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SUMMARY  
May 25, 2023

**2023COA43M**

**No. 21CA0669, *People v Johnson* — Criminal Law — Sentencing — Restitution — Assessment of Restitution — Procedural Deadlines — “Good Cause” to Extend Trial Court’s Deadline**

A majority of a division of the court of appeals applies *People v. Weeks*, 2021 CO 75 to conclude that (1) the final restitution amount wasn’t available to the prosecution at the time of the guilty plea; (2) the parties’ agreement to allow the prosecution ninety-one days to provide that restitution amount and the court’s acceptance of the agreement satisfied section 18-1.3-603(1)(b); (3) the prosecution complied with section 18-1.3-603(2)(b) by providing a restitution amount on the ninety-first day; (4) the court complied with section 18-1.3-603(1)(b) by entering the restitution order on the ninety-first day; and (5) the court’s standing case management order, permitting the defense to object to restitution within thirty

days, coupled with its specific order at the plea and sentencing granting the defense sixty days to object, constituted good cause under section 18-1.3-603(2)(b). The special concurrence would not decide whether the restitution information was available to the prosecution at the time of plea and sentencing and would instead hold that the defendant waived any challenge to granting the prosecution ninety-one days to provide the restitution amount, under the terms of the plea agreement. Therefore, the majority affirms the restitution order. The majority also rejects the defendant's challenge to the amount of restitution and holds that the plea agreement shows the defendant specifically agreed to pay restitution for dismissed counts and uncharged misconduct. The dissent concludes that the court did not enter a restitution order that complied with section 18-1.3-603(1) because (1) the People conceded that although the victim provided a final restitution figure shortly before ninety-one days, the prosecution had possessed the underlying information necessary to determine restitution before the plea was entered and didn't provide this information to the

court; (2) the prosecution offered no reason for requesting ninety-one days at the time of the plea and sentence; and (3) the court asked no questions to determine whether restitution information was available at the time of the plea and sentence. It also concludes that the court made no express good cause finding as required by *Weeks* and that good cause can't be implied from the surrounding circumstances. Accordingly, it would reverse the order and remand with directions for the court to enter a restitution order in the amount of zero.

Court of Appeals No. 21CA0669  
El Paso County District Court No. 20CR508  
Honorable Michael P. McHenry, Judge

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The People of the State of Colorado,

Plaintiff-Appellee,

v.

Darryl Cornelius Johnson,

Defendant-Appellant.

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ORDER AFFIRMED

Division II  
Opinion by JUDGE FREYRE  
Welling, J., specially concurs  
Furman, J., dissents

Opinion Modified  
On the Court's Own Motion

Announced May 25, 2023

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Philip J. Weiser, Attorney General, Frank R. Lawson, Assistant Attorney  
General, Denver, Colorado, for Plaintiff-Appellee

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State Public Defender, Denver, Colorado, for Defendant-Appellant

OPINION is modified as follows:

**Added Paragraph Number at Page 23, ¶ 44:**

¶ 44 The first mistake was made by the prosecution.

¶ 45 Subsection (2)(a) of section 18-1.3-603 provides:

The 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.

¶ 1 In this restitution appeal, we must apply *People v. Weeks*, 2021 CO 75 (*Weeks II*), *aff'g* 2020 COA 44 (*Weeks I*), to determine whether the district court's restitution order, initially entered ninety-one days after the plea and sentencing hearing and re-entered after a defense objection and subsequent hearing 287 days later, complied with section 18-1.3-603, C.R.S. 2022. Defendant, Darryl Cornelius Johnson, contends the court violated the restitution statute by "imposing restitution past the ninety-one-day deadline without good cause" and argues that his objection beyond the ninety-one-day deadline did not constitute good cause. Johnson also challenges the amount of restitution and claims that the court deprived him of due process by ordering restitution in an amount not authorized by his guilty plea.

¶ 2 Because the record shows that the restitution information wasn't available to the prosecution at the time of Johnson's plea, the court complied with section 18-1.3-603(1)(b) by accepting the parties' agreement that the prosecutor would provide a restitution amount within ninety-one days of the conviction. We further conclude that (1) the prosecutor complied with the plea agreement and section 18-1.3-603(2)(b) by providing the restitution amount on

the ninety-first day; (2) the court complied with section 18-1.3-603(1)(b) by entering the restitution order on the ninety-first day; and (3) the court's standing case management order permitting the defense to object to restitution within thirty days (discussed at the plea and sentencing hearing), coupled with its order at sentencing granting the defense sixty days to object to the restitution order entered, constituted good cause, under section 18-1.3-603(2)(b), to permit entry of a final restitution order beyond ninety-one days.

¶ 3 Additionally, we discern no error in the amount of restitution ordered because Johnson agreed, as part of the plea agreement, to pay restitution in connection with dismissed cases, dismissed counts, and counts the prosecutor agreed not to file. Accordingly, we affirm the court's order.

## I. Background

### A. Pre-Plea Facts

¶ 4 Johnson worked as a loss prevention officer for Walmart. In this capacity, he had access to a barrel key that he used to steal cash from registers and electronics. His actions were captured on surveillance video. When confronted with his conduct, Johnson

admitted to the thefts. The prosecution charged him with third degree burglary and theft of between \$2,000 and \$5,000.

¶ 5 The initial investigation revealed that Johnson stole property valued at \$3,097.59. One month later, the investigating officer received a witness statement from another loss prevention officer who reported that the actual value of the stolen property was between \$10,000 and \$11,000. The officer submitted a supplemental report to the prosecution in February 2020 with a recommendation to amend the theft charge, and he booked thirteen surveillance videos into evidence.

¶ 6 The prosecutor elected not to amend the theft charge based on the supplemental report. Instead, on June 9, 2020, (the date the conviction was entered), Johnson pleaded guilty to theft as a class 6 felony and to an added count of theft as a class 1 misdemeanor in exchange for the dismissal of the third degree burglary count. The prosecutor agreed to a deferred judgment on the felony theft for three years and to enter a concurrent probationary sentence for the misdemeanor theft. Paragraph 29 of the plea agreement set forth the parties' agreement concerning restitution. As relevant here, it provided as follows:



I agree to pay all restitution within the term of my original sentence. I agree to pay restitution for all counts and cases governed by this plea agreement, including counts and/or cases dismissed as part of this plea agreement. I further stipulate to causation for restitution purposes in this case and in any case(s) dismissed as part of this agreement . . . . The District Attorney's Office will act in good faith to provide correct information establishing the amount of restitution within 91 days of sentencing.

. . . .

b. As part of my plea agreement with the People, I am agreeing to pay restitution for other counts that the People have agreed not to file. I understand that I engaged in misconduct with regard to those other counts which caused a loss to victims and that it would be helpful to me in my rehabilitation to be required to make those victims whole. In order to obtain the benefit of the plea offer presented to me by the People I am agreeing to pay restitution for those other counts and the remaining counts in the current case.

¶ 7 Additionally, in paragraph (1)(e) of the “Stipulation for Deferred Judgment and Sentence and Court Order,” Johnson agreed to pay “[r]estitution in an amount to be determined within 91 days.”

¶ 8 The district court accepted the plea agreement, ordered the prosecutor to provide the restitution amount within ninety-one days, and gave the defense sixty days to object.

