1-16-2014

State v. McNeil Appellant's Brief Dckt. 41165

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. LLOYD HARDIN MCNEIL, Defendant-Appellant.	NO. 41165 ADA COUNTY NO. CR 2011-6449 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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STATEMENT OF THE CASE

Nature of the Case

Lloyd Hardin McNeil appeals from the district court's Amended Order for Restitution and Judgment. On appeal, he asserts that the district court erred when it overruled his objections to restitution for counseling sessions attended by the father of the victim, which he had attended before her death, and for the cost of a plane ticket for the adult brother of the victim to attend her funeral in California.

Statement of the Facts and Course of Proceedings

Following a jury trial at which Mr. McNeil was convicted of voluntary manslaughter in the death of Natalie Davis, arson in the first degree, and grand theft,[1] the State requested restitution for seven different individuals or entities, including Ms. Davis' father, Ken Davis. (39881 R.,[2] pp.270-73.) Aside from raising an objection based on his inability to pay the total amount sought in light of the length of his sentence,[3] Mr. McNeil did not object to restitution to six of the seven individuals or entities, and only objected to that portion of the restitution requested on behalf of Ken Davis in the State's amended restitution request.[4]

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[1] The factual background of this case is set forth in greater detail in *State v. McNeil*, __ Idaho __ (Ct. App. Nov. 8, 2013), *petition for rev. filed.*

[2] The Idaho Supreme Court took judicial notice of the transcript and record prepared in an earlier appeal in this matter, and ordered the preparation of a limited clerk's record for this appeal. (R., p.2.) References to that record will be to "39881 R." References to the limited clerk's record prepared for this appeal will be to "R."

[3] Mr. McNeil does not pursue the denial of this basis for objection to the overall restitution on appeal.

[4] Of the $21,611.67 in restitution sought by the State in its Motion to Modify Restitution, Mr. McNeil only objected to the sum of $960.80. Reflecting Mr. McNeil's successful objections to its original request, the State reduced the amount it sought by over $7,000. (39881 R., pp.270-73, R., pp.28-29, Tr., p.13, Ls.18-24.)

Those amounts that Mr. McNeil challenged unsuccessfully were $300.80 for a plane ticket so that Ms. Davis' adult brother could attend her funeral in California and $660 for counseling sessions for Mr. Davis and his wife. (R., pp.22-23.) Pursuant to the State's Motion to Modify, the district court issued an Amended Order for Restitution and Judgment, reducing the total restitution amount to $21,611.67. (R., pp.32-33.)

Mr. McNeil filed a timely Notice of Appeal. (R., p.34.)

ISSUE

Did the district court err when it overruled Mr. McNeil's objections to $960.80 of the restitution award?

ARGUMENT

The District Court Erred When It Overruled Mr. McNeil's Objections To $960.80 Of The Restitution Award

A. Introduction

Mr. McNeil objected to a total of $960.80 of the more than $20,000 in restitution requested. He challenged the restitution for counseling sessions that began before Ms. Davis' death and for a plane ticket purchased on behalf of Ms. Davis' adult brother so he could attend her funeral in California. The objections to those two amounts were based on the fact that the counseling sessions were not attended as a direct result of Ms. Davis' death, as they were for a pre-existing condition, and that the plane ticket expense was not the direct result of the conduct underlying Mr. McNeil's voluntary manslaughter conviction. Mr. McNeil maintains that the district court erred when it assessed restitution for the two amounts that were not the direct result of the conduct for which he was convicted.

B. The District Court Erred When It Overruled Mr. McNeil's Objections To $960.80 Of The Restitution Award

Idaho Code § 19-5304(1)(a) provides:

> "Economic loss" includes, but is not limited to, the value of the property taken, destroyed broken, or otherwise harmed, lost wages, and *direct* out-of-pocket losses or expenses, such as medical expenses resulting from the criminal conduct, but does not include less tangible damages such as pain and suffering, wrongful death or emotional distress.

I.C. § 19-5304(1)(a) (emphasis added). "The restitution statute is not so broad . . . as to authorize compensation for *every* expenditure that a victim may personally deem reasonable or necessary as a response to a crime." *State v. Card*, 146 Idaho 111, 114 (Ct. App. 2008) (emphasis in original).

