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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0013**

State of Minnesota,
Respondent,

vs.

Antonio Albert Schally,
Appellant.

**Filed November 4, 2019
Reversed and remanded
Randall, Judge*
Dissenting, Johnson, Judge**

Ramsey County District Court
File No. 62-CR-17-2078

Keith Ellison, Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney,
St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Christopher Mishek, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Johnson, Judge; and
Randall, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

RANDALL, Judge

After this court affirmed appellant's convictions, sentences, and the district court's restitution award, the Minnesota Supreme Court granted and stayed appellant's petition for further review pending its decision in *State v. Boettcher*, 931 N.W.2d 376 (Minn. 2019). After issuing its opinion in *Boettcher*, which clarified the direct-causation standard for imposing restitution, the supreme court vacated the section of this court's opinion affirming the district court's restitution award and remanded the matter with instructions to reconsider appellant's arguments on this issue in light of *Boettcher*. Because the record is insufficient to allow this court to determine whether any damage to the victim's vehicle was directly caused by the conduct underlying appellant's convictions relating to possession of the victim's firearms, we reverse and remand for further restitution proceedings.

FACTS

While P.K. was on vacation in March 2017, thieves burglarized his home, stealing a safe containing firearms and driving it away from the residence in P.K.'s gold minivan. In the afternoon of March 21, 2017, K.M. heard loud banging in a nearby parking lot and observed three men beating on an object with sledge hammers in the back of a gold van. Shortly thereafter, he saw the men loading what appeared to be firearms into the back of a blue Oldsmobile that police later determined was registered to appellant. When investigating a residence possibly connected to the suspects, police saw the Oldsmobile and watched as appellant carried long objects wrapped in a blanket into the house. When

appellant left the residence later that evening, police stopped him on the street and found him to be in possession of a pistol belonging to P.K., as well a backpack containing multiple rounds of ammunition and the radio that had been removed from P.K.'s van. A subsequent search of the residence uncovered multiple firearms, several belonging to P.K., in appellant's bedroom.

A jury found appellant guilty of unlawful possession of P.K.'s pistol, unlawful possession of the ammunition found upon his arrest, one count of possession of stolen property for P.K.'s pistol, and one count of possession of stolen property for the additional firearms belonging to P.K. found in appellant's residence. The district court imposed a 60-month sentence for unlawful possession of P.K.'s pistol, and a concurrent 27-month sentence for receiving P.K.'s stolen property.

Among appellant's arguments on appeal was that the district court improperly ordered him to pay \$1,000 in restitution for P.K.'s insurance deductible concerning damage done to his van. In an unpublished opinion, this court affirmed appellant's convictions and sentences, as well as the district court's restitution award. *State v. Schally*, No. A18-0013, 2018 WL 6442684, at *7 (Minn. App. Dec. 10, 2018), *vacated in part and remanded* (Minn. Aug. 21, 2019). Appellant petitioned for further review to the Minnesota Supreme Court. The supreme court granted appellant's petition and stayed the matter pending its decision in *Boettcher*, 931 N.W.2d at 376. After the release of its opinion in *Boettcher*, the supreme court issued an order vacating the portion of this court's opinion concerning the restitution award, and remanded for reconsideration in light of *Boettcher*. This court reinstated this appeal and ordered supplemental briefing from the parties.

DECISION

The issue presented to this court on remand is whether the district court erred in awarding restitution for damage caused to P.K.'s van as part of the disposition for appellant's convictions of possessing P.K.'s stolen firearms. District courts are afforded broad discretion to award restitution. "[Q]uestions concerning the authority of the district court to order restitution are questions of law subject to de novo review." *State v. Andersen*, 871 N.W.2d 910, 913 (Minn. 2015).

By statute, the victim of a crime is entitled to receive restitution "as part of the disposition of a criminal charge." Minn. Stat. § 611A.04, subd. 1 (2016). In determining the amount of restitution awardable, a district court is required to consider:

- (1) the amount of economic loss sustained by the victim as a result of the offense; and
- (2) the income, resources, and obligations of the defendant.

Minn. Stat. § 611A.045, subd. 1(a) (2016). In *State v. Riggs*, the Minnesota Supreme Court held that this represents an exclusive list of considerations for the district court in determining the appropriate restitution amount, and that the phrase "as a result of the offense" is interpreted to mean "as a consequence of the defendant's violation of the law." 865 N.W.2d 679, 684-68 (Minn. 2015).

