EFiled: Mar 09 2015 04:16PM EDT
Filing ID 56888230
Case Number 684,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE, VICTIMS' COMPENSATION ASSISTANCE PROGRAM, **Appellant.** **v.** **DAVID P. CHIANESE,** **Appellee.**	**No. 684, 2014**

APPELLEE'S ANSWERING BRIEF

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Dated: March 9, 2015

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NATURE AND STAGE OF THE PROCEEDINGS

On September 9, 2009, Appellee David Chianese (hereinafter "David") entered a guilty plea to Offensive Touching in violation of 11 Del. C., §601(a)(1) in the Court of Common Pleas, to resolve a charge arising from an incident on November 23, 2008 with a woman whom David, for the sake of her privacy, will identify herein by the name of Jane, although that is not her real name. Pleading guilty to Offensive Touching admits no more than directly or indirectly touching another in a manner "likely to cause offense or alarm." David does not accept the State's characterizing the incident as "domestic violence" because there was no violence or resulting injury requiring medical care and leading to loss of earnings.

Based on a non-adversarial, unilateral investigation conducted by the Victims' Compensation Assistance Program (hereinafter, "VCAP"), in which David had no opportunity to participate, VCAP concluded that David caused physical and emotional injury to Jane which caused her to lose time from work and to receive medical treatment and psychological therapy, notwithstanding that David's plea admitted no physical or emotional injury. Initially, Jane sought compensation of $500,000, later reducing her demand to $79, 000, and ultimately accepted the $12, 107.23 approved by VCAP (A6-10, A113). Her demands, David argued below, were "something that sounds more like the rage of a woman scorned than the rage of a woman injured" (A 113).

On September 29, 2010, almost two years after the November 23, 2008 incident, VCAP authorized and offered her $12,107.23 (A9). Because of Jane's dissatisfaction with the amount, she sought reconsideration of the amount, but VCAP rejected her claim for more, and ultimately paid her the original $12,107.23 award on August 29, 2011 (A10). [The sequence of events is not in dispute and is spelled out in the Court of Common Pleas Memorandum Opinion and Order (pp. 2-4, including footnotes)]. The award was based on interviewing Jane and on documents submitted by Jane or collected by VCAP (A11-29). It is undisputed that, in the course of its investigation, VCAP did not give David notice of the investigation, did not show him the documents, did not tell him the basis for its award, and did not offer him any opportunity to challenge it, but after making the award and paying Jane, presented him with a demand to reimburse VCAP for the $12,107.23 awarded to her (A118-119).

David refused to reimburse VCAP the $12,107.23. Because of inaction by VCAP, its demand for a judgment against David first reached a hearing in the Court of Common Pleas (hereinafter "CCP") on December 13 & 20, 2013, more than five years after the original November 23, 2008 incident. Neither Jane nor any direct witnesses testified to her alleged injuries. VCAP simply submitted the documentation it had assembled in its investigation of Jane's claim.

At the close of the State's evidence in CCP, David moved that the Court dismiss the action because of the State's failure to establish a *prima facie* case and argued that imposing a judgment based on VCAP's closed investigation, without notice to him and opportunity to be heard would deny him Due Process (A80), but CCP denied his motion (A83). Ultimately, on April 10, 2014, CCP entered its "Memorandum Opinion and Order" denying VCAP's claim for reimbursement (A52-86). As stated in that Memorandum Opinion and Order, in connection with his sentence for the criminal offense, "No order for restitution was imposed" (p.2).

VCAP appealed the CCP decision to Superior Court. After full briefing, the Superior Court affirmed the CCP Order on December 4, 2013, without opinion. VCAP's appeal to this Court followed.

SUMMARY OF THE ARGUMENT

I. A CRIMINAL DEFENDANT IS NOT NECESSARILY OBLIGATED TO REIMBURSE VCAP FOR ITS PAYMENT TO A VICTIM MERELY BECAUSE IT CLAIMS THE PAYMENT IS COMPENSATION FOR INJURIES SHE SUSTAINED AS A RESULT OF THE DEFENDANT'S CRIMINAL OFFENSE.

