

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09 CAC 020010
JOHN DREMSEK	:	
	:	
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Delaware Municipal Court
Case No. 08 TRD 05679

JUDGMENT: REVERSED; JUDGMENT VACATED

DATE OF JUDGMENT ENTRY: December 2, 2009

APPEARANCES:

For Plaintiff-Appellee:

MARK CORROTO
DELAWARE CITY PROSECUTOR
70 N. Union St.
Delaware, OH 43015

For Defendant-Appellant:

DOMINIC L. MANGO
46 N. Sandusky St.
Delaware, OH 43015

Delaney, J.

{¶1} Defendant-Appellant John Dremsek appeals the January 5, 2009 judgment entry of the Delaware Municipal Court ordering Appellant to pay restitution. Plaintiff-Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND THE CASE

{¶2} On May 2, 2008, Appellant and Jason Jenkins were driving their respective vehicles in a private parking lot. While Jenkins was moving his car forward from his parking space, he vehicle was struck by Appellant's vehicle. Appellant did not notice damage to his vehicle and drove away.

{¶3} A police officer arrived on the scene and interviewed Jenkins. Shortly thereafter, the officer interviewed Appellant. Based on his investigation, the officer charged Appellant with a violation of R.C. 4549.021, entitled "Duty to stop after accident occurring on property other than public highways."

{¶4} On August 22, 2008, Appellant appeared before the Delaware Municipal Court and entered a plea of no contest to an amended charge of violation of R.C. 4549.03, failure to stop after an accident involving the property of others. In its judgment entry, the trial court found Appellant guilty and ordered Appellant to pay a \$200 fine and court costs. The trial court simultaneously issued a second Order in which the trial court stated that Appellant must pay restitution if he was at fault in the accident that gave rise to the charge. The trial court stated an evidentiary hearing would be held on the matter.

{¶5} An evidentiary hearing was held on December 22, 2008. Appellant did not appear at the hearing, but he was represented by his counsel. Jenkins testified as to

the accident that occurred on May 2, 2008 in which Appellant struck his car and left the scene. Jenkins testified that he incurred \$1,834.53 in damages to his car.

{¶6} On January 5, 2009, the trial court issued a judgment entry ordering Appellant to pay restitution in the amount of \$1,834.53 to Jenkins to compensate him for his economic loss. The trial court found Appellant's reckless driving resulted in the collision with Jenkins's vehicle.

{¶7} It is from this decision Appellant now appeals.

ASSIGNMENT OF ERROR

{¶8} Appellant raises one Assignment of Error:

{¶9} "I. THE TRIAL COURT ERRED WITH PREJUDICIAL IMPACT AGAINST DEFENDANT BY ORDERING RESTITUTION RELATING TO AN OFFENSE OR OFFENSES FOR WHICH THE APPELLANT WAS NOT CONVICTED OR EVEN CHANGED."

I.

{¶10} Appellant argues in his sole Assignment of Error that the trial court was not authorized to impose restitution as a sanction based upon Appellant's conviction for failure to stop after an accident involving property of others, a first-degree misdemeanor. We agree.

{¶11} R.C. 2929.28(A) governs the trial court's authority to impose restitution as part of a criminal sanction for misdemeanor offenses. It states in pertinent part:

{¶12} "(A) In addition to imposing court costs pursuant to section 2947.23 of the Revised Code, the court imposing a sentence upon an offender for a misdemeanor, including a minor misdemeanor, may sentence the offender to any financial sanction or

combination of financial sanctions authorized under this section. If the court in its discretion imposes one or more financial sanctions, the financial sanctions that may be imposed pursuant to this section include, but are not limited to, the following:

{¶13} “(1) Unless the misdemeanor offense is a minor misdemeanor or could be disposed of by the traffic violations bureau serving the court under Traffic Rule 13, restitution by the offender to the victim of the offender's crime or any survivor of the victim, in an amount based on the victim's economic loss. The court may not impose restitution as a sanction pursuant to this division if the offense is a minor misdemeanor or could be disposed of by the traffic violations bureau serving the court under Traffic Rule 13. If the court requires restitution, the court shall order that the restitution be made to the victim in open court or to the adult probation department that serves the jurisdiction or the clerk of the court on behalf of the victim.

{¶14} “If the court imposes restitution, the court shall determine the amount of restitution to be paid by the offender. If the court imposes restitution, the court may base the amount of restitution it orders on an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense. If the court decides to impose restitution, the court shall hold an evidentiary hearing on restitution if the offender, victim, or survivor disputes the amount of restitution. If the court holds an evidentiary hearing, at the hearing the victim or survivor has the burden to prove by a preponderance of the evidence the amount of restitution sought from the offender.

