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Gee v. State of Nevada, 140 Nev. Adv. Op. 16 (Mar. 21, 2024)

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AN ORDER OF RESTITUTION MUST BE BASED ON COMPETENT EVIDENCE AND
MUST BE OFFSET BY COMPENSATION VICTIMS RECEIVED FROM A DEFENDANT.

Summary

An award of restitution must be based on competent evidence. On an appeal from a judgment of conviction, the Nevada Supreme Court considered whether the district court abused its discretion in awarding a challenged restitution amount that was not supported by evidence. Given that the victim had already been compensated by the defendant's insurance, the Court further considered whether the district court was required to offset the restitution amount by the compensation already received by the victim. The Court held that in order to prevent double recovery by a victim, restitution awards must be offset by compensation victims receive through a defendant's insurer when the payments cover the same losses.

Background

This is an appeal from a judgment of conviction challenging the district court's award of restitution to Victims of Crime. Appellant Demetri Gee was driving while intoxicated when he lost control of his vehicle and collided with a car carrying driver Patricia Allen and passenger Alcie Allen. The Allens were severely injured, requiring surgery and resulting in several months of lost wages. Gee and the Allens entered into a civil settlement agreement in which the Allens received pecuniary compensation through Gee's insurance.

Subsequently, Gee and the State of Nevada executed a guilty plea agreement, which included the language that Gee agreed "to pay restitution as determined by Parole and Probation" and that Gee understood that, if appropriate, he will be ordered to make restitution to the victim of the offense. At Gee's sentencing hearing, the State requested restitution in the amount of \$9,940 to be paid to Victims of Crime to reimburse payments made to Mr. Allen for lost wages.

Gee challenged this restitution, indicating that he had not received supporting documentation for that amount and that he had already compensated the Allens through his insurer. Gee asserted that the Allens had received \$300,000 through the civil settlement, and that Gee's insurance paid for their medical costs. The district court instructed the State to provide documentation related to the challenged amount and ordered a status check on the issue.

Before the status check was held, and without notice to the parties, the district court entered a judgment of conviction ordering Gee to pay the challenged restitution amount to Victims of Crime. Gee appealed the judgment of conviction, challenging only the \$9,940 restitution award. On appeal, Gee argued that the district court erred in entering a judgment of conviction with an amount of restitution that was not based on competent evidence, and that the district court was required to offset restitution by the amount the Allens had already recovered from his insurance.

¹ By Alyson Smith.

Discussion

The district court abused its discretion by entering the judgment of conviction and awarding restitution that was not based on competent evidence

The first issue addressed by the Court was whether the district court abused its discretion by awarding \$9,940 in restitution that was not supported by competent evidence. On appeal, appellant Gee contended that the State failed to provide documentation to support the amount requested. Gee argued that he was prevented from effectively challenging the restitution award because the district court entered the judgment of conviction before the State provided evidence to support the challenged award. The Court agreed with Gee's argument.

"A sentencing judge has discretion when ordering restitution pursuant to NRS 176.033(3),² but must use reliable and accurate information in calculating a restitution award."³ "Under *Martinez v. State*, a defendant is entitled to challenge restitution and may obtain and present evidence to support that challenge."⁴ Following *Nied v. State*,⁵ the Court reiterated that an order of restitution must be based on competent evidence. Here, the only evidence to support the amount requested was the presentence investigation report and an email from the State. Under *Nied* and *Martinez*, the State needed to present further evidence to support the challenged amount.

The district court abused its discretion by failing to evaluate whether the award to Victims of Crime needed to be offset by the amount paid by Gee's insurance

The second issue considered by the Court was whether the district court abused its discretion by failing to evaluate whether the restitution award needed to be offset by the amount paid to the victims by Gee's insurance. On appeal, Gee argued that the district court was required to assess whether an offset was required. The Court agreed with Gee's argument.

Under *Nied*, a district court must offset a defendant's restitution obligation by the amount the defendant's insurer paid to the victim for losses subject to the restitution order.⁶ In *Nied*, the court concluded that the purpose of restitution is to make the victim whole without giving the victim a windfall or double recovery. In this matter, the Victims of Crime compensated Mr. Allen for his lost wages, then sought reimbursement for that compensation from Gee through restitution. However, when victims have recovered full economic compensation for their losses, Victims of Crime has statutory subrogation rights to seek reimbursement from the victims it has compensated.

It is undisputed that the Allens received money from Gee through a civil settlement, but it remained unclear what amounts within that settlement payment were awarded for what purposes. It was also unclear whether and what amount Victims of Crime issued to Mr. Allen for lost wages. Given that the district court entered the judgment of conviction before holding the status check on the issue, the Court was unable to determine whether the restitution award was proper. Because the status check hearing was not held, it is unclear whether Gee already compensated for Mr. Allen's lost wages through the civil settlement. The Court concluded that to avoid

² NEV. REV. STAT. § 176.033(3).

³ *Martinez v. State* 115 Nev. 9, 13, 974 P.2d 133, 135 (1999).

⁴ *Id.*

⁵ *Nied v. State* 138 Nev., Adv. Op. 30, 509 P.3d 36 (2022).

⁶ *Id.*

potential double recovery for the victim and duplicate payment by the defendant, restitution awards must be offset by compensation victims receive from a defendant, or a defendant's insurer, when both payments cover the same losses.

Conclusion

In vacating the \$9,940 award of restitution, the Nevada Supreme Court held that an order of restitution must be based on competent evidence and must be offset by compensation that victims receive from a defendant. The Court held that the district court abused its discretion by awarding an amount that was not based on competent evidence and by failing to evaluate whether the settlement from Gee's insurance and the award to Victims of Crime duplicated Mr. Allen's recovery. The Court remanded the judgment of conviction for the district court to determine what, if any, portion of the restitution awarded should be offset by the payment from Gee's insurance.