

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 APPLICATION FOR FURTHER REVIEW
OF THE DECISION OF THE IOWA COURT OF APPEALS
FILED DECEMBER 6, 2017

MARK C. SMITH
State Appellate Defender

SHELLIE L. KNIPFER
Assistant Appellate Defender
sknipfer@spd.state.ia.us
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 December 11, 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, Davenport Work Release Center, 605 Main St., Davenport, IA 52803.

APPELLATE DEFENDER'S OFFICE



SHELLIE L. KNIPFER

Assistant Appellate Defender

Appellate Defender Office

Lucas Bldg., 4th Floor

321 E. 12th Street

Des Moines, IA 50319

(515) 281-8841

sknipfer@spd.state.ia.us

appellatedefender@spd.state.ia.us

SLK/sm/6/17

SLK/lr/9/17

SLK/sm/12/17

QUESTION PRESENTED FOR REVIEW

I. WHETHER RESTITUTION SHOULD NOT HAVE BEEN ORDERED FOR DAMAGES THAT WERE NOT INCURRED AS A RESULT OF SHEARS' CRIMINAL ELUDING OFFENSE, BUT WERE INCURRED IN THE NORMAL COURSE OF LAW ENFORCEMENT?

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STATEMENT IN SUPPORT OF FURTHER REVIEW

This court should grant further review in this matter for the following reasons:

(1) The court of appeals has entered a decision in conflict with a decision of this court or the court of appeals on an important matter. In order to be liable for the damages to the law enforcement vehicles, by them ramming Shears' van in a PIT maneuver, the State must show that the damages were the result of defendant's criminal activity. Iowa Code section 910.1. However, under the scope of liability standard, the State cannot show their decision to deploy their law enforcement vehicles to crash into a fleeing van was within the "scope of liability" for Shears' conduct. The damage to the law enforcement vehicles resulting from the PIT maneuvers was outside the scope of risk taken by Shears when he ignored the law enforcement lights and sirens. Therefore, the court of appeals decision is contrary to Thompson v. Kaczinski, 774 N.W.2d 829, 836-39 (Iowa 2009)(adopting "scope of liability" analysis) and In re J.S., No. 13-0174, 2013 WL 5291959 (Iowa

Ct. App. Sept. 18, 2013) (officer's torn hamstring was not within the scope of liability of a juvenile's act of running from officer after being told to stop).

(2) The court of appeals has decided a an important question of law that has not been, but should be, settled by the supreme court. The question is whether a defendant can be liable for damages that are not the result of his criminal activities, which is contrary to Iowa Code section 910.1. Pecuniary damages are to be paid to the victim of a criminal act. Iowa Code § 910.1. Law enforcement is not a victim because it did not suffer damages as a result of the defendant's criminal actions, but due to its own actions in attempting to stop the offender.

(3) The case presents an issue of broad public importance that the supreme court should ultimately determine. Defendants are incurring draconian debts through the courts. While they should pay restitution to their actual victims, they should not be liable for actions taken by law enforcement that cause damages to law enforcement property.

See Iowa R. App. P. 6.1103(b)(1), (2), and (4).

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.

ARGUMENT

I. RESTITUTION SHOULD NOT HAVE BEEN ORDERED FOR DAMAGES THAT WERE NOT INCURRED AS A RESULT OF SHEARS' CRIMINAL ELUDING OFFENSE, BUT WERE INCURRED IN THE NORMAL COURSE OF LAW ENFORCEMENT.

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 and not as a result of defendant's actions. 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. State v. Bonstetter, 637 N.W.2d 161, 166 (Iowa 2001); 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). "The words 'as a result of' in the definition of 'victim' clearly connote causation" State v.

Starkey, 437 N.W.2d 573, 574 (Iowa 1989). “Criminal activities” is defined as any crime for which there is a plea of guilty or a verdict of guilty, or is admitted by the offender, whether or not prosecuted. Id. § 910.1(1). “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. Law enforcement was not the victim of Shears’ eluding offense. 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). Shears was not charged with criminal mischief for damaging the law enforcement vehicles. As noted by the dissent, this was probably because the State knew it could not prove Shears intentionally damaged the vehicles. See Iowa Code § 716.1 (2015). It was the law enforcement that rammed three different vehicles into Shears' van, thereby incurring \$7093.88 in damages. "[A] restitution order must rest on 'a causal connection between the established criminal act and the injuries to the victim.'" State v. Ihde, 532 N.W.2d 827, 829 (Iowa 1995). Shears' eluding itself did not cause the damages. The actions by law enforcement caused the damages.

