Cleveland Municipal Court
Housing Division
Judge Raymond L. Pianka

CITY OF CLEVELAND,
Plaintiff(s)

Date: OCTOBER 7, 2010

-v-

Case No: 2009 CRB 41868

FEDERAL NATIONAL MORTGAGE ASSN.,
Defendant(s)

JUDGMENT ENTRY

This case, regarding the property at 4809 East 173rd Street in Cleveland, Ohio is before the Court on the issue of restitution. Defendant was charged with violating municipal code sections 369.19, 369.15(b), 3101.10(c), 369.13, and 3101.10(a), relating to deterioration of the garage roof, walls, and door, as well as to deterioration of the roof, gutters, and windows of the primary structure. Defendant entered a plea of no contest on June 10, 2010 The Court found Defendant guilty, and sentenced it to pay a fine of $25,000. In addition, the Court ordered restitution and continued the case for hearing on victim claims.

The Court first heard testimony from three residents (collectively, the "Neighbors") who live on 173rd Street in the same block as the subject property: Ms. JohnElla Collins, of 4817 East 173rd Street; Ms. Johnnie Mae Harrison, of 4813 East 173rd Street, and Ms. Vivian Walker, of 4777 East 173rd Street. Each claimed victim status under the R.C. 2929.28(A)(1), and testified about the impact that the subject property had on them and on their property values.

The City of Cleveland has also claimed victim status under R.C. 2929.28(A)(1), under theories relating to the inspection of the property, 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 inspection claim, 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, (2) apply the law to the Neighbors' claims, and (3) apply the law to the City's claims. For the reasons below, no restitution will be awarded to any of the victim claimants in this case.

The Legal Framework of Misdemeanor Restitution in the State of Ohio

Restitution Generally

Restitution is a financial sanction that may be imposed by a court as part of a criminal sentence. R.C. 2929.28(A). The purpose of restitution is to reimburse victims for economic losses suffered as a direct result of the offender's conduct.

The body of Ohio law providing for restitution to victims of misdemeanor offenses requires that a particular set of circumstances exist in order for a court to award restitution to a victim or a surviving family member. This law of restitution, however, does not determine who is a victim. Rather, it allows for a court to order restitution to certain victims. Victims entitled to restitution are defined with respect to the nature of their loss and the proximity of that loss to the conduct for which the defendant was convicted.

There are several legal bases for restitution. A sentencing court may order misdemeanor restitution, where applicable, under R.C. 2929.28(A)(1), under municipal ordinances such as C.C.O. 601.99(b)(3)), or as a condition of probation, as in *City of Maple Heights v. Lazar* (Apr. 1, 1999), 8th Dist. No 74144, 1999 WL 179478. In the present case, where Defendant has been convicted under the Building Code of the City of Cleveland, R.C. 2929.28(A)(1) is applicable.

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

State statutory misdemeanor sentencing provisions, including R.C. 2929.28, apply to violations of Cleveland's Building Code. Defendant argues that state sentencing provisions are not applicable to municipal code violations if there is not an equivalent state statute, citing *Cincinnati v. Howard*, 2008-Ohio-5502, 179 Ohio App.3d 60, 900 N.E.2d 689. This argument does not apply here.

In *Howard*, the First District held that the trial court erred in sentencing the defendant to both community service and a fine for a minor misdemeanor for two reasons. First, the municipal code did not provide for community service for minor misdemeanors. Second, the state statute allowed community service for misdemeanors as an alternative to all or part of a fine, not in addition to the maximum fine. *Id.* at ¶¶7-9. Defendant argues that the state statutory scheme for restitution, outlined in R.C. 2929.28(A)(1), occupies the same place in the present case as did the state statutory provisions regarding community service in *Howard*. Therefore, Defendant argues, this Court is lacking in authority to award restitution under R.C. 2929.28(A)(1) for a violation of a municipal code provision.

