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SUMMARY
March 17, 2022

2022COA32

No. 19CA1997, *People v. Le* — Criminal Law — Sentencing — Restitution — Victim; Crimes — Tax Evasion — Criminal Penalties; Taxation — Taxes on Marijuana and Marijuana Products — Retail Marijuana Excise Tax

A division of the court of appeals concludes, as a matter of first impression, that the Colorado Department of Revenue can be considered a “victim” entitled to restitution under Colorado’s Restitution Act, sections 18-1.3-601 to -603, C.R.S. 2021, where a criminal defendant has illegally evaded marijuana excise taxes.

Court of Appeals No. 19CA1997
Arapahoe County District Court No. 16CR970
Honorable Shay K. Whitaker, Judge

The People of the State of Colorado,

Plaintiff-Appellant,

v.

Ton Thai Le,

Defendant-Appellee.

ORDER REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE FOX
Dailey and Schutz, JJ., concur

Announced March 17, 2022

Philip J. Weiser, Attorney General, Daniel A. Pietragallo, Senior Assistant
Attorney General, Denver, Colorado, for Plaintiff-Appellant

Springer and Steinberg, P.C., Harvey A. Steinberg, Craig L. Pankratz, Denver,
Colorado, for Defendant-Appellee

¶ 1 In this criminal tax evasion case, the People appeal the trial court’s order denying their motion for payment of restitution to the Colorado Department of Revenue (Department). Defendant, Ton Thai Le, who pleaded guilty to evading Colorado’s marijuana excise tax, maintains that restitution is not an appropriate remedy by which the Department can collect unpaid marijuana excise taxes. The trial court agreed, finding as a matter of law that the Department could not recover such taxes on behalf of Coloradans under Colorado’s Restitution Act, sections 18-1.3-601 to -603, C.R.S. 2021.

¶ 2 On appeal, we are asked to address a question that the trial court left unresolved: Can the Department be considered a “victim” under the Restitution Act such that the agency itself — as opposed to the public at large — is entitled to restitution for the unpaid taxes? We conclude that it can. Thus, we reverse the trial court’s order and remand for further proceedings.

I. Background

¶ 3 Le was among thirty-one codefendants indicted on numerous felony charges stemming from their roles as high-ranking members

of a Colorado-based drug trafficking organization that illegally cultivated and distributed marijuana between 2014 and 2016.

¶ 4 Le pleaded guilty to, among other offenses, evasion of taxes administered by the Department in violation of section 39-21-118(1), C.R.S. 2021, a class 5 felony. As part of his negotiated plea agreement, Le agreed to be sentenced to between sixteen and thirty-two years in the custody of the Department of Corrections on one count of violating the Colorado Organized Crime Control Act, section 18-17-104, C.R.S. 2021. That sentence, however, was suspended, and Le further agreed to a term of eight years of probation for all remaining counts, which would run concurrently.

¶ 5 Le’s plea agreement required him to “pay restitution jointly and severally with any co-defendants.”

¶ 6 The People filed a motion requesting restitution be made by Le and two of his co-defendants — Linh Ngoc Tran and Jonathan Tieu.¹ Therein, the People sought payment to the Department of

¹ The People appealed the denial of the motion as to all three defendants, but later withdrew their appeal as to Tieu. The People’s appeal in Tran’s case is addressed in a separate opinion.

unpaid marijuana excise taxes. Le and his co-defendants objected, arguing that the Restitution Act does not authorize such restitution.

¶ 7 The court held an initial hearing on the matter. At the outset, Tieu requested a continuance. In the subsequent discussion, the parties and the court framed the People's restitution request as raising two distinct issues: (1) as a matter of law, whether the Department can recover unpaid excise taxes as restitution; and (2) if so, whether the People had met their burden of proving the amount owed in restitution.

¶ 8 The People indicated that they intended to present testimony of a Department agent at the continued evidentiary hearing. They also asked if "the Court want[s] the bank records at this point or if you want me to hold off until we go to the second phase." The court responded, "Let's hold off." It stated that it first intended to issue an order addressing the threshold legal question based on the parties' briefs. Then, if it was necessary, the court would allow the People to present further evidence in support of their motion.

