SUMMARY
May 28, 2020

2020C0A83

No. 16CA0446, *People v. Perez* — Criminal Law — Sentencing — Restitution — Assessment of Restitution

A division of the court of appeals concludes for the first time that the ninety-one-day provisions in section 18-1.3-603, C.R.S. 2019, do not establish a deadline by which the trial court must enter an order for restitution. Rather, the period refers to the time within which the prosecution must provide restitution information to the trial court. Thus, the trial court had the authority to enter a restitution order.

However, the prosecutor failed to submit the information within that time, the trial court made no finding of extenuating circumstances affecting the prosecutor's ability to determine restitution within that period, and the record on appeal does not establish such extenuating circumstances. Therefore, we vacate the

order imposing restitution and remand to the trial court to consider whether such extenuating circumstances existed.

COLORADO COURT OF APPEALS **2020C0A83**

Court of Appeals No. 16CA0446
Adams County District Court No. 12CR1963
Honorable Robert W. Kiesnowski, Jr., Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Rafael Perez,

Defendant-Appellant.

ORDER VACATED AND CASE
REMANDED WITH DIRECTIONS

Division II
Opinion by JUDGE TOW
Terry, J., concurs
Yun, J., concurs in part and dissents in part

Announced May 28, 2020

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¶ 1 Defendant, Rafael Perez, appeals the trial court's order of restitution, asserting both that the trial court lacked authority to enter a restitution order more than ninety-one days after sentencing and that there were no extenuating circumstances justifying the prosecutor's delay in submitting the information to the court. A division of this court previously addressed this appeal. *People v. Perez*, 2019 COA 62. However, the supreme court vacated that opinion and remanded for reconsideration in light of its recent decision in *Fransua v. People*, 2019 CO 96.

¶ 2 We reject Perez's first claim, concluding — contrary to decisions of other divisions of this court — that nothing in the restitution statute sets a deadline by which the trial court must enter an order for restitution. However, we agree that the trial court erred by ordering restitution without finding extenuating circumstances for the prosecution's untimely submission of the restitution information. In addition, we reject Perez's contention that his statutory and constitutional rights were violated when the trial court declined to disclose Crime Victim Compensation Board (CVCB) records.

¶ 3 Because of the lack of a finding of extenuating circumstances, we vacate the restitution order and remand for further proceedings.

I. Background

¶ 4 In June 2012, Perez hosted a wedding at his ranch. An argument ensued among some of the wedding guests. "A bunch of guys" started kicking one of the wedding guests and then Perez broke a beer bottle on the victim's face. The victim had to be transported to the hospital via helicopter for medical treatment.

¶ 5 Perez was charged with and convicted of second degree assault with a deadly weapon. On December 2, 2013, the trial court sentenced Perez to five years in the custody of the Department of Corrections. A division of this court affirmed his conviction. *People v. Perez*, (Colo. App. No. 14CA0326, Mar. 2, 2017) (not published pursuant to C.A.R. 35(e)).

¶ 6 At sentencing, the trial court reserved a determination of restitution for ninety days. On March 6, 2014, ninety-four days after the order of conviction, the prosecution moved for an extension of time to request restitution. In its motion, the prosecution cited extensive and complex medical bills and a lost wages form received from the victim the previous day, as well as

"substantial and possible ongoing medical claims from Crime Victim Compensation" as reasons for the requested extension. Perez did not object to this request, and the trial court granted the motion.

¶ 7 The prosecution filed its motion to impose restitution with supporting documentation on May 12, 2014. The trial court then held multiple hearings on the issue of restitution. At a restitution hearing in January 2015, the trial court determined that an in camera review of the records of the CVCB was necessary to address Perez's proximate causation concerns.

¶ 8 After the trial court conducted an in camera review of the CVCB's records, the trial court issued an order of restitution on March 16, 2015, finding that proximate cause had been established and ordering restitution in the amount of $17,060 to be paid to the CVCB. It also ordered restitution in the amount of $2546 to be paid to the victim for lost wages.

II. Analysis

¶ 9 Perez now appeals the restitution order on procedural and substantive grounds. He first argues that the trial court's failure to issue an order setting restitution within ninety-one days requires reversal. Second, he contends that the prosecution failed to

establish extenuating circumstances to extend the deadline for submitting restitution information to the trial court. And third, he argues that the court improperly relied on records from the CVCB without disclosing those records to him.