II. VCAP IS NOT ENTITLED TO RECOVER PAYMENTS IT MADE TO A VICTIM WHERE THE EVIDENCE FAILS TO ESTABLISH THAT SUCH PAYMENTS WERE WARRANTED COMPENSATION FOR INJURIES SHE SUSTAINED AS A RESULT OF DEFENDANT'S CRIMINAL OFFENSE.

III. THE SUPERIOR COURT BELOW DID NOT ERR IN REFUSING TO ORDER CRIMINAL DEFENDANT TO REIMBURSE VCAP FOR PAYMENTS IT MADE TO A VICTIM FOR INJURIES SHE ALLEGEDLY SUSTAINED AS A RESULT OF DEFENDANT'S CRIMINAL OFFENSE.

STATEMENT OF FACTS

The key fact in this matter is that Appellee David P. Chianese (hereinafter "David") pled guilty only to Offensive Touching in violation of 11 Del.C., §601(a)(1) in the Court of Common Pleas (hereinafter "CCP"). He did so to resolve a criminal charge arising from an incident on November 23, 2008 with a the victim, whom David, for the sake of her privacy, will identify as "Jane," although that is not her real name. Pleading guilty to Offensive Touching admits no more than directly or indirectly touching her in a manner "likely to cause offense or alarm." It does not admit injury of any sort. David did not admit causing any injury in the plea itself or in any plea agreement or in any statement to the Court in any part of the criminal proceedings (A 84). In the December CCP hearing, his unrebutted testimony admitted rudeness but denied inflicting any injury (A84-85; 112-113). As stated in the April 10, 2014 CCP Memorandum Opinion and Order (hereinafter "Final CCP Order"), "No order for restitution was imposed" (p.2).

Appellant's Statement of Facts is based entirely on administrative findings made by the VCAP staff after a non-adversarial, unilateral, closed investigation without any hearing or any elements of Due Process. Every allegation made by Appellant beyond the fact of David's plea rests on VCAP's closed unilateral investigation and the documents it produced (A80 & 119). This is undisputed.

Outside that investigation, there is no factual basis for any of VCAP's allegations that David dragged the victim, his former girlfriend, from his house, feet first, knocking her unconscious, and causing injuries to her neck and head. Similarly, there is no independent basis for allegations that any conduct by David caused headaches, neck pain, problems with concentration and memory, sleep disorder, balance issues, irritability, depressed mood, post-concussion syndrome, cervical sprain, post-traumatic stress disorder, or traumatic brain injury. There is no independent basis to conclude that any action by David caused her to miss work. There is no independent basis for allegations that David's conduct caused her to experience nightmares, depression, intrusive thoughts, agitation, irrational fears post-traumatic stress disorder, major depressive disorder, visual distortions, inability to read for extended periods, depression, anxiety, severe migraines, or inability to work. There is no independent basis for VCAP's allegations that any conduct by David caused Jane to become unable to work, to lose wages, or to incur medical expenses. All these allegations are based on documents from VCAP's closed, unilateral investigation that were admitted at the restitution hearing and are identified in Appellant's Appendix (A-3-5, 11-20, 27-29, 82, 84-87). Because this was a unilateral, closed investigative proceeding, David had no opportunity to challenge whether injuries Jane claimed were attributed to pre-existing events,

which the documentary record shows included two auto accidents, two shoulder injuries, a disc herniation and chronic pain (A 113).

The hearing in the Court of Common Pleas began on December 13, 2013 (A52) and was completed on December 20, 2013 (A98).

