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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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, *Appellant*,

v.

GERARDO GASPAR-VIRAMONTES, *Appellee*.

No. 1 CA-CR 16-0895

FILED 1-23-2018

Appeal from the Superior Court in Maricopa County
No. CR2013-434179-001
The Honorable Virginia L. Richter, Judge *Pro Tempore*

REVERSED AND REMANDED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Andrea L. Kever
Counsel for Appellant

Maricopa County Public Defender's Office, Phoenix
By John Champagne, Nicholas Podsiadlik
Counsel for Appellee

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MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Paul J. McMurdie and Judge Thomas C. Kleinschmidt¹ joined.

S W A N N, Judge:

¶1 The state appeals the superior court's ruling denying the state's request for an order of restitution against Gerardo Gaspar-Viramontes. For the following reasons, we reverse the court's ruling and remand for a restitution hearing.

FACTS AND PROCEDURAL HISTORY

¶2 In 2013, the state charged Gaspar-Viramontes with two counts of aggravated assault for physically injuring two peace officers engaged in official duties. At the time of the assault, Gaspar-Viramontes was on probation. Gaspar-Viramontes entered into a plea agreement in which he pled guilty to one count of aggravated assault. In return, the state dismissed the second aggravated assault charge. As part of the plea agreement, Gaspar-Viramontes agreed to pay restitution to "all victims, for all counts . . . and/or [to] their insurance companies, and/or MCAO Victims Compensation Bureau . . . in an amount not to exceed \$1,000,000 regardless of who caused the loss."

¶3 Gaspar-Viramontes's aggravated assault charge was a violation of his probation. As a result, the court revoked his probation. In accordance with the plea agreement in the aggravated assault case, he was sentenced to a term of three years' imprisonment to run consecutive to his sentence in the probation matter. Regarding the victims' statements, the probation report indicated: "[a]n attempt to reach the victims by telephone was unsuccessful. Letters were sent to their precinct in an attempt to reach them; however, to date, this officer has not made contact with either officer. If contact is made, a supplemental will be provided to the Court."

¹ The Honorable Thomas C. Kleinschmidt, retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

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¶4 At the July 30, 2014 sentencing hearing, the superior court inquired whether restitution was “requested” on either the underlying case or the probation violation matter. Defense counsel answered that there was “outstanding restitution” in the amount of \$237 on the “probation matter” and stated there was no request “in the current case.” Consistent with defense counsel’s representations, the prosecutor answered, “[n]o, I don’t have . . . anything listed . . . I don’t believe so.”

¶5 In the probation matter, the court ordered “[a]ny unpaid financial sanctions” would be “reduced to a criminal restitution order,” and included language to that effect in its signed sentencing minute entry: “The Arizona Department of Corrections shall notify [the clerk of the court] of [Gaspar-Viramontes’s] release from custody . . . [and] upon said notification, [the clerk of the court] shall furnish financial information for a Criminal Restitution Order for Judicial signature for any unpaid monies to date.” As for restitution in the underlying case, the court left the issue open at sentencing and did not set any deadline for restitution claims to be heard.

¶6 On September 12, 2016, the state requested a restitution hearing for a claim submitted on December 19, 2014 by “the company that services” the police department’s worker’s compensation fund. After the superior court set a hearing, Gaspar-Viramontes moved to vacate it and close restitution, arguing the state’s request, more than two years after sentencing, was unjustifiably delayed and untimely. At the scheduled restitution hearing, the parties stipulated “to the restitution amount of \$504.11,” but disputed the superior court’s continuing “jurisdiction over restitution.”

¶7 The court granted Gaspar-Viramontes’s motion, implicitly finding the victims waived any right to restitution by failing “to respond to both telephonic and written requests” and concluded that the court lacked “jurisdiction to order payment of restitution over two years after sentence was final.” The state timely appeals.

