

FILED

January 08, 2024

IMAGE ID N24008RNQNSC, FILING ID 0000032634

**CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS**

NO. A-23-831

IN THE COURT OF APPEALS
FOR THE STATE OF NEBRASKA

STATE OF NEBRASKA
IN THE INTEREST OF JEOVANI EBAN HERNANDEZ CHACON
A JUVENILE UNDER EIGHTEEN YEARS OF AGE.

APPEAL FROM THE COUNTY COURT
OF HALL COUNTY, NEBRASKA
The Honorable Arthur S. Wetzel, County Judge

BRIEF OF APPELLANT

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CASES SITED

State v. Holecek, 260 Neb. 976, 979, 621 N.W.2d 100, 103 (2000).2,4
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STATUTES AND OTHER SOURCES SITED

Nebraska Revised Statute §29-2281 (Reissue 2023). 2,4
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Nebraska Revised Statute §43-347 (Reissue 2016). 1

STATEMENT OF JURISDICTION

The court adjudicated Jeovani H.C. under *Neb. Rev. Stat.* §43-247(2) (Reissue 2016). The court entered a disposition order pursuant to *Neb. Rev. Stat.* §43-286 placing him on a term of supervised probation to District 9. This is a final order for purposes of appeal.

STATEMENT OF THE CASE

A. Nature of the case.

The case is brought by Juvenile Petition under *Neb. Rev. Stat.* §43-347(2) alleging second-degree assault.

B. Issues tried below.

Whether the juvenile had the ability to pay restitution requested by the State.

C. How the issues were decided.

After a restitution hearing, the Court found that the juvenile could obtain a job which would allow him to pay the requested restitution of \$2,553.05.

D. Scope of Review

An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. *In re Seth C.*, 307 Neb. 862, 862, 951 N.W.2d 135, 137 (2020).

ASSIGNMENT OF ERRORS

- I. The Court incorrectly held that the Juvenile is capable of paying restitution.
- II. The Court erred in not following proper procedure at the restitution hearing.

PROPOSITIONS OF LAW

- I. In imposing restitution, *Neb. Rev. Stat. § 29 -2281* provides, in part, the following parameters: . . . The court shall consider the defendant's earning ability, employment status, financial resources, and family or other legal obligations and shall balance such considerations against the obligation to the victim. *State v. Holecek*, 260 Neb. 976, 979, 621 N.W.2d 100, 103 (2000).
- II. For purposes of restitution, the court's consideration of "the defendant's earning ability, employment status, financial resources, and family or other legal obligations" is mandatory. *State v. Wells*, 257 Neb. 332, 598 N.W.2d 30 (1999).
- III. While criminal restitution statutes do not control in juvenile proceedings, the Nebraska Supreme Court has held that the juvenile court may use the factors listed in the criminal restitution statutes as proper "guidelines" in determining restitution amounts. *In re Lawrence S.*, 274 Neb. 620, 742 N.W.2d 484 (2007).
- IV. Where restitution is concerned, the juvenile court is not required to adopt any one method for valuation. Instead, the juvenile court may exercise its discretion to determine the amount of restitution based on the record presented and the juvenile's ability to pay, as long as the amount of restitution is in keeping with the purposes of the Nebraska Juvenile Code. In short, the juvenile court may use any rational method of fixing the amount of restitution, so long as the amount is rationally related to the proofs offered at the dispositional hearing, and the amount is consistent with the juvenile's ability to pay, and the purposes of education, treatment, and rehabilitation. *In re Seth C.*, 307 Neb. 862, 951 N.W.2d 135 (2020); *In re Lawrence S.*, 274 Neb. 620, 742 N.W.2d 484 (2007).
- V. Despite the existence of a plea agreement involving restitution, the trial court still must give meaningful consideration to the defendant's ability to pay the agreed-upon restitution. *State v. Mick*, 19 Neb. App. 521, 808 N.W.2d 663 (2012).
- VI. The Nebraska Evidence Rules, sections 27-101 to 27-1103, do not apply in juvenile court dispositional hearings, such as one to terminate parental rights; however, they do provide guidance in determining the type of evidence which meets due process requirements. *In re Interest of D.L.S.*, 230 Neb. 435, 432 N.W.2d 31 (1988).

VII. The juvenile shall be entitled to a hearing before the court to determine the validity of the allegations. At such hearing the juvenile shall be entitled to those rights relating to counsel and those rights relating to detention. The juvenile shall also be entitled to speak and present documents, witnesses, or other evidence on his or her own behalf. He or she may confront persons who have given adverse information concerning the alleged violations, may cross-examine those persons, and may show that he or she did not violate the conditions of his or her probation or supervision. *Nebraska Revised Statute* §43-286 (5)(b)(ii) (Reissue 2016).

