

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 1281

STATE OF LOUISIANA

VERSUS

EDMUND LeBLANC

Judgment Rendered: FEB 11 2011

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On Appeal from the Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket No. 12-07-0130

Honorable Bob Hester, Judge Presiding

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

DMC
WBN
JMM

McCLENDON, J.

Defendant, Edmund LeBlanc, was charged by bill of information with misapplication of payments by a contractor, a violation of LSA-R.S. 14:202.¹ Defendant entered a plea of not guilty, waived his right to a trial by jury, and was found guilty as charged after a bench trial. The trial court sentenced defendant to five years imprisonment at hard labor, suspended execution of the sentence, and placed defendant under supervised probation for five years. In addition to the general conditions of probation, the trial court imposed the following special conditions: a \$50.00 monthly supervision fee; restitution in the amount of \$17,351.00; and one hundred hours of community service. The trial court granted in part the motion to reconsider sentence as to the request to suspend the sentence pursuant to LSA-C.Cr.P. art. 893, but denied the motion to reconsider sentence as to the request to waive the supervision fee and vacate the restitution order. Defendant now appeals, assigning error as to the order to pay restitution. Based on the following reasons, we affirm the conviction and sentence, and remand with instructions.

STATEMENT OF FACTS

Homeowners Doug and Stacy Barron (the victims) entered into a contractual agreement with defendant to have him construct an addition to their home in exchange for a total payment of \$45,000.00, to be paid in three installments (the first upon execution of the contract, the second at the halfway mark, and the final upon completion of the project). According to Paul Bourque, the State Residential Compliance Supervisor of the State Contractor's Board, defendant's contractor's license was revoked on or before February 27, 2007, before defendant entered into the contract to construct the victims' home improvements. On March 9, 2007, the victims paid defendant's construction company, LeBlanc Construction & Maintenance, LLC, the first installment of

¹ Due to inconsistencies, it is unclear from the record whether defendant's name is "Leblanc" or "LeBlanc." Herein, defendant's last name is listed as "LeBlanc."

\$15,000.00.² By June 3, 2007, the victims paid defendant two additional payments totaling \$15,000.00.

Ronnie Foster, of On Track Construction LLC, entered into a verbal sub-contractual agreement with defendant to perform the victims' residential project. The construction on the home commenced at the beginning of May, 2007. On May 24, 2007, defendant paid Foster \$3,840.00. On May 29, 2007, defendant submitted another check to Foster, but it was insufficiently funded, and thus not honored by the bank. On June 18, 2007, defendant paid Foster \$4,500.00 and submitted another insufficiently funded check on June 29, 2007. At this point, Foster had completed a significant portion of the contract, including the following: pouring concrete; framing; performing exterior work; electrical and plumbing; and an inspection in preparation for sheetrock. Corresponding invoices were submitted. Defendant had paid Foster a total of \$8,340.00 and, according to the final invoice, was indebted to Foster for the total amount of \$21,300.00 when Foster pulled out of the project. As a result of the delay in construction, the victims lived with a blue tarp as a back wall for a significant time period.

Defendant told Stacy Barron that he could resume the project if they would pay him an additional \$3,000.00, and the victim remitted a payment in that amount to defendant on August 21, 2007. Defendant contacted Larry Case and entered into a verbal agreement with him to make construction improvements for the project for approximately \$2,000.00 or \$3,000.00. Case delivered approximately \$900.00 worth of sheetrock, and performed tasks to complete the construction job, such as: reframing doors and a pull-down staircase; moving a wall; and additional work near a hot tub. Case replaced the blue tarp with plywood to prevent the entry of insects and rodents and to retain air conditioning. Although several tasks were completed during a three to four

² Though variations are contained in the record, herein the name of defendant's construction company is listed as stated in the contractual agreement with the victims.

day period, defendant did not compensate Case for the work as agreed, and Case abandoned the project.

The victims contacted the police and on September 5, 2007, Officer Chris Lechuga of the East Baton Rouge Parish Sheriff's Office met with Stacy Barron. Stacy Barron informed Officer Lechuga that the job was seventy percent complete. In October 2007, the victims contracted with Legrendre Construction to complete the project and paid them a total of \$29,486.00. The bill of information charging defendant with the instant criminal offense was filed on December 6, 2007.

In an attempt to collect the debt from defendant, Foster contacted his attorney and a lien was placed on the victims' residence, and a series of correspondence requesting payment was sent to defendant. Defendant did not respond to the letters. A petition for damages was filed on January 24, 2008, and a judgment against defendant was entered on March 14, 2008. On July 7, 2008, Foster canceled the lien against the Barron residence after receiving \$35,000.00 as payment for defendant's debt, attorney's fees, and expenses.

ASSIGNMENT OF ERROR

In his sole assignment of error, defendant argues that the trial court erred and/or abused its discretion in ordering unjust, excessive, and unlawful restitution in the amount of \$17,351.00. Defendant contends that LSA-R.S. 14:202D requires him to pay the victims the amount of money that was not properly applied. While acknowledging that \$24,660.00 was not properly applied in this case, defendant notes that prior to sentencing, he paid Foster \$35,000.00 to release the lien against the victims' residence. Defendant notes that as a result of the \$35,000.00 payment and the previous payments (totaling \$8,340.00), Foster received a total of \$43,340.00, an amount that exceeds the total payment defendant received from the victims by \$10,340.00.

Defendant argues that LSA-R.S. 14:202 does not contemplate this scenario wherein the contractor paid the subcontractor the amount owed to him, and, in doing so, remediates the misapplication and pays out all monies paid to

him by the victims. Defendant contends that any amount now paid to the victims would subject the homeowners to unjust enrichment. Defendant notes that according to Foster's trial testimony, the job was 85% complete when he stopped working on the victims' home, while police reports indicate that Stacy Barron informed the police that the job was 70% complete. Based on those estimations, defendant contends that the victims received at least 70% of the job for the price of \$33,000.00, 73.3% of the contract price. Defendant concludes that the applicable restitution statute does not authorize restitution that exceeds the amount of sums not properly applied, other than legal and court processing costs, and contends that the restitution order in this case should be vacated.

In ordering restitution, the trial judge has discretion and his decision will not be disturbed, absent an abuse of this discretion. **State v. McGloster**, 303 So.2d 739 (La. 1974); **State v. Averette**, 99-2054, p. 6 (La.App. 1 Cir. 6/23/00), 764 So.2d 349, 352; **State v. Stephenson**, 30,271, p. 5 (La.App. 2 Cir. 1/21/98), 706 So.2d 604, 607, writ denied, 98-0426 (La. 6/19/98), 720 So.2d 1211. Louisiana Revised Statute 14:202 provides, in pertinent part, as follows:

A. No person, contractor, subcontractor, or agent of a contractor or subcontractor, who has received money on account of a contract for the construction, erection, or repair of a building, structure, or other improvement, ... shall knowingly fail to apply the money received as necessary to settle claims for material and labor due for the construction or under the contract.

* * * * *

D. Any person, contractor, subcontractor, or agent of a contractor or subcontractor who knowingly fails to apply construction contract payments as required in Subsection A shall pay to the court, and the court shall transfer to the person whose construction contract payments were misapplied, an amount equal to the sum of the payments not properly applied and any additional legal costs resulting from the misapplication of construction fund payments, including a fee charged by the clerk of court for handling such payments.

In addition, LSA-C.Cr.P. art. 895 provides in pertinent part:

A. When the court places a defendant on probation, it shall require the defendant to refrain from criminal conduct and to pay a

supervision fee to defray the costs of probation supervision, and it may impose any specific conditions reasonably related to his rehabilitation, including any of the following. That the defendant shall:

* * * * *

(7) Make reasonable reparation or restitution to the aggrieved party for damage or loss caused by his offense in an amount to be determined by the court.

Under LSA-C.Cr.P. art. 895, a trial court may impose any specific condition of probation reasonably related to a defendant's rehabilitation. A condition so harsh, however, that the probationer is destined for failure, serves no purpose.

State v. Carey, 392 So.2d 443, 444 (La. 1981) (per curiam). Louisiana Code of Criminal Procedure article 895.1 provides in pertinent part:

A. (1) When a court places the defendant on probation, it shall, as a condition of probation, order the payment of restitution in cases where the victim or his family has suffered any direct loss of actual cash, any monetary loss pursuant to damage to or loss of property, or medical expense. The court shall order restitution in a reasonable sum not to exceed the actual pecuniary loss to the victim in an amount certain....The restitution payment shall be made, in discretion of the court, either in a lump sum or in monthly installments based on the earning capacity and assets of the defendant.

* * * * *

B. When a court suspends the imposition or the execution of a sentence and places the defendant on probation, it may in its discretion, order placed, as a condition of probation, an amount of money to be paid by the defendant to any or all of the following:

* * * * *

(5) To the victim to compensate him for his loss and inconvenience. Such an amount may be in addition to any amounts ordered to be paid by the defendant under Paragraph A herein.

In excessive sentence assignments of error, this court recognizes the wide discretion of the trial court and requires a manifest abuse of discretion be demonstrated before setting aside a sentence. **State v. Lobato**, 603 So.2d 739, 751 (La. 1992); **Averette**, 99-2054 at p. 6, 764 So.2d at 352. Based on the documentation presented during the trial, the victims contracted with defendant to have the extension project completed for a total payment of \$45,000.00. The victims paid defendant a total of \$33,000.00. Thus, under the

contract, an additional \$12,000.00 would have satisfied the original payment obligation for the project. However, the victims had to pay an additional \$29,486.00 to have the project completed as a result of the defendant's actions and the cessation of the project. Thus, the victims paid \$17,486.00 above the original monetary obligation to have the project completed. Based on the foregoing, we conclude that the restitution figure is not excessive, because it essentially represents the amount of actual pecuniary losses suffered by the victims, as allowed by LSA-C.Cr.P. art. 895.1A(1). The \$35,000.00 payment made by defendant, in compliance with the judgment against him, removed the lien from the victims' home, but did not negate the above-detailed pecuniary loss and the inconvenience suffered by the victims as a direct result of the instant offense. LSA-C.Cr.P. art. 895.1B(5) Based on the foregoing, we find that the trial court did not abuse its discretion in ordering restitution in this case. Accordingly, the sole assignment of error lacks merit.

REVIEW FOR ERROR

In accordance with LSA-C.Cr.P. art. 920, the record has been reviewed for errors on the face of the record, and one error was discovered. The trial court failed to establish a payment schedule for the payment of restitution as required by LSA-C.Cr.P. art. 895.1A. Accordingly, we remand the matter to the trial court for a determination of the manner in which restitution should be paid, either in a lump sum or in monthly installments, based on defendant's earning capacity and assets. **State v. McGee**, 08-0395, p. 7 (La.App. 5 Cir. 10/28/08), 996 So.2d 1191, 1195, writ denied, 08-2791 (La. 6/5/09), 9 So.3d 868.

CONVICTION AND SENTENCE AFFIRMED; REMANDED WITH INSTRUCTIONS.