

Review of Recent Juvenile Cases (2010)

by
The Honorable Pat Garza
Associate Judge
386th District Court
San Antonio, Texas

In arson adjudication, restitution order in the amount of \$248,429.37 was set aside because it was not adequately supported by the record.[In the Matter of D.S.W.](10-4-5)

On September 1, 2010, the San Antonio Court of Appeals set aside a restitution order and remanded the case for a new hearing on restitution because the amount the trial court ordered in restitution was not adequately supported in the record and required some amount of speculation

¶ 10-4-5. In the Matter of D.S.W., MEMORANDUM, Nos. 04-09-00592-CV, 04-09-00593-CV, 2010 WL 3443214 (Tex.App.-San Antonio, 9/1/10).

Facts: This is an appeal of two juvenile cases. In cause number 2009-JUV-01290, D.S.W. pled true to arson of a habitation causing bodily injury and to arson of a habitation. In 2009-JUV-01291, D.S.W. pled true to three counts of arson of a habitation causing bodily injury and to arson of a habitation. The trial court found a need for disposition and committed D.S.W. to the Texas Youth Commission. The court also ordered restitution in the total amount of \$477,556.72, to be owed jointly and severally by D.S.W. and his mother.

D.S.W. brings three issues on appeal. In his first two issues on appeal, D.S.W. contends his double jeopardy rights were violated in each case when he was adjudicated for arson of a habitation causing bodily injury and for arson of a habitation. The State agrees that D.S.W.'s double jeopardy rights were violated and, therefore, we will sustain D.S.W.'s first two issues on appeal. In his third issue, D.S.W. argues "[t]he trial court abused its discretion when it ordered restitution in the aggregate amount of \$477,556.75, because this extraordinary amount of restitution is not appropriate to the age and physical, emotional, and mental abilities of [D.S.W.], and is not supported in the record."

Held: Restitution order set aside and remanded for a new hearing on restitution.

Memorandum Opinion: Because juvenile proceedings are considered quasi-criminal, the rules of restitution for criminal cases apply to restitution ordered by a court in a juvenile proceeding. *In re D.S.*, 921 S.W.2d 860, 861 (Tex.App.-San Antonio 1996, no writ). The amount of restitution ordered must be "just," that is, supported by a factual basis within the record. *Thompson v. State*, 557 S.W.2d 521, 525-26 (Tex.Crim.App.1977); *In re J.R.*, 907 S.W.2d 107, 109 (Tex. App.-Austin 1995, no writ). When the amount of restitution is not supported by the record, the proper procedure on appeal is to set aside the amount of restitution and remand the case for a hearing to determine a just amount of restitution. *Barton v. State*, 21 S.W.3d 287, 290 (Tex.Crim.App.2000).

In cause number 2009-JUV-01290, the trial court ordered restitution to be paid to the property owner, William Ponce, in the amount of \$2,240.00 and to the property insurer, American Reliable Insurance Company in the amount of \$226,887.38. The evidence relating to the amount of loss incurred in 2009-JUV-01290 consisted of

the fire marshal's report, William Ponce's unsworn affidavit, and American Reliable Insurance Company's loss run statement. The fire marshal's report stated that the building was owned by William Ponce, that the building was appraised for \$218,180.00 in 2008, that it was insured by Voyager Indemnity Insurance Company for \$224,000.00, that the policy was in effect from May 16, 2008, until May 16, 2009, and that the policy number was TSG019061. The unsworn affidavit of William Ponce declared that the amount of pecuniary loss to the building was \$224,000.00. The American Reliable Insurance Company's loss run statement indicated that it was for policy number TSG019061 with an effective date of May 16, 2008, until May 16, 2009. The statement included William Ponce's name and the address of the property that was lost. It also contained a series of columns indicating "Payments" at the "Policy Total" of \$224,000.00, "L.A.E." of \$2,887.38, and "Total Inc." of \$226,887.38. One might speculate that William Ponce's deductible under the insurance policy was \$2,240.00; however, there is no evidence in the record to support payment of restitution to William Ponce for any amount. Further, one might speculate that American Reliable Insurance Company insured the property for \$224,000.00, but paid out \$226,887.38, which included an amount for "L.A.E." There is nothing in the record explaining what the "L.A.E." amount is. Yet, the "Policy Total" plus the "L.A.E." is the amount the court ordered in restitution to American Reliable Insurance Company.

In cause number 2009-JUV-01291, restitution was ordered in the amount of \$248,429.37 to Wachovia Bank Account # 5320511000161788. The evidence relating to the amount of loss incurred in 2009-JUV-01291 consisted of the fire marshal's report and a letter dated July 2, 2009. The fire marshal's report stated that the building was owned by Alexander and Alejandra Mathes and was appraised for \$209,880.00 in 2008. It further indicated the building was insured by Farmers Insurance Group for \$250,000.00, the policy was in effect from December 21, 2008, until December 21, 2009, and the policy number was 60470-29-76. The July 2, 2009, letter was addressed to "Leslie Lovelace" and signed by "Kath White, Bankruptcy Specialist." The letter identified the "Customer" as Alejandra Matthes and lists the address of the destroyed property as "Collateral." The letter indicated the payoff amount was \$248,429.37 and stated payment should be sent to Wachovia Bank. The letter did not identify Leslie Lovelace nor did it identify Kath White with any certainty since the letter was not written on letterhead stationery. Again, one might speculate that Wachovia Bank was the mortgagor on the destroyed property and that the payoff amount was to be paid because of the fire; however, there is no evidence in the record to support that assumption.

Conclusion: Because the amount the trial court ordered in restitution is not adequately supported in the record and requires some amount of speculation, we set aside the restitution orders and remand the causes to the trial court for a new hearing on restitution. [FN1]

FN1. Because we are remanding the causes for a new restitution hearing, we need not address D.S.W.'s contention that the amount of restitution ordered is excessive because it is not appropriate to his age and physical, emotional, and mental abilities.