

Cleveland Municipal Court
Housing Division
Judge Raymond L. Pianka

CITY OF CLEVELAND,
Plaintiff(s)

Date: OCTOBER 7, 2010

-v-

Case No: 2010 CRB 09822

GO INVEST WISELY, LLC,
Defendant(s)

JUDGMENT ENTRY

This case, regarding the property at ^{840*}~~841~~ East 141st Street in Cleveland, Ohio is before the Court on the issue of restitution. Defendant was charged with twenty-six violations of Cleveland's Building and Housing Code. On June 17, 2010, Defendant was found guilty. At sentencing, on July 8, 2010, the Court ordered a fine of \$915,000. In addition, the Court ordered restitution and continued the case for hearing on victim claims.

The City of Cleveland claimed victim status under R.C. 2929.28(A)(1), under theories relating to the cleaning, grass-cutting and removal of debris, as well as the tax revenue lost by the City as a result of Defendant's conduct. Upon receiving briefs from both the City and Defendant on the City's eligibility for restitution, the Court narrowed the City's claim in its September 15, 2010 Judgment Entry. The Court held a hearing on the City's remaining claims on September 22, 2010. At that hearing, the City proffered evidence on its cleaning, grass-cutting and removal of debris claims, but the City did not present evidence as to its tax revenue claim, citing the extended time needed to conduct a study isolating the impact of the condition of individual properties on its tax revenue.

This entry will (1) lay out the applicable law regarding restitution in the State of Ohio, and (2) apply the law to the City's claims. For the reasons below, no restitution will be awarded in this case.

Restitution Under R.C. 2929.28(A)(1)

Guiding Principles

Restitution is a central part of misdemeanor sentencing in the State of Ohio. R.C. 2929.21(A) lays out the framework for such sentencing: "The overriding purposes of misdemeanor sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the impact of the offense upon the victim and the need for changing the offender's behavior, rehabilitating the offender, and making restitution to the victim of the offense, the public, or the victim and the public." To this end, R.C. 2929.21(A) calls for sentences "reasonably calculated to achieve the two overriding purposes of

* Address corrected in 10/8/10 Nunc Pro Tunc Judgment Entry

misdemeanor sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender’s conduct and its impact upon the victim, and consistent with sentences imposed for similar offenses committed by similar offenders.”¹

General Availability

In light of these purposes, R.C. 2929.28(A)(1) authorizes a trial court to order “restitution by the offender to the victim of the offender’s crime *** in an amount based on the victim’s economic loss.” Restitution is available in all misdemeanor cases unless “the offense is a minor misdemeanor or could be disposed of by the traffic violations bureau.” R.C. 2929.28(A)(1).²

It is not necessary that the convicted offense include elements of property damage. *State v. Byrd*, 7th Dist. No. 04 BE 40, 2005-Ohio-2720, at ¶37. Nor is it necessary that the offense contemplate a discrete victim. “Many courts *** have affirmed a sentence which included a restitution award when the offense is aimed at preventing harm to ‘society as a whole,’ rather than to a particular victim.” *Id.* at ¶39.

The sentencing court is tasked with a two-part determination: first, the court must decide to whom and in what amount to award restitution; second, the court must hold an evidentiary hearing if any party disputes its determination and from that hearing, may award restitution only if the victims are able to prove the amount of their economic loss with a preponderance of the evidence. R.C. 2929.28(A)(1). The statute further provides that “[i]f 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.” *Id.* Whatever the basis, however, the amount of restitution awarded must “bear a reasonable relationship to the actual loss suffered.” *State v. Downie*, 183 Ohio App.3d 665, 2009 Ohio-4643, 918 N.E.2d 218, at ¶30 (citing *State v. Schandel*, 7th Dist No. 07CA848, 2008-Ohio-6359, at ¶154).

Eligible Losses

To recover restitution, a victim must suffer an economic loss, and that loss must be the direct and proximate result of the conduct for which the defendant is convicted.

