

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 18-0705
Plaintiff-Appellee,	:	On Appeal From the
vs.	:	Franklin County Court of Appeals
	:	Tenth Appellate District
ZACHARY ALLEN,	:	Court of Appeals Case No.
	:	17AP-296
Defendant-Appellant.	:	

**MEMORANDUM OPPOSING JURISDICTION OF
DEFENDANT-APPELLEE ZACHARY ALLEN**

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**EXPLANATION OF WHY THIS CASE DOES NOT PRESENT A SUBSTANTIAL
CONSTITUTIONAL QUESTION OR MATTERS OF PUBLIC OR
GREAT GENERAL INTEREST**

In *State v. Allen*, a unanimous Tenth District Court of Appeals found that a bank that reimburses an accountholder for checks fraudulently written on their account is not a victim within the context of R.C. 2929.18(A)(1) and is therefore not entitled to an order of restitution. *State v. Allen*, 10th Dist. No. 17AP-296, 2018-Ohio-1529, ¶ 16-17. The Court used sound reasoning that had already been used by several other appellate districts. See *State v. Harris*, 6th Dist. No. WD-14-069, 2015-Ohio-4412, ¶ 8, *State v. Crum*, 5th Dist. No. 12 CAA 08 0056, 2013-Ohio-903, ¶12; *State v. Stump*, 4th Dist. No. 13CA10, 2014-Ohio-1487, ¶12; *State v. Kiser*, 2d Dist. No. 24419, 2011-Ohio-5551, ¶ 16.

STATEMENT OF THE CASE AND FACTS

The appellee accepts the state's Statement of the Case and Facts with the following addition. The state notes that Mr. Allen was indicted for seven counts of forgery in violation of O.R.C. 2913.31 and seven counts of possession of criminal tools in violation of O.R.C. 2923.24. Mr. Allen pled guilty to the seven forgery counts. None of these counts contained a "victim" in the language of the indictment.

LAW AND ARGUMENT

Response to Proposition of Law: A bank which cashes a forged check and reimburses the account holder is not a victim under R.C. 2929.18 and is therefore not entitled to an order of restitution.

The State of Ohio in its Memorandum in Support of Jurisdiction suggests that the Tenth District Court of Appeals adopts a “constrained interpretation of R.C. 2929.18” (State’s MISJ at 8) but the Tenth District was, as it stated, following the “majority of appellate courts that have addressed similar scenarios” in determining “that a bank that reimburses its customer is a third-party and cannot be awarded restitution from a defendant.” *Allen* at ¶ 16, *State v. Harris*, 6th Dist. No. WD-14-069, 2015-Ohio-4412, ¶ 8, *State v. Crum*, 5th Dist. No. 12 CAA 08 0056, 2013-Ohio-903, ¶12 (“If a victim is reimbursed by a third party, the victim has not suffered an economic loss. Third-parties are ‘not statutorily entitled to recover the costs of its decision to reimburse the victim’”); *State v. Stump*, 4th Dist. No. 13CA10, 2014-Ohio-1487, ¶12; *State v. Kiser*, 2d Dist. No. 24419, 2011-Ohio-5551, ¶ 16. The state is asking this court to extend the definition of “victim” to third-party banks because they suffered the economic loss. However, this approach ignores the numerous cases which have held differently. Ohio law simply does not permit restitution to every third-party who has suffered a loss as a result of a crime.

Ohio law allows the court to order restitution to the victim of the crime, or any survivor of the victim, for the amount of the victim’s economic loss. R.C. 2929.18(A)(1). “Although the former version of the statute permitted restitution to third-parties, that language was removed by the Ohio Legislature from the current version. *State v. Dull*, 3d Dist. Seneca No. 13-12-33, 2013-Ohio-1395. ‘Pursuant to the plain language of R.C. 2929.18(A)(1), restitution may not be ordered payable to a third party.’ *Id.* at ¶11. See also *State v. Didion*, 173 Ohio App.3d 130, 2007-Ohio-4494, 877 N.E.2d 725 (3d Dist.) at ¶29.” *State v. Radebaugh*, 3d Dist. Marion No. 9-

14-13, 2015-Ohio-1186, ¶7.