In *Boettcher*, the supreme court reiterated that "a district court may order restitution only for losses that are directly caused by, or follow naturally as a consequence of, the defendant's crime." 931 N.W.2d at 381. There, Boettcher and two friends entered a cabin in St. Louis County, took property from inside, and left the cabin ablaze as they fled. *Id.* at 377. The *Boettcher* record is clear that the defendants entered the cabin to steal and after

they completed the theft, as they were leaving, someone started a fire and left the cabin in flames. *See id.* at 378-79. There was no claim that the fire preceded the property theft or that it was part of the property theft. Both of Boettcher's codefendants testified at his trial that, as they were leaving, Boettcher started the fire that destroyed the cabin. *Id.* The jury found Boettcher guilty only of second-degree burglary; it was unable to reach a verdict on first-degree arson. *Id.* at 379. As part of Boettcher's sentence for the burglary, the district court ordered him to pay nearly \$82,000 in restitution to the property owners, which included costs associated with the fire damage that occurred subsequent to the burglary. *Id.*

This court on appeal affirmed the restitution award regarding the fire damage, concluding that the evidence demonstrated "a factual relationship in time, victims, and location between the conduct for which restitution is being ordered and the crime of which Boettcher was convicted." *Boettcher*, 2018 WL 2186993, at *4. After granting Boettcher's petition for further review, the supreme court concluded that this court had erred as a matter of law by interpreting the direct-causation standard to include a mere "factual relationship" between the claimed loss and the offense of conviction. *Boettcher*, 931 N.W.2d at 381.

The *Boettcher* facts are materially distinguishable from the facts of this case. The *Boettcher* record is clear that the fire that destroyed the cabin was a mindless afterthought as the defendants were leaving with the stolen property. *See id.* at 378-79. For that reason, the supreme court decided that the insurance company and the victim were entitled to a civil claim for restitution, but that it could not tie the restitution claim for the fire to the criminal case. The *Boettcher* court's holding was clear that there must be a direct causal

relationship between the crime and the damage in order for restitution to be imposed as part of a criminal sentence. *Id.* at 381.

The *Schally* facts are the reverse. Unlike *Boettcher*, the damage to the victim's gun safe was not an afterthought. It was a deliberate, premeditated act necessary to open the locked gun safe and steal and possess the weapons inside. The forcible opening was inextricably linked to the crime for which Schally was convicted. Within the meaning of *Boettcher*, there was a direct link, a direct cause, and a causal connection between forcing open the gun safe, removing the weapons, and possessing them.

In his supplemental brief addressing the impact of the *Boettcher* decision on this case, appellant argues that the \$1,000 restitution award relating to the insurance deductible for P.K.'s van must be reversed because his convictions of firearm possession were not the direct cause of any damage to the vehicle. The state argues that "there is a causal connection between the damage to the van and appellant's possession of the guns" because:

[t]he evidence, through eyewitness testimony, further established that appellant and his accomplices torched the gun safe with a blow torch and beat on it with sledge hammers and pry bars—while it was still in the back of P.K.'s van—until they gained access to it. This process took at least 10 to 15 minutes and caused damage to P.K.'s van.

Thus, the state argues, "appellant's possession of the firearms . . . has a direct causal connection with his conduct"—that of damaging the van in the course of gaining access to the firearms inside the safe.

Notwithstanding the state's assertion of damage to the van related to opening the safe, the record developed in the district court is insufficient to permit this court to directly

determine whether P.K.'s van sustained damage (apart from the removal of the radio/stereo) as a result of forcibly opening the gun safe to remove the firearms. And the parties agree that the dashboard damage (radio/stereo) was not a direct result of appellant's convictions for the possession of the firearms.

The only question on remand is whether any damage to the van occurred that could be causally attributed to appellant's offense of forcibly opening the gun safe to remove and possess the weapons inside.

At trial, P.K. identified a picture taken by police of his gun safe inside of his van after it was recovered. P.K. identified damage to the safe, including apparent torch marks caused by the efforts to open it, and identified damage to the van's dashboard from which the radio had been removed, which is not at issue.

The witness, K.M., testified that he observed several men hammering on an object in the back of the van, but he did not testify that he saw this conduct result in any damage to the vehicle itself.

At sentencing, after appellant objected to the restitution request for the \$1,000 insurance deductible, the state presented no additional information concerning the extent of damage to the vehicle beyond that testified to at trial.

Despite the state's assertions that the conduct involved with removing the firearms from the safe caused damage to P.K.'s van, the actual record in this matter does not adequately demonstrate this to be the case. In light of this dearth of information, we are unable to determine whether any damage to the vehicle was "directly caused by" appellant's offenses of conviction. *Boettcher*, 931 N.W.2d at 381.

