

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2009-162404-001 DT

08/12/2010

HON. ROLAND J. STEINLE

CLERK OF THE COURT
L. Rubalcaba
Deputy

STATE OF ARIZONA

JESSICA MARIA ERICKSON

v.

JUDY LEE MCCRAY (001)

JAMES S PARK
RENA P GLITSOS

APO-CCC
AZ DOC
AZ DOC - INMATE TRUST ACCOUNTS
RFR
VICTIM SERVICES DIV-CA-CCC

RULING

The Court held a Restitution Hearing on June 30, 2010 and the defendant waived her appearance. The Court heard testimony from Laurie Weiskopf. Laurie Weiskopf testified that Tom Weiskopf and she are owners of Weiskopf Enterprises Inc. Further, Laurie Weiskopf testified she was designated by Weiskopf Enterprises to handle all matters relating to the Fraudulent Schemes and Thefts committed by Judy McCray who had been the executive assistant to Tom Weiskopf in the Phoenix, Arizona office. They also maintained offices in Montana. Exhibit #13 was a summary of the losses claimed to have been incurred as a direct result of the fraudulent schemes committed by Judy McCray.

The parties stipulated to the figures in Exhibits 1 through Exhibit 5. There were disputes as to Exhibits 6 through Exhibit 12. The summary of losses was in Exhibit 13. Having considered the testimony, the exhibits, the memorandums filed by counsel and arguments made in Court, the Court enters the following decision and order:

Section 13-804, A.R.S., provides in pertinent part:

A. Upon a defendant's conviction for an offense causing economic loss to any person, the Court, in its sole discretion, may order that all or any portion of the fine imposed be allocated as

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2009-162404-001 DT

08/12/2010

restitution to be paid by the defendant to any person who suffered an economic loss caused by the defendant's conduct.

B. In ordering restitution for economic loss pursuant to § 13-603, subsection C or subsection A of this section, the Court shall consider all losses caused by the criminal offense or offenses for which the defendant has been convicted.

Section 13-901(A), A.R.S., provides in pertinent part: If probation is granted the Court... shall order restitution pursuant to § 13-603, subsection C where there is a victim who has suffered economic loss.

Section 13-105(14), A.R.S., provides: "Economic loss" means any loss incurred by a person as a result of the commission of an offense. Economic loss includes lost interest, lost earnings and other losses which would not have been incurred but for the offense. Economic loss does not include losses incurred by the convicted person, damages for pain and suffering, punitive damages or consequential damages.

The purpose of the restitution statutes is to make victims whole. *See State v. Lindsley*, 191 Ariz. 195, 953 P.2d 1248 (App.1997); *State v. Ellis*, 172 Ariz. 549, 838 P.2d 1310 (App.1992). Sections 13-105(14) and 13-603(C) require restitution for "economic loss" incurred by a "person as a result of the commission of an offense."

The Court next turns to the defendant's argument that the restitution request for several items is not warranted because it included consequential costs. In *State v. Wilkinson* 202 Ariz. 27 (2002), our Supreme Court focused on the apparent tension in § 13-105(14), which authorizes restitution for losses which would not have been incurred "but for" the criminal offense, but expressly precludes restitution for "consequential damages." The Court found restitution must be: (1) Based on economic loss that (2) Would not have occurred but for the criminal act. The Court concluded that, additionally, the statutory scheme imposes a third requirement: the criminal conduct must directly cause the economic loss. If the loss results from the concurrence of some causal event other than the defendant's criminal conduct, the loss is indirect and consequential and cannot qualify for restitution under Arizona's statutes.... The Court held that the statutes direct a Court to award restitution for those damages that flow directly from the defendant's criminal conduct, without the intervention of additional causative factors. *State v. Wilkinson*, 202 Ariz. 27 (2002)

The Court finds that "restitution does *not* require proof beyond a reasonable doubt." (emphasis added). Restitution is not part of the adjudication of guilt; it is part of the sentencing function. *Id.* Accordingly, a different burden of proof applies: Restitution is not an element of the offense nor punishment exacted by the state. *It is the act of restoring or making the victim whole and does not require proof beyond a reasonable doubt.* The determination of the amount of

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2009-162404-001 DT

08/12/2010

restitution is part of the sentencing function of the Court and *is bound by different rules than the adjudication of guilt*. *State v. Fancher*, 169 Ariz. 266, 268, 818 P.2d 251, 253 (App.1991) (citations omitted) (emphasis added).