Howard is distinguishable. The Building Code of the City of Cleveland[1] incorporates state statute misdemeanor sentencing provisions in its penalty section. In *Howard*, the court held that Ohio municipalities set the penalty for violations of their municipal codes. *Howard*, at ¶5. The *Howard* court overturned the sentence because

---

1 References to the Building Code of the City of Cleveland (Ch. 3101 et seq.) include the Housing Code of the City of Cleveland (Ch. 361 et seq.).

Cincinnati's ordinances did not authorize community service for minor misdemeanors. Id. at ¶7.

This same problem does not exist with respect to restitution under the Building Code of the City of Cleveland. Cleveland's Building Code is part of a comprehensive scheme composed of both state and municipal law. C.C.O. 3111.01. In its penalty provisions, this comprehensive scheme directly references state statutes for misdemeanor sentencing provisions. C.C.O. 3103.99(c) provides, with regard to misdemeanor penalties, that "[o]rganizations convicted of an offense shall be fined as provided by RC 2901.23 and 2929.31." Cleveland City Council's classification of Building Code violations as first degree misdemeanors alongside a direct reference to state statute sentencing provisions shows Council's intent to incorporate state sentencing standards for violations of the Building Codes.[2] Moreover, this incorporation of penalties is consistent with a municipal code title that draws heavily on state law provisions throughout.

But even if the Building Code were not part of a comprehensive state/municipal hybrid scheme, state statutory sentencing standards would still apply. *Howard* aside, state misdemeanor sentencing guidelines are regularly applied to municipal code violation cases. While the *Howard* court dismissed the possibility of implied incorporation of state sentencing statutes in municipal code violation cases where there was no state statutory equivalent, at least one other Ohio appellate court has applied state misdemeanor sentencing guidelines under similar circumstances without hesitation. *State v. Downie,* 183 Ohio App.3d 665, 2009-Ohio-4643, 918 N.E.2d 218, at ¶29 (applying R.C. 2929.28(A)(1) in a case involving misdemeanor violations of a municipal housing because "[m]isdemeanor financial sanctions are governed by R.C. 2929.28."); *State v. Williams* (Sept. 8, 2002), 7th Dist. No. 01 CA 221 , 2002-Ohio-5022, at ¶29 (remanding, in a municipal ordinance noise violation case, for application of R.C. 2929.22 and noting that "compliance with R.C. 2929.22 is required"); *City of Youngstown v. Glass* (June 2, 2005), 7th Dist. No. 04 MA 155, 2005-Ohio-2785 (affirming the judgment of the trial court in a municipal ordinance littering case and holding that the trial court properly adhered to the state misdemeanor sentencing statute provisions in R.C. 2929.21 and .22).

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

---

2 The Council of the City of Cleveland's recent passage of Res. No. 1054-10 (eff. Aug. 20, 2010) further reinforces this interpretation: "existing law recognizes the rights of property owners who have economically suffered by the willful negligence of property owners who defy local housing code law"

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 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."[3]

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).

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. R.C. 2929.28(A)(1). Economic loss is "any economic detriment suffered by a victim as a

---

3 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.

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.[4] 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).[5]

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 of *Columbus v. Cardwell,* the trial court awarded restitution to the driver whose car was

---

[4] For further discussion, see this Court's September 15, 2010 Judgment Entry in this case.

5 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).

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. Three individuals responded, as did the City of Cleveland. A central component of each claim for restitution was a diminution of property values for homes near the subject property. The starting point for showing such a reduction would have been to show property values prior to Defendant's conduct, property values subsequent to Defendant's conduct, and to then show a causal connection between the decrease and Defendant's conduct. None on the parties were able to show that the property values surrounding Defendant's property decreased during the time that Defendant was found to be in violation. No claimant was able to show a connection between an economic loss that she suffered and any of the offenses for which Defendant was convicted. While it appears to the Court that each of these individuals, as well as the City, has been victimized by Defendant's conduct with regard to the subject property, none have provided the Court with a sufficient basis to award restitution in this case.

