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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
) No. 48019-2020
 Plaintiff-Respondent,)
) Ada County Case No.
 v.) CR01-19-3376
)
 SHERRI LEANN WATRING,)
)
 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 JASON D. SCOTT
District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Sherri Leann Watring appeals from the district court's order of restitution.

Statement Of The Facts And Course Of The Proceedings

Watring worked through a company called Right at Home as a caregiver to Joella and William ("Bill") Howell beginning in 2011. (See Tr., p.272, Ls.6-8, 20-22) Initially, she assisted them with errands, housekeeping, and getting to appointments. (Tr., p.202, Ls.18-22; p.272, L.23 – p.273, L.5.) Around 2013, Watring quit working for Right at Home and began working for the Howells directly. (Tr., p.273, Ls.16-22.) Over time, she began to take on more duties and become more involved in their daily lives; by 2016, Watring had become their full-time caregiver. (Tr., p.203, Ls.4-15; p.273, L.23 – p.274, L.7.) Watring installed cameras in the home and monitored the Howells' conversations with others. (See Tr., p.246, L.25 – p.247, L.8; p.318, L.6 – p.319, L.2; p.351, Ls.8-11.) Watring obtained power of attorney for both Joella and Bill. (See Tr., p.397, Ls.6-7.) She had access to and control over the Howells' finances. (Tr., p.213, Ls.2-5.)

Bill Howell died on February 1, 2018. (See Tr., p.186, L.11 – p.188, L.8.) Watring did not inform the Howells' family of his death. (Tr., p.206, L.25 – p.207, L.2.) Instead, the family found out around one week later. (Tr., p.276, Ls.16-17; p.322, Ls.8-17) After visiting Joella, family members became concerned about her care. (See Tr., p.280, L.25 – p.281, L.2.) The Howells' son Donald Howell and his wife Sandy sought out alternative caregivers and guardianship for Joella. (Tr., p.281, Ls.5-12.)

Around that time, Shaw Phillips and Teresa McClenathan were hired through Doctors Hospice to provide care for Joella Howell following her diagnosis of pneumonia. (See Tr., p.241, L.20 – p.244, L.19; p.330, L.24 – p.331, L.2; p.503, L.21 – p.504, L.5.) Joella was very quiet and

reserved; when they tried to speak with her, Joella “would look up to the back of her for some reason.” (Tr., p.246, Ls.8-12.) Later, they discovered cameras in the home, including one right over Joella. (Tr., p.246, L.25 – p.247, L.8.) Watring watched and listened in on conversations on her iPad. (Tr., p.351, Ls.8-11.) Phillips noticed that the home was being remodeled, new tile was being installed and the kitchen island was being redone; when Phillips asked why, Watring said she intended to bring in more patients to make more money. (Tr., p.252, L.25 – p.253, L.7.)

Phillips and McClenathan noticed bedsores on Joella’s body. (Tr., p.249, Ls.10-13; p.335, L.7 – p.338, L.3.) McClenathan gave Watring instructions for how to treat Joella, including keeping her turned in bed, keeping her dry and clean, and to not use cream on her wounds. (Tr., p.338, Ls.16-25.) Watring disregarded these instructions; she did not turn Joella in bed, Joella’s clothes and bedding were “typically very soaked in urine,” and she continued to use cream on the wounds. (Tr., p.342, Ls.1-9.) Watring told McClenathan that she was administering gabapentin medication to Joella without Joella’s knowledge by putting it in juice because Joella did not want to take it. (Tr., p.349, Ls.4-7.) McClenathan found this particularly concerning; caregivers do not give medication without the patient’s knowledge because the patient has a right to refuse. (Tr., p.349, Ls.8-14.) At one point, McClenathan called law enforcement because Watring would not allow her to see Joella and she was concerned about her care. (Tr., p.366, Ls.18-24.)

In late February, Donald Howell was granted guardianship of Joella. (Tr., p.210, L.24 – p.211, L.1.) He fired Watring on February 22, 2018. (Tr., p.210, Ls.5-8; p.282, Ls.8-14.) Watring was upset, tried to block the family from seeing Joella, and tried to get Joella to speak to her attorney on the phone to stop it. (Tr., p.282, L.15 – p.283, L.2.) Watring locked herself in Bill’s office for around an hour. (Tr., p.283, Ls.5-13.) When Watring left the home, she took some boxes, including one containing medicines, and a large laundry bag that was full to the top. (Tr.,

p.211, L.24 – p.212, L.2; p.254, L.20 – p.255, L.6; p.283, Ls.20-23.) After she was gone, the family noticed important items were missing from the home, including the computer, medical records, military records, identifications, wallets, checkbooks, credit cards, keys, garage door openers, and the urn with Bill’s ashes. (Tr., p.212, Ls.3-13; p.284, Ls.9-12.)

