

IN THE SUPREME COURT

STATE OF ARIZONA

STATE OF ARIZONA,

Appellant,

vs.

VIVEK A. PATEL,

Appellee.

) Arizona Supreme Court
) No. CR-19-0366-PR
)
) Court of Appeals Division One
) No. CA-CR 18-0774
)
) Maricopa County Superior Court
) No. LC2018-000192
)
) Phoenix Municipal Court
) Complaint No. 14483182
)

**STATE'S RESPONSE TO PETITION FOR REVIEW OF A DECISION OF
THE COURT OF APPEALS**

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I. Issue presented for review

The Phoenix Municipal Court determined that the restitution cap contained in Arizona Revised Statutes § 28-672(G) violated the Victims' Bill of Rights contained in the Arizona Constitution. The trial court awarded the victim in Patel's case approximately \$61,000 in restitution. After the superior court found the cap constitutional and overturned the award based upon the statute, the court of appeals correctly determined that a victim is entitled to collect full restitution for damages caused by a criminal defendant and reinstated the trial court's restitution award. Therefore, this Court should deny Patel's Petition for Review.

II. Material Facts

These charges stemmed from a collision where Appellant turned his vehicle into the path of a motorcycle carrying the victim. Appendix item 1; Record Transcript (June 20, 2017), page 32, line 11–15 (hereinafter RT (_____, 20__), p. __, ll. __); Court of Appeals Record on Appeal (ROA) item 8. The State charged Appellant with causing a collision that resulted in serious injury or death (in violation of A.R.S. § 28-672(A)) and failing to yield while turning left (in violation of A.R.S. § 28-772).

On June 20, 2017, the trial court held a nonjury trial. The victim testified he was severely injured in the collision. *Id.*, p. 114, ll. 3–5. The trial court found Appellant guilty of A.R.S. § 28-672(A) and responsible for A.R.S.

§ 28-772, concluding that he had an obligation to yield to oncoming traffic, that he failed to do so, and that the victim was seriously injured as a result. *Id.*, p. 210, ll. 18–25 through p. 211, ll. 7.

At the restitution hearing, the victim testified that he was severely injured in the collision and that he accumulated substantial debts because of his injuries. Appendix item 2; RT (November 6, 2017), p. 22, ll. 2–23; ROA item 9. His out of pocket portion of those expenses amounted to \$61,191.99. *Id.*, p. 37, ll. 10–19. The trial court ordered Appellant to pay restitution to the victim in the amount of \$61,191.99 agreeing with the State that the cap contained in A.R.S. § 28-672(G) was unconstitutional. *Id.*, p. 51, ll. 16–20.

III. Reasons why this Court should deny review.

A. The monetary cap on restitution in A.R.S. § 28-672(G) violates the Arizona Constitution.

Article II, Sec. 2.1(A)(8) of the Arizona Constitution’s Victims’ Bill of Rights (VBR) provides victims with the right “to receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim’s loss or injury.” “A defendant's restitution obligation is actually created by the VBR. . . .” *State v. Cota*, 234 Ariz. 180, 184, ¶ 12, 319 P.3d 242, 246 (App. 2014).

“The objectives of mandatory restitution are both reparative and rehabilitative in nature: to make the victim whole, and to make the offender

recognize the specific consequences of his criminal activity and accept responsibility for those consequences.” *State v. Freeman*, 174 Ariz. 303, 306, 848 P.2d 882, 885 (App. 1993) (internal citations and quotation marks omitted).

Under A.R.S. § 13-804(A) “[o]n a defendant’s conviction for an offense causing economic loss to any person, the court. . . may order that all or any portion of the fine imposed be allocated as restitution to be paid by the defendant to any person who suffered economic loss caused by the defendant’s conduct.” Subsection 13-804(B) also specifies that “[i]n ordering restitution for economic loss pursuant to § 13-603, subsection C or subsection A of this section, the court shall consider all losses caused by the criminal offense...” “Section 13-804 does not apply to traffic offenses, except for a violation of § 28-661, 28-662, 28-693, 28-1381, 28-1382, or 28-1383 or any local ordinance relating to the same subject matter of such sections.” A.R.S. § 13-809(B).

While A.R.S. § 13-809(B) specifies that “Section 13-804 does not apply to traffic offenses”—it says nothing about the applicability of section 13-603. Subsection 13-603(C) addresses a defendant’s obligation to pay restitution a victim of the crime. Under A.R.S. § 13-603(C) “the court shall require the convicted person to make restitution to the person who is the victim of the crime. . . in the full amount of economic loss. . . .”

...

The court of appeals was correct when it determined that because A.R.S. § 13-603(C) was in effect at the time that the VBR was enacted and that the subsection requires restitution in the full amount of economic loss, “had the voters wished to restrict or otherwise distinguish rights to restitution under the VBR from those under existing criminal statutes, such as § 13-603(C), they would have done so.” *Op.* at ¶ 8.