DISCUSSION

¶8 We review a restitution order for an abuse of discretion. *State v. Slover*, 220 Ariz. 239, 242 (App. 2009). When the superior court bases its restitution award on improper criteria, the proper remedy is to vacate the restitution order and remand back to the superior court for a proper redetermination of restitution. *State v. Carbajal*, 177 Ariz. 461, 465 (App. 1994). A victim of a crime has a constitutional right to receive “prompt restitution from the person or persons convicted of the criminal conduct

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that caused the victim's loss or injury." Ariz. Const. art. 2, § 2.1(A)(8). This constitutional mandate is fulfilled through A.R.S. § 13-603(C), which requires a court to impose restitution to compensate victims for their full economic loss. *State v. Holguin*, 177 Ariz. 589, 590 (App. 1993). Legislative requirements and the policies underlying mandatory restitution are best fulfilled if the term "victim" under A.R.S. § 13-603 includes the entity that suffers economic loss resulting from a defendant's criminal activity. *State v. Merrill*, 136 Ariz. 300, 301 (App. 1983).

¶9 To impose restitution, the court must have sufficient evidence upon which to base its restitution order. *State v. Grijalva*, 242 Ariz. 72, 72 (App. 2017). The prosecutor and probation officer each have an "independent duty" to contact the victim so that he or she is informed "of the right to make a statement" and can "describe the extent of restitution sought." *State v. Contreras*, 180 Ariz. 450, 454 (App. 1994); A.R.S. §§ 13-4410(D), 12-253.² Both the state and the court have a concurrent obligation to see that restitution claims brought by crime victims are preserved and adjudicated in a timely fashion. Ariz. Const. art. 2, § 2.1(A)(8). Restitution is part of a defendant's sentence. A.R.S. § 13-603(C); *State v. Barr*, 172 Ariz. 42, 43 (App. 1992).

¶10 The record reveals that both officers injured by Gaspar-Viramontes were contacted by the probation officer handling the case. However, the record does not show that the probation officer contacted the state compensation fund and insurance company to inform them of their rights as victims.³ The probation officer was aware of the entities' designation as victims because they were listed in the plea agreement as entitled to restitution. When an enforceable plea agreement identifies victims of a crime, the probation officer must inform them of their right to appear personally or by counsel at any aggravation or mitigation proceeding and to explain the extent of restitution sought. *See* A.R.S. § 12-

² While A.R.S. § 13-4410 identifies a prosecutor's duties to provide notice to the victim when the victim has "requested notice," section (D) of the statute provides that "notice provided pursuant to this section does not remove the probation department's responsibility under § 12-253, where he or she shall initiate contact between the victim and the probation department."

³ The state compensation fund suffered an economic loss from the crime when it reimbursed the officers \$504.11 for their injuries.

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253; *Contreras*, 180 Ariz. at 454 (probation officer has independent duty to contact victim and determine financial consequences of crime).

¶11 Further, the absence of notice prevented the victims from furnishing the court with the information necessary to assess the full amount of restitution owed and to conduct an informed exercise of its sentencing power.⁴ We hold that the superior court erred by denying the state's request for a restitution hearing because the state compensation fund and insurance company were not afforded notice of their rights as victims, which included the opportunity to personally attend or have their counsel attend the sentencing hearing, to bring their claims for restitution, and to inform the probation officer or the court of the financial impact of the offense.

¶12 Citing *In re Alton D.*, 196 Ariz. 195 (2000), Gaspar-Viramontes argues that "victims who fail to present restitution claims and supporting evidence" by a deadline set by the court waive their right to restitution. This argument fails for several reasons. First, the superior court did not set a deadline. Second, *In re Alton D.* was a juvenile case, and we recently held that its reasoning does not extend to adult criminal cases. *Grijalva*, 242 Ariz. at 74. Finally, *In re Alton D.* did not involve a failure of notice.

CONCLUSION

¶13 For the foregoing reasons, we reverse the superior court's ruling denying the restitution order and remand for a restitution hearing.



AMY M. WOOD • Clerk of the Court
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⁴ A hearing regarding the victims' claims for restitution would not threaten Gaspar-Viramontes's own due process rights. "A restitution order made after sentencing does not impair appellate rights because such orders are separately appealable." *Grijalva*, 242 Ariz. at 72. And Gaspar-Viramontes was on notice that both the state compensation fund and the insurance company might seek restitution from him as part of the plea agreement.