Donald Howell recovered the urn from Watring but was never able to recover Bill’s ashes. (See Tr., p.208, L.10 – p.209, L.13.) Watring told McClenathan that Bill’s ashes were to be buried or left at the VA cemetery. (Tr., p.354, Ls.12-15.) Watring told Phillips that she had Bill’s ashes and was going to deal with them as she saw fit. (Tr., p.253, L.14 – p.254, L.19.) Watring told law enforcement she scattered Bill’s ashes at Moses Lake, per Joella’s request. (See Tr., p.386, Ls.22-24.) However, Watring posted on Facebook a map of the location where she scattered the ashes, which was a location north of Spokane, Washington, over one hundred miles east of Moses Lake. (See State’s Ex. 11; see also Tr., p.385, L.17 – p.387, L.15.)

After Watring was fired, Joella’s health began to improve. Before Watring was fired, Joella looked very unhealthy, frail, and bed-bound; she had chest congestion, large bedsores, and showed signs of dehydration. (Tr., p.294, Ls.5-7; p.333, Ls.5-9; p.335, L.11 – p.336, L.3.) Once she was no longer under Watring’s care, Joella gained twenty-six pounds, her bedsores were treated, and her health greatly improved. (Tr., p.294, Ls.13-16; p.348, Ls.9-22.) Joella died on June 26, 2018. (Tr., p.294, Ls.24-25.)

Officer Wigington met with Watring several times. (Tr., p.375, Ls.10-13.) During one meeting, Watring “offered up a very large box completely full of paperwork” from her residence, which contained power of attorney documents for both Bill and Joella, medical records, veterans records, financial records, and Bill’s will. (Tr., p.375, L.20 – p.376, L.16.) The family put together a detailed accounting of the Howells’ finances. (See Tr., p.287, Ls.3-18; see also Defense Ex.101.)

They owed on two mortgages, one for the home the Howells originally lived in and the one they moved into while under Watring's care. (Tr., p.288, L.17 – p.289, L.9.) They owed on the construction being done in the new house. (Tr., p.289, Ls.10-18.) They owed on four credit cards, two of which were in default. (Tr., p.289, L.22 – p.290, L.12.)

Officer Anjelkovich detailed the Howells' financial records, transfers made to accounts in Watring's name, and debts incurred. (See Tr., p.403, L.1 – p.420, L.4; p.431, L.24 – p.451, L.3.) He calculated the total debt accrued in the Howells' names from December 2016 to February 2018 to be \$25,439.98; he calculated the total amount disbursed from the Howells' accounts to Watring during that same time to be \$78,051.46. (Tr., p.449, L.20 – p.450, L.7.)

The state charged Watring with two counts of felony abuse, exploitation, or neglect of a vulnerable adult and one count of misdemeanor petit theft. (R., pp.33-34.) Following a trial, the jury found Watring guilty as charged. (R., pp.352-53; Tr., p.618, L.25 – p.619, L.18.) The district court sentenced Watring to one and a half years fixed on each felony count, to run concurrently, and left open the issue of restitution. (R., pp.382-84; Tr., p.686, Ls.11-15.)

Thereafter, the district court held a restitution hearing. (See R., pp.1131-32; see also Supp. Tr.) The state requested the district court take judicial notice of the trial transcript as well as State's Exhibits 13 through 16. (Supp. Tr., p.5, Ls.12-18; R., pp.393-1130.) With no objection, the district court granted the state's motion. (Supp. Tr., p.5, L.19 – p.6, L.3.) The state relied on those materials and requested restitution in the amount of \$103,491.44. (See Supp. Tr., p.6, Ls.4-8; p.16, Ls.15-18.) Watring testified on her own behalf. She testified that she did not have assets but had various debts, including medical bills and rent. (See Supp. Tr., p.7, L.14 – p.9, L.16.) Watring also testified about her physical and mental condition. (Supp. Tr., p.9, L.18 – p.11, L.11.)

