

**FILED**

**January 8, 2013**

**In the Office of the Clerk of Court  
WA State Court of Appeals, Division III**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

THEODORE N. SAROFF,

Appellant.

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No. 30375-6-III

UNPUBLISHED OPINION

Korsmo, C.J. — Theodore Saroff challenges the trial court’s decision to raise the amount he must pay each month towards his restitution obligation. We conclude the matter must be remanded for the court to clarify its exercise of discretion.

FACTS

Mr. Saroff pleaded guilty to four charges relating to his actions in defrauding companies that provided financing for his automobile sales business. The plea agreement to four counts spared him a prison sentence when the trial court agreed with the recommendation and exercised its discretion to sentence him as a first time offender. He was not required to spend any time in jail, but was ordered to make restitution in the sum

of \$269,393.11. He initially was directed to pay \$50 per month towards his legal financial obligations.

Three years after sentencing the amount owing in legal financial obligations had risen to \$356,408.89 including interest. The State moved to modify the monthly payment. Represented by private counsel, Mr. Saroff contested the motion. He filed an affidavit indicating that his family income was \$3,300 per month. He and his wife lived on a 40-acre parcel of land that he rented from his son for \$1,650. The property had belonged to him before it was sold in bankruptcy to the son.

The prosecutor argued that the defendant's expense affidavit included non-essential expenses and that the defendant was paying excessive rent. In response, defense counsel argued that rent for a two bedroom apartment in Spokane was about \$1,000.

Report of Proceedings (RP) at 9. The trial court recessed before returning and making the following comments:

The State's math would seem to indicate it would take 443 years for Mr. Saroff to pay back the funds he owes at \$50 a month. Even at \$1500 a month, as the State suggested, it is over fifteen years for Mr. Saroff to pay.

Well, the first point of discussion, it is clear to me that at \$50 a month, we are just never going to get anywhere. That is not to the benefit of Mr. Saroff, certainly not to the benefit of the victims. . . . I suspect that Mr. Saroff, given his age, sixty years old or so, and with the life span that he can expect from this point forward, it wouldn't surprise me if this is never paid off. But we have to make some diligent efforts I think to get this under control.

. . . Mr. Saroff has, frankly, a significant amount of expenses in discretionary income. . . .

. . . [C]ell phones aren't mandatory. Internet service . . . is not necessary . . . . Cable TV or satellite TV is nice, but it certainly is not mandatory . . . . [T]hinking should not be in the budget. There is not room for it.

. . . [H]e is paying \$1650 a month in rent to his son per month. Counsel, I am here to tell you that \$1650 per month for rent in Spokane, Washington, is a huge sum of money. Two people can live very comfortably in a very nice accommodation for a lot less than \$1650. How do I know that? I know that because I am a landlord. I have an apartment available that is available for \$540 per month that has been vacant for four months. It is very nice. There is \$1100 available right there in terms of reasonable rent. I happen to know that all those complexes in the building where I have my apartment are around the \$500 to \$550 range for two bedrooms, two baths on the South Hill of Spokane, Washington.

So it strikes me that there is a significant opportunity here for Mr. Saroff to pay much more than the \$50 per month that he is paying. . . . I will set his obligation at \$1250 per month starting October 2011.

RP at 20-23.

After the order entered, Mr. Saroff filed a motion for reconsideration. He argued that he also boarded dogs on the property and if he moved to an apartment he would have to give up his business and lose most of his income. No argument was held and the court denied reconsideration without an explanation. Mr. Saroff then appealed to this court.

#### ANALYSIS

Mr. Saroff argues that the trial court improperly injected personal knowledge into the proceedings by becoming a witness and abused its discretion by increasing the amount of his monthly payment to \$1,250. While we do not accept his arguments, we agree that the matter should be remanded for further explanation.

RCW 9.94A.753(2) permits the trial court to amend an offender's monthly restitution payment amount upon a report of "change in circumstances." A court's decision respecting the amount of restitution is reviewed for abuse of discretion. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007); *State v. Davison*, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). Similarly, a court's decision to modify the amount or terms of a restitution award under RCW 9.94A.753(4) is reviewed for abuse of discretion. *State v. Gray*, 174 Wn.2d 920, 931, 280 P.3d 1110 (2012); *State v. Burns*, 159 Wn. App. 74, 79, 244 P.3d 988 (2010). We believe the ability to modify the monthly payment amount under RCW 9.94A.753(2) is subject to the same discretion accorded trial courts acting under other sections of the same statute. Discretion is abused only when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Mr. Saroff argues that the trial court's comments regarding the judge's rental property on the South Hill constituted both improper judicial notice of facts in violation of ER 201 and also "testimony" from the judge contrary to ER 605. He relies on *Vandercook v. Reece*, 120 Wn. App. 647, 86 P.3d 206 (2004). There the trial judge in a bench trial used his memory to recall the substance of disputed testimony from an earlier dissolution trial involving the same parties. The parties had not prepared a transcript of the earlier trial. On appeal, this court concluded that the judge violated the strictures of