The Court will address the items which the defense stated is not warranted:

1. ATTORNEY FEES: The victims testified they retained an attorney to assist them in handling the issues relating to the fraudulent schemes and theft. They needed advise on how to terminate the defendant. They needed advise on how to handle the insurance claims, and they needed advise to advise them on their rights as victims including restitution issues. The defense claims these are consequential damages. As authority the defense cites *State v. Stover* 220 Ariz. 239. However, that case is distinguishable. The victims here did not hire an attorney to pressure the State to prosecute. The victims here are owners of a family held business. The business sustained a loss. The wrongdoer needed to be terminated properly. Claims needed to be submitted to insurance companies, and they needed advise on their rights under the victim's statutes which they were unfamiliar with.

Clearly the request for attorney fees meets the "but for" standard". The only argument is the state could have advised them on victim's issues. The State does not represent the victims. The victims are entitled to retain independent counsel. Here the attorney just served as an advisor and did not appear. This is distinguishable from the State's duty to prosecute and would effectively deprive victims of independent legal advice on their rights to prompt restitution.

Accordingly, the Court finds the request for attorney fees is reimbursable as restitution.

2. INVESTIGATOR FEES: The investigator was hired to determine whether all of the losses were accounted for. Again this was a family held business; the hiring of the investigator was to help the owners determine if all losses were accounted for. While the State has the duty to investigate and prosecute the defendant that is not mutually exclusive of what a prudent business person would do to help determine the total loses. A prudent business person will retain legal, accounting or other services to evaluate what happened, the amount of the loss or recommendations to the owners so that in the future they can identify and prevent it in the future. The myopic view of the defense would fly in the face of the case law cited above indicating the purpose of restitution is to make the victim whole. The only question is: are these reasonable business expenditures which a prudent business person would have incurred based upon the fraudulent scheme perpetrated on the company. Clearly these are reasonable business expenses incurred directly the result of the actions of the defendant.

Accordingly, the Court finds the investigator fees reimbursable as restitution

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2009-162404-001 DT

08/12/2010

3. **AUDIT FEES:** The objection to the audit fees was more general. For the same reasons set forth in the section on attorney fees and investigator fees, the Court finds these fees are reasonable business expense incurred as a direct result of the acts of the defendant.

Accordingly, the Court finds the audit fees are reimbursable as restitution.

4. **BANKING FEES/MISCELLANEOUS:** The Court finds these items are “other loss which would not have been incurred but for the loss.”

Accordingly, Banking fees are reimbursable as restitution.

5. **TIME SPENT BY LAURIE WEISKOPF:** The Court has reviewed Exhibits #10 and #11 which was the time spent by Laurie Weiskopf on behalf of Weiskopf Enterprises directly related to the losses sustained. The statute contemplates loss of wages and other losses which would not been incurred but for the acts of the defendant. Weiskopf Enterprises could have hired someone to do this work. The amount requested based upon the hourly rate requested is reasonable based upon the testimony of Laurie Weiskopf.

Accordingly, the Court finds the time spent by Ms. Weiskopf is reimbursable as restitution.

6. **INTEREST:** The definition of economic loss includes lost interest. The only issue is whether the 8% interest rate is fair and reasonable. The parties have not briefed the issue. The question is: Does lost interest mean the current rate offered on savings accounts? CD? The rate of return in the stock market or legal interest. The requested rate of 8% is less than legal interest which the Court would otherwise impose so under the circumstances, the Court finds the requested interest is reasonable.

Accordingly, the Court finds that the request for lost interest is reimbursable as restitution.

Accordingly, the Court finds the total amount of losses incurred by Mr. and Mrs. Weiskopf and Weiskopf Enterprises is \$217,270.07.

In Exhibit #13, the parties agree that Ms. McCray is entitled to certain credits totaling \$105,500.00. The only dispute is the return of a watch given to the defendant as a gift. She apparently returned it. There was no testimony offered by the defense surrounding the circumstances of the return. Did Ms. McCray return the watch as a credit? Did she return it because she felt it was necessary considering the breach of her fiduciary duty? What was the value of the returned watch which had been worn by the defendant. Given the conflicting

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2009-162404-001 DT

08/12/2010

testimony of Laurie Weiskopf, the Court finds the defendant has failed to show by the preponderance of the evidence that the return of the watch was meant as a credit on the thefts she committed.

Accordingly, the defendant will not be given credit against her restitution order.

After deducting the credits for insurance payments and payments made by the defendant,

THE COURT FINDS the Defendant, Judy McCray is ordered to pay restitution in the amount of \$112,729.67.

Pursuant to A.R.S. § 31-230 and 31-254(D) and (E),

IT IS ORDERED that the Department of Corrections shall collect monies on this inmate's account and/or 30% of Defendant's earnings while incarcerated at the Department of Corrections commencing this date and to continue until Defendant is released from the custody of the Department of Corrections.

This case is eFiling eligible: <http://www.clerkofcourt.maricopa.gov/efiling/default.asp>