¶ 9 On September 12, 2019, the court issued an order denying the People's motion for restitution, finding that the Department could not recover unpaid marijuana excise taxes on behalf of Colorado's

taxpayers. The court’s analysis flowed from an allegation in the People’s motion that “[t]he State of Colorado and its taxpayers, by and through the [Department], are the victims of the Defendants’ conduct and criminal scheme.” It considered whether the Restitution Act permitted the Department to collect restitution on behalf of “society” — “the victim in this case.” But the court did not address or analyze whether the Department could be entitled to restitution as a “victim” in its own right under the Restitution Act.

¶ 10 In denying the People’s motion, the court ultimately concluded that “a specific legislative pronouncement is required for the People to successfully obtain restitution” under the circumstances, and absent such pronouncement, “the People cannot recover the restitution sought.”

II. Discussion

¶ 11 The People do not challenge the propriety of the trial court’s analysis that the Department could not collect restitution on behalf of the People of Colorado for unpaid marijuana excise taxes. In fact, they explicitly renounce any such argument. Instead, they raise a slightly distinct contention apparently not considered by the trial court: that the Department itself can be considered a “victim”

under the Restitution Act and is thus entitled to restitution.

Accordingly, they argue, the trial court erred by determining that the Department could not be awarded restitution for the unpaid taxes. We agree and thus reverse the trial court's order and remand for further proceedings.

A. Preservation

¶ 12 As the trial court pointed out, the People specifically alleged in paragraph thirty-five of their motion that “[t]he State of Colorado and its taxpayers, by and through the [Department], are the victims of the Defendants’ conduct and criminal scheme.” Le argues that, based on this allegation, the trial court’s failure to address whether the Department itself could be considered a “victim” was an error invited by the People. Thus, he argues, the People cannot now raise the issue on appeal. *See People v. Zapata*, 779 P.2d 1307, 1309 (Colo. 1989) (“[A] party may not complain on appeal of an error that he has invited or injected into the case”); *see also People v. Rediger*, 2018 CO 32, ¶ 34 (a party “must abide the consequences” of an error he invited).

¶ 13 However, in examining the totality of the People’s request for restitution, including the entirety of their motion, attached exhibits,

and proposed order, it is apparent that the People identified the Department as a victim and suggested it was entitled to restitution. For example, in paragraph thirty-six of their motion, they describe the unpaid taxes as a “pecuniary loss” that was “suffered” specifically by “the [Department].” And in paragraph thirty, in referencing the Restitution Act’s definition of “victim,” they added that “[a] government department is a ‘person’ for purposes of the restitution statute.” Moreover, they drafted the following proposed order for the court: “The court, having reviewed the People’s Motion for Restitution, orders that the Defendants . . . pay restitution . . . to the [Department].”

¶ 14 Accordingly, the trial court’s omission of this issue was not invited by the People, and the issue was preserved for our review.

B. Standard of Review

¶ 15 “[B]ecause in restitution cases[] the statutory scheme no longer allows for abuse of discretion as the default standard of review, the appropriate standard of review necessarily will depend on which of a wide variety of restitution issues district courts decide and we are asked to review.” *People v. Barbre*, 2018 COA 123, ¶ 24. Where the sole issue on appeal is the proper interpretation of the

Restitution Act, we review the trial court’s restitution order de novo. *Id.* at ¶ 23 (“[I]t seems inappropriate to use the term ‘discretion’ in describing the appropriate standard of review, for example, in a case where the sole issue is the proper interpretation of the restitution statute.”); *see also Dubois v. People*, 211 P.3d 41, 43 (Colo. 2009).

