

IN THE SUPREME COURT OF IOWA

---

STATE OF IOWA, )  
 )  
 Plaintiff-Appellee, )  
 )  
 v. ) S.CT. NO. 16-1665  
 )  
 DARRYL B. SHEARS, )  
 )  
 Defendant-Appellant. )

---

APPEAL FROM THE IOWA DISTRICT COURT  
FOR SCOTT COUNTY  
HONORABLE HENRY W. LATHAM, II,  
HONORABLE MARLITA A. GREVE, AND  
HONORABLE MARK D. CLEVE, JUDGES

---

APPELLANT'S BRIEF AND ARGUMENT

---

MARK C. SMITH  
State Appellate Defender

SHELLIE L. KNIPFER  
Assistant Appellate Defender  
[sknipfer@spd.state.ia.us](mailto:sknipfer@spd.state.ia.us)  
[appellatedefender@spd.state.ia.us](mailto:appellatedefender@spd.state.ia.us)

STATE APPELLATE DEFENDER'S OFFICE  
Fourth Floor Lucas Building  
Des Moines, Iowa 50319  
(515) 281-8841 / (515) 281-7281 FAX

ATTORNEYS FOR DEFENDANT-APPELLANT

## CERTIFICATE OF SERVICE

On the 15<sup>th</sup> day of September, 2017, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Darryl Shears, No. 6718945, Correctional Treatment Unit, 2000 N 16<sup>th</sup> St., Clarinda, IA 51632-1174.

APPELLATE DEFENDER'S OFFICE



**SHELLIE L. KNIPFER**

Assistant Appellate Defender

Appellate Defender Office

Lucas Bldg., 4<sup>th</sup> Floor

321 E. 12<sup>th</sup> Street

Des Moines, IA 50319

(515) 281-8841

[sknipfer@spd.state.ia.us](mailto:sknipfer@spd.state.ia.us)

[appellatedefender@spd.state.ia.us](mailto:appellatedefender@spd.state.ia.us)

SLK/sm/6/17

SLK/lr/9/17

## TABLE OF CONTENTS

	<u>Page</u>
Certificate of Service .....	2
Table of Authorities.....	4
Statement of the Issue Presented for Review .....	5
Routing Statement.....	6
Statement of the Case.....	6
Argument	
Division I .....	10
Conclusion.....	16
Request for Nonoral Argument.....	16
Attorney's Cost Certificate.....	16
Certificate of Compliance .....	17

## TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page:</u>
Dubois v. People, 211 P.3d 41 (Colo. 2009) .....	14
State v. Bonstetter, 637 N.W.2d 161 (Iowa 2001) .....	11-13, 15
State v. Haase, 716 N.W.2d 526 (Wis.App. 2006) .....	13, 14
State v. Hagen, 840 N.W.2d 140 (Iowa 2013).....	13
State v. Klawonn, 688 N.W.2d 271 (Iowa 2004) .....	11
State v. Mai, 572 N.W.2d 168 (Iowa Ct.App.1997) .....	11
State v. Paxton, 674 N.W.2d 106 (Iowa 2004).....	11
State v. Storlie, 647 N.W.2d 926 (Wis.App. 2002).....	14
State v. Thomas, 520 N.W.2d 311 (Iowa Ct.App.1994)....	11
State v. Watts, 587 N.W.2d 750 (Iowa 1998).....	11
<u>Statutes:</u>	
Iowa Code § 910.1(3) (2015) .....	13
Iowa Code § 910.1(5) (2015) .....	13
Iowa Code § 910.2 (2015) .....	12

## **STATEMENT OF THE ISSUE PRESENTED FOR REVIEW**

### **I. WHETHER THE DISTRICT COURT SHOULD NOT HAVE ORDERED RESTITUTION FOR DAMAGE TO DAVEPORT POLICE DEPARTMENT VEHICLES WHERE THE DAMAGE WAS INCURRED IN THE NORMAL COURSE OF LAW ENFORCEMENT, AND NOT INCURRED AS A RESULT OF SHEARS'S CRIMINAL ACTIVITY?**

#### **Authorities**

State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct.App.1994)

