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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1921**

State of Minnesota,
Appellant,

vs.

Brett David Borg,
Respondent.

**Filed January 27, 2014
Affirmed
Stauber, Judge**

Mille Lacs County District Court
File No. 48K6CR041375

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

Janice S. Jude, Mille Lacs County Attorney, Tara Christel Ferguson Lopez, Assistant County Attorney, Milaca, Minnesota (for appellant)

Cathryn Young Middlebrook, Chief Appellate Public Defender, Michael W. Kunkel, Assistant Public Defender, St. Paul, Minnesota (for respondent)

Considered and decided by Johnson, Presiding Judge; Peterson, Judge; and Stauber, Judge.

UNPUBLISHED OPINION

STAUBER, Judge

On remand from the supreme court's reversal of this court's dismissal of the state's appeal, the state argues that the district court erred when it (1) reduced, by \$337.10, the

amount of restitution requested and (2) held a restitution hearing to consider respondent's restitution challenge and amended the restitution order, when respondent failed to challenge restitution within the 30-day timeframe allowed by Minn. Stat. § 611A.045, subd. 3(b) (2008). Because the 30-day time limit set forth in section 611A.045, subdivision 3(b), does not apply to respondent's restitution challenge, and because the district court properly reduced the amount of restitution ordered, we affirm.

FACTS

In 2008, respondent Brett David Borg was convicted of third-degree criminal sexual conduct.¹ A sentencing hearing was held on November 7, 2008, at which Borg was sentenced to 48 months in prison and ordered to pay restitution. The district court held "open the restitution issue" to allow the state 30 days to submit the total restitution amount sought.

On November 12, 2008, the state submitted a written request for restitution in the form of (1) medical costs incurred by the victim and (2) mileage and lost wages incurred by the victim *and her parents*. The district court granted the state's request, but noted that Borg had a right to request a hearing to challenge the amount sought. This right is established under Minn. Stat. § 611A.045, subd. 3(b), which allows an offender to request a hearing within 30 days of receiving written notice of the amount of restitution requested. About two weeks later, in a letter dated November 26, 2008, and addressed to him in prison, Borg's trial counsel informed Borg of the restitution request. Thereafter,

¹ A more thorough recitation of the facts involving the offense can be found in *State v. Borg*, 780 N.W.2d 8, 10-12 (Minn. App. 2010).

trial counsel discontinued her representation of Borg because counsel's retainer agreement did not include representation for a restitution hearing.

Meanwhile, Borg contacted the state public defender's office on November 16, 2008, seeking a public defender to represent him in a direct appeal. Borg was informed on December 1, 2008, that the public defender's office would represent him in a direct appeal, but that he would not immediately be assigned a lawyer "because we do not have sufficient staff to handle all of our new cases as soon as they are ready to be assigned." Borg called the state public defender's office on December 19, 2008, to discuss a challenge to his restitution. A note regarding this call was discovered by the public defender assigned to his case three days later as she reviewed the file. The public defender wrote to the district court that day requesting a restitution hearing and more time to submit the required affidavit. The state responded, alleging that Borg's restitution challenge was untimely. Borg's public defender wrote again, conceding that the request was untimely, but arguing that the court should hear the challenge in the interests of justice, based on the circumstances. This letter also briefly described the "good faith" legal basis for Borg's challenge.

In February 2009, Borg filed a direct appeal challenging his conviction. Thereafter, the district court granted Borg's request for a restitution hearing. In a handwritten note, dated March 13, 2009, and written on top of the earlier letter from Borg's public defender, the district court stated: "Due to substitution of attorney and delay in assigning a public defender, defendant is entitled to a restitution hearing even though requested outside the 30 days."

The restitution hearing was held in May 2009. The district court issued its order on July 24, 2009, stating that the restitution hearing was granted because of the “confusion inherent in a change of attorneys.” The order noted that Borg had not been informed of the restitution request by his trial counsel until November 26, that Borg tried to find new counsel, and that new counsel, once secured, “acted diligently to challenge restitution.” The court then considered Borg’s contention that the victim’s parents were not entitled to restitution for (1) their wages lost when they took the victim to the hospital after the sexual assault or (2) their lost wages and travel expenses for attending the trial as spectators. The district court concluded that the victim’s parents were entitled to recover their lost wages and mileage when they missed work to take their daughter to the hospital because “[t]hese expenses were directly caused by the criminal act for which [Borg] was convicted.” But the court further concluded that \$337.10 in mileage and lost wages for the victim’s parents attending the trial was not recoverable because it does “not fall within the purview of the criminal-restitution statute.”

