

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 11AP-245
	:	(C.P.C. No. 08CR-09-6809)
Tina Blay,	:	
	:	
Defendant-Appellant.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on January 10, 2012

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Shaw & Miller, and *Mark J. Miller*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Defendant-appellant, Tina Blay ("appellant"), appeals the judgment rendered by the Franklin County Court of Common Pleas ordering her to pay restitution in the amount of \$5,804.75 as a result of an aggravated burglary conviction. For the reasons that follow, we reverse.

{¶2} This matter previously presented to this court in *State v. Blay*, 10th Dist. No. 10AP-247, 2010-Ohio-4749. That appeal also regarded the restitution ordered as part of appellant's sentence. Specifically, in *Blay*, appellant presented the issue of whether she preserved her right to a restitution hearing by timely objecting to the amount ordered. We

held that appellant did timely object and was therefore entitled to a hearing under R.C. 2929.18(A)(1). Id. at ¶¶11-12. We reversed and remanded the matter for that to occur. Id. at ¶13.

{¶3} On February 8, 2011, the parties presented to the trial court for a restitution hearing. On February 14, 2011, the trial court journalized its entry ordering restitution in the amount of \$5,804.75. Appellant timely appealed and presents the following assignments of error:

Assignment of Error I:

The Appellant was denied her right to due process because the trial court failed to properly conduct a complete and impartial evidentiary hearing on restitution, as ordered by this Court in *[Blay]* and as required by Revised Code 2929.18(A)(1).

Assignment of Error II:

The Appellant was deprived [of] her right to confrontation and cross-examination in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States and Section 2951.09 of the Ohio Revised Code.

Assignment of Error III:

The trial court's order of restitution was not based on the victim's actual economic loss, not based on competent and credible evidence in the record, and did not bear a reasonable relationship to the loss suffered.

Assignment of Error IV:

The trial court abused its discretion in failing to enter restitution in "open court", as required by R.C. 2929.18(A)(1).

Assignment of Error V:

The trial court erred in failing to consider the Appellant's ability to pay restitution, as required by R.C. 2929.19(B)(6).

{¶4} In her first assignment of error, appellant argues that the hearing conducted on February 8, 2011 was anything but a fair and impartial hearing. She argues the trial court went on a tirade and criticized appellant's counsel for filing the appeal in *Blay*. She notes that the trial court's conduct prevented any cross-examination of adverse witnesses. Finally, she notes that the trial court indicated that a two-week continuance would be granted, concluded the hearing, and then issued its judgment entry ordering restitution six-days later without further hearing. Consequently, appellant argues that she was denied due process during the restitution hearing.

{¶5} Under R.C. 2929.18(A)(1), a trial court must "hold a hearing on restitution if the victim, offender, or survivor disputes the amount." *Id.* at ¶12, citing *State v. Lamere*, 3d Dist. No. 1-07-11, 2007-Ohio-4930, ¶10. Implicit within this right to a hearing is the fundamental right to due process at that hearing. See *Fuentes v. Shevin* (1972), 407 U.S. 67, 80, 92 S.Ct. 1983, 1994. While the concept of due process may be flexible and amorphous, at a minimum, procedural due process requires an opportunity to be heard. *State v. Cowan*, 103 Ohio St.3d 144, 2004-Ohio-4777, citing *Boddie v. Connecticut* (1971), 401 U.S. 371, 91 S.Ct. 780. It is axiomatic that this opportunity to be heard must be granted in a meaningful manner. *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191.

{¶6} Nevertheless, it is settled that restitution orders are subject to an abuse of discretion standard of review. *State v. Simmons*, 8th Dist. No. 96208, 2011-Ohio-6074, ¶66, citing *State v. Mobley-Melbar*, 8th Dist. No. 92314, 2010-Ohio-3177, ¶37. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the

court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, quoting *State v. Adams* (1980), 62 Ohio St.2d 151.

{¶7} As background, the trial court ordered restitution during the February 12, 2010 sentencing. Appellant's counsel timely objected to the amount and requested a hearing in accordance with R.C. 2929.18. The trial court scheduled a restitution hearing for April 29, 2010. However, because the hearing was scheduled outside of the time limit for filing an appeal, appellant appealed the restitution order. Because no restitution hearing had occurred in spite of appellant's timely objection, we reversed.