¶ 16 “In construing a statute, we aim to effectuate the General Assembly’s intent.” *People v. Weeks*, 2021 CO 75, ¶ 25. “Our first step in this endeavor is to inspect ‘the language of the statute, giving its words and phrases their plain and ordinary meaning.’” *Id.* (quoting *McCulley v. People*, 2020 CO 40, ¶ 10). “When the language of a statute is clear and unambiguous, we give effect to its plain and ordinary meaning ‘and look no further.’” *Id.* at ¶ 27 (quoting *Cowen v. People*, 2018 CO 96, ¶ 12). “If, however, the statutory language is susceptible of more than one reasonable interpretation and is thus ambiguous, we may resort to extrinsic aids of construction to address the ambiguity and decide which reasonable interpretation to accept based on the legislature’s intent.” *Id.*

¶ 17 Moreover, in interpreting the Restitution Act in particular, we must favor a liberal construction so as “to serve the General Assembly’s goals of rehabilitating offenders, deterring future criminality, and compensating victims.” *People v. Steinbeck*, 186 P.3d 54, 60 (Colo. App. 2007).

C. Applicable Law

1. The Marijuana Excise Tax

¶ 18 The marijuana excise tax statutes, sections 39-28.8-301 to -308, C.R.S. 2021, establish a fifteen percent tax on marijuana sales between “retail marijuana business licensees.” § 39-28.8-302(1)(a)(I), C.R.S. 2021. Specifically, the tax is imposed “at the time when the retail marijuana cultivation facility first sells or transfers unprocessed retail marijuana . . . to a retail marijuana product manufacturing facility or a retail marijuana store.” *Id.*

¶ 19 Under section 39-28.8-306, C.R.S. 2021,

[i]t is unlawful for any retail marijuana cultivation facility to sell or transfer retail marijuana without a license as required by law, . . . or to willfully evade the payment of the tax, or any part thereof, as imposed by this part 3. Any retail marijuana cultivation facility or agent thereof who willfully violates any provision of this part 3 shall be punished as provided by section 39-21-118.

¶ 20 Section 39-21-118(1) directs that

[a]ny person who willfully attempts in any manner to evade or defeat any tax administered by the department or the payment thereof, in addition to other penalties provided by law, is guilty of a class 5 felony and, upon conviction thereof, shall be punished as provided in section 18-1.3-401, C.R.S. [2021], or shall be punished by a fine of not more than one hundred thousand dollars, or five hundred thousand dollars in the case of a corporation, or by both such fine and imprisonment, together with the costs of prosecution.

¶ 21 Section 18-1.3-401 — which outlines the presumptive penalties for felonies — clarifies that “[e]very sentence entered under this section shall include consideration of restitution as required by [the Restitution Act] and by article 18.5 of title 16.” § 18-1.3-401(12).

¶ 22 Accordingly, the marijuana excise tax statutes contemplate that unpaid excise taxes may be recoverable as restitution if permitted by the Restitution Act.² And the Department is obligated

² Le argues, as he did at sentencing, that the marijuana excise tax statutes does not apply to him because his is not a “retail marijuana business licensee[.]” § 39-28.8-302(1)(a)(I), C.R.S. 2021. Accordingly, he argues, he had no obligation to pay marijuana excise taxes under section 39-28.8-302, and thus the People cannot

to collect such taxes. See § 24-35-101(1)(f), C.R.S. 2021 (providing that the Department’s functions include “the collection of . . . [t]axes, fees, and other revenues, the payment of which is required by law”).

2. The Restitution Act

¶ 23 Under the Restitution Act, convicted offenders are required to pay restitution to compensate crime victims for the harm they have suffered. §§ 18-1.3-601 to -603. “Restitution” is defined as “any pecuniary loss suffered by a victim . . . proximately caused by an offender’s conduct and that can be reasonably calculated and recompensed in money.” § 18-1.3-602(3)(a), C.R.S. 2021. “Victim,” in turn, “means any person aggrieved by the conduct of an offender and includes . . . [a]ny person harmed by an offender’s criminal conduct in the course of a scheme, conspiracy, or pattern of criminal activity.” § 18-1.3-602(4)(a)(II). A governmental agency is

show that the Department suffered any harm from his failure to do so. However, Le waived any argument as to the applicability of the statute when he pleaded guilty to unlawfully evading marijuana excise taxes. Indeed, in doing so, he effectively stipulated to section 39-28.8-302’s applicability. See *People v. Rediger*, 2018 CO 32, ¶ 39 (Waiver is “the *intentional* relinquishment of a *known* right or privilege.” (quoting *Dep’t of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1984))).

considered a “person” for purposes of the restitution statute. *People v. Oliver*, 2016 COA 180M, ¶ 26; *see also* § 2-4-401(8), C.R.S. 2021 (“person” includes “any . . . government or governmental . . . agency”). And a person is “aggrieved” if the person has “legal rights that are adversely affected.” *People v. Padilla-Lopez*, 2012 CO 49, ¶ 16 (quoting Black’s Law Dictionary 77 (9th ed. 2009)).

