

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2016-CA-001574-MR

KELVIN ERIC SEXTON

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT  
HONORABLE JAMES W. CRAFT, III, JUDGE  
ACTION NO. 13-CR-00291

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

\*\* \*\* \* \* \* \*\*

BEFORE: COMBS, JONES, AND NICKELL, JUDGES.

JONES, JUDGE: Appellant, Kelvin Eric Sexton, appeals a portion of a judgment from the Letcher Circuit Court ordering him to pay restitution. Following a review of the record and applicable law, we reverse and remand.

**I. BACKGROUND**

On July 27, 2013, the vehicle Sexton was driving collided with a vehicle driven by Shawn Roark. As a result of the accident, Roark was killed and

his passenger, Dorothy Gibson, was seriously injured. The following December, a Letcher County Grand Jury indicted Sexton on ten charges stemming from the accident.<sup>1</sup> Discovery and pretrial motions proceeded until June 27, 2016, at which time the parties reached a plea agreement. The Commonwealth's offer on plea of guilty provided, in part, as follows:

The Defendant will further pay court costs of One Hundred Forty Dollars (\$140), **as well as restitution for all unpaid medical and funeral bills incurred by and owed by the Estate of Shawn E. Roark and all unpaid medical bills owed by Dorothy L. Gibson<sup>2</sup> as a result of the fatal collision which have not been paid by the Defendant's or the victim's insurance carrier.** In addition, the Defendant must pay any sums not previously paid by the Defendant's or Mr. Roark's insurance carrier to the Estate of Mr. Roark for the fair market value of the 1993 4x4 Toyota pickup truck, which was totally destroyed as a result of the collision. The exact amount of restitution owed by the Defendant is to be determined by a subsequent restitution hearing, to be scheduled by the Court.

---

<sup>1</sup> (1) Operating a motor vehicle under the influence of alcohol/drugs (1st offense – aggravators); (2) Manslaughter – Second Degree; (3) Assault – First Degree; (4) Criminal Mischief – First Degree; (5) Possession Of Marijuana < 8 ounces (Firearm Enhancement); (6) Possession of a Controlled Substance – Second Degree (Hydrocodone) (Firearm Enhancement); (7) Possession of a Controlled Substance – Third Degree (Alprazolam) (Firearm Enhancement); (8) Controlled Substance (Prescription Drug) Not in Proper Container; (9) Possession/Use Drug Paraphernalia; (10) Concealed Deadly Weapon.

<sup>2</sup> Restitution owed to Gibson is not at issue in this appeal. The record indicates that Gibson had filed a civil suit against Sexton, which was settled through Sexton's insurance carrier. As part of that settlement, Gibson executed a release of all claims against Sexton, including any claim for restitution in this case.

R. 376 (emphasis added). The plea was entered on June 29, 2016, at which time the circuit court set a date for a hearing on the amount of restitution Sexton owed.

On July 7, 2016, the Commonwealth filed a Verified Claim for Funeral Bill of Shawn E. Roark. The claim stated a total amount of \$5,250.00, which included a \$200.00 reimbursement to Anthony Roark for partial payment of the funeral bill, a \$1,800.00 reimbursement to Nolan Roark for partial payment of the funeral bill, and a \$3,250.00 reimbursement to the Estate of Shawn Roark “for payment made to Letcher Funeral Home for balance of funeral bill from auto insurance . . . .” R. 383. Two accountings, signed and prepared by Nolan Roark as Administrator of the Estate of Shawn E. Roark, were attached to the Commonwealth’s notice of claim. The first accounting indicated that the Estate had received a \$25,000.00 payment from Sexton’s insurance company under Sexton’s liability policy. After deducting attorney fees, the payment had been divided amongst the beneficiaries of Roark’s estate. The second accounting showed that the Estate had received two payments under Roark’s insurance party, for a total of \$27,828.67: a payment of \$25,000.00 under Roark’s UIM coverage and a payment of \$2,828.67 under Roark’s property damage policy. The second accounting indicated that the \$27,828.67 was distributed and checks were issued as follows:

1. \$8,803.09 to Gary C. Johnson, P.S.C. for attorney fees and costs.

