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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1736

State of Minnesota,
Respondent,

vs.

Cory Daniel Bell,
Appellant.

Filed September 12, 2011
Affirmed
Kalitowski, Judge

Sherburne County District Court
File No. 71-CR-08-1607

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Kathleen A. Heaney, Sherburne County Attorney, Therese A. Galatowitsch, Deputy County Attorney, Tim Sime, Arden Jay Fritz, Assistant County Attorneys, Elk River, Minnesota (for respondent)

Bradford Colbert, William Mitchell College of Law Legal Assistance to Minnesota Prisoners, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Kalitowski, Judge; and Collins, Judge.[*]

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[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D   O P I N I O N

KALITOWSKI, Judge

This appeal arises from appellant Cory Daniel Bell's convictions for first-degree burglary and second-degree assault with a dangerous weapon. Appellant challenged the district court's order to pay restitution for the installation and maintenance of a security system at the home of the victim, and this court determined that appellant's challenge to the district court's order was procedurally barred. *State v. Bell*, No. A09-1736, 2010 WL 3743990, at *2 (Minn. App. Sept. 28, 2010, *vacated and remanded* (Minn. Apr. 19, 2011). Appellant petitioned the supreme court for further review, and the supreme court vacated our decision and remanded the case for further proceedings consistent with its decision in *State v. Gaiovnik*, 794 N.W.2d 643 (2011). Because we conclude that appellant's claim is procedurally barred we affirm the district court.

D E C I S I O N

In order to challenge a district court's restitution order, an offender must submit a detailed affidavit setting forth all challenges to the amount of, or specific items of restitution. Minn. Stat. § 611A.045, subd. 3(a) (2008). An offender must also "request[] a hearing within 30 days of receiving written notification of the amount of restitution requested, or within 30 days of sentencing, whichever is later. . . . A defendant may not challenge restitution after the 30-day time period has passed." *Id.*, subd. 3(b) (2008). "Under the plain language of the statute, a valid dispute arises only after an offender meets the threshold burden of raising a specific objection by affidavit." *State v. Thole*, 614 N.W.2d 231, 235 (Minn. App. 2000).

The district court may order restitution based on the economic loss sustained by the victim as a result of the offense and the resources of the defendant. Minn. Stat. § 611A.045, subd. 1(a) (2008). We review a district court's order for restitution under an abuse-of-discretion standard. *State v. Tenerelli*, 598 N.W.2d 668, 671 (Minn. 1999). But whether a claimed item of restitution meets the statutory requirements is a question of law that we review de novo. *Thole*, 614 N.W.2d at 234.

Appellant failed to submit an affidavit detailing his challenges to the restitution award and failed to request a hearing to present his restitution challenges within 30 days either of receiving notification or of sentencing; he thus does not dispute that he did not comply with the statutory procedural requirements. *Bell*, 2010 WL 3743990, at *1. On remand, appellant argues, based on *Gaiovnik*, that he did not have to comply with the statutory procedural requirements for challenging restitution because "the district court [did] not have the legal authority to award restitution" for an item that does not constitute an "economic loss" under the statute. We disagree.

In *Gaiovnik*, the defendant and an accomplice robbed two employees of a clothing store, taking the day's receipts totaling at least $19,200. 794 N.W.2d at 645. Neither the store nor the employees filed a restitution request with the court. *Id*. The defendant argued that the district court lacked authority to award restitution because no victim submitted a request for restitution. *Id.* at 646. The supreme court held that (1) if a defendant is challenging "a district court's legal authority to award restitution in the absence of a request from the victim," *id.* at 644, then the statutory procedural bar does not apply, so the defendant's failure to request a hearing within 30 days did not bar his

challenge on appeal, and (2) the district court did not err in ordering, and thus has the legal authority to order, restitution, even when the victims did not file a request for restitution. *Id*. at 646-49, 652. The supreme court concluded that the district court properly ordered restitution because the defendant was "on notice" of the amount allegedly stolen, he never contested the amount, and the record provided a factual basis for the award. *Id*. at 652.