A. Standard of Review

¶ 10 Generally, a trial court has broad discretion to determine a restitution order's terms and conditions. *People v. Rivera*, 250 P.3d 1272, 1274 (Colo. App. 2010). We will reverse only if the trial court abused its discretion. *Id.* An abuse of discretion occurs when the trial court's decision is manifestly arbitrary, unreasonable, or unfair, or the court misinterprets or misapplies the law. *See People v. Henson*, 2013 COA 36, ¶ 9. To the extent this appeal requires us to consider the trial court's interpretation of the restitution statutes, we review such legal issues de novo. *People v. Ortiz*, 2016 COA 58, ¶ 15.

B. Good Cause and Extenuating Circumstances

¶ 11 Perez first argues that the trial court erred by ordering restitution more than ninety-one days after sentencing absent a showing of good cause. Perez also argues that the trial court failed to find extenuating circumstances for granting the prosecution

additional time to provide the information necessary to determine restitution. We disagree with Perez's first contention but agree with the second.

1. Waiver and Preservation

¶ 12 The People assert that Perez waived any challenge to the timeliness of either the People's request for restitution or the trial court's order granting that request. Before the trial court, Perez raised two challenges regarding restitution. First, he argued there was insufficient evidence that he, as opposed to the other assailants, caused the damages. He also objected to not having been provided access to the CVCB records. But Perez did not challenge either the People's motion requesting more time to submit restitution information or the order granting that request and never objected that there was no showing of good cause or finding of extenuating circumstances affecting the prosecution's ability to determine restitution.

¶ 13 Waiver is the "intentional relinquishment of a known right or privilege." *People v. Rediger*, 2018 CO 32, ¶ 39 (quoting *Dep't of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1984)). Perez did not intentionally relinquish or abandon his claim on appeal simply by

failing to raise this claim while contesting other aspects of the restitution order. *See id.* at ¶ 40 ("The requirement of an intentional relinquishment of a known right or privilege . . . distinguishes a waiver from a forfeiture, which is 'the failure to make the timely assertion of a right.'" (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993))). Because Perez's claim is not waived, we address the merits.

¶ 14 We also reject the People's request that we review Perez's unpreserved claim for plain error. Perez's claim would be cognizable under Crim. P. 35(a) as a contention that the court imposed the restitution (a component of Perez's sentence) in an illegal manner. *See People v. Knoeppchen*, 2019 COA 34, ¶ 27. Our supreme court recently held that a claim that is cognizable under Crim. P. 35(a) need not be preserved. *Fransua*, ¶ 13 ("It makes no sense to require preservation of a claim on direct appeal when an identical claim could be raised without preservation after the conclusion of the direct appeal.").

2. Applicable Law

a. The Statutory Language

¶ 15 Every order of conviction for a felony "shall include consideration of restitution," which must take one or more of four prescribed forms: (1) an order to pay a specific amount; (2) an order that the defendant is obligated to pay restitution, but deferring the establishment of the actual amount owed; (3) an order that the defendant is obligated to pay the actual costs of specific future treatment for the victim; or (4) a finding that no victim suffered a pecuniary loss and thus no restitution is owed. § 18-1.3-603(1), C.R.S. 2019. If the court reserves the determination of restitution, the statute provides that the amount of restitution "*shall be determined* within the ninety-one days immediately following the order of conviction, unless good cause is shown for extending the time period by which the restitution amount *shall be determined*." § 18-1.3-603(1)(b) (emphasis added).

¶ 16 The court must base its restitution order on information presented by the prosecution. § 18-1.3-603(2). The prosecution "shall present this information to the court prior to the order of conviction or within ninety-one days, if it is not available prior to

the order of conviction." *Id.* The court may extend this deadline "if it finds that there are extenuating circumstances affecting the prosecuting attorney's ability to determine restitution." *Id.*

¶ 17 Notably, subsection (1)(b) does not explicitly identify who "determines" the restitution amount for purposes of that subsection. But subsection (2) clearly states that the prosecutor "determines" the amount of restitution and the identities of the victims.

b. The Historical View

¶ 18 Despite this language, our appellate courts have routinely stated, or at least assumed, that the determination of restitution referenced in section 18-1.3-603(1)(b) is a different act than the determination of restitution referenced in section 18-1.3-603(2). Recently, for example, a division of this court explicitly held that this provision places the onus of determining the amount of restitution within ninety-one days on the sentencing court. *People v. Weeks*, 2020 COA 44, ¶ 13.