2. \$3,250.00 to the Letcher County Funeral Home.
3. \$200.00 to Anthony Roark for reimbursement of funeral expenses.
4. \$1,800.00 to Nolan Roark for reimbursement of funeral expenses.
5. \$4,591.86 to Nolan Roark for wrongful death damages.
6. \$4,591.86 to Anthony Roark for wrongful death damages.
7. \$4,591.86 to Tessa Whitaker for wrongful death damages.

R. 386. The Commonwealth subsequently amended the notice of claim to request that any judgment reflect that Sexton was required to reimburse the Commonwealth for any amounts previously received by any individual to pay for Roark's funeral through the Crime Victim's Compensation Act.

A brief hearing on the issue of restitution was held on July 27, 2016. All parties at the hearing agreed that the \$2,828.67 insurance payment went solely to reimbursement of Roark's vehicle. However, the Commonwealth indicated that Roark's family believed that all insurance proceeds they received were meant to be wrongful death proceeds. Accordingly, the Commonwealth argued that Sexton was still required to pay restitution to reimburse Roark's family for funeral expenses. Sexton argued that the insurance proceeds fully covered all funeral

expenses and that he should not be required to repay money that had already been paid through his and Roark's respective insurance policies. The trial court instructed Sexton's counsel to file a written response to the Commonwealth's notice of claim and stated that it would make an order on restitution at Sexton's sentencing hearing.

The sentencing hearing was held on August 10, 2016. At that hearing, the trial court announced from the bench that it had reviewed the positions of the Commonwealth and Sexton concerning restitution and ordered that Sexton pay \$5,250 in restitution. The trial court did not explain the reasoning for its decision and did not enter written findings of fact on the issue. On August 12, 2016, the trial court entered a judgment on plea of guilty, which sentenced Sexton to ten years' imprisonment, probated for five years and ordered Sexton to pay \$140 in court costs, \$375 for DUI service fee, and \$5,250 in restitution. The trial court's order on probation set out the conditions for Sexton's probation, which included the following:

3. Pay Court Costs \$140.00 along with restitution for all unpaid medical and funeral bills incurred by and owed by the Estate of Shawn E. Roark and all unpaid medical bills owed by Dorothy L. Gibson as a result of the fatal collision. In addition, the Defendant must pay any sums not previously paid by the Defendant's or Mr. Roark's insurance carrier to the Estate of Mr. Roark for the fair market value of the 1993 4x4 Toyota Pickup truck.

R. 423-24.

This appeal followed.

## II. STANDARD OF REVIEW

“We review a trial court’s findings with regard to restitution for an abuse of discretion.” *Bentley v. Commonwealth*, 497 S.W.3d 253, 255 (Ky. App. 2016) (citing *Commonwealth v. Morseman*, 379 S.W.3d 144, 148 (Ky. 2012)).

“The test for abuse of discretion is ‘whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.’” *Id.* (quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

Specifically, a court abuses its discretion when “(1) its decision rests on an error of law . . . or a clearly erroneous factual finding, or (2) its decision . . . cannot be located within the range of permissible decisions.” *Miller v. Eldridge*, 146 S.W.3d 909, 915 n.11 (Ky. 2004) (internal citations omitted).

## III. ANALYSIS

On appeal, Sexton argues that the trial court abused its discretion by requiring him to pay restitution for funeral expenses when the accounting submitted by the Commonwealth explicitly showed that Roark’s family had already been reimbursed for the amounts they had expended on Roark’s funeral. The Commonwealth argues that all insurance proceeds paid to Roark’s “estate”

represented compensation for Roark's wrongful death and are separate and distinct from any claim to cover funeral expenses.<sup>3</sup>

Under KRS 532.032, a trial court has authority to order a criminal defendant to pay restitution to his victim. "Restitution" is defined as "any form of compensation paid by a 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." KRS 532.350(1)(a). "Restitution is not meant to be an 'additional punishment exacted by the criminal justice system. . . .'" *Sevier v. Commonwealth*, 434 S.W.3d 443, 469 (Ky. 2014) (quoting *Commonwealth v. Bailey*, 721 S.W.2d 706, 707 (Ky. 1986)). Accordingly, under KRS 533.030(3), restitution is limited to the victim's actual out-of-pocket expenses related to the criminal act.

Under the terms of the plea agreement, Sexton agreed to pay restitution for all unpaid medical and funeral bills. Plea agreements are bargained-for exchanges, and are governed by contract law. *Covington v. Commonwealth*, 295 S.W.3d 814, 816 (Ky. 2009). There is no allegation by either party that the plea agreement lacks the requirements of a valid and enforceable contract.