After taking the matter under advisement, the district court awarded restitution in the amount of \$38,911.00. (R., pp.1133-39.) First, the district court concluded that the Howells' estate was eligible to receive restitution, given that the Howells were directly injured victims before their deaths. (R., pp.1134-35.) Second, the district court addressed Watring's ability to pay, and concluded that "Watring's financial circumstances and earning ability don't justify declining to enter any restitution order at all...[n]or do they justify a restitution order in a lower amount" than that proven by the state to be caused by Watring's criminal acts. (R., pp.1135-36.)

Last, the district court determined the appropriate amount of restitution. (R., pp.1136-39.) The state requested restitution in the amount of \$103,491.44: \$78,051.46 based on "monies allegedly paid from the Howells' accounts to Watring," and \$25,439.98 based on "credit-card debts allegedly accumulated by Watring in the Howells' name." (R., p.1136.) The district court first deducted "reimbursements whose propriety was unchallenged," which lowered the \$78,051.46 figure to \$38,911.00. (R., pp.1136-37.) Then, the district court determined the state failed to prove that the credit card debts had been accumulated for Watring's benefit, rather than for the Howells' benefit. (R., p.1137.) Therefore, the district court ordered restitution in the amount of \$38,911.00. (R., pp.1137-39.) The district court further ordered that interest not accrue on that amount. (R., pp.1138-39.)

Watring filed a timely notice of appeal from the judgment of conviction. (R., pp.389-90.)

ISSUE

Waring states the issue on appeal as:

Did the district court abuse its discretion by entering an order of restitution without properly considering Ms. Waring's ability to repay the amount in the future?

(Appellant's brief, p.9.)

The state rephrases the issue as:

Has Waring failed to show that the district court abused its discretion by entering an order of restitution after considering her financial circumstances and ability to pay?

ARGUMENT

Watring Has Failed To Show That The District Court Abused Its Discretion By Entering An Order Of Restitution After Considering Her Financial Circumstances And Ability To Pay

A. Introduction

Watring argues the district court abused its discretion when it awarded restitution because it did not properly consider her ability to repay the amount in the future.¹ (Appellant’s brief, pp.10-16.) This argument is unavailing. The district court considered both Watring’s restitution hearing testimony regarding her financial circumstances and the information in the PSI. Only after discussing her apparent immediate inability to pay and potential foreseeable future ability to pay did the district court order restitution. Further, the district court specifically declined to order interest in light of Watring’s financial circumstances. Watring has shown no abuse of discretion.

B. Standard Of Review

“The sentencing court has discretion to determine whether restitution is appropriate and, if so, to set the amount.” State v. Houser, 155 Idaho 521, 524, 314 P.3d 203, 206 (Ct. App. 2013). See also State v. Wisdom, 161 Idaho 916, 919, 393 P.3d 576, 579 (2017). When reviewing a district court’s order of restitution for abuse of discretion, this Court “examin[es] whether the trial court ‘(1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason.’” State v. Garcia, 166 Idaho 661, ___, 462 P.3d 1125, 1145 (2020) (quoting State v. Bodenbach, 165 Idaho 577, 591, 448 P.3d 1005, 1019 (2019)). The district court’s factual findings in relation to restitution will not be

¹ Watring challenges only whether the district court properly considered her ability to pay, but does not otherwise dispute the propriety or amount of restitution awarded.

disturbed if supported by substantial evidence. State v. Straub, 153 Idaho 882, 885, 292 P.3d 273, 276 (2013); State v. Corbus, 150 Idaho 599, 602, 249 P.3d 398, 401 (2011); see also Garcia, 166 Idaho at ____, 462 P.3d at 1145-46 (defendant’s foreseeable ability to pay “is a factual finding that will not be disturbed on appeal if supported by substantial evidence”).

C. The District Court Properly Considered Watring’s Financial Circumstances And Ability To Pay Before Ordering Restitution

The court shall order a defendant found guilty of any crime which results in an economic loss to the victim to make restitution to the victim unless the court determines that an order of restitution would be inappropriate or undesirable. I.C. § 19-5304(2). The policy behind this statute “favors full compensation of crime victims who suffer economic loss.” State v. Olpin, 140 Idaho 377, 378, 93 P.3d 708, 709 (Ct. App. 2004). In determining whether to order restitution and the amount of such restitution, the court must consider the amount of economic loss sustained by the victim, and the financial resources, needs, and earning ability of the defendant. I.C. § 19-5304(7). However, “[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). Indeed, a defendant’s “inability to pay neither precludes nor limits a restitution award,” but is simply one factor for the court to consider in making its discretionary determination. Olpin, 140 Idaho at 379, 93 P.3d at 710; see also State v. Taie, 138 Idaho 878, 880, 71 P.3d 477, 479 (Ct. App. 2003); State v. Bybee, 115 Idaho 541, 543, 768 P.2d 804, 806 (Ct. App. 1989).

