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I. A CRIMINAL DEFENDANT IS ENTITLED TO A HEARING ONLY AFTER VCAP ASSERTS A STATUTORY CLAIM FOR REIMBURSEMENT OF COMPENSATION PAID TO THE VICTIM

The defendant's Due Process argument, wherein he claims that he was entitled to participate in the process whereby VCAP determined the statutory reimbursement payable to the victim, is based on a fallacy. The General Assembly did not provide for any role on the part of the criminal defendant in the investigation of crime victim claims or the calculation of awards. That process is governed by statute, and is an entirely separate determination from the issue of reimbursement from the offender. Contrary to the argument on appeal, there is no statutory role for the offender at this stage. The Constitution does not require that a criminal defendant participate in the process of determining victim compensation. No state victim compensation statute so provides. No authority has been cited to support such a preposterous approach.

Only in those cases where, as here, the State seeks reimbursement of the Crime Victims' Fund from the offender in the form of restitution and/or a compensating fine, is the criminal defendant then entitled to a notice of the claim and a hearing. It is undisputed that the appellee here was afforded notice, documentation of the claim, and an adversary hearing before a Judge of the Court of Common Pleas. The Due Process rights articulated in the cases cited by the appellee were, without question, afforded to him. His problem is not a lack of Due

Process. His problem is his failure to take advantage of that opportunity to present evidence to dispute the VCAP claim. He did not call witnesses, and did not present expert medical testimony to dispute causation or the cost of medical treatment. Nor did he seek to cross-examine the investigating police officer on the contents of his report, which was placed in evidence by VCAP. There is nothing in the record to suggest that the appellee was denied due process of law.

On appeal, the claim is made that the appellee was denied the opportunity to confront witnesses against him. Yet the record reflects that defense counsel did not dispute the use by VCAP of the police report and medical records and bills as exhibits before the Court. Those exhibits were properly admitted into evidence by Chief Judge Smalls. The record reflects that they were provided to the defendant in advance of the hearing (which in any event was adjourned for a week, affording still more time to the defense). The appellee was free to subpoena the investigating police officer, and to cross-examine him concerning the details of the incident. Likewise, the appellee was free to subpoena the medical witnesses relied upon by VCAP, and to question them concerning treatment of the victim for her injuries. Finally, there has been no showing that the appellee was prevented from calling lay or medical witnesses to dispute the police officer's account of the incident, medical causation, or the cost of treatment. The Appellee did not even seek to submit an affidavit or statement from such a witness, in an effort to contradict the State's

case. Given the fact that the appellee was represented, the only possible conclusion is that there were no such witnesses, lay or expert, who were able to dispute the VCAP claim. Moreover, counsel's apparent tactical decision to refrain from cross-examination of the police officer and medical witnesses suggests a tacit acknowledgment that nothing would be gained from such efforts. Instead, counsel relied on technical legal arguments in an attempt to deny VCAP reimbursement.

Furthermore, appellee is mistaken in attempting to apply authority regarding the trial rights of a criminal defendant to a post-conviction proceeding such as this. The appellee stands convicted by virtue of his guilty plea, during which he waived his right to trial. A criminal defendant who has entered a plea of guilty stands convicted of that offense, and subject to the broad power of the Court in sentencing. That power includes, *inter alia*, the statutory authority to impose a compensating fine and to require reimbursement of VCAP. In contesting reimbursement, the convicted criminal defendant is entitled to the procedural due process rights that he enjoyed in this case.

In this case the trial court erred in failing to order reimbursement of VCAP on an uncontradicted record that established that the injuries sustained were related to the conduct of the appellee, and that the net amount of reimbursement awarded was proper under the circumstances documented by the medical records. In the absence of any competent evidence to contradict the claim, it was an abuse of

discretion to deny it. Further, the trial court erred as a matter of law by citing nonexistent procedural bars to recovery from a criminal defendant. This error was compounded by the failure of the Superior Court to issue an opinion in the course of summarily affirming the flawed decision of the lower court.

The only possible factual conclusion, based on the evidence presented, is that the offender caused the mental, emotional, and physical injuries to the victim that her treating physicians found she sustained as a direct result of his conduct on November 23, 2008.

II. THE OBLIGATION OF THE APPELLE TO REIMBURSE THE VICTIMS' FUND IS NOT TIME-BARRED, AND VCAP DID NOT WAIVE ITS STATUTORY RIGHT TO RECOVER COMPENSATION PAID TO THE CRIME VICTIM

Contrary to appellee's procedural claim, there is no applicable limitation period barring VCAP from seeking reimbursement for victim compensation through a restitution order or a compensating fine. Appellee fails to cite a deadline or any statutory prohibition that would enable him to escape his obligation to the Victims' Fund. Nor does he cite any instance of prejudice in being required to pay reimbursement later, rather than sooner. The VCAP statute contemplates a process whereby a crime victim may seek compensation in select categories within a year of sustaining injury as a result of criminal acts. 11 *Del.C.* §9010(a)(4). The agency may then continue to make awards up to two years from the last payment. 11 *Del.C.* §9009(10). VCAP is entitled to then recover from the criminal

defendant the full amount of the compensation paid that is attributable to his conduct. 11 *Del.C.* §9014; §9018. Thus, the General Assembly contemplated a process of reimbursement where VCAP would not be barred by the mere passage of time in seeking recovery of compensation paid. The statute sets forth a logical sequence in which the victim submits claims and receives compensation, and VCAP then may seek reimbursement from the offender responsible. The time limits set forth in the statute contradict the appellee claim that VCAP's ability to recover reimbursement is somehow time-barred. To the contrary, it is self-evident that the legislature anticipated that reimbursement would follow compensation, as in this case.

