

FILED: December 05, 2012

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

CINDY JEAN BECKHAM,
Defendant-Appellant.

Washington County Circuit Court
D100380M

A145541

Gayle Ann Nachtigal, Judge.

Submitted on January 31, 2012.

Peter Gartlan, Chief Defender, and Morgen E. Daniels, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

John R. Kroger, Attorney General, Mary H. Williams, Solicitor General, and Doug M. Petrina, Senior Assistant Attorney General, filed the brief for respondent.

Before Armstrong, Presiding Judge, and Haselton, Chief Judge, and Duncan, Judge.

ARMSTRONG, P. J.

Supplemental judgment vacated and remanded; otherwise affirmed.

1 ARMSTRONG, P. J.

2 Defendant was convicted of one count of fourth-degree assault constituting
3 domestic violence, a Class A misdemeanor. ORS 163.160. On appeal, she challenges a
4 supplemental judgment of restitution entered 104 days after her judgment of conviction.¹
5 Defendant contends that the court erred in imposing restitution because (1) the
6 supplemental judgment was entered after the 90-day period allowed under ORS
7 137.106(1)(b), and the court did not find good cause for extending that time, and (2) the
8 record lacks evidence to support the amount of restitution imposed. The state concedes
9 that the trial court erred in its imposition of restitution; we agree and accept that
10 concession. Thus, the only issue on appeal is the proper disposition of the case.
11 Defendant urges us to reverse the supplemental judgment outright;² the state, on the other
12 hand, argues that the proper remedy is to "vacate the supplemental judgment and remand
13 for a hearing for the trial court to determine whether good cause existed to extend the

¹ Although defendant also appealed her judgment of conviction, she does not raise any assignment of error pertaining to it; accordingly, we affirm that judgment.

² Defendant uses the term "vacate"; however, that disposition generally indicates that the court is free to impose the same ruling on remand, a result defendant opposes here. See Bryan A. Garner, *A Dictionary of Modern Legal Usage* 632 (2d ed 1995) ("Vacate" is "used to denote an appellate court's wiping clean the judgment slate. The effect is to nullify the previous decision, usually of a lower court, but not necessarily to dictate a contrary result in further proceedings."). Although, admittedly, our cases are not entirely consistent on this point, compare *State v. Biscotti*, 219 Or App 296, 182 P3d 269 (2008) (vacating supplemental judgment of restitution where court erred in determining that there was good cause to extend the time for determining restitution), with *State v. Murrell*, 242 Or App 178, 255 P3d 574 (2011) (reversing award of restitution under similar circumstances), "reverse" is the more appropriate terminology where, as here, a party seeks to overturn the judgment outright.

1 restitution determination and, if so, the amount of economic damages." We agree with
2 the state.

3 The relevant facts are few and undisputed. On April 2, 2010, defendant
4 was convicted, after a bench trial, of fourth-degree assault constituting domestic violence.
5 Sentencing took place immediately after trial. At sentencing, the prosecutor asked the
6 court to impose \$299 in restitution for damage to the victim's property (a model car and
7 camera). Defendant asked for documentation. The trial court responded that it would
8 "set a restitution hearing in 90 days" to resolve the matter if the parties were unable to
9 come to agreement in the meantime. The court then set the restitution hearing for July 1,
10 2010.

11 The court entered the judgment of conviction and sentence on April 14,
12 2010. Then, although the restitution hearing scheduled for July 1 never occurred,³ on
13 July 27, 2010, the trial court nonetheless entered a supplemental judgment imposing
14 restitution in the amount of \$358.95. This appeal followed.

15 We review sentencing decisions, including restitution awards, for legal
16 error. *State v. Noble*, 231 Or App 185, 189, 217 P3d 1130 (2009); *State v. Ferrara*, 218
17 Or App 57, 67-68, 178 P3d 250, *rev den*, 344 Or 539 (2008). ORS 137.106 provides, as
18 relevant:

³ The only indication in the record as to why the restitution hearing did not take place as scheduled is the notation, "CANCELLED PER DA PHONE CALL," that appears in the trial court's OJIN register.

