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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2018-2019

CR-17-1049

D.A.H.

v.

State of Alabama

Appeal from Talladega Juvenile Court
(JU-02-100089.08 and JU-02-100089.09)

JOINER, Judge.

Delinquency petitions were filed in the Juvenile Court of Talladega County, charging D.A.H.¹ with first-degree arson,

¹Pursuant to Rule 52, Ala. R. App. P., initials are used throughout to protect the identity of the juvenile defendant.

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see § 13A-7-41, Ala. Code 1975, and second-degree arson, see § 13A-7-42, Ala. Code 1975. Following a hearing, the juvenile court adjudicated him delinquent and committed him to the custody of the Department of Youth Services. On May 11, 2018, the court held a restitution hearing and awarded \$7,408.33 in case number JU-02-100089.08, and \$69,177.92 in case number JU-02-100089.09. D.A.H. filed a postjudgment motion asking the court to amend or vacate its order, but that motion was denied. D.A.H. appeals the juvenile court's order requiring him to pay restitution.

Facts and Procedural History

On November 9, 2017, Officer Chris Vinson with the Sylacauga Police Department filed delinquency petitions against D.A.H. Those petitions charged D.A.H. with first-degree arson for intentionally setting fire to a building, in violation of § 13A-7-41, Ala. Code 1975 (JU-02-100089.08), and with second-degree arson for burning a barn which contained cars, motorcycles, and other items, in violation of § 13A-7-42, Ala. Code 1975 (JU-02-100089.09).² A delinquency hearing was held during which D.A.H. denied the charges against him.

²D.A.H. was charged with those offenses along with his accomplices, A.A.T. and S.S.S., who were also juveniles.

As a result of that hearing, the juvenile court adjudicated him delinquent and committed him to the custody of the Department of Youth Services. The State then moved for a restitution hearing, and that motion was granted.

On May 11, 2018, a restitution hearing was held³ during which the juvenile court heard testimony from victims David Thornton and Kim Smith. Thornton testified that his barn, along with the motorcycles, rebuilt automobiles, and automobile parts inside the barn, was damaged by the fire set by D.A.H. and his accomplices. According to Thornton, the total cost of the damage to that property was \$203,100. He further testified that, as a result of the incident, he was going to have to pay an estimated \$22,000 to clean up the damage. On cross-examination, the defense questioned Thornton extensively about those amounts. The State and the defense later stipulated to a claim from Thornton's insurance company, Progressive Insurance, for restitution in the amount of \$4,467.75.

Next, Kim Smith testified as to the damage that was done to her rental property. Specifically, she testified that her

³That hearing was a consolidation of all the cases involving D.A.H., A.A.T., and S.S.S.

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trailer and the appliances and furnishings inside the trailer were all damaged in the fire started by D.A.H. and his accomplices, which resulted in a total of \$22,225 in property damage and included the estimated \$1,500 she would have to spend to clean up the property and to remove the resulting trash and debris. On cross-examination, the defense questioned Smith extensively about those amounts.

D.A.H.'s grandfather, Calvin Parrett, was the only witness who testified on D.A.H.'s behalf. At the end of the restitution hearing, the court took the matter under advisement. It also stated on the record that it believed that children ought to be responsible for the damage they cause.

On May 17, 2018, the juvenile court issued a restitution order in which it ordered D.A.H. to pay Smith \$7,408.33 and to pay Thornton \$69,177.92. On May 31, 2018, and June 7, 2018, D.A.H. filed what appeared to be identical motions to alter, amend, or vacate the juvenile court's restitution order. In those motions, D.A.H. argued that the court's restitution order was contrary to this Court's holding in D.J.W. v. State, 705 So. 2d 521, 524 (Ala. Crim. App. 1996). Specifically, he argued that the Court failed to consider all the relevant

factors required by D.J.W. in awarding restitution and that the State failed to prove that the property had been accurately valued by the victims.

A hearing was held on D.A.H.'s motions on June 21, 2018. The primary argument asserted by D.A.H. during that hearing was that restitution was primarily about the rehabilitation of the delinquent child and that the juvenile court's order was contrary to that principle. D.A.H. also asserted that he had no job, no education, and no means to pay the restitution. Finally, he argued that the State had failed to prove that the damaged property had been accurately valued by the victims. D.A.H.'s motion was denied. Thereafter, D.A.H. filed a timely notice of appeal.

Discussion

I.⁴

D.A.H. argues that the juvenile court abused its discretion by ordering him to pay "nearly \$80,000 in restitution that was unsupported by any documented evidence aside from the victims' testimony." (D.A.H.'s brief, p. 9.) According to D.A.H., the State failed to present any

⁴This claim appears as Issue III in D.A.H.'s appellate brief.

documentary evidence to support the damages the juvenile court awarded to Thornton and Smith. (D.A.H.'s brief, pp. 9-12.) As a result, D.A.H. contends that the amount of restitution the juvenile court ordered him to pay "constitutes a clear and flagrant abuse of discretion and should be set aside." (D.A.H.'s brief, p. 12.) We disagree.