David does not deny that VCAP paid Jane $12,107.35 as compensation for such alleged injuries and losses (A116). He believes she suffered no such injuries as a result of anything that he did. In the CCP restitution hearing, VCAP presented only documents which it assembled through its unilateral non-due-process investigation. Neither Jane nor any of her examining or treating physicians appeared. VCAP's case rested entirely on documents it collected and introduced over David's objections (A73-74). Regarding those, Alfred J. Lindh (hereinafter "Lindh"), David's attorney told CCP that "nothing in the documents…connects the medical problems the victim had with the act to which my client pled guilty. There's no showing of nexus in those documents. There's no proximate cause… (A73-74).

As VCAP concedes in its Statement of Facts, at the restitution hearing, David testified, but admitted only to taking the victim by the wrist and leading her out of his house and into his truck. He admitted that he was rude. When interviewed by a police officer at about the time of the incident, he denied any

action likely to injure her (A 104-105). At the Common Pleas hearing, he testified that the victim's alleged injuries were "bogus" (A84-85). Neither Jane nor any physician or other witness testified to contract him.

Initially, Jane sought compensation of $500,000, later reducing her demand to $79,000.00, and ultimately accepting the $12, 107.23 approved by VCAP. Her demands, David argued below, were "something that sounds more like the rage of a woman scorned than the rage of a woman injured" (A 113).

At the end of VCAP's case, Lindh renewed the motion he had earlier made to dismiss the case for VCAP's failure to establish a prima facie case (A80, 83-85). Among other things, he contended that if VCAP's investigative findings were incontrovertible, there could be no Due Process (A118-119).

David testified in the CCP hearing (A83-84). He denied that he knocked her down or dragged her (A 84-85). He said he grabbed her by the wrist led her out of his house to his truck, bought her belongings to the truck, and drove her home, where he dropped her off (A84-85). He conceded that his behavior was rude, but denied that anything he did could have caused her alleged injuries (A85-86). He affirmed his belief that her claim of injury was "bogus" (A86). No witness, no one at all, contradicted David's testimony!

ARGUMENT

I. A CRIMINAL DEFENDANT IS NOT NECESSARILY OBLIGATED TO REIMBURSE VCAP FOR ITS PAYMENT TO A VICTIM MERELY BECAUSE IT CLAIMS THE PAYMENT IS COMPENSATION FOR INJURIES SHE SUSTAINED AS A RESULT OF THE DEFENDANT'S CRIMINAL OFFENSE**.**

Question Presented

May VCAP recover a judgment against a criminal defendant for a payment it made to a victim for injuries allegedly resulting from the offense that are neither established by the offender's plea nor by any Due Process finding?

Scope of Review

The decision below was that of the Court of Common Pleas ("CCP"), affirmed without opinion by the Superior Court. Appellant argues that CCP erred by failing to apply the relevant law to the facts and therefore failing to award VCAP reimbursement for the payment it made to Jane as a crime victim. Appellee argues that there were no facts established in the criminal proceeding or properly established thereafter by which CCP could order David to reimburse VCAP. This Court may review a trial court's decision for errors in applying the law to the facts presented. *Downs v. State*, 540 A.2d 1140, 1144 (Del. 1990). This Court may determine whether the evidence supports the findings below and whether the decision is the product of orderly and logical deductive process. *DuPont v.*

DuPont, Del.Supr., 216 A.2d 674 and *Levitt v. Bouvier*, Del.Supr., 287 A.2d 671 (1972).

Merits of the Argument

In its April 10, 2014 Memorandum Opinion and Order (CCP Final Order), CCP pointed out that in David's sentencing, "No order for restitution was imposed" (CCP Final Order, p. 2). Further along in that Order, CCP stated that "The sentence order did not require that he pay restitution" (CCP Final Order, p.6). Citing *State v. Schafferman, 2013 WL 4716350 (Del. Super. Aug. 20, 2013),* CCP held that this precluded restitution to VCAP for its award to Jane. "As in Schafferman, the State cannot recover restitution from [David] Chianese under these circumstances" (CCP Final Order, p. 6).

The State argues that CCP could always provide for restitution to a crime victim by a "compensating fine." Regardless of whether that might apply in other circumstances, CCP imposed no such "compensating fine" at the time of sentencing and the criminal case is long since closed.

