

1-14-2015

State v. Reale Appellant's Brief 2 Dckt. 41892

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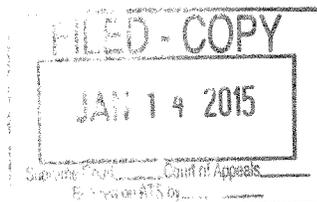
IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 41892
Plaintiff-Respondent,)	
)	JEROME COUNTY NO. CR 2013-4140
v.)	
)	
SHEPERD REALE,)	APPELLANT'S BRIEF
)	IN SUPPORT OF
Defendant-Appellant.)	PETITION FOR REVIEW
_____)	

STATEMENT OF THE CASE

Nature of the Case

Sheperd Reale asks the Idaho Supreme Court to review the opinion of the Idaho Court of Appeals, 2014 Opinion No. 102 (Ct. App. Dec. 4, 2014) (*hereinafter*, Opinion). He submits that this Court should exercise its review authority in this case because the Opinion decides a question of substance not heretofore determined by the Idaho Supreme Court, and it is inconsistent with previous decisions of the Court of Appeals. Specifically, as Chief Judge Gutierrez concluded in his dissent, the time the mother of



the victim took off work to rest was not an economic loss under the criminal restitution statute. (Opinion, pp.9-10 (Gutierrez, C.J., concurring in part and dissenting in part).)

Statement of the Facts & Course of Proceedings

The State filed a Criminal Complaint alleging Mr. Reale had committed the crime of lewd conduct with a minor under sixteen years of age, felony, in violation of Idaho Code § 18-1508. (R., pp.9-10.) The State later filed an Amended Criminal Complaint alleging Mr. Reale had committed one count of felony lewd conduct with a minor under sixteen years of age, and one count of felony sexual abuse of a child under sixteen years of age. (R., pp.47-48.) After Mr. Reale waived a preliminary hearing, the magistrate bound him over to the district court. (R., pp.57, 59-60.) The State then filed an Information charging Mr. Reale with one count of lewd conduct and one count of sexual abuse. (R., pp.63-64.) Mr. Reale initially entered a not guilty plea to the charges. (R., p.70.)

Pursuant to a plea agreement, Mr. Reale subsequently agreed to plead guilty to the sexual abuse count, and the State agreed to dismiss the lewd conduct count. (R., p.92.) The district court accepted Mr. Reale's guilty plea. (R., p.93.)

The State then filed a restitution request, asking for an award of \$698.65 to the Idaho Industrial Commission's Crime Victim's Compensation Program (CVCP), and an award of \$10,260.00 to the parents of the victim. (R., pp.100-04.) The requested award to the parents included a request for \$3200.00 in "Lost Wages" to the mother of the victim. (R., p.100.)

At the sentencing hearing, the State recommended that the district court impose a unified sentence of fifteen years, with five years fixed. (Tr., p.40, Ls.17-23.)

Mr. Reale recommended that the district court place him on probation. (Tr., p.46, L.24 – p.48, L.15.) The district court then imposed a unified sentence of fifteen years, with three years fixed. (R., pp.110, 112-18.) Mr. Reale filed a Notice of Appeal timely from the district court's Judgment of Conviction. (R., pp.124-26.)

At the subsequent restitution hearing, the State, based upon the testimony of the parents, requested a modified total restitution award of \$11,862.68. (Tr., p.106, Ls.16-19.) Part of the increase came from the State's request for \$3315.68 instead of \$3220.00 for the mother's lost wages. (See Tr., p.106, L.20 – p.107, L.6; State's Ex. 1.) The mother's requested lost wages were from when she missed part or all of her 12-hour shifts as a night charge nurse on the nights before scheduled counseling sessions or court proceedings. (See Tr., p.72, L.13 – p.86, L.15; State's Ex. 1, p.1.) She reported that she missed a total of 92 hours of work, at an hourly rate of \$36.04, for a total of \$3315.68. (State's Ex. 1, p.1.) The mother represented that she missed part or all of her shifts because she wanted to be "rested" for the court proceedings. Mr. Reale asserted, with respect to those requested lost wages, that it was not foreseeable "that someone would miss a 12-hour shift the night before a court hearing in order to be there for that hearing in the morning." (Tr., p.110, Ls.18-21.)

After the restitution hearing, the district court issued its Memorandum Decision Re: Restitution. (R., pp.140-47.) In the Judgment/Order of Restitution, the district court awarded CVCP a total of \$698.65 and the parents a total of \$4355.68. (R., pp.148-150.) The district court awarded the mother \$3315.68 for lost wages, (R., p.144.)

On appeal, Mr. Reale asserted that the district court abused its discretion when it imposed his sentence, and that substantial evidence did not support the district court's

restitution award of \$3315.68 to the mother for lost wages. (App. Br., pp.6-20.) He asserted that substantial evidence did not support the award of \$3315.68 for lost wages, because the award was for time the mother spent resting instead of going to work. (App. Br., p.8.) Mr. Reale asserted that the criminal restitution statute, I.C. § 19-5304, “does not contemplate awarding victims lost wages for taking time off work to be rested or prepared before attending court proceedings.” (App. Br., pp.8-9.) By spending time resting instead of going to work, the mother did not suffer an economic loss analogous to lost wages. (App. Br., p.11.)

Further, Mr. Reale asserted that the mother’s choice to spend time resting instead of going to work was an intervening, superseding cause that severed the causal link between Mr. Reale’s criminal conduct and the mother’s loss of wages. (App. Br., p.11.) If the mother’s time spent resting were awardable as restitution for lost wages, Mr. Reale asserted that it was not reasonably necessary for the mother to take entire 12-hour shifts off work to be rested before court proceedings, and that the voluntary choices of the third parties who decided not to cover those entire 12-hour shifts was an intervening, superseding cause that precluded a finding that his criminal conduct was the proximate cause of the mother’s economic loss for the entire shifts. (App. Br., p.13.)

The Idaho Court of Appeals, in a 2-1 decision, affirmed the decisions of the district court. (Opinion, pp.1-12.) The Court of Appeals held that the district court did not abuse its discretion when it imposed Mr. Reale’s sentence.¹ (Opinion, pp.2-4.) The

¹ In requesting that this Court exercise its review authority in this appeal, Mr. Reale does not challenge the Court of Appeals’ holding that the district court did not abuse its discretion when it imposed his sentence.

Court of Appeals also held that “substantial evidence supported the district court’s decision to award restitution as well as the amount awarded.” (Opinion, p.9.) According to the Court of Appeals’ majority, “a victim is entitled to lost wages for time off that was reasonably necessary to enable him or her to attend court proceedings, even if that time off does not coincide with the actual court proceeding.” (Opinion, p.6.) “A defendant may not avoid restitution liability simply due to a victim’s irregular work hours that do not coincide with the court’s hours of operation.” (Opinion, p.7.) The majority agreed with the district court that “the time the mother took off of work was reasonably necessary to enable her to attend court proceedings.” (Opinion, p.7.) Thus, “substantial evidence supported the district court’s determination that Reale’s conduct was the true proximate cause of the mother’s lost wages.” (Opinion, p.7.)

Further, the majority determined that “the mother’s decision to take the time off work reasonably necessary to allow her to attend the court proceedings was not an intervening, superseding cause, as the mother’s missed work time was neither unforeseeable nor extraordinary.” (Opinion, pp.7-8.) The majority also determined that “the mother’s inability to switch shifts, resulting in her having to take off full shifts in five instances, was neither unreasonable nor an unforeseeable and extraordinary occurrence constituting an intervening, superseding cause.” (Opinion, p.9.)

Chief Judge Gutierrez dissented from the majority’s holding that substantial evidence supported the award of restitution. (Opinion, pp.9-10 & n.2 (Gutierrez, C.J., concurring in part and dissenting in part).) In his dissent, “[b]ased on the evidence presented at the restitution hearing,” Chief Judge Gutierrez concluded “that the time the mother took off work to rest was not an economic loss under the restitution statute.”

(Opinion, pp.9-10.) He explained that economic loss compensable under the criminal restitution statute “includes necessary expenses or loss that the victim incurred *in order to address the consequences of the criminal conduct.*” (Opinion, p.11 (internal quotation marks omitted) (emphasis in original).) A “victim’s time spent appearing and testifying at a restitution hearing, when the victim would otherwise be working, is an economic loss because it is analogous to lost wages.” (Opinion, p.11.) “The analogy holds because the time taken off to testify is a *necessary* loss the victim incurred in order to address the consequences of the criminal conduct.” (Opinion, p.11.)

Because this case instead involved “time spent resting before an event or hearing, when the victim would otherwise be working, even though the hearing or other event would occur during nonworking hours,” to be an economic loss the rest time “must be necessary for the victim to address the consequences of the criminal conduct.” (Opinion, pp.11-12.) Chief Judge Gutierrez concluded that “[f]or the rest time to be *necessary* for the victim to address the consequences of the criminal conduct . . . the victim’s active participation must be required at the hearing or event.” (Opinion, p.12 (emphasis in original).) “Therefore, an economic loss occurs when the victim takes time off work to rest in order to participate in hearings or other events that require the victim’s active participation.” (Opinion, p.12.) Because the State did not present evidence showing the mother testified or otherwise actively participated in any of the events or hearings, Chief Judge Gutierrez concluded that “the time the mother took off work to rest before the court hearings was not an economic loss to the mother, as defined by the restitution statute.” (Opinion, p.12.)

