IN THE COURT OF APPEALS OF IOWA

No. 2-166 / 91-1048

FILED
JUN 25 1992
CLERK SUPREME COURT

1260

STATE OF IOWA,

Appellee,

vs.

BILLY WAYNE SMITH,

Appellant.

Appeal from the Iowa District Court for Scott County, John A. Nahra, Judge.

Smith appeals the amount of restitution ordered following his conviction of going armed with intent and gang participation. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shari Barron, Assistant Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Thomas S. Tauber, Assistant Attorney General, and William E. Davis, County Attorney, for appellee.

Heard by Oxberger, C.J., and Donielson and Schlegel, JJ.

OXBERGER, C.J.

On March 28, 1991, Billy Smith and three other gang members of the Black Gangster Disciples went to the house of Kimberly Lamp to "get even." One of the members had a gun and Smith was aware that he intended to use it to hurt the Lamps. At the Lamps' house, one of Smith's fellow gang members fired the gun through the window, seriously injuring Kimberly.

On April 9, 1991, the State filed a trial information charging Smith with attempted murder, willful injury and gang participation. Later, the State added the charge of going armed with intent.

On May 31, 1991, Smith pleaded guilty to going armed with intent and gang participation. The other charges were dismissed. On June 17, 1991, the district court entered judgment and sentenced Smith to no more than five years in prison for each count. The sentences were to be served consecutively. On the same day, the district court imposed victim restitution in the amount of $16,767.70. This amount covers all the victim's pecuniary damages. The court did note that the matter of restitution would be taken up when Smith's codefendants were dealt with. Smith filed this appeal, challenging the restitution order.

Smith's key complaint on appeal is that the district court erred in imposing restitution against him for the full amount of the victim's damages instead of, at least, apportioning the damages among all the defendants.

Iowa's comparative fault statute provides:

> As used in this chapter, "fault" means one or more acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages.

Iowa Code Section 668.1(1).

Tort theories dealing with fraud and intentional torts are not included in the definition of "fault" to which chapter 668 applies. Consequently, the Iowa Supreme Court has held the chapter 668 comparative fault principles do not apply in fraud cases. Tratchel v. Essex Group, Inc., 452 N.W.2d 171, 180-81 (Iowa 1990). Trachtel's reasoning applies to intentional torts as well. See id. By pleading guilty to criminal gang participation, Billy also plead guilty to the underlying crime of aiding and abetting a terrorist act. The criminal terrorist act in this case was an intentional tort and was the proximate cause of the damage caused. We determine comparative fault principles do not apply to restitution for criminal acts under Iowa Code chapter 910.

We review for an abuse of discretion. The court's restitution order may only be overturned or modified by showing "a failure of the trial court to exercise discretion or abuse of discretion." State v. Kaelin, 362

N.W.2d 526, 528 (Iowa 1985). Because Iowa Code section 703.1 requires aiders and abettors of criminal acts are to be tried, charged, and punished as principals, we do not find an abuse of discretion with regard to the imposition of full restitution on Billy.

AFFIRMED.