

IN THE SUPREME COURT OF OHIO

STATE OF OHIO) CASE NO. 07 -1462
)
 APPELLANT) On Appeal from the
)
 v) Crawford County Court
)
 CHARLES W. BARTHOLOMEW) of Appeals, Third
)
 APPELLEE) Appellate District
)
) Court of Appeals
)
) Case No. 3-06-0016

MERIT BRIEF OF THE APPELLEE

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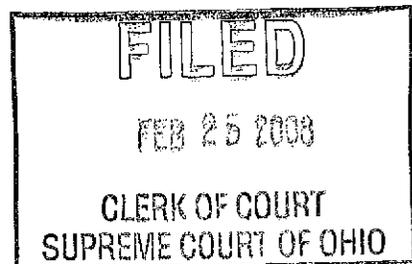


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STATEMENT OF THE CASE AND FACTS

The State of Ohio, Appellant, appeals from the judgment of the Crawford County Court of Appeals. This judgment ruled that the restitution order against the Defendant must be reversed. This case involves the interpretation of State v Kreisler, 109 Ohio St. 3d 391, 2006-Ohio-2706 (hereinafter "Kreisler".)

The Court of Appeals decision was an appropriate and accurate interpretation of Kreisler based upon the situation presented in this case. Charles W. Bartholomew, the Appellee, (hereinafter, "Defendant") was charged with rape of his child. Upon his plea of guilty, he was sentenced as of record, including a provision that he make restitution to the Ohio Victims of Crime fund in the amount of \$426.00, for the child's counselling. This provision is the pertinent issue herein. The Court of Appeals, Third Appellate District, ruled that the provision was in conflict with this Supreme Court's decision of Kreisler, supra, in that it attempted to continue reimbursement to third parties after the legislature already had spoken clearly otherwise.

Thereupon the Appellant appealed the ruling in the instant cause.

ARGUMENT IN OPPOSITION TO CLAIMED PROPOSITION OF LAW

APPELLANT STATE OF OHIO'S PROPOSITION OF LAW;

The restitution statute, R.C. 2929.18 (A)(1) and the repayment provision, R. C. 2743.72(E), authorize the trial court to designate the Attorney General's Crime Victims Fund as the agency to receive a restitution payment.

The Appellant, the Victims of Crime fund of the State of Ohio, seeks to reverse this case upon policy arguments that the instant Third Appellate decision would prevent the Victims of Crime fund from seeking reimbursement from indigent criminals. However, there is nothing in the instant decision that would forbid the Victims of Crime fund from filing a civil lawsuit, based upon inter alia the theory of subrogation. The Victims of Crime fund could thereby seek to recover funds without running afoul of State v Kreisler, 109 Ohio St. 3d 391, 2006-Ohio-2706 (hereinafter "Kreisler").

To affirm the instant decision would thereby place the burden on the civil courts, not on the criminal courts, to collect money owed. The defendants are usually indigent, and the temptation is to use criminal court sanctions to collect money that could not otherwise be collected, because of such indigency.

The Ohio Administrative Code recites an established procedure to withhold the funds from the inmate's account.

"(D) If withdrawals are authorized and if there are sufficient funds in the inmate's account to satisfy the amount shown as due, as long as the account retains ten dollars for inmate expenditures, the designee shall promptly cause a check to be issued payable to the clerk of the court or other appropriate authority

issuing the order." Administrative Code 5120-5-03

There is no differentiation here between civil or criminal courts; the inmate must remit to satisfy a civil judgment in the same manner as a criminal judgment for costs. If civil lawsuits were filed, then there would be exemptions that would have to be considered, and other entities would be competing for the same money, specifically the inmate's dependents. See Ohio Administrative Code 5120-5-03:

"(C) When a certified copy of a judgment from a court of proper jurisdiction is received directing the DRC to withhold funds from an inmate's account, the warden's designee shall take measures to determine whether the judgment and other relevant documents are facially valid. If a facial defect is found then a letter of explanation shall be sent to the clerk or other appropriate authority and the collection process stops until the defect is cured. If no defect is found, the warden's designee shall promptly deliver to the inmate adequate notice of the court-ordered debt and its intent to seize money from his/her personal account. The required notice must inform the inmate of a right to claim exemptions and types of exemptions available under section 2329.66 of the Revised Code and a right to raise a defense as well as an opportunity to discuss these objections with the warden's designee. This practice provides safeguards to minimize the risk of unlawful deprivation of inmate property."

It is much better for the civil courts to handle the collection of monies. In all likelihood there will be several entities competing for the inmate's money. For instance the dependents of the defendant would be making claims for support. The insurance companies and the victim, if not otherwise reimbursed, could make their claims for the same money with civil judgments. The Appellant seeks to attach the funds of the defendants, which represent the money earned by the defendant for doing work in the

institution. These amounts are legally insufficient for a traditional garnishment. Realistically, most criminal defendants are indigent; they are paid only \$3.00 to \$12.00 per month, for the most part, for their institution work. Ohio Administrative Code 5120-3-08. Placing restitution orders onto defendants who are indigent and incarcerated is a long, drawn-out process. The General Assembly did not wish to turn the criminal court system into an "unpaid collection agency" because of such complications. It is a different matter when the Defendant is collectible, such as when he is on judicial release or post release control. Then a Defendant can be ordered to seek employment and become able to pay his obligations, through the adult probation authority. The civil judgments may then be paid into the Victims of Crime fund. Civil judgments avoid the main problem with a restitution order, which is that the money will be collected without involving the criminal courts in the processing of the money. The criminal courts are burdened enough with requirements that it is reasonable for the General Assembly to place this burden on the civil courts.

The Court of Appeals believed that it was following the clear dictates of this Court in Kreischer. Kreischer pointed out that the most recent amendment to Ohio Revised Code 2929.18 deleted all references to restitution for third parties. See State v Didion, (2007) 173 Ohio App. 3d 130 at footnote two;

"FN2. The relevant deleted language stated: "The order may include a requirement that reimbursement be made to third parties for amounts paid to or on behalf of the victim or any survivor of the victim for economic loss

resulting from the offense. If reimbursement to third parties is required, the reimbursement shall be made to any governmental agency to repay any amounts paid by the agency to or on behalf of the victim or any survivor of the victim for economic loss resulting from the offense before any reimbursement is made to any person other than a governmental agency." R.C. 2929.18(A)(1) (effective Jan. 1, 2004)."

The language of the third parties in the second sentence spoke of reimbursement to a government agency; such must clearly be a reference to Victims of Crime fund. This same result was also obtained in State v Baltzer, Washington App. No. 06CA76, 2007-Ohio-6719; State v Smith, Washington App. No. 07CA25, 2008-Ohio-142; and State v Kanniard, Marion 9-07-21, 2008 -Ohio- 518.

Clearly, the General Assembly had its reasons for terminating third parties and insurers as recipients of restitution when the legislature amended the statute. Obviously, the General Assembly did not wish the trial courts of Ohio to be diverted from their primary mission, which is to deal with criminals and punishment, and be made into an "unpaid collection agency", as suggested by Mr. Justice Pfeiffer's concurrence and dissent in Kreischer. The other problem is that not only would the criminal courts become collection agencies, they would also have to undertake the record-keeping and the concern about priorities in distribution. The General Assembly's policy decisions thus include the Victims of Crime fund among the definition of "third parties". If the General Assembly wished that the courts function as such a collection agency, they could have easily have written the legislation in that manner, and

provided the necessary funding and structure for the bookkeeping that would go with it.

The Appellant advances many policy arguments that could be made and reasons for a contrary result to that of the Third Appellate District. However, the place to make such policy arguments is the General Assembly. Whatever the merit there may or may not be to the Appellant's arguments in the abstract, the place to make the arguments is before the General Assembly. The General Assembly can legislate. The Honorable Supreme Court of Ohio does not legislate under the guise of interpreting the statutes of Ohio. In fact the headnote to Kreischer states:

"Statutory interpretation involves an examination of the words used by the legislature in a statute, and when the General Assembly has plainly and unambiguously conveyed its legislative intent, there is nothing for a court to interpret or construe, and therefore, the court applies the law as written."

This is what the Appellant seeks to do in the instant case; the Appellant seeks to have this Honorable Supreme Court re-write the statute and restore the prior language regarding third parties, under the guise of interpreting Kreischer.

