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Alabama Court of Criminal Appeals

OCTOBER TERM, 2020-2021

CR-19-1017

Joseph Paul Fitzgerald

v.

State of Alabama

Appeal from Mobile Circuit Court
(CC-20-912)

WINDOM, Presiding Judge.

Joseph Paul Fitzgerald appeals the Mobile Circuit Court's order of restitution in the amount of \$3,563.01. The circuit court ordered

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Fitzgerald to pay restitution after he pleaded guilty to second-degree receiving stolen property, see § 13A-8-18, Ala. Code 1975.

On April 23, 2020, Fitzgerald pleaded guilty by way of information to receiving Kenneth Michael Cranford's stolen 2005 GMC Yukon vehicle. Cranford had purchased the vehicle three months before the theft for \$10,000. When the vehicle was recovered and returned to Cranford, the vehicle was damaged, requiring an estimated \$2,498.01 in repairs. Cranford also testified that \$1,065 in personal property was missing from his vehicle when it was returned to him. At the conclusion of the restitution hearing, the circuit court ordered Fitzgerald to pay \$3,563.01 in restitution -- \$2,498.01 for the damage to Cranford's vehicle and \$1,065 for the personal property missing from Cranford's vehicle.

On appeal, Fitzgerald argues: 1) that the State failed to prove that Fitzgerald's actions proximately caused the loss of the personal property within the victim's vehicle, and 2) that the circuit court's restitution order violates Fitzgerald's rights to notice and due process.

I.

Fitzgerald first argues that the State failed to prove that his actions proximately caused the loss of personal property from Cranford's vehicle. Specifically, Fitzgerald claims that he pleaded guilty only to receiving Cranford's stolen vehicle and that the State failed to prove that the loss of Cranford's personal property inside his vehicle was caused by his receiving the stolen vehicle.

Section 15-18-65, Ala. Code 1975, requires all "perpetrators of criminal activity or conduct ... to fully compensate all victims of such conduct or activity for any pecuniary loss, damage or injury as a direct or indirect result thereof." Section 15-18-66(1), Ala. Code 1975, defines "criminal activities" as "[a]ny offense with respect to which the defendant is convicted or any other criminal conduct admitted by the defendant."

Section 15-18-66(2), Ala. Code 1975, defines pecuniary damages as:

"All special damages which a person shall recover against the defendant in a civil action arising out of the facts or events constituting the defendant's criminal activities; the term shall include, but not be limited to the money or other equivalent of property taken, broken, destroyed, or otherwise used or harmed and losses such as travel, medical, dental or burial

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expenses and wages including but not limited to wages lost as a result of court appearances."

The Alabama Supreme Court has explained that "'special damages' [are those] that 'flow naturally, but not necessarily, from the wrongful act.'"

Ex parte Fletcher, 849 So. 2d 900, 908 (Ala. 2001) (quoting Crommelin v. Montgomery Indep. Telecasters, Inc., 194 So. 2d 548, 551 (1967)).

Under Alabama's restitution statute, a defendant

"could be ordered to pay restitution to the victim of his crime only if one of two conditions existed: (1) his victim suffered direct or indirect pecuniary loss as a result of the criminal activity of which the defendant has been convicted, or (2) he admitted to other criminal conduct during the proceedings that was the proximate cause of the victim's pecuniary loss or damages."

B.M.J. v. State, 952 So. 2d 1174, 1176 (Ala. Crim. App. 2006).

"'Before a defendant can be held liable for damages, it must be established that his criminal act was the proximate cause of the injury sustained by the victim.'" Ex parte Theodorou, 53 So. 3d 151, 156 (Ala. 2010) (citing Reeves v. State, 24 So. 3d 549, 553 (Ala. Crim. App. 2009)).

"The State has the burden of proving that a defendant's criminal act was the proximate cause of the victim's injury before a defendant can be held

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liable for damages." Reeves, 24 So. 3d at 533 (citing Richardson v. State, 603 So. 2d 1132 (Ala. Crim. App. 1992)). In Strough v. State, this Court explained:

"As our Supreme Court observed in Alabama Power Company v. Taylor, 293 Ala. 484, 306 So. 2d 236 (1975), foreseeability is the cornerstone of proximate cause. This does not mean, however, that the defendant must have actually foreseen the particular injury which resulted from his action. Rather, the injury sustained by the victim must have been of such a nature that a reasonable person could have foreseen or anticipated that the injury might occur as a natural consequence of the action. Williams v. Woodman, 424 So. 2d 611 (Ala. 1982); Prescott v. Martin, 331 So. 2d 240 (Ala. 1976). Where an injury is caused by intentional conduct, the rules of proximate cause are more liberally applied. Phillips v. Smalley Maintenance Services, Inc., 435 So. 2d 705 (Ala. 1983)."

501 So. 2d 488, 491 (Ala. Crim. App. 1986).

Once the circuit court has determined that the victim has suffered damage and that the damage was proximately caused by the defendant's criminal activity, "[t]he particular amount of restitution is a matter which must of necessity be left almost totally to the discretion of the trial judge." Ex parte Stutts, 897 So. 2d 431, 433 (Ala. 2004) (quoting Clare v. State, 456 So. 2d 355, 356 (Ala. Crim. App. 1983)). "[T]he exercise of

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'[t]hat discretion [will] not be overturned except in cases of clear and flagrant abuse.'" Ex parte Stutts, 897 So. 2d at 433 (quoting Clare v. State, 456 So. 2d at 356).