The state appealed the restitution order. This court subsequently released its opinion in Borg’s direct appeal, which reversed Borg’s conviction and remanded for a new trial. *State v. Borg*, 780 N.W.2d 8, 16 (Minn. App. 2010), *rev’d and remanded*, 806 N.W.2d 535 (Minn. 2011). In light of the reversal, this court declined to address all of the arguments raised by Borg in his direct appeal. *Id.*

After the state petitioned for review of this court’s decision reversing Borg’s conviction, this court stayed the state’s appeal in the restitution matter pending the outcome of Borg’s direct appeal. The supreme court then reversed this court’s decision

on Borg's conviction and remanded the case to this court "for consideration of Borg's remaining arguments." *State v. Borg*, 806 N.W.2d 535, 548 (Minn. 2011). On remand from the supreme court, this court affirmed Borg's conviction after consideration of Borg's remaining arguments. *State v. Borg*, No. A09-243 (Minn. App. Mar. 26, 2012), *review denied* (Minn. June 19, 2012). The supreme court denied review, which was followed by an order from this court dissolving the stay of the state's appeal of the July 24, 2009 restitution order.

In November 2012, we dismissed the state's appeal of the restitution order without addressing the state's argument that "the district court erred by holding a restitution hearing, considering [Borg's] restitution challenges, and amending the restitution order, because [Borg] failed to challenge restitution within the 30-day time period allowed by Minn. Stat. § 611A.045." *State v. Borg*, 823 N.W.2d 352, 353 (Minn. App. 2012). Instead, we reasoned that under *State v. Hughes*, 758 N.W.2d 577 (Minn. 2008), "[w]hen restitution is ordered at sentencing, but the specific amount is determined later, the later-issued restitution order does not extend the 90-day period that a defendant or the state has to appeal from the sentence." *Id.* at 356. We held that "because the restitution order in this case was issued after the 90-day period that the state had to appeal Borg's sentence, and there is no specific rule that allows the state to appeal from a restitution order, the state is not entitled to appellate review of the restitution order." *Id.*

The supreme court again granted the state's petition for review and reversed our decision dismissing the state's appeal of the restitution order. *State v. Borg*, 834 N.W.2d 194, 199-200 (Minn. 2013). The supreme court concluded that an order amending the

restitution portion of a sentence constitutes a “sentence imposed” within the meaning of Minn. R. Crim. P. 28.04, subd. 1(2), such that the state may appeal an amended sentencing order within 90 days after the entry of the order. *Id.* The court held that because the state filed its notice of appeal within 90 days after the amended sentencing order was entered, the state’s appeal was timely. *Id.* at 200. The supreme court also concluded that *Hughes* was “not dispositive of the issue.” *Id.* at 199. Thus, the supreme court remanded the case to this court “for consideration of the merits of the state’s appeal.” *Id.* at 200.

D E C I S I O N

I.

The state argues that the district court abused its discretion by reducing the amount of restitution ordered. Under Minnesota law, victims of crimes are permitted to request restitution from a defendant if the defendant is convicted. Minn. Stat. § 611A.04, subd. 1 (2008). This court reviews a district court’s order for restitution for an abuse of discretion. *State v. Tenerelli*, 598 N.W.2d 668, 671 (Minn. 1999). A district court abuses its discretion by awarding restitution to a person who does not meet the statutory requirements to be a victim. *State v. Esler*, 553 N.W.2d 61, 65 (Minn. App. 1996), *review denied* (Minn. Oct 15, 1996). Whether a person seeking restitution meets those requirements is a question of law, which we review de novo. *See In re Welfare of M.R.H.*, 716 N.W.2d 349, 351 (Minn. App. 2006) (noting that application of restitution statutes to particular claim is a question of law), *review denied* (Minn. Aug. 15, 2006).