A look at the statute, Ohio Revised Code 2929.18, states that restitution is to be paid directly to the victim, or through the "adult probation" department, or through the "clerk of courts"; the Appellant relies on the language of the statute that follows, that payment may be made to "any other agency." Ohio Revised Code 2929.18(A)(1). The intent is clear, however; the General Assembly obviously meant agencies designed for a clerical or bookkeeping function, such as the adult probation or the clerk

of courts are, to be chosen to do such clerical or bookkeeping functions. The General Assembly was not making policy decisions as to what entity may be reimbursed in this part of the statute. Nor was the General Assembly intending either to institute or to end any funding mechanism for the victims of crime fund when it amended Section 2929.18 of the Revised Code. The General Assembly was stating what agency or agencies may appropriately do the bookkeeping function. It was not making decisions regarding a funding mechanism.

The General Assembly did not leave the Victims of Crime fund without any recourse; the General Assembly took no steps to forbid the Victims of Crime fund from pursuing its civil remedies in civil court.

The civil courts are designed to deal with the collection of money owed. The criminal courts are not.

For all the foregoing reasons, this Honorable Court must affirm the decision of the Court of Appeals.

CONCLUSION

FOR ALL THE FOREGOING REASONS, THE DECISION OF THE COURT OF APPEALS MUST BE AFFIRMED.

Respectfully submitted,



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PROOF OF SERVICE

I certify that I mailed a copy of the foregoing Appellee's Brief on the Merits to Appellant's attorneys, Stanley Flegm and Clifford Murphy, County Prosecutors, at 112 E. Mansfield, 3d floor, Bucyrus, Ohio 44820; also to Marc Dann, William P. Marshall, Benjamin Mizer, and Melanie Cornelius, Attys. General, 30 E Broad St, 17th floor, Columbus OH 43215; by regular US mail this 27th day of February, 2008.



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5120-3-08 Inmate compensation for work program assignments and related matters

(A) Inmates who are assigned to work programs, other than those operated by Ohio penal industries, are enrolled in institutional school programs or who are unassigned, shall receive compensation according to the following schedule:

(1) Category one inmates shall receive no compensation. "Category one inmates" include those in reception at a designated reception facility who are unassigned, those who are confined in disciplinary control pursuant to a finding of the rules infraction board, those who are absent with leave for more than seven days and those absent without leave.

(2) Category two inmates shall receive three dollars per month to be credited and paid to their personal account. "Category two inmates" include those who are absent with leave (not to exceed seven days) and those who have no job assignment in a work program but maintain their personal living quarters in accordance with rules issued by the managing officer. Category two also includes those on death row, those who are new arrivals at a parent institution awaiting assignment, those in administrative control, local control, security control, protective control and those who are in pre-classification assignment status.

(3) Category three inmates shall receive six dollars per month to be credited and paid to their personal account. "Category three inmates" are those not in category one or two and include those who have an actual work assignment of less than sixty hours per month, those who are assigned to limited duty by the medical staff and those who have been confined to a hospital or the infirmary for more than thirty consecutive days. For the first thirty days of a hospital or infirmary stay, an inmate shall be compensated according to his category and level immediately preceding admittance.

(4) Category four inmates shall receive nine dollars per month to be credited and paid to their personal account. "Category four inmates" are those who have an actual work assignment of sixty to eighty-nine hours per month or those who are part-time students for sixty to ninety hours per month.

(5) Category five inmates shall receive twelve dollars per month to be credited and paid to their personal account. "Category five inmates" include those who have an actual work assignment of ninety to one hundred thirty-nine hours per month.

(6) "Category six inmates" are those in full-time work assignments or apprenticeship training, of at least one hundred forty hours per month, or those who are full-time students or those who are part-time students with part-time work assignments with a combined total of at least one hundred forty hours per month.

Grade	Maximum Security Level	Close Security Level	Medium Security Level	Minimum Security Level
Apprenticeship	\$12.00	\$13.00	\$14.00	\$16.00
General labor	\$16.00	\$17.00	\$18.00	\$20.00
Semi-skilled	\$17.00	\$18.00	\$19.00	\$21.00
Skilled	\$18.00	\$19.00	\$20.00	\$22.00

Those inmates who are full-time students or part-time students with part-time work assignments shall be compensated at the general labor grade within the proper security level.

(7) Category seven inmates shall receive twenty-four dollars per month to be credited and paid to the personal account. "Category seven inmates" include those with full-time work assignments requiring a high degree of skill or responsibility which are authorized by the managing officer. The number of inmates in category seven may not exceed three per cent of the institution's population.

