

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS CLARK YODER,

Defendant-Appellant.

UNPUBLISHED
February 14, 2008

No. 273435
Branch Circuit Court
LC No. 05-108372-AR

Before: Davis, P.J., and Murphy and White, JJ.

PER CURIAM.

Defendant appeals by leave granted the September 11, 2006, circuit court order affirming a district court ruling that denied defendant's motion for discharge from probation, to limit restitution, and to vacate an attorney fee award. Defendant also appeals the denial of his motion to disqualify the circuit court judge who entered the September 11, 2006, order. We affirm the denial of the motion to disqualify, and remand the restitution issue and attorney fee issue for further proceedings consistent with this opinion.

I

This case arises out of the events addressed in *Anthony v Delagrang Remodeling, Inc*, unpublished opinion per curiam of the Court of Appeals, issued March 15, 2005 (Docket No. 252644), and in *Delagrang Remodeling, Inc v Anthony*, unpublished opinion per curiam of the Court of Appeals, issued March 24, 2005 (Docket No. 250022). Briefly, defendant was one of the principals of Delagrang Remodeling. David and Holly Anthony purchased land and entered into an oral agreement with Delagrang Remodeling to construct a summer home on the land, the construction to be paid on a cost-plus basis. The parties disputed their agreement and commenced civil litigation against each other. Meanwhile, a police investigation of a contractor fraud complaint led to the arrest of defendant's partner for building without a license and an investigation of defendant for the same offense. On April 2, 2003, defendant pleaded nolo contendere to "an occupational code violation of performing an occupation without a license." See MCL 339.601 *et seq.* On July 14, 2003, the district court entered an order sentencing defendant to two years' probation. The district court additionally imposed fines, fees, and court costs; and it awarded the victims restitution and attorney fees in the civil case. Defendant did not object to the district court's sentence, and he signed the probation order.

On February 18, 2004, defendant moved in the district court to set aside the restitution order requiring payment to be made in full by April 30, 2004, to set aside the restitution order entirely, and for an evidentiary hearing on whether the victims' damages were caused by defendant's failure to have a residential builder's license. The district court granted defendant's motion to set aside the order to pay all restitution by April 30, 2004, but it denied the motions for an evidentiary hearing and to set aside the order in full to pay restitution.

On August 5, 2005, defendant again moved in the district court to set aside the restitution and attorney fee orders and to discharge his probation. The district court denied the motion on August 17, 2005. Defendant moved for reconsideration on September 9, 2005; the district court granted that motion and scheduled a hearing for October 13, 2005. Meanwhile, on October 5, 2005, defendant filed another motion to set aside the restitution order, to set aside the award of attorney fees, and for discharge from probation. At the motion hearing, the district court denied defendant's motions.

Defendant appealed the district court's October 13, 2005, ruling to the circuit court. Defendant moved to disqualify the assigned circuit court judge because the judge had also presided over the related civil litigation. The assigned judge denied the motion to disqualify, as did another judge appointed by the state court administrator. On September 11, 2006, the circuit court affirmed the district court's rulings with respect to defendant's motions for relief from his order of probation. On March 27, 2007, this Court granted defendant's application for leave to appeal.

II

Defendant contends that the restitution award was conditioned on the circuit court's final determination in the civil action. He asserts that the circuit court's denial of his appeal of the restitution award, after his payments made to the district court were summarily paid to the complainant without notice or a hearing and were not limited to the final determination in the circuit court civil action, is manifestly unjust. We agree.

We review questions of law and the interpretation of court rules de novo. *People v Fletcher*, 260 Mich App 531, 554; 679 NW2d 127 (2004); *People v Hawkins*, 468 Mich 488, 496-497; 668 NW2d 602 (2003). Jurisdictional issues are always subject to review; the existence of jurisdiction is a question of law we review de novo. *Ammex, Inc v Dep't of Treasury*, 272 Mich App 486, 494; 726 NW2d 755 (2006). "The jurisdiction of the court of appeals shall be provided by law and the practice and procedure therein shall be prescribed by rules of the supreme court." Const 1963, art VI, § 10. Leave to appeal is subject to a twelve-month jurisdictional limitation as provided by MCR 7.205(F)(3) and (4). *In re Withdrawal of Attorney*, 231 Mich App 504, 507; 586 NW2d 764 (1998). Further, this Court may only grant leave to appeal judgments or orders designated by statute or court rule as being appealable, as set forth in MCR 7.203(B). *Attorney General v Michigan Public Service Comm*, 237 Mich App 27, 38; 602 NW2d 207 (1999).