¶ 19 Several other divisions have at least assumed that to be the case. In *People v. Harman*, 97 P.3d 290, 293 (Colo. App. 2004), a division of this court rejected a claim that the ninety-one-day

provision was jurisdictional. In doing so, the division observed that "[t]he General Assembly set forth separate standards for accepting the late presentation of restitution information by the prosecutor and for the late determination of the restitution amount." *Id.*

¶ 20 In *People v. Turecek*, 2012 COA 59, ¶ 13, a division of this court held that the statute "mandates the determination of the specific amount of restitution within ninety days of the order of conviction and provides an exception only if good cause to extend that time period is shown."[1]

¶ 21 And in *Knoeppchen*, ¶ 19, a division of this court stated that when the determination of restitution has been reserved, "the statute requires the amount of restitution to be established within ninety-one days." However, in a footnote, the division observed that making the deadline for the prosecution to provide the court with restitution information the same as the deadline for the court to set the amount of restitution creates an inconsistency such that the

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[1] Subsequent to the entry of the order on appeal in *People v. Turecek*, 2012 COA 59, the time periods in the statute were amended from ninety to ninety-one days. Ch. 208, sec. 112, § 18-1.3-603, 2012 Colo. Sess. Laws 866-67.

sentencing court in many, if not most, situations would not be able to rule by the ninety-first day. *Id.* at ¶ 19 n.4.

¶ 22 Our supreme court has never been directly asked to resolve the issue as to whom the ninety-one-day deadline applies, but has made observations similar to those in *Weeks*, *Harman*, *Turecek*, and *Knoeppchen* reflecting at least an assumption that the deadline in section 18-1.3-601(1)(b) applies to the court.

¶ 23 For example, in *Sanoff v. People*, 187 P.3d 576 (Colo. 2008), the court explained that this provision, originally enacted in 2000, altered the statutory process for establishing criminal restitution. *Id.* at 578. Before this enactment, the amount of restitution had to be fixed at the time of sentencing and included on the mittimus. *Id.* The new statute, though still requiring that the order of conviction include some consideration of restitution, authorized the sentencing court to "postpone a determination of the specific amount of restitution." *Id.*

¶ 24 The supreme court again addressed this scheme in two companion cases involving the sentencing court's ability to modify restitution once ordered. *People v. Belibi*, 2018 CO 24; *Meza v. People*, 2018 CO 23. In *Belibi*, the court stated that "the current

statutory scheme permits a criminal court, under certain circumstances, to order a defendant obligated to pay restitution and yet order that the specific amount of restitution *be set within ninety-one days*." *Belibi*, ¶ 7. Notably, this language was qualified with the phrase "[a]s we described more fully in *Meza v. People*, 2018 CO 23, ___ P.3d ___, also reported today by this court." *Id.*

¶ 25 In *Meza*, however, the court was not as direct. In fact, the court seemed to use different nomenclature to refer to the sentencing court's act of establishing a restitution amount. For example, the court observed that the 2000 legislation "altered existing law by relieving the sentencing court of its obligation *to set* the amount of restitution at the time of sentencing." *Meza*, ¶ 10 (emphasis added). Similarly, in discussing how a court might be faced with altering a nonfinal restitution amount, the court stated, "[t]he statutory scheme therefore allows for specific amounts of restitution *to be determined and ordered* at sentencing, without their necessarily representing the 'final amount' to be set by the court." *Id.* at ¶ 15 (emphasis added). In other words, *Meza* appears to recognize the difference between the determination of the amount of restitution and the trial court's act of setting or ordering that (or

some other) amount. Indeed, the supreme court also stated that "the statutory scheme does not explicitly limit the circumstances under which a sentencing court may postpone until after conviction a final determination of the specific amount of restitution owed by the defendant." *Id.* at ¶ 11. This language is difficult to reconcile with an interpretation of the ninety-one-day deadline in section 18-1.3-603(1)(b) as applying to the sentencing court.

¶ 26 Significantly, the issue of whether this particular ninety-one-day deadline applies to the sentencing court's act of entering an order imposing restitution or merely to the prosecution's act of providing restitution information to the sentencing court was not before the supreme court in *Sanoff*, *Belibi*, or *Meza*. In *Sanoff*, the issue was solely whether the filing of a direct appeal of a judgment of conviction divested the sentencing court of jurisdiction to order a specific amount of restitution while the appeal was pending. 187 P.3d at 577. In *Belibi* and *Meza*, the issue was not whether the sentencing court ruled (or was required to rule) within ninety-one days, but rather whether it could change the amount of restitution previously ordered. *Belibi*, ¶ 2; *Meza*, ¶ 2.

¶ 27 Thus, in our view, the language in each of these cases appearing to state that the time period in section 18-1.3-603(1)(b) establishes a deadline by which the court must fix the amount of restitution was dictum. As such, this language does not conclusively resolve the interplay between section 18-1.3-603(1)(b) and section 18-1.3-603(2).