D. Analysis

¶ 24 The People ask us to take up the question that the trial court left unresolved: Can the Department itself be a “victim” here under the Restitution Act and thus be properly awarded unpaid excise taxes as restitution? For the reasons that follow, we answer that question in the affirmative.

¶ 25 No Colorado case has yet addressed whether the Department can be “aggrieved by” the evasion of marijuana excise taxes so as to fall within the purview of the Restitution Act. *See* § 18-1.3-602(4)(a)(II). Indeed, it is initially unclear what harm, exactly, the Department itself suffers from a loss of marijuana excise tax revenue — revenue that is ultimately credited in full to the public

school capital construction assistance fund.³ However, we find guidance from the federal courts’ analogous application of the Mandatory Victims Restitution Act (MVRA). 18 U.S.C. § 3663A.

¶ 26 The MVRA requires that a defendant make restitution to the “victim” of certain enumerated offenses. Similar to Colorado’s Restitution Act, the MVRA defines a “victim” as “a person directly and proximately harmed as a result of the commission of an offense.” 18 U.S.C. § 3663A(a)(2). Also like our statute, governmental agencies, including the Internal Revenue Service (IRS) and state departments of revenue, are eligible “victims” under the MVRA. *See United States v. Senty-Haugen*, 449 F.3d 862, 865 (8th Cir. 2006).

¶ 27 Federal courts have invariably held that losses incurred by tax evasion or fraud constitute a direct harm to those governmental entities that collect taxes such that they can recover restitution as “victims” under the MVRA. *See United States v. Senninger*, 429 F.

³ Marijuana excise tax revenue is collected by the Department, transferred to the state treasury, and then distributed to the public school capital construction assistance fund. *See* § 39-28.8-305, C.R.S. 2021. The fund is used to renovate, maintain, and construct public school facilities. §§ 22-43.7-102, -104, C.R.S. 2021.

App'x 762, 768 (10th Cir. 2011) (upholding an award of restitution to the IRS and the Colorado Department of Revenue for refunds issued pursuant to fraudulent tax returns); *United States v. Mickle*, 464 F.3d 804, 810-11 (8th Cir. 2006) (same as to the Minnesota Department of Revenue); *Senty-Haugen*, 449 F.3d at 865 (the defendant's fraudulent tax filings caused a pecuniary loss to the IRS that was recoverable as restitution); *United States v. Ingersoll*, No. 14-cr-20216, 2016 WL 5219536, *25 (E.D. Mich. Sept. 22, 2016) (unpublished opinion) (conduct of the defendants who committed, among other offenses, tax evasion "directly harmed" the IRS and thus it was a "proper victim" under the MVRA). This is because the governmental entity that has been defrauded or to whom taxes are owed has a cognizable interest in the lost revenue, regardless of how the revenue will ultimately be spent. See *Pasquantino v. United States*, 544 U.S. 349, 355-56 (2005) (a governmental entity's right to uncollected excise taxes is an entitlement that is considered property of the entity, and the evasion of such taxes "inflict[s] an economic injury" on that entity); *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 311-12 (1978) (contemplating that the IRS has an "interest in unpaid taxes");

United States v. Porcelli, 865 F.2d 1352, 1361 (2d Cir. 1989) (by failing to collect and remit sales taxes, the defendant “was in a very real sense ‘depriving’ [New York] of its property”); *United States v. Helmsley*, 941 F.2d 71, 94 (2d Cir. 1991) (reaffirming the court’s stance in *Porcelli* that the state has a property interest in tax obligations). Thus, the deprivation of unpaid excise taxes represents a distinct harm to the legal interests of the entity charged with collecting such taxes.