A

The issue of restitution was discussed at the sentencing proceeding on July 14, 2003:

THE COURT: I'm inclined to adjudge and address the restitution issue here, however.

MR. BAPPERT [*Defendant's counsel*]: Well, your Honor, the restitution question relates to . . . not to failure to have a license but to whether or not the . . . monies that were put into the house by Mr. and Mrs. Anthony were necessary as a result of my client's not having a license and we certainly contend that that's not true. And these matters will all come out in a civil matter and civil case in October.

THE COURT: All right.

MR. BAPPERT: And this is, I believe, a similar . . . remedy . . . that . . . the court availed itself of in the previous matter with Mr. Dahlman.^[1]

THE COURT: And that didn't work. Because that case did not come to trial before Mr. Dahlman was discharged from probation. Now I know this may come as a surprise to both parties here but *I am inclined, should this matter go to sentencing, to order appropriate restitution to be paid into the court on a regular basis as a condition of probation and it would be held in escrow by the court until such time as the court determines that it should be paid over to the alleged victim in this matter.*

MR. BAPPERT: In the civil matter, your Honor?

THE COURT: Yes. Recognizing that, I will allow your client, if he chooses, to withdraw his plea and go to trial on this matter as he probably had every right to anticipate that the court would simply do as it did in the prior case, adjudge restitution consistent with the civil verdict in this matter. *And I'm still not necessarily inclined to deviate from what the civil case may ultimately resolve. Here's what my inclination is; is to order immediate payment of restitution to be paid into the court on a monthly basis through the Probation Department to be held in escrow and should the case be resolved within the two years of probation and it most certainly ought to be . . .*

* * *

--then the court would pay over either the amount settled for, if there is a settlement, or such amount as is determined by the civil jury to be an appropriate amount of damages to the alleged victim in this matter.

* * *

¹ Gregory Dalman was the other owner of the remodeling company that performed the work.

But the monies would have to be paid as the case progresses. I don't want to be placed in the position of having the probation running out as it did with [Dahlman] without that civil case having been resolved, that civil case having dragged on and on incessantly.

MR. BAPPERT: Would the Court accept some kind of a motion from me, a promise of a motion if this matter is not adjourned or if it is adjourned in October? We're coming up on a trial date and all of these matters . . .

THE COURT: Well then, the matter may very well be resolved, hopefully by the end of the year. In the meantime, monies will be paid into the court. * * *

I'm ordering \$233,000 plus \$86,000 in attorney's fees * * *

To be set out over the next two years of probation on a monthly basis and those monies would have to be paid in and failure to do that would result in a probation violation with up to 90 days in jail at issue. That would be my indication at this time . . . and I would order that through the Probation Department. *It would be paid into escrow . . . [i]t wouldn't be paid out to anyone until such time as the court found that that was appropriate.* But I think there needs to be a system put in place by which the victim's rights are secured here, because obviously if this gentleman wasn't acting in violation of a building license here, or hadn't forged that license as alleged, that that building permit would not have been obtained and the incident would never have occurred.

* * *

And ultimately, I want [defendant] to understand if there is a judgment of no cause of action over there, then all monies will be returned to him. You may address sentence at this time . . .

MR. BAPPERT: Your Honor, only that the sums that have been asked for by Mr. Anthony relate to the contractual obligations that they had with themselves. And that the money that went into that house is not put in there as a result of any damages fly by night contracting caused by [defendant] . . . [b]ut I believe ultimately the civil matter will demonstrate that all of the damages that are being sought for are not legally caused by [defendant].

