

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DALE GANN,)
) No. 197, 2011
 Defendant Below,)
 Appellant,) Court Below: Superior Court
 v.) of the State of Delaware in
) and for New Castle County
)
 STATE OF DELAWARE,) Cr. ID No. 0903018507
)
 Plaintiff Below,)
 Appellee.)

Submitted: September 14, 2011

Decided: October 19, 2011

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices.

ORDER

This 19th day of October 2011, it appears to the Court that:

(1) Dale Gann appeals from a Superior Court sentencing order requiring him to pay \$276,320.89 in restitution. Gann raises two arguments on appeal. First, Gann contends that the trial judge denied him due process of law by not holding a hearing to determine the appropriate amount of restitution. Second, Gann contends that the trial judge erred by granting restitution because the State failed to establish an appropriate amount by a preponderance of the evidence. We find that the trial judge provided Gann with due process and did not abuse her discretion in determining the amount Gann owed.

(2) In March 2004, the Court of Chancery appointed Gann as guardian for his relatives Gordon and Mildred Gann. Gann sold Gordon and Mildred's house in 2006 to pay for their residence at a nursing home owned by Five Star Quality Care. The house sold for \$320,000,¹ and Gann deposited \$274,743.05 into the proper account.² Five Star Quality Care first noticed problems when check payments bounced, and eventually, Gann stopped making payments altogether in May 2007. After receiving information about Gann's potential breach of fiduciary duty, the Court of Chancery replaced Gann with Senior Partner, Inc. on May 14, 2009.³

(3) On June 1, 2010, Dale Gann pled guilty to two counts of misdemeanor exploitation of Gordon and Mildred Gann and one count of misdemeanor theft. At the plea hearing, both parties asked the trial judge for a Presentence Investigation to determine the appropriate restitution. In a letter to the Presentence Office dated August 16, 2010, Gann contended that he should pay no restitution and provided the Presentence Office with at least 10 exhibits that constituted, in his words, "a complete accounting of the funds at issue."⁴

¹ App. to Appellant's Br. 39. Since the defendant accepted a plea agreement, we are presented with a limited record, but the Appendix to Appellant's Opening Brief contains documents that reveal the relevant facts.

² App. 74. Closing costs account for the difference between the sale price and the amount deposited.

³ App. 53.

⁴ App. 20.

(4) The Presentence Office completed the Presentence Report on August 17, 2010, which included an offender interview with Gann, family history, employment history, and a financial conditions assessment. The Report recommended that Gann pay restitution of \$156,939.54 to Five Star Quality Care and \$2,000 to the Department of Justice Medicaid Investigative Fraud Unit.⁵ On the other hand, the State delivered a letter dated August 26, 2010 to the trial judge recommending restitution of \$12,320.89 to Emma Sue Kirk for funeral expenses and \$262,000 to Five Star Quality Care.⁶ Since Gordon and Mildred's estate owed \$356,000 for unpaid nursing home services, the State recommended almost all proceeds from the sale be paid to Five Star Quality Care.⁷

(5) At the sentencing hearing on August 27, 2010, both Gann and the State had an opportunity to make their case regarding the amount of restitution. Because the trial judge found Gann's documentation haphazard and unreliable, she ordered restitution of \$262,000 to Five Star Quality Care, \$12,320.89 to Emma Sue Kirk, and \$2,000 to the Department of Justice Medicaid Investigative Fraud Unit.

⁵ App. 38.

⁶ App. to Appellant's Br. 44.

⁷ Appellant's Br. Ex. 1. Sentencing Tr. ("There is a judgment entered in the State of Colorado for over [] I think it's about \$156,000 plus interest in favor of Foulk Manor North. There is also still another \$200,000 due to Foulk Manor North.").

The trial judge also provided Gann with the opportunity to reduce the restitution amount by providing independent accounting evidence:

The Court will allow that to be reduced upon showing by an independent forensic auditor or accountant [] that that money is [] not [the] actual amount of restitution because nothing in the documents thus far have given me any reason to reduce it.⁸

On March 22, 2011, the trial judge denied Gann’s motion for modification of sentence because Gann had not provided independent forensic accounting in the 7 months after the sentencing order⁹ and continued to present the same “unsubstantiated, conclusory statements.”¹⁰ Gann appealed.

(6) “[F]undamental requirements of fairness which are the essence of due process”¹¹ govern all judicial proceedings. The two most fundamental elements of due process are notice and a hearing.¹² In this case, the trial judge gave Gann notice of the presentence report, the sentencing hearing, and the ability to reduce

⁸ Appellant’s Br. Ex. 1 at 25.

⁹ The fact that Gann failed to have independent forensic accounting performed reveals the weakness of his argument. Gann stated that he never completed forensic accounting because it would have cost in excess of \$45,000 for the work. Appellant’s Br. at 9 n.1. Since the restitution order totaled \$276,320.89, any rational person would be willing to pay \$45,000 for forensic accounting to reduce the amount, especially because Gann maintains that he should not have to pay any restitution at all.

¹⁰ *State v. Gann*, No. 0903018507 (Del. Super. Ct. March 22, 2011) (ORDER).

¹¹ *Vincent v. E. Shore Markets*, 970 A.2d 160, 163-64 (Del. 2009).

¹² *See id.* at 164; *Formosa Plastics Corp. v. Wilson*, 504 A.2d 1083, 1089 (Del. 1986) (“Before a party can be deprived of life, liberty, or property, it has the right to notice and a hearing in a meaningful time and a meaningful manner.”).

restitution through a motion for modification. Gann also interviewed with the Investigative Services Officer, pleaded his case at the sentencing hearing, and filed a motion for modification of the restitution order. According to Gann, the lack of an express, focused restitution hearing violated his due process rights. Gann is incorrect. The sentencing hearing constituted a restitution hearing since the singular purpose of the hearing was for the trial judge to determine the appropriate amount of restitution.¹³ Therefore, we find that the trial judge provided Gann with full due process of law in the course of determining his restitution payment.

