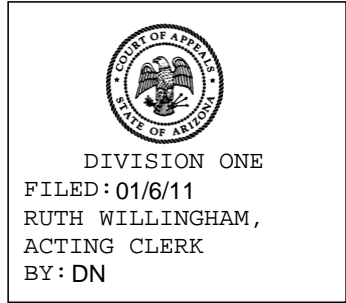


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**



STATE OF ARIZONA,) No. 1 CA-CR 10-0224 PRPC
)
Respondent,) Coconino County
) Superior Court
v.) No. CR2009-0337
)
NATHAN JOSEPH BELL,) DEPARTMENT D
)
Petitioner.) DECISION ORDER
_____)

Petitioner Nathan Joseph Bell ("Bell") pled guilty to aggravated assault and was sentenced to a presumptive term of one year imprisonment. In one matter pending before this Court, Bell petitions for review of the dismissal of his of-right petition for post-conviction relief. In a second matter, Bell appeals the award of \$364.58 in restitution to the victim. Presiding Judge Lawrence F. Winthrop and Judges Patricia K. Norris and Patrick Irvine have considered both matters. Because we do not have jurisdiction over the direct appeal, we previously entered an order treating Bell's opening brief in the direct appeal as a supplemental petition for review and the

State's answering brief as the response.¹ We now treat them as a single petition for review. For the reasons that follow, we grant review of the consolidated petition for review and grant relief in part, deny relief in part and remand for proceedings consistent with this decision order.

We first address the issue presented on direct appeal - whether the trial court erred when it ordered Bell to pay restitution. As part of the plea agreement, Bell agreed to pay restitution to the victim in an amount up to \$1,000,000. Bell further agreed the trial court retained jurisdiction to decide any and all restitution issues, including the amount of restitution to be paid. It was agreed that jurisdiction would be retained throughout any period of imprisonment or probation imposed.

Medical expenses incurred by the victim prior to sentencing were submitted to the trial court. The trial court was made aware, however, that the victim would continue to incur expenses for several more months, including after sentencing. At

¹ We have no jurisdiction because Bell pled guilty and restitution was required by the plea agreement. Restitution is part of a sentence. *State v. Barrs*, 172 Ariz. 42, 43, 833 P.2d 713, 714 (App. 1992). A defendant who pleads guilty in a noncapital case pursuant to a plea agreement may not file a direct appeal and may seek review of the judgment or sentence only through a petition for post-conviction relief. See Ariz. Rev. Stat. ("A.R.S.") § 13-4033(B) (2009); Ariz.R.Crim.P. 17.1(e).

sentencing, the trial court noted it had been provided information regarding restitution. The court did not, however, award any restitution at sentencing.

Approximately five months later, after the victim had completed his medical treatment, the State filed a motion to award the victim restitution in the amount of \$364.54. Bell filed a response in which he did not challenge the amount of restitution sought. Bell argued, however, that the State waived restitution when it failed to address restitution at sentencing, in its appeal, which was subsequently dismissed, or in a motion to modify. The trial court ultimately ordered Bell to pay \$364.58 in restitution to the victim.² Rather than file a petition for post-conviction relief challenging the award of restitution, Bell filed a direct appeal.

Because the trial court could order Bell to pay restitution to the victim, we deny relief because there is no error. It is not an abuse of discretion to order a defendant to pay restitution where restitution was agreed to as part of a plea agreement. *State v. Lewus*, 170 Ariz. 412, 413, n.2, 825 P.2d 471, 472 n.2 (App. 1992). Where a defendant agrees to pay restitution as part of a plea agreement, the defendant may even

² Bell does not raise any issue regarding the four-cent discrepancy in the amount sought and the amount awarded.