{¶8} Upon remand, the matter came before the trial court for a hearing on February 8, 2011. At the outset of the hearing, the judge made it very clear that he believed appellant's counsel should have called the court to reschedule the hearing, rather than file an appeal. Indeed, the transcript reveals the following exchange:

THE COURT: Why didn't you call me? I have a telephone, you know? Never mind. Sit down, Mr. Miller.

The thing that irritates me about Mr. Miller is this is a court-appointed case. He tries to do everything the hard way. He said there was a question about restitution. I set up a hearing. Did I not, Mr. Miller? Did I set up a hearing, Mr. Miller?

MR. MILLER: Yes, sir.

THE COURT: Did I set up a hearing?

MR. MILLER: It was scheduled for April 29th, correct, sir.

THE COURT: I am not arguing about the date. Did I set a hearing up for restitution?

MR. MILLER: Yes.

THE COURT: Okay, fine. And you decided on your own that that wasn't soon enough; is that right?

MR. MILLER: As the Court knows, we only have 30 days.

THE COURT: I am aware of that. Answer my question. That date wasn't soon enough for you, right?

MR. MILLER: That is correct, Judge.

* * *

THE COURT: Well, okay. You can rest assured I am not going to appoint you to any more cases for this kind of nonsense. You appealed it for nothing, that is what you did, waste everybody's time.

(Feb. 8, 2011 Tr. 4-5.)

{¶9} After this exchange, the victim testified about the bills she incurred as a result of appellant's crime. The trial judge then asked appellant's counsel whether he wished to cross-examine the victim. In response, counsel stated that he believed he was being prevented from effectively performing his job and felt uncomfortable proceeding forward. As a result, counsel asked the trial judge to recuse himself. The judge explained that he would not and then proceeded to the following exchange:

THE COURT: What do you want? You are a lawyer. You come to court. You want a hearing. I am saying, what do you want? Now what is - - did you go to law school?

MR. MILLER: Yes, Judge.

THE COURT: Then you understand that?

MR. MILLER: Yes, Judge.

THE COURT: What are you asking me for? Is that tough?

MR. MILLER: Right now I don't know.

THE COURT: You don't know?

MR. MILLER: I am being yelled and screamed at.

THE COURT: Your feelings are hurt?

MR. MILLER: No.

THE COURT: Okay. I am sorry. What do you want? You don't know. How much restitution do you think this lady owes? You don't know?

MR. MILLER: I do know. That would be \$865.

THE COURT: Okay. Why did I have to ask you three times to get you to say that? You don't understand why I am upset with you? How many times did I say, what do you want, what do you want, what do you want?

\$865. You mind telling me how you arrived at that figure, or would that also hurt your feelings?

MR. MILLER: I am not hurt at all. That would be for the out-of-pocket expenses that Ms. Wider has paid.

(Feb. 8, 2011 Tr. 18-19.)

{¶10} Following this exchange, the court asked whether appellant wished to continue the restitution hearing. Counsel requested a two-week continuance, and the court indicated it would notify the parties of what it intended to do. Six days later, it journalized its judgment.

{¶11} In this appeal, the State concedes error on the part of the trial court in failing to order restitution in open court, despite the statutory provision in R.C. 2929.18(A)(1) requiring such. It nevertheless argues that appellant was afforded a meaningful opportunity to be heard on February 8, 2011. We disagree.

{¶12} As is clear from the transcript, the trial judge used the restitution hearing to issue a barrage of berating and belittling remarks towards appellant's counsel. He unabashedly expressed his irritation with appellant's counsel. While we do not speak to

the foundations of his irritation, we nevertheless find that appellant was denied a meaningful opportunity to be heard on the issue of restitution. Appellant is entitled to cross-examine adverse witnesses and present her own evidence in defense of the restitution sought by the State. The trial court abused its discretion in conducting a restitution hearing that denied appellant due process.

{¶13} Based upon the foregoing, appellant's first assignment of error is sustained, which renders moot her other four assignments of error. We accordingly reverse the judgment rendered by the Franklin County Court of Common Pleas and remand this matter for further proceedings consistent with this decision and in accordance with law.

*Judgment reversed;
cause remanded.*

BROWN, P.J., and TYACK, J., concur.