Victim Claims: Neighbors

The first of the neighbors to present a claim for restitution was Ms. JohnElla Collins. Ms. Collins testified that she has lived at 4871 East 173rd Street since 1960 (7). She described, at length, the impact that both the subject property, 4809 East 173rd Street, and another vacant property on the street had on her and the neighborhood. She spoke of the foot traffic through her yard, of stray animals, and of squatters living in the subject property. Ms. Collins also explained that she had paid for repairs to the fence at the back line of her lot to cut down on such traffic. She noted that she and several of her neighbors often picked up trash from the front yard of Defendant's property. But Ms. Collins did not explain how any of this, aside from the fence repairs, translated into economic loss. In the case of the fence, which separated her property from the lot behind, not the subject property, she did not show how Defendant's conduct (as opposed to that of the property owner behind her or unknown third persons) led to her loss.

Ms. Collins testified that she believed that her house lost value as a result of the condition of Defendant's property. However, Ms. Collins was unable to provide the Court with a clear picture of how much, if any, her property declined in value and how much, if any, of this change was caused by Defendant's criminal conduct in this case. Ms. Collins stated that she believed her home to be worth over $100,000, and listed numerous improvements she had made: central air, replacement windows, steel doors, a new roof and a new driveway. At some point in the past, she said that she had received

an offer from a real estate broker on her home for $100,000. She explained that she had placed her house on the market sometime prior to 2008, and that her realtor had told her she was unlikely to sell for more than $70,000 or $80,000. Ms. Collins did not receive an offer at that time, and has not tried to sell her home since. She has had no recent appraisals other than for insurance purposes, and has not recently refinanced or mortgaged her home. In short, she has no concrete valuation of her property aside from her own belief and the statement of a realtor several years ago. The only available gauge of value is the county property tax valuation—which, from her testimony, appears to have increased. While Ms. Collins was not aware of what the new value is, she recalled that her property taxes had increased after the 2009 reassessment determined that her home had increased in value. She disagreed with that increase, but said that she has not formally challenged the valuation.

The second of the neighbors to present a claim for restitution was Ms. Johnnie Mae Harrison. Ms. Harrison testified that she has lived at 4813 East 173rd Street for approximately 11 years. Her late husband already owned the home when they were married. Ms. Harrison's home is right next door to the subject property. She described her view of that property: the porch and roof were falling in, the paint was peeling, some windows were boarded and others were broken, and the house was open and unsecured. She saw the condition of the property decline significantly in the 5 years that is has been vacant. Just like Ms. Collins, Ms. Harrison sometimes picked up trash from Defendant's yard let by people driving by at night. She noted that the property has become a magnet for nuisance behavior. She also had to call the City to come and cut the grass.

Ms. Harrison did not know for what amount her late husband purchased the home. She stated that she has not tried to sell her home, nor has she had an independent appraisal in the past two years. When the county reassessed property values in 2009, she said that it valued her home at $70,000. Ms. Harrison did state that she mortgaged the property approximately 2 years ago with a home equity loan, but she did not testify to the amount of the loan or to whether an appraisal was done at that time. It is Ms. Harrison's belief that if she were to try to sell her home, she would be unable to get $70,000, due to Defendant's property next door. She would like, however, to be able to sell her home for $80,000.

While it may be possible for Ms. Harrison to establish a recent value through an appraisal associated with her recent mortgage, and perhaps through the county tax valuation, that would appear to only provide a "before" value. To begin to show that she experienced an economic loss relative to her home's value, Ms. Harrison (as well as the other neighbors) needed to provide both a "before" and an "after" value, with the latter lower than the former. Moreover, the dates of her values would need to correspond to the timeframe of the offenses for which Defendant was convicted—in this case, May 15, 2009 through October 5, 2009. Even with all of this in place, a claimant would then need to meet the burden of showing causation—that Defendant's criminal conduct caused the decline in value.

