Circuit Court for Baltimore City
Case No. 617026016

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1066

September Term, 2018

IN RE: K.W.

Nazarian,
Arthur,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: March 29, 2019

The Circuit Court for Baltimore City sitting as a juvenile court found K.W., appellant, involved in delinquent acts stemming from a carjacking and ordered him to pay $1,500 in restitution to the vehicle's owner. K.W. appeals the restitution order, advancing the following two questions, which we have slightly rephrased:

I. Did the juvenile court err in how it determined the amount of restitution K.W. was ordered to pay?

II. Did the juvenile court err in ordering restitution because the court did not adequately consider K.W.'s inability to pay?

We answer the first question in the negative but the second in the affirmative. Accordingly, we shall reverse the restitution order.

FACTS

The facts as elicited at the adjudicatory hearing are not in dispute. On the late afternoon of January 23, 2017, Purnell Nelson, parked and exited his car, a 2013 Chrysler 200, at the corner of Fremont Avenue and Bennett Place in Baltimore City. When he entered his car a few minutes later, K.W., who at that time was 14 years old, opened the car door and pulled Nelson from the car. Nelson was then attacked by four male companions of K.W. During the attack, one of K.W.'s companions started Nelson's car and began driving away. Nelson's coat was caught in the car door, and he was dragged about a block until his jacket tore and he fell away. Nelson suffered face and back injuries as a result of the incident. The car was recovered two days later, and the insurance company deemed it a total loss. Nelson testified he had purchased the car in 2015 for $21,000, at which time he had taken out a $16,000 loan to pay for it. Before the incident the car had dents on the door and front bumper, but ran well.

Based on the evidence presented at the adjudicatory hearing, the magistrate recommended that K.W. be found involved in the delinquent acts of carjacking, felony unauthorized use, misdemeanor unauthorized use, robbery, second-degree assault, and conspiracy to commit each of those offenses. The magistrate recommended that K.W. be adjudicated a delinquent child and committed to the care and custody of the Maryland Department of Juvenile Services (the "Department") with conditions. The juvenile court agreed with the recommendations and affirmed.

The State sought restitution, and a magistrate conducted a subsequent restitution hearing. Nelson, who was the only witness, testified as to the losses he incurred as a result of the incident. Although the State asked Nelson to keep receipts and documents to help prove his losses, he did not. The State focused on his out-of-pocket expenses associated with the car, which was deemed to be "totaled." Nelson testified several times about the money he still owed on the car that the insurance company did not pay, stating: "It was, like, I was paying, like, 250 a month for, like, 6 months, something like that." The court questioned him about his payments and the following colloquy occurred:

> THE COURT: I have in my notes the insurance company paid the car dealer but you had to pay the difference of $250 a month for 6 months. So that was just a – after the 6 months, you didn't have to continue to pay $250 a month?
>
> THE WITNESS: Correct.
>
> THE COURT: So you had to pay the difference of, by my math, about $1,500?
>
> THE WITNESS: Yes.
>
> THE COURT: Okay. And you paid that to who?

THE WITNESS: What is it? (Indiscernible)

THE COURT: Is this the bank through your—through the car dealership?

THE WITNESS: Yes.

When defense counsel asked Nelson on cross-examination whether he had "any GAP insurance"[1] on the car, he replied, "I think so."

Defense counsel submitted two documents as to K.W.'s ability to pay restitution. One was a report by the Department dated April 9, 2018, which included neuropsychological, psychosocial, and psychological evaluations of K.W. The report related that K.W. lived with his sister prior to his detention – his mother had effectively abandoned him by moving to Georgia and his father was killed when K.W. was a young child. K.W. functioned at a second-grade level and had a full-scale IQ of 60. There was some indication that K.W. had been exposed to lead paint during his early years, and that he had suffered traumatic brain injury as a 13-year-old when he was a passenger in a car involved in an automobile accident. As a result of the evaluations, a Multidisciplinary Assessment and Staffing ("MAS") team recommended a program with intensive services for behavior modification. The Department could only locate one such program, in Ohio, but it rejected K.W. because of his aggressive behavior. As part of the neuropsychological testing, the Department recommended that an application to the Department of Rehabilitation Services ("DORS") be submitted on his behalf. The Department observed