¶ 28 We are not required to adhere to statements that are dicta. *McCallum Family L.L.C. v. Winger*, 221 P.3d 69, 73 (Colo. App. 2009). Nor are we obligated to follow the decisions of other divisions of this court. *Roque v. Allstate Ins. Co.*, 2012 COA 10, ¶ 20. We decline to do so here because we believe the earlier pronouncements misconstrue the statute.

c. A Different Interpretation

¶ 29 When interpreting statutes, we "ascribe the same meaning to the same words occurring in different parts of the same statute, unless it clearly appears therefrom that a different meaning was intended." *Everhart v. People*, 54 Colo. 272, 276, 130 P. 1076, 1078 (1913); *see also Berthold v. Indus. Claim Appeals Office*, 2017 COA 145, ¶ 35.

¶ 30 As noted, both subsection (1)(b) and subsection (2) of section 18-1.3-603 refer to "determining" restitution. The latter subsection, two separate times, explicitly places the obligation to determine restitution on the prosecuting attorney. First, it provides that the prosecuting attorney "shall compile such information through victim impact statements or other means *to determine* the amount of restitution and the identities of the victims." § 18-1.3-603(2) (emphasis added). Then it states that the court may extend the deadline for submitting the information "if it finds that there are extenuating circumstances affecting *the prosecuting attorney's ability to determine restitution*." *Id.* (emphasis added).

¶ 31 To the contrary, subsection (1)(b) does not impose the duty to determine restitution upon the court. Rather, it provides one way in which the court may discharge its obligation to address restitution in the judgment of conviction: the court may enter an order that restitution is owed "but that the specific amount of restitution shall be determined within the ninety-one days immediately following the order of conviction, unless good cause is shown for extending the time period by which the restitution amount shall be determined." § 18-1.3-603(1)(b).

¶ 32 The word "determine" should be given the same meaning throughout the statute: the process of identifying the amount of restitution and the victims to whom it is owed.[2] There is nothing in the statute to suggest the legislature intended otherwise. Indeed, as noted in *Knoeppchen*, ¶ 19 n.4, to read the provisions as if one refers to the prosecutor's gathering of the information to present to the court and the other refers to the sentencing court's ultimate resolution of the request based on that information would set up a frequent conflict in that the court would often be left with little to no time to rule without giving the defendant an opportunity to respond to the request. It would seem odd for the legislature to provide for a "good cause" extension when the need for such an extension would appear to be the rule and not the exception.

¶ 33 Significantly, within this same section, the legislature used a different term than "determine" when referring to the sentencing court's act of establishing the final amount of restitution. In

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[2] Of course, the ultimate act of fixing the amount owed falls to the court, after providing the defendant with an opportunity to challenge the prosecuting attorney's "determination" of the amount and holding the prosecution to its burden of proving the accuracy of its determination by a preponderance of the evidence. *See People v. Martinez*, 166 P.3d 223 (Colo. App. 2007).

particular, the statute provides that if additional victims or losses are later discovered, the sentencing court may increase the amount of restitution provided that "the final amount of restitution due has not *been set* by the court." § 18-1.3-603(3)(a) (emphasis added). Thus, while the sentencing court "sets" the final amount of restitution, it does so based on the prosecutor's "determination." But only the latter must be accomplished (absent a showing of good cause or extenuating circumstances as applicable) within ninety-one days.

¶ 34 Moreover, contrary to the division's view in *Weeks*, this construction does not "render section 18-1.3-603(1)(b) superfluous of the language in section 18-1.3-603(2)." *Weeks*, ¶ 14. The two provisions serve different purposes. The first subsection requires the court to expressly include consideration of restitution in the judgment of conviction. It is important to remember that this subsection does not say "the court shall determine restitution within ninety-one days." Rather, it only says that, when a court is deferring restitution, the order of conviction must include specific language — i.e. that restitution shall be determined within that time

frame (or some other time frame upon a showing of good cause). § 18-1.3-603(1)(b).

¶ 35 The second subsection explains how the amount of restitution (if any) is arrived at. Note that the process by which the prosecuting attorney determines the restitution and the identity of the victims, as set forth in subsection (2), applies whether the court is deferring restitution, ordering restitution on the day of sentencing, ordering restitution for a particular future treatment, or finding that no restitution is owed.

