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State v. Andersen Respondent's Brief Dckt. 43889

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	No. 43889
Plaintiff-Respondent,)	
)	Ada Co. Case No.
vs.)	CR-2014-14108
)	
RICHARD ERNEST ANDERSEN,)	
)	
Defendant-Appellant.)	

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA**

**HONORABLE PATRICK H. OWEN
District Judge**

**LAWRENCE G. WASDEN
Attorney General
State of Idaho**

**PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division**

**JOHN C. McKINNEY
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534**

**ATTORNEYS FOR
PLAINTIFF-RESPONDENT**

**JENNY C. SWINFORD
Deputy State Appellate
Public Defender
P.O. Box 2816
Boise, Idaho 83701
(208) 334-2712**

**ATTORNEY FOR
DEFENDANT-APPELLANT**

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STATEMENT OF THE CASE

Nature of the Case

Richard Ernest Andersen appeals from the restitution order associated with his convictions for battery on a police officer, malicious injury to property (misdemeanor), and battery (misdemeanor).

Statement of Facts and Course of Proceedings

According to the Presentence Report ("PSI"), the facts underlying Andersen's convictions are as follows:

The attached police report indicates that on September 23, 2014, police responded to a fight situation. Dispatch advised that Robert Smith had walked up to some neighboring [sic] occupants to ask them to keep the noise down. When he did, a male spit on him. While in route, it was advised that Richard Andersen was out of control and acting strange. Upon arrival, Richard Andersen was in the driveway. He had obviously urinated himself, as his crotch area was wet. He also had blood all over his mouth. Mr. Andersen was jumping up and down as officers ordered him to sit down. Mr. Andersen then started aggressing Corporal Markle. Officer Cromwell approached Mr. Andersen and grabbed his left arm. Mr. Andersen attempted to pull away. Officer Cromwell then used a [sic] arm-bar takedown technique in order to take him to the ground. Once on the ground, Mr. Andersen kicked Officer Cromwell on two (2) occasions. As a result, Officer Cromwell delivered knee strikes to Mr. Andersen's thigh area in attempt to stop him. Mr. Andersen's left wrist was placed in handcuffs, while keeping his right arm underneath him. He was ordered to place his right arm behind his back, but refused and began kicking around and moving around on the ground. Concerned that he might have a weapon, Officer Cromwell delivered several more knee strikes to his thigh. Mr. Andersen then complied and was able to be placed in handcuffs. After doing this, Mr. Andersen was able to move to his side and kick Officer Cromwell in the left leg.

Upon speaking with Devian Stapleton and Victor Kennedy, Mr. Stapleton advised that he lived at the address and had several people over. He advised that he had never met Mr. Andersen before. Mr. Andersen showed up at his house and informed everyone that he had just taken Acid. Mr. Andersen then

proceeded to break items in Mr. Stapleton's kitchen, to include several dishes and glasses, as well as throwing items on the floor. Mr. Stapleton then began fighting with Mr. Andersen, stating this was how Mr. Andersen got the bloody lip. Mr. Andersen then spit blood on Mr. Stapleton. Mr. Stapleton said that his neighbor, Robert Smith, came over. When he did, Mr. Andersen spit blood in Mr. Smith's face.

(PSI, p.3.)

The state charged Andersen with battery on a police officer, malicious injury to property (misdemeanor), and two counts of misdemeanor battery. (R., pp.116-123.) Pursuant to a plea agreement, Andersen pled guilty to all but one count of misdemeanor battery. (R., p.103.) The district court sentenced Andersen to a unified term of five years, with two years fixed, for battery on a police officer, all suspended, and placed him on probation for five years. (R., pp.116-123.) The court sentenced Andersen to 17 days of jail on each of the two misdemeanors. (Id.)

