[Cite as *State v. Wilson*, 2010-Ohio-109.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23167
v.	:	T.C. NO. 2007 CR 1509
VAN R. WILSON	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 15th day of January, 2010.

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FROELICH, J.

{¶ 1} Van R. Wilson pled no contest in the Montgomery County Court of Common Pleas to breaking and entering, in violation of R.C. 2911.13(A). The trial court found him guilty and sentenced him to five years of community control. After a later hearing on restitution, the

court imposed restitution in the amount of $1,500.

{¶ 2} Wilson appeals from his sentence, claiming that the trial court erred in ordering restitution. Wilson also claims that the trial court erred in denying his subsequent motion to withdraw his plea. For the following reasons, the portion of Wilson's sentence ordering restitution will be reversed, and the matter will be remanded for a revised restitution order. Because the trial court's denial of his motion to withdraw his plea is not properly before this Court, we do not address that issue.

I

{¶ 3} Wilson was charged by complaint with one count of breaking and entering in an unoccupied structure, 1214 Catalpa Drive, on April 16, 2007. A sworn statement by Detective Bullens in support of the complaint indicated that probable cause was established by physical evidence, namely a Frigadaire air conditioning unit. Wilson was subsequently indicted for the breaking and entering of 1214 Catalpa Drive between the dates of April 13 and 16, 2007, in violation of R.C. 2911.13(A), a fifth degree felony.

{¶ 4} Wilson moved to suppress the physical evidence and any statements that he made after his arrest. However, prior to a hearing on that motion, Wilson withdrew his motion to suppress and pled no contest to the charge. The plea form acknowledged that Wilson could be ordered to pay restitution to the victim.

{¶ 5} At the plea hearing, the prosecutor's statement of the charge consisted of the language in the indictment.[1] The prosecutor stated: "*** In Case No. 2007-CR-1509, the State

[1]At the same hearing, Wilson pled guilty to one count of possession of

was prepared to prove beyond a reasonable doubt that the Defendant Van R. Wilson, between the dates of April the 13th 2007, and April the 16th 2007, in the County of Montgomery, State of Ohio, did by force, stealth or deception, trespass in an unoccupied structure to [wit:] a residence located at 1214 Catalpa Drive, in Dayton, Ohio, with the purpose to commit there any theft offense defined by the Code or any felony. This is a violation of Section 2911.13A, breaking and entering, a felony of the fifth degree." The State did not clarify what had been taken from the property. Wilson told the court that he understood the charge, that he had discussed the charge with his attorney, and that he was satisfied with his attorney's representation. Wilson expressed that he "honestly did not break in this place" and had a defense to the breaking and entering charge, but he wanted to take the State's plea offer so that he could be released from jail. The court found that Wilson's plea was voluntary, accepted the no contest plea, and found him guilty "based upon the facts and the indictment and the plea itself."

{¶ 6} The court held a sentencing hearing on July 10, 2008. At that time, the court imposed five years of community control sanctions and ordered Wilson to pay restitution to Richard Thompson in the amount of $1,500. Upon Wilson's objection to the restitution order, the trial court scheduled a restitution hearing for August 1, 2008, at 10:30 a.m. The trial court's written "termination entry," which was filed on July 18, 2008, reflected the community control sentence and that a restitution hearing would be held on August 1, 2008.

{¶ 7} The State's witnesses did not appear for the August 1, 2008, restitution hearing. As a result, the trial court orally informed the parties that it would amend the termination entry to

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crack cocaine, a fifth degree felony, in Case No. 2007 CR 3575. Wilson has not appealed from that conviction.

reflect a restitution amount of $0. No amended termination entry was filed.

{¶ 8} At the State's request, an additional restitution hearing was held on November 13, 2008. The State indicated that it was seeking restitution for copper piping, which had been taken from the victim's property. Wilson objected to the hearing, arguing that his plea related to the theft of an air conditioning unit, which had been returned to its owner, and not of copper piping. The record does not indicate when Wilson became aware that the State considered the theft of copper piping to be part of the breaking and entering charge. Wilson further argued that the court had previously indicated that it would not order restitution, because the State's witnesses had not appeared for the prior hearing. Wilson orally moved to withdraw his plea in the event that the court permitted the restitution hearing to proceed. The court overruled Wilson's objections and proceeded with the hearing. The judge requested that Wilson file a written motion to withdraw his plea.