## B. Post-Plea Facts

¶ 9 Following the plea, the prosecution's senior restitution coordinator, Shannon Ashley, requested Walmart's losses based on the February supplemental report. On August 26, 2020, she followed up by telephone. Walmart then provided Ashley with an in-house report and an accompanying narrative report on September 2 detailing each of the items and cash amounts taken and noting offsets for recovered items. Walmart calculated its total loss from Johnson's actions at \$11,030.30. Ashley prepared a restitution payout order requesting \$11,030.30 in restitution that was filed with the court on September 8 (the ninety-first day after the plea and sentencing). The district court signed the order later that same day.

¶ 10 On October 2, 2020, Johnson filed an objection to the restitution amount and requested a hearing. Following several continuances requested by both sides, the court conducted an in-person hearing on March 23, 2021, at which Ashley and the investigating officer testified.<sup>1</sup> As relevant here, Johnson's counsel

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<sup>1</sup> The majority of the proceedings were conducted virtually due to the COVID-19 shutdown.

argued that the court’s September 8 order did not constitute a “final determination” because the statute contemplated a restitution hearing, if necessary, followed by a final determination within the ninety-one-day timeframe, as well as the ability of defense counsel to object within ninety-one days. And if such objection could not occur within ninety-one days, then “at that point I argue that would be good cause to extend the 91-day determination and the DA [district attorney] would be able to argue at the same time that would be good cause as well, which is what the statute allows.”

Johnson further argued that the complaint placed him on notice of restitution in the range of \$2,000-\$5,000, his plea subjected him to an amount in the \$3,000-\$4,000 range, and thus, the court’s order in excess of \$11,000 violated his due process rights.

¶ 11 In response, the prosecutor argued that her office didn’t receive the final documentation from Walmart until six days before the ninety-first day and that situations such as this are the reason the statute allows the court to extend the ninety-one days for good cause.<sup>2</sup> She further argued that the court’s September 8 order

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<sup>2</sup> The prosecutor explained that before *People v. Weeks*, 2020 COA 44 (*Weeks I*), her office routed requests for final restitution

constituted a restitution determination, and that the defense's objection constituted good cause to extend the ninety-one days for a final determination. She reasoned that it would be absurd to interpret the statute as requiring that all objections and hearings be concluded within ninety-one days because such a process simply wasn't feasible and would permit a defendant to continue the hearing beyond the ninety-first day to avoid restitution altogether.

¶ 12 Concerning the amount of restitution, the prosecutor argued that the officer's February 2020 supplemental report stating that the actual amount of restitution ranged from \$10,000 to \$11,000 sufficiently notified Johnson of potential restitution before he entered a plea.

¶ 13 Defense counsel then clarified that he was only arguing that the initial restitution request on the ninety-first day "doesn't allow this Court to make that final determination," and repeated, "As I already indicated in my initial argument, the Defense challenging the restitution would constitute good cause."

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determinations to the coordinators upon a verdict or plea of guilt. Post-*Weeks I*, her office now routes such requests at the time a DA tenders an offer.

¶ 14 The district court rejected Johnson’s due process argument and found that the charging document did not control the amount of restitution. It further found that the plea agreement documents refuted his due process argument.

¶ 15 Next, applying *Weeks I*, the court found that the ninety-one days was not jurisdictional, that it had discretion to determine restitution beyond ninety-one days for good cause, and that it could determine good cause after ninety-one days. The court further found that Johnson’s objection and request for a hearing, made in accordance with the court’s sentencing order, constituted good cause to conduct a hearing and determine restitution beyond ninety-one days. It then found that Ashley’s testimony satisfied the preponderance of the evidence standard and ordered restitution in the amount requested.

## II. Timeliness of Restitution Order

¶ 16 We begin with Johnson’s challenge to the timeliness of the court’s order as it may be dispositive of his challenge to the amount.

### A. Standard of Review and Applicable Law

- ¶ 17 We review questions of statutory construction de novo. *Weeks II*, ¶ 24. And “[i]n construing a statute, we aim to effectuate the General Assembly’s intent.” *Id.* at ¶ 25.
- ¶ 18 To discern the General Assembly’s intent, we look first to the language of the statute, and, when “the language of [the] statute is clear and unambiguous, we give effect to its plain and ordinary meaning.” *Id.* at ¶¶ 25, 27.
- ¶ 19 In so doing, we “must take care to read statutory words and phrases in context and in accordance with the rules of grammar and common usage.” *Id.* at ¶ 26. And we “must take equal care to construe a statute ‘as a whole,’ with an eye toward giving consistent, harmonious, and sensible effect to all its parts.” *Id.* (quoting *Whitaker v. People*, 48 P.3d 555, 558 (Colo. 2002)).
- ¶ 20 The restitution statute provides that “[e]very order of conviction of a felony [or] misdemeanor . . . shall include consideration of restitution.” § 18-1.3-603(1). Subsection (1) of the restitution statute defines the responsibilities and deadlines that district courts must follow:

Each such order [of conviction] shall include one or more of the following:

(a) An order of a specific amount of restitution be paid by the defendant;

(b) An order that the defendant is obligated to pay restitution, 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;

(c) An order, in addition to or in place of a specific amount of restitution, that the defendant pay restitution covering the actual costs of specific future treatment of any victim of the crime; or

(d) Contain a specific finding that no victim of the crime suffered a pecuniary loss and therefore no order for the payment of restitution is being entered.

§ 18-1.3-603(1); *see Weeks II*, ¶ 34 (“[S]ubsection (1)(b) is all about the court’s obligation” and authorizes the court “to preliminarily require the defendant to pay restitution and to table the determination of the amount of restitution.”).

¶ 21 Subsection (2) defines the responsibilities and deadlines that prosecuting attorneys must follow:

The 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.

§ 18-1.3-603(2)(a); *see also Weeks II*, ¶ 31.

¶ 22 After Johnson filed his opening brief, our supreme court announced its opinion in *Weeks II*. As relevant here, the court held that the ninety-one-day deadline in subsection (1) refers to the court's deadline for determining the amount of restitution a defendant must pay. *Weeks II*, ¶ 39. It further held that the district court may extend this deadline by finding good cause and that this finding must occur before the ninety-one-day deadline expires. *Id.* at ¶ 41.

#### B. Application

¶ 23 The prosecutor and the court met their respective statutory deadlines. Beginning with the prosecutor's obligations under subsection (2)(b), the statute requires the prosecutor to present restitution information to the court prior to the order of conviction, or within ninety-one days if it is not available as of the date of the



conviction. The record shows that the restitution information was not available when Johnson pleaded guilty, and that the prosecution received the final figures from Walmart on September 2. While the prosecution possessed the supplemental report and the surveillance videos showing Johnson's thefts, it lacked the information concerning recovered property necessary to properly apply offsets and, thus, it could not determine a final figure without Walmart's assistance. Indeed, the report submitted by Walmart reflects offsets for returned property not reflected in the supplemental report or videos.<sup>3</sup>

¶ 24 Moreover, we interpret the parties' agreement allowing the prosecutor ninety-one days to submit restitution information as both a motion for restitution and the parties' acknowledgment that restitution information was not available before the conviction. See *Weeks II*, ¶ 30 (any motion for restitution must be made before or during the sentencing hearing even if the information supporting

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<sup>3</sup> Although the People conceded at oral argument that the prosecution had all the information available to determine restitution before the conviction, we are not bound by that concession when it is not supported by the record. See *People v. Sabell*, 2018 COA 85, ¶ 48 n.5 (the court of appeals is not bound by the People's concessions on legal issues).

the motion isn't yet available). We further conclude that the prosecution met its obligation under subsection (2) by filing its restitution motion on the ninety-first day.