Also, CCP rejected the State's suggestion that VCAP could recover restitution under §9014 of the Act because that only applied to circumstances when the Court has control of funds of the offender and the CCP had no such funds.

However, regardless of the CCP Final Order, there are other substantial reasons why the denial of VCAP's claim was justified. At the close of VCAP's case, David moved that CCP dismiss VCAP's claim because it failed to establish a *prima facie* case. Although CCP eventually denied relief to VCAP at the end of the proceedings, it wrongfully denied David's motion to dismiss at the close of VCAP's case. A judgment against David based on the paper record of the closed VCAP investigation would violate his Due Process rights under the United States Constitution and the Constitution of Delaware. VCAP's investigation afforded David no opportunity to challenge the sufficiency of the paper record on which its payment to Jane was based, no opportunity to confront witnesses, and no opportunity to testify or otherwise challenge VCAP's findings.

In *Formosa Plastics Corp. v. Wilson*, 504 A.2d 1083, 1089 (Del.1986), this Court held that, before a party can be deprived of life, liberty, or property, the party has the right to notice and a hearing in a meaningful time and a meaningful manner. Specifically, the Court declared:

> "Before a party can be deprived of life, liberty, or property, it has the right to notice and a hearing in a meaningful time and a meaningful manner. *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983, 1994, 32 L.Ed.2d 556 (1972). The due process

> requirements of the Fifth and Fourteenth Amendments of the United States Constitution dictate that result as do Art. I, sections 7–9 of the Delaware Constitution" (1089-1090).

VCAP afforded David no notice of the investigation and no timely opportunity to examine or challenge the paper record on which its action was based. He had no timely opportunity to cross-examine the medical or other witnesses on whose reports VCAP relied or to challenge VCAP's investigation in any way. VCAP presented no live witness to the underlying facts at the December 13 & 20, 2013 hearings. Arguing that David could challenge VCAP's paper record then, more than five years after the original November 23, 2008 incident and almost three years after VCAP's September 29, 2010 initial award to Jane is not timely. As the United States Supreme Court has said:

> "[A] primary interest secured by [the Confrontation Clause of the Sixth Amendment] is the right of cross-examination...." *Douglas v. Alabama*, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965). Cross-examination is the "principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974)."

This Court has insisted on Due Process even in restitution proceedings pursuant to the explicit term of a criminal sentence. In *Moore v. Delaware*, Del. Supr., 15 A.3d 1240 (Del. 2011), this Court reversed a civil judgment for restitution to certain victims against a former probationer who had been discharged from probation resulting from a sentence for vehicular assault and driving under the influence. The Court held that Superior Court lacked jurisdiction to issue a restitution order to victims other than those specified as recipients of restitution by the guilty plea agreement, and that the Court could not impose restitution without notice and hearing before it issued an expanded restitution order, violating former probationer's due process rights. In *Moore*, the Court also stated:

> "Judicial proceedings are governed by 'fundamental requirements of fairness which are the essence of due process.' The two most fundamental elements of due process are notice and a hearing (*Moore, supra* at 1246).…
>
> "In this case, the record before us reveals no evidence that the court ever provided Moore with notice or a hearing before it issued the expanded restitution order that was both inconsistent with the plea agreement and with the earlier discharge order indicating that no further restitution was outstanding. To be sure, Moore had already agreed to pay

> restitution to Seibert and the Bensons in an amount to be determined. But, even assuming the court had continuing jurisdiction to modify restitution to those parties after discharging Moore from probation, Moore was still entitled to notice and a hearing, to provide him the opportunity to contest the amount and to contest any new claimants to restitution. The record also discloses that the court never provided Moore with notice or a hearing before it entered the civil judgment against him in the amount the court ordered (*Moore, supra* at 1246-1247)."

In *Snowden v. State*, 672 A.2d 1017, 1024 (Del. 1996), this Court held that merely restricting the party's cross-examination of a witness to challenge his credibility in a proceeding for the termination of the party's police employment violated the party's confrontation rights under the Sixth Amendment and Article I, §7 of the Delaware Constitution.