1 "(1) When a person is convicted of a crime, or a violation as
2 described in ORS 153.008, that has resulted in economic damages, the
3 district attorney shall investigate and present to the court, prior to the time
4 of sentencing, evidence of the nature and amount of the damages. If the
5 court finds from the evidence presented that a victim suffered economic
6 damages, in addition to any other sanction it may impose, the court shall
7 include one of the following in the judgment:

8 " * * * * *

9 "(b) A requirement that the defendant pay the victim restitution, and
10 that the specific amount of restitution will be established by a supplemental
11 judgment based upon a determination made by the court within 90 days of
12 entry of the judgment. In the supplemental judgment, the court shall
13 establish a specific amount of restitution that equals the full amount of the
14 victim's economic damages as determined by the court. The court may
15 extend the time within which the determination and supplemental judgment
16 may be completed for good cause. * * * "

17 In this case, the trial court determined the amount of restitution, without a hearing or
18 evidence as to the amount of damages, and entered a supplemental judgment imposing
19 that obligation 104 days after entry of the original judgment.⁴ Thus, as the state
20 concedes, and we agree, the trial court erred.⁵

⁴ We also observe that, contrary to the recitals in the supplemental judgment prepared by the district attorney's office, the original judgment did *not* include "[a] requirement that the defendant pay the victim restitution," the specific amount to be established by supplemental judgment, as required by ORS 137.106(1)(b). Although the money award in the original judgment contained a line item for restitution, that item was left blank, as was a "check the box" option indicating that the amount was "to be determined." Defendant does not raise any issue with respect to that deficiency, and, given that our disposition of this appeal requires a remand, we leave it to the trial court to consider on remand the consequences of that omission.

⁵ As the state also acknowledges, preservation principles are inapposite in this circumstance, because nothing in the record indicates that defendant had notice of, or a prior opportunity to object to, the trial court's restitution ruling before the court entered the supplemental judgment. *See State v. DeCamp*, 158 Or App 238, 241, 973 P2d 922 (1999) ("A party cannot be required to raise an objection contemporaneously with a trial

1 Consequently, as noted, the only question presented by this appeal concerns
2 the proper disposition of the case. The state contends that remand is appropriate "to
3 determine whether the trial court has authority to impose restitution in a supplemental
4 judgment and, if so, the proper amount." In particular, the state asserts:

5 "At the hearing, the state can make a record to establish that 'good cause'
6 existed to impose restitution outside the 90-day window. For example, the
7 state can make a record whether it provided defendant with the restitution
8 documentation, and defendant manifested her agreement or acquiescence in
9 the state's proposed amount, or whether the state provided defendant with
10 notice of the proposed supplemental judgment, and defendant failed to
11 object. At the hearing, the state can also make a record that establishes the
12 proper amount of restitution--either by establishing the precise amount of
13 economic damages or by establishing that defendant expressly or implicitly
14 agreed to the state's proposed amount."

15 The state initially relies primarily on *State v. Tippetts*, 239 Or App 429, 433, 244 P3d 891
16 (2010), as support for its position.

17 In *Tippetts*, the state conceded that the trial court had plainly erred in
18 imposing restitution in the absence of evidence that the victims had suffered economic
19 damages, and, as in the present case, the only dispute was over the appropriate
20 disposition. The state urged us to remand for resentencing, at which time the state could
21 present its evidence. The defendant argued against a remand, "so that the state does not
22 have a second opportunity to present evidence of economic damages." *Id.* at 431. We
23 agreed with the state, concluding that the defendant's position was "inconsistent with a
24 long line of restitution cases," beginning with *State v. Edson*, 329 Or 127, 985 P2d 1253

court's ruling or other action when the party was not on notice of the trial court's intended action and had no opportunity to be present when the trial court acted.").

