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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

KAREN ROXANNA GUTH,

Defendant and Appellant.

2d Crim. No. B237956
(Super. Ct. No. F423908)
(San Luis Obispo County)

Karen Roxanna Guth was ordered to pay \$202,003,233.73 victim restitution after she pled guilty to 26 counts of securities fraud and was sentenced to 12 years state prison. (Corp. Code, §§ 25110, 25401, 25541; Pen. Code, § 1202.4, subd. (f).)¹ The securities fraud involved the sale of real-estate-backed securities to more than 1,000 victims. Appellant appeals on the ground that the methodology used to calculate the restitution amount could result in a windfall to the victims. We affirm. "When there is a factual and rational basis for the amount of restitution ordered, no abuse of discretion will be found. [Citation.]" (*People v. Phu* (2009) 179 Cal.App.4th 280, 284.)

¹ All further statutory references are to the Penal Code. Pursuant to the negotiated plea, Guth admitted a \$500,000+ taking enhancement (§ 186.11, subd. (a)(2)), a \$3.2+ million taking enhancement (former § 12022.6, subd. (a)(4)), and a theft of more than \$100,000 (§ 1203.045, subd. (a)). Appellant also agreed to give up all her real and personal property including sizeable personal investments in her two bankrupt companies.

Facts and Procedural History

From October 18, 2002 through May 20, 2008, appellant and codefendant Joshua Yaguda induced more than 1,000 victims to invest \$317+ million in two companies controlled by appellant: Estate Financial, Inc. (EFI) and Estate Financial Mortgage Fund, L.L.C. (Fund). EFI loaned money to real estate developers, selling fractional shares in the loans to investors. Fund invested in the EFI loans and was the single largest investor in EFI's projects.

After EFI and Fund filed Chapter 11 bankruptcy petitions in July 2008, the real estate projects declined in value. Appellant and Yaguda were charged with securities fraud and entered into negotiated pleas on October 25, 2009. Restitution notices were sent to 3,216 potential victims and more than 1,000 victims responded with requests for restitution. The probation department investigated the claims and submitted a June 29, 2010 restitution report listing the victims, the restitution claims and investment amounts, and bankruptcy disbursements. In a March 25, 2011 second supplemental restitution report, the probation department reported that many investors named in the Chapter 11 bankruptcy proceedings failed to submit restitution claims because they assumed the bankruptcy trustees would do it for them. The names of the investors/potential victims were set forth in a 21-page attachment.

The trial court ordered appellant to pay, as victim restitution, each victim's principal investment (collectively totaling \$202,003,233.73), less any payment received by the victim from the bankruptcy trustees, the court, the California Department of Corrections and Rehabilitation, or appellant or codefendant Yaguda. (See *People v. Moser* (1996) 50 Cal.App.4th 130, 136 [Bankruptcy Code does not bar state courts from ordering victim restitution].) The court found that the investors listed in the 21-page attachment to the probation department's supplemental report "may be treated as victims of defendants['] crimes provided they file victim impact statements, and claims with the probation department on or before July 29th, 2011."

Credit for Pre-Bankruptcy Value of Real Estate Assets

Appellant asserts that the trial court erred in not crediting her for the value of the real estate assets before the bankruptcy trustees took control of EFI and Fund. We reject the argument because the real estate assets were not turned over to the victims. The restitution amount is based on the principal invested by each victim. A decline in the value of the EFI's and Fund's assets may affect appellant's ability to make restitution but does not affect the amount of the restitution award.

The trial court explained it this way: "[D]efendants complain that the 'starting point' selected by the court takes no account of the general decline in the value of real estate. In other words, the defendants are requesting that they be allowed to benefit from the loss [in] value of each investment due to the current economic conditions. However, unlike any of the cases cited by defendants, . . . once the money changed hands the loss occurred. The defendants will not be permitted to receive a windfall because of a general decline in the value of the financial products sold. (*People v. Tucker* (1995) 37 Cal.App.4th 1, 4-6.)"

Appellant's reliance on *United States v. Tyler* (9th Cir. 1985) 767 F.3d 1350 is misplaced. There, defendant was convicted of conspiracy to steal timber from a national forest. "The timber was restored to the government on the day of the theft. Any reduction in its value stems from the government's decision to hold the timber during a period of declining prices, not from Tyler's criminal acts." (*Id.*, at p. 1352.)

Unlike *Tyler*, the victims never had possession, control, or the right to sell EFI's and Fund's real property assets. The trial court reasonably concluded that the restitution amount should not be reduced because of a decline in the market value of EDI's and Fund's assets after the bankruptcy petitions were filed.

Credits/Offsets for Investment Distributions

The trial court found, as a restitution starting point, that each victim's economic loss was the principal amount invested, minus whatever principal was paid back to the victim. Appellant, however, produced no evidence that principal was repaid, in whole or part, to any victim.

Appellant argues that victims who were paid income/interest on their investments will receive a windfall unless it is deducted from principal.² Based on appellant's construction of the law, appellant should be credited for any investment income/interest received by a victim even though the credit/offset would benefit appellant at the victim's expense.

