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EMILIA A. WITTENBERG
CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OHIO

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

STATE OF OHIO :
Plaintiff : **CASE NO. 2014 CR 00119**
vs. : **Judge McBride**
TODD R. SHAW : **DECISION/ENTRY**
Defendant :

D. Vincent Faris, prosecuting attorney, and Jason E. Nagel, assistant prosecuting attorney, for the State of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103;

William J. Rapp, counsel for the defendant Todd R. Shaw, One East Main Street, Amelia, Ohio 45102.

This matter is before the court for consideration as to the amount, if any, to be ordered to be paid by the defendant as restitution in this case.

The undisputed facts of this case, as reflected by the guilty pleas entered by the defendant and the defendant's own statement, are the following:

On February 21, 2014, the defendant consumed a number of alcoholic beverages at two different bars to the point that he was under the influence of alcohol. He left to drive home in his van, and while driving on Roundbottom Road in Clermont County, Ohio, observed the victim Frederick Carey on his bicycle at a distance of about

100 feet ahead. He began looking at the contact list on his phone and was inattentive to the conditions around him. He struck Carey with his vehicle causing Carey's severe injuries and death. After hitting the victim, Carey drove his van to his mother's house where he left the van and had his mother drive him to his house. He was later contacted by police and was arrested and charged with crimes related to this occurrence.

On June 17, 2014, the defendant appeared in court, represented by attorney William J. Rapp, and entered pleas of guilty to and was found guilty of aggravated vehicular homicide in violation of R.C. 2903.06(A)(2)(a), a felony of the third degree; failing to stop after an accident in violation of R.C. 4549.02(A), a felony of the third degree; an amended charge of attempted tampering with evidence in violation of R.C. 2923.02(A)/2921.12(A)(1), a felony of the fourth degree; and an OVI offense in violation of R.C. 4511.19(A)(1)(a), a misdemeanor of the first degree.

On July 10, 2014, the defendant appeared before the court represented by attorney William J. Rapp and was sentenced to a term of imprisonment of nine and one-half years on the felony offenses and a 180-day term of incarceration on the misdemeanor offense. The court did not address the issue of restitution at the sentencing hearing and the sentencing was continued in progress several times in order for the court to hold a restitution hearing.

On August 1, 2014, the defendant appeared before the court for the restitution hearing and was represented by attorney William Rapp. The state of Ohio was represented by Prosecuting Attorney D. Vincent Faris.

During the restitution hearing, the state did not present any evidence but made argument and asked the court to make awards in the following amounts as requested by family members:

- 1) \$3,320.51 to Frederick Carey's parents George Carey and Anney Carey for funeral expenses (bill provided).
- 2) \$4,980.00 to Frederick Carey's parents George Carey and Anney Carey for travel expenses incurred for the victim's three siblings and their families to attend the funeral.
- 3) \$1,125.00 to Frederick Carey's parents George Carey and Anney Carey for the expense of psychiatric counseling (bill provided).
- 4) \$750.00 to Frederick Carey's parents George Carey and Anney Carey for the expense of an additional six weeks of counseling to occur in the future.
- 5) \$4,420.00 to Frederick Carey's wife Deborah Floyd for the expense of grief counseling which is to occur weekly for one year.
- 6) \$525.00 to Frederick Carey's sister Eugenia Carey Randolph for the expense of individual therapy (bill provided).

Additional restitution requests were made by family members during the presentence investigation as follows:

- 1) \$1,530.00 to Frederick Carey's father George Carey for help that he has needed to hire to assist in his and his wife's daily living expenses and farm upkeep to replace help that had been previously provided by their son.
- 2) \$30,000 to Frederick Carey's father George Carey for tuition expenses that he will need to incur to keep Frederick Carey's minor children in school at

Cincinnati Country Day now that tuition remission will no longer be provided through Frederick Carey's employment at the school.

