

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ADAM LEE FORGUSON,
Petitioner.

No. 2 CA-CR 2022-0049-PR
Filed May 13, 2022

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Petition for Review from the Superior Court in Gila County
No. S0400CR201700445
The Honorable Bryan B. Chambers, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Emily Danies, Tucson
Counsel for Petitioner

STATE v. FORGUSON
Decision of the Court

MEMORANDUM DECISION

Vice Chief Judge Staring authored the decision of the Court, in which Presiding Judge Eppich and Judge Brearcliffe concurred.

STARING, Vice Chief Judge:

¶1 Adam Forguson seeks review of the trial court’s order denying his petition for post-conviction relief filed pursuant to Rule 33, Ariz. R. Crim. P. We will not disturb that order unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Forguson has not shown such abuse here.

¶2 Forguson pled guilty to manslaughter and aggravated assault and was sentenced to consecutive prison terms totaling 13.5 years. The trial court ordered him to pay \$6,210.46 in restitution to the parents of the manslaughter victim. Forguson sought post-conviction relief, arguing a \$30,000 insurance payment to the parents should offset the restitution owed because that payment included compensation for economic loss. His argument focused on a release, signed by one of the parents, which purported to release Forguson from “all claims, demands, actions and causes of action[] and liability” related to the victim’s death and stated “this settlement is in full compromise” of potential claims against Forguson. Forguson reasoned that, because the release included “both non economic and economic claims,” the restitution ordered by the court “would therefore be part of the \$30,000 payment,” and he was thus entitled to credit against restitution “through the insurance payment.”

¶3 At a hearing on Forguson’s petition, the victim’s parents addressed the trial court, stating the restitution was for “cremation, our lost wages, our time in travel for the motel room, [and] out of pocket expenses.” Forguson agreed and declined to present any additional evidence—the only evidence admitted at the hearing was a copy of the estate accounting. The court denied relief,¹ noting that the accounting showed the estate’s only

¹The trial court expressed some concern as to whether the rules governing post-conviction relief were the proper vehicle under which Forguson should seek relief. Our supreme court has determined a pleading defendant contesting a restitution award must raise claims related to restitution in a post-conviction proceeding. *Hoffman v. Chandler ex rel. Cnty.*

STATE v. FORGUSON
Decision of the Court

assets were funds from two insurance settlements, including the settlement with Forguson's insurer, and that nothing in the accounting showed the parents had been compensated for the expenses forming the restitution award. Thus, the court concluded, Forguson was not entitled to any offset. It further determined the settlement did not preclude the parents "from collecting on the restitution order." This petition for review followed.

¶4 Forguson is required to pay restitution to the victim's family for their economic loss. *See* A.R.S. § 13-603(C). Forguson, however, maintains he is entitled to credit the insurance payment made to the victim's estate against the restitution award because the insurance payment includes compensation for economic loss. He further contends the settlement precludes the victim's parents from receiving restitution. As he did below, he relies primarily on *State v. Iniguez*, 169 Ariz. 533 (App. 1991). There, like here, the defendant's victims settled with the defendant's insurer "in exchange for release of all claims." *Id.* at 534-35. The state argued the trial court could not consider "compensation other than restitution payments" and, thus, could not offset restitution by any amount paid by the insurer. *Id.* at 537. Conversely, the defendant argued "that the only evidence of the victim's full economic loss is the settlement agreement" and therefore "the victim was fully compensated." *Id.*

¶5 We rejected both arguments, instead concluding the trial court must "coordinate criminal restitution and civil damage recoveries" and may not "order restitution exceeding the victim's actual economic losses after crediting payments received by the victim outside the criminal proceeding." *Id.* We cautioned, however, that because settlement agreements may compensate non-economic loss, a court may not assume a settlement paid the full economic loss and thus precludes restitution. *Id.* at 538. We remanded the case for the trial court to "reconsider the propriety of the restitution order and to specify the basis for its determination," noting the court may "consider evidence which may enable it to determine the extent to which a portion of the insurance payment should be attributed to compensation for non-economic loss, and thus should not be credited against the amount of restitution." *Id.* at 538-39.

of Pima, 231 Ariz. 362, ¶ 19 (2013); *see also* A.R.S. § 13-805(A)(2) (trial court retains jurisdiction over restitution orders until "paid in full"). We assume, without deciding, that holding applies to claims like Forguson's that a restitution order should be modified.

STATE v. FORGUSON
Decision of the Court

¶6 Forguson first contends the trial court “erred when it failed to determine the apportionment of non-economic and economic losses covered by the insurance settlement.” But, in the trial court, Forguson chose not to present evidence regarding that question. He instead appeared to maintain below and on review that, because the settlement included a release, it must have fully compensated the victim’s parents for all of their economic loss. But nothing in the release suggests the estate or its beneficiaries have been fully compensated for economic loss; it instead states it is a compromise settlement. The \$30,000 payment is the limit of Forguson’s insurance policy, not the amount of economic loss he caused. Absent evidence that the \$30,000 payment included compensation for the specific economic loss forming the restitution award, there was no basis for an offset.

¶7 Nor is there any legal basis for Forguson’s apparent position that, because of the release, we must presume the victim’s parents have been fully compensated for economic loss or his belief they are precluded from collecting restitution in this case. As we observed in *Iniguez*, “the victim’s release of *civil* liability does not prevent the state from ordering the *criminal* law remedy of restitution” because “restitution is not a claim which belongs to the victim, but a remedial measure that the court is statutorily obligated to employ.” *Id.* at 536. Nothing about the settlement creates a presumption that it reflects full compensation for all economic loss, nor does the release from civil liability free Forguson from his obligation to pay restitution.

¶8 We agree a trial court should, under *Iniguez*, determine if an insurance settlement includes economic loss that should be excluded from a restitution award lest the victim obtain a windfall. Forguson has identified nothing in the record suggesting the victim’s parents received a windfall here. Indeed, he passed on the opportunity to explore that question in the trial court. Consequently, he has not demonstrated the trial court abused its discretion in denying him relief.

¶9 We grant review but deny relief.