¶ 36 Nor is it either a superfluity or an inconsistency that the legislature established two different standards to obtain an extension of the ninety-one-day deadline, because the assessment addresses the need for additional time at two different points in the process. The first subsection allows the court to determine at the time it enters the order of conviction that there is good cause for granting an initial period of deferral longer than ninety-one days. The second subsection allows for an additional deferment period, but to warrant this additional time requires a different showing — "extenuating circumstances." § 18-1.3-603(2). At these two different points on the timeline, both the reasons underlying the

need for additional time and the impact of additional delay on defendants and victims may be different. Accordingly, it is not unusual that the legislature chose to impose different standards for the two requests.

¶ 37 Consequently, construing the statute in this manner actually avoids making any of the language superfluous. *See People v. Null*, 233 P.3d 670, 679 (Colo. 2010) (Appellate courts "avoid interpretations that would render any words or phrases superfluous or would lead to illogical or absurd results."). Moreover, this interpretation differs from the historically held view of the statute in that it avoids the nearly unworkable conflict created when the two ninety-one-day provisions are read to apply to different acts (the prosecution's provision of the information and the court's ultimate decision imposing restitution). Also, the historical view increases the possibility that a victim loses the right to restitution, and a defendant avoids responsibility to pay it, merely because a trial court does not act within the relatively short time period. Instead, by reading the statute as imposing deadlines by which the prosecution must act, but granting the court the flexibility to adjust those deadlines, this construction serves the purposes of the

statute, which include imposing restitution as "a mechanism for the rehabilitation of offenders," § 18-1.3-601(1)(c), C.R.S. 2019; deterring "future criminality," § 18-1.3-601(1)(d); ensuring full restitution for victims of crime in the most expeditious manner, § 18-1.3-601(1)(g)(I); and "aid[ing] the offender in reintegration as a productive member of society," § 18-1.3-601(2). This statutory construction is thus more consistent than the historical view with the legislative mandate that the restitution statute "be liberally construed to accomplish" these purposes. *Id.*

3. Application

¶ 38 With this construction in mind, we turn to Perez's claims. We turn first to his claim that the trial court lost the authority to enter any restitution order because it failed to act within ninety-one days. We address this claim first because, were he correct, we would have to vacate the order with no further proceedings. However, Perez's claim must fail, as we have concluded that the trial court is under no obligation to act within that time.

¶ 39 However, Perez's objection that the trial court did not find extenuating circumstances to allow the prosecuting attorney more time to determine the restitution meets a different fate. As noted,

when a trial court's initial sentencing order defers determination of restitution, the statute requires the prosecuting attorney to determine the restitution within ninety-one days, unless the court "finds that there are extenuating circumstances affecting the prosecuting attorney's ability to determine restitution." § 18-1.3-603(2).

¶ 40 Although the trial court granted the prosecution's motion for an extension of time to request restitution, the trial court did not formally find that extenuating circumstances existed. Because the court made no such finding explicitly, the court erred. We acknowledge that there are circumstances in which an appellate court may infer that a trial court made a necessary finding. *See, e.g.*, *People v. Kyles*, 991 P.2d 810, 819 (Colo. 1999) (inferring that the trial court made credibility findings during its analysis of a postconviction challenge to the voluntariness of a plea). Here, however, we opt not to draw such an inference, since neither the request nor the proposed order submitted by the prosecution references the statute or the extenuating circumstances standard.

¶ 41 Although the prosecution did not explicitly recite the extenuating circumstances standard, it asserted that it had

received "extensive and complex medical bills as well as a lost wages form" just the day before it filed its extension request, and that there were "substantial and possible ongoing claims from Crime Victim Compensation." Perez now claims that "[t]his one sentence did not establish good cause." He further contends that the bills ultimately submitted by the prosecutor were one-page invoices, and thus not complex. And he correctly points out that the bills were dated well before sentencing, although he tacitly acknowledges that the prosecution explained that it had only recently obtained the documentation from the victim.

¶ 42 However, Perez never raised in the trial court the issue of the prosecution's timeliness nor challenged the veracity of the claimed need for an extension. Consequently, there was no factual record developed, and the trial court was never given the opportunity to weigh the evidence and make the requisite finding.

¶ 43 Consequently, we conclude that the order must be vacated and the case remanded to the trial court for a determination of whether there were extenuating circumstances permitting the extension.

C. Disclosure of CVCB Records

¶ 44 Perez also argues that the trial court erred by relying on, but not fully disclosing, otherwise confidential CVCB records in determining proximate cause for the purpose of restitution. He argues this violated both the statute in effect at the time and his right to due process. We disagree with both contentions.

