

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-002638-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE STEPHEN K. MERSHON, JUDGE  
ACTION NO. 98-CR-02403

JAMES HEARN AND  
PATRICIA HEARN

APPELLEE

OPINION  
REVERSING AND REMANDING  
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BEFORE: BUCKINGHAM, KNOPF, AND SCHRODER, JUDGES.

KNOPF, JUDGE: In May 1999, the appellees, James and Patricia Hearn, pled guilty to thirteen counts of felony theft.<sup>1</sup> They admitted having converted to their own use more than \$300,000.00 that had been entrusted to Patricia in her role as a Deputy Superintendent of the Jefferson County School Board. In due course they were sentenced to serve ten years in prison, which sentence was probated on the condition, among others, that they

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<sup>1</sup>Theft by deception (KRS 514.040(7)), one count, and Theft by failure to make required disposition of property (KRS 514.070(4)), twelve counts.

pay restitution to the victim of their dishonesty. The victim was Jefferson County Public Education Foundation, a private fundraising organization created to make possible the purchase of computers, encyclopedias, and other resources for Jefferson County's schools. The Commonwealth appeals from an October 13, 1999, order of the Jefferson Circuit Court denying its motion that the Hearn's be required to pay interest on their restitution debt until it is paid in full. The trial court deemed itself to be without statutory authority to order the requested interest payment. The Commonwealth contends that the trial court misconstrued the pertinent statutes. We agree. Accordingly, we reverse the relevant portion of the trial court's order and remand for additional proceedings.

Since 1982, restitution has been mandated in Kentucky as a condition of probation. In that year KRS 533.030(3) was amended to provide in pertinent part as follows:

When imposing a sentence of probation or conditional discharge in a case where a victim of a crime has suffered monetary damage as a result of the crime due to his property having been converted, stolen, or unlawfully obtained, or its value substantially decreased as a result of the crime, or where the victim suffered actual medical expenses, direct out of pocket losses, or loss of earnings as a direct result of the crime, or if as a direct result of the crime the victim incurred medical expenses that were paid by the department for human resources, the crime victim compensation board, or any other governmental entity, the court shall order the defendant to make restitution in addition to any other penalty provided for the commission of the offense. Payment of restitution to the victim shall have priority over payment of restitution to any government agency.  
*Restitution shall be ordered in the full*

*amount of the damages, unless the damages exceed one hundred thousand dollars (\$100,000) or twice the amount of the gain from the commission of the offense, whichever is greater, in which case the higher of these two amounts shall be awarded. (Emphasis added).*

Aside from minor changes not relevant to this opinion, the statute is the same today. Restitution is now similarly mandated as a condition of parole. KRS 439.563 (1998).

Does this statute authorize the imposition of interest on an order of restitution? The statute being silent with respect to interest, the question presented is, as the parties have noted, a matter of statutory construction which appellate courts undertake *de novo*. Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth of Kentucky Transportation Cabinet, Ky., 983 S.W.2d 488 (1998). This Court's responsibility is to give effect to the intent of the General Assembly as revealed in the statutory language and suggested by the evil the law was intended to remedy. Commonwealth v. Allen, Ky., 980 S.W.2d 278 (1998).

This being a criminal statute and one addressing a practice of long standing--probation--we are hesitant to find in it much innovation. Criminal statutes have traditionally been construed narrowly. For example, it is often said that, under the rule of lenity, courts are bound to construe criminal statutes narrowly and to give the benefit of ambiguities to the accused. Commonwealth v. Lundergan, Ky., 847 S.W.2d 729 (1993); State v. Akers, 435 N.W.2d 332 (Iowa 1989); 73 Am. Jur. 2d "Statutes," § 294 (2<sup>nd</sup> ed. 1974 & Supp. 1999). At common law, moreover, criminal fines and penalties were not subject to pre-

judgment interest. Rogers v. United States, 332 U.S. 371, 92 L. Ed. 3, 68 S. Ct. 5 (1947).<sup>2</sup> Nor at common law was interest allowed on judgments. Powell v. Board of Education of Harrodsburg, Kentucky, Ky. App., 829 S.W.2d 940 (1991); Pierce v. United States, 255 U.S. 398, 65 L. Ed. 697, 41 S. Ct. 365 (1921). Finally, it was the rule in many jurisdictions, and in some jurisdictions still is, that legislative deviations from the common law require clear statutory mandate, and such statutes are construed narrowly. State v. Akers, *supra*; 73 Am. Jur. 2d "Statutes," § 287 2<sup>nd</sup> ed. 1974 & Supp. 1999).

