STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

GARY GILMORE

Defendant-Appellant

_____/

Supreme Court No.

COA No. 334205

Lower Court No. 16-003006-FH

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

_____

STEVEN D. HELTON (P78141)
Attorney for Defendant-Appellant

_____

APPLICATION FOR LEAVE TO APPEAL

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Table of Contents

List of Attachments

Index of Authorities

Statutes

Court Rules

Cases

Other Sources

Statement of Questions Presented

I. Did Defendant-Appellant waive his right to an evidentiary hearing regarding the proper amount of restitution where he disputed the amount of restitution specified in the People's settlement offer before ultimately availing himself in that offer?

Defendant Answers: No

The People Answer: Yes

The Trial Court did not answer

The Court of Appeals Answered: Yes

Ii. If Defendant-Appellant did not waive his right to an evidentiary hearing regarding the proper amount of restitution, did the trial court err by denying him such a hearing?

Defendant Answers: Yes

The People Answer: No

The Trial Court Answered: No

The Court of Appeals did not answer

Judgment Appealed from and Relief Sought

Defendant-Appellant Gary Gilmore appeals from the Court of Appeals' September 25, 2018, opinion affirming the circuit court's decision to order Mr. Gilmore to pay $18,000 in restitution, and concluding that by accepting the prosecutor's plea offer that specified that restitution would be set at $18,000, Mr. Gilmore waived his right to a restitution hearing despite placing the proper amount of restitution in dispute immediately before pleading guilty, and despite his denial that he caused more than $1,000 in damages to the victim when he provided the factual basis for his convictions. (Attachment 1 – Court of Appeals Opinion)

Mr. Gilmore seeks leave to appeal the Court of Appeals' decision because it was wrongly decided. He did all that was required of him to trigger a restitution hearing under MCL 780.767(4) by placing the proper amount of restitution in dispute, shifting the burden to the prosecutor to establish the proper amount of restitution by a preponderance. The restitution ordered by the trial court was not authorized by MCL 780.766(2) because Mr. Gilmore's course of conduct did not give rise to $18,000 in damages to the victim of his crimes. And thus, the Court of Appeals' decision to apply traditional rules of waiver and forfeiture in this context resulted in affirmation of an invalid sentence that was challenged within the time afforded by the Michigan Court Rules.

Introduction: Why Leave Should Be Granted

After the trial court threatened to sentence Gary Gilmore to life in prison for his involvement in retail frauds that had been committed at a Home Depot, Mr. Gilmore was presented a Settlement Offer from the prosecutor that specified restitution would be set at $18,000. Before accepting the plea offer, Mr. Gilmore made clear that he disputed the amount of restitution because he did not believe that he had caused anywhere near $18,000 in damage. The trial court refused to accept the plea offer if Mr. Gilmore persisted in challenging the specific amount of restitution. Mr. Gilmore relented and pled guilty to one count of organized retail crime and one count of using a computer to commit a crime pursuant to the plea offer.

After the Court of Appeals denied leave to appeal, this Court remanded Mr. Gilmore's case to the Court of Appeals to determine whether Mr. Gilmore waived his right to an evidentiary hearing, citing *People v McKinley*, 496 Mich 410 (2014) as the controlling precedent to guide the Court of Appeals' decision. (Attachment 2 – Supreme Court Order) (Doc # 24)[1] The Court of Appeals did not consider *McKinley* in finding that Mr. Gilmore had waived his right to a restitution hearing. Instead, it cited traditional rules on waiver and forfeiture in support of its decision to affirm Mr. Gilmore's sentence, resulting in affirmation of an invalid sentence that was timely challenged, a restitution order that is not authorized by the Crime Victims Rights Act, and ultimately, endorsing a system of plea bargaining that leads to different results based on defendants' ability to pay.

Mr. Gilmore now requests that the Court grant leave to determine whether he waived his right to challenge the amount of restitution where he made known to the trial court before accepting the prosecutor's Settlement Offer that he disputed the amount of restitution set forth in the offer.

[1] All docket entries referred to are from COA Case Number 334205 and MSC Case Number 154534.

STATEMENT OF FACTS

I. Gary Gilmore's convictions in the Wayne County Circuit Court

On March 24, 2016 a Felony Complaint was filed against Defendant-Appellant Gary Gilmore, containing five Counts:

> Count 1 - Organized Retail Crime, in violation of MCL 752.1084;
>
> Count 2 - Using a Computer to Commit a Crime, in violation of MCL 752.797(3)(d);
>
> Count 3 - Possession of a Financial Transaction Device, in violation of MCL 750.157p;
>
> Count 4 - Uttering and Publishing a Financial Transaction Device, in violation of MCL 750.248a; and
>
> Count 5 - Receiving and Concealing Stolen Property ($200.00 or More But Less Than $1,000.00), in violation of MCL 750.535(4)(a).

