

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO: 00-11,038

VS :

DAVID DEATON :

OPINION AND ORDER

Before the Court is Defendant's Motion to Reconsider Restitution. Defendant was charged with multiple counts of delivery of a controlled substance, conspiracy, and criminal use of a communication facility. Defendant pled guilty on August 23, 2001, to one count of criminal use of a communication facility. He was sentenced to one year of supervision by the Adult Probation Office, to pay the costs of prosecution, and to pay restitution in the amount of \$1,004.86 to the Office of the Attorney General, Bureau of Narcotic Investigation.

Defendant now requests that the Court reconsider the Order for restitution. Defendant argues that the amount specified for restitution in this case¹ was the amount expended for the delivery charges and not the amount expended for the charge of criminal use of a communication facility. Defendant argues that it was improper to order restitution for the amount expended for the delivery charge, as it relates to an act which he was neither tried nor convicted of.

Amounts Properly Included in Restitution

The Courts have utilized a "but-for test" in determining restitution due. Restitution is due for damages which would not have occurred *but for* a defendant's

¹ The amount was characterized as follows: \$1,000.00 to purchase 17.6 grams of crack cocaine, and \$4.86 to develop film.

criminal conduct. [Commonwealth v. Gerulis](#), 420 Pa.Super. 266, 616 A.2d 686, (Super.1992), appeal denied 535 Pa. 645, 633 A.2d 150. See [Commonwealth v. Penrod](#), 396 Pa.Super. 221, 578 A.2d 486 (1990) (Defendant who pleaded guilty to driving under influence of alcohol could properly be ordered to make restitution for tapes stolen from demolished car after the accident. The Court reasoned that the tapes would not have been stolen "but-for" accident)

The case [Commonwealth v. Cooper](#), 319 PaSuper 351, 466 A.2d 195 (1983), was cited by the defense in this case. In [Cooper](#), the defendant was charged with leaving the scene of an accident without rendering aid under 75 Pa.C.S.A. § 3744. The Sentencing Order ordered the defendant to pay restitution to the family of the deceased victim. The Superior Court held that the defendant could not be responsible for paying restitution to the victim, since the defendant did not admit that he was in any way criminally responsible for having struck the accident victim. The court reasoned that the defendant had not even been charged with any offense purporting to hold the defendant criminally responsible for the victim's death. In fact, a review of the guilty plea record suggested that the charges may have been considered, but found to be unsupportable.

In [Cooper](#), there was no evidence that the victim would not have died "but- for" the defendant's criminal act of leaving the scene of an accident. The defendant was not assessed with restitution to the victim, because the defendant was not held criminally accountable for the actions which resulted in the death of the victim. Using the but-for test, and the analysis of [Penrod](#) and [Cooper](#), this Court finds that the amount expended for the delivery would not have occurred "but-for" the Defendant's criminal use of the communication facility in this case to set up the drug transaction and delivery.

Accordingly, the Court finds that an Order for restitution for any damages incurred in the delivery in this case would have been appropriate.

Restitution vs. Cost of Prosecution

The outcome of this case is not dependent on a determination of the “but-for” test, however, as this Court finds that the amount expended by the Commonwealth should have been characterized as a cost of prosecution, and not as an amount of restitution. The Pennsylvania Supreme Court, in the case Commonwealth v. Runion, 662 A.2d 617 (Pa., 1995), held that governmental agencies of this Commonwealth can not receive restitution as it is defined in the statute, as they are specifically excluded from the definition of “person.” The Court reasoned that 18 Pa.C.S.A. §1106 provides for restitution to the “victim” of a defendant’s criminal activity. Victim is further defined in 18 P.S. § 11.103 as a person against whom a crime is committed.

As “person” was not further defined in that statute, the Court was compelled to rely on the definition of a person as provided for under the Statutory Construction Act, 1 Pa.C.S. § 1991, which states: “‘Person’ Includes a corporation, partnership, limited liability company, business trust, other association, government entity (other than the Commonwealth), estate, trust, foundation or natural person.) Based on this definition, the Supreme Court concluded that government agencies of the Commonwealth are expressly excluded from the definition of person and as such may not be considered as a victim under 18 Pa.C.S.A. § 1106. Runion, supra, at 621. Based on Runion, the Court finds that the amounts expended by the Commonwealth in controlled buy situations should be characterized as costs of prosecution, and not as restitution. However, since this is a case of first impression in Lycoming County, either party may, if it wishes,

request an en banc hearing, after filing an appropriate request.

ORDER

AND NOW, this ____ day of December, 2001, this Court's Sentencing Order dated August 23, 2001 is Amended as follows:

Sentence of the Court is that the Defendant shall pay the costs of prosecution, including but not limited to \$1004.86 to the Office of the Attorney General Bureau of Narcotic Investigation.

In all other respects, the Sentencing Order of August 23, 2000 remains unchanged.

By The Court,

Nancy L. Butts, Judge

xc: DA
Eric Linhardt, Esquire
Adult Probation
Honorable Nancy L. Butts
Judges
Law Clerk
Gary Weber, Esquire