

IN THE SUPREME COURT OF OHIO

STATE OF OHIO)	CASE NO. 2020 - 1392
Plaintiff/Appellant)	
--vs--)	On appeal from the Columbiana County, Court of Appeals, Seventh Appellate District
JOHN D. YERKEY)	
Defendant/Appellee)	Court of Appeals Case No. 19 CO 44

REPLY BRIEF OF APPELLANT STATE OF OHIO

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STATEMENT OF FACTS AND CASE

This matter arises from two criminal cases in which the offender pled guilty to two counts of Violation of a Protection Order in violation of Revised Code Section 2919.27(A)(1) and was subsequently ordered to pay the crime victim restitution in the amount of \$1,615.00 for lost wages suffered because of attending court proceedings.

A full restitution hearing was held by the trial court on September 27, 2019. At the restitution hearing, the State elicited witness testimony from the victim indicating she lost wages in the amount of \$1,615.00 while attending court for the prosecution of the criminal offenses. The trial court concluded that because Revised Code Section 2929.18(A)(1) directs trial courts to base restitution orders on the economic losses suffered by the victim as a direct and proximate result of the commission of the offense, it was appropriate for the trial court to order that Defendant pay the victim restitution in the amount of \$1,615.00 to compensate her for the lost wages she incurred while attending court for the case. *See* October 1, 2019, Judgment Entry of the Trial Court.

Defendant appealed the restitution order to the Seventh District Court of Appeals. The Seventh District reversed the trial court by striking the order of restitution from the trial court's sentencing order. In doing so, the Seventh District relied on the victim's lack of party status in the case to suggest that her participation in the prosecution was purely voluntary, and, therefore, an expense she alone caused. The Seventh District also improperly relied on an overly narrow and incorrect interpretation of Revised Code Section 2929.01(L) to limit the victim's right to "full and timely restitution" even though Marsy's Law supersedes the statute to the extent they conflict. Ohio Constitution, Article I, Section 10a(E). The Seventh District distinguished between the costs victims of criminal offenses incur during the commission of the criminal

offense, i.e. physical injuries from, for example, a criminal assault, and the costs victims of criminal offenses incur while the criminal conduct is being addressed by the criminal justice system through the prosecution of the criminal offense, i.e. lost wages incurred because the victim was attending court proceedings related to the prosecution of the criminal offense. The Seventh District concluded that while the first is directly and proximately caused by the commission of the criminal offense, the prosecution of the offense is somehow so far removed from the offense itself that it is no longer directly and proximately related to the defendant's commission of the criminal offense(s). Ultimately, the Seventh District held that the costs a victim incurs related to active participation in the court proceedings for the prosecution of the criminal offense committed against him/her are not compensable as restitution.

The State of Ohio timely filed a notice of appeal to this Honorable Court on November 12, 2020. The appeal was accepted by this Honorable Court on February 2, 2021.

ARGUMENT

PROPOSITION OF LAW NO. 1

VICTIMS ARE CONSTITUTIONALLY ENTITLED TO FULL AND TIMELY RESTITUTION, INCLUDING RESTITUTION FOR LOSSES VICTIMS INCUR THROUGHOUT THE PROSECUTION OF THE CRIMINAL OFFENSE.

Appellee continues to maintain that judicial determinations regarding restitution are limited to the statutory framework set forth in ORC Section 2929.18(A). Appellee argues that Marsy's law did not change the definition of restitution nor create a new right to restitution. However, Marsy's law did create an enforceable constitutional right to full and timely restitution. Ohio Constitution, Article 10a(A)(7).

Appellee also erroneously concludes that this Court's recent decision in *City of Centerville v. Knab*, Slip Opinion No. 2020-Ohio-5219, approved and upheld ORC 2929.18 as

the mechanism for ordering restitution thereby limiting restitution to the statutory definition. Actually, *Knab* dealt with whether a municipality is a “victim”. In its analysis, this Court looked to the plain meaning of the language used in the Amendment as well as the intent of the voters. This Court also noted that the express purpose of Marsy’s Law is to secure justice and due process for victims and provide rights to victims that must be protected with the same vigor as an accused’s rights. Article I, Section 10a(A), Ohio Constitution. *Knab*, supra.

Applying this same analysis, the definition of economic loss should not be narrowly limited or defined by the statutory framework. Instead, courts should be guided by the intent of the voters in enacting Marsy’s law as reflected in the purpose of same.

