



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



Town of Gilbert Prosecutor's Office v. Mitchell M. Matykiewicz
Court of Appeals No. 1 CA-SA 07-0078
Supreme Court No. CV-07-0300-PR

PARTIES AND COUNSEL:

Petitioner: Mitchell Michael Matykiewicz, represented by Michael J. Dew.

Respondents: Town of Gilbert Prosecutor's Office ("the State"), represented by Lynn R. Arouh, Gilbert Town Prosecutor, and Denise E. Boode, Assistant Town Prosecutor.

FACTS:

Petitioner was convicted in the Gilbert Municipal Court of contracting without a license, a class 1 misdemeanor, in violation of A.R.S. § 32-1151. Following are the facts leading to the conviction.

Through a business known as "MLM Construction Services," petitioner made a series of written proposals to Richard and Felicita Rada to construct a swimming pool and other improvements at the Radas' Gilbert home. Over the course of the next ten months, the Radas paid the following amounts by check directly to MLM Construction:

- \$540 on April 5, 2005, with notation "pool permit"
- \$5067.70 on April 27, 2005
- \$973.28 on May 12, 2005
- \$563.64 on May 20, 2005, with notation "extra shelves"
- \$7321 on May 20, 2005, with notation "pool construction 1st phase"
- \$4750 on June 7, 2005
- \$2146 on July 8, 2005
- \$4680 on July 14, 2005
- \$13,372.50 on July 27, 2005
- \$4452 on August 10, 2005
- \$3062.50 on August 30, 2005
- \$5855.60 on October 7, 2005

TOTAL: \$52,784.22

Petitioner personally endorsed each of the Radas' checks. At trial, Richard Rada testified that petitioner personally performed some of the work but that most of it was done by others under his supervision. Mr. Rada did not know whether those individuals were licensed contractors. At no time did the Radas pay anyone other than petitioner for the work performed at their home.

Petitioner testified that he received only a \$2500 "consulting fee" from the Rada project

and that the rest of the money paid to MLM Construction went to licensed contractors who actually performed the work. Although petitioner stated that he had a list of the subcontractors used on the job, no such list was introduced into evidence. Neither during trial nor at the ensuing restitution hearing did petitioner offer documentary evidence establishing his payments to others.

In delivering the guilty verdict, the trial judge stressed the fact that petitioner was the payee on each and every check tendered by the Radas:

The Court finds it's very relevant that as you look at each check, it's made out to the defendant's corporation. The Court would be more persuaded to find that the – he merely acted consultant and didn't do the contracting if each check was simply made out to the individual licensed contractors. That would carry more weight and be more supportive of the defendant's argument.

* * * * *

So based on the evidence produced in court today, the fact that specifically each check is written out to MLM Construction, the fact the bid is written out by MLM Construction, the card is by – indicating MLM Construction is in defendant's name, the Court finds that the defendant did commit contracting without a license and is a violation of the statute.

Immediately after the bench trial, the trial judge conducted a restitution hearing. Relying on *State v. Wilkinson (Porter)*, 202 Ariz. 27, 39 P.3d 1131 (2002), the State argued that the Radas were entitled to restitution in the full amount that they paid to petitioner. Petitioner, on the other hand, contended that requiring him to pay more than \$2,500 in restitution would result in a windfall to the Radas and that he should only be liable for the amount he received. The trial judge, citing *Wilkinson*, ordered petitioner to pay \$52,784.22 in restitution.

Petitioner appealed to the superior court solely on the issue of whether the trial court erred in ordering him to pay restitution in the sum of \$52,784.22. In a ruling filed February 13, 2007, the superior court vacated the trial court's restitution order and remanded for a new restitution hearing. The superior court distinguished *Wilkinson* in ruling as follows:

It is important to note at the outset that *Wilkinson* decided a relatively narrow point of law, which the Arizona Supreme Court framed as follows:

We granted review to consider whether and to what extent the courts can order restitution for victims of an unlicensed contractor ***who performs incomplete and faulty work***. We conclude that a trial court may award restitution when and to the extent that the criminal act of contracting without a license directly causes a victim's economic loss.

202 Ariz. at 28, 39 P.3d at 1132 (emphasis added).

Wilkinson did not alter the legal landscape for restitution awards against unlicensed contractors as broadly as the State contends. It did not establish a strict

liability standard for restitution or hold that an unlicensed contractor may *never* retain money he has received. Indeed, *Wilkinson* reiterated the statutory underpinnings of restitution, including:

A.R.S. § 13-603(C)

If a person is convicted of an offense, the court shall require the convicted person to make restitution to the person who is the victim of the crime or to the immediate family of the victim if the victim has died, **in the full amount of the economic loss as determined by the court** and in the manner as determined by the court or the court's designee pursuant to chapter 8 of this title. Restitution ordered pursuant to this subsection shall be paid to the clerk of the court for disbursement to the victim and is a criminal penalty for the purposes of a federal bankruptcy involving the person convicted of an offense. [emphasis added]

A.R.S. § 13-105(14) defines "economic loss" as follows:

"Economic loss" means any loss incurred by a person as a result of the commission of an offense. Economic loss includes lost interest, lost earnings and other losses which would not have been incurred but for the offense. Economic loss does not include losses incurred by the convicted person, damages for pain and suffering, punitive damages or consequential damages.

Unlike *Wilkinson*, where the unlicensed contractor clearly "failed to complete the work and did some of the work improperly," the record in the case at bar is not adequately developed regarding incomplete or faulty work. Although the State attempted to delve into these topics during the trial itself, defense objections to those lines of inquiry were sustained.

Remand to the trial court is required to establish the extent of the Radas' economic loss. The trial court must find that the Radas suffered an economic loss, as defined by statute. The State's burden of proof is by a preponderance of the evidence. *In re William L.*, 211 Ariz. 236, 119 P.3d 1039 (App. 2005). While the trial court has broad discretion in setting the restitution amount, it may not order restitution that would make the victims *more* than whole. *Id.* Based on the record here, the previous factual findings by the trial judge, and the *Wilkinson* decision, any restitution award on remand is not limited to the \$2500 amount advocated by Appellant.

Based upon this ruling of the superior court, the trial court set a new restitution hearing. The superior court denied the State's motions for rehearing and a stay, and the State sought a stay and special action relief in the court of appeals. The court of appeals stayed the restitution hearing pending its decision on the special action.

In an opinion filed July 24, 2007, the court of appeals accepted jurisdiction and granted relief. The court based its decision upon *Wilkinson* and public policy. Petitioner filed his petition

for review on August 14, 2007. The State filed its response on September 11, 2007.

ISSUE PRESENTED FOR REVIEW:

The Court of Appeals determined that the Supreme Court’s holding in *State v. Wilkinson (Porter)*, *supra*, established a *per se* rule that *all* payments made to an unlicensed contractor are automatically forfeitable as restitution, regardless of whether there is any evidence of “economic loss,” and regardless of whether the result would be a windfall to the victim. *See* Slip Op. at ¶14.

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