1 (1999), in which the Supreme Court interpreted ORS 138.222(5)⁶ to require remand of
2 the entire case for resentencing "so long as there 'remain options that the trial court
3 permissibly could adopt on resentencing.'" *Tippetts*, 239 Or App at 432 (quoting *Edson*,
4 329 Or at 139). In arriving at that conclusion, we distinguished *State v. Canady*, 225 Or
5 App 299, 201 P3d 225 (2009), and *State v. Biscotti*, 219 Or App 296, 182 P3d 269
6 (2008)--restitution cases in which we did *not* remand for resentencing--because, in each
7 of those cases, we held, as a matter of law, that good cause did not exist to extend the
8 time to determine restitution under ORS 137.106(1)(b), and the trial court had erred in
9 concluding otherwise.⁷ Therefore, in those cases, "there was nothing to resentence: the
10 sentencing court no longer had statutory authority to impose restitution and so, in the
11 words of *Edson*, there were no 'options that the trial court permissibly could adopt on
12 resentencing[.]'" *Tippetts*, 239 Or App at 433 (brackets in *Tippetts*).⁸

⁶ At the time *Edson* was decided, the relevant portion of ORS 138.222(5) (1997) provided:

"If the appellate court determines that the sentencing court, in imposing a sentence in the case, committed an error that requires resentencing, the appellate court shall remand the entire case for resentencing. The sentencing court may impose a new sentence for any conviction in the remanded case."

The identical text now appears in the third and fourth sentences of ORS 138.222(5)(a); paragraph (b) of subsection (5) was added in 2005. *See* 2005 Or Laws, ch 563, § 1.

⁷ We further noted that, in *Tippetts*, unlike in *Canady* and *Biscotti*, the claim of error was unpreserved; thus, the state had been deprived of the opportunity to present additional evidence of damages at the time. *Tippetts*, 239 Or App at 434 n 3 ("Defendant should not *benefit* from his failure to object in the trial court[.]" (Emphasis in original)).

⁸ Our ultimate resolution in *State v. McLaughlin*, 243 Or App 214, 258 P3d 1241

1 Here, the state points out that "the trial court did not hold a restitution
2 hearing, and whether that court has authority to impose restitution depends on facts that
3 appear outside the record"; thus, as in *Tippetts*, we should remand for the court to make
4 that determination. In other words, as we understand the state's argument, the court may
5 or may not have had the authority to impose the restitution award that it did, depending
6 on whether the salient facts--which are unknown given the court's failure to hold a
7 hearing--support a conclusion that there was good cause to extend the time to determine
8 restitution.

9 The state's reliance on *Tippetts*, however, is misplaced. That line of cases,
10 beginning with *Edson*, provides little guidance in this context because the statute on
11 which those cases are predicated--ORS 138.222--applies only in felony sentencing. *See*
12 *State v. Cloutier*, 351 Or 68, 91, 251 P3d 1234 (2011) (confirming that, since the
13 enactment of the sentencing guidelines in 1989, ORS 138.222 governs appeal and review
14 of sentences imposed for felonies; ORS 138.040 and ORS 138.050 govern with respect to
15 misdemeanor sentences); *Edson*, 329 Or at 136 (scope of appellate review and the

(*McLaughlin I*), disposition modified on recons, 244 Or App 691, 260 P3d 814 (2011)
(*McLaughlin II*), opinion withdrawn and original disposition adh'd to on recons, 247 Or
App 334, 269 P3d 104 (2011) (*McLaughlin III*), rev allowed, 352 Or 107 (2012), is
consistent with that reasoning. In *McLaughlin I*, we held that the trial court erred in
setting a restitution hearing and imposing restitution in the absence of the predicate
showing required under ORS 137.106(1). 243 Or App at 220-21. Ultimately, however,
we remanded the judgment rather than reversing it outright because, although restitution
was no longer an option in the case, the court had expressed a desire to have the
defendant compensate the victim, and the court could still impose a compensatory fine
that would be paid to the victim; thus, under ORS 138.222(5)(a), remand for resentencing
was required. *McLaughlin III*, 247 Or App at 337.

1 appellate court's disposition options following judgment of conviction on a felony
2 committed in 1994 governed by ORS 138.222). In *Edson*, the Supreme Court explained
3 that

4 "[t]he scope of an appellate court's review and the range of options
5 available to that court when it concludes that the trial court erred are
6 dictated by applicable statutes and generally are dependent on the type of
7 trial court decision under consideration."

8 329 Or at 136.