Minn. Stat. § 611A.01(b) (2008) defines “[v]ictim” as “a natural person who incurs loss or harm as a result of a crime.” “The term ‘victim’ [also] includes the family members, guardian, or custodian of a minor, incompetent, incapacitated, or deceased person.” *Id.*

The state argues that under *State v. Palubicki*, 727 N.W.2d 662 (Minn. 2007), the victim’s parents are entitled to reimbursement for mileage and lost wages to attend the trial. In *Palubicki*, the adult children of a murder victim sought restitution for their lost wages and travel expenses arising from their voluntary attendance at the defendant’s trial. *Palubicki*, 727 N.W.2d at 664. The court stated that because a murder victim’s adult children are victims under the statutory definition set forth in Minn. Stat. § 611A.01(b) (2002), they “are not foreclosed from requesting restitution for their personal expenses resulting from the murder.” *Id.* at 666. The court then stated that “[t]he next of kin were in court as a direct result of [the defendant’s] crime. As victims under the statute, the next of kin did not choose to attend the court proceedings as disinterested bystanders. They attended because they were unavoidably entwined in the criminal proceedings.” *Id.* at 667. Thus, the court held that the district court did not abuse its discretion by ordering the defendant to pay restitution to the victim’s adult children for expenses arising from their voluntary attendance at the murder trial as the claimed expenses resulted from the crime under Minn. Stat. § 611A.01(b). *Id.*

The state argues that like the next of kin in *Palubicki*, the victim’s parents in this case were in court (1) “because they are natural persons who incurred a loss as a result of a crime (and thus victims), and (2) because they were ‘unavoidably entwined in the

proceedings.”” Consequently, the state argues that under *Palubicki*, the district court had “authority under the restitution statute” to reimburse the victim’s parents for the \$337.10 they incurred in attending trial.

We disagree. The first step in our inquiry is whether the victim’s parents are in fact victims under the restitution statute. In *Palubicki*, the victim was murdered. 727 N.W.2d at 664. The supreme court noted that under the restitution statute, “[w]hen the crime victim is deceased, the victim’s surviving spouse or next of kin may receive restitution.” *Id.* at 665 (citing Minn. Stat. § 611A.01(b) (2002)). Neither party disputed that the victim’s adult children were the nearest living blood relatives to the victim. *Id.* (applying the common law definition of “next of kin,” which is the “nearest living blood relation”). Thus, the supreme court determined that the adult victim’s children were victims under the restitution statute.² *Id.* at 666.

In 2005, however, Minn. Stat. § 611A.01(b) was amended.³ 2005 Minn. Laws ch. 136, art. 8, § 22, at 1016-17. The amendment deleted the language: “If the victim is a natural person and is deceased, ‘victim’ means the deceased’s surviving spouse or next of kin.” *Id.* The legislature broadened the definition of “victim” to include “family members, guardian, or custodian of a minor, incompetent, or deceased person.” *Id.*; *see also Palubicki*, 727 N.W.2d at 665 n.4. But the legislature retained the language defining “victim” as a “natural person who incurs loss or harm as a result of a crime.” *Id.*

² The challenge in *Palubicki* concerned the “type of reimbursement” to which the adult victim’s children were entitled under the statute.

³ Although *Palubicki* was decided in 2007, after section 611A.01(b) was amended, the supreme court applied the 2002 version of the statute. *See Palubicki*, 727 N.W.2d at 665.

Here, as Borg points out, the victim was not a minor and, therefore, the parents of the victim were not the family members, guardian, or custodian of a minor. *See* Minn. Stat. § 611A.01(b). They were also not the family members, guardian, or custodian of an incompetent person or deceased person. *See id.* Consequently, in order for the victim's parents to be "victims" under the restitution statute, they must be "natural person[s] who incur[red] loss or harm as a result" of the sexual assault. *See id.* (defining "victim").