Victim restitution damages are analyzed the same as those recoverable in civil actions. Iowa Code § 910.1(3), (4) (2017); State v. Paxton, 674 N.W.2d 106, 108 (Iowa 2004). Issues of causation are determined by whether the damages were in the "scope of liability" of the offender's criminal acts instead of the proximate cause test. See Thompson v. Kaczinski, 774 N.W.2d

829, 836-39 (Iowa 2009) (adopting the Restatement (Third) of Torts concept of “scope of liability” in place of legal or proximate cause in civil cases). “ ‘An actor's liability is limited to those physical harms that result from the risks that made the actor's conduct tortious.’ ” Id. at 837 (citing Restatement (Third) § 29, at 575). “This principle, referred to as the ‘risk standard,’ is intended to prevent the unjustified imposition of liability by ‘confining liability's scope to the reasons for holding the actor liable in the first place.’ ” Id. (citing Restatement (Third) § 29 cmt. d, at 579–80).

The damages caused to the officers' vehicles were not within the scope of liability of Shears' act of eluding.

Wisconsin has found acts of eluding not to be the cause of damage to law enforcement vehicles. In State v. 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. Haase, 716 N.W.2d at 528. The Wisconsin appellate 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). 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’ 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 the courts 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 in the commission of the offense 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 grant further review and to vacate the restitution order.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was \$ 2.24, 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
FURTHER REVIEWS**

This application complies with the typeface and
type-volume requirements of Iowa R. App. P. 6.1103(4) because:

[X] this application has been prepared in a
proportionally spaced typeface using Bookman Old
Style, font 14 point and contains 1,634 words,
excluding the parts of the application exempted by
Iowa R. App. P. 6.1103(4)(a).


SHELLIE L. KNIPFER

Dated: 12/11/17

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

IN THE COURT OF APPEALS OF IOWA

No. 16-1665
Amended December 8, 2017

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DARRYL B. SHEARS,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Mary E. Howes,
Judge.

A defendant appeals an order requiring him to pay restitution. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Shellie L. Knipfer, Assistant
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, and Kelli A. Huser, Assistant Attorney
General, for appellee.

Considered by Tabor, P.J., McDonald, J., and Scott, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2017).

SCOTT, Senior Judge.

In this appeal of a restitution order, we are asked to resolve whether it is foreseeable that police officers would end a high-speed chase of the van driven by Darryl Shears by hitting his van with their police vehicles. Because we find such actions foreseeable, we affirm the restitution order.

On February 11, 2016, the City of Davenport filed a restitution claim for \$7093.88 for damages to the police vehicles sustained during the officers' efforts to stop the van Shears was driving. In April 2016, the State and Shears entered into a plea agreement, and Shears agreed to plead guilty to a lesser-included eluding charge and second-degree criminal mischief as charged.¹

At the April 8, 2016 plea hearing, Shears admitted to intentionally damaging other people's property in excess of \$1000 and failing to stop when signaled to do so by a uniformed officer in a marked patrol car using flashing lights and sirens while exceeding twenty-five miles per hour. The court deferred acceptance of the pleas pending receipt of a presentence investigation report and set sentencing for May 19, 2016. But before the hearing, Shears filed a motion in arrest of judgment on May 4, asking the court to set aside his pleas and claiming he was not aware "of the potential consequence [of] restitution for both counts." After the May hearing on his motion, the court found Shears had "buyer's remorse" and denied relief.

On July 26, 2016, the court sentenced Shears to five-year and two-year consecutive, indeterminate terms of incarceration. The court also required "a

¹ The State agreed to drop another charge, possession of controlled substances, second offense.

victim restitution hearing be held within the next [thirty] days.” At that August 24 hearing, Shears did not challenge the dollar amount of restitution, only whether he was responsible for paying it. The court’s September 16, 2016 restitution order required Shears to pay “\$7093.88 for damage to Davenport Police Squad Cars. The squad cars were damaged when the police were chasing [Shears] by car for his eluding and criminal mischief crimes, which he later” pled to and was sentenced on.

Shears filed a pro se notice of appeal on September 28, 2016. On February 1, 2017, the supreme court’s order noted Shears had timely appealed the September 16, 2016 restitution order and granted Shears a delayed appeal from the July 26, 2016 sentencing order, combining the appeals under the same docket number.

In this restitution proceeding, if we find no error of law, we are bound by the district court’s factual findings if they are supported by substantial evidence. See *State v. Bonstetter*, 637 N.W.2d 161, 165 (Iowa 2001). Restitution connotes “compensating the victim for loss,” and it “forces the offender to answer directly for the consequences of his or her actions.” *Id.* The rationale for a restitution order under Iowa criminal law “is similar to the rationale of tort under civil law.” *Id.* Iowa law requires restitution to be ordered in all criminal cases in which the defendant pleads guilty. See Iowa Code § 910.2 (2015).