State v. Mai, 572 N.W.2d 168, 171 (Iowa Ct.App.1997)

State v. Klawonn, 688 N.W.2d 271, 274 (Iowa 2004)

State v. Paxton, 674 N.W.2d 106, 108 (Iowa 2004)

State v. Bonstetter, 637 N.W.2d 161, 165 (Iowa 2001)

State v. Watts, 587 N.W.2d 750, 752 (Iowa 1998)

Iowa Code § 910.2 (2015)

Iowa Code § 910.1(5)

Iowa Code § 910.1(3)

State v. Hagen, 840 N.W.2d 140, 147 (Iowa 2013)

State v. Haase, 716 N.W.2d 526, 530 (Wis.App. 2006)

State v. Storlie, 647 N.W.2d 926, 929 (Wis.App. 2002)

Dubois v. People, 211 P.3d 41 (Colo. 2009)

## **ROUTING STATEMENT**

This case should be retained by the Iowa Supreme Court because the issue raised involves a substantial issue of first impression in Iowa. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c). The question is whether a person convicted of eluding is liable for damages to law enforcement vehicles incurred during the pursuit by law enforcement and in the course of their normal law enforcement duties.

## **STATEMENT OF THE CASE**

**Nature of the Case:** This is an appeal by the Defendant-Appellant, Darryl Shears, from the judgment and sentence following appellant's plea of guilty to the offenses criminal mischief in the second degree in violation of Iowa Code sections 716.1 and 716.4 (2015) (Count I) and eluding in violation of Iowa Code section 321.279(2) (2015) (Count III). The Honorable Henry W. Latham, II, presided at the plea proceeding, the Honorable Marlita A. Greve presided over the motions hearing, and the Honorable Mark D. Cleve presided over sentencing in Scott County District Court.

**Course of Proceedings in the District Court:** On

January 20, 2016, Darryl Shears was charged by trial information with criminal mischief in the second degree in violation of Iowa Code sections 716.1 and 716.4 (2015) (Count I), possession of controlled substance, second offense, in violation of 124.401(5) (2015) (Count II), and eluding while participating in a public offense in violation of 321.279(3)(a) or (b) (2015). (Trial Information, 1/20/16)(App. pp. 4-8). A restitution claim for damage to the law enforcement vehicles was filed February 11<sup>th</sup>. (Restitution Claim, 2/11/16)(Conf. App. pp. 4-10). The district court later allowed the State to amend the trial information to name the controlled substance determined by DCI laboratory tests. (Application to Amend Trial Information, 3/24/16, Amended Trial Information, 3/24/17, Minutes of Testimony, 3/24/16)(App. pp. 9-14).

On April 8, 2016, Shears entered a plea of guilty to criminal mischief in the second degree in violation of Iowa Code section 716.4(1) and lesser include eluding in violation of Iowa Code section 321.279(2). (Memorandum of Plea Agreement,

4/8/16; Order Accepting the Plea, 4/8/16)(App. pp. 15-19). A motion in arrest of judgment was timely filed on May 4<sup>th</sup> arguing that the plea court failed to inform him of the restitution consequences of his guilty plea. (Motion in Arrest of Judgment, 5/4/16)(App. pp. 20-21). At the motions hearing Shears argued the factual basis of the amount of damages was not correct because there had been no determination of the amount of damages. (5/19/16 tr. p.4 L.3-p.5 L.11). The motion was denied. (5/19/16 tr. p.22 L.7-p.24 L.3).

On July 26, 2016, Shears appeared in open court, with counsel, and was adjudged guilty of criminal mischief in the second degree in violation of Iowa Code section 716.4. The district court sentenced Shears to an indeterminate term of five years and imposed a fine of \$750, which was suspended. (Sentencing Order, p.1, 7/26/16)(App. pp. 22-24). Shears was also adjudged guilty of the lesser included charge of eluding as an aggravated misdemeanor in violation of Iowa Code section 321.279(2). The district court sentenced Shears to an indeterminate term of two years and imposed a \$615 fine, which



was suspended. (Sentencing Order, p.1)(App. p. 22). The court directed a victim restitution hearing to be held within 30 days. (Sentencing Order, p.1)(App. p. 22).