(B) Overtime and incentive rates of compensation.

(1) Subject to the approval of the managing officer, category six and category seven inmates may be paid at the rate of one and one-half times their regular rate of pay for each hour in excess of one hundred forty hours per month, whenever the managing officer deems the additional employment of such inmates necessary and proper to the accomplishment of a special project or in the event of an emergency.

(2) The managing officer may adopt an incentive plan appropriate to designated work assignments, under which inmates may earn compensation in addition to their regular pay for the category to which they are assigned. Such incentive plan shall be based upon an established production quota or other like system developed by the department of rehabilitation and correction.

(C) Reduction of compensation for disciplinary reasons.

(1) All inmates are responsible for the maintenance of their personal living quarters in accordance with posted rules issued by the managing officer. Failure to comply with those rules constitutes a violation of class III, rule 5, as specified in rule 5120-9-06 of the Administrative Code, and may subject the violator to a reduction of compensation to three dollars for the period of one month. If the hearing officer determines that a violation has occurred, he shall assess the appropriate remedy pursuant to paragraph (D) (2) of rule 5120-9-06 of the Administrative Code, and may recommend to the managing officer a reduction of compensation.

(2) The rules infraction board may recommend a reduction of future compensation due to a rules infraction. Reductions shall require the approval of the managing officer and shall not exceed fifty per

cent of normal compensation and shall not be reduced below three dollars.

(3) Paragraph (C) (1) and paragraph (C) (2) of this rule apply to the following compensation plans: Inmates receiving compensation from Ohio penal industries pursuant to rule 5120-3-05 of the Administrative Code; inmates receiving monies from industrial arts activities pursuant to rule 5120-5-06 of the Administrative Code; and inmates receiving earnings from private employment pursuant to rule 5120-3-09 of the Administrative Code.

(D) Work assignment hours shall be determined by calculating the number of hours spent on the work assignment in an average month. An "average month" is twenty-two working days for a five-day-per-week assignment. Only hours of actual work shall be counted for less than full-time assignments.

(E) Reasonable time spent on visits, sick call, official pass, or for other reasons approved by the managing officer or his designee shall not affect the managing officer or his designee shall not affect the calculation of work assignment hours.

(F) As far as practicable, changes in work assignments which result in a change of pay category or grade, shall be made at the beginning of the month. For changes of pay category or grade occurring at quarter-month intervals, compensation for each quarter shall be made according to the assignment for each quarter. For changes of category or grade occurring within any quarter-month, the assignment which was held longer shall determine the compensation for that quarter-month. The smallest time unit for determining compensation shall be a quarter-month.

(G) Personal account. Compensation paid to an inmate pursuant to this rule shall be placed in the inmate's "personal account." At the request of the inmate, funds not exceeding the amount on deposit in that inmate's "personal account" shall be drawn from that account and paid to the inmate's family. The inmate may draw against his or her "personal account" to purchase items kept for sale by the institution. The managing officer may authorize other expenditures. Any balance remaining in an inmate's personal account at the time of his lawful release shall be paid to such inmate upon such release.

(H) Release procedure. In addition to the compensation paid to their personal account pursuant to this rule, each inmate shall be paid upon release an amount to be determined by the division of business administration based upon appropriate funds.

Inmates who have compensation credited to their release account prior to the adoption of this rule shall receive the amount credited or the amount paid under this rule, whichever is greater.

(I) The institution may furnish appropriate clothing to an inmate upon release.

(J) An inmate who is unable to obtain transportation to the place to which he is paroled may be provided such transportation and necessary meal costs at the discretion of the managing officer. Transportation shall be provided at the lowest cost available. The institution shall purchase non-refundable tickets for this purpose.

(K) Compensation paid pursuant to this rule may be from designated special purpose funds or the manufacturing, services and agricultural special account.

Rules are current to February 4, 2008;

Ap 2

5120-5-03 Court order for payment of funds from inmate's account

(A) The purpose of this rule is to establish guidelines and procedures for withdrawing money that belongs to an inmate and that is in an account kept for the inmate by the department of rehabilitation and correction (DRC), upon receipt of a certified copy of a judgment of a court of record in an action in which an inmate was a party that orders an inmate to pay a stated obligation. The DRC may apply such money toward payment of the stated obligation to the court or in another matter as directed by the court.

