[Cite as *State v. Ruppert,* 2010-Ohio-1281.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-10-136
	:	O P I N I O N
- vs -		3/29/2010
	:	
JASON RUPPERT,	:	
Defendant-Appellant.	:	

APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 09CR26006

Rachel A. Hutzel, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Jeffrey E. Richards, 147 Miami Street, P.O. Box 536, Waynesville, Ohio 45068, for defendant-appellant

HENDRICKSON, J.

{¶1} Defendant-appellant, Jason Ruppert, appeals a sentencing decision of the Warren County Court of Common Pleas ordering him to pay restitution. For the reasons outlined below, the decision is affirmed as modified.

{¶2} The indictment in this case stems from forced entries upon two separate premises located in the city of Franklin, Ohio. In July 2009, appellant was charged with one count of burglary in violation of R.C. 2911.12(A)(2), a second-degree felony, and

two counts of breaking and entering in violation of R.C. 2911.13(B), both fifth-degree felonies. Pursuant to a plea agreement, appellant pled guilty to a reduced burglary charge and one breaking and entering charge. He was sentenced to one year in prison and ordered to pay restitution in the amount of $225 to one of the victims for a stolen handgun. It is from this restitution award that appellant appeals, raising a single assignment of error.

{¶3} Assignment of Error No. 1:

{¶4} "THE TRIAL COURT ERRED IN REQUIRING APPELLANT TO PAY RESTITUTION WITHOUT FIRST MAKING THE DETERMINATION THAT HE HAD THE ABILITY TO PAY RESTITUTION."

{¶5} Appellant challenges the trial court's $225 restitution award, arguing that the trial court failed to make an affirmative determination on the record that he had the ability to pay restitution prior to imposing the award. We agree that the trial court erred in imposing the restitution award, but for reasons distinct from those advanced by appellant.

{¶6} As stated, appellant was charged with two counts of breaking and entering and pled guilty to only one of those counts. The problem with the trial court's restitution award is that it corresponded to damages for the breaking and entering charge that was dismissed. The following facts in the record support this determination.

{¶7} Count 1 of the indictment charged appellant with burglary, while Counts 2 and 3 charged appellant with breaking and entering. According to the bill of particulars, the breaking and entering charge contemplated by Count 2 involved allegations that appellant trespassed upon premises owned by his father, Ronald Ruppert, for the purpose of stealing two computers valued at $3,300. The bill of particulars also detailed the facts surrounding the Count 3 breaking and entering charge, alleging that appellant

trespassed upon premises owned by his father for the purpose of stealing a .357 magnum handgun.

{¶8} At the plea hearing, the trial court engaged appellant in a colloquy to ensure that his plea was being made knowingly, intelligently, and voluntarily. Upon the court's request, the prosecutor read into the record the factual bases for the offenses contemplated by appellant's guilty plea. The prosecutor explicitly recited the facts underlying the Count 1 burglary charge and the Count 2 breaking and entering charge. The court conveyed the possible penalties for these two offenses, including "any restitution that may be appropriate." Appellant indicated that he understood the nature of the charges to which he was pleading guilty and the possible penalties. Appellant then entered his guilty pleas to the Count 1 burglary charge, reduced to a third-degree felony, and the Count 2 breaking and entering charge. The Count 3 breaking and entering charge was dismissed. This arrangement was reflected in the plea form signed by appellant.

{¶9} At the sentencing hearing, the state informed the court that it would be requesting restitution for Ronald Ruppert in the amount of $225 for the stolen handgun. Indeed, when imposing sentence at the hearing, the trial court expressly stated that it was "order[ing] restitution in the amount of $225 for the gun." The judgment entry of sentence detailed that appellant was found guilty of the reduced Count 1 burglary charge and the Count 2 breaking and entering charge. The entry went on to impose a $5,000 fine, which was suspended due to appellant's indigent status, and restitution in the amount of $225.

{¶10} From the record, it is clear that restitution was ordered for property which was not the subject of appellant's convictions. As this court recently noted, "[i]t is well established that, in fashioning a restitution order, a trial court is restricted to awarding

restitution only for those acts which constitute the crime for which the defendant has been convicted and sentenced." *State v. Christman*, Preble App. Nos. CA2009-03-007, -008, 2009-Ohio-6555, ¶12. The breaking and entering charge in Count 3 involved the theft of the .357 magnum handgun, and Count 3 was dismissed as part of appellant's plea bargain. Restitution was therefore improperly awarded for damages connected to an offense for which appellant was charged but not convicted. *State v. Coldiron*, Clermont App. No. CA2008-06-062, 2009-Ohio-2105, ¶22. The record does not indicate that appellant agreed to pay restitution on the dismissed count as part of the consideration for the plea agreement. *State v. Strickland*, Franklin App. No. 08AP-164, 2008-Ohio-5968, ¶12.

{¶11} We conclude that the trial court erred in ordering appellant to pay restitution in the amount of $225 for Ronald Ruppert's .357 magnum handgun. We are granted the authority under App.R. 12(A)(1)(a) to modify appellant's sentence. Therefore, the order of restitution in the amount of $225 is vacated. In all other respects, the judgment of the trial court is affirmed.

{¶12} Appellant's sole assignment of error alleging that the trial court failed to consider his ability to pay before imposing restitution is rendered moot by our disposition of the appeal.

{¶13} Judgment affirmed as modified.

BRESSLER, P.J., and POWELL, J., concur.