And again in *Cunningham v. McDonald*, 689 A.2d 1190 (Del. 1997), citing *Snowden v. State*, *supra*, this Court reversed the trial court for merely restricting cross-examination unduly, making it clear that even in a civil action a party was entitled to full cross-examination of an adverse witness. The Court quoted *Davis v.* Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed. 2d 347 (1974), stating:

> "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." In *Cunningham, supra*, at 1195, the Court also cited its own decision in *Weber v. State*, Del. Supr., 457 A.2d 674, 682 (1983) where the Court said it was important that the trier of fact (the jury there) "be exposed to facts sufficient for it to draw inferences as to the reliability of the witness… ."

In this case, David never waived his due process rights. Even in the context of confess judgment notes, this Court recognizes the primacy of due process rights. In *Mazik v. Decision Making, Inc.*, 449 A.2d 202, 204 (Del. 1982), this Court held that any waiver of such rights must be make voluntarily, knowingly, and intelligently. It said:

> "Indeed, the due process **rights to notice** and a **hearing** before a civil judgment are subject to waiver. *D. H. Overmyer Co., Inc. v. Frick*, 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972); *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). In the civil realm, as in the criminal, a valid waiver must be voluntarily, knowingly and intelligently made, *Overmyer*, 405 U.S. at 186, 92 S.Ct. at 782 (citations omitted), or 'an intentional relinquishment or abandonment of

> a known right or privilege.' *Overmyer*, 405 U.S. at 186, 92 S.Ct. at 782, *quoting Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938) (*Mazik, supra* at 204)."

At the December 13 & 20, 2013 hearing in CCP, VCAP produced only the paper record of its investigation as a basis for asking CCP to impose judgment on David based on its September 29, 2010 award to Jane, more than three years earlier, and five years after the November 23, 2008 event. After CCP denied his motion to dismiss at the close of VCAP's case, David testified and denied causing any injury to Jane. He was the only live witness to the underlying facts. His testimony, which went un-contradicted, was therefore the only evidence that CCP could properly consider. His uncontradicted testimony prohibited any judgment for VCAP.

II. VCAP IS NOT ENTITLED TO RECOVER PAYMENTS IT MADE TO A VICTIM WHERE THE EVIDENCE FAILS TO ESTABLISH THAT SUCH PAYMENTS WERE WARRANTED COMPENSATION FOR INJURIES SHE SUSTAINED AS A RESULT OF DEFENDANT'S CRIMINAL OFFENSE.

A. Question Presented

The question presented is whether, under the circumstances of this case, 11 Del.C, §9018 required or even permitted CCP to order the criminal defendant to reimburse VCPA for an award it made to the victim of his offense.

B. Scope of Review

The decision below was that of the Court of Common Pleas (CCP), affirmed without opinion by the Superior Court. Appellant argues that CCP erred by failing to apply the relevant law to the facts and therefore failing to award VCAP reimbursement for the payment it made to Jane as a crime victim. Appellee argues that there were no facts established in the criminal proceeding or properly established thereafter by which CCP could order David to reimburse VCAP. This Court may review a trial court's decision for errors in applying the law to the facts presented. *Downs v. State*, 540 A.2d 1140, 1144 (Del. 1990). This Court may determine whether the evidence supports the findings below and whether the decision is the product of orderly and logical deductive process. *DuPont v. DuPont, Del.Supr., 216 A.2d 674* and *Levitt v. Bouvier*, Del.Supr., 287 A.2d 671 (1972).

C. Merits of the Argument

The answer to the State's argument that CCP might have imposed a compensating fine on David under 11 Del.C., §9018 at the time of sentencing is that the Court was not asked to do so at the time of sentencing and that the Court did not do so.

