IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
July 30, 2008 Session

STATE OF TENNESSEE v. STANLEY A. GAGNE

Appeal from the Criminal Court for Campbell County
No. 13242 E. Shayne Sexton, Judge

No. E2007-02071-CCA-R3-CD - Filed February 11, 2009

Appellant, Stanley A. Gagne, pled guilty to felony reckless endangerment stemming from an incident that resulted in the death of his step-daughter. The trial court sentenced Appellant to a one-year suspended sentence to be served on probation. The trial court also ordered Appellant to pay restitution to a church and a funeral home in the total amount of $10,697.06. On appeal, Appellant argues that the amount of restitution ordered paid to Woodlawn Cemetery is excessive. After a thorough review of the record, we have determined that neither entity is a "victim" as contemplated by the restitution statutes. Therefore, we vacate the trial court's order with regard to restitution and remand for further proceedings consistent with this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Vacated and Remanded.

JERRY L. SMITH, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J. and D. KELLY THOMAS, JR., J., joined.

Michael G. Hatmaker, Jacksboro, Tennessee, for the appellant, Stanley A. Gagne.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; and William Paul Phillips, District Attorney General, for the appellee, State of Tennessee.

OPINION

Appellant stipulated to the following facts at his guilty plea hearing:

> [O]n the date alleged in the indictment which was in October of two years ago – October the 27th, 2005, in Count Three of the indictment to an amended count of felony reckless endangerment with a motor vehicle. That the defendant, Stanley Gagne, did operate a vehicle and committed felony reckless endangerment with that vehicle resulting in the death of his step-daughter, April Jones, and that pursuant to

55-59-501(a)(3), his license should be revoked for one year in addition to the other punishments.

At the conclusion of Appellant's guilty plea hearing, the trial court sentenced Appellant to a one-year sentence which was suspended and ordered a one-year supervised probation. The trial court also ordered restitution in the amount of $10,697.06. The restitution was ordered paid in the following manner, $6,167.06 to East Jackboro Baptist Church[1] for the victim's funeral and $4,530 to Woodawn Cemetery for the purchase of a gravestone.

Appellant filed a timely notice of appeal.

ANALYSIS

Appellant's sole issue on appeal is that the trial court erred in ordering the $4,530 restitution to Woodlawn Cemetery for the purchase of the gravestone. He argues that a more appropriate amount is $1,200. In the hearing, Appellant's attorney stated that Appellant and his wife had already ordered and arranged payment for a gravestone for that amount. He does not contest the restitution amount for the funeral.[2]

Tennessee Code Annotated section 40-35-304 sets out the procedures the trial court must follow in ordering restitution. The trial court "may direct a defendant to make restitution to the victim of the offense as a condition of probation." T.C.A. § 40-35-304(a). "Whenever the court believes that restitution may be proper or the victim of the offense or the district attorney general requests, the court shall order the presentence service officer to include in the presentence report documentation regarding the nature and amount of the victim's pecuniary loss." T.C.A. § 40-35-304(b). The amount of restitution that the defendant may be directed to pay is limited to "the victim's pecuniary loss." *See* T.C.A. § 40-35-304(b). The phrase "pecuniary loss" includes:

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[1] The trial court ordered that the restitution amount for the funeral services was to be paid to East Jackboro Baptist Church. We note that the exhibit in the record shows an invoice for the amount of $6,167.06 and includes an extensive list of individuals and organizations, including the church, with various amounts listed next to their names. These amounts were subtracted line-by-line from the $6,167.06 amount until the invoice showed a zero balance. Also, at the hearing, there was mention of a telethon in connection with the funeral. We can only assume that the church was intending to receive the restitution and repay the individuals listed for the amounts they donated.

[2] At the guilty plea hearing Appellant had no objection to re-paying the funeral expenses of $6,100. Nor did he object to paying $1,200 for a gravestone. We in no way mean to indicate that an appellant may not still voluntarily make such payments or offer to make such payments as a condition of probation. As this opinion sets out *infra*., we hold here only that Appellant may not be *ordered* by the trial court to make these payments or payment for the more expensive gravestone by way of the restitution statute.

> (1) All special damages, but not general damages, as substantiated by evidence in the record or as agreed to by the defendant; and
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> (2) Reasonable out-of-pocket expenses incurred by the victim resulting from the filing of charges or cooperating in the investigation and prosecution of the offense; provided, that payment of special prosecutors shall not be considered an out-of-pocket expense.

