



ORIGINAL

**IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA**

BOBBY LEE RUPPEL, JR.,

Appellant,

v.

STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

Case No. F-2018-513

**FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA**

JUN 27 2019

**JOHN D. HADDEN,
CLERK**

SUMMARY OPINION

HUDSON, JUDGE:

Appellant, Bobby Lee Ruppel, Jr., was tried and convicted in a nonjury trial in Lincoln County District Court, Case No. CF-2016-325A, of Count 1: Assault with a Dangerous Weapon, After Two or More Felony Convictions, in violation of 21 O.S.2011, § 645; and Count 2: Robbery with a Weapon, After Two or More Felony Convictions, in violation of 21 O.S.2011, § 801. The Honorable Cynthia Ferrell Ashwood, District Judge, presided at trial. At a separate sentencing proceeding, Judge Ashwood sentenced Ruppel to twenty-five (25) years imprisonment in each of Counts 1 and 2.¹

¹ Under 21 O.S.2011, § 13.1, Ruppel must serve 85% of his Count 2 sentence before he is eligible for parole.

Both sentences were ordered to run consecutively each to the other.² The court further ordered Ruppel to pay restitution in the amount of \$9,757.49.

Ruppel now appeals, raising two (2) propositions of error before this Court:

- I. THE TRIAL COURT ABUSED ITS DISCRETION BY IMPOSING RESTITUTION WITHOUT FOLLOWING THE MANDATORY STATUTORY PROCEDURES GOVERNING RESTITUTION ORDERS, IN VIOLATION OF APPELLANT'S DUE PROCESS RIGHTS UNDER THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. II, § 7, OF THE OKLAHOMA CONSTITUTION; and
- II. BASED ON THE FACTS AND CIRCUMSTANCES OF THIS CASE, APPELLANT RECEIVED AN EXCESSIVE SENTENCE THAT SHOULD BE MODIFIED.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and the parties' briefs, we find Ruppel's Judgments and Sentences should be **AFFIRMED**, but the matter must be remanded to the District Court for a proper proceeding on the determination of restitution.

Proposition I: Pursuant to 22 O.S.2011, § 991f(C), a district court shall order a convicted defendant to pay restitution if the

² The court additionally ordered that Ruppel's sentences run consecutive to "any other sentences [Ruppel has] in any other cases."

crime victim suffered compensable injury, such as incurred medical expenses and loss of wages. The amount may be up to three times the amount of economic loss suffered as a direct result of the defendant's criminal act. 22 O.S.2011, § 991f(A)(1). Although a defendant may be ordered to pay restitution for economic loss as defined by Section 991f, an order of restitution may only include those losses which are determinable with "reasonable certainty." 22 O.S.2011, § 991a(A)(1)(a). "A 'reasonable certainty' must be more than an approximation, estimate, or guess. Inherent in the definition of reasonable certainty is the requirement of proof of the loss to the victim." *Logsdon v. State*, 2010 OK CR 7, ¶ 9, 231 P.3d 1156, 1162 (internal citations omitted). The record must reflect a basis for the trial judge's determination of a victim's loss or the decision will be deemed arbitrary and found to violate Section 991a. *Honeycutt v. State*, 1992 OK CR 36, ¶ 33, 834 P.2d 993, 1000.

Title 22 O.S.2011, § 991f(E)(3) requires the district attorney to provide the court an official request for restitution form, completed and signed by the victim, which includes "all invoices, bills, receipts, and other evidence of injury, loss of earnings and out-of-

pocket loss. This form shall be filed with any victim impact statement to be included in the judgment and sentence."

Despite Ruppel's failure to object to the manner or amount of restitution awarded at sentencing, upon review we find Ruppel is entitled to relief under the plain error doctrine.³ See *Baird v. State*, 2017 OK CR 16, ¶ 25, 400 P.3d 875, 883; *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395; 20 O.S.2011, § 3001.1. At sentencing, the State merely advised the trial court that the restitution owed to the victim totaled \$9,757.49. The record does not contain testimony regarding the victim's monetary losses, written documents showing the amount of economic injury, or a restitution claim form to support the court's restitution order. We thus cannot conclude from this record that the restitution amount ordered by the district court was determined with reasonable certainty. This is plain error which requires the restitution order be vacated and the case remanded to the district court for a proper determination on the issue of the victim's loss. Relief is thus granted for Proposition I.

³ Notably, the State concedes the district court's restitution order must be vacated as the court failed to follow the governing statutory procedures.

Proposition II: Under the facts and circumstances of this case, Appellant's sentence is not so excessive as to shock the conscience of the Court. *Baird*, 2017 OK CR 16, ¶ 40, 400 P.3d at 886; *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149. There is no absolute constitutional right or statutory right to receive concurrent sentences. *Pickens v. State*, 1993 OK CR 15, ¶ 41, 850 P.2d 328, 338; 22 O.S.2011, § 976. The decision to run a defendant's sentences concurrently or consecutively rests within the sound discretion of the trial court. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. Sentences are to run consecutively unless the trial judge, in his or her discretion, rules otherwise. 21 O.S.2011, § 61.1; *Riley v. State*, 1997 OK CR 51, ¶ 20, 947 P.2d 530, 534-35. As with other decisions left to the trial court's discretion, we will not interfere with that decision unless an abuse of discretion can be shown. *Neloms*, 2012 OK CR 7, ¶ 35, 274 P.3d at 170. Here, the judge exercised her discretion and upon review, we find her exercise of this discretion was not an abuse of discretion. Proposition II is denied.

DECISION

The Judgments and Sentences of the District Court are **AFFIRMED**. The District Court's restitution order is **VACATED** and the case is **REMANDED** to the District Court for a proper determination on the issue of loss in accordance with this opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF LINCOLN COUNTY
THE HONORABLE CYNTHIA FERRELL ASHWOOD,
DISTRICT JUDGE

APPEARANCES AT TRIAL

CHARLES MICHAEL THOMPSON
PATRICK AARON THOMPSON
104 W. 8TH STREET
CHANDLER, OK 74834
COUNSEL FOR DEFENDANT

PATRICIA HIGH
JAMES SIDERIAS
ASST. DISTRICT ATTORNEYS
811 MANVEL AVE., STE. 1
CHANDLER, OK 74834
COUNSEL FOR THE STATE

APPEARANCES ON APPEAL

NICOLLETTE BRANDT
OKLA. INDIGENT DEFENSE
SYSTEM
P.O. BOX 926
NORMAN, OK 73070
COUNSEL FOR APPELLANT

MIKE HUNTER
ATTORNEY GENERAL
JOSHUA R. FANELLI
ASST. ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OK 73105
COUNSEL FOR APPELLEE

OPINION BY: HUDSON, J.

LEWIS, P.J.: CONCUR

KUEHN, V.P.J.: CONCUR

LUMPKIN, J.: CONCUR IN RESULT

ROWLAND, J.: CONCUR