IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellant,

and

D.H.,

Intervenor-Appellant

v.

KYLE BRASHER,

Defendant-Appellee.

CASE NO. 2021-1060

On Appeal from the Butler County Court of Appeals, Twelfth Appellate District

Court of Appeals Case No. 2020-08-094

REPLY BRIEF OF APPELLANT STATE OF OHIO

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Appellant State of Ohio's Response to Appellee Brasher's Introduction and Statement of the Case and the Facts.

In his Introduction and Statement of the Case and the Facts Appellee Brasher raises five issues addressed by Appellant State of Ohio as follows:

A. "The trial court considered restitution at Mr. Brasher's original sentencing hearing." Merit Brief, p. 3.

Appellee Brasher submits the trial court's brief comments as to Brasher's appearance at sentencing with no restitution, nor any plan for restitution, followed by the court's expressed difficulty in determining a specific figure, indicated the trial court "expressly considered restitution then exercised its discretion not to award restitution…". Merit Brief, p. 3.

While it is certainly debatable whether the trial court's statement constitutes "express" consideration of restitution, neither R.C. 2929.18(A)(1) nor Marsy's Law requires mere "consideration".

It is true that R.C. 2929.18(A)(1), governing restitution and hearings, includes certain discretionary language:

> "*If the court imposes restitution*, at sentencing, the court shall determine the amount of restitution to be made by the offender. *If the court imposes restitution*, the court may base the amount of restitution it orders on an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information, … *If the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount.*
>
> * * * Emphasis added.

The State further notes that, interestingly enough, "the state" is not listed among those who may dispute the amount of restitution. *Id.*

As found by the Twelfth District in the related mandamus action:

> ...it is undisputed that relator is the victim of a crime and that she suffered economic loss from the offender through the commission of a criminal offense. Under the new provisions in Marsy's Law, there was a clear legal duty to provide for full and timely restitution. Ohio Constitution, Article I, Section 10a(A)(7).

State ex rel. Howery v. Powers, 12th Dist. Butler CA2019-03-045, 2020-Ohio-2767, ¶ 12.

As pointed out by the State in its Merit Brief (p. 7), Marsy's Law provides victim's with enumerated "rights" "which shall be protected in a manner no less vigorous than the rights afforded to the accused" including the right "to full and timely restitution from the person who committed the criminal offense * * *". Ohio Const. Art I, Section 10a, (A)(7). Marsy's Law further includes

> (E) All provisions of this section shall be self-executing and severable, and shall supersede all conflicting state laws. *Id.*

In comparing the now constitutional right "to full and timely restitution" to the seemingly discretionary elements of R.C. 2929.18(A)(1) it appears the Twelfth District has given voice to the constitutional right to restitution and "read out" the discretionary elements of R.C. 2929.18(A)(1). A trial court's "consideration" of restitution is not enough.

B. "The victim-intervenor did not attend the [sentencing] hearing, and the prosecutor expressly waived the right to comment. No one asserted rights under Marsy's Law." Merit Brief, p. 3.

There is no indication the victim attended the sentencing hearing. There is similarly no indication she was advised of the hearing, or of any necessity to be present, nor of any subpoena

for her presence. Brasher fails to point to any case or authority (particularly Marsy's Law) that predicates a victim's right to restitution on these acts.

The State disagrees "no one asserted rights under Marsy's Law." The victim asserted her rights when she made a claim for restitution, submitted documents in support of the claim, all of which was underscored by the trial court's spoken awareness and discussion of the claim. As previously noted by the state, the issue of "economic loss" to the victim was at issue from the beginning, with the state's August 30, 2018 response to Brasher's request for discovery including photographs of damage to the victim's vehicle, a receipt for a replacement key, and a repair estimate. Discovery Response, R.C.P. 7; State's Merit Brief, p. 4.

C. "There is no evidence Mr. Brasher personally knew of the writ D.H. filed, and he never waived his right to counsel at that critical stage." Merit Brief, p. 4.

The state agrees the record is devoid of any indication Brasher was aware of or participated in the mandamus action. Though in hindsight his joinder, permissive or otherwise, may have served an economy of resources and time, the gist of the mandamus action was the victim seeking to compel the trial court's compliance with Marsy's Law. The action was not the victim versus the defendant, it was not the state versus the defendant. Any rights of Brasher, constitutional or otherwise, were not implicated until he was brought back before the trial court in compliance with the Twelfth District's order in *Howery* to re-open sentencing.

