

DA 22-0042

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 250

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOHNATHAN ALBERT BERTSCH,

Defendant and Appellant.

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APPEAL FROM: District Court of the Fourth Judicial District,  
In and For the County of Missoula, Cause No. DC-19-174  
Honorable Shane A. Vannatta, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Tammy Hinderman, Appellate Defender, Gregory Hood, Assistant  
Appellate Defender, Helena, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Brad Fjeldheim,  
Assistant Attorney General, Helena, Montana

Matthew Jennings, Missoula County Attorney, Jordan Kilby, Deputy  
County Attorney, Missoula, Montana

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Submitted on Briefs: July 31, 2024

Decided: October 29, 2024

Filed:



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Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Johnathan Bertsch appeals the Fourth Judicial District Court's order imposing nearly \$35,000 in restitution to the victims of his felony offenses. On appeal, he argues that the District Court should have waived restitution as unjust under the circumstances. We affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

¶2 The State charged Bertsch in an amended information on December 31, 2019, with two felony counts of deliberate homicide and two felony counts of attempted deliberate homicide after Bertsch shot at a vehicle, killing one person and injuring two others, and then shot a highway patrol officer who pursued him.<sup>1</sup> Bertsch pleaded guilty on June 26, 2020, to one count of deliberate homicide and three counts of attempted deliberate homicide.

¶3 The State requested \$34,728.14 in restitution based on payments already made to the victims and their families by Montana's Crime Victim Compensation Program. In its sentencing memorandum, the State acknowledged that Bertsch relied on Social Security payments as his only income and had not been able to maintain employment. The State requested, however, that a portion of any prison wages Bertsch made in the Montana State Prison go to restitution payments under § 46-18-237, MCA. Defense counsel's sentencing memorandum discussed, among other factors, Bertsch's inability to maintain employment

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<sup>1</sup> The State originally charged Bertsch with one count of deliberate homicide and three counts of attempted deliberate homicide but amended the information after one of the shooting victims died due to complications from her injuries. The two surviving victims suffered life-long injuries.

after graduating high school with a 1.5 grade point average and his autism spectrum disorder diagnosis following a suicide attempt when he was twenty years old. At a two-day sentencing hearing, the District Court asked if the defense “had any specific objection to the restitution requested.” Defense counsel stated, “[Y]es. The defense would lodge a general objection due to defendant’s indigent status.” Defense counsel confirmed that they did not object to the manner calculated or amount incurred. The District Court sentenced Bertsch to prison for four consecutive life terms without the possibility of parole and imposed \$34,728.14 in restitution plus the 10% administrative fee. In issuing the order, the District Court reasoned that any funds Bertsch earned through work at the prison should first be paid to restitution. Bertsch appeals only the court’s restitution order.

#### **STANDARD OF REVIEW**

¶4 “Restitution awards create mixed questions of law and fact that we review de novo.” *State v. Lodahl*, 2021 MT 156, ¶ 11, 404 Mont. 362, 491 P.3d 661. “We review the appropriateness of imposing restitution for correctness and the District Court’s findings regarding the amount of restitution to determine whether they are clearly erroneous.” *State v. Cleveland*, 2018 MT 199, ¶ 7, 392 Mont. 338, 423 P.3d 1074.

#### **DISCUSSION**

¶5 Bertsch argues that the restitution order cannot stand because he is financially unable to pay restitution. He was unable to work, owned no assets, received full Social Security Disability Insurance benefits as a person diagnosed with autism spectrum disorder, and had no future income prospects given the impending life prison sentences

and past inability to maintain employment. He contends the District Court therefore erred when it imposed a restitution amount that he will be unable to pay. He argues that § 46-18-246, MCA, allows the court to adjust or waive restitution if it would be unjust to require payment and, under § 46-18-101(2)(h), MCA, and our holding in *Lodahl*, the District Court could not impose restitution because Bertsch was financially unable to pay and requested a waiver. The State counters that a sentencing court must impose restitution regardless of a person's ability to pay. It contends that Bertsch did not adequately request a waiver or present sufficient evidence to show restitution is unjust under § 46-18-246, MCA. The State argues that a general reference to indigence does not meet Bertsch's burden on this issue.

¶6 “Sentencing practices must emphasize restitution to the victim by the offender. A sentence must require an offender who is financially able to do so to pay restitution[.]” Section 46-18-101(3)(h), MCA (2021).<sup>2</sup> Section 46-18-246, MCA, provides that a person “may at any time petition the sentencing court to adjust or otherwise waive” restitution if:

- (1) the circumstances upon which the court based the imposition of restitution no longer exist;
- (2) the amount of the victim's pecuniary loss no longer exists;
- (3) the method or time of payment no longer exists; or
- (4) that it otherwise would be unjust to require payment as imposed.

*Lodahl*, ¶¶ 24-25 (quoting *State v. Erickson*, 2018 MT 9, ¶ 16, 390 Mont. 146, 408 P.3d 1288).

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<sup>2</sup> The District Court sentenced Bertsch under the 2021 Montana Code Annotated. All references are to the 2021 version of the MCA unless otherwise indicated. The substance of the statutes at issue has not changed.

¶7 It is the offender’s burden to both “request and factually demonstrate” relief eligibility under “at least one of the four conditions” of § 46-18-246, MCA. *Lodahl*, ¶ 25 (citing *Erickson*, ¶ 17). The court also must notify the victims and conduct a hearing that provides the victims an opportunity to be heard. Section 46-18-246, MCA.