[1] Appellant states in his brief that GAP stands for "Guaranteed Auto Protection" insurance and generally "covers the difference (or gap) between the amount you owe on your auto loan and what your insurance pays if your vehicle is . . . totaled."

that K.W. "may be eligible for services through DORS, including pre-employment transition services, as well as possible pre-vocational and vocational skills, including opportunities for job training/coaching." K.W. argues that the second document, which is not in the record, was a report by the Department dated about two months after the first document notifying the juvenile court that he had been rejected by several Maryland residential placements because he was "too aggressive" and had "low IQ scores," and because of the difficulties in meeting the requirements of his individualized education program.

At the conclusion of the hearing, the State argued, among other things, that K.W. should be liable for the totaled car in the amount of $1,500. Defense counsel argued that restitution in that amount was inappropriate because: 1) it did not represent the fair market value of the car; 2) it did not represent Nelson's out-of-pocket expenses because Nelson "would have to pay off the car anyway" and therefore, the debt was not the direct result of K.W.'s actions; and 3) Nelson testified he had GAP insurance. Defense counsel also argued that K.W. lacked the ability to pay because of his intellectual disabilities, traumatic brain injury, and the unavailability of his parents to provide a means of support.

After hearing the parties' arguments, the magistrate recommended restitution in the amount of $1,500. The magistrate reasoned:

> Mr. Nelson testified that his insurance company paid the car dealership from which he obtained the car, but Mr. Nelson himself had to pay a balance which was $250 a month for 6 months; that is $1,500. In this case, the payment of $250 a month was not a payment that Mr. Nelson would have had to make anyway. The payment was to the dealer because his car was totaled and because the insurance company paid a set amount and Mr. Nelson had to pay the balance.

* * *

> The [c]ourt does find that it has been presented with competent evidence [] that the Respondent's actions caused Mr. Nelson's loss and the [c]ourt will grant restitution against the Respondent in the amount of $1,500, which is the balance Mr. Nelson paid for his car after the insurance company made the initial payment.

As to K.W.'s ability to pay, the magistrate found that he had "some limitations" but was not persuaded that his "limitations will entirely preclude him from working, particularly given the information that [K.W.] may in the future be eligible for a program such as DORS which will assist him with obtaining employment." The juvenile court affirmed the magistrate's recommendations. The court noted that appellant was committed to the care and custody of the Department until 2020 and "cannot make payments now or in the immediate future because he is pending placement." The court nonetheless ordered K.W. to pay the $1,500 restitution on or before October 30, 2020, by which time he would be 18 years old.

Notwithstanding the juvenile court's order, K.W. filed exceptions to the magistrate's restitution recommendation and the State filed a written motion opposing K.W.'s exceptions. At an exceptions hearing held before the juvenile court, defense counsel raised the same three arguments he raised before the magistrate about why restitution was not warranted. Also, K.W. again argued that the Department's report suggesting that he might find employment assistance through the DORS program was unwarranted because there was no evidence that he was eligible for DORS's assistance or, even if eligible, the agency could assist him in securing employment. The juvenile court denied the exceptions motion.

DISCUSSION

I.

K.W. advances, as he did below, three challenges to the basis for the juvenile court's restitution order. First, citing *In re Christopher R.*, 348 Md. 408 (1998) and *In re Levon A.*, 124 Md. App. 103 (1998), *rev'd*, 361 Md. 626 (2000), he argues that only fair market value or replacement value can be used to measure the amount of restitution in cases involving theft of property and because the State did not produce evidence of either, the restitution order was in error. Second, appellant argues that the restitution order was in error if the restitution amount represented Nelson's "out-of-pocket" expenses, reasoning that the restitution amount was not a "a direct result" of the delinquent act but rather "an obligation [Nelson] incurred prior to the offense." Third, appellant argues that the juvenile court erred in its restitution order when it failed to take into account Nelson's testimony that he had GAP insurance. We shall address each argument in turn.