1. The Crime Victim Compensation Statute

¶ 45 A compensation board's records relating to a crime victim's claims are confidential. § 24-4.1-107.5(2), C.R.S. 2014.[3] "Any such materials shall not be discoverable unless the court conducts an in camera review of the materials sought to be discovered and determines that the materials sought are necessary for the resolution of an issue then pending before the court." *Id.*

¶ 46 In accordance with section 24-4.1-107.5(3), Perez asserted that the CVCB records were necessary for the resolution of an issue pending before the trial court — that he was not the proximate cause of some of the victim's injuries because "several people were

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[3] This section of the crime victim compensation act was amended in its entirety, effective March 30, 2015. The prior version is applicable here.

kicking the victim in an assault," and that this issue warranted an in camera review of the CVCB's records by the trial court. The trial court then reviewed in camera the CVCB's file and, according to the trial court's order, "all non-privileged billing information was provided to defense counsel." Though not specifically identified by the trial court, it is clear from the record that the court was referring to the physician-patient privilege.

¶ 47 Perez now asserts that the trial court erred in "not disclosing to Perez *all* materials related to the CVCB's payment to the victim." (Emphasis added.) However, Perez's argument is contrary to what was required under the statute at the time. The statute provided that confidential information contained within the file was discoverable if it was necessary to resolve an issue pending before the court. *Id.* Yet, nothing in the statute suggested that this exception abrogated other established privileges that had attached to the information. *See People v. Turley*, 870 P.2d 498, 502 (Colo. App. 1993) (finding that no exception to the physician-patient privilege exists in Colorado). Here, the court stated in its order that it provided defense counsel with all nonprivileged information from the CVCB's records. Because the statute in effect at the time did

not require that the trial court disclose otherwise privileged information to the defendant in violation of the victim's privilege rights,[4] we perceive no error.

2. Due Process Violation

¶ 48 Lastly, Perez argues that the trial court's failure to disclose confidential information from the CVCB's records violated his right to due process. We disagree.

¶ 49 Due process is satisfied in a restitution hearing when the defendant receives notice of the factual basis for the order and an opportunity to contest that basis. *United States v. Battles*, 745 F.3d 436, 461 (10th Cir. 2014); *see also Rivera*, 250 P.3d at 1275 ("A court may not order restitution without a hearing at which the prosecution must prove the amount of the victim's loss and its causal link to the defendant's conduct, and at which the defendant may contest those matters."). However, in a different context, a division of this court has held that a defendant's constitutional right to due process does not override a claim of privilege. *See*

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[4] The statute as amended in 2015 clarifies that the court may not release information contained in the records if it will violate privilege. § 24-4.1-107.5(2)(b), C.R.S. 2019.

People v. Zapata, 2016 COA 75M, ¶ 30 (holding that the defendant was not entitled to discovery or an in camera review of statements protected by the psychologist-patient privilege), *aff'd*, 2018 CO 82.

¶ 50 The logic underpinning *Zapata* is equally applicable in this context. Perez's right to due process does not override the victim's physician-patient privilege. The trial court, therefore, committed no error by declining to disclose the privileged records.

III. Conclusion

¶ 51 The restitution order is vacated. The case is remanded to the trial court to determine whether there were extenuating circumstances warranting an extension of the prosecution's deadline for submitting the restitution information to the court. The trial court may, in its discretion, take evidence related to the issue. If the trial court finds there were extenuating circumstances, it may re-enter the restitution order. If not, no restitution order shall be entered.

JUDGE TERRY concurs.

JUDGE YUN concurs in part and dissents in part.

JUDGE YUN, concurring in part and dissenting in part.

¶ 52 I agree with most of the majority's opinion. I agree that Perez did not waive his arguments on appeal and that, given the supreme court's order remanding for reconsideration in light of *Fransua v. People*, 2019 CO 96, plain error review does not apply. *See supra* ¶ 14. I also agree that the district court's refusal to disclose Crime Victim Compensation Board records did not violate Perez's statutory or constitutional rights. *See supra* ¶ 44. And I agree that the restitution order in this case should be vacated and the case remanded for the district court to determine whether extenuating circumstances existed "affecting the prosecuting attorney's ability to determine restitution" under section 18-1.3-603(2), C.R.S. 2019. But I respectfully disagree with the majority's interpretation of section 18-1.3-603(1)(b). *See supra* ¶¶ 29-37. In my view, section 18-1.3-603(1)(b) further requires the district court to determine on remand whether "good cause [wa]s shown for extending the time period by which the restitution amount shall be determined." I therefore concur in part and dissent in part.