(Attachment 3 – Felony Complaint) Mr. Gilmore was charged as a fourth habitual offender, and therefore, his conviction of either Count 1 or Count 2 would have subjected him to a potential maximum sentence of life in prison. MCL 769.12(1)(b).

During his first appearance before Wayne County Circuit Court Judge Callahan, who had been selected by blind draw to oversee his case, Judge Callahan told Mr. Gilmore, "Hell, I wouldn't try to settle this case. I'd go to trial, you know." 4/26/16, 4**.** The court then questioned Mr. Gilmore:

> THE COURT: Now you know you've been given a habitual fourth notice, right?
> DEFENDANT GILMORE: Yes, Your Honor.
> THE COURT: What does that result in if you're convicted of either Count Number 1, organized retail crime or Count 2, computers using to commit to a crime? You know what that exposes you to?
> DEFENDANT GILMORE: I believe it raises it to 20 years to life.
> THE COURT: Life imprisonment.
> DEFENDANT GILMORE: Life?
> THE COURT: Yes.
> DEFENDANT GILMORE: Okay.

4/26/2016, 4.

Even though Mr. Gilmore more accurately described the result of MCL 769.12(1)(b) than the trial court, the court appeared to correct Mr. Gilmore by giving him the impression that upon conviction he would automatically be sentenced to life in prison, when this was certainly not the case, and far from the most likely result in most circumstances.

The court went on:

> THE COURT: You must have seen that play Oliver or read the book Oliver Twist too many times.
> MR. COOPER: Have you read it at all?
> DEFENDANT GILMORE: I have read.
> THE COURT: Oh, have you really?
> DEFENDANT GILMORE: No, I seen the movie.
> THE COURT: Oh, have you now?
> DEFENDANT GILMORE: Yes, sir.
> THE COURT: You don't have a nickname by the name of Fagan [sic], do you?
> DEFENDANT GILMORE: No, sir, no, sir.

4/26/2016, 4-5. Fagin from the Dickens novel *Oliver Twist*, is a villain who makes his living by teaching children to pick pocket from others and then reaping the fruits of the children's thievery. Charles Dickens, *Oliver Twist* (Bentley 1838).

When the prosecutor stated the terms of the plea offer that was currently on the table, the court asked, "Why so generous?" 4/26/2016, 6.

The implications of these exchanges were clear: the trial court had already determined that Mr. Gilmore was guilty without even a preliminary examination transcript before him, and if Mr. Gilmore did not settle this case and was convicted he would be sentenced to life in prison.

At a hearing on May 18, 2016, the parties announced that they had reached a plea agreement:

> PROSECUTOR: the offer is to plead to counts 1 and 2, dismiss the remaining counts, as well as withdrawing the habitual; with a sentence agreement of 3 ½ years of probation with the 1st year in the Wayne County Jail. Restitution is set at $18,000.80.

5/18/16, 3; Attachment 4 – Settlement Offer and Notice of Acceptance.

Mr. Gilmore, through counsel, then requested a hearing on that restitution amount. The prosecutor appeared to concede that Mr. Gilmore should receive such a hearing. However, the trial court appeared unable to untangle Mr. Gilmore's acknowledgment of guilt to the two crimes that he was agreeing to plead guilty to with the amount of damages those two crimes gave rise to. When defense counsel failed to make this distinction to the trial court, he appeared to make clear that he was preserving this issue by requesting that it be put on the record. The prosecutor also unsuccessfully attempted to make this distinction clear to the trial court, and also offered to present the evidence to the court and the defendant, presumably so that a restitution hearing could be held. Mr. Gilmore himself then unsuccessfully attempted to make this distinction clear to the trial court, to no avail. At that point, defense counsel announced that Mr. Gilmore would "avail himself of the People's offer." Because the specific language of this exchange may be outcome determinative, it is reproduced in its entirely below:

> [DEFENSE COUNSEL]: I have a question for the Court as well as for the People. … the question would be that if we were to avail ourselves of the People's offer, would we be entitled to a restitution hearing based on the fact that they're arguing that my client is part of a larger ring and that other people are involved in it and --
> THE COURT: So he wants to add further undue expense to the community and to -- what's the name of the financial, not the financial but the retail –
> [DEFENSE COUNSEL]: Home Depot.
> THE COURT: Home Depot. So he wants to add further expense to Home Depot and the community in establishing proofs that they would have to otherwise establish during the course of a trial. So, let's see, what would be the benefit to the community to allow such a thing? I guess nothing. And the only person who'd derive a benefit from that would be the defendant. What kind of negotiation is that? It's bullshit to me. How's that?
> [DEFENSE COUNSEL]: I would like to also state that -- to request that on behalf of my client we add some discussions about that and we'll put it on the record.
> THE COURT: Well, I guess it's up to the prosecuting attorney in that regard.
> [PROSECUTOR]: I mean. Judge, in terms of restitution, we have something like 50 different receipts that all total up to the $18,000 -- I mean, that's what the proofs would show, and that's what we would be arguing with the restitution. But, I mean, I'm also more than willing to go talk to my supervisor about that and we can set restitution. But I know Home Depot's position as well as this, you know, hundred

page binder with their investigation too shows that restitution is around that number, if not that number.
THE COURT: If someone isn't guilty of a crime though they shouldn't plead guilty to it.
[PROSECUTOR]: Agree.
THE COURT: I mean, if they aren't guilty of a crime they shouldn't plead guilty to it, they should go to trial and have a trial by their peers.
[PROSECUTOR]: Well, I think though, your Honor, we could have a situation where a person feels that they have a certain level of guilt but not necessarily guilty for the whole thing. And I know we always like to make the argument is he in for a penny in for a whole pound and that type of analogy, but still, I mean, we are talking about, you know, a certain number of people, we are talking about exact, you know, figure.
THE COURT: Yes, but if someone's unjustly accused then they should just go to trial. If the complaining witness is lying about what was taken from them let them prove it, it's up to them, they've got to prove it. Baloney. I don't need to establish my innocence, they have to prove my guilt.
DEFENDANT GILMORE: May I speak, your Honor?
THE COURT: Why sure.
DEFENDANT GILMORE: I do have a certain amount of guilt, as you —
THE COURT: Oh, no, no, don't start telling me about your guilt. I don't want to hear that. Either you take advantage of this plea offer that's been extended to you or you go to trial, one or the other. I'm not going to hear a cockamamie bull story from you.
DEFENDANT GILMORE: I wouldn't give you one, your Honor.
THE COURT: Okay. Well, then, you've got to fish or cut bait today, my man. My dad used to use another expression.
[DEFENSE COUNSEL]: Your Honor, my client would like to avail himself of the People's offer.
THE COURT: He's a lot smarter than what I thought. Put the man over here.

5/18/16, 4-7.

Following the advice of rights, Mr. Gilmore provided a factual basis for the two crimes to which he was pleading guilty:

THE COURT: On March 22nd, 2016 at 47725 Five Mile Road in the City of Plymouth Township, County of Wayne, State of Michigan, commonly known as a Home Depot, did you use some trickery or artifice, false instrument or container, device or other article to facilitate the commission of an organized retail crime using a, what, a false or misleading UPC label?
DEFENDANT GILMORE: Yes, your Honor.
THE COURT: Describe to me in your own words what you did?
DEFENDANT GILMORE: Went to the Home Depot, changed the bar code on a door mount and I bought it.
…

THE COURT: Okay. What was the cost of this thing?
DEFENDANT GILMORE: I'm not sure, I believe it was $160, $169.
THE COURT: And what did you take the UPC code from?
DEFENDANT GILMORE: I got it from one of the -- one of the guys I was with.
THE COURT: What?
DEFENDANT GILMORE: One of the guys I was in the car with.
THE COURT: Who was this guy in the car with you?
DEFENDANT GILMORE: His name is Bud, that's what [w]e call them. Bud. He's one of the defendants.
…
THE COURT: Had you used [the UPC label] in the past?
DEFENDANT GILMORE: Yes.
THE COURT: To acquire how much property?
DEFENDANT GILMORE: One other one.
THE COURT: One other what?
DEFENDANT GILMORE: Same thing.
THE COURT: So it was a door unit?
DEFENDANT GILMORE: Yes, sir.
THE COURT How many times -- you had just used this UPC, false UPC label one time before or many times before?
DEFENDANT GILMORE: One time before.
THE COURT: Did you get these things all from one person?
DEFENDANT GILMORE: It was the same thing. it was the same one used over.
THE COURT Oh, you kept using the same UPC code from the previous purchase and you also used that --
DEFENDANT GILMORE: Yeah, most times it was the same one.
THE COURT: What was the UPC label originally on? So needless to say the door unit that you were getting costs a certain amount of money, right?
DEFENDANT GILMORE: It's the same one –
THE COURT: Normally.
DEFENDANT GILMORE: It's the same product. Just for a lesser price.
THE COURT: Okay. That's what I was going to ask you. What was it originally at? In other words, it had to be on another unit that costs a lot less, right?
DEFENDANT GILMORE: I don't know, I can't recall the name of it right now, your Honor. They were the same kind just a lesser price. Same brand, lesser price.
THE COURT: And this use of the computer, did you use a computer in any way in --
DEFENDANT GILMORE: We used a U-scan.
THE COURT: You scanned this UPC code?
DEFENDANT GILMORE: Yes, sir, a U-scan.
THE COURT: So that contributed to or allowed you to use that UPC code inappropriately; is that right?
DEFENDANT GILMORE: Yes, your Honor.
THE COURT: So the computer that you were misusing so-to-speak was in the hands of Home Depot, but you knew it was going to misread this, right?
DEFENDANT GILMORE: Yes, your Honor.