---

<sup>3</sup> Legally, this is an incorrect statement. Wrongful death proceeds are not paid to the estate of the deceased. Kentucky's wrongful death statute, Kentucky Revised Statute (KRS) 411.130, requires wrongful death proceeds to be paid directly to the deceased's statutory beneficiaries; they pass outside of the estate. *Moore v. Citizens Bank of Pikeville*, 420 S.W.2d 669, 672 (Ky. 1967).

“Accordingly, ‘[e]ach party should receive the benefit of his bargain,’ and ‘[the contract’s] terms must necessarily be interpreted in light of the parties’ reasonable expectations and understanding of what the agreement means.’” *Commonwealth v. Morseman*, 379 S.W.3d 144, 150 (Ky. 2012) (quoting *United States v. Wesley*, 13 F. App’x 257, 259 (6th Cir. 2001); 22 C.J.S. *Criminal Law* § 490 (2006)). Under *Morseman*, the parties are bound by the restitution terms agreed to in the plea agreement.

The plea agreement specifically mentions insurance proceeds twice when discussing restitution. First, it states that Sexton will pay “restitution for all unpaid medical and funeral bills incurred by and owed by the Estate of Shawn E. Roark . . . **which have not been paid by the Defendant’s or the victim’s insurance carrier.**” R. 376 (emphasis added). Next, it states that Sexton will pay “any sums not previously paid by Defendant’s or Mr. Roark’s insurance carrier” for the fair market value of Roark’s vehicle. *Id.* We must presume the references to insurance payments are included for a reason. If the Commonwealth intended for Sexton to pay the total amount of funeral expenses out of his own pocket, it could have indicated such or could have omitted the clause referring to insurance payments. Instead, the agreement indicates that Sexton is responsible for funeral and medical expenses not covered by insurance proceeds. Therefore, if the cost of Roark’s funeral was fully compensated by the insurance proceeds, Sexton is not



required to pay restitution. *Clayborn v. Commonwealth*, 701 S.W.2d 413, 415 (Ky. App. 1985) (“If the victim’s actual out-of-pocket losses exceeded [the insurance payment] then he is entitled to restitution under KRS 533.030(3) for the excess. However, if the victim’s injuries were fully compensated by the . . . insurance payment, then he is not entitled to restitution.”).

Assuming that the proceeds at issue were properly characterized as wrongful death proceeds by the parties, Kentucky’s wrongful death statute, KRS 411.130, is instructive. It provides that funeral expenses are to be paid out of any wrongful death proceeds prior to distribution to the deceased’s statutory beneficiaries. *See* KRS 411.130(2) (“The amount recovered, less funeral expenses and the cost of administration and costs of recovery including attorney fees, not included in the recovery from the defendant, shall be for the benefit of and go to the kindred of the deceased . . .”).

The wrongful death statute is clear that a wrongful death recovery should first be used to pay for funeral expenses. The parties agree that a portion of the money paid by Sexton’s insurance was for the decedent’s wrongful death. The accountings attached to the Commonwealth’s notice of claim indicate that Roark’s beneficiaries received a total of \$52,828.67 in insurance proceeds, at least \$25,000 of which was from Sexton’s insurance carrier. This amount more than covers the expenses incurred for Roark’s funeral. Thus, pursuant to *Clayborn* and the terms

of the plea agreement, Sexton owes nothing in restitution. Accordingly, the circuit court abused its discretion in ordering Sexton to pay restitution for the funeral expenses.

#### **IV. CONCLUSION**

In light of the foregoing, we reverse the portion of the Letcher Circuit Court's judgment requiring Sexton to pay \$5,250.00 in restitution. Based on the terms of the plea agreement, Sexton should not have been ordered to pay any restitution because the wrongful death proceeds paid by his insurance carrier were more than enough to cover the funeral expenses for which restitution was ordered.

ALL CONCUR.

#### **BRIEFS FOR APPELLANT:**

Susan Jackson Balliet  
Frankfort, Kentucky

#### **BRIEF FOR APPELLEE:**

Andy Beshear  
Attorney General of Kentucky

Todd D. Ferguson  
Assistant Attorney General  
Frankfort, Kentucky