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# ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

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CR-18-0066

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Ex parte Michelle Lynn Butler

PETITION FOR WRIT OF MANDAMUS

(In re: Michelle Lynn Butler v. State of Alabama)

(Greene Circuit Court, CC-16-22)

MINOR, Judge.

In this case, we consider whether a circuit court has jurisdiction to order a defendant to pay restitution after the case against the defendant has been dismissed and after the time for filing postjudgment motions and for appealing the dismissal has expired. For the reasons discussed below, we

hold that a circuit court does not have subject-matter jurisdiction to order restitution in such a case.

Michelle Lynn Butler was indicted for first-degree theft of property on September 27, 2016, and in February or March 2017, she sought entrance into a drug-court program. The drug-court application packet filed with the circuit court included a signed acknowledgment by Butler that she must pay restitution as determined by the circuit court at a later time, and the packet included an unsigned "Order for Restitution" that identified "Edgar's Foodland" as the business that would receive restitution.<sup>1</sup> On March 10, 2017, the circuit court adjudged Butler guilty of first-degree theft of property, see § 13A-8-3, Ala. Code 1975, but the circuit court deferred sentencing "because defendant is in drug court." Butler successfully completed the drug-court program, and on March 14, 2018, the State moved to dismiss the case against Butler based on the fact that Butler had "completed 17th Circuit Drug Court Program on March 9, 2018." The

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<sup>1</sup>Butler also signed a document entitled "Limited Waiver of Right to Attorney, Preliminary Hearing and Speedy Trial." That document includes the following statement: "I understand ... that the criminal charges pending against me will be dismissed, with prejudice, upon my successful completion of the program." (C. 36.)

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circuit court dismissed the case the next day, March 15, 2018. No postjudgment motions were filed, and neither party appealed the circuit court's judgment dismissing Butler's case.

On August 3, 2018, the State filed a motion in the circuit court requesting the circuit court to set a restitution hearing "to address the restitution that is owed and was ordered paid to Edgar's Foodland on or about March 7, 2017." After conducting a restitution hearing, the circuit court entered an "Amended Order" on August 31, 2018, directing Butler to pay restitution to Edgar's Foodland.

"That certain order heretofore entered on the 15th day of March 2018 is hereby amended to require defendant, Michelle Lynn Butler, to pay \$6200.00 to Edgar's Foodland, at the rate of \$50.00 per month beginning October 1, 2018. Said order through inadvertence and/or mistake failed to include the restitution owed to Edgar's Foodland which formed the basis of Theft of Property First Degree Charge."

(C. 60.) Butler filed a timely notice of appeal, arguing that the circuit court did not have jurisdiction to enter the order directing her to pay restitution to Edgar's Foodland because, she says, at the time the restitution order was entered, more than 30 days had passed following the dismissal of the case

against Butler, and the time for appealing the dismissal had expired. We agree.<sup>2</sup>

Initially, we note that Butler's "appeal" of the circuit court's order of restitution presents a bit of a jurisdictional paradox. The crux of her argument is that the circuit court lacked subject-matter jurisdiction to enter the restitution order. If that argument is correct, the circuit court's order is void. And, under longstanding precedent, a void order will not support an appeal. See, e.g., Ex parte Holley, 883 So. 2d 266, 268 (Ala. Crim. App. 2003). To remedy this problem, this Court may, when appropriate, exercise its discretion under the Rules of Appellate Procedure to treat an appeal challenging the subject-matter jurisdiction of the circuit court as a petition for a writ of mandamus. See Kirksey v. Johnson, 166 So. 3d 633 (Ala. 2014). In

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<sup>2</sup>Butler also argues that the restitution order is uncertain, inconsistent, and ambiguous; that ordering Butler to pay restitution after she had completed drug court and after her case had been dismissed violates double-jeopardy principles; and that restitution cannot be ordered against someone who has, by virtue of dismissal, ceased to be a defendant to which the restitution statute, see § 15-18-67 et seq., Ala. Code 1975, applies. Because we conclude that the circuit court did not have jurisdiction to amend the March 15, 2018, order of dismissal to order restitution, we do not address the other issues Butler raises.