{¶ 9} At the restitution hearing, the State presented the testimony of Detective Jamie Bullens of the Dayton Police Department and Richard Thompson, the fiancé of the owner of 1214 Catalpa Drive. Wilson called Officer Patricia Pasquel as a defense witness. On November 25, 2008, the trial court filed its decision on the amount of restitution. Based on the State's evidence, the trial court found that restitution in the amount of $1,500 was appropriate. The decision did not state to whom the restitution should be paid. Although the court did not file an amended termination entry, Wilson's sentence became final and appealable upon the court's entry of a restitution order specifying the amount of restitution. See *State v. Plassenthal*, Montgomery App. No. 22464, 2008-Ohio-5465, at ¶8 (stating that an order of restitution remains interlocutory until a specific amount of restitution owed is determined).

{¶ 10} On December 4, 2008, Wilson moved to withdraw his plea, arguing that he had pled no contest based on the understanding that he was pleading to the theft of the air conditioning unit only. Wilson asserted that he did not knowingly plead to theft of the copper pipes, and that he was innocent of those charges and had a meritorious defense to the case. The court held a hearing on the motion on December 19, 2008. On December 23, 2008, Wilson filed a notice of appeal from his conviction and sentence. The trial court overruled Wilson's motion to withdraw his plea in January 2009.

{¶ 11} Wilson appeals, raising two assignments of error, which we will address in reverse order.

II

{¶ 12} Wilson's second assignment of error states:

{¶ 13} "THE TRIAL COURT ERRED IN DENYING THE DEFENDANT-APPELLANT'S MOTION TO WITHDRAW HIS NO-CONTEST PLEA."

{¶ 14} In his second assignment of error, Wilson claims that the trial court abused its discretion when it denied his motion to withdraw his plea. This assignment is not properly before this Court.

{¶ 15} Wilson's notice of appeal, which was filed prior to the trial court's ruling on his motion to withdraw his plea, was directed only to his conviction and sentence. Wilson cannot raise the court's denial of his motion to withdraw his plea in his appeal from his conviction and sentence. Wilson did not file a notice of appeal after the trial court overruled his motion to withdraw his plea on January 21, 2009, as he was required to do in order to invoke this Court's

appellate jurisdiction on that issue. App.R. 3(A).

{¶ 16} Parenthetically, we note that Wilson's filing of a notice of appeal from his conviction and sentence divested the trial court of jurisdiction to address his motion to withdraw his plea. *State v. Champion*, Montgomery App. No. 22312, 2008-Ohio-3611, at ¶12; *State v. Leach*, Cuyahoga App. No. 84794, 2005-Ohio-1870, at ¶16-17. "Once an appeal is taken, the trial court is divested of jurisdiction except 'over issues not inconsistent with that of the appellate court to review, affirm, modify or reverse the appealed judgment, such as the collateral issues like contempt ***." *State ex rel. State Fire Marshal v. Curl*, 87 Ohio St.3d 568, 570, 2000-Ohio-248, quoting *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas* (1978), 55 Ohio St.2d 94, 97. A motion to withdraw a plea is not a collateral issue, because it could directly affect the judgment under appeal. *State v. Winn* (Feb. 19, 1999), Montgomery App. No. 17194.

{¶ 17} Because this Court's jurisdiction was not properly invoked, Wilson's second assignment of error is overruled.

III

{¶ 18} Wilson's first assignment of error states:

{¶ 19} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN ORDERING THE DEFENDANT-APPELLANT TO PAY RESTITUTION IN THE AMOUNT OF $1,500.00 TO RICHARD THOMPSON."

{¶ 20} Under R.C. 2929.18(A)(1), a court may order a felony offender to pay, as part of the sentence, a financial sanction in the form of restitution. The statute sets forth four possible

payees to whom the court may order restitution to be paid: the victim or survivor of the victim, the adult probation department that serves the county on behalf of the victim, the clerk of courts, and "another agency designated by the court," such as the crime victims' reparations fund. Id.; *State v. Bartholomew*, 119 Ohio St.3d 359, 2008-Ohio-4080, at ¶11; *State v. Brinson*, Montgomery App. No. 22925, 2009-Ohio-5040.