The state filed a Motion for Restitution, requesting \$53,715.51 for losses incurred by the City of Boise and \$70.70 to the Boise City Police Department. (R., pp.124-132.) At the restitution hearing, the only witness was Jason Carrier, a senior claims adjuster for Intermountain Claims, "a third-party administrator for the City of Boise for the workers' compensation as a self-insured employer under the state of Idaho." (Tr., p.2, Ls.10-23.) During the hearing, the court admitted State's Exhibit 1, an itemization verified by Mr. Carrier as consisting of "all of the documentation and all the reimbursements that were actually made by the insurance company and/or the City of Boise to providers." (Tr., p.12, Ls.1-10.) After Mr. Carrier testified, the state requested the court order restitution in the

amount set forth in State's Exhibit 1, which reduced the amount of restitution to \$50,705.91. (Tr., p.56, Ls.16-21; St. Ex. 1, p.3.) Andersen's counsel argued that Andersen should not be ordered to pay such a high amount of restitution because he was unlikely to have the ability to pay it due to his lack of education and work experience, explaining, "[h]e will be financially ruined by this." (Tr., p.61, L.2 – p.62, L.12.)

After taking the matter under advisement (Tr., p.66, Ls.19-20), the district court issued a "Memorandum Decision and Order Re: Restitution" (R., pp.142-150), and "Order for Restitution and Judgment" (R., pp.151-152), ordering Andersen to pay \$50,705.91 in restitution, while "fully aware it is unlikely that Andersen will ever pay the restitution in full" (R., p.149). Andersen filed a timely notice of appeal from the district court's restitution order. (R., pp.153-155.)

ISSUE

Andersen states the issue on appeal as:

Did the district court err when it ordered Mr. Andersen to pay \$50,705.91 in restitution to the Boise City Attorney's Office for Officer Cromwell's injury?

(Appellant's Brief, p.5.)

The state rephrases the issue on appeal as:

Has Andersen failed to show that the district court abused its discretion by ordering him to pay \$50,705.91 in restitution?

ARGUMENT

Anderson Has Failed To Show That The District Court Abused Its Discretion By Ordering Him To Pay \$50,705.91 In Restitution

A. Introduction

Andersen contends that the district court abused its discretion under I.C. § 19-5304(7)¹ by ordering him to pay \$50,705.91 in restitution despite his current and future earning ability. (Appellant's Brief, pp.10-11.) The record however, reflects that, pursuant to I.C. § 19-5304(7), the district court properly considered Andersen's current and future earning ability and exercised sound discretion in determining the amount of restitution.

B. Standard Of Review

The decision whether to order restitution is committed to the trial court's discretion, and the trial court's factual findings in relation to restitution will not be disturbed if supported by substantial evidence. State v. Smith, 144 Idaho 687, 692, 169 P.3d 275, 280 (Ct. App. 2007).

C. The District Court Did Not Abuse Its Discretion By Ordering Andersen To Pay \$50,705.91 In Restitution

Idaho's restitution statute provides that the sentencing court "shall" order restitution for economic loss actually suffered by the victim. I.C. § 19-5304(2).

¹ I.C. § 19-5304(7) reads:

The court, in determining whether to order restitution and the amount of such restitution, shall consider the amount of economic loss sustained by the victim as a result of the offense, the financial resources, needs and earning ability of the defendant, and such other factors as the court deems appropriate. The immediate inability to pay restitution by a defendant shall not be, in and of itself, a reason to not order restitution.

Nevertheless, the court may decline to order restitution or order less than full restitution after considering other factors, including “the financial resources, needs, and earning ability of the defendant.” I.C. § 19-5304(3), (7). While a district court is required to *consider* these factors, inability to pay neither precludes nor limits a restitution award; rather, ability to pay is only one factor for a court’s consideration when it makes a discretionary restitution determination. State v. Olpin, 140 Idaho 377, 379, 93 P.3d 708, 710 (Ct. App. 2004) (citing State v. Taie, 138 Idaho 878, 880, 71 P.3d 477, 479 (Ct. App. 2003)). In addition, “[t]he immediate inability to pay restitution by a defendant shall not be, in and of itself, a reason to not order restitution.” I.C. § 19-5304(7).

