

COMMONWEALTH OF PENNSYLVANIA
v. JON STEVENS COX, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Criminal Action, No. 746 - 2003

Restitution for Injuries to Person or Property; Restitution as Direct Sentence

1. Upon conviction of a crime wherein property has been stolen, converted, or otherwise unlawfully obtained, or its value substantially decreased as a direct result of the crime, or wherein the victim suffered personal injury directly resulting from the crime, the offender shall be sentenced to make restitution in addition to the punishment prescribed therefore.
2. Restitution ordered as a direct sentence is only permitted for losses for which the defendant has been found criminally liable.
3. A person commits statutory sexual assault when that person engages in sexual intercourse with a complainant under the age of 16 years and that person is four or more years older than the complainant and the persons are not married to each other.
4. Restitution is not proper as a direct sentence for expenses incurred for diagnostic testing for sexually transmitted diseases when the defendant is convicted of statutory sexual assault since injury to the victim is not an element of the crime, therefore, not directly attributable to the defendant's criminal acts.

Appearances:

Angela Krom, Esq., *Assistant District Attorney*

Sean Fitzgerald, Esq., *Counsel for Defendant*

OPINION

Van Horn, J., September 15, 2004

Background

Defendant, Jon S. Cox, was charged with Statutory Sexual Assault, Sexual Assault, Aggravated Indecent Assault, Unlawful Contact or Communication with a Minor, and Indecent Assault in a Criminal Complaint filed by the Pennsylvania State Police. The charges arose from an interview police had with the victim on November 29, 2002. The victim was 15 years old at the time of the incident described below.

The victim told police that Defendant met her through the Internet in June of 2002. He told her he was 17 years old, and that he wished to see her in person. They eventually met at a local park where it became evident to the victim that Defendant was older than he had indicated. After this meeting, the victim told Defendant that she did not want to have contact with him due to his age. However, she indicated that he continued to contact her via the Internet, but she did not respond.

On August 5, 2002, the victim thought she saw Defendant drive by her house. She then immediately went inside and downstairs to her bedroom. The victim indicated that shortly afterwards

Defendant arrived in her bedroom and informed her that he wanted to have sex with her. He then pushed her onto her bed and proceeded to perform sexual acts upon her that resulted in the filing of the above named charges.

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Procedural History

Pennsylvania State Police filed a Criminal Complaint and Affidavit of Probable Cause on March 3, 2003. On May 10, 2004, Defendant entered a plea of nolo contendere to one count of Statutory Sexual Assault. This Court imposed a sentence on July 7, 2004 of 24 months to 60 months with 320 days credit for time served. Additionally, this Court ordered that Defendant pay \$756.00 in restitution to Quest Diagnostics.

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Discussion

This matter comes before the Court from Defendant's Motion to Modify Sentence, issue (1) below. Defendant requested that this Court eliminate \$756.00 in restitution that it ordered paid to Quest Diagnostics. This Court ordered restitution to cover the costs of testing the victim for sexually transmitted diseases. During argument on the Motion, Defendant raised two additional issues, (2) and (3) below, in support of the Motion. All issues now before this Court are as follows:

1. Whether restitution was impermissible under 18 Pa.C.S.A. § 1106(a) because it was imposed as a direct sentence and not as a condition of parole or probation, but the restitution did not arise as a direct result of the offense to which the Defendant pled?

2. Whether the Motion must be granted under Pa.R.Crim.P. 575(B)(1) because the Commonwealth failed to file an answer ordered by the Court, thereby constituting an admission of the well-pleaded facts in the Motion?

3. Whether documentation purported to evidence the amount of restitution should be inadmissible under Pa.R.E. 901 because the Commonwealth has not provided sufficient authentication?

Because this Court finds that issue (1) must be answered in the affirmative and because it is the principle issue upon which Defendant requested relief, discussion will be limited to that issue.

Impermissible Restitution

In the Order of Court dated July 7, 2004, this Court sentenced Defendant to 24 months to 60 months incarceration in a State Correctional Institution. Under the sub-heading "It Is Further Ordered," this Court checked the box that indicated "Restitution shall be made in the amount of \$756.00 to Quest Diagnostics." The amount and the name of the payee were handwritten in spaces provided on the form. Defendant alleged in his Motion to Modify Sentence that the imposition of restitution was a direct sentence, i.e. punishment imposed from consequences directly attributable to Defendant's criminal act. However, Defendant contested that the injury or loss to the victim did not necessarily flow from conduct that formed the elements of the crime to which he pled. Therefore, the restitution imposed as a direct sentence should be impermissible.

Pennsylvania courts obtain their authority to impose restitution as a direct sentence in criminal cases from 18 Pa.C.S.A. § 1106. Subsection (a) provides as follows:

"Upon conviction for any crime wherein property has been stolen, converted or otherwise unlawfully obtained, or its value substantially decreased as a direct result of the crime, or wherein the victim suffered personal injury **directly resulting from the crime** (emphasis added), the offender shall be sentenced to make restitution in addition to the punishment prescribed therefore." 18 Pa.C.S.A. § 1106(a).

Subsection (b) follows with:

"Whenever restitution has been ordered pursuant to subsection (a) and the offender has been placed on probation or parole, his compliance with such order may be made a condition of such probation or parole." 18 Pa.C.S.A. § 1106(b).

In its letter of authority addressing the outstanding issues raised by the Defendant, the Commonwealth admitted that the restitution ordered in this case is clearly a direct sentence, not a

condition of probation or parole. Therefore, the only issue remaining is whether the restitution is for an injury to the victim directly attributable to the Defendant's crime.

Defendant cited Commonwealth v. Harner, 617 A.2d 702 (Pa. 1992) to support his argument. In Harner, Appellant pled guilty to two counts of interference with custody of children. The court sentenced Appellant to twelve months probation and ordered her to pay restitution to the children's father for expenses that accumulated during his search for the children. The Superior Court vacated the restitution order because it included attorney's fees and remanded. Both parties sought further review.

Restitution is permitted only for losses for which the defendant has been found criminally liable. Harner, 617 A.2d at 705. Due process would not permit incidental costs to be passed on to the defendant, as a sentence, if they had not been made part of the criminal proceeding. Id. The Court found that the loss incurred by Mr. Harner was not a direct result of the crime to which Appellant pled. The Court looked to the plain language of the statute to find that the legislature's intent was to give courts authority to sentence defendants only for damages caused "in the commission of a crime." Id. The Court found that the lower courts attempted to include Mr. Harner's assets as **the property** (emphasis added) that lost its value as a result of Appellant's actions. However, the Court concluded that the actions of Mr. Harner could be separated from the Appellant's criminal conduct such that one is not necessarily related to the other.

Here, as in Harner, the incidental costs to the victim do not necessarily flow directly from the criminal actions of Defendant. Defendant pled nolo contendere to one count of Statutory Sexual Assault, 18 Pa.C.S.A. § 3122.1, which provides that:

"[A] person commits a felony of the second degree when that person engages in sexual intercourse with a complainant under the age of 16 years and that person is four or more years older than the complainant and the persons are not married to each other."

Defendant argued that by entering the plea of nolo contendere, he admitted that he had sexual intercourse with the victim, but he did not cause any physical injury, nor did he admit as much. Physical injury is not an element of the crime to which he pled. Defendant noted that the only reason the victim sought testing was because an anonymous informant had contacted the victim's grandmother informing her of the sexual encounter. It was only then, months later, that knowledge of Defendant's actions came to light and testing was conducted to set the victim's and her parents' minds at ease. Defendant submits that since the victim had not reported the sexual encounter, she was not aware of or in fear of any injury to her in the form of a sexually transmitted disease. Additionally, Defendant contends that testing to set one's mind at ease is not a direct and necessary result of his criminal conduct.

The Commonwealth argued that the diagnostic testing was a direct result of Defendant's criminal activity. The Commonwealth utilized a "but for" analysis arguing that had it not been for Defendant's criminal activity, the victim would not have had to undergo the testing. As logical as this argument seems, the Court in Harner expressly dismissed "but for" reasoning. In Harner, the Court found that when the Superior Court applied 18 Pa.C.S.A. § 1106 it reasoned that Mr. Harner "would not have been put in the position of spending \$14,000.00 **but for** (emphasis added) the actions of Appellant." Harner, 617 A.2d at 705. The Court corrected this interpretation by noting, "restitution can be permitted under 18 Pa.C.S. § 1106 only as to losses for which the defendant has been held criminally accountable." Id. In the case at bar, Defendant is accountable for having had sexual intercourse with a victim who was less than 16 years of age, that he was at least four years older than the victim, and that he and the victim were not married. Defendant has not been found criminally accountable for any real or potential physical injury to the victim. Therefore, based on the reasoning of the Court in Harner and a strict interpretation of 18 Pa.C.S.A. § 1106 restitution was improperly ordered, and Defendant's Motion to Modify Sentence will be granted.

ORDER OF COURT

And now this 15th day of September, 2004, upon consideration of the foregoing Motion to Modify Sentence, it is hereby ordered that the Motion is granted and restitution in the amount of \$756.00 to Quest Diagnostics is hereby stricken from the sentencing Order of July 7, 2004.