STATEMENT OF FACTS

The State filed a juvenile petition on April 20, 2023, charging Jeovani with assault 2nd degree alleging that on or about April 7, 2023, Jeovani did intentionally or knowingly cause serious bodily injury to another: to wit A.T. On May 30, 2023, Jeovani appeared for an arraignment when he was advised of his rights and the possible disposition options of the court. A denial was entered on the record and the matter was set for status hearing. (1:10-25; 2:1-2). On August 4, 2023, a status hearing was held on the matter and a plea agreement was reached. Pursuant to the plea agreement, Jeovani entered an admission to the amended petition and agreed the amount of restitution owed was \$2,553.05 but disputed his ability to pay that restitution amount. (4:8-11). Jeovani entered an admission on the record to the amended petition alleging assault 3rd degree, a factual basis was stipulated by the parties, and Jeovani was adjudicated to be a juvenile under *Neb. Rev. Stat.* §43-247(1). A pre-dispositional investigation report was ordered to be completed by the office of juvenile probation and the matter was set for dispositional hearing on October 8, 2023. (5:6-25; 6:1-8).

On October 8, 2023, a dispositional hearing including a hearing on Jeovani's ability to pay restitution was held. Defense presented Kayla Hernandez Chacon, Jeovani's mother, as a witness. (7:18-19). The State presented two witnesses at this hearing, Jeovani (the appellant), and Bethany Skodmin, specialized juvenile probation officer. (11:7-11; 14:9-16). At the conclusion of the state's evidence arguments were made for the purpose of disposition. Following arguments, the court entered a disposition order placing Jeovani on a term of

supervised probation and ordering him to pay restitution in the amount of \$2,5503.05. (22:2-3; 24:12-18).

SUMMARY OF THE ARGUMENT

It was improper for the juvenile court to order Jeovani to pay full restitution as he lacks the ability to pay such restitution. The juvenile court failed to properly consider Jeovani's age, ability to pay, his family's other obligations, and his current employment status. Jeovani's mother testified at the restitution hearing about the family's inability to transport Jeovani to and from a job as both parents work 12 hour shifts at least 5 days a week. Jeovani's mother also testified to the parents' need to provide extra care for their daughter who is battling an inoperable brain tumor. Jeovani is currently unemployed and is only 14 years old, making it difficult for him to find suitable employment to pay restitution. The juvenile court also failed to allow the defense to present evidence and cross-examine the State's witnesses presented at the restitution hearing. Jeovani was not given a fair opportunity to present his own evidence and dispute the evidence the State was offering as to Jeovani's ability to pay restitution.

ARGUMENT

I. THE JUVENILE COURT ERRED IN FINDING THE APPELLANT HAD THE ABILITY TO PAY RESTITUTION.

In imposing restitution, *Neb. Rev. Stat. § 29 -2281* provides, in part, the following parameters: . . . The court shall consider the defendant's earning ability, employment status, financial resources, and family or other legal obligations and shall balance such considerations against the obligation to the victim. *State v. Holecek*, 260 Neb. 976, 979, 621 N.W.2d 100, 103 (2000). For purposes of restitution, the court's consideration of "the defendant's earning ability, employment status, financial resources, and family or other legal obligations" is mandatory. *State v. Wells*, 257 Neb. 332, 598 N.W.2d 30 (1999). While criminal restitution statutes do not control in juvenile proceedings, the Nebraska Supreme Court has held that the juvenile court may use the factors listed in the criminal restitution statutes as proper "guidelines" in determining restitution amounts. *In re Lawrence S.*, 274 Neb. 620, 742 N.W.2d 484 (2007).