Andersen does not argue that the district court failed to *consider* his ability to pay restitution, nor does he highlight any part of the record that would indicate as much.² Instead, he disagrees with the district court’s decision after considering his ability to pay. Specifically, Andersen contends the court abused its discretion in ordering restitution because he has shown a current and future inability to pay restitution based on the following factors gleaned from the Presentence Report: (1) he is a 21-year-old high school drop-out who does not

² Even if Andersen is contending the district court failed to consider his ability to pay, his argument fails. In Olpin, 140 Idaho at 379-380, 93 P.3d at 710-711, the defendant challenged a restitution order where, at the restitution hearing, the district court did not specifically state that it had considered the defendant’s ability to pay. Olpin, 140 Idaho at 379-380, 93 P.3d at 710-711. This ability was referenced only in Olpin’s PSI. Id. at 380. Nonetheless, the Idaho Court of Appeals said it was not convinced that the district court failed to adequately consider Olpin’s ability to pay restitution, and the restitution order was affirmed. Id. Here, unlike in Olpin, the district court expressly recognized the requirements of I.C. § 19-5304(7), including Andersen’s ability to pay. (R., p.149; Tr., p.56, L.25 – p.57, L.1; p.60, Ls.6-11; p.61, Ls.13-16.)

have a GED, and who had to have an Individual Education Plan in school because he was “slow,” (2) he has had only one job in his life, and that lasted seven days, and (3) he lives in his parent’s home with his girlfriend and their (he and his girlfriend’s) young daughter. (Appellant’s Brief, pp.7-8.) Anderson concludes, “It is all but impossible for someone in [his] position to obtain the education level and earning capacity needed to pay over \$50,000 in restitution.” (Appellant’s Brief, p.8.) Andersen’s argument fails.

In State v. Bybee, 115 Idaho 541, 768 P.2d 804 (Ct. App. 1989), Bybee was convicted of grand theft, and was ultimately ordered to pay over 1.5 million dollars in restitution. Bybee, 115 Idaho at 542, 768 P.2d at 805. Bybee argued that the amount was excessive given his incarceration, age, financial needs and inability to pay. Id. at 543. The Idaho Court of Appeals, however, found no abuse of discretion:

Given the magnitude of the amounts involved here, we believe it unlikely that Bybee will ever meet the full amount of restitution ordered. But, in the event Bybee is able to obtain some assets, the victims should have ready access to the assets for satisfaction of their losses. The order of restitution will provide the essential avenue of relief to the victims. The order may be recorded as a judgment and the victims may execute as provided by law for civil judgments. I.C. § 19-5305.

If the order required Bybee to make installment payments or if had set a deadline for paying restitution, we would be inclined to vacate the order. As it now stands, however, the order simply gives the victims the present ability to obtain a judgment. We see nothing wrong with that.

Id.

Here, similar to the situation in Bybee, and in obvious reference to I.C. § 19-5304(7), the district court realized it was unlikely that the full amount of restitution would ever be paid, explaining:

As an exercise of discretion, the Court does not determine an order of restitution would be inappropriate or undesirable. For that reason, the Court will order restitution as requested. In so doing, the Court is fully aware it is unlikely that Andersen will ever pay the restitution in full. At the same time, the Court also considered and hopes that Andersen's future ability to pay may improve.

(R., p.149.) Although the district court did not expressly state that its restitution order would do so, as in Bybee, the order gave "the victims the present ability to obtain a judgment." See Bybee, 115 Idaho at 543, 768 P.2d at 806.³

Andersen, like Bybee, may never have the financial ability to fully repay the victims for his crimes. That fact, standing alone, does not show an abuse of discretion. Further, he could potentially obtain money by inheritance or gifts from friends and relatives. The victims of Andersen's crimes should have access to any assets that Andersen might come across. The fact that the Andersen disagrees with the district court's decision does not amount to an abuse of discretion.

³ As was true in Bybee, the district court here did not order a payment deadline or installment payments on the restitution amount. See Bybee, 115 Idaho at 543, 768 P.2d at 806.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order of restitution.

DATED this 6th day of September, 2016.

/s/ John C. McKinney
JOHN C. McKINNEY
Deputy Attorney General

JCM/vr

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 6th day of September, 2016, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

JENNY C. SWINFORD
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

/s/ John C. McKinney
John C. McKinney
Deputy Attorney General

JCM/vr