¶ 25 Turning to the district court's obligations under subsection (1)(b), Johnson faults the court's actions on two fronts. First, he claims that the statute required the court to enter a final order within ninety-one days and that the court "failed to do so" because it received the request on the ninety-first day. We disagree because the record shows the court entered its restitution order on the ninety-first day.

¶ 26 Second, he claims the court "erred when it found good cause to rule after ninety-one days because the defense counsel filed an objection." We disagree with this assertion for three reasons. First, our supreme court considered the very situation that occurred here, i.e., the prosecution requiring the full ninety-one days (or close to it) to submit the proposed restitution amount. *Weeks II*, ¶ 44. It noted that if the defendant is uncertain whether they will object or request briefing and a hearing, "there may well be good cause for extending the court's deadline." *Id.*

¶ 27 Second, to the extent Johnson argues that a defense objection and request for a hearing can never constitute good cause under the statute, we note that he took a contrary position in the district court and argued, on two separate occasions, that a defense objection, particularly one lodged after ninety-one days, constituted good cause for the court to enter a final order beyond ninety-one days. Therefore, any error was invited. *See People v. Rediger*, 2015 COA 26, ¶¶ 52-53, *aff'd in part and rev'd in part*, 2018 CO 32.

¶ 28 Third, we find error in the court's statement that it could determine good cause *after* ninety-one days because our supreme court has held otherwise. *See Weeks II*, ¶ 40 (holding that any good cause finding must be made expressly before the court's ninety-one-day deadline expires). Nevertheless, this statement doesn't alter the outcome because the record shows that the court's standing case management order (requiring a defense objection within thirty days following entry of the restitution order) and the court's more specific order at sentencing permitting the defense sixty days to object to the restitution order constitute a good cause finding and comply with *Weeks II* since both occurred *before* the expiration of ninety-one days. *Weeks II*, ¶ 7 n.4 (When making findings of good cause or

extenuating circumstances for extending the restitution deadlines, “talismanic incantations are [not] necessary” and, “[i]n both instances, substance controls over form.”).

¶ 29 Accordingly, we conclude that both the district court and the prosecution complied with their respective deadlines under section 18-1.3-603, and we affirm the restitution order on this basis.

### III. Restitution Amount

¶ 30 Johnson contends that the amount of restitution ordered exceeds the amount authorized by his plea agreement. Relying on *People v. Roddy*, 2021 CO 74, which was issued after he filed his opening brief but before he filed his reply brief, he reasons that the court lacked the authority to order restitution for the dismissed count and the conduct reflected in the February 2020 supplemental report (uncharged misconduct). We disagree and conclude that the terms of the plea agreement, as set forth above, belie his assertion and show that he specifically agreed to pay restitution for dismissed cases (not applicable here), dismissed counts, and uncharged misconduct. *Cf. id.* at ¶ 32 (holding that absent applicable language in a plea agreement or an oral representation clearly supplementing the written plea agreement, the district court could

not order restitution for the dismissed charges). Accordingly, we affirm the court's restitution order on this basis.

#### IV. Disposition

¶ 31 The order is affirmed.

JUDGE WELLING specially concurs.

JUDGE FURMAN dissents.

JUDGE WELLING, specially concurring.

¶ 32 I agree with the majority, and its analysis, in all respects except one: in my view, we don't need to reach the issue of whether the record establishes that the restitution information was available to the prosecution at the time the court took Johnson's plea and entered his sentence.

¶ 33 Among Johnson's challenges to the restitution order is that because the proposed amount of restitution was available to the prosecution at the time of Johnson's plea, the district court erred by affording the prosecution ninety-one days within which to file its motion. *See* § 18-1.3-603(2)(a), C.R.S. 2022.

¶ 34 A key point of departure between the majority and the dissent is whether the record establishes that the information on which the court based its restitution order was available at the time of Johnson's plea. The majority concludes that it wasn't, observing that the prosecution "lacked the information concerning recovered property necessary to properly apply offsets and, thus, could not determine a final figure without Walmart's assistance." *Supra* ¶ 23. The dissent, on the other hand, reads the record as establishing that "Walmart provided the prosecution with information on its

losses well before the June 2020 hearing.” *Infra* ¶ 48. (And based on this view of the record, the dissent concludes that the statutory predicate for granting the prosecution an additional ninety-one days to file for restitution isn’t satisfied and, thus, the restitution order must be vacated as untimely. *See* § 18-1.3-603(2)(a) (“[T]he 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.*”) (emphasis added).)

¶ 35 I wouldn’t wade into this issue because, in my view, when Johnson entered his plea and agreed to a deferred judgment, he waived any challenge to granting the prosecution ninety-one days to file its request for restitution. Specifically, in paragraph 29 of his written plea agreement, under the heading “Waiver of Rights,” Johnson agreed to the following:

I agree to pay all restitution within the term of my original sentence. . . . The District Attorney’s Office will act in good faith to provide correct information establishing the amount of restitution *within 91 days of sentencing.*

(Emphasis added.)

¶ 36 The Stipulation for Deferred Judgment and Sentence, which Johnson also signed on the date of his plea, contained a similar agreement that restitution would be determined within ninety-one days of sentencing:

I [Johnson] will pay through the registry of the Court the following amounts, which I expect to be able to pay:

- Restitution *in amount to be determined within 91 days.*

(Emphasis added.) And during the providency hearing at which the court accepted Johnson’s plea, Johnson told the court that he understood and agreed to the terms of his plea and deferred judgment agreements, and the court found that he entered the “pleas . . . knowingly, intelligently, and voluntarily” and that “[t]hey [we]re not the product of any undue influence or coercion.” (He doesn’t challenge the adequacy of the advisement or the court’s findings in this regard.)

¶ 37 All of this, taken together, constitutes waiver of any challenge to restitution on the basis that the prosecution waited ninety-one days to file its motion. *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))). And “waiver extinguishes error, and therefore appellate review.” *Id.* at ¶ 40. (At most, Johnson has an illegal manner claim under Crim. P. 35(a). See *People v. Tennyson*, 2023 COA 2, ¶¶ 17, 38. And while illegal sentence claims can’t be waived, see, e.g., *People v. Rockwell*, 125 P.3d 410, 414 (Colo. 2005), illegal manner claims can, see, e.g., *People v. Bottenfield*, 159 P.3d 643, 646 (Colo. App. 2006).)

¶ 38 Moreover, Colorado courts have long applied contract principles when interpreting defense and prosecution obligations under plea agreements. See *People v. McCormick*, 859 P.2d 846, 856 (Colo. 1993). “Included in the obligations of all parties to a plea agreement, consistent with contract principles, is a continuing duty to perform in good faith.” *People v. Johnson*, 999 P.2d 825, 830 (Colo. 2000). Here, the agreements between Johnson and the People allowed for the amount of restitution “to be determined within 91 days.” Because Johnson agreed to this term, he can’t now claim that the court erred by giving the prosecution ninety-one days to file its request for restitution.

¶ 39 Because any challenge to fixing restitution within ninety-one days is waived, the error, if any, “is extinguished and further appellate review is unnecessary.” *People v. Carter*, 2021 COA 29, ¶ 77 (Pawar, J., concurring in part and dissenting in part). Thus, I offer no opinion regarding whether the restitution information was available to the prosecution at the time of the plea (or the consequences if it was).

¶ 40 Still, my conclusion of waiver and the majority’s conclusion that there was a basis in the record for granting the prosecution ninety-one days to file its restitution motion leaves us in the same place: the fact that the court gave the prosecution ninety-one days after sentencing to seek restitution isn’t an infirmity in the court’s restitution order. And because I fully agree with the remainder of the majority opinion, I concur.

