

FILED BY CLERK

JUL 23 2009

COURT OF APPEALS  
DIVISION TWO

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Appellee,	)	2 CA-CR 2008-0156
	)	DEPARTMENT A
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
CALEB QUIXOTE LEWIS,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20032646

Honorable John Davis, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General  
By Kent E. Cattani and Kathryn A. Damstra

Tucson  
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender  
By Joy Athena

Tucson  
Attorneys for Appellant

PELANDER, Judge.

¶1 After a jury trial, appellant Caleb Lewis was convicted of drive-by shooting but acquitted of aggravated assault. He appeals from the trial court’s restitution order against him, contending the court erred by ordering him to pay restitution to a victim after he had been acquitted of aggravated assault against her. He also maintains for the first time on appeal that, because evidence at trial suggested there were two shooters, either of whom could have caused the victim’s injury, the facts underlying his drive-by shooting conviction do not support the restitution award. We affirm the court’s restitution order in a separate, published opinion. In this memorandum decision, we address sua sponte some questions relating to the trial court’s jurisdiction and conclude the court had jurisdiction to enter the order from which this appeal was taken. *See* Ariz. R. Crim. P. 31.26; Ariz. R. Sup. Ct. 111(b), (h).

¶2 On October 5, 2004, at Lewis’s sentencing hearing below, the parties and trial court discussed the state’s intent to assert a restitution claim on behalf of the shooting victim. After some discussion about whether any restitution was awardable, the court ordered the parties to file supplemental memoranda on that issue. Defense counsel said he did not want to delay Lewis’s appeal pending resolution of the restitution claim but, rather, would appeal “with the understanding that the Court of Appeals would continue to vest jurisdiction in [the Superior Court] for the purposes of that restitution issue.” The prosecutor agreed with that procedure, and defense counsel avowed “the law [would] permit” that. Pursuant to that

exchange, the trial court “directed” Lewis’s counsel “to request the Court of Appeals that jurisdiction of the restitution matter remain with” it.

¶3 Two days later, Lewis filed a notice of appeal from his conviction and sentence. Over the next several weeks, the parties filed memoranda on the restitution issue and, on November 23, 2004, the court held a restitution hearing and ordered restitution in the total amount of \$12,448.94. The same day, Lewis filed a second, “supplemental notice” of appeal from the restitution order. In Lewis’s initial appeal, however, he did not raise the restitution issue, and this court affirmed his conviction and sentence in December 2006. *State v. Lewis*, No. 2 CA-CR 2004-0353 (memorandum decision filed Dec. 22, 2006).

¶4 In December 2007, Lewis moved below, pursuant to Rules 31.3(b) and 32.1(f), Ariz. R. Crim. P., to file a delayed appeal on the issue of restitution only and to stay a petition for post-conviction relief he had filed pursuant to Rule 32. With no objection from the state, the trial court granted his request. Therefore, on April 30, 2008, Lewis filed his notice of delayed appeal from the restitution order.

¶5 Although we generally disfavor piecemeal appeals, a restitution order is separately appealable. *See State v. Fancher*, 169 Ariz. 266, 266 n.1, 818 P.2d 251, 251 n.1 (App. 1991). And Rules 31.3(b) and 32.1(f) allow a trial court to grant a delayed appeal, as the court did here.<sup>1</sup> *See State v. Dawson*, 164 Ariz. 278, 283, 792 P.2d 741, 746 (1990); *State*

---

<sup>1</sup>As noted above, Lewis filed a supplemental notice of appeal on November 23, 2004, the day the trial court held a restitution hearing and ordered restitution. By that time, however, the clerk of the superior court had already transmitted the record on appeal to this court.

*v. Hamilton*, 142 Ariz. 91, 92, 688 P.2d 983, 984 (1984). Thus, assuming the trial court had jurisdiction to enter the restitution order when it did, we agree with both parties that this court has jurisdiction pursuant to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033.

¶6 Neither party, however, addresses the question whether the trial court had subject matter jurisdiction to address and rule on the restitution claim after Lewis appealed from his conviction and sentence. Despite having been directed to do so, Lewis apparently did not seek an order from this court staying the first appeal and revesting jurisdiction in the trial court for purposes of ruling on the restitution claim. Nor did the parties or trial court discuss that point before the court heard and ruled on the claim. Although the parties do not question the trial court’s jurisdiction, we are obliged to determine sua sponte whether that court exceeded its subject matter jurisdiction, or power, by ruling on the restitution claim while Lewis’s initial appeal was pending. *See State v. Maldonado*, No. 1 CA-CR 07-0837, ¶9, 2009 WL 1298991 (Ariz. Ct. App. May 12, 2009) (“Defects in subject matter jurisdiction cannot be waived and may be contested at any time, including on appeal.”); *State v. Chacon*, 555 Ariz. Adv. Rep. 3, ¶ 5 (Ariz. Ct. App. May 7, 2009) (same); *State v. Marks*, 186 Ariz. 139, 141, 920 P.2d 19, 21 (App. 1996) (same).

