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NOTICE: UNPUBLISHED OPINION

NOTICE
Memorandum decisions of this court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law.
Court of Appeals of Alaska.

James E. Barber, Petitioner,
v.
Superior Court, Respondent.

Court of Appeals No. A–11553
|
August 10, 2016

Original Application for Relief from the Superior Court, First Judicial District, Sitka, William B. Carey, Judge. Trial Court No. 1SI–10–440 CR

Attorneys and Law Firms

James E. Barber, in propria persona, Wasilla, for the Petitioner.

No appearance for the Respondent.

No appearance for the real party in interest, Jeffrey Bettencourt.

Tamara E. de Lucia, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for amicus curiae State of Alaska.

Allen M. Bailey, Anchorage, and Ami C. Liu and Margaret Garvin, Portland, Oregon, for amicus curiae National Crime Victim Law Institute, aligned with the Petitioner.
Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.*

MEMORANDUM OPINION

Judge MANNHEIMER.

***1** Both Article I, Section 24 of the Alaska Constitution and AS 12.61.010(a) guarantee crime victims the right to be heard at the defendant's sentencing. In particular, AS 12.61.010(a)(9) guarantees crime victims the right to personally appear at sentencing, to present a written statement, and to give testimony or make an unsworn oral presentation.

This case is an original application for relief brought by a crime victim, James E. Barber, who was assaulted by three men, and who was denied his right to be heard at the sentencing hearing of one of these defendants, Jeffrey Bettencourt.

We granted Barber's application because we thought to clarify the question of whether, in these circumstances, a crime victim is entitled to seek re-opening of a defendant's sentencing, and whether the double jeopardy clause of our constitution would allow a modification of the defendant's sentence that would make it more severe.

We received no brief from either the superior court or the real party in interest, Jeffrey Bettencourt. However, we received thoughtful and well-researched briefs from two *amici curiae*: the State of Alaska and the National Crime Victim Law Institute.

The State of Alaska argues that, in these circumstances, the double jeopardy clause absolutely forbids any modification of Jeffrey Bettencourt's sentence that would make it more severe. But both Barber and the National Crime Victim Law Institute argue that the double jeopardy clause does not forbid re-opening the sentencing proceeding for the limited purpose of modifying the judgement to require Bettencourt to pay restitution to Barber.

After examining the record, we conclude that we need not resolve this constitutional question. As we are about to explain in more detail, Barber's restitution has been paid in full by another defendant who was also convicted of assaulting Barber. This makes the issue of restitution

moot—meaning that we need not decide whether Barber would otherwise have been entitled to have the sentencing court reconsider Jeffrey Bettencourt's restitution obligation.

Underlying facts

In December 2010, James Barber and Matt Hornaman were assaulted by three men—Lance Smith, Christopher Bettencourt, and Jeffrey Bettencourt. All three of these men have since been convicted for their roles in the assault.

Barber participated in Lance Smith's sentencing by submitting a victim-impact statement, and he participated telephonically at Christopher Bettencourt's sentencing.

As part of Christopher Bettencourt's sentencing, the superior court made a finding regarding the total amount of restitution that was owed to Barber and Hornaman, and the court ordered Christopher Bettencourt to pay this restitution jointly and severally with the other defendants. More specifically, Christopher Bettencourt was ordered to pay restitution to Barber and Hornaman in the amounts of $2,083.41 and $29,351.59, respectively—for a total of $31,435.00.

Later, at Barber's request (a request seconded by the District Attorney's Office), the amount of restitution payable to Barber was increased by $54.81, for a total of $2,138.22. Because of this increase, Christopher Bettencourt's total restitution obligation rose to $31,489.81.

***2** The problem in this case arose later, when the superior court sentenced the third defendant, Jeffrey Bettencourt. The court did not give Barber a chance to participate in this sentencing. The prosecuting attorney mistakenly told the court that Barber had already expressed his approval of Jeffrey Bettencourt's negotiated sentence—a sentence that did not contain a restitution provision. And when Barber, who was in jail, attempted to participate in the sentencing hearing telephonically, the clerk's office refused to accept his collect call.

As we explained earlier, Barber and the *amicus curiae* aligned with him (the National Crime Victim Law Institute) argue that, in these circumstances, the double jeopardy clause does not prohibit the superior court from re-opening Jeffrey Bettencourt's sentencing and ordering him to pay restitution to Barber.

But while this appellate case was being litigated, the issue of Barber's restitution became moot. The superior court's file in *Christopher* Bettencourt's case contains a "Satisfaction of Judgment" filed by the Attorney General's Office on December 3, 2014. This document memorializes the fact that the restitution ordered in Christopher Bettencourt's case (restitution in favor of Barber and Hornaman in the combined amount of $31,489.81) "has been fully satisfied".

Conclusion

Because Barber has already received the full amount of the restitution he requested, this moots the question of whether Jeffrey Bettencourt's sentencing might otherwise be re-opened to impose a restitution obligation on him (or to increase an already imposed restitution obligation). Accordingly, Barber's original application for relief is DENIED as MOOT.

Even though we are denying Barber's application for relief as moot, we wish to echo the words of Superior Court Judge William B. Carey, who acknowledged the wrong that was done to Mr. Barber in this case. Judge Carey noted that if Barber had been allowed to participate at Jeffrey Bettencourt's sentencing hearing, it was "almost certain" that the court would have ordered Bettencourt to pay restitution to Barber. Judge Carey then continued:

> The other effect [of Mr. Barber's exclusion from the sentencing hearing] is the loss of trust in a [judicial] system that is now constitutionally and statutorily mandated to [recognize] the right of crime victims to participate in court proceedings and to have their interests considered by the court and the State. In this case, ... the rights of a crime victim ... were not given the priority they merited.

Although we conclude that this issue is moot under the particular facts of Barber's case, we agree with Judge Carey that important rights and policies were violated here. We urge prosecuting attorneys, sentencing judges, and court staff to be more attentive to this problem in the future.

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All Citations

Not Reported in P.3d, 2016 WL 4254886

Footnotes

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

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