The trial court acknowledged that "some investors/victims" selected projects that are worth more than other projects [and] have received and may continue to receive proceeds from the sale of those projects by the trustees. On the other hand, there are other investors who have not received anything as a result of the bankruptcy liquidation of EFI's assets. Faced with these disparities, the [trial] court has determined that it must establish a common starting point that will ultimately lead to a proportional sharing of the funds realized from defendant's assets. From this starting [point] we may proceed to reduce the victims individual losses as distributions are made to the victims. Defendant's debt for restitution will according be reduced by payments the victims individually receive from the bankruptcy trustees, this court, CDRC, and defendants."

The restitution formula is consistent with section 186.11, subdivision (k) which provides that where "the value of the property to be levied upon is insufficient to pay for restitution and fines, the court shall order an equitable sharing of the proceeds of the liquidation of the property, and any other recoveries. . . ." Victim restitution is a

² This is known as the "netting rule" which is used to determine whether a Ponzi scheme investor can be ordered to disgorge illicit profits. (See *Donell v. Kowell* (9th Cir. 2008) 533 F.3d 762, 771.) Under this rule, amounts transferred by the Ponzi scheme perpetrator to the investor (i.e., investment income/interest) are "netted" against the initial amounts invested by that individual. If the net is positive, the investor may be liable to the receiver of the Ponzi scheme operator under the California Uniform Fraudulent Transfer Act. (Civil Code § 3439 et seq; *Donell v. Kowell, supra*, 533 F.3d at p. 771.) "Payments of amounts up to the value of the initial investment are not, however, a 'return of principal,' because the initial payment is not considered a true investment. Rather, investors are permitted to retain these amounts because they have claims for restitution or rescission against the debtor that operated the scheme up to the amount of the initial investment." (*Id.*, at p. 772.)

constitutional right (Cal. Const., art. I, § 28, subd. (a)) and the statutory provisions implementing this constitutional directive are broadly and liberally construed. (*People v. Stanley* (2012) 54 Cal.4th 734, 737.) "[T]he trial court must order the defendant to pay restitution . . . 'based on the amount of loss claimed by the victim . . . *or any other showing to the court,*' (§ 1202.4, subd. (f)) the statute further provides the trial court 'shall order full restitution unless it finds compelling and extraordinary reasons' not to do so" (*Ibid.*, *italics added.*)

Appellant asserts that some victims could "accidentally" receive windfalls or double recoveries but that is highly unlikely. The trial court found that the real estate holdings are not "sufficient to cover all of the victim's losses. This is true no matter how one chooses to measure those losses. This is also true whether there are 900 victims or 1,800 victims. Most certainly the defendants will work a lifetime, and not be able to fully repay the amounts involved here."

"Once the victim makes a prima facie showing of economic losses incurred as a result of the defendant's criminal acts, the burden shifts to the defendant to disprove the amount of losses claimed by the victim. [Citation.]" (*People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1543.) Appellant makes no showing that the restitution award, as fashioned, is unfair or will result in a windfall to any victim whose claim is approved by the trial court. "A trial court's determination of the amount of restitution is reversible only if the appellant demonstrates a clear abuse of discretion. [Citation.]" (*People v. Akins* (2005) 128 Cal.App.4th 1376, 1382.)

Notice of Future Restitution Hearings

The April 21, 2011 restitution order provides that potential victims listed in the 21-page attachment to the second supplemental restitution report must submit victim impact statements and restitution claims by July 29, 2011. The order states: "[I]f the probation department determines that it can recommend that the persons listed on said attachment receive restitution in the amounts listed on the attachment, then there will be no need to return to court for further approval of those individual[] claims, and those persons shall thereafter be treated as victims and shall be entitled to restitution calculated

as provided in this order. If however, the probation department determines that there are persons . . . listed on the attachment . . . who the probation department would recommend receive [restitution] amounts different than those contained in said attachment, then probation shall arrange through the district attorney's office to notice a further restitution status . . . on the court's calendar, and provide the court with its recommendations as to such persons or amounts."

Appellant argues that she is entitled to notice and opportunity to be heard if the probation department determines that a victim should be awarded restitution in an amount different from that listed on the 21-page attachment. The argument is disingenuous because appellant waived her presence at all restitution hearings at the time of sentencing. The waiver was reiterated by appellant's trial attorney at each restitution hearing.

Appellant makes no showing that she or her trial attorney were denied notice or the opportunity to be heard at any restitution hearing. The superior court docket indicates that no hearing was conducted on or after July 29, 2011 to determine restitution amounts³ To the extent that appellant seeks notice of on-going bankruptcy proceedings, the request should be directed to the bankruptcy court, not this court.

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

³ We granted appellant's petition to file a late notice of appeal on November 4, 2011. (*In re Benoit* (1973) 10 Cal.3d 72.) The record on appeal includes the superior court docket from October 15, 2008 through October 28, 2011.

Jac A. Crawford, Judge
Superior Court County of San Luis Obispo

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Defendant and Appellant.

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