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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-965

Filed: 1 March 2016

Mecklenburg County, No. 11 CRS 218388

STATE OF NORTH CAROLINA, Plaintiff,

v.

ROBERT McPHAIL, Defendant.

Appeal by defendant from judgment entered 28 May 2015 by Judge William R. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 January 2016.

*Attorney General Roy Cooper, by Assistant Attorney General Mary Carla Babb, for the State.*

*Staples S. Hughes, Appellate Defender,<sup>1</sup> by Kathryn L. Vandenberg, Assistant Appellate Defender, for defendant-appellee.*

ZACHARY, Judge.

Robert McPhail (defendant) appeals from judgment entered on his convictions of first-degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. On appeal defendant argues that the trial court

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<sup>1</sup> Defendant's reply brief was filed on 29 September 2015. Effective 1 November 2015, Glenn Gerding succeeded Staples S. Hughes as Appellate Defender.

STATE V. MCPHAIL

*Opinion of the Court*

erred in its order for restitution. We conclude that the trial court did not err and that defendant's argument lacks merit.

I. Background

On 2 May 2011, defendant was indicted by the Grand Jury in Mecklenburg County, North Carolina, for the first-degree murder of Larry Dean Wallace, Jr., robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. Following a jury trial in Mecklenburg County Superior Court before Judge Robert T. Sumner, defendant was found guilty of all offenses. Judge Sumner sentenced defendant to life without parole for first-degree murder, together with a consecutive sentence of 38-55 months for conspiracy, and arrested judgment on the charge of robbery with a dangerous weapon. The judgment included an order for restitution of \$113,140.52 to be paid to Mr. Wallace's wife.

Defendant appealed to this Court, which filed its opinion on 19 August 2014, in *State v. McPhail*, \_\_ N.C. App. \_\_, 764 S.E.2d 699 (2014) (2014 N.C. App. LEXIS 903) (unpublished) (*McPhail I*), *disc. review denied*, 367 N.C. 811, 767 S.E.2d 533 (2015). In *McPhail I*, we found no error in defendant's convictions, but remanded "for the entry of a new judgment containing a properly calculated restitution award." On 4 September 2014, a new hearing on restitution was held before Judge Beecher R. Gray, and a new restitution order was imposed in the same amount. Defendant appealed to this Court, and on 5 May 2015, we filed an opinion in *State v. McPhail*,

STATE V. MCPHAIL

*Opinion of the Court*

\_\_ N.C. App. \_\_, 772 S.E.2d 876 (2015) (2015 N.C. App. LEXIS 351) (unpublished)

(*McPhail II*), holding that the court did not have jurisdiction to enter judgment:

“An appeal removes a case from the trial court which is thereafter without jurisdiction to proceed on the matter until the case is returned by mandate of the appellate court.” Under Rule 32(b), this Court’s mandate in *McPhail I* issued on 8 September 2014, which was 20 days after the opinion filing date of 19 August 2014. The trial court held the restitution hearing and entered its new judgment on 4 September 2014, before its jurisdiction was restored.

*McPhail II*, \_\_ N.C. App. at \_\_, 772 S.E.2d 876 at \*2 (quoting *Woodard v. Local Governmental Employees’ Retirement Sys.*, 110 N.C. App. 83, 85, 428 S.E.2d 849, 850 (1993)). In *McPhail II*, we vacated the order and remanded to the trial court for a new restitution hearing.

On 28 May 2015, the trial court conducted a new hearing to determine restitution. Courtney Wallace testified that she was the widow of Mr. Wallace, the victim in defendant’s first-degree murder conviction, and that she had incurred expenses for the medical treatment of Mr. Wallace’s gunshot wounds prior to his death from these injuries, and for funeral expenses. Documentary evidence was admitted without objection, establishing the amount of these bills. On 28 May 2015, the trial court entered judgment using Administrative Office of the Courts Forms AOC-CR-601 and 611. The trial court resentenced defendant to life in prison without parole *nunc pro tunc* 17 April 2013, and ordered restitution in the amount of

\$113,140.52 as a civil lien against defendant. The judgment form names Courtney Wallace in the section provided for “victim information.”

Defendant appealed to this Court.

## II. Validity of Restitution Order

On appeal, defendant does not challenge the amount of restitution ordered, or the sufficiency of the evidence offered to support the restitution order. In his sole argument on appeal, defendant contends that “the trial court’s order that restitution be paid to [Mrs. Wallace] must be vacated, as no evidence showed she was the personal representative of [Mr. Wallace’s] estate.” We disagree.

