

Opinion No. 2011-122

January 18, 2011

The Honorable Gilbert Baker
State Senator
17 Cooper Lane
Conway, Arkansas 72034-7935

Dear Senator Baker:

This is my opinion on your question about restitution in criminal cases:

Could expenses incurred by law enforcement agencies of municipalities in the investigation, apprehension, and service or processing of defendants be considered “monetary expenses” incurred as a “direct or indirect result of the defendant’s offense or criminal episode” as contemplated by [A.C.A. § 5-4-205(c)(1) (Supp. 2011)], or is the language in *Tumlison v. State*, 93 Ark. App. 91[, 216 S.W.3d 620] (2005) dispositive of this question?

The statute you cite defines “victim” for restitution purposes:

As used in this section and in any provision of law relating to restitution, “victim” means any person, partnership, corporation, or governmental entity or agency that suffers property damage or loss, monetary expense, or physical injury or death as a direct or indirect result of the defendant’s offense or criminal episode.

A.C.A. § 5-4-205(c)(1). The statute provides for restitution in the amount of the “actual economic loss caused to a victim . . .” A.C.A. § 5-4-205(b)(1).

The court in *Tumlison* stated that “[t]he cost to investigate [the defendant’s crime] does not constitute actual economic loss.” 93 Ark. App. at 100. I assume this is “the language in *Tumlison*” to which you refer in your question.

RESPONSE

In my opinion, the quoted language from *Tumlison* is not dispositive of your question, and there may indeed be instances where a municipal law enforcement agency, in the course of investigation or one of the other activities mentioned in your question, incurs “monetary expense . . . as a direct or indirect result of [a] defendant’s offense or criminal episode,” and therefore is a victim as defined in A.C.A. § 5-4-205(c)(1). Whether an expense will be eligible for reimbursement through restitution will depend on the facts of each particular case.

Arkansas courts construe unambiguous statutes according to the plain meanings of the words used. *E.g.*, *May Const. Co., Inc. v. Town Creek Const. & Dev., LLC*, 2011 Ark. 281, ___ S.W.3d ___, 2011 WL 2477185. Criminal statutes, including A.C.A. § 5-4-205, are construed strictly, resolving any doubt in favor of the defendant. *Singleton v. State*, 2009 Ark. 594, ___ S.W.3d ___, 2009 WL 4403242.

A municipal law enforcement agency is obviously a “governmental entity or agency.” A.C.A. § 5-4-205(c)(1). And nothing in the statute limits the kinds of expenses that, if incurred “as a direct or indirect result of [a] defendant’s offense or criminal episode,” make a person or entity a victim eligible to receive restitution. *Id.* On the face of the statute, then, under the plain meaning of the words used, it appears that a municipal law enforcement agency may become a victim for restitution purposes if it incurs monetary expense as a result of a crime, regardless of the nature or type of the expense.

The question becomes whether something in *Tumlison* requires a different conclusion. There, the defendant defrauded his employer. The trial court ordered the defendant to pay the employer restitution in a sum that included amounts paid to other employees for time they spent investigating the fraud. The Supreme Court reversed, holding that the employer suffered no actual economic loss in conducting the investigation. 93 Ark. App. at 100.

Your question suggests that you interpret *Tumlison* to mean that the employer could not receive the restitution at issue because the expenses were incurred in the course of an investigation. I do not agree with that interpretation. In my view, the

court's language must be viewed in, and limited to, *Tumlison's* factual context. The expenses at issue were wages paid to employees while they conducted an investigation, and the court characterized them as investigative expenses. But I do not consider the expenses' nature to have been the basis of the court's holding. Instead, I interpret *Tumlison* to mean that the expenses, regardless of their characterization, were not eligible for restitution because they did not constitute *actual economic loss*. The court did not, as I read the case, hold that expenses of investigating a crime can never be the kind of expenses described in the statute defining "victim."

There is not a body of Arkansas case law that is especially helpful in answering your question, but there is a case that suggests by analogy that my opinion is correct. In *Brown v. State*, 375 Ark. 499, 292 S.W.3d 288 (2009), the court held that the defendant's crime, cruelty to animals, resulted in a humane society's expenses in caring for horses the defendant had maltreated, and thus that the humane society was a victim for restitution purposes. In my view, the case demonstrates that the statute may be interpreted to include any sort of expense, provided it results from the crime and constitutes actual economic loss. And although the restitution in *Brown* was ordered to be paid directly to the humane society, I believe the result would have been the same if a police agency had hired and paid the humane agency to care for the horses, then sought reimbursement from the defendant through restitution.¹

¹ This is not to say that police agencies will necessarily routinely incur expenses that are eligible for restitution. A police agency's regular, recurring costs probably are not the sort of "actual economic loss[es]" contemplated by the statute, even though they might in some sense be attributed to the investigation, etc., of a particular crime and defendant. It seems unlikely that a law enforcement agency will suffer "actual economic loss" within the meaning of the statute unless, as a threshold matter, the agency would not have spent the money absent the defendant's offense or criminal episode. Expenses that would have been incurred absent the offense or episode simply do not "result" from it or constitute "actual economic loss." See A.C.A. § 5-4-205(c)(1), (b)(1). While the court in *Tumlison* did not address the issue at length, I believe this is the point it was making when it stated that "[t]he cost to investigate [the defendant's crime] does not constitute actual economic loss." *Tumlison*, 93 Ark. App. at 100. There was no indication in *Tumlison* that the employer paid the employees conducting the investigation any more than it would have paid them had the defendant not committed the fraud. "Restitution is meant, as far as it is practicable, to make the victim whole with respect to the financial injury suffered." *Id.* If the offense or episode does not cause a person to incur expense, the person has not been harmed in the monetary-expense context discussed in this opinion, and is already whole.

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In sum, then, it is my opinion that there may be instances in which a municipal law enforcement agency incurs “monetary expense . . . as a direct or indirect result of [a] defendant’s offense or criminal episode” and therefore is a victim as defined in A.C.A. § 5-4-205(c)(1). Whether an expense will be eligible for reimbursement through restitution will depend on the facts of each particular case.

Assistant Attorney General J. M. Barker prepared this opinion, which I approve.

Sincerely,

DUSTIN McDANIEL
Attorney General

DM:JMB/cyh