(B) Upon the DRC's receipt of a certified copy of a judgment that orders an inmate to pay a stated obligation in a matter which an inmate was a party, the warden or designee shall determine if the inmate is still in the custody of the DRC. If the inmate is not in the custody of the DRC, the warden or designee shall advise the clerk of the court or other appropriate authority issuing the order of that fact and, if known, the forwarding address of the inmate. If the inmate is in custody of the DRC the warden or designee shall forward such judgment to the institution where the inmate is presently incarcerated, specifically addressed to the attention of the warden or designee who is responsible for the inmate's account at the institution. Requests for funds to fulfill court orders are prepared by the warden's designee where the inmate is presently housed.

(C) When a certified copy of a judgment from a court of proper jurisdiction is received directing the DRC to withhold funds from an inmate's account, the warden's designee shall take measures to determine whether the judgment and other relevant documents are facially valid. If a facial defect is found then a letter of explanation shall be sent to the clerk or other appropriate authority and the collection process stops until the defect is cured. If no defect is found, the warden's designee shall promptly deliver to the inmate adequate notice of the court-ordered debt and its intent to seize money from his/her personal account. The required notice must inform the inmate of a right to claim exemptions and types of exemptions available under section 2329.66 of the Revised Code and a right to raise a defense as well as an opportunity to discuss these objections with the warden's designee. This practice provides safeguards to minimize the risk of unlawful deprivation of inmate property.

When the pre-deprivation notice is delivered to the inmate, the warden's designee shall also deliver notice to place a hold on the inmate's account to the cashier. The court ordered amount or available portion thereof shall be held until further notice by the

designee.

After the inmate's timely opportunity to assert any exemption or defense, the designee shall review the record and determine the department's authority to withdraw money from the inmate's account. The inmate shall receive notice of the designee's decision to either remove the hold and withdraw no money or initiate payments.

(D) If withdrawals are authorized and if there are sufficient funds in the inmate's account to satisfy the amount shown as due, as long as the account retains ten dollars for inmate expenditures, the designee shall promptly cause a check to be issued payable to the clerk of the court or other appropriate authority issuing the order. A check shall be drawn and charged or debited against funds in the inmate's account. At such time, the hold shall be released on the inmate's account. It shall be the designee's responsibility to see that the check is transmitted directly to the appropriate clerk of the court for disbursement or payment is made in another manner as directed by the court.

(E) If withdrawals are authorized and if there are insufficient funds in the inmate's account to satisfy the amount shown as due, a monthly check shall be issued payable to the appropriate clerk's office or in another matter as directed by the court, for the amount of monthly income received into the inmate's account which exceeds ten dollars until the full amount of the court obligation has been paid. The hold shall remain on the inmate's account until sufficient funds have been paid to satisfy the amount shown as due on the balance remaining thereon.

(F) Nothing in this rule shall preclude the DRC from distributing earnings as set forth in rules 5120-3-09 and 5120: 1-1-28 of the Administrative Code.

(G) If the inmate is released from the custody of the DRC before he/she has paid the full amount of the judgment upon his/her release, the designee shall send a notice to the appropriate clerk's office or other authority advising of the inmate's release, the inmate's last forwarding address, if known, and the fact that the inmate has not paid the full amount of the judgment. A copy of this notice shall be placed in the inmate's file and a copy given to the division of parole and community services if the offender is released under supervision.

(H) If the inmate is transferred to another institution or facility within the DRC during the time that there is an unsatisfied judgment with a monetary order and a hold placed on the inmate's account by reason thereof, the hold, as well as a copy of the judgment with a monetary order shall be transferred with the inmate to such new institution or facility and the procedure specified

above shall continue to apply. Collection of the court obligation will continue at any subsequent DRC institution or facility until payment in full can be made.

(I) Successive orders to pay a stated obligation will be collected as directed after each preceding judgment has been satisfied, unless otherwise directed by a court with proper jurisdiction.

(J) Pursuant to paragraph (B) of rule 5120-5-02 of the Administrative Code, an individual account record shall be maintained for each inmate in an institution which reflects all receipts and disbursements of funds from each account. The accounting, computations, and disbursements of such funds to pay a court ordered obligation shall be made in accordance with procedures established and approved by the DRC. The inmate shall be provided written notice each time monies are withdrawn from his/her account; and the final notice of disbursement shall be provided to the inmate when the court ordered amount has been paid in full.