I. Background

¶ 53 Though I agree with the majority's recitation of the facts and procedural history, for clarity and context I include the following timeline of the restitution order in this case:

- On December 2, 2013, at Perez's sentencing on one count of second degree assault, a class 4 felony, the district court reserved a determination of restitution for ninety days.
- On March 6, 2014 — ninety-four days later — the prosecution moved for an extension of time to request restitution. Because Perez did not object, the court granted this motion without any explanation or findings.
- On July 3, 2014, the prosecution asked that Perez be ordered to pay $22,291.65 in restitution.
- On August 1, 2014, Perez requested a hearing "regarding the assessment of restitution."
- Between September 2014 and January 2015, the court held three hearings on restitution.
- On February 9, 2015, Perez filed a motion objecting to the amount of restitution that the prosecution had

requested and asserting that, because he was not the proximate cause of all the victim's injuries, he should not be held responsible for all the victim's medical bills.

- On March 16, 2015 — 496 days after Perez's sentencing — the court ordered Perez to pay $19,606 in restitution.

¶ 54 Perez appeals that restitution order, arguing, for the first time on appeal, that the court reversibly erred by failing to set restitution within ninety-one days of sentencing and by failing to find that good cause existed to act outside that window.

II. Analysis

¶ 55 In 2000, the General Assembly substantially reorganized the restitution scheme by adding an entirely new article titled "Restitution in Criminal Actions." *Meza v. People*, 2018 CO 23, ¶ 9 (citing Ch. 232, sec. 1, §§ 16-18.5-101 to -110, 2000 Colo. Sess. Laws 1030-41). Section 18-1.3-603 currently governs the "[a]ssessment of restitution" and states that "[e]very order of conviction of a felony . . . shall include consideration of restitution." § 18-1.3-603(1). It then mandates that every order of conviction include at least one of the following: (1) an order to pay a specific amount of restitution; (2) an order that the defendant is obligated to

pay restitution but deferring the determination of the actual amount owed; (3) an order that the defendant is obligated to pay the actual costs of specific future treatment for the victim; or (4) a finding that no victim suffered a pecuniary loss and thus no restitution is owed. *Id.*; *Meza*, ¶ 10. Thus, the statutory scheme contemplates the court entering a restitution order on the date of sentencing or shortly after the date of sentencing.

¶ 56 This case requires us to assess the interplay between section 18-1.3-603(1)(b) and section 18-1.3-603(2) when additional time is required to determine restitution. Subsection (1)(b) allows the district court, at the time of conviction, to "order that the defendant is obligated to pay restitution" but to defer a determination of "the specific amount of restitution" for up to ninety-one days "unless good cause is shown for extending th[at] time period." Subsection (2), in turn, states,

> [t]he court shall base its order for restitution upon information presented to the court by the prosecuting attorney, who shall compile such information through victim impact statements or other means to determine the amount of restitution and the identities of the victims. Further, the prosecuting attorney shall present this information to the court prior to the order of conviction or within ninety-one days, if it is

> not available prior to the order of conviction. The court may extend this date if it finds that there are extenuating circumstances affecting the prosecuting attorney's ability to determine restitution.

¶ 57 The majority interprets the ninety-one-day provisions in subsection (1)(b) and subsection (2) as applying to the *prosecutor's* determination of restitution "at two different points in the process." *Supra* ¶ 36. According to the majority, subsection (1)(b) requires "good cause" to defer the prosecutor's determination of restitution at the time the district court enters the order of conviction, while subsection (2) requires "extenuating circumstances" to defer the same determination after an initial ninety-one-day extension. *Id.* I respectfully disagree.

¶ 58 In my view, subsection (1)(b) requires the *district court* either (1) to determine the specific amount of restitution due within ninety-one days of the order of conviction or (2) to find that good cause exists to determine the amount of restitution after ninety-one days. The court may find that good cause exists for an extension when it enters the order of conviction (as the majority contemplates), but it may also do so at a later time. *See People v. Knoeppchen*, 2019 COA 34, ¶ 26 (noting that the statute does not

dictate when a showing or finding of good cause must be made). Nothing in the language of subsection (1)(b) requires that "good cause [be] shown" at the time of the order of conviction, and we may not add words to a statute. *Turbyne v. People*, 151 P.3d 563, 367 (Colo. 2007).

¶ 59 Nor, as the majority suggests, does subsection (1)(b)'s provision for a ninety-one-day extension belong exclusively to the prosecutor. *See supra* ¶ 30. The statute requires only that "good cause [be] shown"; it does not specify by whom. § 18-1.3-603(1)(b). Thus, the court may, on its own motion, find that good cause exists to delay its determination of the amount of restitution if, for instance, it receives the prosecutor's request for a given amount of restitution on the ninetieth or ninety-first day after conviction or if the press of other business precludes the court from determining the amount within the ninety-one-day window. The defense might request an extension beyond ninety-one days for good cause, too, perhaps to investigate and conduct discovery on the prosecution's request or, perhaps, because defense counsel has a trial scheduled, has fallen ill, or has some other conflict. Ultimately, though, the court will be the arbiter of whether a justification for delay rises to

"good cause" (subject to appellate review), because subsection (1)(b) refers to the court's deadline to determine the restitution amount.