- 3) \$36,000 to Frederick Carey's father George Carey for legal expenses related to the probate of the victim's estate and related to visitation issues involving Frederick Carey's minor children.
- 4) \$833.40 to the Frederick Carey's sister Eugenia Carey Randolph for travel expenses for the day following Frederick Carey's death.
- 5) \$3,4423.80 to Frederick Carey's sister Eugenia Carey Randolph for travel expenses for her family in April and May following the defendant's death.
- 6) \$2,950.00 to Frederick Carey's sister Eugenia Carey Randolph for the expense of anticipated family counseling and individual therapy.

The defendant agreed to pay the funeral expenses as requested, but defense counsel objected to restitution being awarded for the balance of the items listed above on the grounds that the additional restitution is not permitted under Ohio law and/or there has not been sufficient evidence presented to warrant the court in ordering the requested restitution.

At the conclusion of the restitution hearing, the court took the issues raised during the hearing under advisement. Upon consideration of the submissions to the Probation Department by family members, the presentence investigation report, and the arguments of counsel, the court renders the following decision.

LEGAL ANALYSIS

The court is limited in ordering restitution in a criminal case to that which is specifically authorized under the applicable statutes.

R.C. 2929.18(A)(1) provides:

"Financial sanctions that may be imposed pursuant to this section include, but are not limited to, the following:

- (1) Restitution by the offender to the victim of the offender's crime or any survivor of the offender's crime, in an amount *based on the victim's economic loss*. *
* * If 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." (Emphasis provided by court)

The statutory definition of "economic loss" is set forth as follows in R.C.

2929.01(M):

" 'Economic loss' means 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. 'Economic loss' does not include non-economic loss or any punitive or exemplary damages." (Emphasis provided by court)

"Although R.C. 2929.18(A)(1) provides, in part, that the trial court, at sentencing, shall determine the amount of restitution to be made by the offender, due process requires that the amount of restitution ordered 'bear a reasonable relationship to the loss suffered' by the victim."¹ Furthermore, to ensure a lawful restitution award, the

¹ *State v. Portentoso*, 173 Ohio App.3d 297, 301, 2007-Ohio-5490, 878 N.E.2d 76 (3rd Dist.), ¶ 7, citing *State v. Christy*, 3rd Dist. Wyandot No. 16-04-04, 2004-Ohio-6963, at ¶ 11, citing *State v. Johnson*, 3rd Dist. Auglaize No. 2-98-39, 1999 WL 455301 (June 30, 1999).

order must be supported by “competent, credible evidence in the record” to support the order “to a reasonable degree of certainty.”² “[T]he amount of restitution requested should, if necessary, be substantiated through documentary or testimonial evidence.”³

In the case at bar, there was no documentary or testimonial evidence presented as to any of the claims for restitution with the exception of the claims for funeral expenses and therapy expenses already incurred by Frederick Carey’s sister Eugenia Carey Randolph and his parents George Carey and Anney Carey. The court lacks authority to order restitution as to the other claims, which were disputed by defense counsel, for this reason alone.

Restitution for “economic loss” is limited to that economic detriment which is suffered by the “victim.” Neither R.C. 2929.01 nor R.C. 2929.18 define “victim.” R.C. 2930.01(H)(1) is useful in understanding the legislature’s intent, although it is not explicitly controlling for matters other than those in Chapter 2930.⁴ Under R.C. 2930.01(H)(1), “victim” means either “a person who is identified as the victim of a crime or specified delinquent act in a police report or in a complaint, indictment, or information that charges the commission of a crime and that provides the basis for the criminal prosecution or delinquency proceeding and subsequent proceedings” or “a person who receives injuries as a result of a vehicle, streetcar, trackless trolley, aquatic device, or aircraft accident that is proximately caused by a violation described in division (A)(3) of this section or a motor vehicle accident that is proximately caused by a violation described in division (A)(4) of this section and who receives medical treatment as described in division (A)(3) or (4) of this section, whichever is applicable.” Under either

² *Id.*, citing *Christy*, *supra*, at ¶ 11.

³ *Id.*, citing *Johnson*, *supra*.