¹ While R.C. 2929.21(D) provides that such guidelines “do not affect any penalties established by a municipal corporation for a violation of its ordinances,” this exclusion does not apply to violations of Cleveland’s Building Codes for the reasons discussed above.

² State statute misdemeanor sentencing provisions apply to violations of Cleveland’s Building and Housing Codes. For further discussion, see this Court’s entry in *City of Cleveland v. Federal National Mortgage Assn.* (October 6, 2010), Cuyahoga Cty. M.C. No. 2009 CRB 41868.

R.C. 2929.28(A)(1). Economic loss is “any economic detriment suffered by a victim as a direct and proximate result of the commission of an offense and includes any loss of income due to lost time at work because of any injury caused to the victim, and any property loss, medical cost, or funeral expense incurred as a result of the commission of the offense.” R.C. 2929.01(L).

Restitution is unavailable, however, for non-economic loss, punitive, or exemplary damages. *Id.* Non-economic loss is “nonpecuniary harm suffered by a victim of an offense as a result of or related to the commission of the offense, including, but not limited to, pain and suffering; loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education; mental anguish; and any other intangible loss.” R.C. 2929.01(VV).

Limitations

Ohio courts have had numerous opportunities to clarify the boundaries of the law of restitution in particular with respect to governmental victims and specificity of causation. One such limit that has emerged is that government entities cannot recover restitution under R.C. 2929.28(A)(1) for costs incurred for fulfilling their responsibility to the public.³ Government entities are not “entitled to restitution for their expenditure of public funds for fighting crime.” *E.g.*, *State v. Ham*, 3rd Dist. No. 16-09-01, 2009-Ohio-3822, at ¶48; *State v. Pietrangelo*, 11th Dist. No 2003-L-125, 2005-Ohio-1686. Courts have consistently denied restitution to public entities for doing what it is that they are supposed to do. *E.g. Ham*, 2009-Ohio-3822 (caring for seized animals); *State v. Toler*, 174 Ohio App.3d 335, 2007-Ohio-6967, 882 N.E.2d 28 (extraditing an offender); *State v. Christy*, 3rd Dist. No. 16-04-04, 2004-Ohio-6963 (towing and storing a vehicle); *State v. Wolf*, 176 Ohio App.3d 165, 2008-Ohio-1483 (fighting fires).⁴

Additionally, courts have interpreted the “direct and proximate” requirement of R.C. 2929.28(A)(1) narrowly. To be eligible for restitution, a victim’s compensable loss must result from the specific conduct for which the offender was convicted. In the case

³ For further discussion, see this Court’s September 15, 2010 Judgment Entry in this case.

⁴ This does not mean that governmental entities can never be victims entitled to restitution; in fact, numerous courts have acknowledged the possibility of restitution where a governmental entity incurred losses unrelated to its operational costs. As the court in *State v. Samuels* explained, with regard to county governments: “We do not question that, under certain circumstances, county government can be the victim of a crime. For instance, if appellant embezzled money from a county department, or vandalized one of its vehicles, then the county would be the ‘victim’ of a crime and appellant could be made liable for restitution for the damage he caused.” 4th Dist. No. 03CA8, 2003-Ohio-6106, at ¶5. While there is some precedent for awarding restitution to a city for the cost of demolition in a housing code violation case, the case stands apart because the award stemmed from the defendant’s failure to repay demolition costs as agreed in the plea agreement. *State v. Downie*, 183 Ohio App.3d 665, 2009 Ohio-4643, 918 N.E.2d 218, at ¶11, 42 (affirming award of restitution but remanding for calculation of the amount).

of *Columbus v. Cardwell*, the trial court awarded restitution to the driver whose car was damaged by the offender convicted of leaving the scene of the collision. The 10th District overturned that award of restitution, concluding that the victim's loss had occurred prior to the commission of the offense for which the conviction was obtained: "the property damage from the collision existed regardless of whether the appellant subsequently left the scene of the accident. Therefore, the property damage could not have been a direct and proximate result of the hit-skip violation." 176 Ohio App.3d 673, 2008-Ohio-1725, 893 N.E.2d 526, at ¶13.