(7) In *Moore v. State*, the State violated Moore's due process rights by not providing him with notice and a hearing before imposing restitution.¹⁴ In *Moore*, the trial judge issued a Sentencing Order that made no specific mention of the parties to receive restitution. Two months later, a different judge modified the sentencing order by mandating \$19,968.88 in restitution without providing Moore notice or a hearing. Nobody made Moore aware of the new restitution order. Unlike the facts in *Moore*, the trial judge in this case gave Gann notice of the sentencing hearing, allowed Gann to present evidence at the hearing, and even afforded Gann seven months to perform independent forensic accounting in

¹³ Appellant's Br. Ex. 1.

¹⁴ *Moore v. State*, 15 A.3d 1240, 1246 (Del. 2011).

support of a motion for modification. The fact that Gann squandered these opportunities does not suggest that the trial judge denied him due process of law.

(8) Having decided that the trial judge provided Gann with notice and a proper hearing to contest the restitution amount, the next issue is whether the State failed to establish an appropriate amount of restitution by a preponderance of the evidence. We find that the trial judge did not act capriciously or arbitrarily when determining the amount of restitution.

(9) Under 11 *Del. C.* § 4106, the trial judge *must* consider restitution as part of sentencing. Section 4106(a) provides that a convicted offender “shall be liable to each victim of the offense for the value of property or property rights lost to the victim and for the value of any property which has diminished in worth as a result of the actions of such convicted offender.”¹⁵ *Pratt v. State* defined a victim as one who suffers injury or loss as a result of the voluntary act or undertaking of another.¹⁶

(10) Section 4106(b) further requires the trial judge to determine the nature and amount of restitution “in accordance with the evidence presented to the

¹⁵ 11 *Del. C.* § 4106(a).

¹⁶ *Pratt v. State*, 486 A.2d 1154, 1160 (Del. 1983).

court.”¹⁷ *Benton v. State* held that during the sentencing stage, “restitution may be based on those factors which are established by a preponderance of the evidence.”¹⁸ Therefore, we review the trial judge’s factual determination of the proper restitution amount for an abuse of discretion.¹⁹

(11) The trial judge did not abuse her discretion in awarding \$262,000 in restitution to Five Star Quality Care. The record demonstrates that Five Star Quality Care suffered monetary losses as a consequence of Gann’s criminal conduct. Although, the Presentence Report found that Five Star Quality Care suffered a loss of \$156,939.54 in unpaid services on September 17, 2008, the trial judge need not accept the Presentence Report’s recommendation. At the sentencing hearing, the Deputy Attorney General established that Five Star Quality Care still had not been paid \$356,000 for elderly care services provided to the Ganns.

(12) The following facts imply that the trial judge did not arbitrarily determine the restitution amount. First, in the Presentence Interview, Gann admitted that Gordon and Mildred Gann’s house sold for \$320,000. Second, Gann

¹⁷ 11 *Del. C.* § 4106(a). In addition, Section 4106 provides that the convicted offender is liable for direct out-of-pocket losses, loss of earnings and other expenses and inconveniences incurred by the victim as a direct result of the crime.

¹⁸ *Benton v. State*, 711 A.2d 792, 797 (Del. 1998).

¹⁹ *Pratt*, 486 A.2d at 1161.

demonstrated that proceeds of \$274,743.05 were deposited into the proper accounts. Third, after the Court of Chancery terminated Gann's guardianship, the successor guardian reported that the account was empty when it took over. Fourth, Five Star Quality Care has not been compensated for \$356,000 of services to Gordon and Mildred Gann. Therefore, the trial judge set restitution at \$262,000 on the basis that almost all of the proceeds from the sale of the house should have been used to pay Five Star Quality Care.

(13) The trial judge did not abuse her discretion by awarding \$12,320.89 to Emma Sue Kirk for funeral expenses. Because of Gann's breach of his fiduciary duties, the remaining funds were insufficient to pay not only the final bill to Five Star Quality Care but also the burial expenses for Mildred Gann. Therefore, Emma Sue Kirk suffered monetary losses as a direct result of Gann's criminal conduct.

(14) The trial judge did not abuse her discretion in awarding \$2,000 to the Department of Justice Medicaid Investigative Fraud Unit. Gann contends that the Department of Justice does not qualify as a victim and therefore cannot receive restitution under § 4106. He cites *Redick v. State*, where this Court held that the Department of Justice did not qualify as a victim of the crime.²⁰ However, the analogy to *Redick* fails for one critical reason: Gann agreed to pay \$2,000 to the

²⁰ *Redick v. State*, 858 A.2d 947, 953 (Del. 2004).

Department of Justice in his plea agreement, independent of § 4106.²¹ In Redick's plea agreement, he merely agreed to pay restitution generally without explicitly naming the Department of Justice.²² Therefore, the trial judge did not abuse her discretion when awarding \$2,000 to the Department of Justice Medicaid Investigative Fraud Unit.

(15) The record demonstrates that the trial judge provided Gann with notice and a hearing on restitution consistent with due process. The record also reflects that the trial judge did not abuse her discretion by determining the proper amount of restitution to Five Star Quality Care, Emma Sue Kirk, and the Department of Justice.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice

²¹ Gann's plea agreement states that Gann will pay "\$2,000 for cost of investigation to Medicaid Fraud Control Unit" under the heading "Other Conditions" which is separate from the "Restitution" heading.

²² *Id.* at 949.