

COMMONWEALTH OF KENTUCKY
FAYETTE DISTRICT COURT
FIRST DIVISION

COMMONWEALTH OF KENTUCKY

PLAINTIFF

VS.

OPINION AND ORDER

NO. 05-M-00815

NO. 05-M-00703

KATHLEEN NYGAARD

DEFENDANT

At the Defendant's sentencing, the Court reserved ruling on the motion of the County for restitution to the Humane Society, and permitted the attorney for the Society to file an Amicus Curiae brief. The sum of \$16,085.50 is requested, primarily for the feeding and veterinary care of the animals.

There is no question but that a sentencing court is obligated under KRS 532.032, 532.033 and 439.563 to order restitution to a named victim. *Commonwealth v. O'Bryan*, 97 S.W.3d 454. (Ky.App. 2003.)

This Court agrees with the sentiments of Judge Mershon, who is quoted in *Hearn v. Commonwealth*¹ as saying: "if this Court found existing Kentucky law to justify it, it would order the Hearn's to pay interest in a heartbeat." The Supreme Court in *Hearn* found authority for the payment of interest to the victim of theft.

In *Hearn*, however, the Court distinguished, but did not overrule, *Clayborn v. Commonwealth*. That case held that a third-party payor, who did not incur direct loss or injury as a result of the defendant's activity, but who did incur indirect loss as a result of its contractual

¹80 S.W.3d 432 at 439 (Ky., 2002).

obligations, was not a "victim" under the restitution statutes.² *Clayborn* has been the law for twenty years, and the Legislature has not seen fit to amend the statutes to broaden the definition of "victim." The Attorney General recognized and elaborated upon this limitation in OAG 94-57.

In the alternative, the County and the Humane Society rely on Urban County Ordinance sec. 4-9. That ordinance provides for "an order of restitution for the actual costs incurred in seizing, impounding and confining the animal or fowl," but this applies to "any person violating the provisions of Sections 4-2 through 4-12.1 of this Code." The Defendant was prosecuted under KRS 525.130, not the Code of Ordinances. It is urged that the Code incorporates the state statutes by reference, but this is not accurate. The "State law references" which follow some Code provisions are not part of the ordinances, and were not voted upon and passed by the Urban County Council. They are research tools added by the publisher.

KRS 258.215 (4) provides that "[t]he owner of an impounded animal is responsible for all fees associated with the impoundment of the animal. If the owner can be identified, the fees are due even if the owner does not reclaim the animal." This statute applies only to animals running at large without valid rabies tags. The animals in the current case were not running at large. (Although this statute imposes the fees on the "owner" of an impounded animal, the definition of "owner" in KRS 258.095(5) is broad enough to cover the Defendant.)

The Society states that the County and its citizens are the victims of the Defendant's crimes and that therefore the costs of such "enforcement actions" should fall on Defendants, rather than on "the law-abiding citizens of the County." While the Court may agree with that philosophy, it is the Legislature's prerogative to state the extent to which an Defendant will be required to reimburse government agencies for the costs of law enforcement.

The County also points to other cases as "precedent" in which on two occasions other divisions of this court have ordered restitution to the Humane Society. These are not published appellate opinions which can be cited as authority.³ They were guilty pleas in which defendants agreed to the payments. There were no legal rulings by the courts in those cases.

² 701 S.W.2d 413 (Ky.App., 1985).

³ CR 76.28(4)(c).