The Appellant, Jeovani, has limited resources to pay restitution and other family obligations make it hard for Jeovani to get to and from a place of employment. At the restitution hearing Jeovani's mother, Kayla Hernandez Chacon, testified about her and her husband's long work hours and the many hospital visits that they must attend for their young daughter. When questioned Mrs. Hernandez Chacon said that she worked at Hornady Manufacturing and that she works 12-hour shifts Monday through Friday. (8:10-15). She also testified that her husband works from 9 pm to 8 am Thursday through Sunday and sometimes Mondays as well. (8:12-20). The family has 4 other children besides Jeovani in the household. One of those children is his sister who is fighting a tumor. Kayla Hernandez Chacon testified at the restitution hearing that "back in 2021, our daughter was diagnosed with a brain tumor, pilocytic astrocytoma, which was resected but she does have a tumor in her spinal cord, which she is taking chemotherapy for, it's not operable, and she does some days need assistance with getting to and from. So, it's usually her brothers that help her quite often." (9:6-10). Mrs. Hernandez Chacon also testified that his sister goes in monthly for labs. Every three months they go to Omaha for imaging and labs. Imaging takes two and half hours. It is usually an all-day process. (9:12-15). The family is in a tough position trying to take care of 5 children, one who is chronically ill. Jeovani's parents have a lot on their plate and do not have the time or ability to get him to and from employment. Jeovani is not old enough to drive himself. He also participates in extracurricular activities that take up a good portion of his time outside of school.

Where restitution is concerned, the juvenile court is not required to adopt any one method for valuation. Instead, the juvenile court may exercise its discretion to determine the amount of restitution based on the record presented and the juvenile's ability to pay, as long as the amount of restitution is in keeping with the purposes of the Nebraska Juvenile Code. In short, the juvenile court may use any rational method of fixing the amount of restitution, so long as the amount is rationally related to the proofs offered at the dispositional hearing, and the amount is consistent with the juvenile's ability to pay, and the purposes of education, treatment, and rehabilitation *In re Seth C.*, 307 Neb. 862, 951 N.W.2d 135 (2020); *In re Lawrence S.*, 274 Neb. 620, 742 N.W.2d 484 (2007). Despite the existence of a plea agreement involving restitution, the trial court still must

give meaningful consideration to the defendant's ability to pay the agreed-upon restitution. *State v. Mick*, 19 Neb. App. 521, 808 N.W.2d 663 (2012).

In this case, the juvenile court's decision to order Jeovani to pay the full amount of restitution is not consistent with his ability to pay and is also not consistent with the purposes of education, treatment, and rehabilitation. During the restitution hearing Bethany Skodmin, juvenile probation officer for District 9 probation, testified "according to the YLS 2.0 (youth level of service), a job does not automatically give them a point for free time or make their recidivism rate lower." (18:21-23). However, when asked if an after-school activity such as wrestling or football would count toward that free time scoring, Mrs. Skodmin testified that it would. (18:24-25; 19:1). After school sports and activities are directly linked to lowering recidivism rates, however employment is not. Jeovani, in order to have free time to find employment to pay restitution would have to quit or limit his after-school sports that he is involved in as they take up much of his free time including weekends. Quitting his after-school activities and sports to find employment would be directly contradictory to the purpose of rehabilitation because as said above after-school sports are directly linked to lowering recidivism rates whereas employment is not.

In making its decision to order restitution the juvenile court inquired into Jeovani's ability to do detasseling in the summertime. Jeovani's mother, Kayla Hernandez Chacon, testified that the family did not have the ability to provide transportation to Jeovani to get to and from detasseling in the summer. (10:16-21). Mrs. Skodmin did testify that one of the detasseling employers provided transportation to detasseling at Walnut Middle School. (17:12-16). The family would still have to get Jeovani to Walnut Middle School to be transported to detasseling. Mrs. Skodmin also stated that the hours vary. They can cut youth early if they do not need them. (17:18-19). Varying hours would make it difficult for the family especially since both parents work long hours and there would be no way to know when Jeovani needs to be picked up on the days the children are off early. Not having a consistent work schedule would make it difficult for his parents to transport him as well as take care of the other children in the home. Also, summer detasseling would interfere with school football. Jeovani stated that in order to be involved in football during the fall he must participate in summer activities and camps. Again, it would be very difficult for him to be involved in his school sports and obtain employment. By ordering such a large amount of

restitution, the juvenile court is making Jeovani choose between one or the other. In ordering the restitution it is clear that Jeovani would need to obtain employment to pay off the restitution prior to the end of his probation term. In order to obtain and keep employment, Jeovani would have to limit or even quit his involvement in after school activities which probation would typically encourage him to participate in to reduce recidivism rates and teach him prosocial skills.

II. THE JUVENILE COURT DENIED THE APPELLANT HIS DUE PROCESS RIGHTS TO PRESENT EVIDENCE AND TO SEE, HEAR, AND CROSS-EXAMINE THE STATE'S WITNESS AT THE RESTITUTION HEARING.