> THE COURT: All right. The Court will accept your guilty plea to organized retail crime, a violation of MCL752.9084 a five-year felony. Count number 2, using a computer to commit a crime, a violation of MCL752.7973D a seven-year felony…

5/18/16, 15-19.

Sentencing was originally scheduled for June 13, 2016. However, when the trial court learned that the Sentence Agreement would constitute a downward departure from the sentencing guidelines, he called the agreement "BS" and announced that he would not follow it, and scheduled a pretrial hearing for the following week. 6/13/16, 7. At the scheduled pretrial hearing Mr. Gilmore announced that he did not wish to withdraw his plea, even though the trial court had announced that it would not sentence him in accordance with the sentence agreement. 6/15/16, 4-5.

The trial court sentenced Mr. Gilmore to 5 years probation for his conviction of organized retail fraud and 30 months to seven years for use of a computer in committing a crime. The court ordered Mr. Gilmore pay $18,000 in restitution. 6/15/16, 7-8. Mr. Gilmore did not renew his request for a restitution hearing at sentencing.

II. Procedural History

Mr. Gilmore filed a Delayed Application for Leave to Appeal with the Court of Appeals on August 2, 2016. (Doc # 1) The sole issue presented in the Application was Mr. Gilmore's entitlement to a restitution hearing, with Mr. Gilmore requesting that the Court of Appeals remand to the trial court so that such a hearing could occur. The Court of Appeals denied leave to appeal pursuant to a 2 to 1 decision. (Doc # 12)

Mr. Gilmore then filed a Pro Per Application for Leave to Appeal with this Court on October 17, 2016. Mr. Gilmore again asserted that he:

> made a timely objection to the restitution amount at the plea hearing. …
> The record reflects that the prosecution did not meet its burden of proof and the court failed to make factual findings on the record to support the amount of restitution awarded. The court's failure to impose restitution in accord with substantive proof of all losses is a substantive change which requires a remand.

> This error is of constitutional magnitude; it goes to the heart of a defendant's right to due process at sentencing. Thus, it is reversible error which cannot be held harmless. *People v Anderson*, 446 Mich 392 (1994).

(Doc # 13, 2-3)

In lieu of granting leave to appeal, this Court remanded to the Court of Appeals on two issues: (1) whether the defendant waived the question of his entitlement to an evidentiary hearing regarding the amount of restitution; and, if not, (2) whether the Wayne County Circuit Court erred in denying him a hearing. (Doc # 24)

Mr. Gilmore argued that he had not waived his right to a restitution hearing by availing himself in the prosecutor's offer because he had done all that was required to trigger such a hearing under MCL 780.767(4) by placing proper amount of restitution in dispute before pleading guilty, and he was not required to request a restitution hearing at sentencing since doing so would have been futile in light of the trial court's statements during the plea hearing. (Doc # 37) Mr. Gilmore further argued that traditional principles of waiver in the context of fixed restitution amounts specified in settlement offers inevitably will result in violations of equal protection because defendants who can pay more can secure more favorable plea offers than indigent defendants based on their ability to pay. The People argued for the application of traditional waiver rules. (Doc # 42) The Court of Appeals applied traditional rules of waiver, and affirmed Mr. Gilmore's sentence. (Doc # 66)

Mr. Gilmore now seeks leave to appeal, and ultimately remand to the trial court so that a hearing can be held on the proper amount of restitution.

Argument

I. Mr. Gilmore created a dispute as to the proper amount of restitution, thereby triggering the requirement that the prosecutor establish restitution by a preponderance of the evidence.

Standard of Review

The proper application of the restitution statutes is a matter of statutory construction subject to de novo review. *People v McKinley*, 496 Mich 410, 414-415; 852 NW2d 770 (2014).

