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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)
)
Appellee,)
)
v.)
)
JAMES PATRICK SCANNELL, JR.,)
)
Appellant.)
_____)

2 CA-CR 2006-0212
DEPARTMENT A

MEMORANDUM DECISION
Not for Publication
Rule 111, Rules of
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-28392

Honorable Hector E. Campoy, Judge

DISMISSED

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H O W A R D, Presiding Judge.

¶1 Appellant James Scannell, Jr. appeals from the trial court’s denial of his “Motion to Correct Restitution Order.” Because the denial is not an appealable order pursuant to A.R.S. § 13-4033, we dismiss this appeal for lack of jurisdiction.

¶2 In 1989, Scannell pleaded nolo contendere to facilitation of a fraudulent land development scheme. At sentencing, the trial court suspended the imposition of sentence, placed Scannell on probation, and ordered him to pay restitution in the approximate amount of \$6.7 million pursuant to the terms of a separate restitution order. The restitution was based on the victims’ potential liability to a third-party insurer. The order also provided that the amount of restitution would be reduced “upon the presentation of appropriate evidence” showing a “change of circumstances in the amount of economic loss.”

¶3 In 1992, Scannell’s probation officer requested that Scannell appear in court and explain restitution arrearages. After a hearing in which one victim, Deborah K. apparently participated,¹ Scannell filed a notice of changed circumstances, which included documents showing that the third party had released some of the victims from the underlying liability that would have resulted in economic loss. In the notice, Scannell stated he believed that Deborah K., had also been released from her liability, though he acknowledged he did not have enough documentation to support this assertion. The court then reduced the total amount of restitution as to certain victims, implicitly left in place restitution as to

¹The transcript from this hearing is not included in the record on appeal.

other victims, and expressly denied reduction as to Deborah K. Scannell did not appeal or otherwise challenge that order.

¶4 In 1995, Scannell moved to terminate probation. He subsequently filed a second notice of changed circumstances alleging again that Deborah K., as well as other remaining victims, had been released from the underlying third-party liability that would have resulted in economic loss to them and arguing that restitution to them was no longer appropriate. The court terminated Scannell's probation and also ordered counsel for the third party, allegedly in possession of evidence that Deborah K. had not incurred and would not incur any economic loss, to disclose this material to Scannell's counsel. The court further ordered that within two weeks of the termination of probation, "counsel [were] to ascertain the amount of restitution owed and to whom." Approximately one week after it terminated probation, the court granted a motion by Scannell to order the clerk of the court and/or the probation department to release a current and accurate accounting of restitution. Neither Scannell nor the state filed anything further with the court regarding this issue until nine years later.

¶5 In 2004, the state filed a restitution lien for approximately \$2 million against Scannell on behalf of Deborah K. and other victims to whom restitution was still owed. In 2006, Scannell filed a motion to correct the restitution amount and again alleged that Deborah K. had been released from the underlying liability that would have resulted in economic loss. To this motion, Scannell attached materials disclosed by counsel for the third

party that suggest Deborah K. may have been released from her underlying liability in 1990. Scannell also stated his belief that amounts still owing to other victims named in the restitution lien should be adjusted but did not provide any documentation to support his contention. The trial court denied Scannell’s motion to correct restitution finding the issue previously had been decided.² Scannell appeals that ruling.

¶6 Scannell asserts this court has jurisdiction under A.R.S. § 12-2101, which applies to civil appeals. The state assumes that § 12-2101 applies but contends that it does not allow Scannell to appeal in this case. Section 12-2101 appears in the title on courts and civil proceedings and governs civil appeals. But this appeal arises from a criminal case involving a criminal restitution order. Section 13-4033 appears in the criminal code and governs appeals in criminal cases.

¶7 Our analysis of our jurisdiction is not affected by the fact that the original restitution order is entitled “Civil Judgment.” The order tracks the language in A.R.S. § 13-805, which governs criminal restitution, and is a criminal restitution order. Although such orders may be enforced as civil judgments by those owed restitution, *see* § 13-805(C), the instant motion was brought in a criminal proceeding by the defendant against the state to

²At oral argument, Scannell’s counsel asserted that the current proceedings revolve around Deborah K.’s restitution claim. But in Scannell’s most recent motion, he raises the issue of restitution to other victim investors who, like Deborah K., were never removed from the restitution order. We note that the trial court’s minute entry ruling denied Scannell’s “effort to recalculate, reconsider or redetermine the amount of restitution ordered” to Deborah K. *and* the other investors. The analysis in this decision applies to the other investors.

challenge the terms of the restitution order. Furthermore, based on the record in this case, no civil proceeding from which a civil order could arise was ever initiated. And the trial court ordered that, although the restitution was in favor of the individual victims, the state would be responsible for the administration and distribution of the restitution. Therefore, we will examine our jurisdiction under A.R.S. § 13-4033, which governs criminal appeals. *See State v. Wilson*, 207 Ariz. 12, ¶¶ 4-5, 82 P.3d 797, 799 (App. 2004) (appellate court considers question of jurisdiction under appropriate criminal statute sua sponte).