⁴ *State v. Christian*, 2nd Dist. Montgomery No. 25256, 2014-Ohio-2672, ¶ 107.

definition of “victim,” the victim of the offense in this case, who is identified as the victim of the crime in the police and charging documents and who received injuries which caused his death as a result of the OVI offense committed by the defendant, is Frederick Carey.

Black’s Law Dictionary similarly defines “victim” as the “person who is the object of a crime or tort, as the victim of a robbery is the person robbed.”⁵⁵ Although a broader definition of “victim” is provided thereafter in Black’s Law Dictionary as “[a] person who [the] court determines has suffered pecuniary damages as result of defendant’s criminal activities,” this court is of the opinion that, since the term “survivor” is used in R.C. 2929.18(A)(1) as a person to whom restitution may be ordered to be paid, but is not listed as a person whose economic detriment is to be considered in terms of the economic loss for which restitution may be ordered, the legislature intended the term “victim” to be confined to the person who is the direct object of the commission of the crime.

Under the plain language of R.C. 2929.01(M), economic loss is limited to economic detriment suffered by the victim. The items listed thereafter are not exclusive, but any items included within the category of economic loss are clearly limited to detriment suffered by the victim. The award of funeral expenses might seem on its face to contradict this holding since those expenses occur after the death of the victim; however, funeral expenses still constitute economic detriment to the victim to the extent that those expenses constitute a diminution of the victim’s estate.

Similarly, under the plain language of R.C. 2929.18(A)(1), restitution may be ordered paid to a survivor, but it is limited in amount to the victim’s economic loss. As a

⁵⁵ Black’s Law Dictionary (6th Ed.1990) 1567. See, also, *State v. Christian*, supra.

result, the use of the term "survivor" in the statute does not broaden the import of the statute so that the court could order restitution for loss to survivors of a victim.

It should be noted that the Second District Court of Appeals, in *State v. Johnson*, 164 Ohio App.3d 792, 844 N.E.2d 372, 2005-Ohio-6826, ¶ 72, approved an award of restitution to surviving children for their lost wages. However, in that case, the defendant did not object or raise any challenge in the trial court to any part of his sentence, so that court did not have occasion to consider the issues which this court is now considering by virtue of the fact that the defendant is contesting the matter of restitution.

In construing the apparent legislative intent of the term "victim" in the statute, the court is not intending in any way to minimize or demean the harm that has been experienced in this case by Frederick Carey's family members as a result of the defendant's criminal conduct. The reality is that the victim's wife, parents, children, and siblings have been harmed greatly by the defendant's criminal conduct, and the court considered the broad ranging effects of the defendant's criminal conduct in sentencing him.

However, while perhaps the legislature should consider broadening the definition of "economic loss" to include any economic detriment caused by a defendant's criminal conduct, or at the very least that economic detriment which is caused to a decedent's family members, the court cannot find that there is authority under the law as it is now written that would allow the court to include economic detriment suffered by a victim's family members in that restitution which is ordered by the court.

Even if the court were able to find that there is authority to consider the economic detriment caused to family members as economic loss incurred by the victim, this court would be unable to order restitution for most of the expenses which are being claimed on the state of the record as it now exists for another reason.

It must be recognized that an order of restitution in a criminal case is a judgment in favor of the victim, or in this case the survivors of the victim, and against the defendant for the damages resulting from the criminal proceedings. It is for all practical purposes the equivalent of a civil judgment, in that restitution ordered in a criminal proceeding can be collected through a certificate of judgment, through execution proceedings, or through a garnishment proceeding.⁶ Furthermore, restitution can only be ordered for economic detriment which was proximately caused by the commission of the criminal conduct. This means that, just as in a civil action, proximate cause must be established as to the injury claimed.

Certainly, the manner in which such evidence is provided can be more relaxed and more informal than in a trial. Evid.R. 101(C)(3) specifically provides that the Ohio Rules of Evidence, other than with respect to privileges, do not apply to miscellaneous criminal proceedings including sentencing.⁷ In this regard, Ohio appellate courts have ruled that, because the rules of evidence do not apply to sentencing, they also do not apply to evidentiary hearings concerning restitution by offenders to victims of crimes.⁸

In addressing the issue as to whether there is competent, credible evidence in the record to prove that the damages claimed in this case were proximately caused by

⁶ See, R.C. 2929.18(D).

