

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
March 13, 2012

v

SHAWN JOSEPH WASS,
Defendant-Appellant.

No. 302263
Montmorency Circuit Court
LC No. 2010-002519-FH

Before: SERVITTO, P.J., and TALBOT and K. F. KELLY, JJ.

TALBOT, J. (*concurring in part, dissenting in part*).

While I concur that the trial court’s award of restitution for jury costs was improper, I write separately because I believe the award of restitution for costs incurred by the fire department necessitates remand to the trial court to permit the prosecution an opportunity to establish a record in support of its restitution request.

I would initially note that on appeal, defendant simply challenges the trial court’s statutory authority to impose a restitution award based on his contention that this governmental agency cannot be construed as a victim under the Crime Victim’s Rights Act (CVRA).¹ Defendant contends that the fire department cannot be deemed to be a victim because it did not suffer “direct financial harm as a result of the crime.”² Specifically, defendant contends that the salaries paid to members of the fire department would have been incurred, regardless of his criminal escapade and, thus, is not subject to restitution.

I would note that the CVRA defines a “victim” as “an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime.” In accordance with the statutory language, a “victim includes a sole proprietorship, partnership, corporation, association, governmental entity, or other legal entity that suffers direct physical or financial harm as a result of a crime.”³ While this Court has previously determined that “the

¹ Defendant cites to MCL 780.766.

² Defendant cites to *People v Newton*, 257 Mich App 61, 68-70; 665 NW2d 504 (2003).

³ MCL 780.766(1).

general cost of investigating and prosecuting criminal activity is not direct ‘financial harm as a result of a crime,’”⁴ the record is insufficient to determine what extraordinary or unusual costs were incurred by this fire department in having to extricate the vehicle that was submerged due to defendant’s criminal activity. I would find that the award of restitution to the fire department for costs incurred in extricating the vehicle from the water and the necessity to respond quickly and/or to engage additional or specialized assistance to determine the presence of anyone in the submerged vehicle is subject to restitution and not precluded by statute.

Pertinent sections of the Crime Victim’s Rights Act (CVRA) provide:

[W]hen sentencing a defendant convicted of a crime, the court *shall* order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant *make full restitution to any victim of the defendant’s course of conduct that gives rise to the conviction. . .*⁵

A separate statutory provision of the CVRA includes the following language:

In determining the amount of restitution to order . . . the court shall consider the amount of the loss sustained by any victim as a result of the offense.

* * *

Any dispute as to the proper amount or type of restitution shall be resolved by the court by a preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the prosecuting attorney.⁶

Addressing issues pertaining to restitution, our Supreme Court has stated:

It is incumbent on the defendant to make a proper objection and request an evidentiary hearing. Absent such objection, the court is not required to order, sua sponte, an evidentiary proceeding to determine the proper amount of restitution due. Instead, the court is entitled to rely on the amount recommended in the presentence investigation report “which is presumed to be accurate unless the defendant effectively challenges the accuracy of the factual information.”⁷

Defendant acknowledges that he did not voice any objection to the restitution award at the time of sentencing.

⁴ *Newton*, 257 Mich App at 69-70.

⁵ MCL 780.766(2) (emphasis added).

⁶ MCL 780.767(1), (4).

⁷ *People v Gahan*, 456 Mich 264, 276 n 17; 571 NW2d 503 (1997), citing *People v Grant*, 455 Mich 221, 233-234, 343 n 8; 565 NW2d 389 (1997) (other internal citations omitted).

It is important to note that the prosecution sought restitution based on the language of a different or alternative statute found within the Code of Criminal Procedure. The statute's wording is substantially similar to language in the CVRA, and provides:

[W]hen sentencing a defendant convicted of a felony, misdemeanor, or ordinance violation, the court *shall order*, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant *make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction. . . .*⁸

The legislative purpose underlying these statutes has been discussed by this Court, which has found:

In our view, the Legislature has clearly manifested an intent to make victims of crime as whole as they can fairly be made and to leave the determination of how best to do so to the trial court's discretion on the basis of the evidence presented and subject to the prosecuting attorney's burden of providing losses attributable to [the] defendant's crime-related acts. The CVRA [Crime Victim Rights Act] was not intended to be narrowly construed merely as a special-purpose replevin action: the focus is consistently not on what a defendant took, but what a victim lost because of the defendant's criminal activity. . . . No other interpretation is consistent with [the] purpose of the act and its specific provisions.⁹

The majority relies on the language of a statutory provision within the Code of Criminal Procedure to reverse the trial court's award, finding that restitution premised on reimbursement for wages and salaries for fire department personnel is limited solely to conviction for specific offenses.¹⁰ The implication being that conviction for an offense not specified within this statutory provision belies any legislative intent to include such costs in restitution awards.

I would suggest that even if the restitution award for personnel costs or wages was in error as limited by statute¹¹, given the unusual circumstances of this case, the prosecution should be afforded the opportunity to present evidence to establish whether the fire department incurred any extraordinary or extenuating losses stemming from defendant's criminal adventure. Consequently, I would remand this matter to the trial court for further development of the record and a determination of the propriety of a restitution award to the fire department.

/s/ Michael J. Talbot

⁸ MCL 769.1a(2).

⁹ *People v Gubachy*, 272 Mich App 706, 713; 728 NW2d 891 (2006).

¹⁰ MCL 769.1f(1), (2)(a).

¹¹ *Id.*