¶8 Section 13-4033 applies to direct appeals and provides, in relevant part, “[a]n appeal may be taken by the defendant only from . . . an order made after judgment affecting the substantial rights of the party.”³ An order that re-imposes a probation condition requiring that a defendant make restitution is not appealable under § 13-4033 because the effect on the defendant’s rights “occurred when the condition was first imposed.” *State v. Gessner*, 128 Ariz. 487, 488, 626 P.2d 1119, 1120 (App. 1981); *see also State v. Steffy*, 173 Ariz. 90, 93, 839 P.2d 1135, 1138 (App. 1992) (although “[a] defendant has a due process right to contest the information on which the amount of a restitution order is based,” that right can be waived); *State v. Herrera*, 121 Ariz. 12, 14, 588 P.2d 305, 307 (1978)

³Section 13-4033 was amended in 1992 to provide that “a defendant may not appeal from a judgment or sentence that is entered pursuant to a plea agreement.” 1992 Ariz. Sess. Laws, ch. 184, § 1. We do not address the potential applicability of this amendment because we resolve the question of appealability in this case on the threshold issue of whether a party’s substantial rights have been affected. *See Fisher v. Kaufman*, 201 Ariz. 500, ¶ 5, 38 P.3d 38, 39 (App. 2001).

(defendant could not wait until after revocation of probation to appeal original judgment of guilt); *State v. Pill*, 5 Ariz. App. 277, 278, 425 P.2d 588, 589 (1967) (statute providing for appeals from certain post-judgment orders “was not intended to provide a means of procuring successive appeals from the same judgment”).

¶9 As Scannell conceded at oral argument, in his current motion, he makes the same argument regarding the amount of restitution owed that he made in 1992 and 1995. The 2006 motion states: “The restitution lien should be corrected to reflect the fact that [Deborah K.] suffered no economic loss in this case because [the third-party insurer] satisfied her notes, and she is, therefore, not entitled to restitution.” The 1995 motion states: “It appears from the investigation that defense counsel has conducted that underlying obligations of several of the remaining investors including Deb[orah K.] were released of liability by [the third-party insurer] during the pendency of these proceedings. That means that . . . the amount of restitution should now be reduced.” The 1992 motion states: “[I]t is believed that [Deborah K.’s] promissory note was . . . forgiven by [the third-party insurer].” Scannell is not entitled to a successive appeal from the prior judgment. *See Pill*, 5 Ariz. App. at 278, 425 P.2d at 589.

¶10 Although the original restitution order allowed for modification upon presentation of appropriate evidence regarding changes in economic loss, the 1992 order denied any modification as to Deborah K. Furthermore, the trial court in 1995 unambiguously imposed a deadline for the submission of such evidence:

It is ordered granting defendant's Motion to Terminate Probation . . . effective at 5:00 p.m. on September 8, 1995 Prior to that time, counsel are to ascertain the amount of restitution owed and to whom so that that amount can be converted to a Civil Judgment.

If counsel determine that they need the time period in which to ascertain the amount of restitution extended, same shall be extended but *for no longer* than two (2) weeks beyond the September 8, 1995 date.

(Emphasis added.)

¶11 The trial court's 1995 order is consistent with § 13-805 in that it requires the amount to be determined conclusively at the termination of probation. That section states that the trial court retains jurisdiction to modify "*the manner* in which court-ordered payments are made" until the restitution is paid in full or the sentence expires. § 13-805(A)

(emphasis added). The statute then states:

At the time the defendant completes the defendant's period of probation or the defendant's sentence, the court shall enter both:

1. A criminal restitution order in favor of the state for the unpaid balance, if any, of any fines, costs, incarceration costs, fees, surcharges or assessments imposed.
2. A criminal restitution order in favor of each person entitled to restitution for the unpaid balance of any restitution ordered.

Id.

¶12 The trial court allowed Scannell a specific amount of time to gather evidence to modify the amount of restitution. He failed to submit anything within that time and never

appealed the court's decision. Absent the requested evidence, the court's 1995 order effectively reaffirmed and finalized the existing amount of restitution. Thus, any effect on Scannell's substantial rights occurred with the entry of that order.

¶13 At oral argument, Scannell's counsel asserted that Scannell had satisfied his restitution obligation in 1996. This assertion is apparently based on the fact that Scannell himself entered an "investor" settlement agreement with the third-party insurer in 1991 and made the final payment in satisfaction of this agreement in 1996. But based on the documents Scannell submitted, his settlement with the third-party insurer was as to his liability as an *investor* in the original scheme and not as to any liability for fraudulently inveigling other investors like Deborah K. It was this fraud that resulted in the criminal charges to which Scannell pleaded *nolo contendere*. The date of the last payment on Scannell's investor settlement with the third-party insurer is irrelevant. Scannell has not provided anything to support his assertion that he satisfied the court-ordered obligation to Deborah K. or any other investor in 1996.⁴

¶14 Although the original order allowed Scannell to move for modification of the restitution amount, it did not provide that he could move unsuccessfully for modification multiple times and continue to renew his failed motion. *See Pill*, 5 Ariz. App. at 278, 425 P.2d at 589. The denial of the current motion has not affected Scannell's substantial rights

⁴We also note that the investor settlement agreement and any assignments therein were immediately effective in 1991, long before the 1992 and 1995 orders.

and thus is not appealable under § 13-4033. *See Gessner*, 128 Ariz. at 488, 626 P.2d at 1120. Because we do not have jurisdiction over non-appealable orders, this appeal is dismissed.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

J. WILLIAM BRAMMER, JR., Judge