The restitution issue on this narrow point has to be remanded for the submission of further evidence by the parties and for the district court to make its finding. It is untenable for this court to reverse outright on the issue of restitution for damage to the van because that would mean we speculated that three men inside a closed van, using sledgehammers, pry bars, and possibly a blow torch, forced open a gun safe and did not cause even some damage. The state's supplemental brief argues that the causal connection between the damage to the van and appellant's possession of stolen guns is based on eye-witness testimony that established that appellant and his accomplices torched the gun safe with a blow torch, beat on it with sledgehammers and pry bars while it was still in the back of P.K.'s van, and that this process took at least 10-15 minutes and caused damage to P.K.'s van. This is the single issue the district court needs to decide on remand.

On remand, the state has the burden of showing by credible evidence that there was damage to P.K.'s van caused by the forcible opening of the gun safe. If the district court finds that that is so, it may order restitution. If the district court finds otherwise, then restitution to P.K. is limited to a civil action.

This will be the fifth instance of a court proceeding on a \$1,000 deductible on a comprehensive car insurance policy. First, the district court—then the Minnesota Court of Appeals—then on a petition for review to the Minnesota Supreme Court—then on a remand back to the Minnesota Court of Appeals—and now a remand to the district court for further proceedings.

We can only hope that the half-life of this \$1,000 deductible is finally extinguished on remand.

Reversed and remanded.

JOHNSON, Judge (dissenting)

The court reverses and remands this case to the district court for additional evidence and for findings as to whether “there was damage to P.K.’s van caused by the forcible opening of the gun safe.” *See supra* at 8. The legal theory underlying the opinion of the court is inconsistent with the supreme court’s recent opinion in *State v. Boettcher*, 931 N.W.2d 376 (Minn. 2019). In light of *Boettcher*, restitution is inappropriate as a matter of law, regardless of whether P.K.’s van was damaged by the forcible opening of the gun safe. Therefore, I respectfully dissent from the opinion of the court.

A victim of a crime may request restitution for, among other things, “any out-of-pocket losses resulting from the crime.” Minn. Stat. § 611A.04, subd. 1(a) (2016). Upon such a request, a district court “shall consider,” among other things, “the amount of economic loss sustained by the victim as a result of the offense.” Minn. Stat. § 611A.045, subd. 1(a)(1) (2016). These statutes allow restitution only for a loss that is a *result* of a crime. Accordingly, “a district court may order restitution only for losses that are directly caused by, or follow naturally as a consequence of, the defendant’s crime.” *Boettcher*, 931 N.W.2d at 381.

In this case, Schally was convicted of and sentenced for two offenses: possession of a firearm (specifically, a .357 Ruger revolver) while ineligible, in violation of Minn. Stat. § 624.713, subd. 1(2) (2016), and receiving stolen property (the same .357 Ruger revolver), in violation of Minn. Stat. § 609.53, subd. 1 (2016). A person is guilty of the former offense if he or she possesses “a pistol or semiautomatic military-style assault weapon” after having been convicted of a “crime of violence.” Minn. Stat. § 624.713, subd. 1, 1(2). A person is

guilty of the latter offense if he or she “receives, possesses, transfers, buys or conceals any stolen property or property obtained by robbery, knowing or having reason to know the property was stolen or obtained by robbery.” Minn. Stat. § 609.53, subd. 1.

By definition, Schally’s offenses were committed *after* the revolver was forcibly extracted from the gun safe. Any damage to the van (other than damage due to the removal of a car stereo, which the parties agree is not a basis for restitution) would have occurred *before* Schally committed the offenses of receiving stolen property and possessing a firearm while ineligible. Given the sequence of events, any loss sustained by P.K. was not the *result* of Schally’s crimes. *See* Minn. Stat. §§ 611A.04, subd. 1(a); .045, subd. 1(a)(1). Consequently, any economic loss associated with any damage to the van caused by the forcible opening of the gun safe did not “follow naturally as a consequence of . . . the defendant’s crime.” *See Boettcher*, 931 N.W.2d at 381. Likewise, any such economic loss was not “directly caused by . . . the defendant’s crime[s].” *See id.*

To be sure, there is some connection between the forcible opening of the gun safe and Schally’s offenses. He would not have received stolen property or possessed a firearm while ineligible if the revolver had not been forcibly removed from the gun safe. But that type of connection does not justify an award of restitution. The supreme court has made clear that merely “some factual relationship” is insufficient. *Boettcher*, 931 N.W.2d at 381. Restitution may be awarded only if an economic loss is the result of a defendant’s crimes. *Id.* at 380-81.

For these reasons, I would reverse in part and reduce the district court’s restitution award by \$1,000, without remanding for additional evidence or additional findings.