In his brief on appeal, Fitzgerald relies on Best v. State, 895 So. 2d 1050 (Ala. Crim. App. 2004). In Best, this Court reviewed the restitution assessed on the appellant for his conviction for first-degree receiving stolen property. Id. at 1052. The appellant was found in possession of a stolen truck and, following his conviction, was assessed \$3,300 in restitution for the victim's personal property missing from inside the holding that the State had failed to prove that the appellant was the proximate cause of the victim's loss. Id. at 1056.

In the present case, the State presented testimony from Cranford only, who could not testify whether Fitzgerald ever possessed the personal property in his vehicle. Additionally, the record does not contain an admission from Fitzgerald stating that he possessed the personal property from Cranford's vehicle. Thus, "[t]here were no allegations or proof that [Fitzgerald] ever had possession of [Cranford's] personal property," from which the circuit court could have found that Fitzgerald's actions were the

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proximate cause of Cranford's loss of personal property. Best, 895 So. 2d at 1056. See also D.J.J. v. State, 213 So. 3d 667, 668 (Ala. Crim. App. 2014). Therefore, the circuit court improperly ordered Fitzgerald to pay \$1,065 in restitution to compensate Cranford for the loss of his personal property.

II.

Fitzgerald next contends that the circuit court's order of restitution in excess of \$2,500 violates his notice and due-process rights. Specifically, Fitzgerald argues that because he pleaded guilty to receiving a stolen vehicle valued between \$1,500 to \$2,500, he did not receive notice of any claim in excess of \$2,500.

This issue, however, is not preserved for appellate review. Section 15-18-69, Ala. Code 1975, states, "At such restitution hearings, the defendant ... may object to the imposition, amount or distribution of restitution or the manner or method thereof and the court shall allow all such objections to be heard and preserved as a matter of record."

It is well settled that "'[r]eview on appeal is restricted to questions and issues properly and timely raised at trial.'" Ex parte Coulliette, 857 So.

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2d 793, 794 (Ala. 2003) (quoting Newsome v. State, 570 So. 2d 703, 717 (Ala. Crim. App. 1989)). Fitzgerald failed to raise this issue during his restitution proceedings; as a result, this issue will not be considered on appellate review. See Hansen v. State, 598 So. 2d 1, 2 (Ala. Crim. App. 1991) ("Even constitutional issues must first be correctly raised in the trial court before they will be considered on appeal.").

Moreover, as discussed above, the circuit court improperly imposed \$1,065 in restitution to compensate Cranford for the loss of his personal property located inside the vehicle. Thus, even if Fitzgerald's claim regarding lack of notice and due process for the \$1,065 restitution assessment were properly preserved and presented, the issue has been rendered moot by this opinion. Accordingly, this issue does not entitle Fitzgerald to any relief.

In light of the foregoing, the portion of the circuit court's order assessing \$1,065 in restitution to compensate Cranford for the loss of his personal property located inside the vehicle is reversed. The remainder of the circuit court's order assessing \$2,498.01 in restitution to compensate Cranford for the damage to his vehicle has not been

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challenged on appeal and is affirmed. The cause is remanded for the circuit court to amend its judgment accordingly. Due return shall be made within 28 days of this opinion.

**AFFIRMED IN PART; REVERSED IN PART; AND REMANDED
WITH INSTRUCTIONS.**

Kellum, McCool, and Cole, JJ., concur. Minor, J., concurs specially, with opinion.

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MINOR, Judge, concurring specially.

I concur in the Court's judgment. I write separately to emphasize that, because nothing in the record shows that Joseph Paul Fitzgerald possessed the personal property from Kenneth Michael Cranford's stolen vehicle, the trial court's award of restitution for that property was improper.¹

In Ex parte Theodorou, 53 So. 3d 151 (Ala. 2010), the Alabama Supreme Court distinguished the restitution award in that case from one for damage to or flowing from stolen items a defendant did not actually or constructively possess. In footnote 7, the Court cited

"Chapman v. State, 733 So. 2d 1055 (Fla. Dist. Ct. App. 1999), a case in which the defendant, who was ordered to pay restitution for certain stolen items she had received, was also ordered to pay restitution for damage to items that were stolen at the same time but that the defendant had not actually received. The statute at issue in Chapman, Fla. Stat. § 775.089(1)(a), authorized 'restitution for damage or loss caused "directly or indirectly" by the defendant.' Bogert v. State, 834

¹Fitzgerald pleaded guilty on information to second-degree receiving stolen property for receiving a stolen 2005 GMC Yukon vehicle. He did not admit to possessing the personal property from the vehicle, and the State did not offer evidence showing he possessed the personal property from the vehicle.

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So. 2d 392, 394 (Fla. Dist. Ct. App. 2003) (quoting Fla. Stat. § 775.089(1)(a)). Under that statute, Florida courts 'have ... held that a defendant receiving stolen property and pawning it is sufficiently "related" to the victim's loss to justify restitution.' Bogert, 834 So. 2d at 394.

"The Chapman court reversed the order of restitution as to the stolen items that the defendant did not 'actually or constructively possess[].' 733 So. 2d at 1056. Chapman illustrates that even the more relaxed, 'indirect' standard of causation is not without limits. The present case does not involve the concerns at issue in Chapman, however, because Theodorou was ordered to pay restitution only for damage related to the specific stolen property that he received."

53 So. 3d at 159 n.7. Fitzgerald's case matches the scenario the Court described in that footnote.