{¶ 21} If the court imposes restitution, the court shall determine, at sentencing, the amount of restitution to be made by the offender. R.C. 2929.18(A)(1). The court may base the amount of restitution on an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense. Id. The court must hold a hearing on restitution if the offender, victim, or survivor disputes the amount of restitution ordered by the court. Id.

{¶ 22} The court's order of restitution must be supported by competent, credible evidence. *State v. Warner* (1990), 55 Ohio St.3d 31, 69; *State v. Bailey*, Montgomery App. No. 23164, 2009-Ohio-4107, at ¶7. And, the amount of restitution must bear a reasonable relationship to the actual loss suffered. *State v. Williams* (1986), 34 Ohio App.3d 33, 34; *State v. Collins*, Montgomery App. Nos. 21510 and 21689, 2007-Ohio-5365, at ¶12-13.

{¶ 23} We review the trial court's order of restitution for abuse of discretion. "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, 218, quoting *State v. Adams* (1980), 62 Ohio St.2d 151.

{¶ 24} According to Thompson's testimony at the November 2008 restitution hearing, the properties located at 1214 and 1216 Catalpa Drive, a duplex, are owned by Thompson's fiancé, Ruby Downey, as rental property. Thompson assists Downey with the maintenance of the duplex. In April 2007, both residences were vacant.

{¶ 25} On April 16, 2007, Thompson went by the duplex and discovered damage to both 1214 and 1216 Catalpa Drive. In 1216 Catalpa Drive, the kitchen sink was smashed, the upstairs bathroom was "dilapidated" with the wall smashed in and the bathtub destroyed. In 1214 Catalpa Drive, plumbing had been removed from the bathtub and sinks, resulting in water damage. According to Thompson, approximately 250 feet of pipe had been taken from each residence. Thompson called the police and reported to Officer Pasquel that copper piping was missing from the residences. Thompson testified that he planned to repair the piping himself. He estimated that it would cost $750 to repair each side of the duplex.

{¶ 26} Based on a conversation with someone from the neighborhood, on April 17, 2007, Thompson went to Wilson's apartment. Wilson's door swung open when Thompson knocked, and Thompson saw the air conditioning unit in the middle of the floor of Wilson's apartment. Thompson called Detective Bullens to report the theft. Upon returning to the duplex, Thompson saw that the air conditioning unit was missing from an upstairs bedroom window. The police returned the air conditioning unit to Thompson.

{¶ 27} Detective Bullens, head of the Metal Theft Unit, testified that he believed it was unlikely that the duplex had 250 feet of copper piping per side. He estimated that the duplex likely had 150 feet per side. Based on his experience, Bullens stated that the retail price of copper piping was $20 per ten feet, or $2 per foot; a contractor might pay $1 per foot. Bullens

had not been to the duplex to assess the damage.

{¶ 28} Officer Pasquel testified that she had received a telephone report from Thompson on April 16, 2007, indicating that copper pipes were missing from the Catalpa duplex. Pasquel did not recall Thompson's mentioning the theft of an air conditioning unit, and there was no mention of such a theft in her report. Pasquel had offered to send an evidence technician to the house, but Thompson had declined the offer because he was on his way to church.

{¶ 29} In the court's November 25, 2008, decision on restitution, the trial court ordered Wilson to pay restitution in the amount of $1,500, representing $1,000 for the copper piping (500 feet at $2 per foot) plus an additional $500 for labor, fitting, and repair of collateral damage.

{¶ 30} On appeal, Wilson argues that the court abused its discretion in ordering restitution to be paid to Thompson, because Thompson was not the victim of the offense. Wilson further states that Thompson did not present any repair estimates or receipts and did not substantiate his ability to perform the repairs. He notes that Downey did not testify. Finally, Wilson asserts that the restitution order relates to copper piping, which was not part of the no contest plea.

{¶ 31} The State responds that Thompson's and Bullen's testimony was sufficient to establish the amount of restitution and that no receipts were necessary. The State further asserts that the court properly awarded restitution to Thompson because, "[r]egardless of whether Thompson's name appeared on the property deed, he was entitled to be compensated for what it was going to cost him to make the repairs."

