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SUMMARY
July 20, 2023

2023COA70

No. 21CA1713, *People v. Roberson* — Criminal Law — Sentencing — Restitution — Assessment of Restitution — Procedural Deadlines — Waiver — “Good Cause” to Extend Trial Court’s Deadline

In this direct criminal appeal of a restitution order, a division of the court of appeals distinguishes two recent decisions from other divisions: *People v. Johnson*, 2023 COA 43M, ¶ 28, which held that a trial court made an express good cause finding to extend the ninety-one-day statutory deadline under section 18-1.3-603(1)(b), C.R.S. 2022, by entering orders allowing the defendant to object to restitution beyond the deadline, and *People v. Babcock*, 2023 COA 49, ¶¶ 13-15, which held that a defendant waived his right to challenge the timeliness of a restitution order by requesting that a restitution hearing be set outside the statutory deadline.

Because the district court did not make an express good cause finding to extend its deadline to determine restitution, as required by *People v. Weeks*, 2021 CO 75, ¶¶ 4-5, the division concludes that the court lacked authority to enter the restitution order. And because the division also concludes that the defendant did not invite or waive the error by accepting a hearing date beyond the statutory deadline, it vacates the restitution order.

Court of Appeals No. 21CA1713
Weld County District Court No. 17CR1903
Honorable Julie C. Hoskins, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Jessica Jo Roberson,

Defendant-Appellant.

ORDER VACATED

Division V
Opinion by JUDGE BROWN
Navarro and Yun, JJ., concur

Announced July 20, 2023

Philip J. Weiser, Attorney General, Brittany Limes Zehner, Assistant Solicitor General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, James S. Hardy, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 Defendant, Jessica Jo Roberson, appeals the district court’s restitution order. She contends that the court erred by (1) entering a restitution order more than ninety-one days after sentencing, in violation of section 18-1.3-603(1)(b), C.R.S. 2022, as construed by the Colorado Supreme Court in *People v. Weeks*, 2021 CO 75 (*Weeks II*), *aff’g* 2020 COA 44 (*Weeks I*); (2) ordering a higher restitution amount than she agreed to in her plea agreement; and (3) ordering restitution for conduct related to dismissed charges.

¶ 2 In resolving Roberson’s first contention, we distinguish this case from two recent decisions from other divisions of this court: *People v. Johnson*, 2023 COA 43M, ¶ 28, which held that a trial court made an express finding of good cause to extend the statutory deadline by entering orders allowing the defendant to object to restitution beyond the deadline, and *People v. Babcock*, 2023 COA 49, ¶¶ 13-15, which held that a defendant waived his right to challenge the timeliness of a restitution order by requesting that a restitution hearing be set outside the statutory deadline.

¶ 3 Because we conclude that the district court lacked authority to determine the amount of restitution to be paid by Roberson more than ninety-one days after sentencing, and that Roberson did not

waive or invite the error, we vacate the restitution order and do not reach her other challenges.

I. Background

¶ 4 Roberson pleaded guilty to felony counts of forgery and theft in one case, a misdemeanor count of criminal mischief in a second case, and a probation violation in a third case. The district court sentenced Roberson on June 25, 2020. At the sentencing hearing, the court ordered restitution but reserved determination of the amount. It gave the prosecution twenty-nine days to file a request and the defense twenty-one days from the date of that filing to file an objection.

¶ 5 The prosecution filed its initial request for restitution on July 23, seeking \$62,241.28. The next day, the court ordered that any objection to the restitution request was due by August 7. Because Roberson did not file an objection by that date, the court entered an order for the requested amount of restitution on August 10. On August 11, however, defense counsel filed an objection and moved the court to reconsider the restitution order because she had confused the deadlines. That same day, the court granted

Roberson’s motion “based on the reasons stated in the motion” and directed the parties to set the matter for a status conference.

¶ 6 On August 13, the court held a status conference at which defense counsel requested that the prosecution provide more information to substantiate the claimed amount of restitution. Reasoning that the prosecution would need some “time to get that information to Ms. Roberson” before the restitution hearing, the court set the next status conference for October 2. Defense counsel acquiesced to that date.

¶ 7 On September 16, the prosecution filed an amended request for restitution. At the status conference on October 2, defense counsel requested that the court set another status conference because she was still trying to understand how the prosecution determined the restitution amount. The court set another status conference for December 21.

¶ 8 After several more amended requests for restitution and several more continuances, the court conducted a final restitution hearing on September 14, 2021, 446 days after sentencing. At that hearing, defense counsel argued that the court was without authority to enter restitution under *Weeks I* because the

ninety-one-day deadline had passed. The court denied this objection and stated, “[T]he [c]ourt can find, and does find, good cause to not have entered the order for restitution based upon the objection and the necessity of setting it for a hearing.” The court ultimately found that the prosecution had provided sufficient evidence to establish restitution in the full amount of its last amended request, \$60,633.94.

II. Authority to Order Restitution

¶ 9 Roberson contends that the district court failed to make an express good cause finding before the statutory ninety-one-day deadline passed and therefore lacked authority to order restitution. We agree.

A. Standard of Review

¶ 10 Questions of statutory interpretation are questions of law that we review de novo. *See Weeks II*, ¶ 24. In construing a statute, we aim to effectuate the legislature’s intent by giving the language its plain and ordinary meaning; reading the words and phrases in context and in accordance with the rules of grammar and common usage; and construing the statute as a whole, giving consistent, harmonious, and sensible effect to all its parts, but avoiding

constructions that render any words or phrases superfluous or lead to illogical or absurd results. *Id.* at ¶¶ 25-26.

B. The Restitution Statute

¶ 11 Under section 18-1.3-603(1), every judgment of conviction must include one 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.

¶ 12 After Roberson was sentenced and restitution was imposed, the Colorado Supreme Court unequivocally held that a trial court (1) must determine the amount of restitution within ninety-one days of the judgment of conviction; and (2) may extend that

ninety-one-day deadline only if, before the deadline expires, it makes an express finding of good cause to do so. *Weeks II*, ¶¶ 4-5. Neither an implicit finding of good cause nor one made after the expiration of the ninety-one-day deadline can support an untimely restitution order. *See id.* Absent an express finding of good cause made before the deadline, a trial court lacks authority to enter a restitution order beyond the deadline. *Id.* at ¶ 45.

C. The District Court Lacked Authority to Determine Restitution

¶ 13 At sentencing, the district court ordered restitution but reserved determination of the amount. Thus, under section 18-1.3-603(1)(b), the court had until September 24, 2020, to determine restitution or make an express finding of good cause to extend the deadline. *See Weeks II*, ¶¶ 4-5.

¶ 14 The court initially entered a timely restitution order on August 10. But after defense counsel filed an objection the following day — still forty-four days before the ninety-one-day deadline — the court reconsidered the restitution order. At the status conference held two days later, defense counsel asked for more information from the prosecution to determine how the restitution amount was calculated. But defense counsel did not represent that she needed

more than the forty-two days remaining within the statutory timeframe to review the materials, nor did she ask the court to hold the restitution hearing after September 24. Instead, the court simply set the next status conference for October 2, eight days beyond the statutory deadline.

¶ 15 *Weeks II*, ¶ 7, explicitly held that section 18-1.3-603(1)(b) “requires an express finding . . . relating to good cause for extending the court’s deadline to determine the amount of restitution the defendant must pay.” Although the court explained that “substance controls over form,” and “talismanic incantations” are not necessary, we see no express finding of any reason to extend the deadline in the record before us. *See id.* at ¶ 7 n.4.

¶ 16 Notably, at sentencing, the court acknowledged that it had ninety-one days to order restitution when it set the deadline for the defense to object to the prosecution’s request. However, at the August status conference following defense counsel’s objection, the court did not mention the deadline before setting the next status conference eight days beyond it. True, the court suggested that the prosecution would need “sufficient time” to provide materials to defense counsel substantiating its restitution request. But at that

time, more than a month remained within the statutory ninety-one-day period. The record is devoid of any indication that the prosecution required more than the time remaining within the statutory period to provide the requested information or that the defense needed more time to review it.

¶ 17 Furthermore, after defense counsel argued at the final restitution hearing that the court lacked authority to enter the restitution order beyond the statutory deadline, the court made a belated finding that it had good cause for not entering a timely order based on defense counsel’s objection to the restitution request. The court’s belated good cause finding confirms that it had not made an express good cause finding before the final restitution hearing. And although a defendant’s objection to restitution may constitute good cause, *see id.* at ¶ 44, the court’s belated good cause finding could not “act as a defibrillator to resuscitate an expired deadline,” *id.* at ¶ 7. Consequently, the court lacked authority to impose restitution, and we must vacate the restitution order. *See id.* at ¶¶ 45, 47.

¶ 18 In reaching this conclusion, we acknowledge that another division of this court recently held that a trial court had made an

express good cause finding compliant with *Weeks II* simply by entering orders setting a defendant’s deadline to object beyond the statutory deadline. *See Johnson*, ¶¶ 1-2. There, the defendant agreed as part of his guilty plea that the prosecutor would provide a restitution amount within ninety-one days after sentencing, the prosecution filed its restitution request and the court entered a restitution order on the ninety-first day, and the defendant objected a month later. *Id.* at ¶¶ 6-10. The court ultimately held a contested restitution hearing 287 days after sentencing, during which it found that the defendant’s objection and request for a hearing constituted good cause to determine restitution beyond ninety-one days and ordered restitution in the amount requested. *Id.* at ¶ 15.

¶ 19 In relevant part, the division disagreed with the trial court that “it could determine good cause *after* ninety-one days because our supreme court has held otherwise.” *Id.* at ¶ 28 (citing *Weeks II*, ¶ 40). Nonetheless, the division held that the trial 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 compliant with *Weeks II* since both occurred *before* the expiration of ninety-one days.

Id.

¶ 20 We agree with *Johnson* that a defendant’s objection and request for a hearing *may* be the basis for finding that good cause exists to determine restitution more than ninety-one days after sentencing. *See id.* at ¶ 26; *see also Weeks II*, ¶ 44. But to the extent *Johnson* held that simply setting a defendant’s objection deadline or a hearing on restitution beyond ninety-one days, by itself, constitutes an express good cause finding, we do not agree. *See Chavez v. Chavez*, 2020 COA 70, ¶ 13 (explaining that one division of the court of appeals is not bound by another); *see also Johnson*, ¶ 53 (Furman, J., dissenting) (“[T]he 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.”).

¶ 21 In any event, the facts underlying Roberson’s case are different. The district court did not have a standing case management order or enter a specific order at sentencing that set

Roberson's deadline to object beyond ninety-one days. Instead, the court set the objection deadline and Roberson in fact objected well within the statutory period. Then, without explaining why a restitution hearing could not be conducted within the forty-two days remaining before expiration of the statutory deadline, the court simply set a hearing date beyond ninety-one days.

¶ 22 On this record, we cannot conclude that the district court made an express finding of good cause to extend the ninety-one-day deadline before its expiration. *See Weeks II*, ¶ 45 (simply granting a prosecutor's request to have the issue of restitution remain open does not constitute a timely and express good cause finding to extend that deadline). Accordingly, we conclude the court lacked authority to enter the restitution order.¹

D. Roberson Did Not Waive or Invite the Error

¶ 23 The People argue that Roberson waived or invited any error by the district court in failing to determine restitution within

¹ Roberson also argues that the prosecution was required to request restitution at the sentencing hearing because the prosecution had all the necessary information at that time. *See* § 18-1.3-603(2)(a), C.R.S. 2022. Because we have concluded that the district court's restitution order must be vacated for the reasons set forth above, we do not address this argument.

ninety-one days by “repeatedly asking for extensions beyond that timeframe.” We disagree.

¶ 24 Waiver is the “*intentional* relinquishment of a *known* right or privilege.” *People v. Rediger*, 2018 CO 32, ¶ 39 (quoting *Dep’t of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1984)). Waiver may be implied, but the “mere failure to raise an issue” does not necessarily amount to a clear intent to relinquish a right. *Phillips v. People*, 2019 CO 72, ¶ 21. We “indulge every reasonable presumption against waiver.” *Rediger*, ¶ 39 (quoting *People v. Curtis*, 681 P.2d 504, 514 (Colo. 1984)).

¶ 25 The invited error doctrine prevents a party from complaining on appeal of an error they have invited or injected into the case. *Id.* at ¶ 34. Invited error is a narrow doctrine that applies to errors in trial strategy but not to errors resulting from oversight. *Id.*

¶ 26 Recently, another division of this court held that the right to have restitution determined within ninety-one days is not jurisdictional and is thus waivable. *Babcock*, ¶ 11; *see also People v. Turecek*, 2012 COA 59, ¶ 20 (“To say that a court lacks authority to order belated restitution does not use ‘authority’ in a jurisdictional sense, but only in the same sense in which a court

lacks ‘authority’ to impose a sentence above the statutory maximum. Such action is an error of law, reversible on appeal, but it is not jurisdictional.” (quoting *Dolan v. United States*, 560 U.S. 605, 626 (2010) (Roberts, C.J., dissenting)), *overruled in part on other grounds by Weeks II*, 2021 CO 75. Assuming, as the *Babcock* division held, that a defendant can waive their right to challenge the timeliness of a restitution order, we conclude no such waiver occurred in this case.

¶ 27 The People argue that the court entered a restitution order within ninety-one days after Roberson failed to object and, “[h]ad this been the end of it, the court would have fully complied with section 18-1.3-603(1)(b).” We agree with the point, so far as it goes. But the court’s initial restitution order was not “the end of it.”

¶ 28 When defense counsel moved the court to reconsider the restitution order in light of Roberson’s objection, the court granted the motion. Defense counsel filed the objection with forty-four days remaining before the ninety-one-day deadline expired. Defense counsel requested more information from the prosecution but did not request more time or ask that the court set a hearing beyond the statutory deadline. *Cf. Babcock*, ¶ 6 (defense counsel objected

ninety days after sentencing and asked that a restitution hearing be set three months later). Instead, at a status conference held just two days after the objection was filed, the court simply set another status conference beyond the ninety-one-day deadline. The prosecutor did not indicate that he could not provide the information in less than forty-two days — the amount of time remaining before the statutory deadline expired — nor did defense counsel represent that she could not review the information within that same period. There was also no discussion about the next court date being set outside the statutory deadline.

¶ 29 True, defense counsel accepted a new status conference date that was more than ninety-one days after sentencing, but no language in the restitution statute suggests that doing so automatically extends the deadline by which the court must determine restitution or waives a defendant’s right to challenge the timeliness of the restitution order. *See generally* § 18-1.3-603; *cf.* § 18-1-405(5.1), C.R.S. 2022 (Under the speedy trial statute, “[i]f a trial date is offered by the court to a defendant who is represented by counsel and neither the defendant nor his counsel expressly objects to the offered date as being beyond the time within which

such trial shall be had pursuant to this section, then the period within which the trial shall be had is extended until such trial date . . .”). Had the legislature intended for acceptance of a date beyond the ninety-first day to have these consequences, it would have so indicated in the plain language of the restitution statute. *See People v. Diaz*, 2015 CO 28, ¶ 12 (“We do not add words to the statute or subtract words from it.”) (citation omitted).

¶ 30 The People also argue that Roberson waived or invited the claimed error by repeatedly asking to continue the restitution hearing. Although defense counsel requested several continuances, she did so only *after* the ninety-one-day deadline had passed. By the time defense counsel affirmatively sought a continuance, the court was already without authority to order restitution. Under the circumstances presented, we conclude that Roberson did not waive or invite this error. *See Rediger*, ¶¶ 34, 39.

E. The Error Requires Us to Vacate the Restitution Order

¶ 31 Finally, the People argue that Roberson’s challenge to the restitution order should be treated like a Crim. P. 35(a) illegal manner claim, subject to harmless error review. *See People v. Tennyson*, 2023 COA 2, ¶ 33 (a postconviction challenge to a court

setting the amount of restitution beyond ninety-one days is an illegal manner claim). The People further argue that the district court's error was harmless because the additional time allowed defense counsel to investigate the restitution request and delayed Roberson's obligation to pay, and because Roberson had her objections heard fairly at a hearing.

¶ 32 However, as in *Weeks II*, ¶¶ 14-18, the timeliness issue here is raised on direct appeal. In *Weeks II*, the supreme court vacated a restitution order entered beyond the ninety-one-day deadline without an express good cause finding; it did not consider harmlessness because the trial court "lacked authority" to order restitution at the time of the order. *Id.* at ¶ 45. We are bound by the supreme court's decision. *See People v. Kern*, 2020 COA 96, ¶ 42 ("[W]e are bound to follow supreme court decisions unless they have been overruled or abrogated.").

¶ 33 Because the district court did not determine the amount of restitution within the ninety-one-day deadline and did not make a

timely and express good cause finding to extend that deadline, we must vacate the restitution order.²

III. Disposition

¶ 34 The restitution order is vacated.

JUDGE NAVARRO and JUDGE YUN concur.

² As a result, we do not consider the parties' arguments about the merits of the restitution order.