Although not articulated, the appellee argument could be read to suggest that VCAP is barred, perhaps estopped, from seeking reimbursement in any form after sentencing. No authority supports this contention. There has been no showing that VCAP waived its statutory right to reimbursement. There is nothing in the VCAP statute to support such a waiver/estoppel theory. Rather, the statute is clear in providing for a process whereby VCAP first investigates a claim and determines if the crime victim is entitled to compensation. Only after the full amount of compensation has been determined and paid, can VCAP turn to the criminal defendant for reimbursement. The record reflects that is what happened in this case. The VCAP statute effectively enables VCAP to reserve the right to seek

reimbursement from any criminal defendant, after compensation has been paid to the crime victim. Put differently, the crime victim is on notice, through the statute, that he or she may be liable to reimburse the Victims' Fund for compensation paid to the crime victim. The Appellee cannot escape his statutory obligation by relying on the delay during which the crime victim received treatment and lost wages as a result of his abuse.

III. A VICTIM OF DOMESTIC VIOLENCE IS ENTITLED TO COMPENSATION FOR PECUNIARY LOSS DUE TO ABUSE, AND THE OFFENDER IS OBLIGATED BY STATUTE TO REIMBURSE VCAP REGARDLESS OF THE NATURE OF THE OFFENSE

Finally, the appellee contends that the offense to which he pled guilty bars VCAP from reimbursement for payments made to the victim of that offense. If this Court were to accept such a limitation on sentencing, it would effect a seismic shift in the longstanding authority of the sentencing judge to hold a criminal defendant to account for his or her acts and their consequences. In order to prevail, the appellee would have the Court turn its back on centuries of practice, as to both discretion to impose statutory fines and the recovery of restitution for losses sustained by crime victims. Yet the appellee cites no authority to support such novel constraints on the sentencing authority of the criminal courts.

Offensive Touching is a crime of domestic violence, where the offender was in a dating relationship with the victim, and caused offense and alarm. According to §1041(2)(b) of Title 10 of the Delaware Code, "domestic violence" means abuse

perpetrated by “persons in a current or former substantive dating relationship” as defined therein. In this case it is undisputed that the victim was the former girlfriend of the offender. “Abuse” as used in the statute is defined to include: intentionally or recklessly placing or attempting to place another person in reasonable apprehension of physical injury or sexual offense to such person or another, §1041(1)(b); engaging in a course of alarming or distressing conduct in a manner which is likely to cause fear or emotional distress or to provoke a violent or disorderly response, §1041(1)(d); or any other conduct which a reasonable person under the circumstances would find threatening or harmful. §1041(1)(h). The appellee admitted to intentionally touching the victim, knowing that this would cause offense or alarm. 11 *Del.C.* §601. The appellee was thus guilty of an offense of domestic violence, as defined above and referenced in the VCAP statute at 11 *Del.C.* §9002(5)(g). Further, the appellee was guilty of ‘abuse’ as defined by §1041.

For purposes of victim compensation, “pecuniary loss” in cases of “personal injury” is defined to include medical expenses, including psychiatric care and mental health counseling of the victim; hospital expenses; loss of past or future earnings because of a disability resulting from such personal injury; and any other expenses actually and necessarily incurred as a result of the personal injury. 11 *Del.C.* §9002(9). The statute defines “personal injury” as bodily harm as well as

mental, emotional or psychological harm. 11 *Del.C.* §9002(10). Thus the victim in this case was fully entitled to seek and receive compensation for the cost of mental health counseling and psychiatric care, her lost earnings as a result of being medically unable to work, and the other hospital and physician expenses incurred (in the opinion of her treating doctors, supported by the police investigative report narrative) as a result of the offender's conduct.

It is noteworthy that the statutes contain no limitations on the recovery of compensation based on the severity of the offense. Consistent with the authority at sentencing to hold the offender accountable for the consequences of his acts, 11 *Del.C.* §4204(c)(8), (9), (10), the compensating fine and/or restitution obligation is tailored to the nature of the loss sustained, and the cost of related treatment and disability. Contrary to the claims of the appellee, sentencing judges are not bound by any concept of equivalency in determining an offender's restitution obligation, or in imposing a compensating fine under 11 *Del.C.* §9018. Thus, a convicted criminal may have little or no restitution obligation at sentencing on a felony charge, whereas a domestic violence offender such as appellee may face a considerable assessment from the Court, in order to make the victim whole.

In cases of domestic violence such as this one, it is not unusual at all for a victim to suffer primarily from psychological, emotional, and mental harm – to the extent of disability – as a direct result of the offense and alarm intentionally caused

by the offender. The medical records submitted by VCAP in support of the claim for reimbursement graphically document the extent of the harm caused by the offender, and the fallout in terms of treatment. Rather than present testimony or expert reports to dispute causation, or the need for or cost of treatment, appellee has chosen to rely solely on legal arguments to deprive the Crime Victims' Fund of reimbursement in this case. Those legal arguments find no support, and cannot bar a full recovery by VCAP of compensation paid to and for the unfortunate victim of abuse by the appellee. The decision below should be reversed, with instructions to the court below to order the offender to pay to VCAP the full amount of compensation paid to the domestic violence victim, \$12,107.35.

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