⁷ *State v. Riley*, 6th Dist. Wood No. WD-08-025, 2009-Ohio-3227, ¶ 28, citing *State v. Cook*, 83 Ohio St.3d 404, 425, 700 N.E. 2d 570 (1998). See, also, Evid.R. 101(C)(3).

⁸ *Id.*, citing *State v. Potts*, 7th Dist. Harrison No. 07-HA-4, 2008-Ohio-643, ¶ 11, citing *State v. Tuemler*, 12th Dist. Warren No. CA2004-06-068, 2005-Ohio-1240, ¶ 17.

the defendant's criminal conduct, the court will address the damages claimed, namely counseling expenses, travel and legal expenses, tuition expenses, replacement for services provided by the victim to his parents, and funeral expenses.

With respect to the claims for psychological and grief counseling, just as in a civil action, there must be competent and credible evidence in the record which demonstrates to a reasonable degree of probability that the injuries and resulting treatment were proximately caused by the defendant's criminal acts. In determining whether the requisite causal nexus exists, a court applies principles from the common law of torts, including standards of cause and proximate cause. Proximate cause exists where an act or failure to act, in a natural and continuous sequence, directly produces the injury and without which it would not have occurred. Furthermore, except as to questions of causation which are so apparent as to be matters of common knowledge, expert medical testimony is necessary in order to establish proximate causation for alleged injuries.⁹

The medical evidence in terms of a restitution request can be in the form of hearsay and need not be formal. In *State v. Riley*, supra, evidence that a heart attack was caused by an assault that occurred thirteen days prior to the heart attack was provided through hearsay. Accordingly, the fact that the medical opinion evidence relating the heart attack to the beating was hearsay was not determinative and restitution was ordered for the costs of the medical treatment related to the heart attack. However, in that case, there was evidence, albeit not in the form ordinarily provided in a civil action, which directly related the injury which resulted in the expenses to the

⁹ See, *Ogolo v. Greater Cleveland Regional Transit Authority*, 8th Dist. Cuyahoga No. 99675, 2013-Ohio-4921, ¶ 15.

defendant's criminal conduct.

In the case at bar, there is little doubt that the victim's family has been traumatized by the defendant's crime which caused death to their loved one. It is entirely plausible that post-death counseling is necessary and that it was caused by the criminal conduct of the defendant. However, the need for specific family members to receive individual or group therapy and counseling is not so apparent as to be a matter of common knowledge in order to dispense with the need for expert psychological evidence as to causation. For the court to order restitution for such, there must be credible evidence to support the order, and that evidence is lacking in this case.

With respect to the claims for restitution for travel and legal expenses, tuition expenses, and replacement for services provided by the victim to his parents, and in applying the proximate cause standard to these claims, the court is compelled to find that these expenses are not the direct and proximate result of the defendant's crimes for purposes of restitution.¹⁰

With respect to the claim for funeral expenses, this is the only claim for restitution that can reasonably be construed as involving economic detriment to the victim, the only claim for which there is competent and credible evidence in the record from which the court may ascertain the amount of restitution required for this item; and the only expense which the court can conclude from the evidence in the record was directly and proximately caused by the defendant's criminal conduct. Additionally, the claim for funeral expenses is not disputed by the defendant.

¹⁰ *State v. McNeil*, Idaho App. No. 41165, 2014 WL 3360511 (July 10, 2014).

Accordingly, the court finds that restitution shall be ordered to be paid by the defendant in the sum of \$3,320.51 to Frederick Carey's parents George Carey and Anney Carey for funeral expenses.

Although the court is not ordering restitution as to the other claims for the reasons stated above, it should be noted that the court's ruling in this case does not mean that the family members are required to go uncompensated. In this regard, the law does allow recovery of damages caused to the surviving spouse, parents, children, and other next of kin of a decedent through a wrongful death action.

IT IS SO ORDERED.

DATED: 8-15-17



Judge Jerry R. McBride