T.C.A. § 40-35-304(e). There is no designated formula or method for the computation of restitution but the trial court is required to consider "the financial resources and future ability of the defendant to pay or perform." T.C.A. § 40-35-304(d). "[T]he amount of restitution a defendant is ordered to pay must be based upon the victim's pecuniary loss and the financial condition and obligations of the defendant; and the amount ordered to be paid does not have to equal or mirror the victim's precise pecuniary loss." *State v. Smith*, 898 S.W.2d 742, 747 (Tenn. Crim. App. 1994).

This Court's primary concern with this restitution order is whether Woodlawn Cemetery and East Jackboro Church are "victims" within the meaning of the restitution statute. The question of what person or entity constitutes a victim under the restitution statutes has been addressed several times by the courts in this State. In *State v. Alford*, 970 S.W.2d 944 (Tenn. 1998), a jury convicted the defendant of aggravated assault for stabbing the victim. 970 S.W.2d at 945. As part of its order of restitution, the trial court ordered the defendant to pay the victim's insurance carrier $68,589.09 for medical expenses. *Id.* On appeal, our supreme court held that an insurance carrier cannot be considered a victim for purposes of the restitution statute. *Id.* at 946. After analyzing the statute, the court stated, "it is apparent that the word 'victim' refers to the individual or individuals against whom the offense was actually committed. Nothing in the statute supports a broader application." *Id.* The court went on to state that an insurer pays medical or other expenses pursuant to a contractual obligation and, therefore, accepts the risk that claims will be made. This fact places an insurer in a different situation from a victim who suffers unexpected harm. *Id.*

In *State v. Cross*, 93 S.W.3d 891 (Tenn. Crim. App. 2002), the defendant entered guilty pleas to presenting a fraudulent insurance claim and arson. 93 S.W.3d at 892. The trial court ordered restitution to Nationwide Insurance Company which had paid $24,752.03 pursuant to the defendant's residential insurance policy. *Id.* at 892-93. This Court held that the situation in *Cross* was different from *Alford*. This Court stated that while the insurance company does accept the risk of claims, it does not accept the risk of fraudulent claims by its policyholders. Therefore, the insurance company was the victim of the crime. *Id.* at 895.

In *State v. Webb*, 130 S.W.3d 799 (Tenn. Crim. App. 2003), a jury convicted the defendants of forty-seven counts of cruelty to animals. 130 S.W.3d at 803. The trial court ordered restitution in the amount of $39,978.85 to the Jackson-Madison County Humane Society ("JMCHS"). *Id.* After the dogs were seized at the defendants' kennels, they were cared for by the JMCHS. The amount ordered by the trial court was the total cost expended on the transportation and care of the

animals. *Id.* at 837. On appeal, the defendants argued that JMCHS was not a "victim" pursuant to the restitution statute. This Court noted that pursuant to Tennessee Code Annotated section 39-14-210(f), victimized animals must be placed in the care of "state-chartered humane societies," such as JMCHS. *Id.* at 836-37. This Court stated, "The creation of this obligation removes the JMCHS from the status of a volunteer or Good Samaritan and, obviously, results in costs and expenses to a society as a result of this mandated responsibility. Accordingly, we conclude that the humane society is a 'victim' within the intent of the statutes and is entitled to restitution." *Id.* at 837.

In the case at hand, it is clear that the two entities that are to be the recipients of the restitution are not " the individual or individuals against whom the offense was actually committed" as stated in *Alford*. Neither were these entities contractually or legally obligated to provide funeral services or gravestone at each entity's own expense. While we can understand the trial court's frustration that as a result of Appellant's conduct, these entities may bear some expense for their goods and services, we find no legal support in statutes or caselaw for Woodlawn Cemetery or East Jackboro Church to be considered victims under that statute. The church's payment for funeral services was actually more of a "volunteer or Good Samaritan" role as referenced in *Webb*.

"The authority to award all forms of restitution, whether by subrogation or any other procedural mechanism, must be granted to the courts by statute." *Alford*, 970 S.W.2d 947. As we have stated, the statute does not recognize the Woodlawn Cemetery or East Jackboro Baptist Church as victims in the present set of facts. Therefore, the trial court did not have the statutory authority to impose the restitution as ordered. *See id.*

For this reason, we must vacate the trial court's order of restitution and remand for a hearing to determine whether restitution is due to any "victim" within the meaning of Tennessee Code Annotates section 40-35-304.

CONCLUSION

For the foregoing reasons, we vacate the trial court's order of restitution and remand for further proceedings in accordance with this opinion.

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JERRY L. SMITH, JUDGE