

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2013-KA-0122**
VERSUS *
DAVID MAGEE * **COURT OF APPEAL**
* **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**

* * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 506-167, SECTION "K"
Honorable Arthur Hunter, Judge

* * * * *

Judge Daniel L. Dysart

* * * * *

(Court composed of Judge Paul A. Bonin, Judge Daniel L. Dysart, Judge Rosemary Ledet)

Leon A. Cannizzaro, Jr.
District Attorney
Matthew R. Payne
Assistant District Attorney
Donna Andrieu
Assistant District Attorney
Parish of Orleans
619 South White Street
New Orleans, LA 70119
COUNSEL FOR APPELLANT/STATE OF LOUISIANA

Hilliard Charles Fazande, III
4902 Canal Street, Suite 201
New Orleans, LA 70119
COUNSEL FOR DEFENDANT/APPELLEE

**APPEAL CONVERTED TO WRIT;
WRIT GRANTED**

OCTOBER 30, 2013

The State appealed the trial court's denial of its motion to revoke defendant's probation. Because rulings on motions to revoke probation are not appealable,¹ we convert the appeal to a writ application. For the reasons that follow, we grant the State's writ application and we remand this matter for further proceedings consistent with this opinion.

PROCEDURAL BACKGROUND

By bill of information dated May 26, 2011, defendant, David Magee, was charged with simple burglary of a structure, a violation of La. R.S. 14:62, to which he pled not guilty. The State amended the bill of information on September 29, 2011 to include a charge of "theft over \$1500 + restitution."² Defendant pled guilty to the theft charge pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160 (1970).³ He was sentenced to serve a term of five years at hard labor

¹ See: *State ex rel Clavelle v. State*, 02-1244, p. 2 (La. 12/12/03), 861 So.2d 186, 187; *State v. Kenniston*, 07-0849, p. 6 (La. App. 4 Cir. 1/16/08), 976 So.2d 226, 229.

² The theft charge arises out of La. R.S. 14:67(B)(1), which provides that "[w]hoever commits the crime of theft when the misappropriation or taking amounts to a value of one thousand five hundred dollars or more shall be imprisoned, with or without hard labor, for not more than ten years, or may be fined not more than three thousand dollars, or both."

³ That case recognizes a defendant's right to enter a plea of guilty while still maintaining his innocence of the charge.

which was subsequently suspended, and defendant was placed on inactive probation. Defendant was also ordered to pay court costs, a fine of \$500, and restitution to the victim, the amount of which was to be determined by a magistrate.

The magistrate court conducted a restitution hearing over the course of two days, and, at its conclusion on January 26, 2012, the court assessed damages of \$106,080.00. On February 2, 2012, the trial court issued an order requiring defendant to pay restitution in the amount of \$106,080.00 to the victim. The case was then closed on May 15, 2012. The Docket Master reflects that “[t]his case is now a civil matter per Judge Hunter.”

On July 20, 2012, the State filed a motion to re-open the case to enforce the restitution order or to revoke defendant’s probation. The State’s motion indicated that the trial court “ceased [d]efendant’s obligation to pay restitution prior to his actual payment of that amount.”⁴ The motion was set for hearing on August 2, 2012, and then reset for August 9, 2012. While the record reflects that defendant appeared for the August 9, 2012 hearing with counsel, neither the Docket Master nor the minute entry reflect the outcome of that hearing. However, the transcript from the hearing reflects that the trial court denied the motion “pursuant to [La. C.Cr.P.] Article 895.1.”

⁴ The record is unclear on this point as no document reflects that, at that time, the trial court had discontinued defendant’s obligation to pay restitution. To the contrary, the Docket Master reflects that, on April 27, 2012, the trial court ordered defendant “to continue to comply with the conditions of probation.”

Thereafter, on August 16, 2012, the State moved to have defendant's probation revoked and his sentence made executory. The motion cited defendant's refusal to make payments as the basis for his probation revocation.

The Docket Master reflects that, at the September 20, 2012 hearing on the State's rule to show cause, the trial court "ordered the enforcement of the restitution judgment pursuant to [La. C.Cr. P.] Article 895.1(A)(2)(B)." While the State filed a notice of intent to file a writ, the State did not file a writ with this Court. Rather, on September 21, 2012, the State filed its appeal of the trial court's error in "finding that the restitution in this case be handled by civil court."

We note that, on September 27, 2013, after this appeal was lodged, the trial court issued a per curiam which seemingly reversed its prior ruling, noting that, "[i]n accordance with statute and case law, this court shall retain jurisdiction to enforce the payment or restitution." It then commented that the "state is expected to follow the rules of the Louisiana Code of Civil Procedure regarding the collection of money judgments" and "grant[ed] the State's motion to resume mandatory restitution payments provided the State pursues restitution according to Louisiana Code of Civil Procedure rules."