¶8 In *State v. Lodahl*, the defendant failed to file a formal petition citing § 46-18-246, MCA, but she sufficiently raised the issue orally at a separate restitution hearing. *Lodahl*, ¶ 26. The victims testified at the hearing (thus complying with § 46-18-246, MCA, procedural requirements). *Lodahl*, ¶¶ 4, 26. Lodahl presented detailed evidence that imposing the restitution would be unjust based on her financial circumstances. *Lodahl*, ¶¶ 4-7. This Court reasoned that “it was clear the parties and the District Court understood Lodahl sought waiver or adjustment [of the restitution payment] as unjust under the circumstances.” *Lodahl*, ¶ 26. It was why the court scheduled a separate hearing when there was no dispute about the restitution amount itself. *Lodahl*, ¶ 26. Accordingly, “‘a court must impose the full restitution at sentencing, but [it may waive] restitution in the same order,’ if the defendant raises the issue and provides sufficient evidence the restitution would be unjust.” *State v. Schroder*, 2024 MT 59, ¶ 11 n.1, 415 Mont. 543, 545 P.3d 62 (quoting *Lodahl*, ¶ 28). “Essentially, when a sentencing judge determines and orders restitution under the general restitution statutes, the defendant may, in the same hearing, request the court to modify or waive it based on financial inability to pay.” *Schroder*, ¶ 11 n.1 (discussing our holding in *Lodahl*).

¶9 In contrast to statutes requiring the court to assess ability to pay before imposing fines and fees at sentencing, *see State v. Dowd*, 2023 MT 170, ¶¶ 10-12, 413 Mont. 245, 535 P.3d 645, “our restitution statutes require courts [to] determine restitution amounts without considering an offender’s ability to pay.” *Lodahl*, ¶ 23. Bertsch is thus incorrect that “[o]rdering [him] to pay an amount that the court knows he will not be able to pay violates the plain language [and mandate of § 46-18-101(2)(h), MCA,] that all offenders be ‘financially able to do so.’” Bertsch is correct that a person may contemporaneously petition the court to waive restitution. In such cases, financial inability to pay may qualify as “unjust” under § 46-18-246, MCA. *Lodahl*, ¶ 26; *State v. Corriher*, 2021 MT 275, ¶ 11, 406 Mont. 120, 497 P.3d 579. To obtain a waiver under § 46-18-246, MCA, however, it is the defendant’s burden “to raise and prove that requiring full payment of the restitution award would be unjust under the circumstances.” *Corriher*, ¶ 12 (quoting *Lodahl*, ¶ 23 n.1).

¶10 Bertsch’s case is distinguishable from *Lodahl*. *Lodahl* presented testimony and detailed evidence on her inability to pay at a separate restitution hearing at which the victims testified. *Lodahl*, ¶¶ 5-8. Here, defense counsel raised a general objection grounded in Bertsch’s indigence. Unlike *Lodahl*, nothing from the sentencing transcript indicates that the court, prosecution or victims present at sentencing understood that Bertsch was petitioning the court and presenting specific evidence to request that the court waive his restitution. Whereas *Lodahl* sufficiently raised the issue through her detailed arguments and testimony, in contrast here, the single, general objection by Bertsch did not

amount to the affirmative request for relief that § 46-18-246, MCA, requires. Because the burden is on the defendant to petition the court for restitution waiver under § 46-18-246, MCA, and to support that request with an evidentiary showing, the District Court did not err in failing to consider the statute on its own initiative.

¶11 Furthermore, the District Court made its restitution finding based on specific evidence presented by the prosecutor (receipts from the Crime Victim Compensation Program) and reasoned that as Bertsch may work in prison, any funds earned should go toward restitution. When Bertsch made his general objection at sentencing, he did not reference specific evidence. On appeal, Bertsch points to evidence found in other parts of his presentence investigation report, sentencing documents, and hearing to support his argument that restitution is unjust under the circumstances (such as his diagnosed autism, disability benefits, lack of assets, inability to work and life sentences in prison). Our case law makes clear, however, that it was his burden to both raise the issue and provide sufficient evidence before the District Court to request waiver under § 46-18-246, MCA. *Lodahl*, ¶ 25; *Erickson*, ¶ 17; *Schroder*, ¶ 11 n.1. He did neither through his general indigence objection. “[W]e will not overturn a district court for an error it did not have the opportunity to address[.]” *State v. English*, 2006 MT 177, ¶ 71, 333 Mont. 23, 140 P.3d 454.

¶12 The restitution statutes also explicitly allow for restitution payments from a person’s wages while in prison. Section 46-18-237, MCA. *See also* § 46-18-241(1), MCA (a person’s duty to pay restitution remains even if they are under state supervision.). A

lengthy prison sentence does not exempt an offender from the requirement to reimburse his victims for the established losses he caused. If Bertsch is able to earn income in the supported environment of the state prison, those wages appropriately may be garnished to help meet his restitution obligation. Section 46-18-237, MCA. If Bertsch remains unable to earn money while incarcerated due to his disability or other circumstances, he may petition the court at any time to waive or adjust restitution. Section 46-18-246, MCA.

### **CONCLUSION**

¶13 For the foregoing reasons, we affirm the District Court's order on restitution.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH  
/S/ LAURIE McKINNON  
/S/ INGRID GUSTAFSON  
/S/ JIM RICE