

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2345

September Term, 2015

JANET LYNN CABEZAS

v.

STATE OF MARYLAND

Meredith,
Beachley,
Davis, Arrie W.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: January 12, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Janet Cabezas, appellant, pled guilty in the Circuit Court for Charles County to second-degree murder and was sentenced to 30 years of imprisonment, all but five years suspended, to be followed by five years of supervised probation upon her release from prison. The issue of restitution was deferred until her release from prison. In 2015, appellant was ordered to pay restitution for funeral expenses in the amount of \$12,394 to the estate of her deceased husband. Appellant filed an application for leave to appeal, which we granted, and we transferred her appeal to the direct appeal docket.

Appellant raises a single question on appeal: “Whether the circuit court erred in ordering [appellant] to pay restitution without making a finding as to her ability to pay the restitution?” For the reasons that follow, we shall vacate the judgment with respect to the order for restitution, and we shall remand the case to the circuit court for further proceedings.

FACTS

Appellant married Steven Cabezas, Sr., in 1999, when she was 43 years old. In July 2009, after experiencing years of spousal abuse, appellant shot and killed her husband during an argument. On September 15, 2010, appellant entered a plea of guilty to second-degree murder. She was sentenced and incarcerated as stated above; the court reserved ruling on the issue of restitution. After appellant was released from prison in February 2014, the court held three hearings regarding restitution: October 15, 2014; December 16, 2014; and October 27, 2015.

The State sought restitution in the amount of \$12,394, the amount of funeral expenses paid by the deceased’s estate. At one of the hearings on restitution, the attorney

for the deceased’s estate testified that the estate was insolvent when it closed. The attorney further testified that “[t]he estate is indebted to me,” and “I am the only creditor at this point[.]”

Appellant testified at the restitution hearing about her employment history, health, and current financial situation. She testified that, when she married the deceased in 1999, she was employed as a Charles County bus driver, a position she had held for 26 years. In 2000, she was diagnosed with multiple sclerosis (“MS”), and the following year, she stopped working for Charles County due to her MS. She then started her own house-cleaning business, which she also discontinued because of her MS. She explained that, because of MS, her brain and muscle functions are poor, and that her muscles are constricted, spastic, and weak. She testified that her MS is treated, in part, by an intrathecal pump that releases medication directly into or around her spinal cord. She is currently in need of a pump replacement, and owes a substantial amount for doctors’ bills. Appellant further testified that she attempted to get her GED degree while incarcerated, but her MS prevented her from completing the program.

Appellant testified that, each month, she receives \$1,556 in income, and has \$1,551 in monthly expenses.¹ She explained that she pays \$675 per month to rent a one-room duplex, \$200 per month for food, and \$35 twice a month to a therapist. She testified that

¹ Because of application of the “slayer’s rule,” which prevents a murderer from sharing in the distribution of the victim’s estate either by way of statute or will, appellant did not receive any assets by way of inheritance or legacy upon her husband’s death. *See Cook v. Grierson*, 380 Md. 502, 505 (2004)(explaining the “slayer’s rule”).

her expenses also include providing for her pets and taking care of housekeeping matters such as using the laundry machines at the laundromat. She owes her MS physician, who has been treating her since 2006, \$14,000, toward which she pays \$50 per month. She testified that she owes money on two credit cards that she cannot pay, and which had accrued “a lot of interest” while she was incarcerated. Additionally, she owes approximately \$11,500 on a line of credit for a motorcycle she purchased for the deceased. She also owes \$3,200 in back taxes to the State of Maryland, toward which she makes monthly payments of \$46, and there were 94 payments remaining.

Appellant testified that she is “trying to get [her] doctor’s bills straight,” and added, “I don’t know if I can file bankruptcy, or how I am going to pay that.” She testified that her aunt lends her money when she runs short. She asserted: “I am trying to make everything right, and it is never going to be right.”

During the restitution hearings, the State argued that the court should not consider appellant’s ability to pay in deciding whether to order restitution, stating: “We’re simply determining whether she should pay restitution and the amount, not whether she can. That’s for another day.” Defense counsel disagreed, arguing that it is “improper for a trial court to order restitution without basing the judgment on a reasoned inquiry into the defendant’s ability to pay.” Defense counsel argued that appellant did not have the ability to work or pay restitution, pointing out that appellant had outstanding debt that she was unable to pay. During the hearings, the court noted: “I do tend to think, if she has the means, in other words, the present ability to pay right this second, that it does count for something[, but] I don’t think that’s really the most determinative factor in the case[.]”

The court ruled:

THE COURT: So, what I'm gonna do in this case: I looked at everything. I mean, certainly restitution has a compensatory component, but it does serve to rehabilitate people. And I think evidence of that, Ms. Cabezas – to be dead-on honest here – is, I find it very interesting that – and this is not, this is, I hope you take as a compliment – I found it very interesting that you are of the character – which is I'm being complimentary – that sees your credit cards and your debt as debts that should be paid. Why? Because you incurred them. Now I'm not somehow making a statement whether you should pay'em, or shouldn't pay'em or declare bankruptcy.