Issue Preservation

For the reasons set forth below, the trial court was required to hold a restitution hearing on the proper amount of restitution because Mr. Gilmore placed that proper amount of restitution in dispute. He did not waive his right to a restitution hearing by pleading guilty pursuant to a plea agreement that specified a fixed amount of restitution because the proper amount of restitution is to be determined by the court when it is disputed, not by the defendant and prosecutor, and because neither party has the right to thwart the Crime Victims' Rights Act, MCL 780.766, *et seq*. ("CVRA"). *See People v McKinley*, 496 Mich 410; 852 NW2d 770 (2014). He timely challenged the restitution award in his application for leave to appeal, filed within six months of sentencing.

A. Mr. Gilmore triggered a restitution hearing by placing the proper amount of restitution in dispute prior to pleading guilty pursuant to the prosecutor's plea offer.

MCL 780.767(4) requires that the trial court hold a restitution hearing whenever the proper amount of restitution is in dispute: "Any dispute as to the proper amount of restitution shall be resolved by the court by a preponderance of the evidence." "In determining the amount of restitution to order ... the court shall consider the amount of the loss sustained by any victim as a result of the offense." MCL 780.767(1). "[A]ny course of conduct that does not give rise to a conviction may not be relied on as a basis for assessing restitution against a defendant." *McKinley*, 496 Mich at 419–20; 852 NW2d 770.

Both Mr. Gilmore's trial counsel and Mr. Gilmore personally placed the proper amount of restitution in dispute before he accepted the prosecutor's plea offer. The factual basis Mr. Gilmore provided under specific questioning by the trial court disputed that his crimes had caused even $1,000 in damages to the victim, much less $18,000 in damages. Mr. Gilmore did all that was required of him under the CVRA to trigger a restitution hearing, and the trial court abused its discretion in failing to hold one. Likewise, the Court of Appeals erred in holding that traditional rules of waiver override the specific wording of the CVRA, especially in light of the circumstances surrounding Mr. Gilmore's plea.

1. A formal request for a restitution hearing at sentencing was not required since renewing his request would have been futile

Through the parties' exchange with the trial court prior to Mr. Gilmore submission of his guilty plea, it was clear that Mr. Gilmore disputed the amount of restitution claimed, that he sought a restitution hearing on the proper amount of restitution, and that the prosecutor would accommodate this request if allowed to do so by the trial court. Placing the amount of restitution in dispute was all that was required to shift the burden to the prosecutor to establish the proper amount of restitution. Mr. Gilmore did not waive his right to a restitution hearing by failing to renew his request for a restitution hearing at sentencing.

Prior to submitting his plea, Mr. Gilmore's counsel made clear that Mr. Gilmore was entering his plea with the caveat that he would later be requesting a hearing on the proper amount of restitution: "if we were to avail ourselves of the People's offer, would we be entitled to a restitution hearing?" 5/18/16, 4. After the trial court made its disdain for the request known, denying the request by asking "What kind of negotiation is that? It's bullshit to me. How's that?" 5/18/16, 4-5, defense counsel requested that the trial court put its ruling that it was denying Mr. Gilmore's request on the record: "I would like to also state that – to request that on behalf of the

record." 5/18/16, 5. At that point, the trial court appeared to concede that it was up to the prosecutor, not the trial court, to determine whether waiver of a restitution hearing would be part of the plea agreement, stating: "Well, I guess it's up to the prosecuting attorney in that regard." 5/18/16, 5. The prosecutor then discussed gathering the evidence in his possession to support the proper amount of restitution. 5/18/16, 5. However, the prosecutor was also cut off by the court, claiming that if Mr. Gilmore was not guilty of the offenses then he should not plead guilty. 5/18/16, 5. The prosecutor attempted to explain to the court, why, despite Mr. Gilmore's guilty plea, a restitution hearing was necessary: "we have a situation where a person feels that they have a certain level of guilt but not necessarily guilty for the whole thing." 5/18/16, 5-6. The trial court again demanded that Mr. Gilmore go to trial if he did not agree with the restitution amount. When Mr. Gilmore stated, "I do have a certain amount of guilt," the trial court responded: "Either you take advantage of this plea offer that's been extended or you go to trial, one or the other. … you've got to fish or cut bait today, my man." 5/18/16, 6.

Mr. Gilmore made clear that he disputed that his course of conduct had caused $18,000 in damages to Home Depot, and that he desired that a restitution hearing be held. The trial court's ruling was equally clear: it was denying Mr. Gilmore's request for the hearing. Given this, Mr. Gilmore was not required to renew his request for a hearing at sentencing because such a request would have been futile in light of the trial court's previous ruling. *See*, *e.g.*, *Baker v Wayne County Bd of Road Com'rs*, 185 Mich App 82, 86-87; 460 NW2d 566 (1990) ("it would have been futile for defendant to object further. Therefore, the issue is not waived."). *See also Miller v Hensley*, 244 Mich App 528, 531–32 n.2; 624 NW2d 582, 584 (2001) ("the issue was properly preserved for appellate review because an issue is not waived by a party's failure to make futile objections."). Defense counsel's decision not to renew his request for a restitution hearing at sentencing was

understandable considering the volatile and threatening demeanor of the trial court throughout the proceedings.