¶ 28 Applying that reasoning here, we conclude that the Department can be considered a “victim” under the Restitution Act for two reasons. First, because the Department had an interest in the unpaid excise taxes at issue, and Le’s evasion adversely affected that interest, the Department was “aggrieved by” Le’s criminal conduct within the meaning of section 18-1.3-602(4)(a). See *Padilla-Lopez*, ¶ 16 (A person is “aggrieved” if the person has “legal rights that are adversely affected.” (quoting Black’s Law Dictionary 77 (9th ed. 2009))). Second, the Restitution Act specifically says that “[a]ny person harmed by an offender’s criminal conduct in the course of a scheme, conspiracy, or pattern of criminal activity” is considered a “victim.” § 18-1.3-602(4)(a)(II). And, as described

above, the evasion of taxes has been generally recognized as working a direct harm on tax collection agencies like the Department. Accordingly, per the plain language of the Restitution Act, the Department can be considered a “victim” under the circumstances. *See Steinbeck*, 186 P.3d at 60 (the Restitution Act must be “liberally construed”); *see also* § 24-35-101(1)(f); *cf. People v. Wilson*, 251 P.3d 507, 510 (Colo. App. 2010) (affirming an order of restitution to the Department of Human Services in a benefits fraud case).⁴

⁴ Le suggests that we must also consider the type of harm the Department has suffered in determining whether it is a “victim.” He points out that the legislative declaration of the Restitution Act never references governmental agencies or business entities, but it twice references reimbursing victims of crime in conjunction with their “immediate families.” *See* § 18-1.3-601(1)(e), (2), C.R.S. 2021. Thus, he contends, the declaration evinces a legislative intent that only those who have suffered a harm that a natural person can suffer — unlike the Department — may be considered a “victim.” Such an interpretation, however, is plainly inconsistent with the Restitution Act’s expansive definition of “victim,” *see* § 18-1.3-602(4)(a), C.R.S. 2021, and runs afoul of our obligation to liberally construe the Act, *People v. Steinbeck*, 186 P.3d 54, 60 (Colo. App. 2007). Moreover, it effectively requires reading additional language into the Restitution Act, and “we [will] not add words to a statute.” *Trujillo v. Colo. Div. of Ins.*, 2014 CO 17, ¶ 24. Accordingly, we reject Le’s contention. *See also People v. Martinez*, 2022 COA 28, ¶ 40 (holding that “an insurance company that indemnifies a policyholder because the policyholder was the victim of a felony,

¶ 29 Our decision is not inconsistent with *Dubois*, 211 P.3d 41, to which the Le directs us.

¶ 30 In *Dubois*, a defendant pleaded guilty to vehicular eluding after a car chase, during which one of the responding officers was involved in a collision that injured her and destroyed her patrol car. *Id.* at 42. The question posed to the court was whether the police officer and the Alamosa County Sheriff’s Department (Alamosa) were “victims” entitled to restitution for the officer’s personal injuries and the loss of the patrol car, respectively.

¶ 31 The court cautioned that “[t]he language ‘aggrieved by the conduct of an offender,’ is not limitless in its reach.” *Id.* at 46. The Restitution Act, it reasoned, generally does not entitle a governmental agency to restitution for costs it expends in carrying out its statutory responsibilities. *See id.* at 45-46; *see also Padilla-Lopez*, ¶¶ 10-11. It held that where the legislature has chosen only “to treat society as a whole”, and not a particular agency, as the entity “‘aggrieved by’ the conduct of the offender,” the costs that the agency expended as a result of the offender’s conduct are not

misdemeanor, or other specified offense can be ‘victim’ for purposes of the restitution statutes.”).

recoverable as restitution absent “an express legislative pronouncement” recognizing as much. *Dubois*, 211 P.3d at 47.

¶ 32 However, the facts of *Dubois* represented a “relatively discrete scenario” in which Alamosa fell “within the general meaning of ‘victim’ and [did] not therefore need to be explicitly included [within the Restitution Act] in order to be eligible for restitution.” *Id.* at 46. The court offered two reasons for its decision: (1) “an essential element of the underlying crime require[d] the primary ‘victim’ to be a peace officer” and (2) “the underlying crime require[d] the use of a vehicle and it [was] reasonably foreseeable that [a] peace officer[] . . . might sustain injuries from a vehicular accident while responding.” *Id.* Accordingly, the court upheld the trial court’s award of restitution to Alamosa for the loss of the patrol car. *Id.* at 47.