Kirksey, the Alabama Supreme Court treated a cross-appeal challenging the subject-matter jurisdiction of the probate court as a petition for a writ of mandamus, and in doing so, the Court stated:

"This Court has treated a notice of appeal as a petition for a writ of mandamus, Morrison Rests., Inc. v. Homestead Vill. of Fairhope, Ltd., 710 So. 2d 905 (Ala. 1998), and, conversely, treated a petition for a writ of mandamus as a notice of appeal, Ex parte Burch, 730 So. 2d 143 (Ala. 1999). As noted in F.L. Crane & Sons, Inc. v. Malouf Construction Corp., 953 So. 2d 366 (Ala. 2006), this Court's actions in the above cases is consistent with Rule 1, Ala. R. App. P., which provides: '[These rules] shall be ... construed so as to assure the just, speedy, and inexpensive determination of every appellate proceeding on its merits.' Likewise, Rule 2(b), Ala. R. App. P., also calls for the suspension of the requirements or provisions of any of the Rules of Appellate Procedure '[i]n the interest of expediting decision.'

Kirksey, 166 So. 3d at 643. There is "no bright-line test" for determining when this Court should treat an appeal as a petition for a writ of mandamus, and in deciding whether to treat a particular filing as a petition or as an appeal, we "consider the facts of the particular case." Kirksey, 166 So. 3d at 644 (quoting F.L. Crane & Sons, Inc. v. Malouf Construction Corp., 953 So. 2d 366, 372 (Ala. 2006)). Because

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Butler challenges the circuit court's subject-matter jurisdiction to order her to pay restitution and because it is well settled that "the question of subject-matter jurisdiction is reviewable by a petition for a writ of mandamus," see, e.g., Ex parte Flint Construction Co., 775 So. 2d 805, 808 (Ala. 2000), we exercise our discretion under the Rules of Appellate Procedure to treat Butler's timely filed appeal as a petition for a writ of mandamus, and we have restyled the case accordingly.

We review a petition for a writ of mandamus under the following standard:

"The writ of mandamus is a drastic and extraordinary writ, to be "issued only when there is: 1) a clear legal right in the petitioner to the order sought; 2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; 3) the lack of another adequate remedy; and 4) properly invoked jurisdiction of the court." Ex parte United Serv. Stations, Inc., 628 So. 2d 501, 503 (Ala. 1993); see also Ex parte Ziqlar, 669 So. 2d 133, 134 (Ala. 1995)."

Ex parte McWilliams, 812 So. 2d 318, 321 (Ala. 2001) (quoting Ex parte Carter, 807 So. 2d 534, 536 (Ala. 2001)). A petitioner challenging an action taken by the circuit court establishes a clear legal right to the relief she requests

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when it is shown that the circuit court did not have subject-matter jurisdiction to take the challenged action. See, e.g., Ex parte Denson, 57 So. 3d 195, 198 (Ala. 2010); Ex parte Liberty National Life Ins. Co., 888 So. 2d 478 (Ala. 2003).

The dismissal of a case is a final judgment subject to appeal. Denson, 57 So. 3d at 199. Any postjudgment motions must be filed within 30 days of a final judgment. See Melvin v. State, 583 So. 2d 1365, 1366 (Ala. Crim. App. 1991) (citing Ex parte Andrews, 520 So. 2d 507, 510 (Ala. 1987)). A circuit court loses subject-matter jurisdiction at the expiration of 30 days following the entry of a final judgment. State v. Webber, 892 So. 2d 869, 870 (Ala. 2004). Any action taken by a circuit court lacking subject-matter jurisdiction is void. Miller v. Riley, 37 So. 3d 768, 772 (Ala. 2009).

Here, the circuit court's March 15, 2018, order dismissing Butler's case was a final judgment. No further action was taken in the case until the State's August 3, 2018, motion requesting the circuit court to set a restitution hearing. By the time the State filed its motion, however, the circuit court had lost subject-matter jurisdiction of the case and had no authority to take any action on the State's motion.

