

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jesse Lee Risley,
Appellant-Defendant,

v.

State of Indiana,
Appellee / Cross-Appellant-Plaintiff

November 20, 2023

Court of Appeals Case No.
22A-CR-02971

Appeal from the Vanderburgh
Circuit Court

The Honorable Kelli E. Fink,
Magistrate

Trial Court Cause No.
82C01-1711-F3-6964

Memorandum Decision by Judge May
Chief Judge Altice and Judge Foley concur.

May, Judge.

- [1] Jesse Lee Risley appeals the trial court’s order that he begin paying the restitution ordered as part of his criminal sentence for Level 3 felony aggravated battery.¹ Risley challenges the trial court’s determination that his restitution order should not be reduced by a monetary settlement between his victim and a third party. The State cross-appeals to assert Risley’s appeal is untimely. The State’s cross-appeal fails because the State misapprehends the meaning of “final judgment” and Risley’s appeal fails because we will not invade the trial court’s discretion to determine whether to reduce Risley’s restitution order based on the victim’s settlement with a third-party tortfeasor. Accordingly, we affirm.

Facts and Procedural History

- [2] When Risley appealed the validity of his underlying conviction of aggravated battery, we stated the facts as follows:

On the night of September 23 and into the morning of September 24, 2017, Cody Utley (“Utley”) and his girlfriend Kara Hale (“Hale”) were drinking at a Vanderburgh County bar (“the Bar”). Risley and his friend, Jacob Humphrey (“Humphrey”), were also at the Bar that night. After getting a drink, Utley and Hale went outside to sit on the patio. The couple found a free table but noticed it had only one chair. Seeing a nearby table with three patrons and more than four free chairs, Utley began moving one of the chairs toward his table but was stopped by a woman. The

¹ Ind. Code § 35-42-2-1.5.

woman, later identified as Heather Warfield (“Warfield”), “grabbed” the chair out of Utley’s hand, “slammed it down,” and pushed Utley. Patrons at another table offered Utley a chair. Utley took the chair back to his table and commented to Hale that Warfield’s behavior was “cuntie.” Warfield, who worked as a server at the Bar, was socializing with friends after her shift and another server, Amanda Breeze (“Breeze”), was on duty. Having seen Warfield’s behavior, Breeze went up to Warfield and told her “it was not okay to shove a patron.”

Later, Breeze approached Utley, apologized to him for Warfield’s behavior, and asked if there was anything she could do to help him. Utley responded by calling Breeze “a cunt.” Risley, who had walked up behind Breeze, could hear the conversation when Utley insulted Breeze. Breeze, unsure of what she had heard, asked Utley to repeat what he said; Utley repeated the insult. Breeze clarified that she was not Warfield, and Utley responded by telling her, “I don’t care, you’re still a cunt[.]” During that exchange, Risley told Utley that he was going to “kick [Utley’s] ass.”

Breeze ordered Utley to leave, and when Utley did not cooperate, Breeze asked the Bar’s bouncer to escort Utley and Hale out. As the two were being escorted out of the Bar, Risley offered to pay for their cab fare. Utley, seeing that Risley’s hair was in dreadlocks, made a comment about “[Risley’s] hair and how bad it looked.” As Utley and Hale left through the patio gate, two men heckled them; Utley “heckled back.”

Once outside the patio gate, Utley called for a ride on his cell phone. Utley had taken only a few steps down the sidewalk when he heard a commotion behind him. Turning, Utley saw two men, later identified as Risley and Humphrey, coming toward him. Risley testified that he “noticed that [Utley] had a knife in his hand and . . . felt [his] life was in danger.” Risley and Humphrey knocked Utley to the ground, got on top of him, and

hit Utley on the head repeatedly, stopping only when bouncers pulled the two men off. The attack lasted about a minute. Utley testified that, during the assault, everything “went black.” From a photo line-up, both Hale and Utley identified Risley as one of Utley’s attackers. From a second photo line-up, Hale was also able to identify Humphrey as the other attacker. A witness named Murray Wilson, Jr. (“Murray”) observed the attack and called 911. Wilson urged the 911 operator to send an ambulance because Utley was “bleeding pretty good.”

After being pulled off of Utley, Risley went back inside the Bar. Risley told Breeze that he had “knocked [Utley] out” and needed to leave, saying, “nobody talks to a woman that way.” Around that time, Utley opened his eyes and discovered that a bouncer had attempted to help him stand and was holding a rag to his bloody head. Utley stated, “[A]fter the hit, it took a little bit to see.” As Utley was trying to get up, but before he could get to his feet, Breeze jumped on him and started hitting him. Breeze repeatedly hit Utley; witnesses testified that Breeze hit Utley with an open hand. Risley went inside the Bar and told another bouncer that Utley needed help. Risley then went to his car and drove home. The next thing Utley remembered was speaking with a police officer and seeing an ambulance.

By this time, Evansville Police Department Officer Michael Evans (“Officer Evans”) responded to a dispatch and arrived at the scene. Officer Evans saw Utley in a seated position, and a woman, later identified as Breeze, “standing over him.” At trial, Officer Evans testified that he heard what he thought was a slap, and, when he looked up, he saw Breeze slapping Utley. Breeze was not wearing any rings. Utley testified that he “felt like [he] wasn’t getting super hard hit” by Breeze.

Meanwhile Officer Nicholas Cassin (“Officer Cassin”) also had arrived at the scene and observed “several dozen big blotches of blood.” Officer Cassin followed the trail of blood until he found

Utley. Officer Cassin then asked the bouncer and Hale what happened. Hale said that Utley was the victim of battery. Noting the amount of blood that Utley had lost, Hale insisted that an ambulance be called. While awaiting the ambulance, the bouncer and Hale attended to Utley, and the police officers continued their investigation.

The police officers recognized that Utley was hurt; however, they misjudged the extent of his injuries and thus did not believe the injuries created a “health emergency.” When the officers first encountered Utley, he mumbled and was incoherent, behavior the officers believed was the result of intoxication. When the ambulance arrived, Utley initially refused to go to the hospital and was reluctant to press charges. However, the emergency responders determined that Utley lacked balance and was unsure about “person, place, time, and situation” and required Utley to go to the hospital. Utley was diagnosed as having a depressed skull fracture.

Utley spent three or four days in the hospital’s intensive care unit and went to a rehabilitation center to recover. During his recovery, Utley missed nine weeks of work, and his medical issues resulted in Utley losing his driver’s license. Utley also had difficulty speaking; he could not say the days of the week or recite the alphabet and two-syllable words were challenging to say. On November 9, 2017, the State charged Risley with aggravated battery resulting in an injury causing “protracted loss or impairment of the function of a bodily member or organ,” a Level 3 felony. Ind. Code § 35-42-2-1.5. Upon learning there was a warrant for his arrest, Risley turned himself in.

On February 7, 2018, while Utley was at work at Toyota, he had a seizure. Utley was on his lunch break, and he was talking to Hale using Facetime. Without understanding how he got there, Utley found himself “walking into the offline where all the vehicles go to get repaired and then everybody was looking at

[him].” Utley asked his co-workers why they were looking at him. Utley’s fellow workers sat him down and called an ambulance. Utley had no memory of what happened in the intervening period.

A jury trial began on September 12, 2018. By the time of trial, Utley knew that he had suffered a depressed skull fracture at the Bar when he was attacked and hit in the head. Utley’s head injury damaged the brain tissue and caused many types of bleeding in and around the brain. Specifically, there was “bleeding between the layers of skin that surround the brain, . . . called a subdural hematoma, and there was bleeding around the vessels inside the brain, . . . called subarachnoid hemorrhage, and then there was bleeding inside the brain tissue itself, . . . call[ed] an intracerebral hemorrhage.” Utley’s injury had left him at “a significant risk for a recurrent seizure.” As such, Utley understood that he would need to take anti-seizure medication for the rest of his life.

Risley v. State, 18A-CR-2707, 131 N.E.3d 220, *1 -*3 (Ind. Ct. App. 2019)
(internal record citations and footnote omitted), *trans. denied*.

[3] A jury found Risley guilty of Level 3 felony aggravated battery. The trial court imposed a twelve-year sentence and ordered it be served as “six years executed at the Indiana Department of Correction, three years executed at Therapeutic Work Release, and three years suspended to the Drug Abuse Probation Services Program.” *Id.* at *3. Risley appealed his conviction and raised two issues: whether a jury instruction was erroneous, and whether the evidence was sufficient to support his conviction. The Court of Appeals affirmed his conviction, *id.* at *6, and our Indiana Supreme Court denied his petition for transfer. 137 N.E.3d 925 (Ind. 2019).

[4] At the time of sentencing, the trial court also issued a restitution order:

Comes now the Court and after considering the arguments and exhibits presented to the Court, finds the appropriate restitution to be as follows:

Lost wages	\$20,000
Prescription co-pays	\$200
Other uninsured medical expenses	\$5,500
TOTAL	\$25,700

The Court orders this restitution amount to be reduced to a civil judgment on behalf of Cody Utley. When the defendant is returned to Vanderburgh County from the Indiana Department of Corrections [sic] to serve the Therapeutic Work Release and Drug Abuse Probation Services (DAPS) portions of his sentence, the Court will need to make a determination regarding the defendant’s ability to pay to determine the amount that he is able to pay while serving his sentence on work release and DAPS.

(Appellant’s App. Vol. II at 34) (emphasis in original).

[5] On July 29, 2022, the State filed a motion asking the trial court to “determine a minimum monthly restitution payment amount to the victim, Cody Utley[,]” (*id.* at 102), because Risley “is now at Work Release and is employed[.]” (*Id.*) The court held a hearing on September 12, 2022, whereat the court received as a confidential exhibit a “Settlement Accounting and Release” between Utley and his attorney that set out the division of the proceeds of a personal injury

settlement that arose from the events surrounding Risley’s aggravated battery of Utley. (*See Ex. Vol. 4 (Confidential) at 4-6.*) Risley had not been a party to that civil case or settlement. The trial court decided it needed to resolve the amount of restitution to be paid by Risley before deciding whether he had the ability to pay.

[6] On September 13, 2022, in support of its argument that Risley’s restitution obligation should not be modified, the State submitted relevant appellate decisions to the trial court. On September 15, 2022, Risley filed a Memorandum on Restitution that urged the trial court to determine that Risley did not owe any restitution because Utley had been fully compensated for his losses by a civil settlement with a “third party joint tortfeasor.” (*Id.* at 118.) On September 29, 2022, the trial court entered an order that provided, in non-redundant part:

In Dupin v. State, 524 N.E.2d 329, 330-32 (Ind. Ct. App. 1988), the Indiana Court of Appeals addressed the issue of whether a trial court abused its discretion by ordering a defendant to pay the victims of his crime \$31,680 without crediting against that sum a prior \$100,000 settlement paid to the victims by his insurance company to settle civil claims arising from the same transaction. The Court found that, “Settlements in civil cases can have no effect upon sentences meted out in criminal cases.” Id.

Based on the holding in Dupin, this Court denies the motion to modify the restitution amount. This Court affirms the progress hearing scheduled September 30, 2022, at which time the Court will schedule a new hearing date to determine the amount Defendant has the ability to pay toward restitution.

(*Id.* at 124) (formatting in original).

- [7] Risley filed a motion to reconsider. The State filed a response asking the court to deny Risley’s motion. The trial court denied Risley’s motion for reconsideration on October 28, 2022, and set the hearing on Risley’s ability to pay for November 14, 2022. Following that hearing, on November 17, 2022, the trial court ordered Risley to pay \$200 every two weeks beginning “on or before November 29, 2022[.]” (*Id.* at 132.) Risley filed his Notice of Appeal on December 13, 2022.

Discussion and Decision

1. Timeliness of Appeal

- [8] The State cross-appeals to assert we should dismiss Risley’s appeal because Risley failed to timely file his notice of appeal.

An appellate court must have jurisdiction to review a trial court’s order, and a court has a duty to determine whether it has jurisdiction before proceeding to the merits of the case. Appellate jurisdiction cannot be conferred by the parties or the trial court if the order is “not appealable either as a final judgment or under Trial Rule 54(B).” “Whether an order is a final judgment governs the appellate courts’ subject matter jurisdiction.” Appellate jurisdiction can be raised at any time and “the appellate court may consider the issue *sua sponte*.” “Jurisdiction is a question of law we review *de novo*.”

Adoption of S.L., 210 N.E.3d 1280, 1282 (Ind. 2023) (internal citations omitted).

[9] The State notes Risley filed his notice of appeal on December 13, 2022, which it alleges was “75 days” after September 29, 2022, when the trial court denied Risley’s request for the trial court decrease the amount of restitution Risley had to pay. (Appellee’s Br. at 15.) According to the State, the order refusing to decrease Risley’s restitution amount was a “final order,” (*id.*), which Risley needed to appeal within thirty days, because “appellate courts routinely hear appeals of orders denying sentence modifications.” (*Id.*)

[10] The flaw in the State’s argument is that Risley did not file a free-standing motion for sentence modification. His motion to modify arose within the context of the State’s motion for the trial court to determine whether, and how much, restitution Risley would be able to pay each month while on work release. In such a circumstance, the “final order” was not entered until the trial court’s order of November 17, 2022. *See* Indiana Appellate Rule 2(H) (a final judgment “disposes of all claims as to all parties”); *Adoption of S.L.*, 210 N.E.3d at 1283 (“Once a final judgment is issued by the trial court, it does not require a future decision by that same court.”). Because Risley filed a notice of appeal within thirty days of the trial court’s November 17, 2022, order concluding the post-judgment proceedings as to restitution, his appeal was timely. *Contra Adoption of S.L.*, 210 N.E.3d at 1284 (holding appellate court did not have jurisdiction over order regarding temporary custody during an adoption proceeding because the adoption petition was still pending and, thus, the trial court’s “order was not a final judgment”). We therefore turn to the merits of Risley’s appeal.

2. Denial of Restitution Modification

[11] Risley asserts the trial court abused its discretion when it refused to modify the amount of restitution he was ordered to pay to Utley based on a payment made to Utley by a third-party tortfeasor. Restitution orders are within the trial court's discretion, and as such we review the court's decision for an abuse of discretion. *Gonzalez v. State*, 3 N.E.3d 27, 30 (Ind. Ct. App. 2014). "An abuse of discretion will be found . . . where the trial court misinterpreted or misapplied the law." *Id.*

[12] Indiana Code section 35-50-5-3(a) authorizes trial courts to order criminal defendants to pay restitution to their crime victims at the time the court imposes the criminal sentence. In determining the amount of restitution to order, the trial court is to consider:

(1) property damages of the victim incurred as a result of the crime, based on the actual cost of repair (or replacement if repair is inappropriate);

(2) medical and hospital costs incurred by the victim (before the date of sentencing) as a result of the crime;

(3) the cost of medical laboratory tests to determine if the crime has caused the victim to contract a disease or other medical condition;

(4) earnings lost while the victim was hospitalized or participating in the investigation or trial of the crime; and

(5) funeral, burial, or cremation costs incurred by the family or estate of a homicide victim as a result of the crime.

Ind. Code § 35-50-5-3(a).

[13] Risley asserts the settlement payment to Utley by a third-party tortfeasor should reduce the amount Risley is required to pay in restitution:

The underlying principle, an elementary one in tort law, is that the victim is not entitled to a double recovery. He is not entitled to be compensated twice for the same wrong. This principle is in tension with the principle that a criminal defendant must be punished, by compensating the victim. But it should not matter whether the payments are made by the defendant or a third-party tortfeasor, if the effect is to doubly compensate the victim.

(Appellant's Br. at 15.)

[14] Our Indiana Supreme Court has held: "A trial court may consider a civil settlement when deciding whether to impose a restitution order, or the amount of restitution to order. However, civil settlements have no bearing on decisions of criminal punishment." *Crawford v. State*, 770 N.E.2d 775, 781 (Ind. 2002).