“[T]he ‘immediate inability’ of a defendant to pay is a separate concept from the ‘foreseeable ability’ of the defendant to repay the award.” Garcia, 166 Idaho at ____, 462 P.3d at 1146. A court may order restitution in contemplation of a defendant’s future ability to pay. Id. at ____, 462 P.3d at 1145; Olpin, 140 Idaho at 380, 93 P.3d at 711; Bybee, 115 Idaho at 543, 768 P.2d

at 806. However, a district court is not “required to divine a defendant’s future capabilities,” nor should a victim’s right to restitution be limited to what is known about the defendant’s financial circumstances at the time of sentencing. Garcia, 166 Idaho at ____, 462 P.3d at 1147. Idaho courts have upheld orders of restitution where the defendant’s future ability to pay was little more than supposition. See Bybee, 115 Idaho at 543, 768 P.2d at 806 (noting “it is unlikely Bybee will ever meet the full amount of restitution ordered,” but “Bybee has the business acumen to earn money for restitution upon his eventual release” and “in the event Bybee is able to obtain some assets, the victims should have ready access to the assets for satisfaction of their losses”); see also Wisdom, 161 Idaho at 924, 393 P.3d at 584 (upholding restitution order despite defendant’s near-minimum wage pay based on district court’s conclusion that there was nothing preventing defendant from “perhaps moving up, realizing an increase in her salary and at some point being able to at least make some payment towards the restitution requested in this case”); see also Garcia, 166 Idaho at ____, 462 P.3d at 1147 (noting that “[a] defendant facing a lengthy prison sentence may be dramatically different and markedly more employable *after* his release than he was at the time of his crime” (emphasis in original)).

The district court acted consistently with applicable legal standards by properly considering Watring’s financial circumstances and ability to pay before ordering restitution. The district court set forth the factors it must consider, quoting the language of I.C. § 19-5304(7). (R., p.1135.) The district court noted that under that provision the immediate inability to pay does not preclude an order of restitution. (R., p.1135.) However, the district court also recognized it must consider Watring’s “‘foreseeable ability’ to pay restitution in the future.” (R., p.1135 (quoting Garcia, 166 Idaho at ____, 462 P.3d at 1145).) Then it did so.

The district court noted Watring’s testimony at the restitution hearing “bearing on her inability to pay a restitution award.” (R., p.1133.) The district court also noted information in the presentence investigation report (PSI) bearing on Watring’s financial circumstances: that Watring was “██████████”, was on food stamps, and had limited financial resources, significant health problems, and not much in the way of an employment history or near-term employment prospects.” (R., pp.1135-36 (citing PSI, pp.1, 17-19).²) The district court considered that Watring may be unable to continue her employment in the health care field as a result of this case, and would be incarcerated for a little over a year. (R., p.1136.) Although the district court noted that Watring “might lack the ‘foreseeable ability’ to fully repay a large restitution award,” the court determined Watring “mostly supported herself so far in her life, and it isn’t unlikely that she’ll find a way to support herself and be capable of making modest restitution payments.” (R., p.1136.) This is supported by substantial evidence in the record. Watring identified various “job skills/experience,” including “caregiver, landscaper, mill-worker.” (PSI, p.18.) Although Watring was unemployed at the time of the PSI and declined to list any employment prior to her time working for the Howells, she “indicated that despite not seeking employment since being fired in 2018, she does not have an issue maintaining work.” (PSI, pp.17-18.) Further, Watring testified that she is very industrious and always had a job since she was a teenager. (See Supp. Tr., p.13, Ls.6-9.)