The Legislature specified in subsection 28-672(G) that restitution should be ordered pursuant to A.R.S. § 13-603. However, the Legislature also capped the amount of restitution at the time of Patel’s conviction, to \$10,000. This cap directly conflicts with the legislature’s own directive that victims receive restitution for their full economic loss.

In *State v. Madrid*, 207 Ariz. 296, 85 P.3d 1054 (App. 2004), the court of appeals discussed the legislature’s enactment of the Victims’ Rights Implantation Act of 1991 and the VBR. The court noted that the Act “enumerated various victims’ rights and included a statement of legislative intent emphasizing that the constitutional rights of “innocent persons [who] suffer economic loss” should be fully protected.” *Madrid*, 207 Ariz. at 299, ¶ 7, 85 P.3d at 1057.

“Moreover, the Victims’ Bill of Rights and its implementing legislation are ‘liberally construed to preserve and protect the rights to which victims are entitled.’ ” *State ex rel. Smith v. Reeves*, 226 Ariz. 419, 422, ¶¶ 12–13,

250 P.3d 196, 199 (App. 2011). Limiting restitution that victims are otherwise entitled to receive denies victims their constitutional right to receive restitution.

Such an exercise neither protects nor preserves rights enumerated to victims. Rather, limiting restitution does exactly the opposite—narrowing a class of victims—those victims of A.R.S. § 28-672. This is contrary to the “legislative and constitutional intent to promote restitution to victims.” *State v. Zaputil*, 220 Ariz. 425, 429, ¶ 15, 207 P.3d 678, 682 (App. 2008).

Arizona has a long-standing history that a victim must be made whole for economic losses. *See In re William L.*, 211 Ariz. 236, 239, ¶ 12, 119 P.3d 1039, 1042 (App. 2005) (“To ensure that the victim is made whole, the court has broad discretion in setting the restitution amount based on the facts of the case.”); *In re Ryan A.*, 202 Ariz. 19, 24, ¶ 20, 39 P.3d 543, 548 (App. 2002) (“Furthermore, the trial court has discretion to set the restitution amount according to the facts of the case in order to make the victim whole.”).

As explained by this Court in *Town of Gilbert Prosecutor's Office v. Downie ex rel. County of Maricopa (Matykiewicz, Real Party in Interest)*, 218 Ariz. 466, 189 P.3d 393 (2008), “Arizona's criminal code implements this constitutional guarantee by requiring ‘the convicted person to make restitution to ... the victim of the crime ... in the full amount of the [victim's] economic loss.’ ” *Id.*, 218 Ariz. at 468, ¶ 7, 189 P.3d at 395 (alterations in original). The court of appeals rejected the

proposition that a restitution cap “would mean that a class of victims who suffered a severe harm would not be entitled to restitution.” *Op.* at ¶ 9.

In *State v. Zaputil*, the court of appeals said, “In Arizona, crime victims have a constitutional right to restitution from the person convicted of the criminal conduct that caused the victim’s loss. If a person is convicted of an offense, the court shall require the convicted person to make restitution...in the full amount of economic loss as determined by the court...” *Id.*, 220 Ariz. at 428, ¶ 10, 207 P.3d at 681 (internal citations omitted, alternations in original).

In fact, courts have consistently held that the purpose of restitution is to make the victim whole. *See State v. Zierden*, 171 Ariz. 44, 45, 828 P.2d 180, 181 (1992) (“The trial court has the affirmative duty to require a defendant convicted of a crime to make full restitution for the economic loss sustained by the victim.”); *Cota*, 234 Ariz. at 184, ¶ 10, 319 P.3d at 246 (“In this way, the provision serves the broader goal of restitution, which is to make victims whole for economic losses they suffer from crimes.”); *Lindsay R. v. Cohen*, 236 Ariz. 565, 567, ¶ 9, 343 P.3d 435, 437 (App. 2015) (Restitution is intended not only to make victims whole, but also to rehabilitate defendants... .”); *State v. Wilson*, 185 Ariz. 254, 260, 914 P.2d 1346, 1352 (App. 1995) (The trial court has discretion to set the restitution amount according to the facts of the case in order to make the victim whole.”).

Because an entire body of case law and relevant statutes defined the scope of victims' right to recover restitution at the time the VBR was enacted, it was unnecessary to specify that victims were entitled to full restitution in the VBR. The VBR guaranteed victims the right to restitution as defined at the time the VBR was enacted—this included the right to recover full economic loss. As noted in *State v. Clinton*, 181 Ariz. 299, 890 P.2d 74 (App. 1995), just five years after the enactment of the VBR, a victims' right to restitution under the VBR is implemented by A.R.S §§ 13-603(C) and 13-804(B). The former requiring the court to order restitution to the victim in the full amount of economic loss and the latter requiring the court to consider all losses caused by the crime. *Clinton*, 181 Ariz. at 300, 890 P.2d at 75.