[CABEZAS]: I'm not gonna pay'em [sic].

THE COURT: No, I understand, I'm not making that statement. And, you know, going forward, my suspicion is there'll be moments where you'll have an easier time paying, and moments where you'll have a harder time paying. And I don't know that you would ever be able to payoff [sic] whatever your credit cards are, or restitution.

But I think in this case, for those purposes, rehabilitation and to compensate the estate, that restitution's appropriate. So I'm gonna order restitution. It'll be part of the probation. It's \$12,394, for those reasonable funeral expenses [payable to the estate of Steven Cabezas].

DISCUSSION

Several standards of appellate review apply to appeals of restitution orders. Legal conclusions are reviewed *de novo*; first-level findings of fact are reviewed for clear error; and the decision to require restitution and the amount of restitution are reviewed for an abuse of discretion. *See In Re A.B.*, 230 Md. App. 528, 531 (2016) (citing *Re Don Mc.*, 344 Md. 194, 201 (1996); *In Re Earl F.*, 208 Md. App. 269, 275 & n.2 (2012); *In Re Delric H.*, 150 Md. App. 234, 240 (2003)).

Appellant argues that the trial court erred when it ordered her “to pay restitution without making a finding as to her ability to pay the restitution,” and therefore, “abused its

discretion in imposing restitution.” The State responds that, contrary to appellant’s argument, the trial court *did* consider appellant’s ability to pay, and therefore, did not abuse its discretion in ordering restitution.

The Court of Appeals stated in *Alexis v. State*, 437 Md. 457, 477-78 (2014), that one of the “more helpful” descriptions of “abuse of discretion” is found in *North v. North*, 102 Md. App. 1 (1994). In *North*, Judge Wilner wrote:

“Abuse of discretion” . . . has been said to occur where no reasonable person would take the view adopted by the [trial] court, or when the court acts without reference to any guiding rules or principles. It has also been said to exist when the ruling under consideration appears to have been made on untenable grounds, when the ruling is clearly against the logic and effect of facts and inferences before the court, when the ruling is clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result, when the ruling is violative of fact and logic, or when it constitutes an untenable judicial act that defies reason and works an injustice.

102 Md. App. at 13–14 (citations and some quotation marks omitted).

With respect to restitution, Maryland Code (2001, 2008 Repl. Vol.), Criminal Procedure Article (“Crim. Proc.”), § 11-603(a), provides: “A court *may* enter a judgment of restitution that orders a defendant . . . to make restitution in addition to any other penalty for the commission of a crime[.]” (Emphasis added.) Section 11-603(a)(2)(i) provides that restitution may be ordered to cover “actual . . . funeral, or burial expenses.” Further, § 11-603(b) states that “[a] victim is presumed to have a right to restitution” under circumstances that appear to exist in this case. Nevertheless, § 11-605(a) provides: “A court *need not issue a judgment of restitution . . . if* the court finds . . . that the restitution obligor does not have the ability to pay the judgment of restitution . . . [or] there are extenuating circumstances that make a judgment of restitution inappropriate.” (Emphasis added.)

Although the court did not expressly explain why the order for restitution might be rehabilitative in this case --- even though the court recognized that appellant might never “be able to payoff whatever [her] credit cards are or restitution” --- the court made the comment that “restitution does rehabilitate people.” This rationale for ordering restitution has been recognized in numerous cases. *See, e.g., Robey v. State*, 397 Md. 449, 458 (2007) (“restitution is significantly rehabilitative in nature in the adult system”); *Grey v. Allstate Ins. Co.*, 363 Md. 445, 459 (2001) (“Restitution is regarded as rehabilitative to the extent that it causes the offender to focus on the victim and the harm that he or she has caused to the victim As noted in [a] Harvard Law Review article, ‘by ordering restitution, a court forces the defendant to acknowledge in concrete terms the harm he has caused.’ [Note,] *Victim Restitution in the Criminal Process: A Procedural Analysis*, *supra*, 97 HARV. L.REV. [931] at 938 [(1984)].”); *Lee v. State*, 307 Md. 74, 78 (1986) (recognizing that one reason for ordering a defendant to pay restitution is “the fundamental purpose of rehabilitating the defendant”); *McDaniel v. State*, 205 Md. App. 551, 558 (2012) (restitution “serves the familiar penological goals of retribution and deterrence, and especially rehabilitation.”) (citations omitted).

Because the court has discretion to decline to enter a judgment of restitution if the obligor “does not have the ability to pay,” it would be an abuse of discretion for the court to order restitution without making a finding regarding the obligor’s ability to pay (when that issue has been timely raised). We said in *In re Delric H.*, 150 Md. App. 234, 251 (2003):

A court may not order restitution, however, if “the defendant or liable parent does not have the ability to pay the judgment or restitution. . .” or if there exists “[g]ood cause to establish extenuating circumstances as to why a judgment of restitution is inappropriate in a case.” Md. Ann. Code . . . (now Crim. Proc. § 11-605(a) (2001)). Therefore, a juvenile court must conduct a “reasoned inquiry” into the respondent’s and parents’ ability to pay. *In re Don Mc.*, *supra*, 344 Md. [191] at 203, 686 A.2d 269 [(1996)]; *In re Levon A.*, *supra*, 124 Md. App. [103] at 145, 720 A.2d 1232 [(1998)].