¶ 33 Several years later, in *Padilla-Lopez*, the court revisited *Dubois* and clarified its ruling:

Dubois . . . articulated a general rule that governmental agency *expenses* are not typically eligible for recovery under the restitution statute absent an express legislative provision authorizing them, unless the underlying criminal statute encompasses the agency as a primary victim. *Dubois* presented a factual scenario of a discrete exception to this general principle, in light of

(1) the nature of the underlying crime; and (2) the fact that the law enforcement agency was the primary victim of the offense charged.

Padilla-Lopez, ¶ 14 (emphasis added).

¶ 34 Here, the Department is attempting to recover unpaid taxes in which it has a legal interest, not “expenses” that it incurred in carrying out its statutory responsibilities in the wake of Le’s criminal conduct. As explained above, the Department is a victim in its own right under a plain reading of the Restitution Act, and it is merely seeking to remedy a distinct harm that it suffered from Le’s tax evasion. Accordingly, the limitation on restitution recovery that *Dubois* imposes on governmental agencies is inapplicable.

¶ 35 Moreover, even assuming *arguendo* that *Dubois* is applicable, *Dubois*’ exception to the general rule is nonetheless satisfied because the underlying charged criminal offense here — tax evasion under section 39-21-118 — “encompasses the agency as a primary victim.” *Padilla-Lopez*, ¶ 14. Under section 39-21-118(1), an offender is guilty of tax evasion if he “willfully attempts . . . to evade or defeat any tax administered by the [Department].” As discussed, the Department has an interest in the unpaid taxes it is charged with collecting. Thus, like *Dubois*, the commission of the offense

necessarily requires inflicting an injury on the Department and specifically contemplates as much.

¶ 36 In sum, the Department may properly be considered a “victim” under the Restitution Act where a criminal defendant has failed to pay to the Department marijuana excise taxes to which it is entitled. Thus, the trial court’s order is reversed.⁵

¶ 37 Because the record indicates that the People were not allowed to present evidence as to the amount of restitution owed pending the trial court’s resolution of the threshold legal question before it, we remand the case for further proceedings. The trial court is directed to afford the People an opportunity to prove, “by a preponderance of the evidence, both the amount of restitution owed

⁵ Le also argues that permitting the Department to recover unpaid marijuana excise taxes would violate his equal protection rights, violate the separation of powers doctrine, and effectively punish him twice in contravention of statutory authority. However, because Le failed to raise these claims below, we decline to address them. See *People v. Stone*, 2020 COA 23, ¶ 47 (The defendant “did not preserve this issue in the trial court, so we will not address it.”). Moreover, that the Department has an alternative method to obtain unpaid taxes under section 39-21-114, C.R.S. 2021, is of no import to our analysis. The fact remains that the Department *may* qualify as a “victim” under the plain language of the Restitution Act and thus be entitled to claim such unpaid taxes through restitution. And the Department is not seeking a double recovery under the Act and section 39-21-114.

and that the victim’s losses were proximately caused by the defendant.” *People v. Henson*, 2013 COA 36, ¶ 11; *see also Martinez*, ¶ 13. Detailed findings are appropriate to help avoid the risk of a remand due to inadequate explanation or insufficient reasoning, if any, concerning a restitution order.⁶

III. Conclusion

¶ 38 The order is reversed and the case is remanded for further proceedings.

JUDGE DAILEY and JUDGE SCHUTZ concur.

⁶ *See United States v. Bradley*, 897 F.3d 779, 783 (6th Cir. 2018) (in a forfeiture context, the court noted that “[b]ack-of-the envelope calculations” could not justify the amount claimed without affecting the defendant’s “substantial rights and the fairness” of the proceeding); *see also United States v. Kreitman*, 773 F. App’x 1073, 1077 (11th Cir. 2019) (cautioning the sentencing court to narrowly tailor restitution where the court did not “meaningfully engage” with argument as to claimed loss amount).