This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0472

Eugene Gerald Secord, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed October 11, 2021
Affirmed
Jesson, Judge

Mille Lacs County District Court
File No. 48-CR-17-2551

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Joe Walsh, Mille Lacs County Attorney, Erica Madore, Assistant County Attorney, Milaca, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Jesson, Judge; and Bratvold, Judge.

NONPRECEDENTIAL OPINION

JESSON, Judge

After a contested restitution hearing, the district court sua sponte—on its own motion—determined that appellant Eugene Secord had waived his right to challenge the original restitution award. Secord, in a postconviction proceeding, challenged that

$9,876.55 award. The postconviction court affirmed the district court's order of restitution and Secord now appeals. Because the district court has a duty to guard the rights of victims in restitution matters, and because Secord did not raise a detailed challenge to the restitution calculations, we affirm.

FACTS

In a desire to have some metal scrapped, W.H. gave his neighbor, appellant Eugene Secord, permission to go onto his mother's property to remove old batteries. Secord arrived and, confused by what he considered "junk" strewn about the property, attempted to call W.H. to determine what he wanted scrapped. W.H. did not answer, so Secord left a voicemail and decided to scrap the additional property anyway. But what was junk to Secord were "valuable antiques" to W.H.'s wife, R.H. In total, Secord collected over 1,300 pounds of metal, including a large metal desk, an antique coal shovel, and decorative wagon wheels. After W.H. called to demand the return of the items, Secord was able to recover several of the items, but over 20 items were destroyed or damaged. The state charged Secord with two counts of theft.[1] A jury found Secord guilty of two counts: (1) intentionally taking possession of movable property of another (more than $1,000) and (2) intentionally taking possession of moveable property of another (valued at $500 or less).

At sentencing, the district court convicted Secord of one count of theft, sentenced him to 365 days in jail and a $3,000 fine, but stayed and suspended all the jail time and all

[1] Minn. Stat. § 609.52, subd. 2(a)(1) (2016).

but $300 of the fine. The district court then ordered restitution for $9,876.55 based on a claim-loss affidavit filed by W.H. and R.H. as well as their testimony at trial. After sentencing, Secord filed an affidavit challenging the restitution amount.

At the contested restitution hearing that followed, R.H. testified and presented three exhibits detailing what property had been taken, the valuation for each item, and photographs of two items that were taken but returned. Secord did not testify nor did he present any evidence. The district court requested briefing for proposed findings for the value of each item and noted the burdens of production as required in the restitution statute. *See* Minn. Stat. § 611A.045, subd. 3(a) (2020).

In Secord's subsequent briefing to the district court, he grouped the items into three separate categories: (1) items "lacking competent evidence"; (2) items he agreed to taking but with inflated pricing; and (3) items and prices he agreed with. But neither in this list nor elsewhere in the brief did he explain what the pricing should be. The state's memorandum reiterated its support for restitution based on the figures supplied by R.H.

The district court ordered Secord to pay $9,868.56 in restitution.[2] In its supporting memorandum, the district court explained that Secord waived his right to challenge the amount of restitution by failing to adhere to the requirements of the restitution statute, an issue the court raised sua sponte. Additionally, the district court found that although W.H.'s and R.H.'s affidavit did not adequately specify the reason justifying some of the

[2] This is a $7 discrepancy from the initial restitution request and a $1 difference from the state's request at the hearing due to rounding errors.

amounts, it could reach an amount based also on hearing testimony and other exhibits in the record.

Secord petitioned for postconviction relief.[3] The postconviction court affirmed the district court's ruling that Secord had waived his right to challenge restitution. The postconviction court reiterated that Secord did not meet his statutory burden of production with his initial affidavit—an issue properly raised sua sponte by the district court—and that even if Secord could combine the evidence from the restitution hearing and his subsequent written arguments with his initial affidavit, there was still not enough specificity for Secord to have met his burden.

Secord appeals.

DECISION

Secord presents two challenges to the postconviction court's order affirming the district court's ruling. He first faults the district court's sua sponte assertion of the issue regarding his failure to meet his burden of production. Secord next contends that, even if the issue was properly raised, the underlying conclusion regarding the burden of production was erroneous as a matter of law. He requests we vacate the restitution order and remand to the district court for another contested restitution hearing after which the district court should make factual findings on "each and every item of restitution."

The denial of a petition for postconviction relief is reviewed for an abuse of discretion. *Howard v. State*, 909 N.W.2d 595, 597 (Minn. App. 2018). But questions of

[3] There was no direct appeal to either his conviction or the restitution order.

law, such as challenging the authority of the district court to order restitution, are subject to de novo review. *State v. Andersen*, 871 N.W.2d 910, 913 (Minn. 2015).