On August 24<sup>th</sup>, a restitution hearing was held. The district court found that Shears had to reimburse the State for the damages to the patrol vehicles in the amount of \$7,093.83. (Order on Restitution, 9/16/16)(App. pp. 25-26).

Shears executed a notice of appeal September 21<sup>st</sup>. (Notice of Appeal, p.5, 9/28/16)(App. p. 31). The notice was actually filed September 28<sup>th</sup>. (Notice of Appeal, p.1, 9/28/16)(App. p. 27). The Supreme Court granted a delayed appeal. (Order, 2/1/17)(App. pp. 32-34).

**Facts:** At the plea proceedings Shears admitted to failing to stop when signaled to do so by a uniformed officer in a marked patrol car. (Plea tr. p.14 L.13-23). The officer signaled Shears to stop by using his flashing lights and sirens. (Plea tr. p.15 L.2-18). Shears also stated that he was going over 25 miles per hour. (Plea tr. p.14 L.13-17). These events were alleged to have occurred December 12, 2015. (Trial

Information, 1/20/16)(App. pp. 4-8).

During the chase Shears intentionally ran over a fence to avoid an officer who had pulled out his weapon. (Plea tr. p.11 L.12-p.12 L.4). Shears agreed that the damage to the fence was more than \$1000 but less than \$10,000. (Plea tr. p.12 L.5-7).

The city of Davenport filed a restitution claim totaling \$7,093.88 for damages to three of its police vehicles. (Restitution Claim, 2/11/2016)(Conf. App. pp. 4-10).

Any other facts relevant to the issue will be discussed below.

## **ARGUMENT**

**I. THE DISTRICT COURT SHOULD NOT HAVE ORDERED RESTITUTION FOR DAMAGE TO DAVEPORT POLICE DEPARTMENT VEHICLES WHERE THE DAMAGE WAS INCURRED IN THE NORMAL COURSE OF LAW ENFORCEMENT, AND NOT INCURRED AS A RESULT OF SHEARS'S CRIMINAL ACTIVITY.**

**Preservation of Error:** Error was preserved by Shears' challenge to the restitution order. (Motion in Arrest of Judgment, 5/4/16; 8/24/16 tr. p.11 L.8-13)(App. pp. 20-21).

Preservation of error rules are relaxed in appeals from sentencing orders. State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct.App.1994). No objection may be necessary to preserve the issue of sentencing irregularity with regard to restitution for appeal. State v. Mai, 572 N.W.2d 168, 171 (Iowa Ct.App.1997).

**Scope of Review:** Decisions regarding restitution are reviewed for errors of law and are only reversed for abuse of discretion. State v. Klawonn, 688 N.W.2d 271, 274 (Iowa 2004). This court is bound by the district court's findings of fact so long as they are supported by substantial evidence. State v. Paxton, 674 N.W.2d 106, 108 (Iowa 2004). Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. State v. Bonstetter, 637 N.W.2d 161, 165 (Iowa 2001). The district court is afforded broad discretion to determine the amount of damages flowing from the criminal acts found to have been committed and may set the amount of restitution where the record contains proof of a reasonable basis from which the amount may be inferred. State v. Watts, 587 N.W.2d 750, 752 (Iowa 1998).

**Merits:** The issue here is whether a defendant is obligated to pay restitution for property damage that occurs as a normal part of police business. Three Davenport Police vehicles incurred bumper damage when the officers attempted to stop Shears. Shears challenges the district court's order that he pay restitution to the Davenport Police Department for damages to its vehicles because he did not cause the damages. Instead, the damage was caused by the actions of the officers trying to stop him. The criminal activity of eluding did not per se cause the damages. Therefore, the district court's order that Shears pay \$7,093.83 in restitution for the law enforcement vehicles should be vacated. (Order on Restitution, 9/16/16)(App. pp. 25-26).

The authority to order restitution is created by statute. Bonstetter, 637 N.W.2d at 166; see Iowa Code § 910.2 (2015). In all criminal cases where a defendant pleads or is found guilty, the sentencing court "shall order that restitution be made by each *offender to the victims of the offender's criminal activities.*" Iowa Code § 910.2 (emphasis added). A "victim" is defined as

“a person who has suffered pecuniary damages as a result of the offender’s criminal activities.” Iowa Code § 910.1(5).

