COURT OF APPEALS
DECISION
DATED AND FILED

February 4, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2987-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

IN THE INTEREST OF JOSEPH G.,
A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JOSEPH G.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Reversed.*

BROWN, J. Joseph G. appeals from a restitution order requiring him to pay towing expenses for towing a car he stole from Menomonee Falls, where it was recovered, to the Village of Hartland Police Department. Because such expenses are not chargeable to the defendant as restitution under § 938.34(5), STATS., we reverse.

The facts in this case are not in dispute. The Hartland police arrested Joseph for car theft when they saw him attempting to enter a car that had been reported stolen. The police had the car under surveillance because the owner of the car, Kelly Shields, had seen the car near the K-Mart in Menomonee Falls and notified the police. After he was apprehended, Joseph admitted to stealing the car and was adjudged delinquent pursuant to § 938.12, STATS. As part of its disposition, the court ordered Joseph to pay restitution, including the $82 the Hartland police had paid to have the car towed from the Menomonee Falls K-Mart parking lot, where it was found, to the Hartland police department.

Joseph claims the court lacked authority to order him to pay the towing expenses pursuant to § 938.34(5), STATS., the juvenile restitution statute, because the expenses were not damage to the victim. Rather, the towing was part of routine police procedure to get the car back to the police department for processing. Since the police department was not the victim, the towing expenses do not fall within the restitution statute. The State claims that the expenses do come within the statute because the towing benefited the victim. Additionally, since the police had to hire a private towing company to tow the vehicle, the State argues that the charge was not an internal police operating expense. The trial court, apparently finding the charge an expense to the public that should be repaid, ordered Joseph to pay the towing rate. We first address the trial court's finding that the towing expense is includable since the village of Hartland was a victim. Second, we address the State's argument that the expense is includable because the tow benefited the victim.

Whether the trial court had the authority to include the towing expenses in the restitution order is a question of law which we review de novo. *See* ***R.W.S. v. State***, 162 Wis.2d 862, 869, 471 N.W.2d 16, 19 (1991).

While the juvenile and adult restitution statutes are not identical, they share common goals: to rehabilitate the offender and to compensate the victim for his or her loss. *See* ***id***. at 879, 471 N.W.2d at 23. Therefore, reference to both adult and juvenile restitution cases guide our decision.

Neither a municipal law enforcement agency nor the general public can be the victim of a crime for restitution purposes due to the expense of processing the crime. *See* ***State v. Schmaling***, 198 Wis.2d 756, 761, 543 N.W.2d 555, 557 (Ct. App. 1995). In ***Schmaling***, we ruled that a county fire department's clean-up expenses could not be taxed against the defendant as restitution, even though his conduct caused the fires, because the county was not a victim of the crime. *See* ***id***. at 760-61, 543 N.W.2d at 557. Similarly, in ***State v. Evans***, 181 Wis.2d 978, 983-84, 512 N.W.2d 259, 261 (Ct. App. 1994), we held that the State could not recover "buy money" spent in a drug investigation as restitution because the State was not a victim of the crime.[1] Even when the State uses an outside agency to process evidence, the expense cannot be charged against the defendant as restitution because neither the State nor the outside agency is a victim of the crime. *See* ***State v. Beiersdorf***, 208 Wis.2d 492, 500-01, 561 N.W.2d 749, 753-54 (Ct. App. 1997).[2]

Here, Hartland paid for the tow. It suffered the damage of the price of the tow. But neither the Hartland police department nor the general population

[1] The state legislature subsequently added "buy money" as a cost chargeable to the defendant under § 973.06(1)(am), STATS. *See* 1995 Wis. Act 53, § 1.

[2] In ***Beiersdorf***, we found that the expense of DNA testing by an outside agency, while not taxable against the defendant as restitution, could be included as a cost under § 973.06(1)(c), STATS. *See* ***State v. Beiersdorf,*** 208 Wis.2d 492, 501, 508, 561 N.W.2d 749, 753, 756 (Ct. App. 1997). We need not address whether the towing costs in this case could be charged against Joseph under § 938.37, STATS., the juvenile counterpart to § 973.06, as this issue was not raised.

of Hartland can be a victim for the purposes of the restitution statute. *See* ***Schmaling***, 198 Wis.2d at 760-61 & n.3, 543 N.W.2d at 557. Thus, the expense cannot be charged against Joseph as restitution because it was not damage to a victim.

The trial court distinguished ***Schmaling*** on the fact that there, a private agency did not have to be called in, whereas here, the Hartland police had a private towing company bring the car to the police department. But the involvement of an outside agency reimbursed by the police does not change the fact that the towing expenses are not payable by the victim, which is all the statute covers. *See* ***Beiersdorf***, 208 Wis.2d at 500-01, 561 N.W.2d at 753-54. True, the Hartland police could have passed the towing bill on to Shields and required her to pay the towing expenses. Had that happened, the towing expenses would be damage to the victim. But, as far as we know from the record, that did not happen. The Hartland police department paid the towing bill, not Shields, and the police department cannot be a victim under the statute.

Nor does case law saying that an insurance company's outlays are includable as restitution affect the outcome of this case. *See* ***R.W.S.***, 162 Wis.2d at 880-81, 471 N.W.2d at 23-24. In ***R.W.S.***, the Wisconsin Supreme Court held, inter alia, that a juvenile can be required to pay restitution directly to the victim's insurer. There, a juvenile stole cash from the victim's home and the victim's insurance paid for the loss. *See* ***id.*** at 868-69, 471 N.W.2d at 18. The court found that it would be unreasonable to require direct payment to the victim, who would then have to reimburse the insurance company. *See* ***id.*** That the money went directly to the insurance company, rather than through the victim's hands, did not change the nature of the restitution: it was reimbursement for damage to the victim.

Here, Shields did not pay the towing expenses, so the expenses are not damage to the victim. In ***R.W.S.***, had the court required payment directly to the victim, the victim would have had to reimburse the insurance company. Here, were the court to order towing expenses paid to Shields, she would not have to reimburse anyone. The police have already paid for the tow. Shields was never missing the cost of the tow, unlike the victim in ***R.W.S.*** who was missing the stolen cash. What would be analogous to ***R.W.S.*** is if Shields' insurance company had paid for the tow. Then, under ***R.W.S.***, Joseph could conceivably be ordered to pay restitution directly to the insurance company. But that is not the case here. Shields' insurer did not pay for the tow, the police department did. And since the police department cannot be a victim for restitution purposes, the towing expenses were not includable under the restitution statute.

The State argues that the expenses should be included in the restitution order because the tow benefited Shields by returning the car to the village of Hartland, closer to her home. The statute, however, only authorizes restitution to cover damage to the victim, not any service that happens to be of benefit to the victim. That the tow benefited Shields in this instance was mere coincidence. The purpose of towing the car back to Hartland was to get it to the police department, not to get it to Shields. Furthermore, if the facts were different and had the car been recovered close to the victim's home, a tow to the police department might have inconvenienced the victim. That the routine police procedure happened to benefit Shields in this instance does not turn its cost into damage to her. Had the expense of that procedure been passed on to her by the Hartland police, she would be damaged, and the amount would properly be included in a restitution order. But the expense was not passed on to her and thus is not includable in the restitution order.

Because the expense of towing was not part of the victim's damages and because Hartland is not a victim of Joseph's crime, we reverse that portion of the restitution order requiring Joseph to reimburse Hartland for its towing expense.

By the Court.—Order reversed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.