¶7 “It is a well-recognized rule that once an appeal has been taken, the trial court has authority to act only in furtherance of the appeal.” *State v. Superior Court*, 86 Ariz. 231, 234, 344 P.2d 736, 738 (1959). That principle, however, is a “court-made rule” that “is

subject to many equally well established exceptions.’” *State v. O’Connor*, 171 Ariz. 19, 21, 827 P.2d 480, 482 (App. 1992), quoting *Cont’l Cas. Co. v. Indus. Comm’n*, 111 Ariz. 291, 294, 528 P.2d 817, 820 (1974); cf. *Castillo v. Indus. Comm’n*, 21 Ariz. App. 465, 468, 520 P.2d 1142, 1145 (1974) (“exception to complete appellate pre-emption of trial court jurisdiction pending review is recognized where, by reason of the peculiar nature of the subject matter involved, the trial court is vested with special powers of a continuing jurisdictional nature”). Under one such exception, “a trial court retains jurisdiction to act so long as that act cannot negate the decision in a pending appeal or frustrate the appeal process.” *O’Connor*, 171 Ariz. at 22, 827 P.2d at 483.

¶8 Based on the particular and unique circumstances of this case, we conclude that exception applies and permitted the trial court to rule on the victim’s restitution claim despite Lewis’s having already filed a notice of appeal from his conviction and sentence.<sup>2</sup> Any trial

---

<sup>2</sup>Arizona law requires a trial court “to impose restitution to reimburse the victim for the full amount of his economic loss.” Although not punitive in nature, restitution is an essential part of the sentencing process. *State v. Holguin*, 177 Ariz. 589, 591, 870 P.2d 407, 409 (App. 1993); see also *State v. Zaputil*, 220 Ariz. 425, ¶ 10, 207 P.3d 678, 681 (App. 2008) (“[R]estitution is mandatory under our sentencing scheme.”); *State v. Contreras*, 180 Ariz. 450, 453, 885 P.2d 138, 141 (App. 1994); A.R.S. §§ 13-603(C), 13-804. In addition, our supreme court has said that, “[o]nce a notice of appeal has been filed, the trial court cannot modify a sentence because the trial court no longer has jurisdiction over the matter.” *State v. Ferguson*, 119 Ariz. 55, 58, 579 P.2d 559, 562 (1978); see also *State v. Albe*, 148 Ariz. 87, 88, 713 P.2d 288, 289 (App. 1984). Here, however, the trial court did not modify Lewis’s sentence after he filed his first notice of appeal. Rather, because restitution is an essential component of sentencing, arguably Lewis’s sentence was not “complete and valid” until the trial court orally pronounced the restitution award in open court on November 23, 2004. Ariz. R. Crim. P. 26.16(a). If so, Lewis’s earlier notice of appeal from his conviction and sentence was premature and, as such, “could not operate to divest the trial court of jurisdiction to correct its sentence.” *State v. Rendel*, 18 Ariz. App. 201, 205, 501 P.2d 42,

court proceedings or orders relating to the restitution issue would not materially affect, interfere with, or negate this court’s processing and resolution of Lewis’s initial appeal. Under these circumstances, a finding that the trial court lacked subject matter jurisdiction to dispose of the restitution claim is not compelled by Arizona law and would elevate form over substance.

¶9 We find further support for this conclusion in the Arizona Rules of Criminal Procedure. Under Rule 31.11, other than a nonprecluded petition for post-conviction relief under Rule 32, “[n]o new matter . . . may be filed in the trial court by any party to an appeal later than 15 days after the record on appeal has been filed.” We do not necessarily view the state’s restitution claim as a “new matter” for purposes of that rule. But even if it were, the trial court’s final order of November 23, 2004, awarding restitution, was entered well before expiration of the time referred to in Rule 31.11.

¶10 “The phrase ‘15 days after the record on appeal has been filed’ [in Rule 31.11] refers to 15 days after the date on which the parties are notified under Rule 31.10.” Ariz. R. Crim. P. 31.11 cmt. Pursuant to Rule 31.10, “[u]pon receipt, the clerk of the Appellate Court shall file each portion of the record and shall immediately give notice to all parties of the date

---

46 (1972); *cf. Smith v. Ariz. Citizens Clean Elections Comm’n*, 212 Ariz. 407, ¶¶ 37-38, 132 P.3d 1187, 1195 (2006) (when premature appeal filed, appellate court should dismiss case for lack of jurisdiction if substantive matter requiring discretion, rather than merely ministerial task, still pending in trial court). In any event, for the reasons stated above, we conclude none of these principles divested the trial court of jurisdiction to rule on the state’s restitution claim. We strongly encourage trial courts and parties to the extent possible, however, to address all restitution claims at the time of sentencing and avoid sequential, piecemeal appeals such as occurred here.

on which the record is complete.” In this case, it was not until March 30, 2005, that this court issued its notice of a complete record in Lewis’s initial appeal. Thus, the deadline for filing any “new matter” in the trial court was not until mid-April 2005. And Rule 31.11 “does not remove the trial court’s jurisdiction to decide motions filed before the cut-off date.” Ariz. R. Crim. P. 31.11 cmt.

¶11 Accordingly, the trial court acted within its jurisdiction in hearing and ruling on the restitution issue in November 2004, well before Lewis’s initial appeal was perfected. For all of these reasons, we find no jurisdictional defect in the trial court’s restitution order. And, for the reasons stated in our separate opinion in this case, we affirm that restitution order.

---

JOHN PELANDER, Judge

CONCURRING:

---

JOSEPH W. HOWARD, Chief Judge

---

PHILIP G. ESPINOSA, Presiding Judge