

SUPREME COURT OF THE STATE OF MONTANA

State v. Dovey

2016 MT 118N (2016) · No. DA 15-0496 · Decided May 17, 2016

SUMMARY

The Montana Supreme Court affirmed a restitution order against John Creswell Dovey for theft from his former employer. The court held that restitution was not reduced by amounts the victim received from its insurer, relying on State v. Fenner. The court remanded for correction of the restitution amount from \$26,562.00 to \$26,500.62.

CASE DETAILS

COURT	Supreme Court of the State of Montana
WRITING FOR THE COURT	James Jeremiah Shea; Mike McGrath; Patricia Cotter; Beth Baker; Jim Rice
JURISDICTION	Montana
DECIDED	May 17, 2016
DOCKET	DA 15-0496
DISPOSITION	affirmed
PROCEDURAL POSTURE	Dovey appealed the legality of a restitution order entered following his guilty plea to felony theft.
STANDARD OF REVIEW	A criminal sentence is reviewed for legality.
PRECEDENTIAL VALUE	Nonprecedential; memorandum opinion designated noncitable under Section I, Paragraph 3(c) of the Montana Supreme Court Internal Operating Rules.
PARTIES	John Creswell Dovey v. State of Montana

TOPICS

- restitution criminal
- criminal procedure
- appellate procedure
- remedies

PRACTICE AREAS

- criminal law
- criminal procedure
- restitution

QUESTIONS PRESENTED

1. Whether a victim's receipt of insurance reimbursement requires reduction of the restitution ordered against the criminal defendant.
2. Whether the restitution order should be corrected to reflect the parties' agreed net amount of unrecovered stolen property.

HOLDINGS

1. A victim's receipt of reimbursement from its own insurer does not require deduction of that reimbursement from the restitution the offender must pay.
2. The restitution order must be amended to state the correct amount of \$26,500.62.

KEY QUOTATIONS

“While the restitution statutes include an insurer as a victim to the extent that it has paid reimbursement for the loss, § 46-18-243(2)(a)(iv), MCA, there is no provision requiring deduction of any such reimbursement from the amount the offender must be ordered to pay.” (¶ 6)

FACTUAL BACKGROUND

Dovey pleaded guilty to felony theft from his former employer, Westland Seed. The net amount of unrecovered stolen property was \$26,500.62, although the District Court's order mistakenly stated \$26,562.00. Westland's insurer reimbursed Westland \$26,208.60 for related losses, and Dovey argued that this payment should reduce his criminal restitution obligation.

PROCEDURAL HISTORY

Dovey pleaded guilty to felony theft against his former employer, Westland Seed. After a restitution hearing, the District Court ordered him to pay \$26,562.00, despite Westland's insurer having reimbursed \$26,208.60 of the loss. The District Court denied Dovey's request to offset the insurance payment, and the Montana Supreme Court affirmed but remanded for correction of the restitution amount to \$26,500.62.

DISPOSITION

affirmed

REMAND INSTRUCTIONS

Remand to the District Court to amend its order to state the correct restitution amount as \$26,500.62.

CASES CITED

- State v. Simpson, 2014 MT 175, ¶ 8, 375 Mont. 393, 328 P.3d 693
- State v. Fenner, 2014 MT 131, 375 Mont. 131, 325 P.3d 691

OPINION

PER CURIAM.

May 17 2016 DA 15-0496 Case Number: DA 15-0496 IN THE SUPREME COURT OF THE STATE OF MONTANA 2016 MT 118N STATE OF MONTANA, Plaintiff and Appellee, v. JOHN CRESWELL DOVEY, Defendant and Appellant. APPEAL FROM: District Court of the Twentieth Judicial District, In and For the County of Lake, Cause No. DC 15-118 Honorable Deborah Kim Christopher, Presiding Judge COUNSEL OF RECORD: For Appellant: Martin W. Judnich, Vincent J. Pavlish, Judnich Law Office, Missoula, Montana For Appellee: Timothy C. Fox, Montana Attorney General, Pamela P. Collins, Assistant Attorney General, Helena, Montana Steve Eschenbacher, Lake County Attorney, Polson, Montana Submitted on Briefs: April 27, 2016 Decided: May 17, 2016 Filed: _____ Clerk Justice James Jeremiah Shea delivered the Opinion of the Court. ¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent.

Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports. ¶2 John Creswell Dovey appeals a judgment from the Twentieth Judicial District Court, Lake County, which ordered him to pay \$26,562.00 in restitution.

The issue is whether the District Court erred in awarding restitution conforming to the full amount of Dovey's theft—excluding items recovered—without reducing it by the amount the victim was reimbursed pursuant to an insurance policy covering Dovey's theft.

We affirm. ¶3 On May 21, 2015, Dovey pled guilty to felony theft against his former employer, Westland Seed (Westland). On July 2, 2015, the District Court held a hearing to determine restitution. On July 7, 2015, the District Court entered a judgment ordering Dovey to pay \$26,562.00¹ in restitution to Westland. Westland's insurer had covered and reimbursed \$26,208.60 of the related losses.

Dovey requested the District Court to reduce his restitution by the \$26,208.60 Westland received from its insurer. The District Court denied the request. Dovey appeals. ¶4 "A criminal sentence is reviewed for legality." State v. Simpson, 2014 MT 175, ¶ 8, 375 Mont. 393, 328 P.3d 693. ¹ The parties agree that the net amount of unrecovered stolen property is \$26,500.62.

The District Court's Order incorrectly stated the amount as \$26,562.00. The Order may be corrected on remand. ² ¶5 Dovey contends the District Court should have reduced his restitution by the amount Westland's insurer paid out. Citing § 46-18-243(1)(a), MCA, Dovey argues Westland's pecuniary loss is only around \$300 because Montana's restitution statutes only allow a victim to recover what he or she otherwise would be able to recover in a civil action.

Dovey contends that Westland should not recover from both Dovey and its insurer, because such recovery would result in a windfall of redundant payments. Dovey also argues the State failed to

identify Westland's insurer as a victim, and therefore the insurer cannot benefit from Dovey paying full restitution. ¶6 The State counters that in *State v. Fenner*, 2014 MT 131, 375 Mont.

131, 325 P.3d 691, this Court settled the law regarding restitution when a victim has been compensated by its own insurance policy. We agree. In *Fenner*, we rejected the same argument that Dovey makes in this case—that a criminal defendant's restitution to the victim “should be reduced by the amount paid by the insurer.” *Fenner*, ¶ 9.

We held: “[w]hile the restitution statutes include an insurer as a victim to the extent that it has paid reimbursement for the loss, § 46-18-243(2)(a)(iv), MCA, there is no provision requiring deduction of any such reimbursement from the amount the offender must be ordered to pay.” *Fenner*, ¶ 12. Dovey failed to address *Fenner* in his opening brief.

In his reply brief, Dovey's argument is basically that our holding in *Fenner* is distinguishable from the present case—it is not—or that we should set aside *Fenner*—we do not. Boiled down, Dovey's argument is that he is more deserving of the windfall from his victim's insurance policy than is his victim.

We opt to stay on this side of the looking-glass and affirm the District Court's Judgment. 3 ¶7 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions.

In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review. The District Court's interpretation and application of the law were correct.

We affirm and remand to the District Court to amend its Order to state the correct amount of restitution as \$26,500.62. /S/ JAMES JEREMIAH SHEA We Concur: /S/ MIKE McGRATH /S/ PATRICIA COTTER /S/ BETH BAKER /S/ JIM RICE 4