"Idaho Code Section 19-5304(6) provides that determination of economic loss is based upon the civil preponderance of evidence standard," and "the amount of the award must be supported by substantial evidence." *In re Doe*, 146 Idaho 277, 284 (Ct. App. 2008) (citations omitted). A trial "court's power to order restitution is limited to that provided by the statute." *State v. Straub*, 153 Idaho 882, 887 (2013).

In *Card*, the Court of Appeals considered whether a series of non-traditional health treatments following a minor car accident were subject to the restitution statute. In analyzing the issue, the Court of Appeals explained, "[I]t is evident that under the restitution statute, a crime must 'result' in an economic loss in order for restitution to be awarded," and that "where treatment expenses are sought, the State bears the initial burden to make a prima facie showing . . . that the expenses were reasonable and necessary to treat injuries caused by the defendant's criminal conduct." *Id.* at 114-15 (citing *In re Doe*).

In *Straub*, the Idaho Supreme Court considered the restitution statute as applied to the immediate family of a homicide victim. In addressing the plain language of the restitution statute, the Court noted, "Medical expenses are expressly included in the definition for economic loss in I.C. § 19-5304(1)(a) if they are *a direct result* of the criminal conduct." *Straub*, 153 Idaho at 890 (emphasis added). In reversing the award of restitution for medical insurance premiums paid to continue health insurance coverage for the immediate family of the victim following his death, the Court reasoned, "Although it is foreseeable that the death of the lone family breadwinner would leave the family without health insurance, foreseeability does not equal a 'direct' result." *Id.*

1. Counseling Sessions

Like the medical insurance premiums in *Straub*, the counseling sessions attended by Mr. Davis were not the direct result of the crime for which Mr. McNeil was convicted. Defense counsel below objected to restitution for therapy costs, explaining, "According to the doctor's invoice, Mr. and Mrs. Davis began psychotherapy February 19, 2011, for treatment of Post-traumatic Stress Disorder. However, Natalie Davis' murder [sic] did not occur until March 5, 2011." As such, the counseling was for "a pre-existing condition not associated with the death of Ms. Davis." (R., pp.22-23.)

Because Mr. Davis had already been attending the counseling sessions prior to Ms. Davis' death for treatment of a pre-existing condition, he should not be able to recover restitution for that counseling unless the State can establish that the crime for which Mr. McNeil was convicted aggravated the condition for which Mr. Davis was already being treated. *See Blaine v. Byers*, 91 Idaho 665, 674 (1967) ("The trial court by its instruction No. 16 correctly advised the jury that respondent was entitled to recover damages for disability resulting from the aggravation of a pre-existing condition, but was not entitled to recover for any disability which respondent may now be suffering which was not caused or contributed to by reason of the accident."); *see also* IDJI 9.02 (Aggravation of Pre-Existing Condition).

Mr. McNeil asserts that *continuing* mental health counseling for the father of a homicide victim when that counseling started prior to the victim's death cannot, without more,[5] be said to have been the "direct" result of the homicide. Even assuming that

[5] Had any evidence been presented that Ms. Davis' father was on the verge of completing a course of counseling when Ms. Davis was killed, causing a setback and necessitating additional sessions, this argument would not be well-taken. *See State v. Behnke*, 553 N.W.2d 265, 273 (Wis. Ct. App. 1996) (fact that sexual assault victim had previously completed mental health treatment due to earlier, unrelated sexual abuse did

some portion of the counseling sessions could be said, on the evidence in this record, to be the result of the aggravation of a preexisting condition, the district court did not delineate what portion is attributable to the crime for which Mr. McNeil was convicted.

In light of the foregoing, Mr. McNeil asserts that the district court erred when it overruled his objection to restitution totaling $660 for counseling sessions that began before Ms. Davis' death. In the alternative, should this Court find that restitution for the continuation of counseling sessions after Ms. Davis' death was appropriate under the statute, Mr. McNeil maintains that the district court erred when it ordered $660 in restitution because $60 of that restitution was for one of the two sessions that preceded Ms. Davis' death.[6] (R., p.22.)