It is well settled that "[t]he particular amount of restitution is a matter which must of necessity be left almost totally to the discretion of the trial judge." Ex parte Stutts, 897 So. 2d 431, 433 (Ala. 2004) (internal quotation marks and citation omitted). Moreover, the exercise of "[t]hat discretion should not be overturned except in cases of clear and flagrant abuse." Id. Additionally,

''[t]he right of crime victims to receive restitution is set forth in the Restitution to Victims of Crimes Act, § 15-18-65 et seq., Ala. Code 1975 ("the Act").' Roberts v. State, 863 So. 2d 1149, 1152 (Ala. Crim. App. 2002). Section 15-18-65 states:

''The Legislature hereby finds, declares and determines that it is essential to be fair and impartial in the administration of justice, that all perpetrators of criminal activity or conduct be required to fully compensate all victims of such conduct or activity for any pecuniary loss, damage or injury as a direct or indirect result thereof. The

provisions of this article shall be construed so as to accomplish this purpose and to promote the same which shall be the public policy of this state.'

"Section 15-18-66(1), Ala. Code 1975, defines 'criminal activity' as '[a]ny offense with respect to which the defendant is convicted or any other criminal conduct admitted by the defendant.' Although the legislative intent of Alabama's restitution scheme dictates a broad application, a trial court's discretion in ordering restitution is not unlimited. A defendant

"'could be ordered to pay restitution to the victim of his crime only if one of two conditions existed: (1) his victim suffered direct or indirect pecuniary loss as a result of the criminal activity of which the defendant has been convicted, or (2) he admitted to other criminal conduct during the proceedings that was the proximate cause of the victim's pecuniary loss or damages.'"

D.J.J. v. State, 213 So. 3d 667, 668 (Ala. Crim. App. 2014) (quoting B.M.J. v. State, 952 So. 2d 1174, 1176 (Ala. Crim. App. 2006)).

In the present case, the State offered the testimony of Thornton and Smith, which established that they suffered direct pecuniary loss as a result of the conduct of D.A.H. and his accomplices. First, Thornton testified that his barn, along with the motorcycles, rebuilt cars, and car parts inside it, was damaged by the fire. According to Thornton, the total

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cost of the damage to that property was \$203,100. He further testified that, as a result of the incident, he was going to have to pay an estimated \$22,000 to clean up the damage.

Next, Kim Smith testified to the damage to her rental property. Specifically, she testified that her trailer and the appliances and furnishings inside it were all damaged in the fire started by D.A.H. and his accomplices, which resulted in a total of \$22,225 in property damage and included the estimated \$1,500 that she would have to spend to clean up the property and to remove the resulting trash and debris.

Although D.A.H. contends that the State should have supplemented Thornton's and Smith's testimony with documentary evidence supporting their valuations, nothing in our caselaw requires them to do so. Under these circumstances, D.A.H. has failed to demonstrate that he is entitled to relief.

II.⁵

Next, D.A.H. argues that the juvenile court "abused its discretion by failing to take into consideration any of the factors laid out in D.J.W. [v. State], 705 So. 2d 521 (Ala. Crim. App. 1996)]," in ordering him to pay restitution.

⁵The claims addressed in this section appear as Issues I and II in D.A.H.'s appellate brief.

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(D.A.H.'s brief, p. 7.) He further argues that the juvenile court's order was insufficient because it failed to include the underlying facts and circumstances that supported its decision. (D.A.H.'s brief, pp. 7-9.)

In D.J.W. v. State, 705 So. 2d 521 (Ala. Crim. App. 1996), D.J.W. was adjudicated delinquent after admitting to the charge of third-degree arson. 705 So. 2d at 523. On appeal, D.J.W. argued that the juvenile court abused its discretion in ordering him to pay restitution in the amount of \$40,600.19, which was the uncontested, estimated cash value of the damage to the burned building. Id. In support of his argument, D.J.W. emphasized a number of facts elicited in the juvenile court: that he was 12 years old and was in the 6th grade at the time of his adjudication; that he received no income of any type at that time; that his mother received no income except \$137 per month in a government subsidy and a child-support payment on rare occasions; that they received a rent subsidy; that the insurance company that insured the building was able to bear the loss; that his admission of guilt was to a reckless rather than an intentional act; and

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that the burned apartment building was vacant, old, and in disrepair. Id.

On appeal, this Court found that, in ordering D.J.W. to pay restitution in the amount of \$40,600.19, the juvenile court had failed to consider the factors announced in Rule 26.11(a), Ala. R. Crim. P., and § 12-15-1.1(b)(7), Ala. Code 1975. This Court then reversed the judgment and remanded the case with instructions for the juvenile court to reconsider its disposition of D.J.W.'s case in light of those factors. 705 So. 2d at 524-25.

