

VICTIMS' RIGHTS BRIEF

For Arizona's Justice System Administrators, Practitioners and Advocates



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The **Victims' Rights Brief** is published by the Arizona Attorney General, Office of Victim Services. The goal in generating the Brief is to promote justice and healing for crime victims by sharing information and fostering sensitivity within the justice system.

To learn more about victims' rights visit us at
www.azag.gov/victim-services

If you have questions, suggestions or an idea for an article, contact **Colette Chapman** at (602) 542-8848 or email
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To preserve and protect victims' rights to justice and due process, a victim of crime has a right [t]o receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury. [AZ Const., art. 2 § 2.1(A)(8)]

Below is a summary of the AZ Court of Appeals State v. Quijada. In part, the court weighs the defendant's right to due process with a victim's right to restitution, addresses subpoenaing a victim to testify in a restitution hearing and what happens if the victim does not appear in response to the subpoena. Please go to **1 CA-CR 18-0247-PRPC** for a full reading of the decision.

Ms. Amy Offenbug authored the summary below. She is an Assistant City Prosecutor assigned to the Appeals Bureau for the Phoenix City Prosecutor's Office.

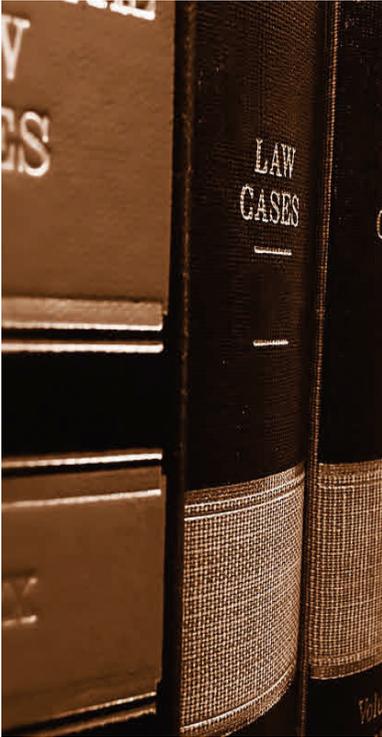
CASE LAW UPDATE – STATE V. QUIJADA CA-CR 18-0247 PRPC (Division 1) 2018 WL 1397189

FACTS

Quijada pled guilty to one count of facilitation to commit trafficking in stolen property and agreed to pay restitution of up to \$100,000. At sentencing, the court placed Quijada on probation and retained jurisdiction over restitution because the victim had not yet submitted a specific restitution request.

The victim later provided an unsworn restitution request for \$5,530.75, including installation and maintenance for a home security system. In the next six weeks, the victim provided an updated, unsworn statement requesting \$13,252.25 in restitution. The State requested that the victim provide documentation of her loss. In response, the victim provided a third restitution request in the amount of \$45,320.18. In support of her requests, the victim provided invoices for electronics and printouts from internet catalogs for jewelry that she claimed was stolen. The items listed in the restitution request as stolen differed greatly from what the victim had told the police were stolen.

CASE LAW-FACTS CONTINUED



The superior court scheduled a restitution hearing. The victim appeared in response to a subpoena issued by the State, but the court continued the hearing because it failed to notify Quijada and her attorney. The court reset the hearing and the State again subpoenaed the victim, but the hearing was continued again because the prosecutor could not be present. When the case was reset, the victim appeared but left before she could be called to testify because she felt ill. The State submitted her restitution request to the court. Quijada requested a continuance to review the documents and to question the victim.

At the continued hearing, the state “requested” that the victim appear but did not subpoena her. The State informed the court that the victim was either unwilling or unable to appear. The State asked the court to rule on the restitution request based on the victim’s submission. Quijada objected on due process grounds. The court ordered restitution in the amount of \$39,969.37.

When Quijada’s probation term was about to expire, the court extended it because the restitution was not paid in full. Quijada filed a petition for post-conviction relief, requesting that the court amend the restitution order. The victim did not appear at the hearing on the petition, despite the State having subpoenaed her. The State expressed “serious misgivings” about the victim’s restitution request. The State recommended that the court reduce the restitution to \$6,696.42. The court affirmed its prior order, but increased the restitution amount to \$40,885.42 to correct an alleged clerical error. Quijada appealed.

ISSUES

The Court of Appeals addressed four issues

1. Did the Superior Court deprive Quijada of due process when it awarded restitution without allowing her to contest the evidence?
2. Does the Victims’ Bill of Rights prevent a defendant from subpoenaing a victim to testify regarding a restitution claim?
3. If a victim does not comply with a subpoena, what is the court’s remedy?
4. Can a theft victim recover the cost of a home security system as restitution?

