

Commonwealth v Rowe

Commonwealth of Pennsylvania v. Justin Lee Rowe, Defendant
Court of Common Please of the 39th District of Pennsylvania,
Franklin County Branch
Criminal Action No. 476-2012

HEADNOTES

Criminal Law; Restitution

- 1.The primary purpose of restitution is rehabilitative, to impress on the defendant that his criminal conduct caused the victim's loss, and that he is responsible to repair the loss as far as possible. Recompense of the victim is a secondary benefit of restitution.
- 2.When ordered as part of a defendant's sentence, restitution is only proper where there is a direct causal connection between the crime and the loss. The Court should apply a "but-for test" to determine the correct amount of restitution imposed as part of a sentence.
- 3.Restitution ordered as part of an order of probation only requires an indirect connection between the criminal activity and the loss suffered. The Court is given more flexibility to determine the amount of restitution imposed as part of an order of probation.
- 4.The Court, when ordering restitution as part of the defendant's sentence, must order full restitution, regardless of the current financial resources of the defendant.
- 5.When ordering restitution as part of an order of probation, the Court may not impose restitution which exceeds the defendant's ability to pay. While such restitution may be such that the defendant must make sacrifices to fulfill his obligations, it shouldn't be so unreasonable that the defendant is incapable of fulfilling his obligations.

Appearances:

Christopher L. Reibsome, Esq., Counsel for Defendant
Lauren E. Sulcove, Esq., Assistant District Attorney

OPINION

Before Van Horn, J.

STATEMENT OF THE CASE

The Defendant, Justin Lee Rowe, was sentenced August 20, 2012 to 12 months of probation to run concurrently with his sentences on case numbers 43 of 2012, 142 of 2012, and 1790 of 2012. Additionally, at the time of sentencing, the Defendant was also ordered, as a condition of his probation, to pay restitution in the amount of \$47.80 to the Franklin County Treasurer. The \$47.80 restitution consists of the cost of the two taser cartridges that were deployed when the Defendant resisted arrest. Defendant filed a Post Sentence [sic] Motion to Modify Sentence Order with Respect to Restitution on August 30, 2012. The Court ordered the Commonwealth to file an answer, which it did on September 20, 2012, but without notice to this Court. Pursuant to Pa. R.Crim.P. 720(B)(3)(a), Defendant's Post Sentence [sic] Motion to Modify Sentence Order with Respect to Restitution was deemed denied by operation of law after 120 days, as this Court failed to decide on the Motion within that time period. By Order of the Court dated January 16, 2013, following the Court's discovery of the filed Commonwealth Answer, the Court noted that, even if the Motion wasn't deemed denied by operation of law, the Court would have denied the Motion on its merits.

Defendant filed a Notice of Appeal on January 24, 2013 and a Concise Statement of Matters Complained of on Appeal ("Statement") on February 1, 2013. In his Statement, Defendant raised one issue on appeal: "Whether the restitution of \$47.80 ordered during sentencing pursuant to 18 Pa.C.S.A. §1106 was valid; where the police used a Taser on the defendant and the police are not considered victims and the Taser's value itself was not diminished because of the use of

the taser.” The Court now responds to Defendant’s Statement though this Opinion pursuant to Pa.R.A.P. 1925(a).

DISCUSSION

Restitution has been defined as the requirement that the criminal offender “repay, as a condition of his sentence, the victim or society, in money or services.” *Commonwealth v. Brown*, 981 A.2d 893 (Pa. 2009). The primary purpose is rehabilitative, to impress on the defendant that his criminal conduct caused the victim’s loss, and that he is responsible to repair the loss as far as possible. See *id.* Recompense of the victim is thusly a “secondary benefit.” *Id.* The Commonwealth bears the burden of proving its entitlement to restitution. See *Commonwealth v. Atanasio*, 997 A.2d 1181, 1183 (Pa. Super. Ct. 2010). A defendant can be ordered to pay restitution to a victim injured by their conduct, despite the fact that a victim has already been paid through a civil settlement, or has been recompensed for their loss by an insurer. See *Brethren Mut. Ins. Co. v. McKernan*, 961 A.2d 205 (Pa. Super. Ct. 2008). Several statutory sections authorize the imposition of restitution. See 18 Pa. C.S.A. § 1106, 42 Pa. C.S.A. §§ 9754, 9763. First, Section 1106 of the Criminal Code states:

General rule.— 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, the offender shall be sentenced to make restitution in addition to the punishment prescribed therefor.

18 Pa. C.S. § 1106(a). Under this Section, restitution is only proper where there is “a direct causal connection between the crime and the loss.” *Commonwealth v. Harriott*, 919 A.2d 234, 238 (Pa. Super. Ct. 2007). The loss must flow from the conduct that forms the basis of the crime for which the defendant was held criminally responsible. See *Commonwealth v. Popow*, 844 A.2d 13 (Pa. Super. Ct. 2004). In *Gerulis*, the Superior Court stated that the correct amount of restitution is determined by the “but-for test,” damages occurring as a direct result of the crime being those which “should not have occurred but for the defendant’s criminal conduct.” *Commonwealth v. Gerulis*, 616 A.2d 686 (Pa. Super. Ct. 1992).

Second, restitution ordered under Section 9754 is part of an order of probation, imposed as a condition requiring the defendant “make restitution of the fruits of his crime or to make reparations, in an amount he can afford to pay, for the loss or damage caused thereby.” 42 Pa. C.S.A. § 9754(c)(8). Case law has interpreted the authorization to impose restitution under this section to be significantly different than that under Section 1106. See, e.g., *Harriott*, *supra*. Section 9754 does not require a direct nexus between the offense and the loss, instead permitting restitution to be ordered where only an indirect connection between the criminal activity and the loss exists. See *Commonwealth v. Kelly*, 836 A.2d 931, 934 (Pa. Super. Ct. 2003). This more liberal standard is consistent with the rehabilitative purpose of probation, where the Court is satisfied that the restitution “is designed to rehabilitate the defendant and to make some measure of reimbursement to the victim.” *Harriott*, *supra*. The restitution allows offenders to understand the egregiousness of their conduct, be deterred from re-offending, and be encouraged to live responsibly. See *id.* The Court is given flexibility to determine “all direct and indirect damages caused by an offender.” See *id.*^[1]. Thus, the requirement of a nexus between the damage and the offense is “relaxed” where restitution is a condition of probation. See *In re M.W.*, 725 A.2d 729, 732 (Pa. 1999).

For example, in *Commonwealth v. Harner*, the defendant was convicted of interference with the custody of children, and sentenced to pay restitution to the father of her children for expenses incurred in locating them. See *Commonwealth v. Harner*, 617 A.2d 702 (Pa. 1992). The Pennsylvania Supreme Court struck down the restitution as ordered under Section 1106, for costs of an investigator and legal fees. See *id.* However, the Court remanded for a determination of whether the costs could be sustained as a condition of probation, what loss or damage had been caused, what amount she could afford to pay, and how it should be paid. See *id.* The Court stated:

[C]onsistent with the broader discretion granted to a sentencing court that chooses to impose restitution as a condition of parole, 42 Pa.C.S § 9754(c)(8) vests the court with an equally broad power to determine what the fruits of the crime are. This is considerably different than the language of 18 Pa.C.S. § 1106 which permits restitution only for losses that are a direct result of the crime. The more liberal language of § 9754(c)(8) is understandable given the purposes of rehabilitation and can encompass all the types of claims Mr. Harner presented, as long as the trial court is satisfied that restitution is being ordered so that the appellant will understand the cruelty of her conduct, be deterred from repeating the conduct, be encouraged to live in a responsible manner, and be able to pay these costs.

Id. at 707 n.3.

In *Commonwealth v. Popow*, the defendant was convicted of simple assault under Section 2701(a)(3) of the Crimes Code, attempt by physical menace to put another in fear of imminent serious bodily injury. See *Popow*, supra. Popow was acquitted of assault charges with respect to a cut on one victim's arm. See *id.* As such, the Superior Court held he could not be sentenced to restitution under Section 1106, as the acquittal demonstrated he was not directly responsible for the injuries. See *id.* However, the appellate court did find that the defendant's illegal actions "triggered the entire event" such that "he is indirectly responsible for the injuries" and could be sentenced to restitution under Section 9754. *Popow*, supra.

The amount of restitution ordered must be supported by facts of record and cannot be speculative or excessive. See *Commonwealth v. Reed*, 543 A.2d 587 (Pa. Super. Ct. 1988). See also *Commonwealth v. Pleger*, 934 A.2d 715 (Pa. Super. Ct. 2007) (court must "ensure that the record contains the factual basis for the appropriate amount of restitution"). The dollar value of the injury suffered by the victim "assists" the Court in calculation of the amount of restitution merited, but cannot be dispositive. *Atanasio*, 997 A.2d at 1183. Additionally, a restitution award should not exceed the victim's losses, and should consider the victim's injuries, the victim's request as presented by the District Attorney, and such other matters as the court deems appropriate. See *Commonwealth v. Pleger*, 934 A.2d 715 (Pa. Super. Ct. 2007).

Further, while Section 1106 requires the court to order full restitution "regardless of the current financial resources of the defendant," restitution imposed as a condition of probation under Section 9754 should not exceed the defendant's ability to pay. 18 Pa. C.S.A. § 1106, see 42 Pa. C.S.A. § 9754(c)(8) and *Commonwealth v. Valent*, 463 A.2d 1127 (Pa. Super. Ct. 1983).

Thus, while restitution under an order of probation may be such that the defendant must make sacrifices to fulfill his obligations, it shouldn't be so unreasonable that the defendant is incapable of fulfilling his obligations.

The Court first notes that the applicable restitution statute is Section 9794, not Section 1106 as the Defendant's Statement implies, as the order to pay restitution was imposed as a condition of the Defendant's 12-month probationary sentence, not as a separate sentence. As such, only an indirect connection between the Defendant's criminal activity and the loss must be established to impose an order of restitution.

Second, the Court disagrees with the Defendant's contention that "police are not considered victims." The police in this case can rightfully be considered a 'victim' when it comes to resisting arrest because the Defendant's actions were in direct conflict with the officer's attempt to arrest the Defendant and were the reason the officer had to take actions, i.e. tasing the Defendant, that go beyond a typical arrest. See *Commonwealth v. Smith*, 699 A.2d 1303 (Pa. Super. 1997) (defendant was ordered to pay restitution to the city for costs it incurred when one of its officers was injured as a result of the defendant resisting his arrest). As a result, this Court found it proper to order restitution for losses related to the officer's use of his taser to effectuate the Defendant's arrest.

The Court also disagrees with the Defendant's assertion that the restitution ordered was invalid because the "taser's value itself was not diminished because of the use of the taser" because no such requirement exists to impose restitution under Section 9754. The Defendant's confusion likely stems from his belief that the appropriate restitution statute is Section 1106. That section states that restitution is proper "[u]pon 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." 18 Pa.C.S.A. §1106(a) (emphasis added). However, under Section 9754's more liberal standard for restitution, ordering restitution for the cost of the taser cartridges, even though the value of the taser itself was not diminished, is appropriate. There is, at a minimum, an indirect connection between the Defendant's criminal activity and the deployment of the taser cartridges. If the Defendant hadn't resisted his arrest, the officer likely would have had no reason to use his taser on the Defendant, thereby eliminating the deployment of the taser cartridges. Therefore, it was appropriate under Section 9754 to order restitution despite the fact that the taser's value itself was not diminished.

Finally, the Court's order of restitution is appropriate given the purpose of restitution. As discussed above, the primary purpose of restitution is to rehabilitate a defendant and the secondary purpose is to recompense the victim. Ordering the Defendant to pay restitution for the taser cartridges will, hopefully, allow him to understand the egregiousness of his conduct, be deterred from re-offending, and be encouraged to live responsibly.

CONCLUSION

In light of the foregoing reasons, this Court did not err ordering restitution in the amount of \$47.80. The Court determined that, at a minimum, an indirect connection existed between the Defendant's criminal actions and the deployment of the taser cartridges, and therefore, that an order of restitution pursuant to Section 9754 was appropriate. This Court respectfully requests that the Superior Court dismiss the appeal of the Defendant.

ORDER OF COURT

AND NOW THIS 11th DAY OF February, 2013 pursuant to Pa.R.A.P. 1931(c),

IT IS HEREBY ORDERED THAT the Clerk of Courts of Franklin County shall promptly transmit to the Prothonotary of the Superior Court the record in this matter along with the attached Opinion sur Pa.R.A.P. 1925(a).

Pursuant to Pa.R.Crim.P. 114, the Clerk of Courts shall immediately docket this Opinion and Order of Court and record in the docket the date it was made. The Clerk shall forthwith furnish a copy of the Opinion and Order of Court, by mail or personal delivery, to each party or attorney, and shall record in the docket the time and manner thereof.

[¹]Under 42 Pa. C.S.A. § 9763(b)(10), the Court is also given the power to order restitution as part of a condition of intermediate punishment. The language under this subsection is almost identical to that under Section 9754, and has been interpreted as requiring only an indirect connection between an offender's activity and the victim's damage. See Harriott,*supra*.