This case is distinguishable from *Gaiovnik*. Unlike the victim in *Gaiovnik*, the victim here requested restitution, which the district court awarded. *Bell*, 2010 WL 3743990, at *1. Importantly, the defendant in *Gaiovnik* argued that the district court did not have the legal authority to award any restitution; here, appellant only challenges the home security system, which was one of several items of restitution ordered by the district court. *Id.*

Appellant characterizes his challenge as contesting the district court's legal authority to award restitution. But in fact, he is claiming that a particular item or type of restitution—the installation and maintenance of a security system—does not qualify as "economic loss" under the statute. *See* Minn. Stat. § 611A.045, subd. 1(a) (2008) (directing the district court to determine restitution by considering "the amount of economic loss sustained by the victim as a result of the offense" and "the income, resources, and obligations of the defendant"). As we stated in our opinion in appellant's initial appeal, *State v. Thole* "governs this case and holds that the plain language of Minn. Stat. § 611A.045, subd. 3, requires that any and all challenges to restitution, whether factual or legal, be brought according to the statute's procedural requirements." *Bell*,

2010 WL 3743990, at *1; *see Thole*, 614 N.W.2d at 234-35 (holding that the statutory procedural bar applies where defendant claimed that items of restitution were not caused by the offense for which he was convicted).

In reaching its conclusion in *Gaiovnik*, the supreme court neither cited to nor overruled the line of cases that have applied the procedural bar established by Minn. Stat. § 611A.045, subd. 3(b). *See id*. at 645-49. Rather, the supreme court narrowly read Minn. Stat. § 611A.045, subd. 3(a) and (b) "to apply only to disputes as to the amount or type of restitution," and stated that the statute should not be construed so broadly as to cover all challenges to restitution. *Gaiovnik*, 794 N.W.2d at 647. Moreover, the supreme court stated that "the procedures in section 611A.045, subdivision 3(b), do not apply *in the narrow circumstances* presented here—where the *only* challenge is to the *legal authority* of the court to order restitution and that challenge was raised in the district court." *Id*. at 648 (emphasis added). We conclude that these "narrow circumstances" are not present here. Appellant's challenge to the district court's legal determination as to what constitutes economic loss is not a challenge to the district court's legal authority to award restitution. Instead appellant disputes "the amount or type of restitution," which is squarely governed by subdivision 3's procedural rules. *Id.* at 647. Thus, we conclude that the procedural bar remains applicable to appellant's restitution challenge.

Appellant also argues that he could not comply with Minn. Stat. § 611A.045, subd. 3, because the state did not serve notice of the restitution request in the form of the victim's restitution affidavit until June 19, 2009, which was five days before the

sentencing hearing on June 24, 2009. We disagree because this assertion does not comport with our reading of the statute.

Statutory interpretation begins with an examination of the plain language of the statute. *Jackson v. Mort. Elec. Registration Sys., Inc.,* 770 N.W.2d 487, 496 (Minn. 2009). "If the words of the statute are 'clear and free from all ambiguity,' further construction is neither necessary nor permitted." *Owens v. Water Gremlin Co.*, 605 N.W.2d 733, 736 (Minn. 2000) (quoting Minn. Stat. § 645.16 (1998)). Minn. Stat. § 611A.045, subd. 3(a), states that an offender's affidavit challenging restitution "must be served on the prosecuting attorney and the court at least five business days before the hearing." But that hearing can be "the sentencing, dispositional hearing, or hearing on the restitution request." *Id.* And in order to "challenge restitution," subdivision 3(b) states that an offender "must do so by requesting a hearing within 30 days of receiving written notification of the amount of restitution requested, or within 30 days of sentencing, whichever is later." Minn. Stat. § 611A.045, subd. 3(b). Thus, the time at which the state provides an offender with notice of a restitution request does not necessarily determine the 30-day time period in which an offender must challenge restitution.

Here, appellant was not required to submit an affidavit challenging restitution five business days before the sentencing, but rather five business days before a hearing regarding a disputed restitution amount. Thus, appellant could have complied with the statute had he requested a hearing to challenge restitution within 30 days of the June 24,

2009 sentencing hearing. We therefore conclude that appellant's argument regarding the timeliness of the notice of the request for restitution is without merit.

Finally, appellant argues in his reply brief on remand that if this court determines that he is procedurally barred from challenging restitution, his counsel was ineffective. Appellant made the same claim in his initial appeal, and we did not address it because appellant raised the issue for the first time in his reply brief. *Bell*, 2010 WL 3743990, at *2. Thus, we do not address the issue here. *See* Minn. R. Civ. App. P. 128.02, subd. 4 (providing that reply brief must be confined to new matter raised in respondent's brief); *Berg v. State,* 557 N.W.2d 593, 596 (Minn. App. 1996) (stating that issues first raised in reply brief are not properly before this court and will not be considered).

Affirmed.