DISCUSSION

The court of appeals first looked at whether the superior court erred when it awarded restitution without the victim appearing. Due process requires that a defendant be permitted to contest the information upon which restitution is based, present relevant evidence regarding restitution, and be heard. Unless a defendant waives the right to a restitution hearing, the court must: “(1) afford the defendant an opportunity, through a hearing or similarly adequate process, to contest the evidence on which the restitution award is based; or (2) if the appropriate amount of the award was evident from the facts before the court, impose restitution in open court with the defendant present so that a challenge maybe made at that time.”

The court found that the superior court had deprived Quijada of her right to due process when it awarded restitution without her being able to question the victim. The court needed to provide Quijada with a meaningful opportunity to contest the claim and in proceeding without allowing that opportunity, cut off the only means that she had to challenge the information that the victim had provided. The court clarified that its holding was not that “defendants have an unconditional due-process right to question any victim who submits evidence or statements to support a restitution claim.” It is only when the veracity or accuracy of the request is in doubt and the defendant cannot challenge the evidence without questioning the victim in open court under oath does due process require the victim’s presence.

The court next turned to the issue of whether a defendant can subpoena a victim to a restitution hearing. The court concluded that the Victims’ Bill of Rights does not preclude a defendant from subpoenaing the victim. The court held that “victims do not have an unconditional right to refuse to appear and testify at restitution proceedings” and that “when a victim’s testimony is necessary to effectuate a defendant’s due-process rights and to ensure the restitution amount does not create a ‘windfall’ to the victim,” the defendant or the State may subpoena the victim.

The court then examined what happens if a victim does not appear in response to a subpoena. The court emphasized that a victim who does not appear in response to a subpoena for restitution hearing may not be arrested and held in contempt of court. What the court may do, at a minimum, is “draw an adverse inference against any uncorroborated statements made by the victim concerning economic loss.” The weight that the court should ascribe to the inference will depend on a totality of the circumstances. Factors to consider include why the victim failed to appear and what information the victim has provided in support of the restitution claim. The State may prove the claim by means other than the victim’s testimony. The court of appeals gave the lower courts the discretion to craft an appropriate remedy, up to and including striking the restitution claim. The court emphasized that trial courts must balance a victim’s constitutional right to restitution against a defendant’s constitutional right to due process.

Did you Know?

Prosecuting agencies are required to inform the victim of his/her right to request a pre-conviction restitution lien pursuant to section 13-806 within seven days after the prosecutor charges a criminal offense by complaint, information or indictment and the accused is in custody or has been served a summons.

[A.R.S. § 13-4408(A)(5)]

Within fifteen days after a conviction, and if the court has ordered restitution, the prosecutor’s office is required to notify the victim of his/her right to file a restitution lien and of the right to request a copy of the defendant’s restitution payment history from the Clerk of Court pursuant to section 13-4426.

[A.R.S. § 13-4410(B)(8)(a)(b)]



DISCUSSION Continued

Finally, the court determined that the victim could be compensated for the installation of a security system and monitoring for a reasonable time period.

Under earlier case law, for an expense to be compensable as restitution, the State must prove that the loss would not have occurred but for the defendant's criminal act and that the loss is not too attenuated. In other circumstances, the court has allowed for recovery for expenses such as counseling and moving expenses. Based upon those prior cases, the court determined that expenses associated with installing and monitoring a home security system in a case related to theft from the victim's home may be recoverable if they were incurred to restore the victim's "equanimity." When determining how long a defendant should be required to pay monitoring costs, the court must determine a reasonable timeframe. "A defendant may not be held responsible for the costs of maintaining a home security system beyond a reasonable period necessary to restore the victim's equanimity. The dividing line between costs incurred to restore equanimity and costs incurred to maintain equanimity will often be indistinct; it will not always be an easy task to pinpoint the moment at which a victim's sense of security is restored. But a 'reasonableness' standard for attenuated causation is well-suited to guide any such line drawing." The court concluded that the superior court ordering monitoring for a year was reasonable.

A NOTE ABOUT THE CONCURRENCE

One of the judges on the panel wrote a concurrence addressing several points. The most important for our practice is that the standard of proof for proving restitution remains a preponderance of the evidence. The concurrence specifically stated: "The government has often and will often meet this burden without any need for the victim to provide live, in-court testimony." It is only where the victim's claim may be called into doubt that a victim must appear and explain the request.

Be in the Know!

The Arizona Judicial Branch has an information page on the different types of restitution liens, along with restitution resources and forms. Please go to:

<https://www.azcourts.gov/restitution/Home-Copy>

The *Arizona Crime Victims' Rights Laws* document developed by the Arizona Attorney General's Office of Victim Services also includes the adult and juvenile restitution statutes and can be found at:

https://www.azag.gov/sites/default/files/docs/criminal/victim-services/pamphlets/2018_Law_Book.pdf