Mr. Gilmore disputed his course of conduct had given rise to $18,000 in damages, and made clear that he was requesting a hearing. That request was denied. He was not required to renew his objection at sentencing. There is no Court Rule or case law that prohibits a defendant from requesting a restitution hearing prior to sentencing. Mr. Gilmore therefore did not waive his right to a restitution hearing.

2. Waiver of a Restitution Hearing Was Not a Condition of the Plea Agreement

The Settlement Offer set the restitution amount at $18,000.80, but did not purport to require Mr. Gilmore to waive his right to a restitution hearing.

"The practical interpretation given to contracts by the parties to them, while engaged in their performance and before any controversy has arisen concerning them, is one of the best indications of their true intent." *Klapp v United Ins. Group Agency, Inc.*, 468 Mich 459, 479; 663 NW2d 447 (2003) (quoting *People ex rel Attorney General v Michigan Central R. Co.*, 145 Mich 140, 166; 108 NW 772 (1906) (portion of dissent by GRANT, J.)).

In the present case, we know that neither party intended for the Settlement Agreement to waive Mr. Gilmore's right to a restitution hearing since after signing the Settlement Agreement defense counsel requested a restitution hearing and the prosecutor offered to obtain and present evidence to establish that the claimed $18,000.80 in restitution was actually owed. 5/18/16, 5-7. This interpretation, as demonstrated by the conduct of both parties, must be given effect by the court. *Klapp*, 468 Mich at 478; 663 NW2d 447.

The Legislature made clear that whenever there is a dispute as to restitution, the trial court is to resolve the dispute, with the prosecuting attorney bearing the burden of demonstrating the loss sustained by a victim as a result of the offense. MCL 780.767(4). There was a dispute as to

the proper amount of restitution, which was made clear at the Plea Hearing. Yet no proofs were presented and the trial court made no finding that Mr. Gilmore's offenses resulted in $18,000 in loss to the victim. Thus, until supported by the prosecutor by a preponderance, restitution is more properly set at $0 than $18,000.

B. Mr. Gilmore was entitled to renew his request for a restitution hearing after sentencing

A sentence based on inaccurate information violates due process and entitles the defendant to a resentencing. *Townsend v Burke*, 334 US 736 (1948); *People v Malkowski*, 385 Mich 244; 188 NW2d 559 (1971); *People v Triplett*, 407 Mich 510; 287 NW2d 165 (1980). The restitution order is part of the sentence, and MCR 6.429(B)(3) allows the defendant to file an application for leave to appeal to correct an invalid sentence within six months from the date of sentence.

"A Motion to correct an invalid sentence may be filed by either party. The court may correct an invalid sentence. MCR 6.429(A). "If the defendant may only appeal by leave… a motion to correct an invalid sentence may be filed within 6 months of entry of the judgment of conviction and sentence." MCR 6.429(B)(3).

A sentence is invalid where, for example, the trial court failed to comply with sentencing procedure,[2] is constitutionally impermissible,[3] or the sentence was the result of a mistake of law or fact.[4] Because, once disputed, the proper amount of restitution must be supported by a preponderance, and that did not occur in this case, Mr. Gilmore's sentence was invalid, and he was entitled to have it corrected via a determination of the proper amount of restitution.

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[2] *See*, *e.g.*, *People v Lowe*, 172 Mich App 347; 431 NW2d 257 (1988) (defendant entitled to resentencing where he did not receive a reasonable opportunity to allocute pursuant to MCR 6.425(D)(2)(c)).

[3] *See*, *e.g.*, *People v Courts*, 401 Mich 57; 257 NW2d 101 (1977) (cannot penalize a defendant for demanding a trial).

[4] *See*, *e.g.*, *People v Green*, 205 Mich App 342; 517 NW2d 782 (1994) (defendant entitled to resentencing where trial court mistakenly believed that sentence enhancement was mandatory rather than discretionary).