The state has interpreted the Court of Appeals decision as recognizing “that a ‘victim’ is someone harmed by a crime or wrong.” (MISJ at 5) This is an incomplete reading of the opinion. The court initially noted that R.C. 2929.18 does not define “victim.”

R.C. 2929.18 does not define “victim.” “The Ohio Revised Code contains a number of different definitions for ‘victim’ at various junctures in the Code, but at no point is there promulgated a generally applicable definition that applies to the entire Revised Code or even to the state’s criminal code, found in Title 29.” *State v. Orms*, 10th Dist. No. 14AP-750, 2015-Ohio-2870, ¶ 15. Some Ohio appellate districts have relied on R.C. 2930.01(H)(1) to determine who qualifies as a victim for restitution. See, e.g. *Thornton* at ¶ 15; *State v. Hunter*, 2d Dist. No. 25521, 2013-Ohio-3759; *Harris* at ¶ 8; and *Maurer* at ¶ 19. That section defines “victim” as “[a] person who is identified as the victim of a crime or specified delinquent act in a police report or in a complaint, indictment, or information that charges the commission of a crime and that provides the basis for criminal prosecution.” R.C. 2930.01(H)(1). Other appellate districts have declined to use this definition outside of the Victim’s Rights, R.C. Chapter 2930, as R.C. 2930.01 specifies that the definitions apply to that chapter only. *Cartwright* at ¶ 13 (R.C. 2930.01(H)(1)’s definition is limited in scope and has no application in determining who is a victim for purposes of restitution under R.C. 2929.18(A)(1)); *State v. Ritchie*, 174 Ohio App.3d 582, 2007-Ohio-6577 (5th Dist.) (declined to use R.C. 2930.01(H)(1) to define “victim” for purposes of R.C. 2953.36); *State v. Goudy*, 7th Dist. No. 15 BE 0046, 2016-Ohio-5193. In this case, the indictment does not identify a victim for any of the forgery counts.

Black’s Law Dictionary defines “victim” broadly as “[a] person harmed by a crime, tort, or other wrong.” Black’s Law Dictionary (10th Ed.2014).

Allen at ¶ 14-15. The Court of Appeals only recognized that that was the definition in Black’s Law Dictionary. It did not accept that as a definition for “victim” and most certainly, given the holding, did not hold that every person or entity who has suffered a loss is a “victim” for purposes of R.C. 2929.18(A)(1).

The court in *State v. Harris*, 6th Dist. Wood No. WD-14-069, 2015-Ohio-4412 did use the definition of “victim” found in R.C. 2930.01(H)(1) yet still came to the conclusion that a bank

which reimburses a customer is not a “victim.”

The question of who constitutes a “victim” under the statute is a question of law that is reviewed de novo. *State v. Hunter*, 2d Dist. Montgomery No. 25521, 2013-Ohio-3759, ¶ 7. A “victim” is defined by R.C. 2930.01(H)(1) as

[a] person who is identified as the victim of a crime or specified delinquent act in a police report or in a complaint, indictment, or information that charges the commission of a crime and that provides the basis for the criminal prosecution or delinquency proceeding and subsequent proceedings to which this chapter makes reference.