THE COURT: O.K. And again, that's a matter that remains to be seen and I recognize that we're dealing with a 90 day misdemeanor here as opposed to any significant amount of money on the other side of the coin as regards restitution. However, it's important, in my view, that that matter be addressed, resolved and that both parties be put in as fair a position as humanly possible under all the circumstances. That's what I'm trying to accomplish here and *hopefully the civil matter will be resolved and yet the restitution issue here will be equally resolved with the ultimate determination being made by the jury.* Perhaps * * *

I do place you upon probation for two years. I adjudge a fine of \$500.00, court costs of \$231.00. There's a \$9.00 judgment fee. I suspend at this time, 90 days in the county jail subject to your complying with all terms and conditions of *probation to include the restitution indicated by the Court in the amount of \$233,000.00 plus \$86,000.00 in attorney's fees . . . The restitution to be paid into the court escrow account and to be reduced only by an agreed settlement of the Circuit Court law suit or final determination in the civil case. Future related attorney's fees may be added to this order of restitution if found to be appropriate.* [Emphasis added.]

Based on this colloquy, defendant reasonably understood that the amounts he would pay in restitution would be held in escrow subject to the ultimate determination in the civil case.²

By not appealing this order, defendant precluded further challenge of the issues whether restitution was appropriate, and whether the victim's damages had a sufficient nexus to defendant's violation of the criminal statute. Defendant accepted that the amount of restitution would be based on the civil suit.

On October 29, 2003, May 12, 2004, August 10, 2004, and March 23, 2005, the district court entered amended orders of probation, upon petition of the probation department, increasing the amount of restitution to be paid for the victim's attorney fees. These orders were entered without hearing. The district court began disbursing the escrow amounts to the victims in October of 2003, also without holding a hearing.

On January 28, 2004, after the civil case was tried, the probation department secured an ex parte order, at the request of the victim, providing that restitution must be paid in full by April 30, 2004, and that interest would accrue on the unpaid balance dating back to the beginning of probation. This order was served on defendant after it was entered. Defendant then filed a motion to set aside order to pay restitution and motion for evidentiary hearing on the nature of damages. Defendant argued that the civil case was being appealed, that the victims were secure, that the amount of restitution was excessive, and that the order requiring payment of restitution in full was unnecessary and inappropriate. The district court heard the motion on March 9, 2004. During the hearing of that motion, the court for the first time stated that its decision regarding restitution was not dependent on the civil case:

THE COURT: There's a very narrow issue here and it does not include the court re-trying a civil case. The narrow issue is whether or not the court's order that this payment of restitution be accelerated, should be continued or set aside. *The original Court order was not, in fact, tied to any prospective civil judgment. The Court order as set forth in the probation order filed in conjunction with that order was that the monies determined to be due and owing, that being \$233,000.00 plus*

² A document entitled "Action in Court and Notice of Hearing," signed by the court and defendant has the hand-written notation "Court orders restit to be pd into Court. – Held at Court until outcome of civil case. – (case in Circuit Ct)." [Emphasis in original].

at that time, \$86,000.00 in attorney's fees, were to be paid into the Court escrow account and would be reduced only by an agreed settlement of the Circuit Court lawsuit. There was no such settlement and any subsequent determination in Circuit Court was not at all related to the Court's determination of an appropriate restitution figure. So to take these in reverse order, the motion for an evidentiary hearing on the nature of damages, is denied. Now the motion to set aside the order to pay restitution forthwith, I will entertain. The only evidentiary issue that is appropriate as to that order is the ability of the defendant to pay in conjunction with the Court's order or his lack of ability to pay. And I will certainly receive evidence in that regard if you wish to present that. I'll also receive any evidence that the prosecution wishes to present. . . . [Emphasis added.]

Defendant then testified regarding his ability to pay restitution. The district court ruled:

To [defendant's] credit, he has kept relatively . . . current in the payments required of him after apparently a rather slow start and then a lump sum figure being paid. I'm going to do this. I do grant the motion setting aside the order that restitution be paid in full by . . . April 30th, 2004. I do find that the defendant has demonstrated an inability, without significant damage to his personal assets and his business, to pay that figure. So I'm going to set aside that order. I am going to direct [the probation officer], however, to re-figure the monthly payments to include the added attorney's fees which I grant upon verification . . .

Those are to be added and the resultant figure will be a monthly payment that will be required to be made in order that all restitution, to include those attorney fees, are comfortably to be paid within the period of this probation which began July 14th, 2003, and runs to July 13th, 2005.

Now, the action sheet will reflect the Court's order which is specifically, and I treat this as a motion to set aside the order to pay all restitution by April 30th, [2004], that motion is granted. The motion for evidentiary hearing on the nature of the damages has been denied as has been the motion to set aside the order in full to pay restitution.^{3]}

Defendant's February 18, 2004, motion was clearly a motion to set aside the court's order of January 28, 2004, which had been entered without notice.