¶ 60 Moreover, though the majority is correct that we should ascribe the same meaning to the same words in different parts of the same statute, I am not persuaded that the legislature's use of "determine" (rather than "set") in subsection (1)(b) evidences an intent to refer to the prosecutor's determination of restitution rather than the court's setting of restitution. *See supra* ¶¶ 29-30; *cf. Berthold v. Indus. Claims Appeals Office*, 2017 COA 145, ¶ 36 (treating "initially" and "originally" as synonyms in distinguishing the legislature's use of a "designated authorized treating physician" from its use of an "originally" or "initially authorized treating physician" in section 8-43-405(5)(a), C.R.S. 2019). In my interpretation of section 18-1.3-603, "determine" carries the same meaning in subsection (1)(b) and in subsection (2) — namely, to calculate the amount of restitution that the defendant owes.

¶ 61 Context makes it clear, however, that the court "determines" the amount of restitution actually due in subsection (1)(b), while the prosecutor "determines" the amount of restitution he or she believes should be due in subsection (2). Specifically, subsection (1)(b)

refers to the district court's obligation to determine a specific amount of restitution within ninety-one days, unless good cause exists to extend that deadline, while subsection (2) refers to the prosecutor's obligation to "determine the amount of restitution" and present "this information to the court" within ninety-one days, unless extenuating circumstances exist to extend that deadline. Thus, subsections (2) and (1)(b) provide "separate standards for accepting the late presentation of restitution information by the prosecutor and for the late determination of the restitution amount" by the court. *People v. Harman*, 97 P.3d 290, 293 (Colo. App. 2004).

¶ 62 As the majority points out, my reading of the statute could "set up a frequent conflict in that the court [c]ould often be left with little or no time to rule" on restitution if, under section 18-1.3-603(2), the prosecutor takes all or most of the ninety-one days after conviction to propose an amount of restitution. *Supra* ¶ 32. But the court, on its own initiative, could easily find good cause to extend subsection (1)(b)'s deadline under these circumstances, since the deadline is not jurisdictional. *Harman*, 97 P.3d at 293. To the extent that this causes practical problems,

"[i]t is not our role to blue-pencil inartfully drafted sections of the Colorado Revised Statutes." *People v. Weeks*, 2020 COA 44, ¶ 22. If statutory language is unambiguous, as it is here, then we must apply the words as written. *People v. Summers*, 208 P.3d 251, 254 (Colo. 2009). The practical problem that the majority identifies "requires a legislative, and not a judicial, fix." *Weeks*, ¶ 22.

¶ 63 And as the majority concedes, every recent opinion to interpret the restitution statute before this one has read section 18-1.3-603(1)(b) to constrain the court's ability to delay its own, not the prosecutor's, determination of restitution. *See supra* ¶¶ 18-25. Even if in dicta, the weight of these opinions indicates a common understanding of subsection (1)(b)'s plain meaning that differs from the majority's.[1] *See Weeks*, ¶ 13 (collecting cases and explaining that "Colorado case law indicates that the 'determin[ation]' of restitution under section 18-1.3-603(1)(b) refers to the district

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[1] In *People v. Roddy*, 2020 COA 72, ¶ 25, the majority assumed, without deciding, that subsection (1)(b) applies to the period within which the court must enter an order for a specific amount of restitution, while the special concurrence interpreted subsection (1)(b) in the same way as the majority in this case, *see id.* at ¶ 69 (Tow, J., specially concurring).

court's obligation to order a specific amount of restitution within ninety-one days, unless good cause exists to extend that deadline").

¶ 64 Accordingly, for a court to delay its determination of the amount of restitution until more than ninety-one days past the conviction, "good cause" must exist for it to do so under section 18-1.3-603(1)(b). In this case, however, the record does not indicate whether good cause existed, and it appears that the court did not consider the matter. As a result, I would remand for the district court to consider not only whether extenuating circumstances existed for the prosecution to delay its determination of restitution under subsection (2) but also whether, under subsection (1)(b), good cause existed for the district court to determine "the specific amount of restitution" outside the ninety-one day window.

III. Conclusion

¶ 65 For these reasons, I respectfully concur in part and dissent in part.