I. The district court's authority to guard victims' rights extends to its sua sponte raising the issue of Secord's failure to meet his burden of production.

First, Secord argues that the postconviction court erred by affirming the district court's conclusion that it could raise sua sponte the issue that Secord failed to meet his burden of production. To address this issue, we first review the statutory construct governing restitution proceedings. We then apply that law to the facts before us.

Restitution is intended to compensate crime victims for their losses. *State v. Rey*, 905 N.W.2d 490, 496 (Minn. 2018). In determining whether to order restitution, the district court considers "the amount of economic loss sustained by the victim as a result of the offense" and the "income, resources, and obligations of the defendant." Minn. Stat. § 611A.045, subd. 1(a) (2020). A district court has broad discretion to order restitution. *Andersen*, 871 N.W.2d at 913. But an offender is permitted to challenge the results or calculations of restitution following a restitution order. Minnesota Statutes section 611A.045, subdivision 3(a), plainly establishes the guidelines for such a challenge to restitution, including the procedural timing, petition requirements, and the challenger's required burden of production, stating:

> At the sentencing, dispositional hearing, or hearing on the restitution request, the offender shall have the burden to produce evidence if the offender intends to challenge the amount of restitution or specific items of restitution or their dollar amounts. This burden of production must include a *detailed* sworn affidavit of the offender setting forth all challenges to the restitution or items of restitution, and *specifying all reasons* justifying dollar amounts of restitution

> which differ from the amounts requested by the victim or victims.

(Emphasis added.) *See also State v. Smith*, 876 N.W.2d 310, 336 (Minn. 2016) ("Under Minn. Stat. § 611A.045, subd. 3(a), the offender bears the initial burden of production to challenge a restitution request.").

Because this restitution statute does not expressly authorize a district court to sua sponte raise the issue of whether a defendant has met this burden of pleading and production, we turn to caselaw to discern whether the court in fact has such authority. That precedent affirms the centrality of a victim's right to restitution. *See State v. Maidi*, 537 N.W.2d 280, 286 (Minn. 1995) (stating that legislative history of Minnesota Statutes section 611A.045 shows the restitution statute was intended primarily to compensate victims); *State v. Fader*, 358 N.W.2d 42, 48 (Minn. 1984) (indicating the primary purpose of restitution is to compensate the victim). Because a victim is not a party to the case, and the victim has a right to restitution, the Minnesota Supreme Court has concluded that a district court has the authority to address a victim's right to restitution—even when a victim does not request it. *State v. Gaiovnik*, 794 N.W.2d 643, 652 (Minn. 2011) (affirming restitution even though the victim did not make a restitution claim). But even with this duty in mind, the district court is required to remain impartial and act with neutrality in its rulings. *See* Minn. Code Jud. Conduct Canon 2 ("A Judge Shall Perform the Duties of Judicial Office Impartially, Competently, and Diligently."); *State v. Miller*, 842 N.W.2d 474, 479 (Minn. App. 2014), *rev. denied* (Minn. Apr. 15, 2014) (citing *United*

States v. Leon, 468 U.S. 897, 917 (1984) (noting that "[j]udges . . . are not adjuncts to the law enforcement team")).

Applying the logic of this precedent, we concluded in *Miller* that a district court may sua sponte order a rehearing on the issue of restitution, although not expressly authorized under the statute to do so. 842 N.W.2d at 479. The facts in *Miller* aid our understanding of its holding. There the district court found that the state had not adequately represented the victim's restitution interests in the initial hearing and—sua sponte—ordered a second hearing, where an additional witness testified. *Id.* at 476. We concluded:

> The victim, an interested, typically unrepresented nonparty to the criminal proceeding, has rights and interests aligned with but independent of the state's interests. This independent right authorizes the district court to order restitution even when the victim does not request it.

Id. at 479. Although *Miller* is factually distinguishable from this case, the underlying principles remain the same—the district court has a right to vindicate a victim's rights to restitution.[4] *Id.* And that same principle applies here—just as a district court retains the power to sua sponte order an additional restitution hearing, it may raise the issue of a defendant's burden of production. And here, Secord's lack of detail in his affidavit challenging restitution and additional briefing infringes on W.H.'s and R.H.'s ability to

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[4] Secord cites to *Steward v. State* to argue that the district court cannot raise an issue that was not timely asserted. 950 N.W.2d 750, 754 n.4 (Minn. 2020). But the issue implicated in *Steward* was the state's ability to challenge the scope of a Minnesota Rule of Criminal Procedure 27.03 motion—a right afforded to all parties in a criminal proceeding. This is distinguishable from the district court's duty to vindicate the rights of a victim, who is otherwise not a party to a criminal proceeding, exclusively in the area of restitution.

receive restitution. Accordingly, the district court did not act partially by sua sponte ruling on an issue not raised by the state—that Secord did not meet his burden of production.