We know of no case law which allows the trial court to retain jurisdiction over restitution matters once an appeal has been taken. The Code of Criminal Procedure provides that the "jurisdiction of the trial court is divested and that of the appellate court attaches upon the entering of the order of appeal" except for

certain matters, none of which are relevant here. La. C.Cr. P. art. 916.

Accordingly, we will neither consider, nor address the trial court's "per curiam."

DISCUSSION

The State raises one assignment of error. It maintains that the trial court erred in amending a negotiated plea agreement by removing the requirement that defendant pay restitution as part of his probation because the victim filed a civil suit against defendant. A review of the record does not reflect any evidence that the State and defendant entered into a negotiated plea bargain. While the States mentions in the transcript of the August 9, 2012 restitution hearing that the parties "reached an agreement for [defendant] to plead in return for lowering the charge," nothing in the record suggests the existence of a plea agreement. Nor did the State file a motion to enforce the plea agreement. To the contrary, the State filed motions to revoke defendant's probation, and challenged the trial court's refusal to reopen the case and enforce the judgment of restitution.

The trial court's final ruling on the issue at the September 20, 2012 hearing was that "the restitution judgment should be enforced in Civil District Court." In doing so, the court commented that there appeared to be a conflict in the Code of Criminal Procedure articles 895.1 and 900. We disagree. La. C.Cr.P. art. 900(A) allows the court to impose sanctions for violating probation. It provides that, when "the court decides that the defendant has violated, or was about to violate, a condition of his probation, it may" impose a number of sanctions. La. C.Cr.P. art. 900(A).

Louisiana Code of Criminal Procedure art. 895.1(A)(1), on the other hand, provides:

When a court places the defendant on probation, it *shall*, as a condition of probation, order the payment of restitution in cases where the victim or his family has suffered any direct loss of actual cash, any monetary loss pursuant to damage to or loss of property, or medical expense. The court shall order restitution in a reasonable sum not to exceed the actual pecuniary loss to the victim in an amount certain. However, *any additional or other damages sought by the victim and available under the law shall be pursued in an action separate from the establishment of the restitution order as a civil money judgment provided for in Subparagraph (2) of this Paragraph*. The restitution payment shall be made, in discretion of the court, either in a lump sum or in monthly installments based on the earning capacity and assets of the defendant.

La. C.Cr.P. art. 895.1 (A)(1) (emphasis added).

Subparagraph 2 of that article, referenced above, states:

(a) *The order to pay restitution together with any order to pay costs or fines, as provided in this Article, is deemed a civil money judgment in favor of the person to whom restitution, costs, or fines is owed*, if the defendant is informed of his right to have a judicial determination of the amount and is provided with a hearing, waived a hearing, or stipulated to the amount of the restitution, cost, or fine ordered. In addition to proceedings had by the court which orders the restitution, cost, or fine, *the judgment may be enforced in the same manner as a money judgment in a civil case*. Likewise, the judgment may be filed as a lien as provided by law for judgment creditors. Prior to the enforcement of the restitution order, or order for costs or fines, the defendant shall be notified of his right to have a judicial determination of the amount of restitution, cost, or fine. Such notice shall be served personally by the district attorney's office of the respective judicial district in which the restitution, cost, or fine is ordered.

(b) In addition to the powers under R.S. 13:1336, the Criminal District Court for the Parish of Orleans shall

have the authority to order the payment of restitution as provided in this Paragraph. The enforcement of the judgment for restitution *shall* be filed in the Civil District Court for the Parish of Orleans.

La. C.Cr.P. art. 895.1(A)(2) (emphasis added).

A plain reading of these statutes reflects that the trial court *must* order restitution to a victim as a condition of probation when the victim suffers a pecuniary loss. La. C.Cr.P. art. 895.1(A)(1). While La. C.Cr.P. art. 895.1(A)(2)(b) provides that the order is deemed a civil judgment in favor of the victim, that article also specifically authorizes the Orleans Criminal District Court to issue and order the payment of restitution, as the trial court did in this case. While the article further provides that the enforcement of the judgment for restitution must be filed in Orleans Civil District Court, nothing prohibits the Criminal District Court from enforcing the penalties for a probation violation as set forth in La. C.Cr. P. art. 900. These remedies are separate and distinct from the victim's right to seek the enforcement of a judgment of restitution in civil court.⁵ Thus, we find that the trial court erred in finding a conflict between the articles and failing to consider whether sanctions are appropriate under La. C.Cr.P. art. 900. We, therefore, remand this matter to the trial court for a hearing to determine whether sanctions are warranted pursuant to La. C.Cr.P. art. 895.1(A)(1).

**APPEAL CONVERTED TO WRIT;
WRIT GRANTED**

⁵ We note that La. C.Cr.P. art. 900(A) gives the trial court discretion in imposing sanctions for a parole violation insofar as it states that the court “may” order any of the enumerated sanctions.