Under these rules of construction it is likely that interest on the Hearn's' restitution obligation would be improper unless the General Assembly had expressly provided for it. What short of an express provision could overcome the bias in favor of the common-law status quo built into those rules? Probably nothing was the conclusion of the Iowa Supreme Court in Akers, *supra*. A similar reluctance to depart from established practice seems to have borne on the trial court's decision. Because a request for interest on a restitution obligation had never previously come before the court, and because this state's statutes do not expressly provide for such interest, the trial

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<sup>2</sup>At oral argument the Commonwealth indicated that it seeks both pre- and post-judgment interest, but the motion it presented to the trial court contemplates only post-judgment interest. Therefore, as an appellate court, the only issue properly before us for our review, is whether post-judgment interest may be imposed on a restitution obligation. Although the two issues overlap to some extent, this issue is nevertheless distinct from the question as to whether pre-judgment interest may be included in the principal restitution obligation. See United States v. Rochester, 898 F.2d 971 (5<sup>th</sup> Cir. 1990).

court concluded that legislative sanction was lacking and so deemed itself without authority to grant the Commonwealth's request for interest. Although we appreciate the trial court's sensitivity to its vital--and statutorily limited--role within the criminal justice system, and though we share its aversion to judicial lawmaking, our consideration of KRS 533.030(3) and the related restitution statutes has led us, for the following reasons, to the opposite conclusion.

We note first that, in Kentucky, deference to the common law plays only a limited role in statutory construction. KRS 446.080; Branzburg v. Pound, Ky., 461 S.W.2d 345 (1970). All statutes are to be liberally construed to carry out the legislature's intent. The rule of lenity is likewise qualified by the same imperative. Commonwealth v. White, Ky., 3 S.W.3d 353 (1999); cf. Perrin v. United States, 444 U.S. 37, 62 L. Ed. 2d 199, 100 S. Ct. 311 (1979) (the rule applies where courts are faced with genuine ambiguity, but is not to be used in complete disregard of the purpose of the legislature). As observed above, however, common-law principles are at the heart of this case, and it will be helpful to frame our analysis in terms of them, keeping in mind that they are not to weigh as heavily on our conclusions as they might in other jurisdictions.

This said, we may ask, "Does KRS 533.030(3) express an intent incompatible with the common-law constraints noted above?" We believe that it does. The common-law rule that fines and penalties do not bear interest had reference to monies owing to the government, not primarily for the government's use but rather

as a means of deterring and punishing the defendant. This state's pre-1982 probation statutes, likewise, which left the imposition of restitution to the trial court's discretion, preserved a focus on punishment and other penal goals.<sup>3</sup> The current mandated restitution, on the other hand, while no doubt continuing to serve to some extent the penal goals of punishment and rehabilitation, is plainly intended not primarily to punish the defendant but to compensate the victim. The revised statute is a manifestation, among many others throughout the country, of the "victim's rights movement," which has gained impetus during the past two or three decades.<sup>4</sup> This shift in purpose evinces a legislative intent, we believe, incompatible with and so contrary to the common-law rule against adding interest to a punishment. *Cf. United States v. Kress*, 944 F.2d 155 (3<sup>rd</sup> Cir. 1991) (holding that the restitutionary provisions of the Victim and Witness Protection Act of 1982 (18 U.S.C. §§ 3579, 3580) are so clearly compensatory in intent as to justify the addition of both pre- and post-judgment interest to restitution obligations even though interest is not expressly provided for in the Act); *United States v. Rochester*, 898 F.2d 971 (5<sup>th</sup> Cir. 1990) (same).

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<sup>3</sup>See Note, "Victim Restitution in the Criminal Process: a Procedural Analysis," 97 Harv. L. Rev. 931 (1984) (discussing the penal benefits of restitution).

<sup>4</sup>*Cf. Commonwealth v. Bailey*, Ky., 721 S.W.2d 706 (1986) (equating the compensatory purpose of KRS 431.200 with that of KRS 533.030(3)); and see Barajas and Nelson, "The Proposed Victims' Federal Constitutional Amendment: Working Toward a Proper Balance," 49 Baylor L. Rev. 1, (1997).

For essentially the same reasons, we are persuaded that KRS 533.030(3) clearly implies a legislative warrant for post-judgment interest and thus overcomes the common-law presumption against applying interest to a judgment. It is true, as the Hearn points out, that where a restitution obligation is alleged to be based on "monetary damage," as is the case here, that damage must clearly be "a result of the crime." It is also true, for the reasons noted above, that some courts have construed narrowly such provisions defining the scope of restitution.<sup>5</sup> The trial court, for example, relied on People v. Engle, 746 P.2d 60 (Colo.App. 1987), and State v. Hufford, 522 N.W.2d 26 (Wis. 1994), in both of which interest on restitution was disallowed. Hufford is readily distinguishable. The decision in that case was based on the fact that the Wisconsin legislature had recently removed from the restitution statute an express provision for interest. Engle, however, is more on point. In that case the court vacated an order to pay 18% post-judgment interest on restitution because such interest did not "constitute actual pecuniary loss caused by the defendant's conduct." 746 P.2d at 62-63. This result has since been qualified somewhat by

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<sup>5</sup>Cf. Clayborn v. Commonwealth, Ky. App., 701 S.W.2d 413 (1985) (discussing restitution for personal-injury damages). Note that KRS 533.030 distinguishes between "monetary damage to property," which must have occurred "as a result of the crime," and, in the personal-injury context, "actual medical expenses, direct out of pocket losses, or loss of earnings," which must have occurred "as a direct result of the crime." The point is that restitution is appropriate only for monetary losses that can be readily determined within a criminal proceeding. Cf. State v. Brewer, 989 P.2d 407 (Mont. 1999) (observing the same concern reflected in Montana's statutory definition of "pecuniary loss"). Post-judgment interest, it seems to us, addresses such a loss.