{¶15} “All restitution payments shall be credited against any recovery of economic loss in a civil action brought by the victim or any survivor of the victim against the offender. * * *”

{¶16} We find the Tenth District Court of Appeals in *City of Columbus v. Cardwell*, 176 Ohio App.3d 673, 2008-Ohio-1725, 893 N.E.2d 526, addressed the exact issue as presented by Appellant. In *Cardwell*, the defendant was convicted of failing to maintain an assured clear distance ahead, a minor misdemeanor, and failing to stop after an accident, a first-degree misdemeanor. The trial court imposed a fine of \$125 and costs; a 90-day jail sentenced but suspended 89 days of the sentence; and placed the appellant on probation for two years. As a condition of probation, the trial court ordered the defendant to pay the victim restitution in the amount of \$771.94, representing the property damage to the victim’s car. *Id.* at ¶1, ¶5.

{¶17} The *Cardwell* court first determined that R.C. 2929.08(A) prohibited the trial court from imposing restitution as a sanction if the offense was a minor misdemeanor. *Id.* at ¶8. The court went on to analyze whether the trial court was authorized to impose restitution for a sanction based on a conviction of a hit-skip offense. The court determined:

{¶18} “By enacting R.C. 2929.28(A), the state legislature limited a trial court’s authority to impose restitution as part of a criminal sentence for misdemeanor convictions. The statute permits the trial court to order restitution for economic loss suffered by the victim for certain misdemeanor offenses, but the amount of restitution ‘shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense.’ R.C. 2929.28(A)(1). In addition,

'economic loss' is statutorily defined as 'any economic detriment suffered by a victim as a direct and proximate result of the commission of the offense.' R.C. 2929.01(M). Here, Fraime [the victim] suffered no economic loss as a direct and proximate result of appellant's hit-skip conviction because the property damage to Fraime's vehicle occurred before the hit-skip violation. Therefore, the trial court could not order restitution as part of a criminal sanction. See *Columbus v. Repine*, Franklin App. No. 07AP-250, 2007-Ohio-5015, 2007 WL 2773839 (victim's economic loss was a direct and proximate result of a defendant's conviction for driving without an operator's license where the victim's economic loss occurred after the unlawful conduct)." Id. at ¶11.

{¶19} We find the same analysis to be applicable to the present case. Jenkins suffered no economic loss as a direct and proximate result of Appellant's conviction for failure to stop after an accident. The property damage to Jenkins's vehicle occurred *before* Appellant's unlawful conduct.

{¶20} As in *Cardwell*, the State relies on this Court's decision in *State v. Hunt*, Knox App. No. 04-CA-00005, 2004-Ohio-5519, to argue that restitution is a proper sanction when there is a conviction for failure to stop after an accident. We find the underlying circumstances in *Hunt* to be distinguishable from the present case. In *Hunt*, the defendant collided with a horse-drawn buggy and caused serious physical injuries to one of the buggy's occupants. The defendant fled the scene of the accident. The defendant entered a guilty plea to one count of leaving the scene of an accident. The charge was elevated from a misdemeanor to a felony of the fifth degree because the violation resulted in serious physical harm to a person as stated in R.C. 4549.02(B). Id.

at ¶3, ¶11. The trial court placed the defendant on community control and ordered him to pay restitution in the sum of \$38,704.93 to the injured party. Id. at ¶6.

{¶21} This Court found the trial court had the authority to order restitution under R.C. 2929.18 because the defendant was convicted of a felony offense involving serious physical harm to the victim. Id. at ¶13. In the present case, however, as in *Cardwell*, the victim's loss was limited to property damage that was not a direct or proximate result of Appellant's unlawful conduct in fleeing the accident. Appellant's misdemeanor conviction was based on conduct that occurred after the accident.

{¶22} We therefore sustain Appellant's sole Assignment of Error.

{¶23} The judgment of the Delaware Municipal Court as to the order of restitution is reversed and the January 5, 2009 judgment is vacated.

By: Delaney, J.

Farmer, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE

PAD:kgb

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
JOHN DREMSEK	:	
	:	
	:	Case No. 09 CAC 020010
Defendant-Appellant	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the January 5, 2009 judgment entry of the Delaware Municipal Court is reversed and vacated. Costs assessed to Appellee.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE