

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-335

APRIL TERM, 2018

State of Vermont v. Jason P. Morse*

} APPEALED FROM:
}
} Superior Court, Bennington Unit,
} Criminal Division
}
} DOCKET NO. 1066-11-15 Bncr

Trial Judge: William D. Cohen

In the above-entitled cause, the Clerk will enter:

Defendant appeals from the trial court's restitution order. He argues that the court erred in determining the amount of restitution and failing to make findings regarding his ability to pay. We affirm the restitution order, and remand for findings on defendant's ability to pay, including a hearing if necessary.

Defendant pled guilty to one count of taking parcels of realty in violation of 13 V.S.A. § 2504. As a condition of probation, defendant agreed to furnish information, including financial records, to determine restitution, and he agreed to cooperate with restitution. The court held a restitution hearing in August 2017. The victim testified that defendant clear-cut approximately five acres of his eleven-acre property without his permission. The victim hired a forester to survey the property and the survey was admitted at the hearing. The forester determined that the fair market value of the removed lumber was \$3794 and that it would cost \$3000 to clean up the property. The victim also consulted a developer who was cognizant of current property values in the area, and who opined that, due to the clear-cutting, the fair market value of the victim's property had decreased by at least \$25,000. The victim testified that based on his own understanding and personal knowledge, this assessment was fair and accurate. At the close of the hearing, the court found that the victim had incurred an uninsured material loss of \$28,000: \$25,000 for the diminished property value and \$3000 in clean-up costs. The court did not allow recovery for the value of the lumber because it felt that would constitute a double recovery since it had allowed recovery for diminution in property value. The court found that these damages were caused directly by the unlawful taking. The court indicated that it would determine defendant's ability to pay the restitution ordered at a later date. Before additional proceedings could occur, however, defendant filed a notice of appeal.

Defendant argues on appeal that the court erred in determining the amount of restitution. He asserts that there was no evidence to explain how the value of the property had been diminished by \$25,000 and contends that this value was speculative. Defendant also notes that the victim could seek additional damages through a civil suit.

We review the court's restitution order for abuse of discretion. State v. Gorton, 2014 VT 1, ¶ 8, 195 Vt. 460. As we have explained, "[t]he purpose of the restitution statute is to compensate

a victim for his or her material loss.” State v. Morse, 2014 VT 84, ¶ 7, 197 Vt. 495 (quotation omitted). The State must prove, by a preponderance, “both the amount of the victim’s loss and that the defendant’s acts caused the victim’s loss.” State v. Driscoll, 2008 VT 101, ¶ 8, 184 Vt. 381. We find no abuse of discretion here.

First, the court could properly consider the diminished value of the victim’s real property as the measure of damages. The restitution statute “does not prescribe a certain method for calculating damages,” and we have recognized that “the difference in fair market value” is one “reasonable means to assess damages.” Morse, 2014 VT 84, ¶ 21. Defendant asserts that diminution in value is an inappropriate way to calculate damages in this case because the cut timber will eventually be replaced by new trees. We do not find this argument persuasive. Under the circumstances of this case, the court was within its discretion in awarding damages for diminution in value. The court’s finding as to the decrease in the property’s fair market value is supported by the evidence. The victim testified to this effect and he was competent to do so. See 12 V.S.A. § 1604 (“The owner of real or personal property shall be a competent witness to testify as to the value thereof.”); Driscoll, 2008 VT 101, ¶ 12 (“When [12 V.S.A.] § 1604 applies, we have routinely affirmed valuations based solely or primarily on the owner’s testimony of its value.”). Defendant’s assertion that the victim should have provided additional detail goes to the weight of the evidence, a matter reserved exclusively for the trial court. Driscoll, 2008 VT 101, ¶ 10. The fact that the victim could file a civil suit against defendant is immaterial. The State provided sufficient evidence to allow the court to calculate the “estimated loss,” which need only be calculated to “a reasonable certainty.” Id. ¶ 8. We find no error in the amount of restitution ordered.

Finally, defendant complains that the court failed to determine his ability to pay. The State agrees that the case should be remanded for findings on this point because the trial court was deprived of the opportunity to determine ability to pay by the immediate appeal of the court’s order regarding the restitution amount. We thus remand the case for additional proceedings, including a hearing if necessary.

The amount of restitution ordered is affirmed; the case is remanded to the trial court for findings, and a hearing if necessary, on defendant’s ability to pay.

BY THE COURT:

Marilyn S. Skoglund, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice