Adelbai v. ROP, 15 ROP 150 (2008)
T-NIGHT ADELBAI,
Appellant,

v.

REPUBLIC OF PALAU,
Appellee.

CRIMINAL APPEAL NO. 08-002
Criminal Case No. 07-237

Supreme Court, Appellate Division
Republic of Palau

Decided: September 29, 2008[1]
⊥151
Counsel for Appellant: Ben Carter

Counsel for Appellee: Ronald K. Ledgerwood

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LOURDES F. MATERNE, Associate Justice; C. QUAY POLLOI, Associate Justice Pro Tem.

Appeal from the Trial Division, the Honorable KATHLEEN M. SALII, Associate Justice, presiding.

PER CURIAM:

The question on appeal is whether a trial court may rely solely on a Probation Office Restitution Determination in determining the amount of restitution owed by a criminal defendant. We answer in the affirmative and affirm the judgment below.

BACKGROUND

In the early morning hours of September 14, 2007, Appellant entered the house of Sophie Gibson, took a bag containing various items including Palauan money and jewelry, and fled. Three days later, Appellant confessed to the burglary and returned the bag along with several items. Appellant pleaded guilty to one count of Burglary in violation of 17 PNC § 801. In the plea agreement, Appellant agreed to "pay restitution in an amount and on a schedule to be determined by the Probation Office and later ordered by this Court." On March 3, 2008, the Trial Division sentenced him to three years ⊥152 imprisonment with all but the first 30 days suspended. He was also ordered to pay "restitution in an amount and on a schedule to be determined by the Probation Office, which shall prepare a restitution report and provide it to

[1] Upon reviewing the briefs and the record, the panel finds this case appropriate for submission without oral argument pursuant to ROP R. App. P. 34(a).

court and counsel by April 3, 2008." A restitution hearing was set for April 7, 2008.

On March 24, 2008, the Probation Office filed its Restitution Determination with the court and provided copies to both counsel. The report noted the victim's insistence that "the list of unrecovered belongings that she provided to Probation Office is accurate; if anything, there might be some still missing not in the list." The report also noted that Appellant "insists that he did not take anything out of the bag. He admits though he was drunk at the time and was in possession of the victim's bag for about one or two days before he gave it to police." According to the report, it was not likely Appellant would break in to a house, steal a bag, but not take anything from the bag. The report concluded that Appellant was lying, did not remember taking anything out of the bag due to his drunkenness, or that someone else took items out of the bag without his knowledge. The Probation Office determined, "[b]y preponderance of evidence and credible testimony of the victim," that Appellant owed restitution of $395.00. On March 26, 2008, Appellant objected to the amount of restitution suggested by the Probation Office and requested a hearing "to address the newly released amount."

At the April 7, 2008, restitution hearing, both the Assistant Attorney General prosecuting the case and the Probation Officer assigned to the case failed to appear, without any explanation for their absence. Regardless, the hearing proceeded, and Appellant testified that he returned everything in the victim's bag to the police. But the trial court noted that

> he was in possession of the victim's bag for at least two days before turning it over to the police, and he conceded to being drunk when he took the bag. While he may be correct that he returned 'everything he had' to the police, that 'everything' consists of what he did not spend or sell over the course of the two days or so that he had the victim's belongings.

The trial court accepted the Restitution Determination filed by the Probation Office as credible and ordered Appellant to pay $395.00 in restitution.

On appeal, Appellant argues that the Restitution Determination filed by the Probation Office does not constitute properly admitted evidence; therefore, because no representative of the Republic attended the hearing, the Republic did not meet its burden of proof on the amount of restitution. Appellant argues that the trial court could not accept the Restitution Determination on its own, and that no restitution can be collected from Appellant.

STANDARD OF REVIEW

It is important to note that we are not reviewing the merits of the trial court's restitution order. If we were, United States case law suggests that "[t]he amount of restitution and manner in which it is made to the aggrieved party is to be determined by the court exercising its judicial discretion and is subject to abuse of ⊥153 discretion review." *State v. Cole,* 155 P.3d 739, 741 (Kan. App. 2007) (quoting *State v. Hunziker,* 56 P.3d 202 (2002)). Appellant does not challenge the credibility of the Probation Officer's conclusions that Appellant is responsible for items missing from the victim's bag. Rather, he challenges, as a matter of law, the trial court's sole

reliance on the Restitution Determination filed by the Probation Office in issuing the Restitution Order. The trial court's conclusions of law are reviewed *de novo* on appeal. *See Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001).

DISCUSSION

Thus the only question on appeal is whether a trial court may rely solely on a Probation Office Restitution Determination in determining the amount of restitution owed by a criminal defendant. Appellant first argues that "agreeing to pay restitution as part of a plea agreement is agreeing to pay after the Republic has proven that amount by a preponderance of the evidence in a restitution hearing." The plea agreement, however, provides that "Defendant shall pay restitution in an amount and on a schedule to be determined by the Probation Office and later ordered by this Court." Monetary restitution "has been commonly recognized as a valid condition of probation" and this condition "is considered a penal sanction rather than civil in nature." 21A Am. Jur. 2d *Criminal Law* § 847 (2008). Probation is "a matter of grace and a conditional liberty that is a favor. It is not a right or an entitlement . . . probation is a sentence and not part of a quasi-contract wherein the court offers something which the defendant is free to acceptor reject." 21A Am. Jur. 2d *Criminal Law* § 844 (2008). Of course, there are limits to the conditions of probation a court may impose; a court abuses its discretion if conditions imposed are "vindictive, vague, or overbroad," or if the probation determination is "arbitrary or capricious, or exceeds the bounds of reason." 21 A Am. Jur. 2d *Criminal Law* § 846 (2008). But as an initial matter, Appellant misconstrues the nature of the conditions of his probation. The restitution hearing is not a civil proceeding in which a victim must submit evidence and prove liability and damages by a preponderance of the evidence;[2] it is apart of the criminal sentencing process that will be upheld as long as the trial court did not abuse its discretion.