JUDGE FURMAN, dissenting.

¶ 41 Ordinarily, a district court must enter one of four types of restitution orders at the time it enters a judgment of conviction:

(a) an order requiring a specific amount of restitution; (b) an order requiring restitution but indicating that the specific amount will be determined within either ninety-one days of the judgment of conviction or, upon a showing of good cause, an extension of that time period; (c) an order, in addition to or in lieu of a specific amount of restitution, requiring payment of the actual costs of a victim's specific future treatment; and (d) an order finding that there is no restitution because no victim suffered a pecuniary loss. Every judgment of conviction must include one or more of these four types of restitution orders.

*People v. Weeks*, 2021 CO 75, ¶ 3 (*Weeks II*) (citing § 18-1.3-603(1), C.R.S. 2022), *aff'g* 2020 COA 44 (*Weeks I*).

¶ 42 Because I conclude that the court did not enter a restitution order that complied with section 18-1.3-603(1), I respectfully dissent and would reverse the order.

¶ 43 Johnson pleaded guilty at the June 2020 hearing. At this hearing, the prosecution “ask[ed] the Court to reserve restitution for [ninety-one] days on all counts in the case and accept the plea agreement as tendered.” And the district court agreed. It gave the

prosecution ninety-one days “to calculate restitution,” accepted the plea agreement, and sentenced Johnson immediately. Absent from the prosecution’s request (or the court’s ruling) was any mention of whether the information necessary to determine the restitution amount was available.

¶ 44 The first mistake was made by the prosecution.

¶ 45 Subsection (2)(a) of section 18-1.3-603 provides:

The 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.

¶ 46 The People concede on appeal that the prosecution had the total amount of restitution available at the June 2020 hearing when the court entered Johnson’s judgment of conviction. The People contend that “while Walmart’s documentation had not been received until September 2, 2020, the underlying allegations and corresponding amount — \$11,030.30 — had been conveyed to [Johnson] well in advance of the plea agreement.” But the

prosecution did not timely provide this information, or this projected restitution amount, to the court. I conclude this violated the prosecution's duty to provide the district court with the information necessary to determine the amount of restitution, since the information was available before the entry of Johnson's judgment of conviction. See § 18-1.3-603(2); *Weeks II*, ¶ 6.

¶ 47 This mistake by the prosecution led to a reversible error by the district court. When the prosecution asked the court to reserve restitution for ninety-one days, it offered no reason, and the court did not ask if the information to determine the amount of restitution was available. I conclude that the district court erred because the court was not sufficiently informed, and thus it was impossible for the court to enter a restitution order at the June 2020 hearing that complied with section 18-1.3-603(1). See *Weeks II*, ¶ 3. I come to this conclusion for three reasons.

¶ 48 First, the record suggests, and the People concede, that the information necessary to determine the amount of restitution was available to the prosecution before the June 2020 hearing. The prosecution simply did not confirm this amount until months afterward.

¶ 49 At the March 2021 hearing on restitution, the investigating officer testified that in February 2020, Walmart sent him DVDs of surveillance videos, receipts, and statements from two of Walmart’s asset protection specialists that showed Walmart’s losses due to Johnson’s theft were greater than first reported. But the investigating officer did not review these materials. He submitted them to the prosecution instead. The prosecution’s senior restitution coordinator also testified at the March 2021 hearing. She recounted that in February 2020, the prosecution received the “supplement” from the investigating officer, stating that the amount of restitution was “closer [to] 10- to 11,000.” But she testified that the prosecution’s first attempt to obtain more documentation on this amount was made on August 26, 2020. And within one week of her request, Walmart delivered the final documentation on its total losses from Johnson’s theft. This record leads me to agree with the People’s concession. Walmart provided the prosecution with information on its losses well before the June 2020 hearing. I conclude that the prosecution had to provide this information to the court and that the prosecution did not fulfill its duty under section 18-1.3-603(2). *See Weeks II*, ¶ 31.

¶ 50 Second, the majority refers to sections of Johnson’s plea agreement and the Stipulation for Deferred Judgment and Sentence and interprets these provisions as acknowledgments by the parties that the information necessary to determine restitution was unavailable. But these provisions are silent about the *availability* of any information necessary to determine the amount of restitution. And to the extent that these provisions may imply that information necessary for calculating restitution was unavailable, I do not believe that such an implication is adequate to satisfy the prosecution’s duty or is supported by the record.

¶ 51 In *Weeks II*, ¶ 44, the court described the prosecution’s duty when the necessary information is not available: “If the proposed amount of restitution is not yet available and the prosecution informs the court that it plans to submit that information within ninety-one days, it should give an estimate of when that will occur.” *Id.* The plea agreement and stipulation to deferred sentence here simply said that the information would be provided in ninety-one days. This, in my view, did not meet the requirements of section 18-1.3-603(2). I believe what happened reflected the common

misunderstanding of section 18-1.3-603's deadlines. *See Weeks II*, ¶¶ 1-2.

¶ 52 I also note the apparent tension between the restitution provisions in Johnson's plea agreement and the prosecution's decision to increase the amount of restitution based on Johnson's "further misconduct." In his plea agreement, Johnson agreed to pay restitution for "other charges" and "other counts" that were dropped pursuant to the plea agreement. But the plea agreement specifies that these "other charges" and "other counts" were "N/A." There is one other provision in the restitution section that would allow the prosecution to increase the amount of restitution: "If the People become aware of further misconduct by [Johnson] prior to [the date the plea was entered], [Johnson] will be given the opportunity to agree to pay restitution for that misconduct as a condition" of his sentence "in exchange for the People's agreement not to file additional charges for that misconduct." The record thus shows that *if* the People became aware of "further misconduct" by Johnson, *then* the prosecution would request an additional amount in restitution. But the record is silent as to what "further misconduct" by Johnson is implicated in this agreement,



particularly when the information necessary for calculating restitution was available to the prosecution before the plea agreement.

¶ 53 Third, the holding of *Weeks II* required the district court to make an express finding that good cause existed to extend its deadline *before* the deadline expired, but no such express finding was made here. Thus, I conclude that the court’s final restitution order was untimely.

¶ 54 While I agree with the majority that a defendant’s objection and request for a hearing on restitution can constitute good cause for extending the deadline, I disagree that the district court’s case management order or its sentencing order was the express finding of good cause described by *Weeks II*. *See id.* at ¶ 40 (concluding that “any finding of good cause must be made expressly and before the court’s deadline expires”). I believe inferring a good cause finding based on the surrounding circumstances runs contrary to the supreme court’s holding in *Weeks II*. *See id.* at ¶ 42 (“What’s the point of enacting the deadline in subsection (1)(b) if the court can be deemed to have impliedly extended it in a case like this one?”).

¶ 55 The process by which the district court entered this restitution order seems typical of how courts handled restitution before *Weeks II*. The prosecution asked the court to reserve restitution for ninety-one days without determining whether any additional information was necessary to determine the amount. And then the prosecution waited until the ninety-first day to submit the restitution information to the court, causing the final determination on restitution to be outside of the court's statutory deadline. Because this process is substantially similar to the process our supreme court held was error in *Weeks II*, I conclude that the court reversibly erred when it did not enter a restitution order at the June 2020 hearing that complied with section 18-1.3-603. Any other reading of the strong language of *Weeks II* would render superfluous section 18-1.3-603(2)'s requirement that the prosecution present restitution information to the court before a conviction enters.