We agree with the State’s assertion that the trial court did *consider* appellant’s ability to pay, but the court did not state for the record what it found with respect to appellant’s ability to pay restitution. It is not clear to us whether the court found that appellant has the ability to pay, or, perhaps, found that, even though appellant has no present ability to pay, she will have the ability at some point in the future. And, although the court said, “It’ll be part of the probation,” the court did not direct that installment payments in an amount and time frame appellant could afford would be a condition of probation.

Although the circuit court made some inquiry into appellant’s ability to pay, our appellate review of whether the court abused its discretion in ordering restitution is hampered because the court did not enlighten us with its findings regarding appellant’s ability to pay, and, if she has no ability to pay, as she claims, why an order for restitution would nevertheless be rehabilitative in this particular case. Aside from the court’s conclusory statements that, in general, restitution “does serve to rehabilitate people,” and in this case, “restitution’s appropriate,” we are left to speculate as to the court’s reasons for exercising its discretion under Crim. Proc. § 11-605(a) in this instance. We will therefore

vacate the order for restitution and remand the case for further consideration. Maryland Rule 8-604(a).

For the guidance of the court on remand, we note that, in *Coles v. State*, 290 Md. 296 (1981), the Court of Appeals observed that the goal of rehabilitation could be frustrated if the order for restitution exceeds the defendant's ability to pay:

It has been said that “a court’s concern that the victim be fully compensated should not overshadow its primary duty to promote the rehabilitation of the defendant.” *Commonwealth v. Fuqua*, 267 Pa. Super. 504, 407 A.2d 24, 26 (1979); see Best & Birzon, *Conditions of Probation: An Analysis*, 51 Geo. L.J. 809, 827 (1963). Should the court choose to impose restitution, this fundamental objective of promoting rehabilitation comes to the fore and the court in ordering such a condition ordinarily should not exceed the defendant’s ability to comply. This is so because if the amount fixed exceeds the defendant’s resources, the rehabilitative purpose of the sentence is frustrated, especially where restitution is set as a condition of probation, “for in such a case the defendant is told that he will not be imprisoned only if he somehow satisfies a condition he cannot hope to satisfy.” *Commonwealth v. Fuqua*, *supra*, 407 A.2d at 26. See *State v. Garner*, 115 Ariz. 579, 566 P.2d 1055, 1057 (App. 1977); *People v. Kay*, 36 Cal. App. 3d 759, 111 Cal.Rptr. 894, 896 (1973); *State v. Harris*, *supra*; *Huggett v. State*, 83 Wis. 2d 790, 266 N.W.2d 403, 407 (1978). Consequently, most courts which have considered the issue have determined that it is improper for a trial court to order restitution without basing that judgment on a reasoned inquiry into the defendant’s ability to pay, e.g., *State v. Garner*, *supra*; *People v. Kay*, *supra*; *People v. Lofton*, 78 Misc. 2d 202, 356 N.Y.S.2d 791, 793-94 (1974) (interpreting statute); *State v. Ledder*, 31 Or. App. 487, 570 P.2d 994, 996 (1977); *Commonwealth v. Fuqua*, *supra*; *State v. Wilson*, 274 S.C. 352, 264 S.E.2d 414, 416 (1980); *State v. Benoit*, 131 Vt. 631, 313 A.2d 387, 389 (1973)(interpreting statute); *Huggett v. State*, *supra*, 266 N.W.2d at 407-08; *contra*, *People v. Tidwell*, 33 Ill. App. 3d 232, 338 N.E.2d 113, 118 (1975) (interpreting statute). For a chronicling of these and other cases on this point, see generally Annot. 73 A.L.R.3d 1240 (1976).

Id. at 306.

Appellant contends this case may be one in which, to borrow language from *Coles*, *supra*, 290 Md. at 306, “the rehabilitative purpose of the sentence is frustrated . . . where

restitution is set as a condition of probation” and imposes “a condition [s]he cannot hope to satisfy.” *See Crim. Proc.* § 11-607(a)(1)(iii) (“When a judgment of restitution has been entered under § 11-603 of this subtitle, compliance with the judgment of restitution . . . shall be a condition of probation.”). Appellant is a 60 year old woman without a high school diploma or its equivalent. She has severe medical problems that limit her ability to work, and her income is currently consumed by her modest living expenses. She is insolvent.

On remand, if the court imposes an order for restitution, the court should provide some explanation of its rationale for concluding that, despite appellant’s circumstances, imposing an order of restitution as a condition of her probation will be rehabilitating.

JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY VACATED. CASE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION.

COSTS TO BE PAID BY CHARLES COUNTY.