As that Court further explained three years later:

Restitution, as a condition of probation, can be an instrumental part of the offender's rehabilitation. While its principal purpose is to vindicate the rights of society, an ancillary result is that it also serves to compensate the offender's victim. This ancillary function, however, does not alter the fact that an order of restitution is as much a part of a criminal sentence as a fine or other penalty. Because restitution is part and parcel to our

system of criminal punishment, its application cannot be precluded by the existence of a civil settlement agreement.

Haltom v. State, 832 N.E.2d 969, 971 (Ind. 2005) (internal citations and quotations omitted). See also *Iltzsch v. State*, 981 N.E.2d 55, 56 (Ind. 2013) (“the principal purpose of restitution is to vindicate the rights of society and to impress upon the defendant the magnitude of the loss the crime has caused”).

[15] Thus, when a civil settlement has occurred, trial courts are given discretion “to order a greater amount in restitution to compensate a victim fully for damages and injuries not yet covered, or order less or no restitution at all to prevent the victim from receiving a windfall.” *Haltom*, 832 N.E.2d at 972. Nevertheless, “civil settlements have no preclusive effect on the power of a criminal court to order restitution.” *Id.* “Our criminal courts are permitted to take note of these agreements in deciding whether to order restitution and in what amount, but these agreements in no way preclude a criminal court from ordering restitution when appropriate under statute.” *Id.*

[16] In support of his argument, Risley cites two cases: *Kelley v. State*, 11 N.E.3d 973 (Ind. Ct. App. 2014), and *Myers v. State*, 848 N.E.2d 1108 (Ind. Ct. App. 2006). (See Appellant’s Br. at 14.) In *Kelley*, this Court refused to hold a trial court abused its discretion by crediting a civil settlement against a restitution order because “the *Haltom* court made it clear that the decision whether to take a civil settlement into account falls within the discretion of the sentencing court[.]” 11 N.E.3d at 979. Because *Kelley* re-affirms the discretion of the trial court to determine when and how to credit a civil settlement against a restitution order,

it does not support Risley's assertion that we should invade the trial court's discretion herein.

[17] *Myers*, on the other hand, supports Risley's argument but is easily distinguishable from the facts herein. *Myers* stole \$101,672.97 from an estate when he was the personal representative. The estate recovered \$68,000.00 from *Myers* in a civil action, and then a criminal court ordered *Myers* to pay the full \$101,672.97 to the estate as restitution for his crime. On appeal, we reversed the trial court's order as to the \$68,000 *Myers* had already paid and directed the trial court to enter a restitution order only as to the \$33,672.97 that *Myers* had not yet returned to the estate. The facts herein are different from *Myers* in two important respects. First, Risley is asking to receive credit for a payment made to Utley by a third party for its own liability, not for a payment made by Risley himself to Utley. Moreover, Utley's permanent injuries and ongoing medical complications are such that he can never be made whole by any amount of restitution, whereas the damage to the estate was a fixed amount. We accordingly decline to follow *Myers* herein.

[18] Risley's circumstances are more akin to those in *Baker v. State*, 70 N.E.3d 388 (Ind. Ct. App. 2017), *trans. denied*. There, a criminal defendant whose driving while intoxicated caused a car crash asked to have his restitution order for the victim's car damage decreased based on payments made by the victim's own auto insurance. *Id.* at 389. We held *Baker* was "not entitled to a credit for the victim's insurance payment" because "it seems incongruous with the purposes of restitution that the defendant should reap the benefits of the victim's

insurance policy.” *Id.* at 391. As in *Baker*, Risley should not receive a “windfall” based on a payment made to his victim by a third party. *Id.* The trial court’s decision to not reduce Risley’s restitution order was within its discretion, and we accordingly affirm. *See Crawford*, 770 N.E.2d at 781 (rejecting wife’s argument that restitution ordered as part of her sentence for murdering her husband should be decreased based on value of assets wife already assigned to her husband’s estate).

Conclusion

[19] Risley timely filed a notice of appeal following the trial court’s final judgment regarding his payment of restitution, but his allegation of error fails as the trial court acted within its discretion when it refused to decrease the amount of restitution that Risley had to pay to Utley. Accordingly, we affirm.

[20] Affirmed.

Altice, C.J., and Foley, J., concur.