Because the circuit court was without subject-matter jurisdiction to order Butler to pay restitution, the circuit court acted beyond its authority when it ordered Butler--nearly five months after her case was dismissed--to pay restitution to Edgar's Foodland.<sup>3</sup>

We note that, although the circuit court stated that it was "through inadvertence and/or mistake" that the March 15, 2018, order dismissing the case failed to include an award of restitution to Edgar's Foodland, Rule 29, Ala. R. Crim. P.,<sup>4</sup>

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<sup>3</sup>The State correctly points out that a circuit court retains jurisdiction to impose restitution more than 30 days after the date of sentencing. See, e.g., Hill v. Bradford, 565 So. 2d 208 (Ala. 1990) (holding that a restitution hearing is not required to be held within 30 days of sentencing); State v. Redmon, 885 So. 2d 850 (Ala. Crim. App. 2004) (holding that a trial court retains jurisdiction to award restitution more than 30 days after the date of sentencing); Grace v. State, 899 So. 2d 302 (Ala. Crim. App. 2004) (restitution order entered 11 months after sentencing was not untimely). Here, however, the circuit court did not sentence Butler but instead, at the State's request, dismissed the case against her. Thus, the decisions of this Court and of the Alabama Supreme Court regarding a circuit court's retention of jurisdiction to impose restitution more than 30 days after sentencing are inapposite.

<sup>4</sup>"Rule 29 is taken directly from Rule 60(a), A[la]. R. Civ. P., which in turn is a variation of Rule 60(a), Fed. R. Civ. P.' Committee Comments, Rule 29, Ala. R. Crim. P." Shapley v. State, 260 So. 3d 69, 70 n.1 (Ala. Crim. App. 2018).



which allows for the amendment of judgments to correct a clerical error, may not operate to modify a court's judgment.

""[W]hile [Rule 60, Ala. R. Civ. P.,] authorizes a court to amend a judgment to correct a clerical error, [it] does not authorize the court to render a different judgment." Mullins v. Mullins, 770 So. 2d 624, 625 (Ala. Civ. App. 2000). "Although Rule 60(a) states that a court may correct a clerical mistake or an error arising from oversight or omission 'at any time,' this does not authorize a second review of a judgment." Cornelius v. Green, 521 So. 2d 942, 945 (Ala. 1988).' Woodward v. State, 3 So. 3d 941, 949 (Ala. Crim. App. 2008). Rule 29, Ala. R. Crim. P. also 'is intended to deal solely with correction of clerical errors and not judicial errors in the rendition of judgments and orders.' Committee Comments, Rule 29, Ala. R. Crim. P. "'The trial court's authority to enter a Rule 60(a)[, Ala. R. Civ. P.,] order or a judgment nunc pro tunc is not unbridled. Merchant v. Merchant, 599 So. 2d 1198 (Ala. Civ. App. 1992). It cannot be used to enlarge or modify a judgment or to make a judgment say something other than what was originally said. Michael [v. Michael], 454 So. 2d 1035 (Ala. Civ. App. 1984)]."' Smith v. Smith, 991 So. 2d 752, 754 (Ala. Civ. App. 2008), quoting McGiboney v. McGiboney, 679 So. 2d 1066, 1068 (Ala. Civ. App. 1995)."

Shapley v. State, 260 So. 3d 69, 70-71 (Ala. Crim. App. 2018).

Here, the circuit court's belated order of restitution was not authorized by Rule 29.

Based on the foregoing, the circuit court acted beyond its authority in ordering Butler to pay restitution to Edgar's

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Foodland; thus the circuit court's August 31, 2018, order is void. Miller, 37 So. 3d at 772 ("Action taken by a trial court lacking subject-matter jurisdiction is void.") (quoting Riley v. Pate, 3 So. 3d 835, 838 (Ala. 2008)). Because Butler has a clear legal right to the relief she seeks--that is, the vacating of the restitution order--we grant Butler's petition for a writ of mandamus and direct the circuit court to vacate its August 31, 2018, order.