In March of 2005, this Court issued its decision in the civil case, affirming in part, and vacating and remanding in part. This Court vacated the award of attorney fees as not being a

³ It is apparent from the proceedings that defendant and defense counsel were unaware that amounts had already been disbursed to the victims from the escrow account.

proper element of damages. Defendant's probation expired July 13, 2005. On August 5, 2005, defendant filed a "motion for discharge from probation, motion to limit restitution to the circuit court award, and motion to vacate complainant's attorney fee award," largely relying on the Court of Appeals decision. The motion was heard August 17th. Defense counsel explained that he and defendant had just learned that the sums defendant had been paying into escrow during probation were being released to the victims and their attorney on an ongoing basis. Counsel reminded the court that the understanding was that the sums would be held in escrow pending resolution of the circuit court case. Counsel repeated an earlier argument that restitution was not appropriate because the damages were not due to the lack of a license, and further argued that the victims were seeking a double recovery, and that in light of the Court of Appeals decision vacating part of the damage award and the entire attorney fee award, the money that had been disbursed should be returned to the court, and the court should hold a hearing on the proper amount of restitution. Counsel for the victims argued that the escrow was properly paid to the victims, the motion was premature, the court should not change the restitution amount, and that the civil judgment could be reduced by the amount paid in restitution for the same damages.

The probation department verified that defendant had paid the original \$86,000 in attorney fees as ordered at sentencing, and an additional \$108,919.21, ordered by the court as additional bills were submitted. These sums were in addition to the \$223,000 restitution. The district court denied the motions to discharge defendant from probation and to limit restitution to the circuit court award. The court noted, however, that it would "entertain any timely objection to any further restitution being paid out with respect to attorneys fees."

Defendant filed a motion for reconsideration on August 25th. The court granted reconsideration and held a hearing on October 13, 2005. The court determined that the order of restitution, including attorney fees, was never appealed, and no hearing was requested. The district court granted the motion to discharge defendant from probation, and denied any other relief. Defendant appealed the district court's order to the circuit court on October 25, 2005. The circuit court denied the appeal from the bench on August 24, 2006, stating that defendant should have challenged the amount of restitution when the order was entered, that there was a sufficient nexus between the restitution and the offense in any event, and that the court would assure that there is no double recovery in the civil matter. An order was entered September 9, 2006, and defendant's application for leave to appeal to this Court was granted.

B

Defendant's probation was under the continuing jurisdiction of the district court. The appeal of the denial of defendant's motion for discharge, to limit restitution, and to vacate attorney fee award to the circuit court was proper, and this Court's grant of the application for leave was also proper.

On the merits, it is perfectly understandable that defendant would have understood the district court's restitution award to be tied to the ultimate outcome of the civil case, and would have left that award unchallenged, intending to litigate the damage issue in the civil case. In fact, defendant's and defense counsel's understanding that the final amount of restitution would be tied to the civil case and the escrow payments would not be disbursed until the civil matter was concluded was based on the court's statements. Further, the orders assessing additional attorney fees were entered without hearing, and the numbers were never scrutinized. Also, while the

portion of the attorney fee award representing the victims' expenses in defending against defendant's unauthorized civil action⁴ in circuit court might be properly awarded, there is no basis for awarding the remainder of the fees. See *United States v Scott*, 405 F3d 615, 620 (CA 7, 2005) in which the court noted that "most [though not all] cases classify attorneys' fees incurred by a crime victim . . . as 'consequential damages' that are therefore ineligible for criminal restitution." The *Scott* Court noted that the reason for denying attorney fees under restitution statutes is that attorney fees are not classified as damages; the decision to award or not award them is a matter of procedural rather than remedial law, and that the exception to the general rule occurs where the costs of bringing a lawsuit "were a direct and mandatory result" of a criminal defendant's furtherance of a criminal activity; not a voluntary action to recover property or damages.

We affirm the denial of the motion to disqualify, and remand the restitution issue and attorney fee issue for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Helene N. White

⁴ Defendant's claim against the victims was barred under the residential builders act, MCL 339.2412, which prohibits an unlicensed builder from seeking compensation under a residential construction contract.