Based on its considerations of Watring’s financial circumstances, ability to pay, and the crimes for which restitution was being sought, the district court “conclude[d], in its discretion, that Watring’s financial circumstances and earning ability don’t justify declining to enter any

² The presentence investigation report (PSI) appears in the Confidential Documents electronic document on pages 3179-3289. Citations to the PSI will refer to the PSI’s internal pagination.

restitution order at all, particularly not given that she committed a theft-type crime.” (R., p.1136.) “Nor do they justify a restitution order in a lower amount than the full economic loss the State has proved was caused by her criminal conduct.” (R., p.1136.) That being said, the district court ordered that interest not accrue on the awarded restitution due to “the sizeable restitution amount and Watring’s difficult financial circumstances and limited earning ability.” (R., pp.1138-39.) Because the district court properly considered the factors of I.C. § 19-5304(7), including Watring’s immediate and foreseeable ability to pay, it did not abuse its discretion when it ordered \$38,911.00 in restitution, without interest.

Watring argues the district court abused its discretion when it ordered restitution because she has no foreseeable ability to pay the amount ordered. (Appellant’s brief, pp.14-16.) Watring points specifically to the facts that she was unemployed, would likely be unable to work in the same field due to her crimes, and her medical conditions. (Appellant’s brief, p.14 (citing PSI, pp.17-20).) Those circumstances, considered by the district court, do not preclude an order of restitution. See Taie, 138 Idaho at 880, 71 P.3d at 479 (upholding restitution order over defendant’s argument that his incarceration and medical conditions would render him unable to secure employment in former occupation). Additionally, Watring argues that Garcia, Bybee, and Wisdom support her argument that the district court abused its discretion. However, each case supports the opposite conclusion.

In Garcia, this Court vacated a restitution order after determining that the district court had failed to recognize the distinction between the defendant’s immediate inability to pay and his foreseeable future ability to pay. Garcia, 166 Idaho at ___, 462 P.3d at 1146. Further, this Court concluded “the district court did not address Garcia’s future ability to repay at all,” where its entire analysis of Garcia’s ability to pay was limited to one sentence stating the court had considered

Garcia's economic circumstances. Id. at ____, 462 P.3d at 1146-47. The district court here committed no such errors. The district court, quoting Garcia, specifically recognized the distinction between Watring's immediate ability to pay and her foreseeable future ability to do so. (R., p.1135.) Rather than rely on one conclusory sentence, the district court devoted two pages of its order to its consideration of the factors set forth in I.C. § 19-5304(7), including both Watring's immediate and foreseeable future ability to pay. (R., pp.1135-36.) Therefore, the district court did exactly as Garcia requires and that decision supports that the district court did not abuse its discretion.

Likewise, the Bybee and Wisdom decisions support the district court's exercise of discretion. In Bybee, the Idaho Court of Appeals upheld the district court's restitution order, which amounted to over 1.6 million dollars. Bybee, 115 Idaho at 542, 768 P.2d at 805. In doing so, the Court of Appeals noted that it was unlikely Bybee would ever pay off that amount. Id. at 543, 768 P.2d at 806. However, the Court of Appeals considered the district court's conclusion that Bybee had business acumen and could potentially find a means to make money upon his release. Id. In that event, "the victims should have ready access to the assets for satisfactions of their losses." Id. Similarly in Wisdom, this Court upheld the district court's restitution order. Wisdom, 161 Idaho at 925, 393 P.3d at 585. This Court noted that Wisdom made barely more than minimum wage but relied on the district court's finding that there was nothing to "preclude her from perhaps moving up, realizing an increase in her salary and at some point being able to at least make some payment towards the restitution requested in the case." Id. at 924, 393 P.3d at 584. Watring's case is no different. Just as in Bybee, the district court acknowledged that Watring may struggle to pay off the full amount of restitution ordered. (R., p.1136.) And, as in both Bybee and Wisdom, the district court noted that Watring had demonstrated the ability to support herself financially

throughout her life and it was not unlikely she would be able to do so again. (R., p.1136.) Should she be able to do so, the Howells' estate should have ready access to those assets to satisfy the economic losses caused by Waring's underlying criminal conduct. The district court did not need to divine how Waring might do so, nor was it limited by Waring's financial circumstances and employment opportunities at the time of the hearing. See Garcia, 166 Idaho at ___, 462 P.3d at 1147.

The record demonstrates that the district court considered Waring's financial circumstances, including her immediate and foreseeable future ability to pay, as well as the policy favoring providing full recovery to crime victims, before it ordered restitution. Accordingly, Waring has failed to show any abuse of the district court's discretion.

CONCLUSION

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

DATED this 27th day of April, 2021.

/s/ Kacey L. Jones
KACEY L. JONES
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 27th day of April, 2021, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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/s/ Kacey L. Jones
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KLJ/dd