2. Funeral Travel

Mr. McNeil also objected to the imposition of restitution "for the costs associated with flying Matthew Hess, Ms. Davis' brother, to California to attend Ms. Davis' memorial services." In so objecting, defense counsel argued, "This 'out-of-pocket' expense is not a direct loss Mr. Davis [who paid for the plane ticket] sustained as the result of Mr. McNeil's criminal behavior," and as such, the $300.80 awarded for the cost of the plane ticket purchased for Mr. Hess should not be awarded as restitution. (R., p.22.)

No Idaho case law appears to exist on the question of whether the expense of an immediate family member of a homicide victim traveling to a funeral for that family member is something for which restitution can be awarded. The statutes governing the

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not necessitate reduction of restitution award on grounds of mental health issue being a pre-existing condition because the victim "prove[d] that Behnke's actions were a substantial factor in producing the injury that required treatment" and she was not required "to prove that the actions were the sole factor").

[6] The district court has already disallowed restitution for one of the two sessions. (Tr., p.13, Ls.18-19.)

Crime Victims Compensation Act contain the following reference to funeral expenses and transportation costs, "Reasonable funeral and burial or cremation expenses of the victim, *together with actual expenses of transportation of the victim's body*, shall be paid in an amount not exceeding five thousand dollars . . . ." I.C. § 72-1019(4) (emphasis added).

Obviously, the Crime Victims Compensation Act is not the criminal restitution statute, but it provides insight into what the legislature, on the same subject, believes to be reasonably appropriate for a crime victim to receive for expenses related to a homicide. This intent is obvious from the Act's language, which includes the following, "[I]t is the legislature's intention to provide compensation for injuries suffered as a *direct result* of the criminal acts of other persons." I.C. § 72-1002 (emphasis added). The legislature used similar language in defining those economic losses for which criminal restitution is authorized, specifically noting that those expenses for which restitution may be ordered "include[], but [are] not limited to, the value of property taken, destroyed, broken, or otherwise harmed, lost wages, and *direct* out-of-pocket losses or expenses . . . ." I.C. § 19-5304(1)(a) (emphasis added).

The use of the term "direct" in both statutes in reference to reimbursable expenses incurred, along with the identical subject matter of the two statutory schemes, supports Mr. McNeil's argument that the ambiguity in the restitution statute regarding transportation costs for immediate family members of homicide victims should be no greater than is allowed under the Crime Victims Compensation Act's provision. Furthermore, when considering an ambiguous criminal statute, the rule of lenity requires interpreting the statute in favor of the criminal defendant. *See Hughey v. United States*, 495 U.S. 411, 422 (1990) (noting that the rule of lenity would apply to any ambiguities in

the federal criminal restitution statute). Finally, similar to the medical insurance premium issue in *Straub*, while it may foreseeable that an immediate family member would need to travel out-of-state in order to attend a homicide victim's funeral, such travel cannot be said to be the direct result of the homicide, as it is not necessary for a funeral to occur in another state nor is it necessary for all immediate family members to attend such a funeral.

CONCLUSION

For the reasons set forth herein, Mr. McNeil respectfully requests that this Court vacate that portion of the restitution order in which Mr. McNeil is ordered to pay for counseling sessions and a plane ticket for Ms. Davis' brother because those expenses were not the direct result of the conduct for which he was found guilty. In the alternative, if this Court finds that it does not have sufficient evidence from which to determine what portion of the counseling sessions were attributable to the conduct for which Mr. McNeil was convicted, he respectfully requests that the matter be remanded for a new hearing at which the district court can make such a determination.

DATED this 16th day of January, 2014.

FOR SPENCER J. HAHN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16th day of January, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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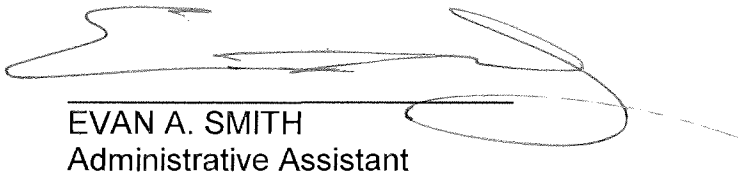

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