{¶ 32} As an initial matter, there is no written order directing that restitution be paid to

Thompson. Although the trial court orally ordered Wilson to pay restitution to Thompson at the sentencing hearing, the "termination entry" did not identify to whom restitution, if any, would be paid; it stated that Wilson's financial sanctions included "[r]estitution to the victim" and indicated the hearing date. The court's November 25, 2008, decision on restitution acknowledged that Downey was the property owner and that the repairs would be performed by Thompson. However, in setting the restitution amount at $1,500, the trial court did not expressly state to whom the restitution was to be paid.

{¶ 33} Assuming that restitution was to be paid to Thompson, as the court had previously ordered orally, we agree with Wilson that Thompson was not a proper payee. Thompson's testimony established that Downey was the owner of 1214 Catalpa Drive. Although Thompson was Downey's fiancé and maintained the property for her, he had no legal rights to the property and, consequently, was not the "victim" of the breaking and entering. R.C. 2929.18(A)(1) does not authorize restitution to third-parties, such as Thompson.

{¶ 34} Although Thompson was not a proper payee, we agree with the State that Thompson's and Bullen's testimony was sufficient to establish the amount of copper piping to be replaced and the replacement cost. R.C. 2929.18(A)(1) allows the court to rely upon the amount of restitution recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, or other information. Downey did not need to testify, nor was Thompson required to provide written estimates.

{¶ 35} Although not expressly raised by Wilson in his assignment of error, Wilson argues throughout his brief that he should not have to pay restitution for the copper piping, because his plea related to the theft of the air conditioning unit. Wilson pled no contest to breaking and

entering based on the allegation that, "between the dates of April 13th 2007, and April the 16th 2007 *** [Wilson] did by force, stealth or deception, trespass in an unoccupied structure to a residence located at 1214 Catalpa Drive, in Dayton, Ohio, with the purpose to commit there any theft offense ***." The indictment did not specify the items that were stolen from the residence. Nevertheless, the restitution hearing testimony indicates that Thompson reported the theft of copper piping on April 16, 2007, and reported the theft of the air conditioning unit on April 17, 2007, after he went to confront Wilson about the damage to the duplex. The trial court could have reasonably found that the indictment included the thefts of the air conditioning unit and the copper piping.

{¶ 36} We note, however, that the trial court's restitution order addressed the economic loss for both sides of the duplex. Wilson was charged with the breaking and entering of 1214 Catalpa Drive, not 1214 and 1216 Catalpa Drive. Although the court could speculate that the same person inflicted damage to both sides of the duplex, the amount of restitution may not exceed the amount of the economic loss suffered by the victim "as a direct and

{¶ 37} proximate result of the commission of the offense." The restitution order should not have included the economic loss resulting from the burglary of 1216 Catalpa Drive, which was not an offense, the commission of which was charged in the indictment.

{¶ 38} Because the trial court's restitution order did not identify a proper payee and exceeded the amount of economic loss as a direct and proximate result of the breaking and entering of 1214 Catalpa Drive, the court abused its discretion in ordering restitution to Thompson in the amount of $1,500.

{¶ 39} The first assignment of error is sustained.

IV

{¶ 40} The portion of Wilson's sentence ordering restitution will be reversed, and the matter will be remanded for a revised restitution order.

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BROGAN, J., concurs.

GRADY, J., concurring:

{¶ 41} A case of this kind is disturbing because there was no trial, the no contest plea Defendant entered was a form of *Alford* plea, and the particular offense of which Defendant was convicted does not by its terms necessarily demonstrate that Defendant was responsible for the theft of copper pipe from the premises he entered. A finding that he is responsible is an inference unsupported by operative facts.

{¶ 42} Because the court lacked jurisdiction to determine Defendant's Crim.R.32.1 motion to withdraw his no contest plea, Defendant may renew his motion on remand. Further, because the restitution sanction remains open regarding the amount to be ordered and the proper recipient, Defendant's motion is one made prior to sentencing and, therefore, should be liberally allowed, *State v. Spivey*, 81 Ohio St.3d 405, 1998-Ohio-437, particularly when the defendant entered an *Alford* plea and the record is devoid of evidence supporting a finding of guilty. *State v. Casale* (1986), 34 Ohio App.3d 339. There is no evidence that Defendant removed the copper plumbing pipes from the apartment, which is the only basis on which restitution for the property that was removed may be ordered.

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