

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

ANDREA NICHOLE DUCOS, *Petitioner*.

No. 1 CA-CR 16-0783 PRPC
FILED 10-31-2017

Petition for Review from the Superior Court in Yuma County
No. S1400CR201400843
The Honorable Lawrence C. Kenworthy, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Yuma County Attorney's Office, Yuma
By Jon R. Smith
Counsel for Respondent

Garcia, Aguirre & Villarreal, P.L.C., Yuma
By Ryan Christopher Hengl
Counsel for Petitioner

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MEMORANDUM DECISION

Chief Judge Samuel A. Thumma delivered the decision of the Court, in which Judge Paul J. McMurdie and Judge Peter B. Swann joined.

T H U M M A, Chief Judge:

¶1 Petitioner Andrea Nichole Ducos seeks review of the superior court's order denying her petition for post-conviction relief, filed pursuant to Arizona Rule of Criminal Procedure 32.1 (2017).¹ Absent an abuse of discretion or error of law, this court will not disturb a superior court's ruling on a petition for post-conviction relief. *State v. Gutierrez*, 229 Ariz. 573, 577 ¶ 19 (2012). Because Ducos has shown no such error, this court grants review but denies relief.

¶2 In February 2014, while riding a motor scooter, Ducos struck and killed the 96-year old victim, who was walking on a sidewalk. Ducos, who was 17-years old at the time, was first charged as a juvenile but the case was later transferred to adult criminal court. In September 2014, Ducos pled guilty to negligent homicide, a Class 4 felony, committed in February 2014. The written plea agreement stipulated that Ducos would be placed on probation (leaving to the court's discretion jail time) and capped restitution at \$500,000.

¶3 The court later placed Ducos on supervised probation for three years and imposed a 6-month jail term. The victim's son, who lived with the victim at the time her death, requested restitution of \$153,340, representing the \$1,328 monthly social security benefit the victim received and using a 105.6 year life expectancy. Ducos responded that this was not proper restitution representing, instead, consequential loss. She also argued that any restitution should be offset by insurance payments. After an evidentiary hearing, the court found a 102 year, eight and a half month life expectancy was appropriate; that Ducos had caused the victim an economic loss of \$828 per month and, ultimately, awarded restitution totaling

¹ Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

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\$66,706.07.² The court found insurance benefits were not an offset to this amount and restitution was to be paid no less than \$150 per month.

¶4 Ducos filed a petition for post-conviction relief alleging that the restitution amount was in violation of the Eighth Amendment and did not comply with applicable law. Ducos argued social security and pension benefits were not “wages” under Title 23 of the Arizona Revised Statutes and, accordingly, were not properly awarded as restitution. Ducos also argued that an actuarial table received at the evidentiary hearing was hearsay and not reliable and that the award represented “consequential damages,” not “economic loss.” A.R.S. § 13-603(C). After full briefing, the court dismissed the petition, finding the restitution award represented economic loss and that life expectancy calculation was appropriate. Ducos timely filed a petition for review challenging that determination.

¶5 The restitution imposed was far less than the \$500,000 cap set forth in the written plea agreement. Imposition of restitution is part of sentencing, *State v. Hawkins*, 134 Ariz. 403, 406 (App. 1982), and in the written plea agreement, Ducos “consent[ed] to judicial fact finding by preponderance of the evidence as to any aspect or enhancement of sentence” and that “[i]n making the sentencing determination, the court is not bound by the rules of evidence.” Moreover, hearsay evidence is admissible at sentencing, provided Ducos was given an opportunity to refute it and it bears some indicia of reliability. *See State v. McGill*, 213 Ariz. 147, 160 ¶¶ 55-56 (2006). Ducos has shown no error on this point.

¶6 Nor has Ducos shown error in the restitution award itself. Ducos has not shown the lost benefits had to constitute “wages” under Title 23 to be the proper subject of restitution under Title 13. The purpose of restitution is to make the victim whole. *See, e.g., State v. Zaputil*, 220 Ariz. 425, 428 ¶ 11 (App. 2008); *State v. Wilson*, 185 Ariz. 254, 260 (App. 1995). A person convicted of an offense is required to make restitution to the victim, or in this case the immediate family of the victim, “in the full amount of the economic loss.” A.R.S. § 13-603(c). Economic loss is “any loss incurred by a person as a result of the commission of an offense,” including “lost interest, lost earnings and other losses that would not have been incurred but for the offense.” A.R.S. § 13-105(16). Although the phrase excludes “consequential damages,” *id.*, Ducos has not shown the restitution award reflects such damages.

² Another son of the victim and a grandson also claimed restitution but those claims are not disputed and are not at issue in the petition for review.

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¶7 Finally, Ducos not shown the evidence received at the hearing was insufficient to support the restitution award. The superior court evaluated the credibility of the evidence presented, adjusted downward the life expectancy calculation and accounted for expenses to offset the award. On this record, Ducos has not shown that the restitution award was not grounded in the facts or that the award did not bear a reasonable relationship to the economic loss caused as a result of Ducos' conviction.

¶8 For these reasons, this court grants review but denies relief.



AMY M. WOOD • Clerk of the Court
FILED: AA