¶ 56 Accordingly, I respectfully dissent and would reverse the court's untimely restitution order and remand this case with directions for the district court to enter a restitution order in the amount of zero.

The summaries of the Colorado Court of Appeals published opinions constitute no part of the opinion of the division but have been prepared by the division for the convenience of the reader. The summaries may not be cited or relied upon as they are not the official language of the division. Any discrepancy between the language in the summary and in the opinion should be resolved in favor of the language in the opinion.

SUMMARY  
May 25, 2023

### **2023COA43**

#### **No. 21CA0669, *People v Johnson* — Criminal Law — Sentencing — Restitution — Assessment of Restitution — Procedural Deadlines — “Good Cause” to Extend Trial Court’s Deadline**

A majority of a division of the court of appeals applies *People v. Weeks*, 2021 CO 75 to conclude that (1) the final restitution amount wasn’t available to the prosecution at the time of the guilty plea; (2) the parties’ agreement to allow the prosecution ninety-one days to provide that restitution amount and the court’s acceptance of the agreement satisfied section 18-1.3-603(1)(b); (3) the prosecution complied with section 18-1.3-603(2)(b) by providing a restitution amount on the ninety-first day; (4) the court complied with section 18-1.3-603(1)(b) by entering the restitution order on the ninety-first day; and (5) the court’s standing case management order, permitting the defense to object to restitution within thirty

days, coupled with its specific order at the plea and sentencing granting the defense sixty days to object, constituted good cause under section 18-1.3-603(2)(b). The special concurrence would not decide whether the restitution information was available to the prosecution at the time of plea and sentencing and would instead hold that the defendant waived any challenge to granting the prosecution ninety-one days to provide the restitution amount, under the terms of the plea agreement. Therefore, the majority affirms the restitution order. The majority also rejects the defendant's challenge to the amount of restitution and holds that the plea agreement shows the defendant specifically agreed to pay restitution for dismissed counts and uncharged misconduct. The dissent concludes that the court did not enter a restitution order that complied with section 18-1.3-603(1) because (1) the People conceded that although the victim provided a final restitution figure shortly before ninety-one days, the prosecution had possessed the underlying information necessary to determine restitution before the plea was entered and didn't provide this information to the

court; (2) the prosecution offered no reason for requesting ninety-one days at the time of the plea and sentence; and (3) the court asked no questions to determine whether restitution information was available at the time of the plea and sentence. It also concludes that the court made no express good cause finding as required by *Weeks* and that good cause can't be implied from the surrounding circumstances. Accordingly, it would reverse the order and remand with directions for the court to enter a restitution order in the amount of zero.

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Court of Appeals No. 21CA0669  
El Paso County District Court No. 20CR508  
Honorable Michael P. McHenry, Judge

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The People of the State of Colorado,

Plaintiff-Appellee,

v.

Darryl Cornelius Johnson,

Defendant-Appellant.

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ORDER AFFIRMED

Division II  
Opinion by JUDGE FREYRE  
Welling, J., specially concurs  
Furman, J., dissents

Announced May 25, 2023

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Philip J. Weiser, Attorney General, Frank R. Lawson, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, Mackenzie R. Shields, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 In this restitution appeal, we must apply *People v. Weeks*, 2021 CO 75 (*Weeks II*), *aff'g* 2020 COA 44 (*Weeks I*), to determine whether the district court's restitution order, initially entered ninety-one days after the plea and sentencing hearing and re-entered after a defense objection and subsequent hearing 287 days later, complied with section 18-1.3-603, C.R.S. 2022. Defendant, Darryl Cornelius Johnson, contends the court violated the restitution statute by "imposing restitution past the ninety-one-day deadline without good cause" and argues that his objection beyond the ninety-one-day deadline did not constitute good cause. Johnson also challenges the amount of restitution and claims that the court deprived him of due process by ordering restitution in an amount not authorized by his guilty plea.

¶ 2 Because the record shows that the restitution information wasn't available to the prosecution at the time of Johnson's plea, the court complied with section 18-1.3-603(1)(b) by accepting the parties' agreement that the prosecutor would provide a restitution amount within ninety-one days of the conviction. We further conclude that (1) the prosecutor complied with the plea agreement and section 18-1.3-603(2)(b) by providing the restitution amount on

the ninety-first day; (2) the court complied with section 18-1.3-603(1)(b) by entering the restitution order on the ninety-first day; and (3) the court's standing case management order permitting the defense to object to restitution within thirty days (discussed at the plea and sentencing hearing), coupled with its order at sentencing granting the defense sixty days to object to the restitution order entered, constituted good cause, under section 18-1.3-603(2)(b), to permit entry of a final restitution order beyond ninety-one days.

¶ 3 Additionally, we discern no error in the amount of restitution ordered because Johnson agreed, as part of the plea agreement, to pay restitution in connection with dismissed cases, dismissed counts, and counts the prosecutor agreed not to file. Accordingly, we affirm the court's order.

## I. Background

### A. Pre-Plea Facts

¶ 4 Johnson worked as a loss prevention officer for Walmart. In this capacity, he had access to a barrel key that he used to steal cash from registers and electronics. His actions were captured on surveillance video. When confronted with his conduct, Johnson



admitted to the thefts. The prosecution charged him with third degree burglary and theft of between \$2,000 and \$5,000.

¶ 5 The initial investigation revealed that Johnson stole property valued at \$3,097.59. One month later, the investigating officer received a witness statement from another loss prevention officer who reported that the actual value of the stolen property was between \$10,000 and \$11,000. The officer submitted a supplemental report to the prosecution in February 2020 with a recommendation to amend the theft charge, and he booked thirteen surveillance videos into evidence.

¶ 6 The prosecutor elected not to amend the theft charge based on the supplemental report. Instead, on June 9, 2020, (the date the conviction was entered), Johnson pleaded guilty to theft as a class 6 felony and to an added count of theft as a class 1 misdemeanor in exchange for the dismissal of the third degree burglary count. The prosecutor agreed to a deferred judgment on the felony theft for three years and to enter a concurrent probationary sentence for the misdemeanor theft. Paragraph 29 of the plea agreement set forth the parties' agreement concerning restitution. As relevant here, it provided as follows:

I agree to pay all restitution within the term of my original sentence. I agree to pay restitution for all counts and cases governed by this plea agreement, including counts and/or cases dismissed as part of this plea agreement. I further stipulate to causation for restitution purposes in this case and in any case(s) dismissed as part of this agreement . . . . The District Attorney's Office will act in good faith to provide correct information establishing the amount of restitution within 91 days of sentencing.

. . . .

b. As part of my plea agreement with the People, I am agreeing to pay restitution for other counts that the People have agreed not to file. I understand that I engaged in misconduct with regard to those other counts which caused a loss to victims and that it would be helpful to me in my rehabilitation to be required to make those victims whole. In order to obtain the benefit of the plea offer presented to me by the People I am agreeing to pay restitution for those other counts and the remaining counts in the current case.

¶ 7 Additionally, in paragraph (1)(e) of the “Stipulation for Deferred Judgment and Sentence and Court Order,” Johnson agreed to pay “[r]estitution in an amount to be determined within 91 days.”

¶ 8 The district court accepted the plea agreement, ordered the prosecutor to provide the restitution amount within ninety-one days, and gave the defense sixty days to object.