both ER 201 and ER 605. *Id.* at 651-52. The opinion in *Vandercook* does not reflect whether either side contested the judge's actions during the bench trial.

*Vandercook* does not control here because of significant differences between that decision and this case. First, a judge's memory of disputed factual testimony from an earlier case is different than a comment on the value of rental property in Spokane. Second, while the Rules of Evidence apply in bench trials, they do not apply in restitution hearings. ER 1101(c)(3); *State v. Kisor*, 68 Wn. App. 610, 620, 844 P.2d 1038 (1993). Third, the issue of error preservation was not discussed in *Vandercook* and it is unclear whether the issue was presented initially to the trial court. That fact is critical because arguments involving court rules generally cannot be raised for the first time on appeal. RAP 2.5(a).

Finally, in context, it is questionable whether the judge's comments about rental value were truly "testimony." Both the prosecutor, who argued the rent was excessive for Spokane, and defense counsel, who argued without evidence that \$1,000 was an appropriate rent for an apartment, addressed Spokane rental market prices. The trial judge appears to have been responding in kind with his own views on appropriate rental values. Moreover, when Mr. Saroff sought reconsideration, he did not respond with evidence of his own concerning market rental values. Instead, expressing a concern that the trial court thought he was living extravagantly, Mr. Saroff attempted to explain the

reason for the rent he was paying.

In short, it does not appear that any of the parties treated the judge's comments as testimony or evidence outside the record. However, whether or not this issue is properly before us, we need not reach it because we are unclear on the trial court's reasoning concerning the motion for reconsideration.

A court abuses its discretion when it acts without having a tenable reason for its decision. *Junker*, 79 Wn.2d at 26. Put another way, a court properly exercises its discretion when it has a tenable reason for doing what it did. *Id.*

The trial court had a tenable basis for raising the payment from \$50 to \$1,250. The circumstances had changed from the time of sentencing. The bankruptcy had been resolved and Mr. Saroff no longer was unemployed. The court considered Mr. Saroff's income and expenses, as required by the statute, and raised the amount to something that he could still afford after changing his lifestyle given his acknowledged income.<sup>1</sup> There was no abuse of discretion in granting the change.

It is less clear what the court's rationale was in denying the motion for reconsideration. While reconsideration typically is denied without explanation, the

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<sup>1</sup> We necessarily reject Mr. Saroff's argument that the court could not consider his age or the amount of restitution owing when setting the monthly payment. The purpose of the payment was to pay the restitution to the victims. The defendant's age was a necessary factor in the equation since restitution needed to be made in his lifetime.

argument presented here makes this typical approach problematic. Mr. Saroff essentially met the court's ruling by arguing that it was impractical because if he moved to a smaller and less expensive location, he would lose his business and most of his income, thus making the new amount impossible to pay. He presented evidence that he was renting the property for what essentially was his son's monthly mortgage payment.

The trial court was free to find this evidence unpersuasive, a decision this court could not countermand. *E.g., Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009). It was free to find that Mr. Saroff was not serious about meeting his restitution obligations and that the business was just a cover for permitting him to continue to live as he had lived before his convictions. *Id.* The court properly may have done either of these things, or something else altogether. However, in light of the evidence that the business would have to close if moving was required, thus dropping Mr. Saroff's family income below the level of the new monthly payment, it also is possible that the court accepted the information as truthful without considering the consequences of requiring Mr. Saroff to move to cheaper lodging. In the absence of an explanation of its reasoning, we cannot determine whether the trial court abused its discretion in denying the motion for reconsideration.

We remand this matter to the trial court for an explanation of its ruling. The court is free, although not required, to consider additional evidence or argument if it so desires.

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Remanded.

A majority of the panel has determined that this opinion will not be printed in the



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Washington Appellate Reports but it will be filed for public record pursuant to RCW

2.06.040.

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Korsmo, C.J.

WE CONCUR:

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Sweeney, J.

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Brown, J.