PROPOSITION OF LAW NO. 2

VICTIMS MUST BE ENTITLED TO RESTITUTION FOR LOSSES INCURRED THROUGHOUT THE PROSECUTION OF THE CRIMINAL OFFENSE IN ORDER TO PROTECT VICTIMS’ CONSTITUTIONAL RIGHTS TO BE PRESENT THROUGHOUT THE CRIMINAL JUSTICE PROCESS AND HEARD WHEN THEIR RIGHTS ARE IMPLICATED.

Appellee Yerkey argues that Marsy’s Law does not expand the rights of a victim and urges this Court to limit victims’ rights to those set forth in ORC Chapter 2930. However, Marsy’s Law was enacted with the specific purpose of expanding the rights of victims. Ohio Constitution Article I, Section 10a. These constitutional rights extend beyond the statutory provisions in Chapter 2930. “The movement seeks to give crime victims constitutional rights that are equal to the rights of individuals accused of committing crimes.” *City of Centerville v. Knab*, Slip Opinion No. 2020-Ohio-5219, para 12. Further, the language of the Marsy’s Law initiative informed voters that the “proposed amendment would expand the rights of victims and require that those rights be protected as vigorously as the rights of the accused.” *Id.*, para 15.

The constitutional amendment guarantees enforceable rights to victims which includes the right to full and timely restitution. Ohio Constitution, Article 10a(A)(7).

Appellee's arguments disregard Marsy's Law as a self-executing constitutional amendment and suggest that courts should look solely to the statutory framework for restitution. This reasoning gives no effect at all to Marsy's Law.

Appellee also argues that permitting the recovery of lost wages for attending court appearances will open a floodgate of litigation. The State respectfully suggests that it is Appellee who is employing scare tactics to encourage this court to limit restitution to less than the full and timely restitution guaranteed by Marsy's Law.

Victims are thrust into the criminal process as a direct and proximate result of the defendant's conduct. Because crime victims are involuntarily forced into the criminal justice system by the criminal conduct of another, Ohio courts must vehemently protect these persons from additional victimization throughout the criminal justice system. Ohio's voters and General Assembly have sought to ensure this protection by passing both Marsy's Law and statutory protections that specifically protect victims' rights, including the constitutional right to full and timely restitution. The expenses that victims incur in exercising their constitutional right to be present at all proceedings and to be heard are not consequential expenses and are not voluntarily incurred. Rather, the expenses are incurred solely because of the defendant's criminal conduct. The Fourth Appellate District recognized the nexus between the criminal offense and the loss of wages for attending court proceedings even prior to the enactment of Marsy's Law. *State v. Shiflett*, 2015-Ohio-4250 (4th Dist., 2015). See also *State v. Madrid*, 207 Ariz 296 (App. 2004).

Appellee's arguments completely disregard the enforceable constitutional rights guaranteed to victims through Marsy's law.

REPLY TO OHIO PUBLIC DEFENDER AMICUS CURIAE:

BECAUSE MARSY’S LAW DID NOT CHANGE THE DEFINITION OF “RESTITUTION” DEFENDANTS IN CRIMINAL TRIALS MAY NOT BE REQUIRED TO PAY THE LOST WAGES OF ACCUSERS WHO ATTEND COURT-PROCEEDINGS.

The amicus brief filed by the Ohio Public Defender’s Office argued that Marsy’s Law does not redefine “restitution” such that now allowing lost wages as part of restitution is, in effect, a trial tax. This argument is without merit. The Ohio Public Defender looks solely to ORC Section 2929.18(A)(1) for the definition of restitution. The State asserts that ORC Section 2929.18(A)(1) is the statutory provision that grants trial courts discretion to impose restitution as part of a criminal defendant’s sentence. The provision further provides that if the court imposes restitution, the amount can be based on “an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of * * * 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”. ORC Section 2929.18(A)(1).

A victim’s lost wages as a result of attending court proceedings during the prosecution of the criminal offense are a direct and proximate result of the commission of the offense and therefore are compensable as restitution. See, *Shiflett*, supra, and *Madrid*, supra. The constitutional right to full and timely restitution guaranteed by Marsy’s Law does not need to redefine restitution. Under both the statutory definition and more expansive Marsy’s law provisions, restitution is designed to compensate a crime victim for any economic detriment suffered as a direct and proximate result of the commission of a criminal offense.