At the time this Court rendered its decision in D.J.W., § 12-15-1.1(b)(7), Ala. Code 1975, provided, in pertinent part:

"To hold a child found to be delinquent accountable for his or her actions to the extent of the child's age, education, mental and physical condition, background and all other relevant factors and to provide a program of supervision, care, and rehabilitation, including rehabilitative restitution by the child to the victim of his delinquent acts to the extent that the child is reasonably able to do so."

(Emphasis added.) In 2008, that section was renumbered as § 12-15-101(b)(7), Ala. Code 1975, and the above emphasized language was changed to the following: "including restitution

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by the child to the victim of his or her delinquent acts." See Act No. 2008-277, Ala. Acts 2008. The State argues that D.A.H.'s arguments on appeal are without merit because, it says, the removal of the language in the statute "that stood for the proposition that the primary purpose of restitution in a juvenile case was rehabilitation as opposed to that of restitution to the victims," "somewhat abrogated" this Court's holding in D.J.W. (State's brief, p. 11.) Following the amendment to the statute, this Court has reaffirmed the principle recognized in D.J.W. that the amount of restitution

"must be based not only on the amount that compensates the victim, but also on the juvenile's ability to reasonably meet that obligation, because the goal of restitution is primarily rehabilitation."

M.L.R. v. State, 129 So. 3d 307, 311 (Ala. Crim. App. 2012). See also D.N. v. State, 246 So. 3d 189, 193-94 (Ala. Crim. App. 2017). As demonstrated below, the juvenile court cannot order D.A.H. to pay restitution without first following the procedural guidelines set forth in Rule 26.11(a), Ala. R. Crim. P.

This Court has previously said:

"Restitution in juvenile cases is governed by Rule 26.11(a), Ala. R. Crim. P. ... It is an abuse of

discretion for the juvenile court to fail to take into account the juvenile's financial resources and obligations, the burden that payment will impose, the juvenile's age, background, and all other relevant factors, as well as the rehabilitative effect of the restitution order. D.J.W. v. State, supra; § 12-15-1.1, Ala. Code 1975; Rule 26.11(a), Ala. R. Crim. P."

T.B. v. State, 819 So. 2d 108, 111 (Ala. Crim. App. 2001).

Thus, the juvenile court, in ordering D.A.H. to pay restitution should have been guided by Rule 26.11(a), Ala. Code 1975, as applied in the context of our statutory juvenile law. Where a court has failed to consider the factors from Rule 26.11(a), Ala. R. Crim. P., described above, this Court has remanded the case for proper consideration of those factors. See T.B., 819 So. 2d at 111.

In the present case, the transcript of the restitution hearing does not indicate that the juvenile court considered any of those factors before awarding restitution. (R. 11-87.) Additionally, none of those factors appears to have been considered in the court's final restitution order. (C. 29.) During the hearing on D.A.H.'s motion to alter or amend the restitution order, D.A.H.'s counsel pointed out to the court that D.A.H. would not have the present means to pay the restitution because he did not have a job, an education, or

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any employment prospects. (R. 4.) Despite that information, the court did not inquire into the factors provided in Rule 26.11(a), Ala. R. Crim. P.

Accordingly, we set aside the restitution order in this case and remand this matter to the juvenile court for that court to enter a new order. The new order should reflect that the juvenile court has considered the financial resources available to D.A.H. and his ability to reasonably meet the obligation pursuant to Rule 26.11(a), Ala. R. Crim. P.

Finally, D.A.H. briefly argues that the juvenile court's order was insufficient because it failed to include the underlying circumstances and facts that supported its decision. (D.A.H.'s brief, pp. 7-9.) Section 15-18-69, Ala. Code 1975, requires the court to state in its restitution order its findings and the underlying facts and circumstances on which those findings are based. In the present case, the juvenile court's order reads as follows:

"This cause coming before the Court on the 11th day of May 2018, and present in court were the following: said child and his parent(s); said child's attorney the Honorable Nicholas Beckham; and the Assistant District Attorney the Honorable Kelly Masters. The Court heard testimony from the victim's in the above-styled cases regarding the Restitution

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Hearing in these matters, and in consideration of such, it is therefore

"ORDERED, ADJUDGE[D] and DECREED as follows:

"1. That restitution in JU-2002-100089.08 in the amount of seven thousand four hundred eight dollars and thirty-three cents (\$7,408.33) is to be paid and made payable to Kim Smith.

"2. That restitution in JU-2002-100089.09 in the amount of sixty-nine thousand one hundred seventy-seven dollars and ninety-two cents (\$69,177.92) is to be paid and made payable to David Thornton."

(C. 29.) Because this case is being remanded for the juvenile court to enter a new order, we pretermit consideration of whether the juvenile court has complied with § 15-18-69, Ala. Code 1975. See Culp v. State, 710 So. 2d 1357, 1358 (Ala. Crim. App. 1996).

Conclusion

For the foregoing reasons, this matter is remanded for proceedings consistent with this opinion. Due return shall be made to this Court within 42 days of the release of this opinion.

REMANDED WITH INSTRUCTIONS.

Windom, P.J., and Welch, Kellum, and McCool, JJ., concur.