Mr. Reale then filed a timely Petition for Review.

ISSUE

Does the Idaho Court of Appeals' Opinion decide a question of substance not heretofore determined by the Idaho Supreme Court, and is it inconsistent with the Court of Appeals' prior decisions, such that the Idaho Supreme Court should grant review?

ARGUMENT

The Idaho Court Of Appeals' Opinion Decides A Question Of Substance Not Yet Decided By The Idaho Supreme Court And Is Inconsistent With The Court Of Appeals' Prior Decisions And, Therefore, Review Should Be Granted

A. Introduction

The Idaho Appellate Rules provide that the decision of whether to grant a petition for review is discretionary on the part of the Idaho Supreme Court, and that petitions for review may be granted only “when there are special and important reasons” for doing so. I.A.R. 118(b). This exercise of discretion is not completely unfettered. Rule 118(b) provides a non-exhaustive list of five factors which must be considered in evaluating any petition for review:

- (1) Whether the Court of Appeals has decided a question of substance not yet decided by the Idaho Supreme Court;
- (2) Whether the Court of Appeals' decision is inconsistent with precedent from the Idaho Supreme Court or the United States Supreme Court;
- (3) Whether the Court of Appeals' decision is inconsistent with its own prior decisions;
- (4) Whether the Court of Appeals' actions are so unusual as to call for the Supreme Court's exercise of its supervisory authority; and,
- (5) Whether a majority of the Court of Appeals has certified that further appellate review is desirable.

I.A.R. 118(b). In this case, Mr. Reale contends that there are special and important reasons for review to be granted. Specifically, the Opinion decides a question of substance not yet decided by the Idaho Supreme Court, and it is inconsistent with the Court of Appeals' prior decisions.

B. Standard Of Review And Applicable Law

A district court has discretion over the decision whether, and in what amount, to award restitution, guided by the factors set forth in I.C. § 19-4304(7). *State v. Corbus*, 150 Idaho 599, 602 (2011). “The district court’s factual findings with regard to restitution will not be disturbed on appeal if supported by substantial evidence.” *State v. Straub*, 153 Idaho 882, 885 (2013) (internal quotation marks omitted). “Substantial evidence is such relevant evidence as a reasonable mind might accept to support a conclusion.” *Id.*

Statutory interpretation “is a question of law over which this Court exercises free review.” *Straub*, 153 Idaho at 276 (internal quotation marks omitted).

The criminal restitution statute, Idaho Code § 19-5304, provides that: “Unless the court determines that an order of restitution would be inappropriate or undesirable, it shall order a defendant found guilty of any crime which results in an economic loss to the victim to make restitution to the victim.” I.C. § 19-5304(2). “Restitution shall be ordered for any economic loss which the victim actually suffers.” *Id.* The definition of “economic loss” includes “lost wages” as well as “direct out-of-pocket losses or expenses.” I.C. § 19-5304(1)(a). “Economic loss shall be based upon the preponderance of evidence submitted to the court by the prosecutor, defendant, victim or presentence investigator.” I.C. § 19-5304(6).

“[I]n order for restitution to be appropriate, there must be a causal connection between the conduct for which the defendant is convicted and the injuries suffered by the victim.” *Corbus*, 150 Idaho at 602. For purposes of criminal restitution, “causation consists of actual cause and true proximate cause.” *Corbus*, 150 Idaho at 602 (citing *State v. Lampien*, 148 Idaho 367, 374 (2009)). “Actual cause is the factual question of

whether a particular event produced a particular consequence.” *Id.* (internal quotation marks omitted). “[T]rue proximate cause deals with whether it was reasonably foreseeable that such harm would flow from the negligent conduct.” *Id.* (internal quotation marks omitted).

C. The Opinion Decides A Question Of Substance Not Yet Decided By The Idaho Supreme Court, And It Is Inconsistent With The Idaho Court Of Appeals’ Prior Decisions

Mr. Reale asserts that the Opinion decides a question of substance not yet decided by the Idaho Supreme Court, and it is inconsistent with the Idaho Court of Appeals’ prior decisions. The time the mother took off work to rest was not an economic loss under the criminal restitution statute.

Whether time a victim spent resting instead of going to work is compensable as an “economic loss” under I.C. § 19-3504 appears to be a question of first impression before the Idaho Supreme Court. As Chief Judge Gutierrez noted (Opinion, p.11 (Gutierrez, C.J., concurring in part and dissenting in part)), this question is one of statutory interpretation, over which this Court would exercise free review. *See Straub*, 153 Idaho at 276.

