

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
March 13, 2012

v

SHAWN JOSEPH WASS,

Defendant-Appellant.

No. 302263
Montmorency Circuit Court
LC No. 2010-002519-FH

Before: SERVITTO, P.J., and TALBOT and K. F. KELLY, JJ.

PER CURIUM.

Defendant appeals as of right the restitution award and jury costs imposed upon him after his jury trial convictions of Unlawfully Driving Away an Automobile (UDAA), MCL 750.413, and Failure to Stop at the Scene of a Property Damage Accident, MCL 257.618. He was sentenced to 23 months to 5 years in prison for the felony UDAA conviction, to be served concurrently with a 93 day sentence for the misdemeanor failure to stop conviction. Because the trial court erred in ordering defendant to pay \$740 in restitution to the fire department and \$1092.53 in jury costs, we reverse the trial court's assessment of the same against defendant and remand for entry of an amended judgment of sentence.

In the early morning hours of March 20, 2010, defendant and his girlfriend were drinking at his step-father's house. Defendant became intoxicated and left the house by himself, driving his girlfriend's car. At some point, defendant lost control of the vehicle, and drove it into Crooked Lake. He was able to get out of the vehicle as it was sinking and to swim to the shore. Defendant then found a truck with the keys in the ignition parked in the driveway of a nearby house and drove it back to his step-father's house. After changing his clothes, he drove the truck back to the area where he thought he had taken the truck, wiping down the inside of the vehicle, and walking back to his step-father's house. Later the same morning, the Montmorency County Sheriff's Office received a report of a vehicle in Crooked Lake. Sergeant Brain Crane requested the Tri-Township Fire Department to come to the scene to determine whether there was anyone in the vehicle. After Tri-County sent a boat with crew members out to the vehicle to confirm that there was no one in the vehicle, the vehicle was brought to shore by a towing company.

On appeal, defendant does not challenge his convictions. Instead, he first asserts that the trial court lacked the statutory authority to order a restitution award to the fire department for the costs it incurred in responding to the scene. Because defendant failed to object to the restitution

order at the time of sentencing, this Court's review of this issue is for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Restitution is provided for in the Michigan Constitution. Const 1963, art 1, § 24. Restitution is also afforded by statute, specifically MCL 780.766, in the Crime Victim's Rights Act, and MCL 769.1a(2) and (3), in the Code of Criminal Procedure. In the matter at hand, the prosecution relies only upon the latter to argue that restitution was properly awarded for the costs incurred while responding to a false emergency created by defendant.

Issues of statutory interpretation and the applicability of a statute are questions of law that we review de novo. *Adams Outdoor Advertising, Inc v City of Holland*, 463 Mich 675, 681; 625 NW2d 377 (2001). The primary goal of statutory interpretation is to give effect to the Legislature's intent, focusing first on the statute's plain language. *Klooster v City of Charlevoix*, 488 Mich 289, 296; 795 NW2d 578 (2011). If the plain and ordinary meaning of the language is clear, judicial construction is normally neither necessary nor permitted. *People v Underwood*, 278 Mich App 334, 338; 750 NW2d 612 (2008). The omission of a provision in one statute that is included in another statute should be construed as intentional, and provisions not included in a statute by the Legislature should not be included by the courts. *Id* (citations omitted).

MCL 769.1a(2) provides:

Except as provided in subsection (8), when sentencing a defendant convicted of a felony, misdemeanor, or ordinance violation, the court shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate.

“Victim” is defined under the above statute as including an individual, sole proprietorship, partnership, government entity or any other legal entity “that suffers direct physical or financial harm as a result of a felony, misdemeanor, or ordinance violation.” Thus, we must determine whether the fire department was a victim, i.e., whether it suffered harm.

In order to answer this question, it is necessary to consult a dictionary as the term “harm” is not defined in the statute. See *People v Stone*, 463 Mich 558, 563; 621 NW2d 702 (2001). “Harm” is defined as “injury or damage.” *The American Heritage Dictionary of the English Language* (1996); *Random House Webster's College Dictionary* (1997). The fire department certainly had financial expenditures; however, there is nothing in the record to show that it suffered injury or damage.

While the prosecutor likens this matter to *People v Crigler*, 244 Mich App 420; 625 NW2d 424 (2001), the facts of this case are distinguishable. In *Crigler*, the defendant was ordered to pay restitution to the Michigan State Police Narcotics Enforcement Team for “buy money” that was expended to purchase drugs from the defendant during the course of three controlled undercover drug purchases. *Id.* at 421. The purchases led to defendant's arrest and ultimate convictions, though the police were unable to recover the “buy money” from two of the

transactions. A panel of this Court found that the loss of the “buy money” qualified as a harm and that the defendant was thus properly ordered to pay restitution to the police for the same under MCL 780.766. *Id.* at 426. The Court reasoned:

Furthermore, there is nothing in the statutory language that suggests that when the financial loss takes place during the course of a criminal investigation, no “harm” occurs. The loss of buy money is qualitatively unlike the expenditure of other money related to a criminal investigation, because it results directly from the crime itself; that is, the money is lost when it is exchanged for the controlled substance. The payment of salaries and overtime pay to the investigators, the purchase of surveillance equipment, the purchase and maintenance of vehicles, and other similar expenditures are “costs of investigation” unrelated to a particular defendant’s criminal transaction. These expenditures would occur whether or not a particular defendant was found to be engaged in the sale of controlled substances. [*Id.* at 426-427.]