As a policy matter, the cap found in subsection 28-672(G) undermines the role of restitution and thwarts the goal of making the victim whole by narrowing a victim's right to recover restitution. Thus, the court of appeals was correct in finding the cap unconstitutional and determining that “the plain language of the VBR implicates the full restoration of a victim's economic loss.” *Op.* at ¶ 8.

B. The VBR does not authorize the legislature to limit a victim's right to recover economic loss by imposing a cap on restitution.

Section 2.1(D) of the VBR authorizes “[t]he legislature. . . to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims.” Generally, a statute is valid “unless it conflicts with

the federal or state constitution. However, the Legislature’s power to enact statutes is subject to any limitations imposed by a constitutional provision, including any limitation that may be implied by the text of the constitution or its structure taken as a whole.” *State ex rel. Thomas v. Klein (Simpson, Real Party in Interest)*, 214 Ariz. 205, 208, ¶ 11, 150 P.3d 778, 781 (App. 2007).

The Legislature is prohibited from enacting legislation that either reduces or eliminates rights guaranteed to victims. *Id.*; *see also Knapp v. Martone*, 170 Ariz. 237, 240, n.5, 823 P.2d 685, 688 (1992) (“[T]he legislature [has] the power to “define, implement, preserve and protect the rights guaranteed to victims.” Ariz. Const. Art. II, § 2.1(D). That provision does not, however, confer upon the legislature. . .the authority to redefine the *scope* of those rights.”); *State v. Lee (Franklin, Real Party in Interest)*, 226 Ariz. 234, 237, ¶ 8, 245 P.3d 919, 922 (App. 2011) (“[W]e follow and apply the language of the constitutional provision to determine the scope of a victim’s rights, because neither the legislature nor court rules can eliminate or reduce rights guaranteed by the VBR.”).

Subsection 28-672(G) makes victims eligible for restitution under A.R.S. § 13-603 but then caps restitution to \$10,000. By so doing, A.R.S. § 28-672(G) contravenes Art. II, Sec. 2.1(A)(8). This is impermissible—no such limitation is found within the VBR, and the plain language of the VBR does not reflect an intent to exclude certain victims from recovering their full economic

loss. *Simpson*, 214 Ariz. at 209, ¶ 13, 150 P.3d at 782 (“[T]he definition of criminal offense that existed at the time of the Victims’ Bill of Rights was enacted contained no such limitation. Nor does the plain language of the Victims’ Bill of Rights reflect an intent to exclude victims of such crimes from protection.”) (internal citations omitted). Rather the goal of restitution is to make victims whole. Thus, the trial court and the court of appeals properly disregarded the cap in A.R.S. § 28-672(G).

Case law supports the State’s assertion that subsection 28-672(G) unconstitutionally limits victims’ right to full restitution. For instance, in *State v. Roscoe*, 185 Ariz. 68, 912 P.2d 1297 (1996), the Arizona Supreme Court considered the validity of A.R.S. § 13-4433 and Arizona Rule of Criminal Procedure 39(b)(11). Section 13-4433 and Rule 39(b)(11) sought to exclude on-duty officers from the definition of victim. That exemption, however, did not exist in Art. II, Sec. 2.1(C). This Court held that section 13-4433 and Rule 39(b)(11) unconstitutionally restricted the VBR:

[Article II, Sec. 2.1] grants to the legislature the authority to define the rights created therein, not the power to redetermine who is entitled to them....It would run counter to *Turley* for us to hold that either we or the legislature can exclude from [Article II, Sec. 2.1] victims who have already been included by the people. Such a result would infringe on the sovereign power of the voting public. *Roscoe*, 185 Ariz. at 73, 912 P.2d at 1302.

...

A similar result occurred in *Simpson*, 214 Ariz. 205, 150 P.3d 778 (App. 2007). When the VBR was first approved in 1990, prevailing statutory law defined “criminal offense” as “a misdemeanor or felony.” *Id.*, 214 Ariz. at 207, ¶ 8, 150 P.3d at 780. Later, the legislature redefined the phrase criminal offense as either a felony or a “misdemeanor involving physical injury, the threat of physical injury or a sexual offense.” *Id.*, 214 Ariz. at 207, ¶ 10, 150 P.3d at 780. The legislature’s act had the effect of eliminating or reducing the class of victims entitled to the rights secured in the Constitution. The court of appeals rejected the legislature’s attempt, holding that “the Legislature does not have the authority to restrict the rights created by the people through constitutional amendment.” *Id.*, 214 Ariz. at 207, ¶ 15, 150 P.3d at 780.