N.C. Gen. Stat. § 15A-834 (2013) states that “[a] victim has the right to receive restitution as ordered by the court pursuant to Article 81C of Chapter 15A of the General Statutes.” N.C. Gen. Stat. § 15A-1340.34(b) (2013) requires that when a trial court sentences a defendant “for an offense for which the victim is entitled to restitution . . . the court shall, in addition to any penalty authorized by law, require that the defendant make restitution to the victim or the victim’s estate for any injuries or damages arising directly and proximately out of the offense committed by the defendant.” N.C. Gen. Stat. § 15A-830(a)(7)a. (2013) defines a “victim” as “[a] person against whom there is probable cause to believe one of the following crimes was committed: A Class A, B1, B2, C, D, or E felony.” In this case the victim was Mr. Wallace. N.C. Gen. Stat. § 15A-830(b) (2013) provides in pertinent part that:

STATE V. MCPHAIL

*Opinion of the Court*

If the victim is deceased, then the next of kin, in the order set forth in the definition contained in this section, is entitled to the victim's rights under this Article. However, the right [to restitution] contained in G.S. 15A-834 may only be exercised by the personal representative of the victim's estate. . . .

N.C. Gen. Stat. § 15A-830(a)(6) defines "next of kin" in relevant part to include "[t]he victim's spouse[.]" In this case, defendant does not dispute that Mr. Wallace was the victim, that he is deceased, that Mrs. Wallace is his next of kin, or that Mrs. Wallace, as Mr. Wallace's widow and next of kin, was competent to testify and to offer evidence as to the expenses incurred as a result of defendant's murder of Mr. Wallace. Nor does defendant challenge the amount of restitution ordered. Defendant's sole challenge to the order for restitution is based on the statutory language providing that "the right contained in G.S. 15A-834 may only be exercised by the personal representative of the victim's estate." Defendant contends that, in order to obtain an order for restitution, the State was required, in addition to offering evidence of the amount of restitution owed, to elicit testimony from the personal representative of the estate of the deceased victim. We do not agree.

N.C. Gen. Stat. § 28A-13-3(a) (2013) provides that the personal representative of an estate "has the power to perform in a reasonable and prudent manner every act which a reasonable and prudent person would perform . . . to accomplish the desired result of settling and distributing the decedent's estate in a safe, orderly, accurate and expeditious manner as provided by law[.]" N.C. Gen. Stat. § 28A-13-3(a)(3)

STATE V. MCPHAIL

*Opinion of the Court*

specifies that this includes the power to “receive assets from other fiduciaries or other sources.” We conclude that, even if it were not specified in the text of N.C. Gen. Stat. § 15A-830(b), the personal representative of an estate would nonetheless have the power to “receive [the] assets” available to the estate pursuant to an order for restitution. As a result, the language in N.C. Gen. Stat. § 15A-830(b), stating that the right to obtain restitution on behalf of a deceased victim “may only be exercised by the personal representative of the victim’s estate,” is simply a recognition of the fact that when a victim is deceased a claim for restitution must be made in accordance with the statutes that govern the administration of estates.

We further conclude that the entry of an order for restitution setting the amount of restitution owed and establishing a lien on defendant’s assets and property does not constitute an “exercise” of the right to obtain restitution. “The plain and ordinary meaning of ‘exercise’ is [t]o make use of [or] to put into action.’ Black’s Law Dictionary 654 (9th ed. 2009).” *In re M.I.W.*, 365 N.C. 374, 379, 722 S.E.2d 469, 473, *rehearing denied*, 365 N.C. 568, 724 S.E.2d 512 (2012). In this case, there is no evidence in the record regarding the administration of Mr. Wallace’s estate, if an estate was administered at all. In fact, at the time that restitution was ordered, there may have been no personal representative for the estate of Mr. Wallace. If, however, defendant makes restitution, the personal representative of the estate of Mr. Wallace may qualify as such at that time and duly exercise the powers of a personal

STATE V. MCPHAIL

*Opinion of the Court*

representative. Regardless, such a circumstance would not change the fact that Mrs. Wallace was qualified to offer admissible testimony as to the amount of restitution, in order to enable the trial court to enter a valid order for restitution. Inasmuch as defendant's only challenge to the restitution order was based on the statutory language referring to the personal representative of an estate, we conclude that defendant has failed to establish that he is entitled to relief.

For the reasons discussed above, we conclude that the trial court did not err in its order for restitution, and that there was no error in the judgment entered against defendant.

NO ERROR.

Judges BRYANT and DILLON concur.

Report per Rule 30(e).