In contrast to *Crigler*, the prosecutor in this matter relies upon MCL 769.1a rather than MCL 780.766 as the basis for its request. More importantly, the prosecutor requested restitution to the fire department “in the amount of \$740; that is \$340 which is 34 man hours at \$10 an hour and two truck hours, which comes to \$400.” The prosecutor thus was requesting not a direct loss like that in *Crigler*, but apparently salary payments. Salary payments and similar expenditures were implicitly recognized in *Crigler* as qualitatively different than the harm contemplated for restitution purposes. See, *People v Newton*, 257 Mich App 61, 68-70; 665 NW2d 504, 509 (2003).

An understanding that such unextraordinary financial expenditures, incurred by the fire department on a daily, routine basis, do not qualify as harm (i.e., injury or damage) for purposes of MCL 769.1a, is buttressed by the Legislature’s inclusion of MCL 769.1f in 1998. 1998 PA 345, effective October 1, 1999. Section 1f provides in part as follows:

(1) As part of the sentence for a conviction of any of the following offenses, in addition to any other penalty authorized by law, the court may order the person convicted to reimburse the state or a local unit of government for expenses incurred in relation to that incident including but not limited to expenses for an emergency response and expenses for prosecuting the person, as provided in this section . . .

* * *

(2) The expenses for which reimbursement may be ordered under this section include all of the following:

* * *

(b) The salaries, wages, or other compensation, including overtime pay, of fire department and emergency medical service personnel, including volunteer fire fighters or volunteer emergency medical service personnel, for time spent in

responding to and providing fire fighting, rescue, and emergency medical services in relation to the incident from which the conviction arose.

The majority of the offenses listed involve operation of some type of motor vehicle while under the influence of alcohol or a controlled substance. See MCL 769.1f(1)(a)-(g).¹ See also Senate Fiscal Agency Analysis, 1998 PA 340-359, January 12, 1999. Also included are the crimes of committing a moving violation causing death, MCL 257.601d, false reporting of a crime or threat, MCL 750.411a, and violation of a personal protection order, MCL 600.2950 and MCL 600.2950a. MCL 769.1f(1)(a), (h), (i).

Providing for the reimbursement of certain financial expenditures in MCL 769.1f for specific crimes signals that the Legislature did not intend that such expenses were included within the scope of “direct financial harm.” Had the Legislature so intended, there would have been no need for the enactment of MCL 769.1f. And, if the Legislature wishes the term “direct financial harm” to include such expenditures, it should be left to the Legislature to amend the statutory scheme. *Underwood*, 278 Mich App at 338. The trial court committed plain error affecting defendant’s substantial rights in ordering him to reimburse the fire department \$740 for their man and truck hours in this matter.

Defendant next contends that the trial court’s assessment of a jury fee in the amount of \$1,092.53 against him was an impermissible infringement upon his right to a jury trial. This unpreserved issue is also reviewed for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

The trial court must have statutory authority to assess costs associated with the trial against a defendant in a criminal matter. *People v Dilworth*, 291 Mich App 399, 400; 804 NW2d 788 (2011). MCL 769.1k(1)(b)(ii) allows a trial court to order “any cost in addition to the minimum state cost.” MCL 769.34(6) also allows a trial court to “order the defendant to pay any combination of a fine, costs, or applicable assessments.” However, there are limitations that have been imposed by our Supreme Court that the trial court must consider.

For example, if the trial court orders defendant to pay costs, they “must bear some reasonable relation to the expenses actually incurred in the prosecution.” *People v Wallace*, 245 Mich 310, 314; 222 NW 698 (1929). Second, costs may not include “expenditures in connection with the maintenance and functioning of governmental agencies that must be borne by the public irrespective of specific violations of the law.” *People v Teasdale*, 335 Mich 1, 6; 55 NW2d 149 (1952). Lastly, “assessing costs against a defendant for a jury in a criminal case is not permissible” because “[e]very person charged with a criminal offense has a constitutional right to a trial by jury.” *People v Hope*, 297 Mich 115, 118; 297 NW 206 (1941).

At defendant’s sentencing, the trial court in the instant matter indicated that “jury costs shall also be assessed. I don’t know what those are, but they will be developed.” An amended

¹ While there was testimony that defendant drove his vehicle into the lake while drunk, he was not convicted of a drunk driving offense.

judgment of sentence was later entered assessing \$1092.53 in what was simply entitled “court order pay/other” against defendant. It appears that this “court order pay” was the jury costs referenced by the trial court, because the statement from the original judgment of sentence “jury costs to be determined and charged to def.” had been removed in the amended judgment. And, the \$1092.53 was in addition to the court costs of \$500 that defendant had already been ordered to pay.

There is no hearing or order indicating the manner in which the trial court determined the “jury cost.” We note that the jury trial lasted approximately 3 ½ hours and the jury thereafter deliberated approximately 30 minutes. Of the five witnesses who testified, none were expert witnesses and only one was a police officer. His testimony lasted approximately 25 minutes. We also note that MCL 769.1f(2)(d) provides that “[t]he salaries, wages, or other compensation, including, but not limited to, overtime pay of prosecution personnel for time spent investigating and prosecuting the crime or crimes resulting in conviction” are expenses that may be reimbursed. However, MCL 769.1f does not apply because neither crime for which defendant stands convicted is included within the closed list of crimes to which the section applies.

Given the record available to this Court, imposing \$1092.53 in “jury costs” on defendant is plain error affecting his substantial rights. Defendant cannot be ordered to pay for the cost of his jury because it interferes substantially with his right to a jury trial. At oral argument, the prosecutor admitted to this Court that the cost of the jury could not be assessed against defendant. Though the prosecutor requested a remand, essentially to allow the trial court to attempt to justify the assessment in some other way, we decline such invitation. We therefore vacate the award of \$1092.53 in jury costs.

Reversed and remanded for issuance of an amended judgment of sentence deleting the assessment of \$740 in restitution to the fire department and \$1092.53 in jury costs. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Kirsten Frank Kelly