## B. Post-Plea Facts

¶ 9 Following the plea, the prosecution's senior restitution coordinator, Shannon Ashley, requested Walmart's losses based on the February supplemental report. On August 26, 2020, she followed up by telephone. Walmart then provided Ashley with an in-house report and an accompanying narrative report on September 2 detailing each of the items and cash amounts taken and noting offsets for recovered items. Walmart calculated its total loss from Johnson's actions at \$11,030.30. Ashley prepared a restitution payout order requesting \$11,030.30 in restitution that was filed with the court on September 8 (the ninety-first day after the plea and sentencing). The district court signed the order later that same day.

¶ 10 On October 2, 2020, Johnson filed an objection to the restitution amount and requested a hearing. Following several continuances requested by both sides, the court conducted an in-person hearing on March 23, 2021, at which Ashley and the investigating officer testified.<sup>1</sup> As relevant here, Johnson's counsel

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<sup>1</sup> The majority of the proceedings were conducted virtually due to the COVID-19 shutdown.

argued that the court’s September 8 order did not constitute a “final determination” because the statute contemplated a restitution hearing, if necessary, followed by a final determination within the ninety-one-day timeframe, as well as the ability of defense counsel to object within ninety-one days. And if such objection could not occur within ninety-one days, then “at that point I argue that would be good cause to extend the 91-day determination and the DA [district attorney] would be able to argue at the same time that would be good cause as well, which is what the statute allows.”

Johnson further argued that the complaint placed him on notice of restitution in the range of \$2,000-\$5,000, his plea subjected him to an amount in the \$3,000-\$4,000 range, and thus, the court’s order in excess of \$11,000 violated his due process rights.

¶ 11 In response, the prosecutor argued that her office didn’t receive the final documentation from Walmart until six days before the ninety-first day and that situations such as this are the reason the statute allows the court to extend the ninety-one days for good cause.<sup>2</sup> She further argued that the court’s September 8 order

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<sup>2</sup> The prosecutor explained that before *People v. Weeks*, 2020 COA 44 (*Weeks I*), her office routed requests for final restitution

constituted a restitution determination, and that the defense's objection constituted good cause to extend the ninety-one days for a final determination. She reasoned that it would be absurd to interpret the statute as requiring that all objections and hearings be concluded within ninety-one days because such a process simply wasn't feasible and would permit a defendant to continue the hearing beyond the ninety-first day to avoid restitution altogether.

¶ 12 Concerning the amount of restitution, the prosecutor argued that the officer's February 2020 supplemental report stating that the actual amount of restitution ranged from \$10,000 to \$11,000 sufficiently notified Johnson of potential restitution before he entered a plea.

¶ 13 Defense counsel then clarified that he was only arguing that the initial restitution request on the ninety-first day "doesn't allow this Court to make that final determination," and repeated, "As I already indicated in my initial argument, the Defense challenging the restitution would constitute good cause."

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determinations to the coordinators upon a verdict or plea of guilt. Post-*Weeks I*, her office now routes such requests at the time a DA tenders an offer.

¶ 14 The district court rejected Johnson’s due process argument and found that the charging document did not control the amount of restitution. It further found that the plea agreement documents refuted his due process argument.

¶ 15 Next, applying *Weeks I*, the court found that the ninety-one days was not jurisdictional, that it had discretion to determine restitution beyond ninety-one days for good cause, and that it could determine good cause after ninety-one days. The court further found that Johnson’s objection and request for a hearing, made in accordance with the court’s sentencing order, constituted good cause to conduct a hearing and determine restitution beyond ninety-one days. It then found that Ashley’s testimony satisfied the preponderance of the evidence standard and ordered restitution in the amount requested.

## II. Timeliness of Restitution Order

¶ 16 We begin with Johnson’s challenge to the timeliness of the court’s order as it may be dispositive of his challenge to the amount.

### A. Standard of Review and Applicable Law

¶ 17 We review questions of statutory construction de novo.

*Weeks II*, ¶ 24. And “[i]n construing a statute, we aim to effectuate the General Assembly’s intent.” *Id.* at ¶ 25.

¶ 18 To discern the General Assembly’s intent, we look first to the language of the statute, and, when “the language of [the] statute is clear and unambiguous, we give effect to its plain and ordinary meaning.” *Id.* at ¶¶ 25, 27.

¶ 19 In so doing, we “must take care to read statutory words and phrases in context and in accordance with the rules of grammar and common usage.” *Id.* at ¶ 26. And we “must take equal care to construe a statute ‘as a whole,’ with an eye toward giving consistent, harmonious, and sensible effect to all its parts.” *Id.* (quoting *Whitaker v. People*, 48 P.3d 555, 558 (Colo. 2002)).

¶ 20 The restitution statute provides that “[e]very order of conviction of a felony [or] misdemeanor . . . shall include consideration of restitution.” § 18-1.3-603(1). Subsection (1) of the restitution statute defines the responsibilities and deadlines that district courts must follow:

Each such order [of conviction] shall include one or more of the following:

(a) An order of a specific amount of restitution be paid by the defendant;

(b) An order that the defendant is obligated to pay restitution, 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;

(c) An order, in addition to or in place of a specific amount of restitution, that the defendant pay restitution covering the actual costs of specific future treatment of any victim of the crime; or

(d) Contain a specific finding that no victim of the crime suffered a pecuniary loss and therefore no order for the payment of restitution is being entered.

§ 18-1.3-603(1); *see Weeks II*, ¶ 34 (“[S]ubsection (1)(b) is all about the court’s obligation” and authorizes the court “to preliminarily require the defendant to pay restitution and to table the determination of the amount of restitution.”).

¶ 21 Subsection (2) defines the responsibilities and deadlines that prosecuting attorneys must follow:

The 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.

§ 18-1.3-603(2)(a); *see also Weeks II*, ¶ 31.

¶ 22 After Johnson filed his opening brief, our supreme court announced its opinion in *Weeks II*. As relevant here, the court held that the ninety-one-day deadline in subsection (1) refers to the court's deadline for determining the amount of restitution a defendant must pay. *Weeks II*, ¶ 39. It further held that the district court may extend this deadline by finding good cause and that this finding must occur before the ninety-one-day deadline expires. *Id.* at ¶ 41.

#### B. Application

¶ 23 The prosecutor and the court met their respective statutory deadlines. Beginning with the prosecutor's obligations under subsection (2)(b), the statute requires the prosecutor to present restitution information to the court prior to the order of conviction, or within ninety-one days if it is not available as of the date of the

conviction. The record shows that the restitution information was not available when Johnson pleaded guilty, and that the prosecution received the final figures from Walmart on September 2. While the prosecution possessed the supplemental report and the surveillance videos showing Johnson's thefts, it lacked the information concerning recovered property necessary to properly apply offsets and, thus, it could not determine a final figure without Walmart's assistance. Indeed, the report submitted by Walmart reflects offsets for returned property not reflected in the supplemental report or videos.<sup>3</sup>

¶ 24 Moreover, we interpret the parties' agreement allowing the prosecutor ninety-one days to submit restitution information as both a motion for restitution and the parties' acknowledgment that restitution information was not available before the conviction. See *Weeks II*, ¶ 30 (any motion for restitution must be made before or during the sentencing hearing even if the information supporting

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<sup>3</sup> Although the People conceded at oral argument that the prosecution had all the information available to determine restitution before the conviction, we are not bound by that concession when it is not supported by the record. See *People v. Sabell*, 2018 COA 85, ¶ 48 n.5 (the court of appeals is not bound by the People's concessions on legal issues).

the motion isn't yet available). We further conclude that the prosecution met its obligation under subsection (2) by filing its restitution motion on the ninety-first day.