Prior decisions of the Court of Appeals have recognized that victims may be compensated under the criminal restitution statute for losses or expenses incurred in attending the restitution hearing and other criminal proceedings. *State v. Parker*, 143 Idaho 165, 167 (Ct. App. 2006) (citing *State v. Doe*, 140 Idaho 873, 880 (Ct. App. 2004); *State v. Olpin*, 140 Idaho 377, 378 (Ct. App. 2004); *State v. Russell*, 126 Idaho 38, 39 (Ct. App. 1994) (per curiam)). As explained in the dissent (see Opinion, p.11 (Gutierrez, C.J., concurring in part and dissenting in part)), “These cases show that ‘economic loss’

includes necessary expenses or losses that the victim incurred in order to address the consequences of the criminal conduct.” *Parker*, 143 Idaho at 167.

The criminal restitution statute’s definition of “economic loss” includes “lost wages.” I.C. § 19-5304(1)(a). By analogy to lost wages, the Court of Appeals in *Russell* held “that the time spent in court by a self-employed victim during which that person could otherwise be pursuing his vocation, but who has been called to testify about the losses caused to him through criminal conduct of the defendant, has suffered an economic loss” for purposes of criminal restitution. *Russell*, 126 Idaho at 39. Similarly, in *Olpin*, a vice president of the victim company testified at the restitution hearing. *Olpin*, 140 at 379. In view of *Russell*, the Court of Appeals in *Olpin* held that the victim company suffered economic loss because it “lost the full value of the time its vice president spent attending court proceedings.” *Id.*

Thus, prior decisions of the Court of Appeals indicate that, for rest time to be analogous to lost wages such that it is compensable under the criminal restitution statute, the time spent resting must be necessary to address the consequences of the criminal conduct. See *Parker*, 143 Idaho at 167. Chief Judge Gutierrez therefore concluded that, “[f]or the rest time to be necessary for the victim to address the consequences of the criminal conduct . . . the victim’s active participation must be required at the hearing or event.” (Opinion, p.12 (Gutierrez, C.J., concurring in part and dissenting in part).)

The analogy to lost wages breaks down in a case, such as the instant one, where the time spent not working was not necessary to address the consequences of the criminal conduct, because the victim did not testify or otherwise actively participate in

the court proceedings. As Chief Judge Gutierrez noted (Opinion, p.12 (Gutierrez, C.J., concurring in part and dissenting in part)), the State did not present any evidence that the mother actually testified or otherwise actively participated in any of the court hearings at issue. (See, e.g., Tr., p.84, Ls.3-16 (containing the mother's testimony on redirect examination that she "wanted to be able to listen to everything and understand everything" at the court hearings, and that she did not know if she "would ever have to speak").)

Because the mother did not testify or otherwise actively participate, the time she took off work to rest before the court hearings was not necessary to address the consequences of the criminal conduct. Thus, the mother's rest time was not an economic loss compensable as restitution under I.C. § 19-5304. The majority's holding to the contrary is therefore inconsistent with *Parker*, *Olpin*, *Russell*, and other prior decisions of the Court of Appeals.

In sum, the Opinion decides a question of substance not heretofore decided by the Idaho Supreme Court, and it is inconsistent with the Court of Appeals' prior decisions. Thus, this Court should exercise its review authority.

On review, this Court should hold that the district court erred when it awarded the victim's mother \$3315.68 in lost wages for time spent resting instead of going to work. As Chief Judge Gutierrez explained in his dissent, the mother's time spent resting before court hearings was not an economic loss under the criminal restitution statute, and therefore the mother was not entitled to that amount of restitution. (See Opinion, p.12 (Gutierrez, C.J., concurring in part and dissenting in part).) Thus, the district court's restitution award of \$3315.68 for the mother's lost wages should be vacated, and

the matter should be remanded to the district court for the entry of a new restitution order reducing the amount of restitution awarded to the parents by \$3315.68.

CONCLUSION

For the above reasons, Mr. Reale respectfully requests that this Court grant review. On review, this Court should vacate the district court's restitution award of \$3315.68 for the mother's lost wages and remand the matter to the district court for the entry of a new restitution order reducing the amount of restitution awarded to the parents of the victim by \$3315.68.

DATED this 14th day of January, 2015.


BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

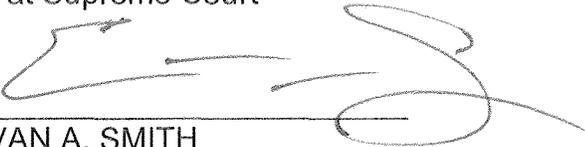
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