

SUPREME COURT OF MONTANA

State v. Kalal

2009 MT 103 (2009) · No. DA 08-0275 · Decided March 31, 2009

SUMMARY

The Supreme Court of Montana considered whether a victim seeking criminal restitution had a duty to mitigate lost-income damages by renting a replacement tractor. The court held that the civil-law reasonableness standard applies to mitigation in criminal restitution proceedings and affirmed the \$15,960 restitution award because renting and transporting a tractor was impracticable under the circumstances.

CASE DETAILS

COURT	Supreme Court of Montana
WRITING FOR THE COURT	W. William Leaphart; John Warner; James C. Nelson; Patricia Cotter
JURISDICTION	Montana
DECIDED	March 31, 2009
DOCKET	DA 08-0275
DISPOSITION	affirmed
PROCEDURAL POSTURE	Kalal appealed from a District Court order requiring him to pay additional criminal restitution for the victim's lost income.
STANDARD OF REVIEW	The legality of a criminal sentence is reviewed to determine whether it is a legal sentence. Findings concerning the amount of restitution are reviewed for clear error.
PRECEDENTIAL VALUE	Published Montana Supreme Court opinion; precedential.
PARTIES	Daniel Carl Kalal v. State of Montana

TOPICS

- restitution criminal
- sentencing
- criminal procedure
- remedies
- damages

PRACTICE AREAS

- criminal law
- criminal restitution
- sentencing
- damages mitigation

QUESTIONS PRESENTED

1. What standard governs a victim's duty to mitigate pecuniary loss when criminal restitution is based on damages recoverable in a civil action?
2. Whether the District Court clearly erred by awarding \$15,960 in lost-income restitution without requiring the victim to rent a replacement tractor.

HOLDINGS

1. The civil-law standard for mitigation of damages applies to criminal restitution: a victim is expected to do what a reasonable and prudent person would do if capable under the circumstances, but need not take action that is unreasonable or impracticable.
2. The District Court did not clearly err in awarding \$15,960 in lost-income restitution based on the impracticability and expense of renting and transporting a replacement tractor.

KEY QUOTATIONS

“The test is: What would an ordinary prudent person be expected to do if capable, under the circumstances?” (¶ 9)

“An injured person is not expected to do what is “unreasonable or impracticable.”” (¶ 9)

“Thus we adopt the following test: What would a reasonable and prudent person be expected to do if capable, under the circumstances?” (¶ 9)

FACTUAL BACKGROUND

Kalal stole a tractor from Jim Petranek and pleaded guilty. Petranek claimed lost income from projects he planned to perform with the tractor, including fencing, cabin construction and grass production. Kalal argued that Petranek had a duty to mitigate his loss by renting another tractor, but the District Court found that Petranek's work schedule, the distance involved and the logistical burden of renting and transporting a tractor made that alternative impracticable. The court awarded \$15,960 for lost income and rejected an additional hunting-lease claim.

PROCEDURAL HISTORY

Kalal pleaded guilty to theft of a tractor and received a two-year deferred imposition of sentence. The District Court initially ordered restitution of \$23,513.43, which Kalal paid. After additional briefing concerning the victim's lost-income claim, the court ordered Kalal to pay an additional \$15,960 in restitution. The Montana Supreme Court affirmed.

DISPOSITION

affirmed

CASES CITED

- State v. Cesnik, 2005 MT 257, 329 Mont. 63, 122 P.3d 456

- State v. Heath, 2004 MT 126, 321 Mont. 280, 90 P.3d 426
- Bitterroot Intl Sys. v. Western Star Trucks, 2007 MT 48, 336 Mont. 145, 153 P.3d 627
- McPherson v. Kerr, 195 Mont. 454, 636 P.2d 852 (1981)
- Spackman v. Ralph M. Parsons Co., 147 Mont. 500, 414 P.2d 918 (1966)
- Harrington v. Holiday Rambler Corp., 176 Mont. 37, 575 P.2d 578 (1978)

OPINION

LEAPHART, J.

2009 MT 103 STATE OF MONTANA, Plaintiff and Appellee, v. DANIEL CARL KALAL, Defendant and Appellant. No. DA 08-0275. Supreme Court of Montana. Submitted on Briefs: February 25, 2009 Decided: March 31, 2009. For Appellant: Torger Oaas; Oaas Law Office; Lewistown, Montana.

For Appellee: Hon. Steve Bullock, Montana Attorney General; Sheri K. Sprigg, Assistant Attorney General; Helena, Montana. Thomas P. Meissner, Fergus County Attorney; Lewistown, Montana Justice W. William Leaphart delivered the Opinion of the Court. ¶ 1 Daniel Kalal ("Kalal") was charged with theft of a tractor. Kalal pleaded guilty and received a two year deferred imposition of sentence.

He was ordered to pay restitution for the value of the tractor and other items of stolen property in the amount of \$23,513.43. Kalal satisfied that restitution obligation. ¶ 2 The victim of the theft, Jim Petranek, sought additional restitution for loss of income in the amount of \$21,724.