Md. Code Ann., Criminal Procedure Art. ("CP") § 11-603, governs restitution and provides:

> (a) *Conditions for judgment of restitution.* – A court may enter a judgment of restitution that orders a [] child respondent to make restitution in addition to any other penalty for the commission of a [] delinquent act, if:
>
> (1) as a direct result of the crime or delinquent act, property of the victim was stolen, damaged, destroyed, converted, or unlawfully obtained, or its value substantially decreased;
>
> (2) as a direct result of the crime or delinquent act, the victim suffered: ... (ii) direct out-of-pocket loss[es.]

Subsection (b) provides that "[a] victim is presumed to have a right to restitution under subsection (a) of this section if: (1) the victim or the State requests restitution; and (2) the court is presented with competent evidence of any item listed in subsection (a) of this section." CP § 11-603(b).

Several standards govern appellate review of a restitution order. Findings of fact will not be disturbed, unless the trial court's findings are clearly erroneous. *Goff v. State*, 387 Md. 327, 338 (2005). The decision to require restitution, as well as the amount, are reviewed on appeal for abuse of discretion. *In re: A.B.*, 230 Md. App. 528, 531 (2016) (citations omitted). An abuse of discretion occurs when the juvenile court's award is so "well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable[.]" *Id*. at 536 (quotation marks and citation omitted). Legal conclusions underlying a juvenile court restitution order are reviewed *de novo*. *Id*. at 531.

1.

As stated above, appellant cites *In re Christopher R.* and *In re Levon A.* in support of his argument that because the State did not produce evidence of either the fair market value of the car or its replacement value, the restitution order was in error. We agree with the State that K.W. is wrong and his reliance on those cases is misplaced.

In 1998, when both of those cases were decided, the applicable restitution statute "unambiguously limited restitution for stolen property to the fair market value of that property or $5,000, whichever was less." *In re Christopher R.*, 348 Md. at 411 (reviewing the then applicable restitution statute, Md. Code Ann., Courts and Judicial Proceedings Art.

("CJP") § 3-829(c)(1)(i), which provided that a restitution judgment may not exceed "[a]s to the property stolen, destroyed, converted, or unlawfully obtained, the lesser of the *fair market value of the property* or $5,000.") (emphasis added). Moreover, in interpreting the plain language of that statute we had "consistently held that the only amount of restitution which the statute authorizes is the fair market value of the stolen or destroyed property." *Id*. at 412 (citations omitted).

Section § 3-829 of CJP was re-designated CJP § 3-8A-28 in 2001, which provides that courts may enter a judgment of restitution in a juvenile case "as provided under Title 11, Subtitle 6 of the Criminal Procedure Article." As related above, CP § 11-603, which governs restitution, has no requirement as to how stolen property is valued. In other words, under the current statutory scheme, an award of restitution "is limited only by the State's proof of loss attributed to the offense or conduct in which the juvenile was adjudged to be involved." *In re Earl F.*, 208 Md. App. 269, 279 (2012). Accordingly, K.W.'s argument premised on earlier case law that the fair market value or replacement value of damaged property are the only means by which to measure Nelson's loss is no longer true under the current statutory scheme governing restitution.

2.

Next, K.W. argues that the juvenile court abused its discretion by ordering restitution in the amount of the outstanding encumbrance on the victim's totaled vehicle. K.W. argues that he cannot be held responsible for the amount Nelson paid above the car's worth because it "was a debt [Nelson] acquired before his car was stolen" and Nelson's

"obligation to make monthly car payments did not arise as a direct result of the delinquent acts."[2] The State disagrees, as do we.