The Nebraska Evidence Rules, sections 27-101 to 27-1103, do not apply in juvenile court dispositional hearings, such as one to terminate parental rights; however, they do provide guidance in determining the type of evidence which meets due process requirements. *In re Interest of D.L.S.*, 230 Neb. 435, 432 N.W.2d 31 (1988). There are no statutes directly on point clarifying the procedures in a hearing on restitution. Despite the Nebraska Evidence Rules not applying to a dispositional hearing where a restitution hearing is held, the same rules do not apply to a hearing on a motion to revoke probation. A juvenile does have certain rights at a hearing on a motion to revoke probation. *Neb. Rev. Stat.* §43-286 subsection 5(b)(ii) states, "the juvenile shall be entitled to a hearing before the court to determine the validity of the allegations. At such hearing the juvenile shall be entitled to those rights relating to counsel and those rights relating to detention. The juvenile shall also be entitled to speak and present documents, witnesses, or other evidence on his or her own behalf. He or she may confront persons who have given adverse information concerning the alleged violations, may cross-examine those persons, and may show that he or she did not violate the conditions of his or her probation or supervision. A juvenile at a restitution hearing with similar relaxed rules of evidence should be entitled to the same rights. The juvenile court in this case violated those due process rights by not allowing the defense to present evidence on its own behalf and not allowing cross-examination of the state's witnesses." *Nebraska Revised Statute* §43-286 (5)(b)(ii) (Reissue 2016).

At the start of the restitution hearing, the court asked defense counsel if they had any evidence to present. Defense was allowed to call only one witness. After questioning of that witness ended, the court never asked the defense if it had any other evidence to present. Instead, the court proceeded to ask the state if they had an argument for disposition. (10:22-23). The State then said that it had evidence as to the juvenile's ability to pay restitution and the court allowed the state to call witnesses beginning with Jeovani. (10:24-25; 11:4-7). Once the state had concluded its questioning of Jeovani, the court erred in not allowing the defense a chance to question him. The court proceeded by asking the State if they wished to be heard, and the State called Bethany Skodmin to the stand. (14:8-10). Once the State finished question Mrs. Skodmin, the defense was given a chance to cross-examine her. (18:15-16). Both parties at the conclusion of the restitution hearing were able to make arguments as to disposition prior to the court entering an order. The court erred in not allowing the defense the opportunity to present further evidence on Jeovani's behalf despite allowing the State to present multiple witnesses. Jeovani should have been given the right at the hearing to call his own witnesses in order to provide proof that he did not have the ability to pay restitution. The defense was only allowed to call one witness as the court never inquired further whether the defense had more evidence to offer. The court also erred in allowing the State to cross-examine the defense's witness but not allowing the defense the opportunity to do the same. The defense was only given the opportunity to cross-examine Mrs. Skodmin from juvenile probation. The defense was never given the opportunity to cross-examine Jeovani. Jeovani's due process rights were not afforded to him at this hearing. He was not given the opportunity to present evidence on his own behalf as well as see, hear, and cross-examine any witnesses for the State.

CONCLUSION

The juvenile court erred in ordering Jeovani to pay the full amount of restitution in this case. Jeovani is involved in wrestling and football at Grand Island Senior High School which takes up a significant portion of his time during the respective seasons. During the summer he is required to be involved in football in order to participate in the fall. In order to pay restitution Jeovani would have to quit his after-school sports to have the time to find employment. Employment is not directly linked to lowering recidivism which is one of the main objectives of juvenile court. Ordering such a significant amount of

restitution is not in line with the purposes of juvenile court which are education, rehabilitation, and treatment. The court is indirectly ordering him to quit activities which probation studies directly link to lowering recidivism rates. The court's order also places a financial burden on the family because now they must find the time and resources to transport him to and from a job.

The juvenile court also erred in not following proper procedure for a restitution hearing. Jeovani's due process rights were denied because he was not able to put on evidence on his own behalf during the hearing. He was also denied his right to see, hear, and cross-examine the State's witness in order to counter any evidence they presented. In doing so, he was not afforded the full opportunity to show that ordering him to pay the full amount of restitution would place a financial burden on his family and would be against the purpose of juvenile court which is rehabilitation not punishment.

Certificate

Appellant certifies this brief contains 3,990 counted using Microsoft Word 2023.

Respectfully submitted,



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Certificate of Service

I hereby certify that on Monday, January 08, 2024 I provided a true and correct copy of this *Brief of Appellant Chacon* to the following:

State of Nebraska represented by Garrett Levi Schroeder (25548) service method: Electronic Service to **courtnotices@hallcountyne.gov**

Kayla E Hernandez-Chacon (Self Represented Litigant) service method: **No Service**

Signature: /s/ Sidnea L. Brown (27549)