Victim Claims

Pursuant to R.C. 2929.28(A)(1), the Court provided an opportunity for individuals claiming victim status to come forward and make a claim for restitution. Only the City of Cleveland responded, and only then on its own behalf. The City's claim was composed of two distinct parts: a claim for costs of cleaning, grass-cutting and removal of debris and a claim for reduced tax revenue. In a previous Judgment Entry, the Court determined that costs incurred in the course of the City and its various departments fulfilling their duties and obligations were not proper claims in the context of restitution.

At hearing on September 22, 2010, after a one week continuance at the City's request, the City failed to make a claim for restitution. Counsel for the City stated that although the City was able to identify a decline in property values and therefore tax revenue over the time period of 2008 to 2009, it was unable to link that loss in value to Defendant's property or conduct. The City cited a need for a study along the lines of those done in Columbus, Ohio and elsewhere, but stated its belief that such a study would require four months or more to conduct. The City did not request a continuance in this case, but expressed a desire to conduct such a study and use it in future cases. The City declined to present a claim for restitution in this case. In light of the City's failure to present a claim for restitution, Defendant did not mount a defense to the City's theory.

In the absence of any evidence of an economic loss directly and proximately resulting from the conduct for which Defendant was convicted, the Court is unable to find that the requirements of R.C. 2929.28(A)(1) have been met and therefore unable to award restitution to the City in this case.

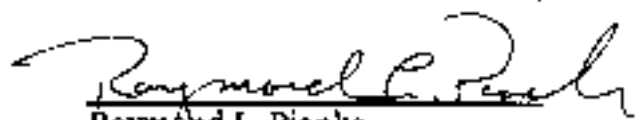
The City has other options for recovering its maintenance and clean-up costs. As detailed in that Entry, however, such costs are not available within the scope of restitution. Had the City requested such costs *at sentencing* when it presented its recommendation, the Court could have awarded reimbursement at that time under C.C.O. 3103.99(e). But because Defendant's sentence—a fine and restitution—has already been pronounced in Court, and the fine has already been executed, it would be error for the Court to now add an additional sanction.⁵ As the Court noted in its

⁵ "Once execution of a sentence begins, however, the trial court may not modify a sentence by increasing 'the severity of the punishment by amending the original

previous entry, however, this does not mean the City lacks a remedy. Pursuant to C.C.O. §3103.09(k), the City may seek to recover its costs through other legal action, or may issue a bill to Defendant and place a lien on the property if that bill is not paid.

Conclusion

In the absence of sufficient evidence of appropriate economic losses, the Court declines to award restitution to the City in this case. Restitution, as a part of misdemeanor sentencing, represents a means to both acknowledge the harm that victims of criminal conduct experience and to reduce the financial impact of that harm. It is a limited means, however, as it is restricted to compensating particular types of losses under particular circumstances. When a court declines to award restitution, it does not mean that a claimant is not a victim. This is especially true in this case. Restitution is admittedly a more difficult proposition where a crime involves more than a simple taking or act of violence by one person against another. But, as numerous courts in this state have found, these more complex circumstances do not preclude a claim for restitution. See *State v. Byrd*, at ¶39. They do, however, make it more difficult. And while the Court is unwilling to speculate as to whether, with more evidence, the City might have been entitled to restitution, it is clear that in one way or another the City—and the citizens of Cleveland—are victims.


Raymond L. Pianka
Judge

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A copy of this judgment entry and order was sent by regular U.S. mail to the addresses of record for parties/counsel on 10 / 7 / 10 by EDP.

sentence.” *State v. Neville*, 9th Dist. No. 02CA0001, 2002-Ohio-5422, ¶16, quoting *State v. Elliott* (1993), 86 Ohio App.3d 792, 797.