A court's restitution order must be "fair and reasonable[.]" *Goff*, 387 Md. at 350. The set amount "is not one of absolute certainty or precision. Rather, there must be competent evidence showing entitlement to and the amount of [] expenses to be incurred by the victim as a direct result of the crime or delinquent act." *In re Cody H.*, 452 Md. 169, 194 (2017) (citation and footnote omitted). Competent evidence "need only be reliable, admissible, and established by a preponderance of the evidence." *Id.* at 192 (quotation marks and citations omitted). Although CP § 11-603 does not define "direct result," the Court of Appeals has stated that "restitution may be compelled only where the injury results from the actions that made the defendant's conduct criminal." *State v. Stachowski*, 440 Md. 504, 513 (2014) (citations omitted). *See In re Cody H.*, 452 Md. at 195 ("something is a 'direct result' where there is no intervening agent or occurrence separating the criminal act and the victim's loss.") (citations omitted).

K.W.'s argument that Nelson's "obligation to make monthly car payments did not arise as a direct result of the delinquent acts" is faulty. Although it is factually true that the encumbrance that Nelson paid on the car after the incident did not arise from the incident, it is K.W.'s delinquent actions that resulted in a totaled car. Therefore, Nelson's requirement to pay the encumbrance became, as a direct result of K.W.'s actions, a payment

[2] We note that K.W. does not argue on appeal, nor did he argue below, that the damage to the car was not a direct result of his actions in committing the delinquent acts of carjacking and the other offenses.

on an object with no value. Therefore, as a direct result of K.W.'s actions, Nelson was required to pay an encumbrance on his vehicle that no longer had any value, which resulted in an out-of-pocket loss to Nelson. *Cf. In re William L.*, 119 P.3d 1039, 1042-43 (Ariz. Ct. App. 2005) (holding that a restitution order for the amount owed on a car above its fair market value was proper because it was an economic loss the victim would not have incurred but for the juvenile's criminal offense, and the criminal conduct directly caused the economic loss). Accordingly, the economic loss of $1,500 constituted Nelson's out-of-pocket expenses, and therefore, was a loss for which restitution could be ordered.

3.

Appellant argues that the trial court erred in ordering restitution because it failed to take into account Nelson's testimony that he might have had GAP insurance at the time of the incident. Appellant admits that Nelson's testimony was "ambiguous as to whether he was or should have been reimbursed pursuant to his GAP insurance policy" and notes that neither the magistrate nor juvenile court made any findings of fact on this issue. We can quickly dispose of this argument. As the State correctly points out, Nelson testified several times that he did not receive any money from his insurance company for his car, and therefore, the record does not show that Nelson was spared from paying any part of the $1,500 he paid out-of-pocket to his creditor because of GAP insurance. Under the circumstances, we cannot say that the juvenile court was clearly erroneous in not finding that Nelson had GAP insurance.

II.

K.W. argues that the juvenile court's restitution order must be vacated because the court did not adequately consider his inability to pay or that he was unlikely to acquire the ability to pay while under the court's jurisdiction. K.W. points out that he is indigent, in the care and custody of the Department, does not receive any financial support from his parents, and has major cognitive and behavioral disabilities. Essentially, K.W. argues that because of his lack of ability to pay, the court abused its discretion in ordering restitution. We agree.

Restitution serves several objectives: (1) rehabilitating the juvenile; (2) compensating the victim; and (3) penalizing the juvenile. *In re Delric H.*, 150 Md. App. 234, 249 (2003) (citation and footnote omitted). "'Restitution under this section 'is a criminal sanction, not a civil remedy.'" *In re Cody H.*, 452 Md. at 183 (quoting *McDaniel v. State*, 205 Md. App. 551, 558 (2012)) (restitution serves "the familiar penological goals of retribution and deterrence, and especially rehabilitation.") (quotation marks and citation omitted). Restitution is considered "an integral part of the process of juvenile rehabilitation . . . [because] restitution can impress upon [the juvenile] the gravity of harm he has inflicted upon another, and provide an opportunity for him to make amends." *In re Levon A.*, 124 Md. App. at 132 (quotation marks and citation omitted). Although compensation of the victim "is an important factor" in the overall goal of rehabilitating a juvenile, *In re Delric H.*, 150 Md. App. at 250, a juvenile "court's concern that the victim be fully compensated should not overshadow its primary duty to promote the rehabilitation of the defendant." *In re Earl F.*, 208 Md. App. at 276 (quotation marks and citation omitted).