PETITION GRANTED; WRIT ISSUED.

Kellum, McCool, and Cole, JJ., concur. Windom, P.J., dissents , with opinion.

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WINDOM, Presiding Judge, dissenting.

The legislative purpose of the Restitution to Victims of Crimes Act is to ensure that "all perpetrators of criminal activity or conduct be required to fully compensate all victims of such conduct or activity for any pecuniary loss, damage or injury as a direct or indirect result thereof." § 15-18-65, Ala. Code 1975. "Criminal activity" is "[a]ny offense with respect to which the defendant is convicted or any other criminal conduct admitted by the defendant." § 15-18-66(1), Ala. Code 1975 (emphasis added). The charge of first-degree theft of property against Butler was dismissed; thus, she was not convicted of a criminal offense. Butler did, however, admit to criminal conduct, which, I believe, obligated her to pay restitution to her victim.

Butler's charge was dismissed following her completion of the Seventeenth Judicial Circuit Drug Court Program. The Alabama Drug Offender Accountability Act, the enabling act for the drug-court program, states that offenders in the program shall be responsible for restitution. § 12-23A-10(f), Ala. Code 1975. As part of her acceptance into the drug-court program, Butler entered a guilty plea to first-degree theft of

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property and acknowledged her obligation to pay restitution.  
(C. 30-31, 34.)

The majority holds, though, that the circuit court did not have jurisdiction to order restitution some five and a half months after it had dismissed the charges against Butler. The majority cites the well settled rule that a trial court loses subject-matter jurisdiction at the expiration of 30 days following the entry of a final judgment. Yet the Alabama Supreme Court, in Hill v. Bradford, 565 So. 2d 208 (Ala. 1990), upheld a restitution order entered approximately 15 months after sentencing:

"[Hill] argues, first, that the judgment was void because, he says, the trial court had lost jurisdiction to enter the order 30 days after his sentence of imprisonment was imposed. We do not agree that the trial court lost jurisdiction to enter this restitution judgment 30 days after Hill was sentenced to a term of imprisonment, because the restitution statute makes it clear that restitution hearings are to be held as a matter of course and that restitution may be ordered in addition to any other sentence imposed and does not require that a restitution hearing be held within 30 days of the imposition of a sentence of imprisonment or other criminal sanctions."

Hill, 565 So. 2d at 210. This Court has relied on Hill several times in approving a trial court's entering an order

of restitution well after the time a trial court ordinarily loses jurisdiction of a case. See, e.g., Jolly v. State, 689 So. 2d 986 (Ala. Crim. App. 1996) (order of restitution entered 23 months after sentencing was not untimely); Grace v. State, 899 So. 2d 302 (Ala. Crim. App. 2004) (order of restitution entered 11 months after sentencing was not untimely).

In a footnote, the majority acknowledges Hill and its progeny, but holds that Hill is inapplicable here because "the circuit court did not sentence Butler but instead, at the State's request, dismissed the case against her." This, in my opinion, is a distinction without a difference.

Here, Butler admitted to criminal conduct that directly caused pecuniary loss to her victim. Under both the Restitution to Victims of Crimes Act and the Alabama Drug Offender Accountability Act, Butler was obligated to pay restitution to her victim. Further, under the holding of Hill, I do not believe that the circuit court lacked jurisdiction to order restitution.<sup>5</sup> Accordingly, I would not

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<sup>5</sup>The circuit court's order of August 31, 2018, purported to modify its final order of dismissal entered on March 15,

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convert Butler's appeal into a petition for writ of mandamus but instead would address Butler's claims as they are presented on appeal. Therefore, I respectfully dissent.

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2018. I agree with the majority that the circuit court lacked jurisdiction on August 31, 2018, to modify its prior order. Nonetheless, I would construe the circuit court's order of August 31, 2018, not as a modification of the prior order, but rather as a timely order of restitution.