9 Here, defendant was convicted of a misdemeanor after a trial. Thus, ORS
10 138.040,⁹ rather than ORS 138.222, governs. That statute provides, in part:

11 "(1) The appellate court may review:

12 "* * * * *

13 "(b) Any disposition described under ORS 138.053^[10] as to whether
14 it:

15 "(A) Exceeds the maximum allowable by law; or

16 "(B) Is unconstitutionally cruel and unusual.

⁹ ORS 138.050 pertains to appeal and review of sentences for misdemeanor offenses following a plea of guilty or no contest and, thus, has no applicability here.

¹⁰ ORS 138.053, in turn, provides, as relevant:

"(1) A judgment * * * is subject to the appeal provisions and limitations on review under ORS 138.040 * * * if the disposition includes any of the following:

"(a) Imposition of a sentence on conviction."

Restitution is part of the sentence on conviction.

1 "(2) If the appellate court determines the disposition imposed
2 exceeds the maximum allowable by law or is unconstitutionally cruel and
3 unusual, *the appellate court shall direct the court from which the appeal is*
4 *taken to impose the disposition that should be imposed.*"

5 (Emphasis added.)

6 The state contends that subsection (2) "provides additional support for the
7 state's argument about the appropriate disposition" in this case.¹¹ However, the state does
8 not explain how that is so, and we do not understand the text emphasized above to
9 require, or even suggest, the result advanced by the state. Instead, the statute simply does
10 not address the question implicated here. In other words, "the disposition that should be
11 imposed" in this case could be (1) as the state suggests, an award of restitution, in an
12 amount determined by the trial court after a hearing on the evidence, if the trial court
13 determines on remand that there was good cause to extend the statutory 90-day period to
14 determine restitution; or (2), as defendant suggests, no award of restitution.

15 We turn to the underlying statute and the nature of the trial court's decision.

16 As we have previously emphasized, "there is nothing 'hortatory'" about ORS

¹¹ There is no dispute that an error in imposing restitution is a disposition that "exceeds the maximum allowable by law." This court has consistently held, in construing the identical text in ORS 138.050(1), that "'a disposition exceeds the maximum allowed by law if it is not imposed consistently with statutory requirements.'" *State v. Easton*, 204 Or App 1, 3, 126 P3d 1256, *rev den*, 340 Or 673 (2006) (quoting *State v. Stubbs*, 193 Or App 595, 606, 91 P3d 774 (2004)); *State v. Sumerlin*, 139 Or App 579, 582, 913 P2d 340 (1996) (same). *See also State v. Anderson*, 113 Or App 416, 420, 833 P2d 321 (1992) (restitution order exceeded the maximum allowable by law under ORS 138.050(1) where the state failed to present evidence to establish the appropriate amount of restitution or hold a hearing as required by ORS 137.106 (1991)). *Cf. Schantz v. Maass*, 114 Or App 167, 169, 834 P2d 508 (1992) (because restitution award is reviewable on direct appeal under ORS 138.040 and ORS 138.053, petitioner's failure to appeal his conviction bars post-conviction relief).

1 137.106(1)(b); rather, "[i]t plainly establishes a 90-day deadline for the issuance of a
2 supplemental judgment ordering restitution." *Biscotti*, 219 Or App at 300, 300-01. In
3 *Biscotti*, we noted that it was "obvious" from the 2003 amendments to the statute--which
4 enacted the 90-day deadline to replace the previous wording that simply required the
5 court to order "prompt payment of restitution whenever possible," ORS 137.106(4)
6 (2001)--"that the legislature wanted to ensure more timely restitution for crime
7 victims[.]" *Id.* at 303. Thus, timeliness is a significant consideration in the trial court's
8 determination of restitution. Allowing the court--at this late stage, that is, long after the
9 90-day period has expired--to reopen the record and determine whether, at the time that it
10 made its restitution award, good cause existed to extend the 90-day deadline, would
11 undermine that goal.