"On August 27, 2010, the Court found [David] Chianese in violation of probation. Chianese was sentenced to pay costs and he was discharged from probation as unimproved. No order for restitution was imposed" (CCP Final Order, p. 2). And again, "When [David] Chianese was discharged from probation…he was sentenced solely to pay costs. The sentence did not require that he pay restitution" (CCP Final Order, p.6).

There is no provision of law for reopening the criminal case now to change the sentence then imposed. There is simply no authority to do that.

III. THE COURT BELOW DID NOT ERR IN REFUSING TO ORDER CRIMINAL DEFENDANT TO REIMBURSE VCAP FOR PAYMENTS IT MADE TO A VICTIM FOR INJURIES SHE ALLEGEDLY SUSTAINED AS A RESULT OF DEFENDANT'S CRIMINAL OFFENSE.

A. Question Presented

Did the evidence presented to the Court support the State's request that a criminal defendant in an alleged domestic violence case pay as restitution the full documented amount received by the crime victim for medical expenses and lost wages allegedly caused by the criminal defendant?

B. Scope of Review

The decision below was that of the Court of Common Pleas (CCP), affirmed without opinion by the Superior Court. Appellant alleges that CCP erred by failing to apply the relevant law to the facts and by failing to award VCAP reimbursement for a payment it made to a crime victim. Appellee argues that there were no facts established at any point on which CCP could order David to reimburse CCP. This Court may review a trial court's decision for errors in applying the law to the facts presented. *Downs v. State*, 540 A.2d 1140, 1144 (Del. 1990). This Court may determine whether the evidence supports the findings below and whether the decision is the product of orderly and logical

deductive process. *DuPont v. DuPont, Del.Supr., 216 A.2d 674* and *Levitt v. Bouvier*, Del.Supr., 287 A.2d 671 (1972).

C. Merits of the Argument

Contrary to the State's argument, David did not plead guilty to a crime of domestic violence. As noted above, he plead guilty only to Offensive Touching in violation of 11 Del. C., §601(a)(1). His plea admits no more than directly or indirectly touching another in a manner "likely to cause offense or alarm." David does not accept the State's characterization of the incident as "domestic violence" or as an occasion of injury requiring medical care and leading to loss of earnings.

Nowhere in the plea, in the plea agreement, or in connection with the plea did David admit to causing injury to Jane. As stated and shown above, CCP made no finding in connection with the plea or in his sentencing that he injured Jane or that he was to pay compensation to her on account of his offense.

The offensive touching incident occurred on November 23, 2008 (A3-5). Jane first sought compensation from VCAP on a claim application filed November 18, 2009, claiming compensation of $500,000.00, but ultimately accepting VCAP's $12,107.23 award . She submitted or VCAP collected medical opinion letters, reports of lost wage claims, medical bills, prescription invoices and similar records dated from March 2, 2009 through May 16, 2010 purporting to show

sundry expenses and losses arising from the incident (A11-29). This was a purely paper record assembled in a closed investigative process by VCP of which David had no notice and in which he had no opportunity to participate or to challenge the evidence or to present contrary evidence. VCAP staff person, Maggie Gall, testified at the December 20, 2013 CCP hearing that these documents included information that Jane had extensive prior trauma and medical history including two automobile accidents, two shoulder surgeries, a cervical disc herniation, and treatment for chronic pain (A106-108). Nothing in the State's exhibits attempts to eliminate the prior trauma as the proximate cause of the injuries that Jane claimed to be caused by David's subsequent conduct.

Suggesting, as does the State, that in December 2013, David had an obligation to negate claims based on a paper record dated between from March 2, 2009 through May 16, 2010, assembled in a closed investigative proceeding of which he had no notice purporting to show sundry expenses and losses arising from an incident on November 23, 2008, five years earlier, is patently unreasonable. No authority authorizes such an unreasonable demand. It would, in any event, deny David Due Process for all the reasons discussed at length in Part I of this answering brief.

CONCLUSION

For all the reasons stated above, the decision of the Superior Court below, which affirmed the decision of the Court of Common Pleas below, should be affirmed.

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Dated: March 9, 2015