D. "Mr. Brasher served his complete period of incarceration, reduced by less than 8% for earned credit pursuant to R.C. 2967.193." Merit Brief, p. 4.

As set forth in its Merit Brief, and infra, the state asserts this issue is non sequitor.

E. "After obtaining a writ without Mr. Brasher's participation, the victim-intervenor exercised the rights they could have exercised at Mr. Brasher's original sentencing hearing." "Merit Brief, p. 5.

The Twelfth District found the trial court's supplemental sentencing entry void as

"the trial court did not have authority to impose restitution after Brasher was released from prison following the completion of his 18-month prison sentence. *State v. Brasher*, 12th Dist. Butler No. CA2020-08-094, 2021-Ohio-1688 at ¶ 22. The victim's "exercise" of her rights at a proceeding ultimately determined to be void is the same as no exercise of her rights whatsoever.

ARGUMENT

Proposition of Law 1:

> Pursuant to Marsy's Law a trial court retains jurisdiction to correct previous proceedings as to restitution following a defendant's conviction and performance of his prison sentence; a trial court's post-completion-of-prison-sentence supplemental sentencing entry ordering restitution is not void.

1. **"This court should dismiss this case as improvidently allowed for want of a final appealable order."** Merit Brief, p. 7.

For the first time Brasher suggests that the trial court's Decision upon Mandamus Regarding Restitution and Supplemental Sentencing Entry of August 18, 2020 (the direct precursor to this appeal) is not a final appealable order. *Id.* The general rule is that questions not raised in either the trial court or the court of appeals will not be considered by this court. *See Village of Clarington v. Althar*, 122 Ohio St. 608, 174 N.E. 251 (1930); *City of Grandview Heights v. Redick*, 165 Ohio St. 326, 135 N.E.2d 267 (1956).

First, the trial court's supplemental sentencing entry was a final appealable order. R.C. 2505.02(B) outlines various types of final orders that may be reviewed. The order that applies is discussed in R.C. 2505.02(B)(1), which provides that:

> (B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:
>
> (1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment * * *.

In *Miller v. First Internatl. Fid. & Trust Bldg., Ltd.*, 113 Ohio St.3d 474, 2007-Ohio-2457, 866 N.E.2d 1059, this Court stressed that:

> To be final, however, "an order must also determine an action and prevent a judgment." *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 88, 541 N.E.2d 64, citing *Gen. Elec. Supply Co. v. Warden Elec., Inc.* (1988), 38 Ohio St.3d 378, 528 N.E.2d 195, syllabus; R.C. 2505.02(B)(1). "For an order to determine the action and prevent a judgment for the party appealing, it must dispose of the whole merits of the cause or some separate and distinct branch thereof and leave nothing for the determination of the court." *Hamilton Cty. Bd. Of Mental Retardation & Developmental Disabilities v. Professionals Guild of Ohio* (1989), 46 Ohio St.3d 147, 153, 545 N.E.2d 1260. See *State ex rel. Downs v. Panioto*, 107 Ohio St.3d 347, 2006-Ohio-8, 839 N.E.2d 911, ¶ 20.

Miller at ¶ 6.

Second, if there is any question as to the finality of the "order", the trial court's supplemental entry was in no way without subject matter or personal jurisdiction, not argued much less demonstrated by Brasher. There being no dispute as to jurisdiction, any defect in the entry was voidable, not void, and Brasher was required to pursue the issue on direct appeal (which he did not) or be barred by res judicata. See *State v. Henderson*, 161 Ohio St.3d 285, 2020-Ohio-4784, 162 N.E.3d 776:

> * * * sentences based on an error, including sentences in which a trial court fails to impose a statutorily mandated term, are voidable [not void] if the court imposing the sentence has jurisdiction over the case and the defendant.

Henderson at ¶ 1.

Third, while we are debating final appealable orders, the state reiterates the trial court's original sentencing entry did not address restitution whatsoever; inasmuch as restitution is a part of the sentence, the trial court's sentencing entry did not "dispose of the whole merits of the cause or some separate and distinct branch thereof and leave nothing for the determination of the court." *Miller*, supra, quoting *Hamilton Cty. Bd. of Mental Retardation & Developmental Disabilities v. Professionals Guild of Ohio* (1989), 46 Ohio St.3d 147, 153, 545 N.E.2d 1260. See *State v. Danison*, 2005-Ohio-781, 105 Ohio St. 3d 127, 127, 823 N.E.2d 444, at syllabus "[a]n order of restitution imposed by the sentencing court on an offender for a felony is part of the sentence and, as such, is a final and appealable order." See also *State v. Hartley*, 3d Dist. Union No. 14-09-42, 2010-Ohio-2018, ¶¶ 4-5 (a judgment entry on restitution that did not list any victims, did not describe how the restitution would be allocated among the victims, and did not incorporate any document providing this information is not a final appealable order, rendering the appellate court without jurisdiction to determine the appeal) and *State v. Kuhn*, 3d Dist. No. 4-05-23, 2006-Ohio-1145, ¶ 8 (finding that judgment entry failing to set forth a specific amount of restitution or method of payment was not a final appealable order).

2. "Finality of Judgment" Rule. Merit Brief, p. 9.

As to the continued argument as to Brasher having completed his prison sentence, and whether it was completed "substantially early" (Merit Brief, pp. 10) the state continues to submit that Brasher's completion of his *prison* sentence is non sequitor to the issue of the victim's now constitutional right to restitution.

There is nothing in the statutes, and particularly Marsy's Law, that conditions or relates the victim's right to recovery having to occur before the defendant is discharged from prison.

Brasher does not address the state's argument that the Twelfth District's reliance on *State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014 was misplaced (*Brasher* at ¶ 21, State's Merit

Brief at ¶ 9-11). The application of *Holdcroft* to a non-party victim is "apples to oranges", this Court holding at syllabus three:

> A trial court does not have the authority to resentence a defendant for the purpose of adding a term of postrelease control as a sanction *for a particular offense* after the defendant has already served the prison term *for that offense*. Emphasis added.

Similarly, Brasher does not address the state's assertion that the Twelfth District's reliance on a criminal defendant's non-constitutional interest in the finality of his judgment, over the now constitutional rights of a victim, ipso facto is contrary to the express language of Marsy's law that victim's rights "be protected in a manner no less vigorous than the rights afforded to the accused" including the right "to full and timely restitution from the person who committed the criminal offense * * *", and that Mary's Law is to "supersede all conflicting state laws." Ohio Const. Art I, Section 10a, (A), (A)(7), (E).

3. "A direct appeal is a form of a 'petition' under Marsy's Law". Merit Brief, p. 10.

The state cannot disagree with Brasher that the "simplest solution" may very well be to construe the victim's right to "petition" the court of appeals for redress be defined to include a direct appeal by the victim, citing in support *State ex rel. Thomas v. McGinty*, 164 Ohio St.3d 167, 2020-Ohio-5452, 172 N.E.3d 824. Merit Brief, p. 10. However, the "simplest solution" is not always the correct solution.

Brasher does not address (as raised in State's Merit Brief, pp. 15-16) the Court found in *Thomas* it "... need not determine what 'petition' means in the context of all the Marsy's Law rights under Section 10a(A) that a crime victim may seek to protect under Section 10a(B)" (*Id.*, at ¶ 42), this Court then "opining" "[t]hus, the undefined term 'petition' in Section 10a(B) is broad enough to encompass an original action or appellate review" (*Id.*, at ¶ 43).

The state submits a more appropriate construction of the terms would include a "petition"

is a request for relief, analogous to a complaint, whereas an "appeal" would connote a *party* to an action seeking redress in a higher court as to prejudicial error suffered in the inferior court. As set forth by the Eighth District:

> Since the passage of the constitutional amendment, the Ohio legislature has not passed legislation related to Marsy's Law to include victims among those entitled to appeal, nor has it passed a new statute extending appellate rights to victims or conferring party status on them. Marsy's Law provides that a victim, the state, or the victim's representative may "petition" the court of appeals if the relief the victim seeks under Marsy's Law is denied by the trial court. "Our duty is to construe the meaning of the plain language of the Constitution." *State ex rel. LetOhioVote.org v. Brunner*, 123 Ohio St.3d 322, 2009-Ohio-4900, 916 N.E.2d 462, ¶ 50. *Although Marsy's Law does not define the term "petition," we find that the law does not confer standing to an alleged victim in a criminal case to file an appeal. The right a victim may have to "petition" an appellate court is not equivalent to that of a party with a right to appeal.* See generally 18 U.S.C. 3771 (federal law provides that a victim of crime may "petition" for a writ of mandamus).