The trial court was put on notice of Mr. Gilmore's dispute of the entry of a $18,000 restitution award prior to the entry of its sentence. 5/18/16, 4-7. A party is not required to bring its post-conviction motion before a trial court where doing so would be futile or a waste of time. In *People v Taylor*, 387 Mich 209, 221; 195 NW2d 856 (1972), this Court held:

> [C]ommencing post plea review of guilty pleas in the trial court is the preferable policy.
> …
> Beneficial as commencement of review in the trial court may be, there are certain obvious cases where doing so would be futile and nonproductive. Where for example the basis for review has already been brought to the attention of the trial judge and he has ruled on it adversely or has on the record refused to consider it, it would be a patent waste of time and a useless act to require the defendant to bring the matter to the attention of the trial court again.

The present case is one such "obvious case where doing so would be futile and unproductive." The trial court had already ruled, in contravention of the CVRA and his judicial authority, and in apparent conflict with the trial level prosecutor, that pleading guilty to Counts 1 and 2 was in and of itself acknowledgment that Mr. Gilmore caused $18,000 in damages, despite argument from defense counsel, the prosecutor, and the defendant himself. Because the trial court was unable to divorce these two concepts prior to accepting Mr. Gilmore's plea, Mr. Gilmore was not required to renew his request at sentencing, and certainly was not required to file a post-conviction motion to correct his sentence. Doing so would have been futile and a waste of resources; Mr. Gilmore already had the trial court's answer.

Instead, Mr. Gilmore took the most obvious and appropriate approach to obtaining relief available to him; he filed an Application for Leave to Appeal with the Court of Appeals seeking remand for a hearing on restitution. (Doc # 1) This is not a novel approach, and this is procedural posture that this Court silently endorsed in *People v Bryant*, 499 Mich 896; 876 NW2d 821 (2016), when it remanded that case to the Court of Appeals for consideration of the restitution order, despite trial counsel's purported ineffectiveness in failing to request a restitution hearing at

sentencing, and appellate counsel's apparent failure to file a motion to correct invalid sentence in the trial court after he was sentenced. *People v Bryant*, 319 Mich App 207; 900 NW2d 360 (2017). The Court of Appeals did not find that the defendant in *Bryant* had waived his right to a restitution hearing in its opinion either. *Id.* The reason for this was apparently because Bryant filed an application for leave to appeal challenging the amount of restitution within the time provided in the Court Rules for doing so.

In the present case, a request for a restitution hearing at sentencing would have been futile and a motion to correct the sentence to correct the restitution amount would have been futile. Mr. Gilmore was not required to make such a futile gesture. He reasserted his request for a restitution hearing in his Delayed Application for Leave to Appeal that he filed with the Court of Appeals within six months of being sentenced.

II. The trial court erred by denying defendant a restitution hearing

For the reasons discussed above, Mr. Gilmore placed the proper amount of restitution in dispute, and the trial court erred by failing to hold a hearing on the proper amount of restitution. For the reasons discussed below, the trial court's belief that a settlement offer and agreement can take the proper amount of restitution out of dispute will inevitably result in violation of criminal defendants' right to equal protection, since it will allow moneyed defendants to purchase more favorable plea offers than indigent defendants. It will also inevitably affect crime victims' constitutional right to restitution, since such agreements will also allow plea offers that provide for increased incarceration in exchange for a lower restitution award. The proper amount of restitution is the loss sustained by any victim as a result of the defendant's course of conduct that gave rise to his conviction. MCL 780.766(2). *McKinley*, 496 Mich at 422; 852 NW2d 770. It is not the amount of restitution that the parties agree to while plea bargaining.

If the Court allows defendants to agree to pay a specific amount of restitution in exchange for a favorable plea offer it will be allowing defendants to purchase more favorable plea offers. If this Court agrees with the Court of Appeals that by pleading guilty pursuant to such an offer, a defendant waives or forfeits his right to a restitution hearing and to subsequently challenge the restitution awarded, it will be allowing trial courts to issue unreviewable invalid sentences that set restitution awards that are not authorized by law.

Standard of Review

"The proper application of MCL 780.766(2) and other statutes authorizing the assessment of restitution at sentencing is a matter of statutory interpretation," and are reviewed de novo. *McKinley*, 496 Mich 410, 414–15; 852 NW2d 770.

Discussion

The People contended that by signing the Settlement Agreement and pleading guilty pursuant to that settlement offer that provided for a fixed amount of restitution, Mr. Gilmore agreed to pay restitution and gave up his right to a restitution hearing. But restitution must accurately the amount of damage that the defendant's crimes gave rise to. The People's argument necessarily requires the Court to hold that the parties may agree to restitution awards not authorized by the CVRA, and that the resulting invalid sentences can never be subject to review.

A. The language of the MCL 780.767(4) did not allow restitution to be set at $18,000 until the prosecutor established by a preponderance that Mr. Gilmore's crimes gave rise to $18,000 in damages to Home Depot.