After receiving additional briefing on this issue, the court ordered Kalal to pay additional restitution for loss of income in the amount of \$15,960. Kalal appealed from this order of restitution. We affirm. BACKGROUND ¶ 3 Petranek's claim of lost income is based upon his testimony that he planned on using the tractor for the following income-generating purposes: (1) To build a two and one half mile fence between his ranch property and adjacent BLM land, which would allow his property to be leased for summer grazing.

The ranch property is 75 miles from Petranek's home. This resulted in a claim of \$5,040 in lost income. (2) To complete construction of a cabin which could be rented for 60 days a year for \$6,000; further the cabin would facilitate leasing this property for hunting and fishing for some \$5,764.

(3) To seed 120 acres for grass production and farming. This resulted in a claim of lost income of \$4,920. ¶ 4 Through cross-examination of Petranek, Kalal established that there were other tractors available to rent; that a reasonable rental price for such a tractor was around \$130 to \$140 per day. Petranek testified that he would have needed 9 days to complete the fencing, 7 to 10 days for the cabin construction, and 20 hours to do the seeding.

Kalal thus contended that Petranek had a duty to mitigate his damages by renting a tractor at a cost of \$3,080 in order to complete his projects in the above time frames. ¶ 5 Petranek, however, testified that because of the demands of his full-time job as a city public works specialist for the City of Lewistown, he would not have been free to complete the projects listed above in one continuous period of time.

Rather, he could only work weekends or long weekends with a day or two off of work. Even then, he was often on-call and was required to drop everything and respond to emergencies. ¶ 6 As a result of Petranek's limited availability to work on projects, the District Court concluded that there were serious practical impediments to his renting a tractor.

The District Court noted, *inter alia*, that it would take several hours to rent, load and haul a rental tractor and that Petranek could not afford to leave a rental tractor on the property during the week so that it would be available for weekend work.

Accordingly, the District Court concluded that the theft of Petranek's tractor resulted in a loss of income for summer grazing and farming/grass production in the amount of \$9,960 and a loss of \$6,000 for cabin rental.

The District Court rejected Petranek's claim for an additional \$5,764 for a hunting lease. STANDARD OF REVIEW ¶ 7 We review a sentence in a criminal case to determine whether or not it is a legal sentence. *State v. Cesnik*, 2005 MT 257, ¶ 13, 329 Mont. 63, 122 P.3d 456. Findings regarding the amount of restitution ordered are reviewed to determine whether they are "clearly erroneous."

State v. Heath, 2004 MT 126, ¶ 13, 321 Mont. 280, 90 P.3d 426. DISCUSSION ¶ 8 Section 46-18-241, MCA, provides that a sentencing court shall, as part of a sentence, require an offender to make full restitution to any victim who has sustained pecuniary loss. Section 46-18-243(1)(a), MCA, defines pecuniary loss as "all special damages... that a person could recover against the offender in a civil action arising out of the facts or events constituting the offender's criminal activities," including loss of income. ¶ 9 The issue of mitigation of damages in the context of restitution for criminal activity is a question of first impression in this state.

Since the statutes requiring restitution in a criminal sentencing are based upon damages available in a "civil action," we look to our precedent in the fields of tort and contract law. The general rule is that an injured party cannot recover damages for breach of contract that the injured party reasonably could have avoided. See *Bitterroot Intl Sys. v. Western Star Trucks*, 2007 MT 48, ¶ 62, 336 Mont.

145, 153 P.3d 627. The duty of an injured party to reduce or mitigate damages is limited. *McPherson v. Kerr*, 195 Mont. 454, 459, 636 P.2d 852, 855 (1981) (quoting *Spackman v. Ralph M. Parsons Co.*, 147 Mont. 500, 505, 414 P.2d 918, 921 (1966)). "The test is: What would an ordinary

prudent person be expected to do if capable, under the circumstances?" McPherson, 195 Mont. at 459, 636 P.2d at 856.

An injured person is not expected to do what is "unreasonable or impracticable." McPherson, 195 Mont. at 460, 636 P.2d at 856. For example, in McPherson, the plaintiff was not expected "to expend \$1,100 which he doesn't have [in order to remove a damaged semi-trailer from storage] to mitigate an injury for which he is not responsible." 195 Mont. at 459-60, 636 P.2d at 856.

In *Harrington v. Holiday Rambler Corp.*, 176 Mont. 37, 42, 575 P.2d 578, 579-80 (1978), the plaintiffs were not expected to transport their defective travel trailer from Great Falls to the factory in Wakarusa, Indiana for repair, to have it repaired by a third party and risk voiding the warranty, or to buy a new travel trailer.

We hold that the above standard is equally applicable to the duty to mitigate damages in the context of criminal restitution. Thus we adopt the following test: What would a reasonable and prudent person be expected to do if capable, under the circumstances? ¶ 10 While recognizing the duty to mitigate, the District Court reasoned that no reasonable man could be expected to spend money (or time) he does not have to mitigate an injury for which he is not responsible.

Applying the reasonableness standard, the court correctly concluded that, given the impracticability and expense of renting and transporting a tractor a long distance for short periods of time, an award of \$15,960 for Petranek's loss of income was reasonable.

The findings supporting that conclusion are not clearly erroneous. ¶ 11 Affirmed. JUSTICES, JOHN WARNER, JAMES C. NELSON, and PATRICIA COTTER, concur.