In *State v. Jones*, the Minnesota Supreme Court considered the state's argument that the definition of a "victim" under section 611A.01(b) generally means "someone who 'incurs a loss or harm.'" 678 N.W.2d 1, 23 (Minn. 2004). In rejecting the state's argument, the supreme court stated that "[a] narrow interpretation of the term victim is . . . consistent with . . . sections of the crime victims' rights statutory scheme to which the Minn. Stat. § 611A.01 definition for victim is to be applied." *Id.* at 24. The court also found support for its narrow interpretation of victim under section 611A.01(b) "in the way the legislature used the term victim in describing a defendant's potential obligations when ordered to pay restitution." *Id.* at 24-25. The supreme court concluded that "in looking at both the statutory provisions addressing victims' rights and those defining restitution obligations, . . . the better interpretation of the term 'victim' is that of the direct victim of a crime." *Id.* at 25.

Citing the definition set forth in *Jones*, Borg argues that the victim's parents were not "direct victims" of the offense. Thus, Borg contends that the victim's parents are not entitled to their lost wages and travel expenses for attending the trial as spectators. Conversely, the state argues that the definition of a victim, as clarified in *Jones*, is

premised on an outdated version of section 611A.01(b), and therefore that definition is no longer applicable.

We acknowledge that the supreme court in *Jones* discussed the 2002 version of Minn. Stat. § 611A.01(b). *See Jones*, 678 N.W.2d at 23. But, as noted above, the 2005 amendment to section 611A.01(b) did not change the definition of a “victim” as being a “natural person who incurs loss or harm as a result of crime.” *See* 2005 Minn. Laws ch. 136, art. 8, § 22, at 1016-17. And, unlike *Palubicki*, which did not discuss the “natural person” language of section 611A.01(b), the supreme court in *Jones* specifically contemplated the meaning of the term “victim” as defined by section 611A.01(b), as a “natural person who incurs loss or harm as the result of a crime.” *Compare Palubicki*, 727 N.W.2d at 665-66, *with Jones*, 678 N.W.2d at 23-26. Moreover, as discussed by the supreme court in *Jones*, an interpretation of the term “victim” as that of the direct victim of a crime, is consistent with the statutory provisions addressing victims’ rights and those defining restitution obligations. *See Jones*, 678 N.W.2d at 24-25 (using a narrow definition of the term victim to compare the statutory provisions addressing victim’s rights under Minn. Stat. §§ 611A.038, .039, and .0395(a) (2002), with the statutory provisions defining restitution obligations under Minn. Stat. §§ 609.10, .125 (2002)). In fact, if we were to adopt the state’s interpretation of the term “victim,” there would seemingly be no limit to who could recover restitution for lost wages and travel expenses for attending a trial. Therefore, we conclude that the definition of the term “victim” as clarified by the supreme court in *Jones*, is still good law.

Here, the victim's parents were not the "direct" victims of the crime. *See Jones*, 678 N.W.2d at 25. They are also not the family members, guardian, or custodian of a minor, incompetent, or deceased person. *See* Minn. Stat. § 611A.01(b). Thus, the victim's parents are not entitled to restitution under section 611A.01(b). The district court did not err by concluding that the victim's parents are not entitled to reimbursement for their lost wages and travel expenses of \$337.10 for attending the trial as spectators.

II.

The state also argues that regardless of whether the victim's parents are entitled to restitution under the restitution statute, the district court did not have authority to hear Borg's restitution challenge because it was untimely. The state's argument involves the interpretation of the timeliness requirement of Minn. Stat. § 611A.045, subd. 3(b), which is a legal issue that we review de novo. *See State v. Leathers*, 799 N.W.2d 606, 608 (Minn. 2011) (stating that questions involving statutory interpretation are reviewed de novo).

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). 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. *Id.*, subd. 3(a) (2008). According to the statute, 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).

Borg concedes that he failed to object to the court-ordered restitution within the 30-day timeframe set forth in Minn. Stat. § 611A.045, subd. 3. But he argues that under *State v. Gaiovnik*, 794 N.W.2d 643 (Minn. 2011), the 30-day deadline set forth in section 611A.045, subdivision 3(b), does not apply.

In *Gaiovnik*, the defendant and an accomplice robbed two clothing store employees, taking the day’s receipts totaling at least \$19,200. 794 N.W.2d at 645. Although neither the store nor the employees filed a restitution request with the court, the district court imposed restitution as part of the defendant’s sentence. *Id.* The defendant argued that the district court lacked authority to impose restitution as part of the sentence 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 by ordering restitution, 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.