The third and final neighbor to present a claim for restitution was Ms. Vivian Walker. Ms. Walker testified that she has lived in her home at 4777 East 173rd Street since 1956. She explained that Defendant's property at 4809 East 173d has been vacant for 7 years and is in "deplorable" condition. She stated that she has on multiple occasions seen people on the property at late hours and that 4809 has had "a lot of vandalism." She told the Court that she believes the structure should be demolished and that she had contacted the City's Building and Housing Department to request that it be torn down. She, like Ms. Collins and Ms. Harrison, testified that she has often picked up trash from the lawn of 4809 East 173rd; she stated that she sent young men from the neighborhood over to pick up trash as well.

As with Ms. Collins and Ms. Harrison, Ms. Walker was able to present only very limited testimony as to the value of her home and what impact, if any, Defendant's conduct with regard to 4809 had on that value. Ms. Walker stated that she has had no appraisals other than for insurance purposes, and that she was not aware of the value that the insurance appraisal assigned to her home. She has not tried to sell her home, and has not received any offers. She testified that the most recent valuation from the County Auditor dropped "quite a bit" and is below what she believes her property to be worth. Ms. Walker told the Court that she thinks the county valued her home at $65,000. She believes her property is worth between $70,000 and $75,000. She stated that she is aware that home values have fallen generally in the few years. She testified that she is aware of other sales in the neighborhood, but could not recall any particular details, such as price.

In addition to Defendant's property at 4809 East 173rd, all three of the neighbors mentioned that, a second vacant property at 4804 East 173rd—just across the street—was an equal cause of the problems that they experienced. Ms. Walker also noted that the house next door to her, owned by a Mr. Scott, was vacant, moldy, and in her belief, in need of demolition. Upon questioning by counsel for Defendant, all three stated that demolishing the structure at 4809 would solve the problems they had relative to that particular property.

None of the three neighbors presented a clear claim for restitution. In order to award restitution, a court must find circumstances that satisfy R.C. 2929.28(A)(1): there must be a clear economic loss, and it must be the direct and proximate result of the conduct for which Defendant was convicted. In this case, the Court must find that Defendant's conduct relative to the code violations for a deteriorated garage roof, deteriorated and/or broken garage walls, a broken garage door, deteriorated, loose or missing roofing material, decayed gutters, and decayed and broken window units was the cause of this loss.

While it is clear to the Court that the condition of 4809 East 173rd Street was a problem for the neighbors, it is not sufficiently clear to the Court what economic loss, if any, resulted from Defendant's criminal conduct. Though all three of the neighbors indicated that they had taken steps to reduce the negative footprint of Defendant's property, none presented a clear claim of loss or linked their efforts to the offenses for which Defendant was convicted. As noted above, it appears to the Court that to find a

loss in property value, it would need clear value measures prior and subsequent to Defendant's criminal conduct. As such measures do not appear to be available, there is insufficient basis to find an economic loss connected with property values.

That the Court is unable to award restitution under these circumstances should not be read by Defendant as a statement that it is immune from an award of restitution. Nor should this entry be read as a statement that Ms. Collins, Ms. Harrison, Ms. Walker, and their neighbors have not in some way been victimized by Defendant's conduct. Should Defendant choose, on its own initiative, to compensate those who live and own property near 4809 East 173rd Street, the Court may consider such efforts as mitigating.

Victim Claims: The City of Cleveland

The City also made a claim for restitution. This claim was composed of two distinct parts, a claim for inspection costs and a claim for reduced tax revenues. In a previous Judgment Entry, the Court determined that inspection 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 inspection 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.[6] As the Court noted in its previous entry, however, this does not

[6] "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 sentence.'" *State v. Neville*, 9th Dist. No. 02CA0001, 2002-Ohio-5422, ¶6, quoting *State v. Elliott* (1993), 86 Ohio App.3d 792, 797.

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 economic losses, the Court declines to award restitution to any of the four claimants. 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 claimants here might have been entitled to restitution, it is clear that in one way or another all are victims.

Raymond L. Pianka
Judge

SERVICE

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