Restitution is a permissible financial sanction that can be imposed by a sentencing court under ORC Section 2929.18(A) and Marsy's Law creates a constitutional right to full and timely restitution for victims of crime. A restitution order may be imposed regardless of whether a defendant elects to go to trial or simply pleads to his offense. No additional penalty results should a defendant exercise his/her constitutional rights to trial.

The Ohio Public Defender argues that including lost wages as part of a restitution order would constitute a "trial tax" upon defendants forcing defendants to forego their constitutional right to trial and/or pretrial procedures because of fear of an increased financial sanction. However, the term "trial tax" is used in situations when it appears that a defendant is punished with a longer sentence of incarceration in retaliation for the defendant choosing to go to trial. See *State v. Rahab*, 150 Ohio St.3d 152 (2017). See also *State v. O'Dell*, 45 Ohio St.3d 140 (1989); *State v. Tellington*, 2011-Ohio-3405 (7th Dist., 2011); and *State v. Mayles*, 2005-Ohio-1346 (7th, Dist., 2005). It is undisputed that such a sentence is unconstitutional. *Id.*

However, the imposition of a restitution order that includes compensation for wages lost as a result of actively participating in court proceedings does not and would not constitute a "trial tax". A restitution order would not be imposed as part of a sentence solely because the defendant elected to go to trial. "Payment of court-ordered restitution is an obligation " " " rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for the purpose." " " *State v. Pettis*, 133 Ohio App.3d at 621 as cited in *State v Aguirre*, 144 Ohio St.3d 179 (2014). The State notes that the *Aguirre* case addressed the issue of eligibility for the sealing of the record when court-ordered restitution had not been paid.

The State further argues that the statutory definition of restitution does not specifically exclude lost wages for attendance at court proceedings. The statute defining “economic loss” plainly permits restitution for any economic detriment suffered by a victim. ORC Section 2929.01(L). The listed items that follow the definition are illustrative examples and not an exhaustive list. See generally *In Re Z.N.*, 11th Dist. No. 2014-L-030, 2015-Ohio-1213. Accordingly, there is no need for Marsy’s Law to redefine restitution. Marsy’s Law constitutionally guarantees victims the right to full and timely restitution. Ohio Constitution, Article I, Section 10a(A)(7). Lost wages for attending court proceedings are an economic detriment that directly and proximately results from the defendant’s commission of the crime. But for the criminal conduct, a victim would not be entwined with the criminal justice system. So, under both the statutory provisions and the constitutional rights created by Marsy’s Law, a restitution order that includes lost wages could be ordered. So, there would be no additional penalty, or trial tax, as the Ohio Public Defender argues.

CONCLUSION

Marsy's Law provides crime victims constitutional rights that are equal to the rights of individuals accused of committing crimes. The enforceable constitutional rights guaranteed to crime victims include the right to full and timely restitution and the right to be present at and participate in the criminal proceedings. These constitutional rights expand upon the statutory rights set forth in ORC Chapter 2930. Further, the right to full and timely restitution includes compensation for wages lost while attending court proceedings. Allowing recovery of this economic loss sustained as a direct and proximate result of the offender's criminal conduct gives meaning and effect to Marsy's law and ensures equal access to justice to all victims and protects their constitutional rights.

Because the Seventh District Court of Appeals decision improperly limits the constitutional rights of victims guaranteed under Marsy's law, including the right to full and timely restitution, it must be reversed.

Respectfully submitted,

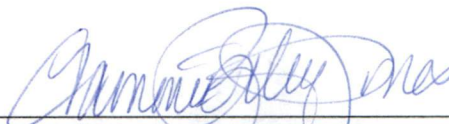
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CERTIFICATE OF SERVICE

A copy of the foregoing Reply Brief of Appellant State of Ohio was served upon Attorneys Greg Rossi and James Melfi, counsel for appellee John Yerkey, 26 Market Street, 8th Floor, P.O. Box 6045, Youngstown, Ohio 44501, garossi@ameritech.net; and upon Attorney Christopher Woeste and Diva Edel, Counsel for Amici Curiae National Crime Victim Law Institute, et al., at 3976 North Hampton Drive, Powell, Ohio 43056, cwoeste@ocvjc.org; and Attorney Steven L. Taylor, Attorney for Amici Curiae Ohio Prosecuting Attorneys Association, 196 East State Street, Suite 200, Columbus, Ohio 43215, taylor@ohiopa.org; and Attorney Craig M. Jaquith, Attorney for Amici Curiae Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, craig.jaquith@opd.ohio.gov by ordinary U.S. mail and email transmission this 27 day of May, 2021.



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