¶ 25 Turning to the district court's obligations under subsection (1)(b), Johnson faults the court's actions on two fronts. First, he claims that the statute required the court to enter a final order within ninety-one days and that the court "failed to do so" because it received the request on the ninety-first day. We disagree because the record shows the court entered its restitution order on the ninety-first day.

¶ 26 Second, he claims the court "erred when it found good cause to rule after ninety-one days because the defense counsel filed an objection." We disagree with this assertion for three reasons. First, our supreme court considered the very situation that occurred here, i.e., the prosecution requiring the full ninety-one days (or close to it) to submit the proposed restitution amount. *Weeks II*, ¶ 44. It noted that if the defendant is uncertain whether they will object or request briefing and a hearing, "there may well be good cause for extending the court's deadline." *Id.*

¶ 27 Second, to the extent Johnson argues that a defense objection and request for a hearing can never constitute good cause under the statute, we note that he took a contrary position in the district court and argued, on two separate occasions, that a defense objection, particularly one lodged after ninety-one days, constituted good cause for the court to enter a final order beyond ninety-one days. Therefore, any error was invited. *See People v. Rediger*, 2015 COA 26, ¶¶ 52-53, *aff'd in part and rev'd in part*, 2018 CO 32.

¶ 28 Third, we find error in the court's statement that it could determine good cause *after* ninety-one days because our supreme court has held otherwise. *See Weeks II*, ¶ 40 (holding that any good cause finding must be made expressly before the court's ninety-one-day deadline expires). Nevertheless, this statement doesn't alter the outcome because the record shows that the court's standing case management order (requiring a defense objection within thirty days following entry of the restitution order) and the court's more specific order at sentencing permitting the defense sixty days to object to the restitution order constitute a good cause finding and comply with *Weeks II* since both occurred *before* the expiration of ninety-one days. *Weeks II*, ¶ 7 n.4 (When making findings of good cause or

extenuating circumstances for extending the restitution deadlines, “talismanic incantations are [not] necessary” and, “[i]n both instances, substance controls over form.”).

¶ 29 Accordingly, we conclude that both the district court and the prosecution complied with their respective deadlines under section 18-1.3-603, and we affirm the restitution order on this basis.

### III. Restitution Amount

¶ 30 Johnson contends that the amount of restitution ordered exceeds the amount authorized by his plea agreement. Relying on *People v. Roddy*, 2021 CO 74, which was issued after he filed his opening brief but before he filed his reply brief, he reasons that the court lacked the authority to order restitution for the dismissed count and the conduct reflected in the February 2020 supplemental report (uncharged misconduct). We disagree and conclude that the terms of the plea agreement, as set forth above, belie his assertion and show that he specifically agreed to pay restitution for dismissed cases (not applicable here), dismissed counts, and uncharged misconduct. *Cf. id.* at ¶ 32 (holding that absent applicable language in a plea agreement or an oral representation clearly supplementing the written plea agreement, the district court could

not order restitution for the dismissed charges). Accordingly, we affirm the court's restitution order on this basis.

#### IV. Disposition

¶ 31 The order is affirmed.

JUDGE WELLING specially concurs.

JUDGE FURMAN dissents.

JUDGE WELLING, specially concurring.

¶ 32 I agree with the majority, and its analysis, in all respects except one: in my view, we don't need to reach the issue of whether the record establishes that the restitution information was available to the prosecution at the time the court took Johnson's plea and entered his sentence.

¶ 33 Among Johnson's challenges to the restitution order is that because the proposed amount of restitution was available to the prosecution at the time of Johnson's plea, the district court erred by affording the prosecution ninety-one days within which to file its motion. *See* § 18-1.3-603(2)(a), C.R.S. 2022.

¶ 34 A key point of departure between the majority and the dissent is whether the record establishes that the information on which the court based its restitution order was available at the time of Johnson's plea. The majority concludes that it wasn't, observing that the prosecution "lacked the information concerning recovered property necessary to properly apply offsets and, thus, could not determine a final figure without Walmart's assistance." *Supra* ¶ 23. The dissent, on the other hand, reads the record as establishing that "Walmart provided the prosecution with information on its

losses well before the June 2020 hearing.” *Infra* ¶ 48. (And based on this view of the record, the dissent concludes that the statutory predicate for granting the prosecution an additional ninety-one days to file for restitution isn’t satisfied and, thus, the restitution order must be vacated as untimely. *See* § 18-1.3-603(2)(a) (“[T]he 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.*”) (emphasis added).)

¶ 35 I wouldn’t wade into this issue because, in my view, when Johnson entered his plea and agreed to a deferred judgment, he waived any challenge to granting the prosecution ninety-one days to file its request for restitution. Specifically, in paragraph 29 of his written plea agreement, under the heading “Waiver of Rights,” Johnson agreed to the following:

I agree to pay all restitution within the term of my original sentence. . . . The District Attorney’s Office will act in good faith to provide correct information establishing the amount of restitution *within 91 days of sentencing.*

(Emphasis added.)



¶ 36 The Stipulation for Deferred Judgment and Sentence, which Johnson also signed on the date of his plea, contained a similar agreement that restitution would be determined within ninety-one days of sentencing:

I [Johnson] will pay through the registry of the Court the following amounts, which I expect to be able to pay:

- Restitution *in amount to be determined within 91 days.*

(Emphasis added.) And during the providency hearing at which the court accepted Johnson’s plea, Johnson told the court that he understood and agreed to the terms of his plea and deferred judgment agreements, and the court found that he entered the “pleas . . . knowingly, intelligently, and voluntarily” and that “[t]hey [we]re not the product of any undue influence or coercion.” (He doesn’t challenge the adequacy of the advisement or the court’s findings in this regard.)

¶ 37 All of this, taken together, constitutes waiver of any challenge to restitution on the basis that the prosecution waited ninety-one days to file its motion. *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))). And “waiver extinguishes error, and therefore appellate review.” *Id.* at ¶ 40. (At most, Johnson has an illegal manner claim under Crim. P. 35(a). See *People v. Tennyson*, 2023 COA 2, ¶¶ 17, 38. And while illegal sentence claims can’t be waived, see, e.g., *People v. Rockwell*, 125 P.3d 410, 414 (Colo. 2005), illegal manner claims can, see, e.g., *People v. Bottenfield*, 159 P.3d 643, 646 (Colo. App. 2006).)

¶ 38 Moreover, Colorado courts have long applied contract principles when interpreting defense and prosecution obligations under plea agreements. See *People v. McCormick*, 859 P.2d 846, 856 (Colo. 1993). “Included in the obligations of all parties to a plea agreement, consistent with contract principles, is a continuing duty to perform in good faith.” *People v. Johnson*, 999 P.2d 825, 830 (Colo. 2000). Here, the agreements between Johnson and the People allowed for the amount of restitution “to be determined within 91 days.” Because Johnson agreed to this term, he can’t now claim that the court erred by giving the prosecution ninety-one days to file its request for restitution.

¶ 39 Because any challenge to fixing restitution within ninety-one days is waived, the error, if any, “is extinguished and further appellate review is unnecessary.” *People v. Carter*, 2021 COA 29, ¶ 77 (Pawar, J., concurring in part and dissenting in part). Thus, I offer no opinion regarding whether the restitution information was available to the prosecution at the time of the plea (or the consequences if it was).

¶ 40 Still, my conclusion of waiver and the majority’s conclusion that there was a basis in the record for granting the prosecution ninety-one days to file its restitution motion leaves us in the same place: the fact that the court gave the prosecution ninety-one days after sentencing to seek restitution isn’t an infirmity in the court’s restitution order. And because I fully agree with the remainder of the majority opinion, I concur.