“Any damages that are causally related to the criminal activities may be included in the restitution order.” *Bonstetter*, 637 N.W.2d at 168. Thus, in calculating the amount of restitution, the court “must find a causal connection between the established criminal act and the injuries to the victim” by a

preponderance of the evidence. *Id.*; *State v. Holmberg*, 449 N.W.2d 276, 377 (Iowa 1989) (noting the same restitution requirements).

On appeal and citing to cases from Wisconsin, Shears argues his “act of eluding itself did not cause the damage” to the police vehicles. “Instead, it was the actions of the Davenport police” “in carrying out their attempts to stop him” that caused the “damage to the police vehicles.” See *State v. Haase*, 716 N.W.2d 526, 527, 530 (Wisc. Ct. App. 2006) (denying restitution where officer drove squad car into field during pursuit, officer stopped car without incident to pursue defendant on foot, and officer’s car subsequently burst into flames); *State v. Storie*, 647 N.W.2d 926, 929 (Wisc. Ct. App. 2002) (denying restitution for the cost of destroyed “stop sticks” utilized to end high-speed chase because “stop sticks” were tool similar to police department’s cost of overtime and thus, a normal cost of law enforcement).

We find the Wisconsin cases Shears cites factually distinguishable and inapplicable. Utilizing the Iowa standard of proximate cause, we conclude the prosecution here has met its causation burden if substantial evidence shows the damage to the police vehicles was “a reasonable foreseeable consequence or within the range of harms” of Shears eluding the officers who were trying to stop him. See *State v. Tyler*, 873 N.W.2d 741, 749 (Iowa 2016) (holding that “[e]ven if ‘proximate cause’ or what we now call ‘scope of liability’ remains part of the State’s causation burden in a criminal case” there is substantial evidence “a group assault on [the victim] was a reasonably foreseeable consequence or within the range of harms of [defendant’s] initial act” of punching the victim in the head and knocking him down); see also *State v. Dillon*, 637 P.2d 602, 608 (Or. 1981) (allowing

restitution for damage to the sheriff's car that defendant hit with his own car because such damage "is an item of damages for which defendant could have been civilly liable under any recognized formulation of tort law").

Similarly, in this restitution challenge, we find the officers using their vehicles to hit the vehicle Shears was driving in an attempt to stop him "was a reasonably foreseeable consequence or within the range of harms" of Shears leading the officers in a high-speed chase and refusing to stop while being pursued. In sum, we find the State satisfied its burden of proving causation and affirm the restitution order. See *State v. Davis*, No. 15-1223, 2016 WL 6902325, at *1 (Iowa Ct. App. Nov. 23, 2016) (resolving restitution challenge and finding evidence supported "district court's conclusion the manner of [the defendant's] operation of the vehicle" "caused the damages" to the other driver's vehicle).

AFFIRMED.

Tabor, P.J., dissents; McDonald, J., concurs.

TABOR, Presiding Judge (dissenting)

I respectfully dissent. In this eluding case, the City of Davenport did not qualify as a “victim” under Iowa Code section 910.1(5) (2015) (defining victim as “a person who has suffered pecuniary damages as a result of the offender’s criminal activities”). The statutory term “person” is broad enough to include a government entity like the Davenport police department. *See State v. Hagen*, 840 N.W.2d 140, 147 (Iowa 2013). But the problem here is the police did not suffer pecuniary damages *as a result* of Shears’s criminal activities.

“The words ‘as a result of’ in the definition of ‘victim’ clearly connote causation.” *State v. Starkey*, 437 N.W.2d 573, 574 (Iowa 1989) (citation omitted). The restitution chapter defines “criminal activities” as any crime for which there is a plea of guilty or a verdict of guilty, or is admitted by the offender, whether or not prosecuted. Iowa Code § 910.1(1). Pecuniary damages include “all damages to the extent not paid by an insurer, which a victim could recover against the offender in a civil action arising out of the same facts or event.” *Id.* § 910.1(3).

Shears pleaded guilty to felony eluding and criminal mischief in the second degree. The criminal mischief charge related to his collision with a chain link fence on private property at the end of the chase. The State did not charge Shears with criminal mischief related to impacts with the police squad cars, likely because it could not prove that Shears intentionally damaged the squad cars that, in fact, ran into him. *See id.* § 716.1; *State v. Chang*, 587 N.W.2d 459, 461 (Iowa 1998) (requiring State to prove defendant intended to cause damage).