Again, Borg’s restitution challenge involved the adult victim’s parents’ lost wages and travel expenses incurred for attending the trial as spectators. Specifically, Borg claimed that the adult victim’s parents do not meet the statutory definition of victim in order to be entitled to restitution for their lost wages and travel expenses. Borg contends

that his challenge was not to an amount or type of restitution, but instead was to the court's legal authority to grant a request for restitution to people who are not entitled to receive it because they are not victims. Thus, Borg contends that under *Gaiovnik*, the 30-day time-bar does not apply.

We agree. Under *Gaiovnik*, the 30-day time limit does not apply under the “narrow circumstances” where the “only challenge is to the *legal authority* of the court to order restitution and that challenge was raised in the district court.” 794 N.W.2d at 648. In reaching this conclusion, the supreme court referred to the language of section 611A.045, subdivision 3(a), establishing the procedures that apply when an offender intends to challenge “the amount of restitution or the specific items of restitution or their dollar amounts.” *Id.* at 647 (quoting Minn. Stat. § 611A.045, subd. 3(a)). As the supreme court further pointed out in *Gaiovnik*, this language provides the “context” for subdivision 3(b), meaning that when the offender is not challenging “the amount of restitution or specific items of restitution or their dollar amounts,” the 30-day time limit set forth in subdivision 3(b) does not apply. *Id.*

Here, as in *Gaiovnik*, Borg's challenge does not fall under the statutory language of section 611A.045, subdivision 3(a): Borg is not challenging specific items of restitution or their dollar amounts—he is challenging whether the victim's parents are permitted to collect those amounts. Borg's claim is a legal question that falls under the “narrow circumstances” contemplated by *Gaiovnik* because if the victim's parents are not “victims” as contemplated by the statute, the district court does not have authority to award restitution to them. *See Esler*, 553 N.W.2d at 65. Moreover, Borg raised the

challenge in district court and the district court properly concluded that the victim's parents are not "victims" under applicable Minnesota law. Accordingly, the 30-day time limit set forth in Minn. Stat. § 611A.045, subd. 3(b), does not apply to Borg's restitution challenge.

We further note that our decision, like the one in *Gaiovnik*, "avoids a potential separation of powers concern." 794 N.W.2d at 648. It is well settled that courts have "primary responsibility under the separation of powers doctrine for regulation of evidentiary matters and matters of trial and appellate procedure." *State v. Lindsey*, 632 N.W.2d 652, 658 (Minn. 2001) (quoting *State v. Olson*, 482 N.W.2d 212, 215 (Minn. 1992)). A statute is procedural, and therefore subject to the courts' inherent authority, when it does not (1) create a new cause of action or (2) deprive a defendant of any defense on the merits. *State v. Losh*, 721 N.W.2d 886, 891 (Minn. 2006). And the supreme court has previously construed statutes that set time limits for an appeal as procedural. *See In re Welfare of J.R.*, 655 N.W.2d 1, 2-3 (Minn. 2003) (concluding that a rule of juvenile procedure setting time limit for taking an appeal governed instead of a statute setting an identical time limit for taking an appeal).

The statute at issue in this case, section 611A.045, subdivision 3(b), appears inconsistent with Minn. R. Crim. P. 27.03, subd. 9, and arguably violates the separation of powers doctrine, because the statute purports to limit a defendant's ability to raise an issue on appeal by limiting the manner and time period in which the defendant can challenge a restitution award. *Compare* Minn. Stat. § 611A.045, subd. 3(b), *with* Minn. R. Crim. P. 27.03, subd. 9. In other words, if a defendant does not challenge the district

court's award of restitution in writing within 30 days of the sentencing hearing, the defendant cannot thereafter seek review of that part of his sentence in a timely direct appeal even if the defendant challenged the district court's legal authority to award restitution at the sentencing hearing. *See* Minn. Stat. § 611A.045, subd. 3(b). But the "narrow" exception set forth by the supreme court in *Gaiovnik*, and applied by us in this case, "avoids a potential separation of powers concern" that could arise by the legislature enacting statutes that "conflict[] with our court rule to the extent it requires the defendant to take additional action in the district court in order to preserve a sentencing issue for appeal." *Id.* at 648.

Affirmed.