Valenzuela v. People, 893 P.2d 97 (Colo. 1995), but be that as it may, to the extent that Engle stands for the proposition that delay in making restitution does not inflict additional monetary damage, we disagree.

It seems to us apparent that "monetary damage" flows directly from any delay in the defendant's making restitution. Indeed, post-judgment interest is so plainly an element of compensatory damages that, in civil cases, its recovery has long been protected by statute. KRS 360.040. By definition, moreover, the restitution judgment itself is based upon monetary damage resulting from the crime. The compounding of that damage by delay in making restitution seems to us a further "result of the crime" within the contemplation of the statute. The statute provides that "[r]estitution shall be ordered in the *full* amount of the damages, . . ." If restitution is to be *full*, it will often need to include post-judgment interest. This case provides a prime example: the amount of the restitution judgment and the period allowed for its payment threaten the Jefferson County Public Education Foundation with a substantial decrease in the value of its property unless interest is allowed.<sup>6</sup> We are persuaded that KRS 533.030(3) makes that allowance. *Cf. United*

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<sup>6</sup>To be sure, a civil action is available to the Foundation if it wishes to pursue damages not available as restitution. KRS 533.030(3)(d). One of the purposes of restitution, however, is to obviate such additional proceedings. In addition to running counter to the statute's provision for the "full amount of the damages," a denial of post-judgment interest would tend to frustrate that purpose. We do not believe, therefore, that the existence of an alternative remedy precludes an award of interest on restitution.

States v. Sleight, 808 F.2d 1012 (3<sup>rd</sup> Cir. 1987) (upholding an award of post-judgment interest on restitution ordered under the Federal Probation Act 18 U.S.C. § 3651); State v. Brewer, 989 P.2d 407 (Mont. 1999) (holding that post-judgment interest is properly applied to restitution).

Finally, the parties have called our attention to certain statutes enacted in 1998, which modify to some extent this state's restitutionary scheme. It remains to consider the effect of those statutes on this case. KRS 532.356 provides as follows:

Upon a person's conviction and sentencing for any nonstatus juvenile offense, moving traffic violation, criminal violation, misdemeanor, or Class D felony offense, the court shall impose the following sanctions in addition to any imprisonment, fine, court cost, or community service: . . . (b) Restitution to the crime victim as set out in KRS 439.563, 532.032, and 532.033.

Even had their sentences not been probated, therefore, under this statute the Hearn's, whose offenses were all Class D felonies, would have been obliged to pay restitution in accordance with, but not directly under, KRS 533.030.<sup>7</sup> Because their sentences were probated, however, KRS 533.030 governs directly the restitution mandated as a condition of that probation.

Also in 1998 the General Assembly enacted KRS 532.350, which provides in pertinent part that

[a]s used in this chapter . . . "Restitution" means any form of compensation paid by a

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<sup>7</sup>Cf. KRS 431.200, which also provides for restitution in cases where there is no probation.

convicted person to a victim for counseling,  
medical expenses, lost wages due to injury,  
or property damage and other expenses  
suffered by a victim because of a criminal  
act . . . .

The parties suggest that this definition rather than KRS 533.030(3) provides the basis for determining the allowable scope of the Hearn's' restitution obligation. We disagree.

As noted, the Hearn's' probation is governed specifically by KRS Chapter 533, not Chapter 532. The definition of restitution in KRS 532.350, moreover, serves primarily to distinguish "restitution" (payments to compensate a victim) from another defined term, "reimbursement" (payments to defer the costs of incarceration). The definition's short list of expenses commonly imposed as restitution is illustrative only, as is indicated by the inclusion of the vague phrase "other expenses," and does not seem to us intended to limit, to expand, or otherwise to alter the scope of allowable restitution delineated much more carefully in KRS 533.030. See KRS 532.032(1) (expressly preserving KRS 533.030) and KRS 532.356(b) (invoking KRS 533.030 as the guide to fashioning restitution orders).

In sum, KRS 533.030(3) mandates that the Hearn's, as a condition of their probation, pay full restitution to the Jefferson County Public Education Foundation. That mandate is not affected by KRS 532.356 or KRS 532.350, and includes, we believe, the authority to add post-judgment interest to the principal amount of restitution imposed. Whether to exercise that authority and, if so, the appropriate rate of interest are matters the trial court will need to address on remand.

Accordingly, for the reasons discussed above, we reverse, to the extent discussed in this opinion, the October 13, 1999, order of the Jefferson Circuit Court and remand for additional proceedings consistent herewith.

ALL CONCUR.

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