“Pecuniary damages” are defined as “all damages to the extent not by an insurer, which a victim could recover against the offender in a civil action arising out of the same facts or event.”

Iowa Code § 910.1(3). The State must show there is a causal relationship between the damages incurred by the victim “and the conduct for which the defendant is ultimately convicted.”

State v. Hagen, 840 N.W.2d 140, 147 (Iowa 2013); State v.

Bonstetter, 637 N.W. 2d at 165 (“As a general rule, restitution depends on the existence of a crime for which the offender is convicted.”).

Shears pled guilty to eluding. The act of eluding itself did not cause the damage to the law enforcement vehicles.

Instead, it was the actions of the Davenport police, in the normal course of their law enforcement duties that caused the damage to the vehicles. See State v. Haase, 716 N.W.2d 526, 530 (Wis.App. 2006) (county was not direct victim of defendant’s criminal conduct within meaning of restitution statute). In

Haase the government sought to recover the loss of a law enforcement vehicle that burst into flames after chasing defendant who was attempting to elude officers. Id. at 528. The court reasoned that the eluding did not cause harm to the property of the county sheriff's department. Id. at 530. "He did not vandalize public property, he eluded an officer." Id. Thus, the court found the county was not a victim of the defendant's conduct. Id.

Further, in State v. Storlie, the Wisconsin court held that the police department was not entitled to damages for stop sticks used in the normal course of law enforcement. 647 N.W.2d 926, 929 (Wis.App. 2002); but see Dubois v. People, 211 P.3d 41 (Colo. 2009) (In upholding the restitution order to county for the loss of vehicle, the Colorado Supreme Court cautioned such orders are not limitless in reach. Victims "aggrieved by the conduct of the offender" was not intended to include ordinary expenses of law enforcement. But the court found eluding was unique because it included as an element a "victim" police officer). The court stated "the expense incurred

was not so much a direct result of the offense itself as much as it was the result of the offense itself as much as it was the result of the officers' successful attempt at apprehension." Id.

This court should adopt the approach by Wisconsin. One purpose of restitution is to compensate victims for a defendant's criminal activity. Bonstetter, 637 N.W.2d at 166. Eluding *per se* does not have a victim compared to criminal mischief where damages are an element of the offense or sexual abuse where the defendant's act directly harmed the victim. Shears's criminal conduct was not causing damage to the police vehicles. The damages were being caused by the officers in carrying out their attempts to stop him. Damages cause by officers during the course of their official duties should not be assessed against defendants. Just consider where would draw the line of causation? Would defendants be liable for the gas consumed? Or the paper and ink used to write the report? Drawing the line at damages *caused by* the defendant draws a clear line. Damaged incurred by law enforcement in carrying out the duties should not be assessed to a defendant.

## **CONCLUSION**

For the reasons stated above, the defendant respectfully requests this court to vacate the restitution order.

## **NONORAL SUBMISSION**

Counsel requests not to be heard in oral argument.

## **ATTORNEY'S COST CERTIFICATE**

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$ 1.80, and that amount has been paid in full by the Office of the Appellate Defender.

MARK C. SMITH  
State Appellate Defender

SHELLIE L. KNIPFER  
Assistant Appellate Defender



**CERTIFICATE OF COMPLIANCE WITH TYPEFACE  
REQUIREMENTS AND TYPE-VOLUME  
LIMITATION FOR BRIEFS**

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

[X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 1,797 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

  
SHELLIE L. KNIPFER

Assistant Appellate Defender  
Appellate Defender Office  
Lucas Bldg., 4<sup>th</sup> Floor  
321 E. 12<sup>th</sup> Street  
Des Moines, IA 50319  
(515) 281-8841  
[sknipfer@spd.state.ia.us](mailto:sknipfer@spd.state.ia.us)  
[appellatedefender@spd.state.ia.us](mailto:appellatedefender@spd.state.ia.us)

Dated: 9/13/17