Still, Secord contends that the victim's rights addressed in *Miller* must be weighed against his "equally-important" right to challenge restitution. But Secord's right to challenge restitution was not denied. When given his statutory opportunity to offer a detailed challenge to restitution, he instead provided cursory opposition. While it is Secord's right to not testify at trial or any of the hearings involving restitution, it is hard to see how failing to do so results in the *district court* denying him his ability to challenge restitution.

In sum, in light of the clear purpose of the restitution statute to protect victims, the district court's duty to protect a victim's right to restitution, and the rationale explained in *Miller*, we conclude that the district court is allowed to raise issues sua sponte if it is closely tied to a victim's right to restitution. Accordingly, the postconviction court did not abuse its discretion when affirming the district court's sua sponte conclusion.

II. The postconviction court properly determined that Secord did not meet his burden of production in his challenge to restitution.

Having determined that the district court could sua sponte raise the issue of Secord's burden of production, we turn to whether the postconviction court erred by affirming the district court's conclusion that Secord did not meet his burden of production and, accordingly, waived his right to challenge the amount of restitution.

Recall a challenger's required burden of production under the restitution statute. Minn. Stat. § 611A.045, subd. 3(a). Considering this statute, we explained that the

restitution statute requires "that the offender fully plead his or her position in the affidavit" and pointed to "the legislature's insistence that the affidavit be 'detailed.'" *State v. Thole*, 614 N.W.2d 231, 235 (Minn. App. 2000). And we emphasized that a valid dispute over a challenge to restitution "arises only after an offender meets the threshold burden of raising a specific objection by affidavit" and that until that burden is met, "the district court need not determine whether restitution is justified by a preponderance of the evidence." *Id.* Accordingly, we held that an offender waives the right to challenge an item of restitution by failing to identify specifically the nature of the challenge in a sworn affidavit. *Id.* at 235.

Here, Secord failed to meet this threshold burden. His affidavit challenging the $9,876.55 figure, specifically stated:

> 8. I believe there is no *competent* evidence to establish these out of pocket losses under Minn. Stat. § 611A.04 subd. 1.
>
> 9. Further the information submitted relating to restitution does not describe the items or elements of loss, under Minn. Stat. § 611A.04 subd. 1. There is no evidence about how these items were obtained and how much they paid for these items.
>
> 10. Further, the [complainants'] affidavit did not specify the reasons justifying these amounts, if restitution is in the form of money or property under Minn. Stat. § 611A.04 subd. 1. The trial testimony consisted of "what antique dealers" supposedly told them and searches on eBay. The condition of the items was in dispute during the course of trial.
>
> 11. I completely disagree with the [complainants'] assessment that these "antiques" were in pristine condition.

> 12. Further, the [complainants] recovered some of the items and they are still claiming losses on the recovered property.
>
> 13. I therefore request a restitution hearing to determine a different amount of restitution awarded to [R.H.] and [W.H.].

But nowhere in the affidavit does Secord specifically identify any item of restitution he sought to challenge or any amounts. Instead he broadly asserted that the valuation was in error.

This does not satisfy the "detail" requirement found in the governing statute. For these reasons, we conclude that Secord waived his right to challenge the amount of restitution or specific items of restitution or their dollar amount.[5] Even if we considered the additional posthearing briefing and the testimony on cross examination, Secord did not provide the district court with any specificity to what the actual value of any of the 20 items were. Instead of providing any information to disprove the amounts claimed by R.H., Secord attempted to poke holes at her methodology used to determine her figures, and then zeroed out any of the items he disagreed with when he calculated his competing $720

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[5] Secord also contends that the issue of the sufficiency of the affidavit is actually moot because a contested hearing was held. To support this argument, Secord cites to *State v. Holmberg*, 527 N.W.2d 100 (Minn. App. 1995). This court in *Holmberg* found that a defendant challenging the probable cause after conviction was irrelevant. 527 N.W.2d at 103. Secord reasons that the timing of the hearing here is equivalent to the timing of the conviction in relation to the criminal complaint in *Holmberg*, so the affidavit matter should be considered moot. But we found Holmberg's argument irrelevant because it was more appropriate for Holmberg to challenge his conviction under a sufficiency-of-the-evidence standard, not because of the timing of the hearing date. *Id.* Secord's comparison to *Holmberg* is not persuasive.

figure. This is not sufficiently detailed to constitute a valid challenge to restitution. And the postconviction court did not err by concluding the same.

In sum, the postconviction court did not abuse its discretion when upholding the district court's conclusion that Secord had waived his right to challenge the amount of restitution.

Affirmed.