12 On the other hand, necessarily inherent in the notion of "prompt" restitution
13 for crime victims is the legislature's desire that victims ultimately be awarded the
14 restitution to which they are entitled. That intent is plainly evident from the text of the
15 statute. Under ORS 137.106(1), if the court finds that a victim suffered economic
16 damages, the court *must* order the defendant to pay the victim restitution in an amount
17 that "equals the full amount of the victim's economic damages as determined by the
18 court," unless the victim consents otherwise. That is the case whether restitution is
19 ordered at the time of sentencing, ORS 137.106(1)(a), or established by a supplemental
20 judgment within 90 days of the entry of the judgment of conviction, ORS 137.106(1)(b).
21 Reversing the supplemental judgment of restitution outright, without an opportunity for

1 the trial court to determine whether, at the time that the court made that determination,
2 good cause existed to extend the 90-day period, would frustrate that clear legislative goal.

3 In *State v. Landreth*, 246 Or App 376, 265 P3d 89 (2011), the trial court
4 held a restitution hearing 98 days after entry of the defendant's judgment of conviction,
5 and, upon the defendant's objection, concluded that good cause had been shown to extend
6 the 90-day deadline to determine restitution. On appeal, the defendant suggested that the
7 trial court lacked "authority to even consider the matter of restitution after the ninetieth
8 day beyond the date of the judgment because the court had not, at that point, made a
9 determination of 'good cause' to permit the issue to be decided after 90 days." *Id.* at 379.
10 We disagreed, holding that nothing in the text or context of ORS 137.106(1) precluded
11 the trial court from making the good-cause determination after the fact--that is, after the
12 expiration of the 90-day period. *Id.* at 380.¹² Thus, *Landreth*, although in a different
13 procedural posture from this case, suggests that ORS 137.106(1) does not preclude us
14 from directing the trial court to *now* decide whether there was good cause to extend the
15 90-day period and, if there was, to determine whether an award of restitution was proper.

16 Defendant does not point to any legal principle--statutory, constitutional, or
17 otherwise--that might compel a contrary conclusion, and we are not aware of any.
18 Defendant cites *State v. Johnson*, 242 Or App 279, 255 P3d 547, *rev den*, 350 Or 530
19 (2011), but that case is unavailing. In *Johnson*, the court entered an amended judgment

¹² We also concluded that the court did not err in finding good cause to extend the time, and, accordingly, affirmed the imposition of restitution. *Id.* at 381-82.

1 purporting to modify an erroneous term in an earlier judgment by providing that the
2 sentence in the case was to be served consecutively to one previously imposed. We held
3 that the court lacked authority to do that, either under ORS 138.083,¹³ because the
4 judgment did not contain any "erroneous term," or under the court's "inherent" authority.
5 242 Or App at 285-86. Consequently, we reversed the amended judgment and remanded
6 with instructions to reinstate the original judgment. Defendant argues that *Johnson*
7 stands for the proposition that, "[i]f a trial court modifies a sentence without authority,
8 the modification is void and the proper remedy is for this court simply to reverse the
9 judgment containing the modification." Here, however, we cannot say that the trial court
10 lacked authority to modify the sentence. That is, if there was good cause for the trial
11 court to extend the 90-day deadline to establish restitution (and the court thereafter found,
12 from evidence presented by the state, that the victim suffered economic damages), then
13 the court acted within its authority in entering the supplemental judgment; if there was
14 not, then the court lacked the necessary authority to do so. The problem is that, because
15 the trial court did not hold a hearing to determine the good-cause question, the issue of
16 the court's authority was never decided. *Cf. Biscotti*, 219 Or App at 304 (concluding that
17 the trial court lacked good cause to extend the deadline as a matter of law). Thus,
18 *Johnson* does not assist defendant.

¹³ ORS 138.083(1)(a) authorizes the sentencing court, irrespective of any notice of appeal after entry of a judgment of conviction, to modify the judgment and sentence "to correct any arithmetic or clerical errors or to delete or modify any erroneous term in the judgment."

1 We conclude that the appropriate disposition in this case is to vacate the
2 supplemental judgment and remand for the trial court to determine (1) whether the failure
3 to include a requirement of restitution in the original judgment precludes the court from
4 now awarding restitution, *see* ___ Or App at ___ n 4 (slip op at 3 n 4); (2) if not, whether,
5 at the time the court entered the supplemental judgment, there was good cause to extend
6 the restitution determination; and (3) if so, the amount of the victim's economic damages,
7 if any.

8 Supplemental judgment vacated and remanded; otherwise affirmed.