MCL 780.766(2) governs restitution and states that a defendant must "make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction…."

As a factual basis for his pleas, Mr. Gilmore stated that he placed a false UPC code on a door mount that he believed cost $169 and scanned that UPC code at a U-scan in Home Depot, which allowed him to pay less than the $169 for the door mount. He then attempted to return the item for store credit. He acknowledged having done this once before being caught. 5/8/16, 15-19. He did not admit to being part of some larger criminal conspiracy. Thus, it appears that Mr. Gilmore acknowledged the crimes he committed gave rise to approximately $338 in damages to Home Depot, less whatever amount, Mr. Gilmore paid into the self-checkout machine using the fraudulent UPC code.[5]

The actual extent of the damages sustained by Home Depot is unknown. The amount of damage caused by Mr. Gilmore's crimes is unknown. Therefore, a restitution hearing was required

[5] According to the Prosecutor, the fraudulent UPC code scanned for $13.99, meaning Mr. Gilmore should have only been ordered to pay approximately $325.01 (Doc #21 p. 17), if he actually used the store credit that he received by returning the item. If he did not use the store credit, it is hard to see how he caused any damage to Home Depot at all.

to set an amount of restitution that was authorized by the CVRA. Mr. Gilmore's Presentence Investigation Report stated: "The noted activity [of returning fraudulently purchased items] took place at least 52 times at various Wayne County Home Deport Locations, with an **estimated** loss of **approximately** $18,000." (emphasis added). But there is no claim or information to support that Mr. Gilmore is responsible for more than two instances of this conduct: once on March 22, 2016 at the Home Depot in Plymouth, and one other time that he admitted to under questioning by the trial court. Nor is there any claim that Mr. Gilmore was involved in a broader conspiracy that resulted in approximately $18,000 in damages to Home Depot; simply that the "noted activity" – presumably returning fraudulently purchased items – resulted in such damages. The PSIR also notes that the items were returned for store credits, but does not say if the store credits were ever actually used by Mr. Gilmore or anyone else.

Under MCL 780.767, "any course of conduct that does not give rise to a conviction may not be relied on as a basis for assessing restitution against a defendant. Stated differently, while conduct for which a defendant is criminally charged and convicted is necessarily part of the "course of conduct that gives rise to the conviction," the opposite is also true; conduct for which a defendant is not criminally charged and convicted is necessarily not part of a course of conduct that gives rise to the conviction." *McKinley*, 496 Mich at 419–20; 852 NW2d 770.

Courts do not have the authority to award restitution on amounts not provided for by statute. *Id*. Even if the defendant has attempted to agreed to pay restitution to a specific sum, if he has not been charged and convicted of a crime, the conduct of which gave rise to the damage, the court may not order restitution. The Legislature and this Court have denied them authority to do so.

2. Equal Protection Does Not Allow a Prosecutor to Condition Dismissal or Reduction of Charges on a Defendant's Agreement to Pay Restitution for Damages He Has Not Caused.

To the extent that recent Court of Appeals decisions on restitution have stood for the proposition that a criminal defendant should be able to bargain for reduced charges by agreeing to pay more restitution, those decisions cannot stand, as every time such a bargain is struck and enforced, the Equal Protection Clause is violated. Defendants who have means, or who foresee having means prior to the termination of their probation or parole, can agree to pay huge sums that are tangentially related or completely unrelated to crimes that they have been charged with, and in exchange receive vastly different sentences than indigent defendants.

The Equal Protection Clauses of the federal and state Constitutions, U.S. Const., Am. XIV; Const. 1963, art. 1 § 2, prohibit "unequal punishment for offenders who have and do not have sufficient money." *People v Collins*, 239 Mich App. 125, 135–36, 607 NW2d 760 (1999) (citing *Tate v Short*, 401 US 395, 397-400 (1971); *People v Baker*, 120 Mich App 89, 99; 327 NW2d 403 (1982)).

A prosecutor's conditioning of a favorable plea offer on a defendant's ability to agree to pay a specific amount of restitution, where, as here, that amount of restitution is not connected to reality and is not authorized by the CVRA, necessarily implicates the rights of defendants who are unable to pay. This practice will lead to untold violations of equal protection. The Court should eliminate this practice by properly interpreting the CVRA to remove the determination of the proper amount of restitution from the discretion and respective bargaining powers of the parties, and by restoring the power to make that determination to the trial courts.

Summary and Request for Relief

WHEREFORE, Defendant-Appellant Gary Gilmore respectfully requests that this Honorable Court grant leave to appeal, or that it remand to the Wayne County Circuit Court for a restitution hearing.

Respectfully submitted,

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