State v. Hughes, 8th Dist. Cuyahoga No. 107697, 2019-Ohio-1000, ¶ 16, 134 N.E.3d 710, 715, emphasis added.

Noting courts have a duty to construe constitutional provisions to avoid unreasonable or absurd results (citations omitted), the *Hughes*' court stated "[a]bsent specific legislation that extends the right to appeal to victims or confers party status on them" and then declined to expand the rights of victims to include full party status or the right to bring an appeal. *Id.*, ¶ 17.

After noting that giving "the victim a right to appeal in a criminal matter could result in extensive victim participation in the matter that might delay the criminal proceedings" (*Id.*, at ¶ 19), the *Hughes*' court concluded: "[i]n sum, we do not read Marsy's Law to mean that crime victims are to be deemed parties to the criminal prosecution of the perpetrator, nor do we read the law as demonstrating the voter's intent to have crime victims file appeals whenever they are dissatisfied with a judge's weighing of their interests.." *Id.*, ¶ 20.

Brasher similarly does not address that this Court cited *Hughes* at ¶ 16 in *State ex rel.*

Suwalski v. Peeler, Slip Opinion No. 2021-Ohio-4061 at ¶ 36:

> And the fact that a victim has the right to petition the court of appeals under Article I, Section 10a(B) of the Ohio Constitution does not make the victim a party or provide her standing on which to assert an appeal.

So, contrary to Brasher's assertion, the state is fairly convinced under current law and procedure a "petition" does not include a non-party appeal, and victims are not parties to the criminal action.

4. "Alternative: Victims can intervene for limited purpose". Merit Brief, p. 11.

The state is all for *any* method that will provide victims a means to effectuate their rights guaranteed by Marsy's Law. But as noted by Brasher any discretionary intervention has issues, including the delay inherent in any appeal of a trial court's denial of the intervention. Left unmentioned by Brasher are significant corollary issues, including:

a. When does the victim's right to intervene begin?

b. Who advises them of the right?

c. If, indigent, who provides them legal counsel?

d. As intervenor, do they call, question and cross-examine witnesses at any hearing?

Most importantly, however, the possibility of intervention does not help the instant victim in any way.

5. [B.] "Other solutions cause significant problems." Merit Brief, p. 12.

> **[1.] "Declaring sentences without restitution void or non-final would create confusing line drawing issues.** Merit Brief, p. 12.

The state does not believe requiring a trial court to comply with all components of felony sentencing, including restitution, in order to generate a final appealable order is a "confusing line drawing issue." Restitution is, now constitutionally, just as much a part of the sentence as any other component.

> **[2.] "The collateral challenge to the judgment in this case in this case is barred under R.C. 2953.21(K)."** Merit Brief, p. 12.

The state disagrees. R.C. 2953.21 governs petitions for postconviction relief (PCR).

Though it is true it states at (K) "the remedy set forth in this section is the exclusive remedy by which a *person* may bring a collateral challenge to the validity of a conviction or sentence in a criminal case" (emphasis added), any reasonable construction of "person" means a "person who has been convicted."

R.C. 2953.21(A) sets forth five classes of "a person" who may file a PCR petition. Each class begins with "[a]ny person who has been convicted…". Therefore victims do not meet the threshold requirements for filing a PCR petition.

> **[3.] "A writ is not an available remedy because the writ can have no preclusive effect on a criminal defendant absent an affirmative waiver of the right to counsel and to participate in the proceeding."** Merit Brief, p. 13.

Brasher's inclusion of this issue is confusing. It sounds as in a further appeal of the Twelfth District's decision in *Howery* granting the writ, yet there was no appeal of that decision (and from Brasher's perspective, that is understandable inasmuch as he was not a party to that case).

This issue was not raised or decided in the courts below. There is no cross-appeal, no cross-assignments of error addressing this issue. There is no reason to consider it now.

6. [C.] "A writ does not lie in this case because the trial court did not have a clear legal duty to impose restitution." Merit Brief, p. 16.

Again, the state submits this issue is not properly before the court. Brasher is collaterally attacking the Twelfth District's decision in *Howery*, issued May 4, 2020, in which the court specifically held the trial court had a clear legal duty to comply with Marsy's Law, not a duty to impose restitution, as now construed by Brasher.

Brasher argues "the state and the victim-intervenor forfeited the right to make a constitutional challenge" and "a non-constitutional objection to a sentence does not preserve a constitutional claim." Merit Brief, p. 17 citing *State v. Awan*, 22 Ohio St.3d 120, 123, 489 N.E.2d 277 (1986) and *State v. Davis*, 116 Ohio St.3d 4040, 2008-Ohio-2, 880 N.E.2d 31, ¶37, respectively.

Brasher has offered no authority as to how the principles of forfeiture and/or waiver can be made applicable to a *non-party victim*. The State can find none. " 'A waiver is a voluntary relinquishment of a known right.' " *White Co. v. Canton Transp. Co.*, 131 Ohio St. 190, 198, 2 N.E.2d 501 (1936), quoting *List & Son Co. v. Chase*, 80 Ohio St. 42, 49, 88 N.E. 120 (1909). A party may waive a right by express words or by conduct that is inconsistent with that right. See *id.* However, *** "[m]ere silence will not amount to waiver where one is not bound to speak." *Id.* To establish waiver, the party seeking waiver must demonstrate (1) that the party knew of its right to assert an argument or defense and (2) that the totality of the circumstances establish that the party acted inconsistently with that right. See, e.g., *Donnell v. Parkcliffe Alzheimer's Community*, 6th Dist. Wood No. WD-17-001, 2017-Ohio-7982, 2017 WL 4329776, ¶ 21; *Atkinson v. Dick Masheter Leasing II, Inc.*, 10th Dist. Franklin No. 01AP-1016, 2002-Ohio-4299, 2002 WL 1934743, ¶ 20.

Issues to be Addressed

If possible within the confines of this case, or by legislative action or modification of the applicable procedural rules, the following, sooner or later, must be addressed:

A. Does the trial court retain the discretionary elements of R.C. 2929.18(A)(1) ("if the court decides to impose restitution...")? E.g., is it at least a two-step process, the court first determining to impose restitution, then turning to the applicable provisions of the statute and Marsy's Law?

B. Does the absence of an agreement as to restitution (particularly in the absence of the victim from the sentencing hearing, as in the present case) equate to a "dispute" as to restitution requiring a hearing pursuant to R.C. 2929.18(A)(1)?

C. What is sufficient to constitute a victim making a "claim" for restitution?

D. Should it be required that a criminal defendant be made a party to any "petition" in the court of appeals by a victim seeking relief under Marsy's Law?

E. Whether it be by intervention in the case, or a right to appeal by the victim, who provides notice of the right, notice of a final appealable order, who pays the victim's legal fees, and what of indigent victims?

CONCLUSION

The Appellant State of Ohio therefore continues to respectfully request the following:

A. That this Court accept the state's proposition of law, or modify it to the extent as justice and the law requires;

B. In conjunction therewith or in the alternative, this Court determine Brasher's Judgment of Conviction, entered without compliance with statutory and constitutional mandates, was not a final appealable order, and that this case be remanded for entry of a "complete" sentence, including compliance with the applicable statutes and Marsy's Law;

C. That this Court determine Marsy's Law requirement that the victim's rights, including restitution, *"shall be protected in a manner no less vigorous than the rights afforded to the accused"* supersedes a defendant's interest, if any, in the finality of his judgment;

D. Appreciating this Court does not render advisory opinions, if the ultimate conclusion is, pursuant to *State v. Henderson*, 2020-Ohio-4784 and its antecedents, that sentences based on an error, including the failure to comply with statutory, and now constitutional rights of victims, renders the sentence voidable, not void, and in the absence of a timely direct appeal the judgment stands, let it be said now, with the message, express or implied, to the powers that be, including the legislature and rule-making authorities, that regardless of the well-meant intentions of

Marsy's Law further action is necessary to afford victims meaningful rights and redress; and

E. For such relief as deemed proper by the Court in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Reply Brief of Appellant State of Ohio was served upon the following by electronic transmission this 29th day of March, 2022:

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