be ordered to pay restitution for a charge that was dismissed pursuant to the agreement. *State v. Zaputil*, 220 Ariz. 425, 428, ¶ 13, 207 P.3d 678, 681 (App. 2008). Perhaps more importantly, "The right to restitution belongs to the victim." *State v. Barrs*, 172 Ariz. at 43, 833 P.2d at 714. The primary purpose of restitution is not to punish the defendant but to make the victim whole. *State v. Iniguez*, 169 Ariz. 533, 537, 821 P.2d 194, 198 (App. 1991). Restitution of the full economic loss to a victim is mandatory, even if the victim does not request restitution. A.R.S. § 13-603(C)(2010); *State v. Steffy*, 173 Ariz. 90, 93, 839 P.2d 1135, 1138 (App. 1992). Bell agreed to pay restitution as part of his plea agreement. He agreed the trial court would retain jurisdiction to decide any and all restitution issues, including the amount of restitution to be paid. The victim made a timely claim for restitution. The extent of the victim's losses were not known at the time of sentencing. The court and parties knew the victim would incur additional medical expenses for a relatively short time after sentencing. It was permissible for the trial court to wait until the victim's medical treatment was completed before determining the amount of restitution to be awarded and, in turn, award that amount.

In regard to the manner in which the trial court awarded restitution, however, the State concedes Bell had a right to be present when the trial court ordered that restitution be paid. The court ordered restitution without holding a hearing at which Bell was present. Restitution is part of a defendant's sentence and must be imposed through an oral pronouncement made in the defendant's presence. See *Barrs*, 172 Ariz. at 43, 833 P.2d at 714. "Rule 26.9, Arizona Rules of Criminal Procedure, provides that a defendant shall be present at sentencing. Restitution is part of the sentencing process." *Lewus*, 170 Ariz. at 414, 825 P.2d at 473. Therefore, we grant relief in part, vacate the restitution order and remand for a restitution hearing where Bell is present or has waived his presence.

We next address the issue presented in the original petition for review - whether the trial court abused its discretion when it summarily dismissed Bell's petition for post-conviction relief without holding an evidentiary hearing. When the presumptive sentence of one year imprisonment was initially imposed, the trial court credited Bell with 110 days of presentence incarceration although the State correctly noted Bell was not entitled to any credit. The court later granted the State's motion to modify sentence and vacated the award of credit for presentence incarceration. Bell concedes he is not

entitled to any credit for presentence incarceration. Even so, Bell filed an of-right petition for post-conviction relief in which he argued he should be resentenced to a mitigated sentence because it was "obvious" the trial court believed a sentence of 255 days' imprisonment (a one year presumptive sentence minus 110 days for presentence incarceration) was the appropriate sentence under the circumstances. Bell further argued that had the court known Bell was not entitled to any credit, it "could" have sentenced him to a mitigated term rather than the presumptive term. The trial court summarily dismissed the petition for post-conviction relief, holding that it had "miscalculated" the credit, that the presumptive sentence was appropriate under the circumstances and that a mitigated sentence was not merited. Bell presents the same arguments in his petition for review that he did in the trial court.

Whether to grant or deny post-conviction relief pursuant to Rule 32 is within the trial court's discretion. *State v. Cramer*, 192 Ariz. 150, 152, ¶ 8, 962 P.2d 224, 226 (App. 1998). We review the allegations in a petition for post-conviction relief in light of the entire record to determine if a claim is colorable. *State v. Lemieux*, 137 Ariz. 143, 146, 699 P.2d 121, 124 (App. 1983). A colorable claim is "one that, if the allegations are true, might have changed the outcome." *State v.*

Runnigeagle, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). A defendant is entitled to an evidentiary hearing on a petition for post-conviction relief if he presents a colorable claim. *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988).

Bell has failed to present a colorable claim. At sentencing, the trial court outlined its reasons for imposing the presumptive sentence and found that under the circumstances, the "presumptive sentence really is appropriate here." There is nothing in the record to indicate the court believed the presumptive sentence would be appropriate *only* if Bell received credit for presentence incarceration. In its summary dismissal of the petition for post-conviction relief, the court explained that even without any presentence incarceration credit, the presumptive sentence was appropriate and a mitigated sentence was not merited. Bell has failed to present a colorable claim that a mitigated sentence was legally required, that resentencing in general was legally required, or that the trial court would otherwise impose a mitigated sentence if given the opportunity on remand. Therefore, we deny relief on this issue.

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For the reasons stated above, we grant review, deny relief in part, grant relief in part and remand for proceedings consistent with this decision order.

/S/
PATRICK IRVINE, JUDGE