Probation is also a statutory creature, and "a form of sentencing that must be authorized by the legislature." 21 A Am. Jur. 2d *Criminal Law* § 845 (2008). In Palau, that statute is 17 PNC § 3105. It provides that "[t]he Court may order restitution in any criminal case to the extent agreed by the parties in a plea agreement. . . . Proof of damages for purposes of compensating a victim of a crime under this section shall b e by a preponderance of the evidence." 17 PNC § 3105. In the plea agreement, Appellant agreed to pay an amount determined by the Probation Office and later approved by the trial court. It could be argued that the plain language of the plea agreement binds Appellant to the amount determined by the Probation Office, without providing him an opportunity to challenge that finding. But assuming that is not the case, a trial court will not abuse its discretion as long as it finds damages are proved by a preponderance of the evidence.
⊥154

Appellant argues that this proof must be adduced by the Republic, and that the Republic failed to meet its burden of proof at the restitution hearing by failing to attend or introduce any evidence. This belies another fundamental misunderstanding of restitution as a condition of probation. Probation is a component of a criminal sentence, and restitution is a component of probation. Does Appellant mean to suggest that, if the Republic failed to attend a sentencing

[2] "[T]he victim has no control over the amount of restitution ordered or over the decision to order probation and restitution." 21 A Am. Jur. 2d *Criminal Law* § 847 (2008).

hearing following a guilty verdict, a trial court could not impose a sentence upon a defendant but must let him go free?

A restitution hearing is akin to a sentencing hearing, as it is merely an opportunity for the court to refine a specific portion of the sentence it imposes on a defendant; that portion being the amount of restitution to be included in the sentence of probation. As such, "[t]he trial judge may conduct a broad inquiry, largely unlimited either as to the kind of information or its source. . . . [A] defendant does not have the right to a full-blown evidentiary hearing, . . . hearsay may be considered." 21 Am. Jur. 2d *Criminal Law* § 742 (2008). The restitution determination of the Probation Office, although it may contain hearsay, is legitimate information for the trial court to consider in making its restitution order, with or without the presence of the Republic, and with or without the presence of the probation officer. Generally, "[t]he function of a presentence investigation report is to provide pertinent information about a defendant to aid a court in imposing an appropriate sentence . . . . If the law requires restitution, the probation officer must also investigate and report on that facet of the case." 21 Am. Jur. 2d § *Criminal Law* 747 (2008). Rule 32 of the Rules of Criminal Procedure governs the restitution determination, and it provides that "the probation service of the court shall make a presentence report ... contain[ing] the restitution needs of any victim of the offense. ROP R. Crim. Proc. 32(c)(1), (c)(2)(D). It is a document filed by the Probation Office, which is a service of the court, and provided to both parties. There is no need for any formal introduction into evidence of the report, because it is a document created by a function of the court and, in any event, the rules of evidence do not apply in proceedings for "sentencing, or granting or revoking probation." ROP R. Evid.1101(d)(3).[3] The trial court made no error of law in ruling on the credibility and veracity of the report.

There is a mechanism for a criminal defendant to challenge the restitution determination and the presentence report made by the Probation Office, which addresses and alleviates Appellant's claimed fear of the "dangerous repercussions" and system-wide abuse that would occur if we allow the trial court to credit the Restitution Determination over the testimony of a criminal defendant. If the defendant objects to parts of the probation officer's report, the trial court

> must rule on disputed portions of the report or other controverted matter . . . . A reviewing court must be able to determine, from the trial court's statements, both its findings and how it treated the disputed facts when imposing the sentence . . . . A court is required to make a clear and ⊥155 independent ruling regarding a disputed sentencing factor on the record, and errs in accepting the government's version of the facts in the presentence report, without either making findings of fact resolving the defendant's conflicting allegations . . . . While a defendant must be given an opportunity to explain why he or she believes that the presentence report is incorrect, the method employed lies within the trial judge's discretion. . . . The sentencing judge is free to rely upon the information contained in the presentence report, if the defendant did not challenge the facts stated, but only the inferences drawn, or where the defendant disputes those facts

[3] Appellant argues that the Rules of Evidence apply "generally . . . to criminal cases and proceedings" but this general provision of the rule must yield to the more specific provision.

> but does not provide rebuttal evidence, if those facts have an adequate evidentiary basis.

21 Am. Jur. 2d *Criminal Law* § 750 (2008). The Rules of Criminal Procedure for the Courts of the Republic of Palau correspond with American jurisprudence. Rule 32(c)(3)(A) provides that "the court shall *afford* the defendant . . . an opportunity before the imposition of the sentence to comment [on the presentence report] and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report."

Here, Appellant objected to the probation officer's determination of the amount of restitution owed. The trial court was therefore obligated to "make a clear and independent ruling" on the record resolving Appellant's objections to the amount of restitution. At the restitution hearing, the court permitted Appellant to explain why he believed the probation officer's determination was incorrect, but the trial court was well within its discretion to conduct the hearing without the presence of the Republic or the Probation Office. In its Restitution Order, the trial court noted Appellant's objections to the report and made a clear and independent ruling, discrediting Appellant's objections because Appellant had possession of the victim's bag for at least two days and took the bag while drunk. The trial court did not err in accepting the Probation Office's determination that a preponderance of the evidence demonstrated Appellant owed $395.00 in restitution.

CONCLUSION

The judgment below is affirmed.