JUDGE FURMAN, dissenting.

¶ 41 Ordinarily, a district court must enter one of four types of restitution orders at the time it enters a judgment of conviction:

(a) an order requiring a specific amount of restitution; (b) an order requiring restitution but indicating that the specific amount will be determined within either ninety-one days of the judgment of conviction or, upon a showing of good cause, an extension of that time period; (c) an order, in addition to or in lieu of a specific amount of restitution, requiring payment of the actual costs of a victim's specific future treatment; and (d) an order finding that there is no restitution because no victim suffered a pecuniary loss. Every judgment of conviction must include one or more of these four types of restitution orders.

*People v. Weeks*, 2021 CO 75, ¶ 3 (*Weeks II*) (citing § 18-1.3-603(1), C.R.S. 2022), *aff'g* 2020 COA 44 (*Weeks I*).

¶ 42 Because I conclude that the court did not enter a restitution order that complied with section 18-1.3-603(1), I respectfully dissent and would reverse the order.

¶ 43 Johnson pleaded guilty at the June 2020 hearing. At this hearing, the prosecution “ask[ed] the Court to reserve restitution for [ninety-one] days on all counts in the case and accept the plea agreement as tendered.” And the district court agreed. It gave the

prosecution ninety-one days “to calculate restitution,” accepted the plea agreement, and sentenced Johnson immediately. Absent from the prosecution’s request (or the court’s ruling) was any mention of whether the information necessary to determine the restitution amount was available.

¶ 44 The first mistake was made by the prosecution.

Subsection (2)(a) of section 18-1.3-603 provides:

The 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.

¶ 45 The People concede on appeal that the prosecution had the total amount of restitution available at the June 2020 hearing when the court entered Johnson’s judgment of conviction. The People contend that “while Walmart’s documentation had not been received until September 2, 2020, the underlying allegations and corresponding amount — \$11,030.30 — had been conveyed to [Johnson] well in advance of the plea agreement.” But the

prosecution did not timely provide this information, or this projected restitution amount, to the court. I conclude this violated the prosecution's duty to provide the district court with the information necessary to determine the amount of restitution, since the information was available before the entry of Johnson's judgment of conviction. See § 18-1.3-603(2); *Weeks II*, ¶ 6.

¶ 46 This mistake by the prosecution led to a reversible error by the district court. When the prosecution asked the court to reserve restitution for ninety-one days, it offered no reason, and the court did not ask if the information to determine the amount of restitution was available. I conclude that the district court erred because the court was not sufficiently informed, and thus it was impossible for the court to enter a restitution order at the June 2020 hearing that complied with section 18-1.3-603(1). See *Weeks II*, ¶ 3. I come to this conclusion for three reasons.

¶ 47 First, the record suggests, and the People concede, that the information necessary to determine the amount of restitution was available to the prosecution before the June 2020 hearing. The prosecution simply did not confirm this amount until months afterward.

¶ 48 At the March 2021 hearing on restitution, the investigating officer testified that in February 2020, Walmart sent him DVDs of surveillance videos, receipts, and statements from two of Walmart's asset protection specialists that showed Walmart's losses due to Johnson's theft were greater than first reported. But the investigating officer did not review these materials. He submitted them to the prosecution instead. The prosecution's senior restitution coordinator also testified at the March 2021 hearing. She recounted that in February 2020, the prosecution received the "supplement" from the investigating officer, stating that the amount of restitution was "closer [to] 10- to 11,000." But she testified that the prosecution's first attempt to obtain more documentation on this amount was made on August 26, 2020. And within one week of her request, Walmart delivered the final documentation on its total losses from Johnson's theft. This record leads me to agree with the People's concession. Walmart provided the prosecution with information on its losses well before the June 2020 hearing. I conclude that the prosecution had to provide this information to the court and that the prosecution did not fulfill its duty under section 18-1.3-603(2). *See Weeks II*, ¶ 31.

¶ 49 Second, the majority refers to sections of Johnson’s plea agreement and the Stipulation for Deferred Judgment and Sentence and interprets these provisions as acknowledgments by the parties that the information necessary to determine restitution was unavailable. But these provisions are silent about the *availability* of any information necessary to determine the amount of restitution. And to the extent that these provisions may imply that information necessary for calculating restitution was unavailable, I do not believe that such an implication is adequate to satisfy the prosecution’s duty or is supported by the record.

¶ 50 In *Weeks II*, ¶ 44, the court described the prosecution’s duty when the necessary information is not available: “If the proposed amount of restitution is not yet available and the prosecution informs the court that it plans to submit that information within ninety-one days, it should give an estimate of when that will occur.” *Id.* The plea agreement and stipulation to deferred sentence here simply said that the information would be provided in ninety-one days. This, in my view, did not meet the requirements of section 18-1.3-603(2). I believe what happened reflected the common



misunderstanding of section 18-1.3-603's deadlines. *See Weeks II*, ¶¶ 1-2.

¶ 51 I also note the apparent tension between the restitution provisions in Johnson's plea agreement and the prosecution's decision to increase the amount of restitution based on Johnson's "further misconduct." In his plea agreement, Johnson agreed to pay restitution for "other charges" and "other counts" that were dropped pursuant to the plea agreement. But the plea agreement specifies that these "other charges" and "other counts" were "N/A." There is one other provision in the restitution section that would allow the prosecution to increase the amount of restitution: "If the People become aware of further misconduct by [Johnson] prior to [the date the plea was entered], [Johnson] will be given the opportunity to agree to pay restitution for that misconduct as a condition" of his sentence "in exchange for the People's agreement not to file additional charges for that misconduct." The record thus shows that *if* the People became aware of "further misconduct" by Johnson, *then* the prosecution would request an additional amount in restitution. But the record is silent as to what "further misconduct" by Johnson is implicated in this agreement,

particularly when the information necessary for calculating restitution was available to the prosecution before the plea agreement.

¶ 52 Third, the holding of *Weeks II* required the district court to make an express finding that good cause existed to extend its deadline *before* the deadline expired, but no such express finding was made here. Thus, I conclude that the court’s final restitution order was untimely.

¶ 53 While I agree with the majority that a defendant’s objection and request for a hearing on restitution can constitute good cause for extending the deadline, I disagree that the district court’s case management order or its sentencing order was the express finding of good cause described by *Weeks II*. *See id.* at ¶ 40 (concluding that “any finding of good cause must be made expressly and before the court’s deadline expires”). I believe inferring a good cause finding based on the surrounding circumstances runs contrary to the supreme court’s holding in *Weeks II*. *See id.* at ¶ 42 (“What’s the point of enacting the deadline in subsection (1)(b) if the court can be deemed to have impliedly extended it in a case like this one?”).

¶ 54 The process by which the district court entered this restitution order seems typical of how courts handled restitution before *Weeks II*. The prosecution asked the court to reserve restitution for ninety-one days without determining whether any additional information was necessary to determine the amount. And then the prosecution waited until the ninety-first day to submit the restitution information to the court, causing the final determination on restitution to be outside of the court's statutory deadline. Because this process is substantially similar to the process our supreme court held was error in *Weeks II*, I conclude that the court reversibly erred when it did not enter a restitution order at the June 2020 hearing that complied with section 18-1.3-603. Any other reading of the strong language of *Weeks II* would render superfluous section 18-1.3-603(2)'s requirement that the prosecution present restitution information to the court before a conviction enters.

¶ 55 Accordingly, I respectfully dissent and would reverse the court's untimely restitution order and remand this case with directions for the district court to enter a restitution order in the amount of zero.