Therefore, the victim is only the person named in the indictment as the victim. *Hunter*. If the named victim has been reimbursed, he has not suffered an economic loss and, therefore, is not entitled to reimbursement. *State v. Crum*, 5th Dist. Delaware No. 12 CAA 08 0056, 2013-Ohio-903, ¶ 12. Furthermore, a bank which reimburses a customer/victim is not a “victim” of the crime and, therefore, the trial court cannot require restitution to be paid to the bank. [Citations omitted]

Id. at ¶ 8. Similarly in *State v. Stump*, 4th Dist. Athens No. 13CA10, 2014-Ohio-1487, the court stated

In the case sub judice, the victim is not Community Bank. Rather the victim is the individual from whose account appellant transferred money into her account. Community Bank is a third-party that reimbursed its customer the money stolen from his account. Ohio courts have consistently held that under the current version of R.C. 2929.18(A)(1), third-parties are not “victims” for whom restitution can be ordered. *State v. Dull*, at 3rd Dist. Seneca No. 13-12-33, 2013-Ohio-1395, ¶11; *State v. Crum*, 5th Dist. Delaware No. 12CAA080056, 2013-Ohio-903, at ¶12; *State v. Kelly*, 4th Dist. Pickaway Nos. 10CA28 & 10CA29, 2011-Ohio-4902, at ¶7. A bank that reimburses a customer who has been a victim of a crime is a third party. As such, the bank cannot be awarded restitution from a defendant who stole from that bank’s customer. See *Crum*, supra at ¶12; *Kiser*, supra at ¶17.

Id. at ¶ 12. It is important to note that the neither the bank nor the accountholder are actually listed in the indictment as victims. “[W]here a bank reimburses a customer-victim but the bank is not named in the indictment, it is not a ‘victim’ under R.C. 2929.18(A)(1).” *State v. Maurer*, 8th Dist. Cuyahoga No. 103162, 2016-Ohio-1380, ¶ 25; *Harris* at ¶ 8.

The state has consistently relied on *State v. Estes*, 3d Dist. No. 13-11-14, 2011-Ohio-5740 as support for its position that a bank that cashes a forged check is the victim of an offense. *Estes* is inapposite to this case and the Court of Appeals recognized as such. *Estes* involved a defendant who used his ex-wife's information to obtain two credit cards in her name. He used these cards to make purchases. He also wrote checks on his ex-wife's existing line of credit to deposit money into his bank account. The Court of Appeals distinguished this case by noting that the banks were victims because they directly suffered the economic loss. No money was withdrawn from any account held by Estes' ex-wife nor was there any indication she actually had to pay the credit cards. *Allen* at ¶ 15. As such, the bank could not be argued to be a third-party as is the case here.

While it is certainly true that restitution was not barred to all third-parties when R.C. 2929.18 was amended in 2004 to remove restitution to insurers, eligible third-parties are limited to those provided in 2929.18(A)(1). That section permits payments to the victim or any survivor of the victim and if the court imposes restitution, it may be ordered to be paid to the victim, the court's adult probation department, the clerk of courts, or to another agency designated by the court. The state cites this court's opinion in *State v. Bartholomew*, 119 Ohio St.3d 359, 2008-Ohio-4080 for the proposition that not all third parties are barred from recovering restitution. (MISJ at 7) *Bartholomew* dealt with a court ordering payments to the victims of crime reparations fund created by R.C. 2743.191 and whether that fell under the other "agency designated by the court" in R.C. 2929.18(A)(1). This court, in upholding the order, did not create any new third parties to which a court could order restitution. The court simply found that the reparations fund fell under one of the specifically enumerated third parties in R.C. 2929.18(A)(1). *Id.* at 363-364. See also *Harris* at ¶ 9. ("[*Bartholomew*] found that the fund was

a state ‘agency designated by the court’ and therefore was an eligible recipient for the payment of restitution under R.C. 2929.18(A).”)

Again, the only allowable third-parties under R.C. 2929.18 are the court’s adult probation department, the clerk of courts or another agency designated by the court. There is no conceivable interpretation that would allow a bank who reimburses a customer to be considered a third-party under the current statute. As such, this Honorable Court should decline jurisdiction.

CONCLUSION

For the foregoing reasons, Appellee respectfully urges this Court to decline to accept jurisdiction in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Memorandum Opposing Jurisdiction was served upon the following by Electronic Mail this 20th day June, 2018:

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