In *State v. Hansen*, 215 Ariz. 287, 160 P.3d 166 (2007), the Supreme Court addressed legislative authority to enact laws regarding restitution payments made while an appeal was pending. The Court held that “A.R.S. § 13-804.D advances victims' rights by permitting payments during an appeal.” *Id.*, 215 Ariz. at 291, ¶ 16, 160 P.3d at 170. Because A.R.S. § 13–804(D) advanced and did not restrict victims’ right to restitution, the statute was a proper exercise of the legislature’s limited rulemaking authority under the VBR. *Id.*, 215 Ariz. at 291,

¶ 17, 160 P.3d at 170. But *Hansen* did not hold that the word “prompt” in the VBR authorized the legislature to enact laws that limited victims’ ability to recover restitution.

Moreover, the Supreme Court in *Hansen* held that it was clear that the Legislature intended to exercise its authority under the VBR by enacting the statute. *Id.*, 215 Ariz. at 290, ¶ 15, 160 P.3d at 169; *cf. State ex rel. Napolitano v. Brown*, 194 Ariz. 340, 342, ¶ 9, 982 P.2d 815, 817 (1999) (“Indeed, the legislative history surrounding the amendments contains no reference to the VBR.”). Conversely, imposing a cap on restitution is not “a proper legislative effort ‘to define, implement, preserve and protect’ victims’ constitutional rights to seek restitution. Nor does such a cap in any way advance victim’s rights to restitution.” *Op.* at ¶ 13.

Here the opposite is true—there is no indication that the Legislature sought to exercise its authority under the VBR when enacting the cap. Rather, the legislature appears to have been concerned with the prevalence of traffic fatalities in Arizona and the fact that Arizona did not have a “vehicle-specific homicide statute.”

Absolutely no reference was made to the VBR. The Legislature did note that courts must consider all losses caused by the criminal offense when ordering restitution but provided no explanation for the restitution cap. *See*

Appendix 4 to State's Opening Brief in the court of appeals, Arizona State Senate, Forty-seventh Legislature, Second Regular Session, Amended Fact Sheet for H.B. 2208, May 19, 2006. Because the restitution cap in A.R.S. § 28-672(G) restricted, rather than advanced, victims' right to restitution, it was not an appropriate exercise of legislative authority.

As of May 16, 2018, the restitution cap contained in A.R.S. § 28-672(G) was raised to \$100,000. However, the amount of the cap does not change the unconstitutionality of any limit on a victim's right to recover restitution. In fact, the new cap simply reduces the number of victims of A.R.S. § 28-672 that are impacted by the restitution cap to those with a loss greater than \$100,000. With a higher cap, only those victims who suffer greater loss and injury and incur greater expenses are precluded from receiving full restitution.

Therefore, the restitution cap in A.R.S. § 28-672, regardless of the amount, prohibits a court from ordering the full amount of a victim's loss and defeats the purpose of making victims whole. *Cf. State v. Howard*, 168 Ariz. 458, 459–60, 815 P.2d 5, 6–7 (App. 1991) (approving restitution for the victim's future medical expenses and lost wages when those expenses are not yet known at the time of the restitution order and noting that the more seriously injured victim who has not yet incurred all the expenses caused by the crime by the time the defendant

has plead would not be made whole if the restitution order was limited by the timing of the sentencing.).

C. Criminal restitution is not the same as civil damages.

Restitution in a criminal case is not equivalent to damages in a civil tort action. “[V]ictim fault is not an issue in the restitution phase of a criminal case.” *Clinton*, 181 Ariz. at 300, 890 P.2d at 75 (internal citations omitted). *See also State v. Guadagni*, 218 Ariz. 1, 6, ¶ 17, n. 5, 178 P.3d 473, 478 (App. 2008) (“We note that a victim's comparative fault for an injury or potential criminal culpability ordinarily is not relevant to his or her status and eligibility for restitution”). As the court of appeals indicated:

“[r]estitution does not apply to losses incurred by the convicted person, damages for pain and suffering, punitive damages, or consequential damages. Further, restitution is restricted to economic loss that directly flows from a defendant’s criminal conduct. Victims may still seek remedies for other incurred losses, damage, or injuries through separate civil proceedings, where defendants may avail themselves of their right to a jury trial and raise defenses such as comparative negligence or assumption of the risk.” *Opinion* at ¶ 14 (internal citations omitted).

CONCLUSION

The VBR gives victims the right to restitution. Implicit in this right is the right to full, not partial restitution. Thus, subsection 28-672(G) invalidly limits restitution awards and impermissibly conflicts with Article II, Section 2.1.

Because the court of appeals opinion was a correct interpretation of the Arizona Constitution and statutes, this Court should deny the Petition for Review.

RESPECTFULLY SUBMITTED this 27 day of November 2019.

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