Nevertheless, the police department’s restitution claim listed damages to three police cars incurred when the officers rammed the vehicle Shears was

driving. The claim listed the following repair amounts: \$574.91 for squad 134; \$4570.28 + \$61.50 (tow) for squad 311; and \$1887.19 for squad 360—for a total of \$7093.88. These repairs were necessitated by the officers' enforcement decisions while pursuing Shears and not by the criminal activities to which Shears pled guilty.

The minutes of evidence indicated Davenport police located Shears, "a wanted suspect," inside a residence on West Locust Street. As Shears left the residence in a minivan, officers "initiated a vehicle pursuit" and eventually a total of five squad cars joined the chase. According to police reports attached to the minutes, Shears was "currently on the pursuable list." At least two different officers performed or tried to perform PIT maneuvers² to impede the progress of the minivan. Officer Bobby Flaherty described his decision to place his squad car in harm's way:

Shears was slowing to an acceptable speed and turning south on Pine [Street]. Due to the reduced speed I was comfortable attempting a PIT maneuver in the corner. I made contact with Shears's van on the rear driver side with my squad car's front passenger side. The PIT maneuver worked and the van spun around 180 degrees. I exited my squad car and ordered Shears out of the vehicle at gunpoint. Shears made eye contact with me but refused to comply with my orders. Shears then drove back east through the alley he had just come from.

Nothing in the minutes or attached police reports suggests the damage to the squad cars was the "result of" Shears's criminal activity—willfully failing to bring

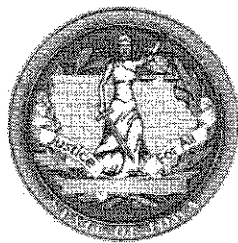
² A "Precision Intervention Technique" or PIT maneuver is a driving technique used by police officers that is designed to halt a fleeing motorist by hitting his or her car at a specific point to throw the car into a spin and brings it to a stop. See *Harris v. Coweta Cty*, 433 F.3d 807, 810 (11th Cir. 2005), *rev'd*, *Scott v. Harris*, 550 U.S. 372, 375 (2007).

the minivan to a stop when given a signal to do so by police. See Iowa Code § 321.279(3).

The majority purports to use “the Iowa standard of proximate cause” to hold that the State met its burden to show the squad car damage was “a reasonably foreseeable consequence” of the officers trying to stop Shears’s eluding. That holding contravenes our prior restitution case law on causation. “The damage must have been caused by *the offender’s criminal act* to justify the restitution order.” *State v. Ihde*, 532 N.W.2d 827, 829 (Iowa Ct. App. 1995) (emphasis added) (discussing similarity between tort element of proximate cause and causal connection necessary for restitution award).

The legal or proximate cause test is now analyzed as “scope of liability.” See *Thompson v. Kaczinski*, 774 N.W.2d 829, 836-39 (Iowa 2009) (adopting concept from Restatement (Third) of Torts: Physical & Emotional Harm (Am. Law Inst. 2010) [hereinafter Restatement Third]). The question is whether the police department’s decision to deploy its squad cars to crash into the fleeing vehicle was within the “scope of liability” for Shears’s conduct. See *In re J.S.*, No. 13-0174, 2013 WL 5291959, at *5 (Iowa Ct. App. Sept. 18, 2013) (holding officer’s torn hamstring was not within the scope of liability of a juvenile delinquent’s act of running from officer after being told to stop). Applying the “risk standard” from the Restatement (Third), I would find the damage to the squad cars resulting from the officers’ PIT maneuvers was outside the scope of the risk taken by Shears when he ignored the police lights and sirens. See Restatement (Third) § 34 cmt. g (“When the harm that occurs arises from a risk other than one that was among those that made the actor’s conduct tortious, the actor is not liable.”).

In this case, it was not Shears's own criminal activities, but the officers' intentional strategy to disrupt those activities that resulted in the damage. Law enforcement agencies generally are not compensated for the public money they spend in performing their basic functions of investigating and solving crimes. See *People v. Ford*, 49 N.E.3d 954, 959 (Ill. Ct. App. 2016). But an agency may receive restitution for its loss if, for example, "a person commits criminal damage to property by destroying a police department squad car." *Id.* (collecting cases, including *Dillon*, 637 P.2d at 608, cited by the majority). The difference between our instant facts and *Ford*, *Dillon* and the other collected cases is that Shears did not drive into the squad cars. They drove into him. The definition of a victim embraces a notion of "passivity, where the harm or loss suffered is generally unexpected and occurs without the voluntary participation of the person suffering the harm or loss." See *Igbinoia v. State*, 895 P.2d 1304, 1308 (1995) (holding police department which expended money in drug-buying operation to obtain evidence against defendant was not "victim" within meaning of statute). I would reverse the restitution order.



IOWA APPELLATE COURTS

State of Iowa Courts

Case Number
16-1665

Case Title
State v. Shears

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