In keeping with the purposes of restitution, where a "restitution obligor does not have the ability to pay the judgment of restitution; or [] there are extenuating circumstances that make a judgment of restitution inappropriate[,]" a juvenile court need not issue a judgment of restitution. CP § 11-605. This is because the rehabilitative purpose is frustrated if the amount fixed as restitution exceeds a defendant's resources. *In re Don Mc.*, 344 Md. 194, 203 (1996). To this end, a court must conduct a "reasoned inquiry" into the ability of the juvenile and/or his parents to pay. *In re Delric H.*, 150 Md. App. at 251 (quotation marks and citation omitted). The statute provides some guideposts for restitution, imposing a $10,000 limit on restitution orders and allowing a court to order restitution against the juvenile, a parent, or both. CP § 11-604. Additionally, a juvenile court has jurisdiction until the juvenile turns 21 years of age, unless terminated sooner. CP § 3-8A-07(a).

In re Levon A., supra, we concluded that the juvenile court had conducted a reasonable inquiry into the 14-year-old respondent's ability to pay a total of $443.73 over a period of 18 months and found no abuse of discretion in awarding an amount of restitution. We held that the juvenile court had considered, among other factors, the juvenile's age and circumstances, that the juvenile would soon be old enough to get a job, and that the juvenile would have a reasonable time to pay the restitution. *Id*. at 144.[3] *See also In re Delric H.*, 150 Md. App. at 251-254 (we held the juvenile court did not abuse its

[3] The Court of Appeals *In re Levon A.*, 361 Md. 626 (2000), reversed our decision on legal and factual bases that did not impact our reasoning that the trial court had conducted a "reasoned inquiry" into respondent's ability to pay.

discretion where it ordered restitution in the amount of $6,693.89 in monthly installments of $50 to be paid by the juvenile and/or his mother where the court had reviewed juvenile's and mother's circumstances and juvenile's age - he was 12 years old, he was capable of earning money in a few years, and he had a reasonable amount of time over which to make the payments).

After the parties' argument at the exceptions hearing held on July 25, 2018[4], the juvenile court stated, as to K.W.'s ability to pay,

> [I]t appears as if the magistrate relied not only on her knowledge of the Respondent, but the report that was provided to the [c]ourt based on MAS Staffing. The [c]ourt's conclusion that even though the Respondent does have some deficiencies, that she believed that he would be a candidate for programs like DORS, which would pay the Respondent some sort of salary that he could then in turn pay the restitution, whether it's in whole or in part, was also a factual finding based on sufficient evidentiary basis.

The court noted that K.W. could not "make payments now or in the immediate future because he is pending placement" but nonetheless ordered K.W. to pay the $1,500 restitution on or before October 30, 2020, by which time he would be 18 years old.

The inquiry clearly demonstrated that K.W. had no ability to pay the restitution award imposed here within the time period required. This is a situation unlike that in *In re Levon A.* and *In re Delric H.*, where both of those juveniles were similar in age to K.W. but not in abilities. The DORS program was suggested by the psychologist who performed a neuropsychological evaluation on K.W. but there was no evidence or explanation as to

[4] It appears that following disposition on October 30, 2017, appellant was placed in the home of his sister. Over the next 60 plus days, he repeatedly violated his curfew and school attendance requirements. Since January 12, 2018, he has been detained at a Department facility.

how K.W., who is detained by the Department, could gain employment under the circumstances. Moreover, K.W.'s parents are not a source of financial support for him. Accordingly, under all the circumstances, we conclude that the court abused its discretion in imposing restitution on K.W.

RESTITUTION AWARD REVERSED.

COSTS TO BE PAID BY MAYOR AND CITY COUNCIL OF BALTIMORE.