[Cite as *State v. Hupp*, 2010-Ohio-2136.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 2009-CA-43
Plaintiff-Appellee	:	
	:	Trial Court Case No. 08-CR-339
v.	:	
	:	
ROBERT HUPP	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 14th day of May, 2010.

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FAIN, J.

{¶ 1} Defendant-appellant Robert Hupp appeals from an order of restitution entered as part of his conviction and sentence, following a guilty plea, for Theft in

Office, in violation of R.C. 2921.41(A)(1), (A)(2), or both. Hupp contends that the trial court lacked authority to order either the restitution of $81,541, which the trial court found to have been moneys belonging to Clark County that Hupp had converted to his own use and benefit, or the cost of a special audit performed by the Ohio Auditor of State to discover the extent of the theft.

{¶ 2} We conclude that the trial court was required, by R.C. 2921.41(C)(2)(a) to order restitution of the $81,541, and that the trial court had authority to require the restitution of the cost of the special audit as a condition of Hupp's being subject to community control sanctions in lieu of imprisonment. Accordingly, the order from which this appeal is taken is Affirmed.

I

{¶ 3} Hupp was charged by indictment with two counts of Theft in Office, in violation of "Section 2921.41(A)(1) and/or (A)(2) of the Ohio Revised Code," three counts of Having an Unlawful Interest in a Public Contract, in violation of R.C. 2921.42(A)(1), (E), two counts of Receiving Improper Compensation, in violation of R.C. 2921.43(A)(1), and one count of Using the Authority of Public Office to Secure Anything of Value, in violation of R.C. 102.03(D). Hupp pled guilty to one count of Theft in Office and to two counts of Having an Unlawful Interest in a Public Contract, while nevertheless maintaining his innocence, under the authority of *North Carolina v. Alford* (1970), 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162. The other charges were dismissed.

{¶ 4} The trial court conducted an evidentiary hearing on the issue of

restitution, at which W. Darrell Howard, the Administrator of Clark County, Ohio, and Rebecca Wolcott, a senior audit manager in the special audit division of the office of the Ohio Auditor of State, both testified. Following that hearing, by entry filed March 19, 2009, the trial court found that the proper amount of restitution was $81,541, plus the cost of a special audit conducted by the Ohio Auditor of State.

{¶ 5} In its termination entry, the trial court imposed the following sentence:

{¶ 6} "IT IS HEREBY ORDERED that the defendant be sentenced to community control for a period of five years with the following conditions:

{¶ 7} "1. The defendant is to serve ninety (90) days in the Clark County Jail;

{¶ 8} "2. the defendant is to pay restitution in the amount of $81,541 plus the cost of the special audit conducted by the Auditor of State;

{¶ 9} "3. the defendant is to pay court costs; and

{¶ 10} "4. the defendant is to comply with all other rules and regulations set forth by the Clark County Probation Department.

{¶ 11} "If the defendant violates community control, the Court will impose the maximum penalty of eighteen (18) months in the Ohio State Penitentiary for each of the three criminal offenses of which he has been convicted. Those sentences will run concurrently for a total sentence of eighteen (18) months in the Ohio State Penitentiary."

{¶ 12} Consistently with the foregoing, Hupp signed a document that includes the following:

{¶ 13} "In consideration of having been sentenced to community control on March 25, 2009 for a period of five years by the Clark County Common Pleas Court, I

agree to report to my supervising officer according to instructions I have received and to the following conditions:

{¶ 14} " * * * *

{¶ 15} "**SPECIAL COMMUNITY CONTROL SANCTION TERMS:**

{¶ 16} "A. If I have not paid my restitution, fine, and court costs in full within 90 days of the date my community control is due to expire, I understand that the Court can extend my period of community control. I agree to such an extension if it should become necessary and waive a hearing in that regard.

{¶ 17} "B. I will pay restitution of $81,541., cost of audit of $18,574.87, fine of $0. plus court costs as billed by the Clerk of Court at the rate of $1,700. per month beginning in April 2009 until paid in full.

{¶ 18} "C. I will pay a $25. monthly Community Control fee each month I am on Community Control.

{¶ 19} "D. To report in person monthly by appointment to my probation officer as ordered.

{¶ 20} "E. To serve 90 days in the Clark County Jail.

{¶ 21} "I have read or had read to me the foregoing conditions of my community control. I fully understand these conditions. I agree to comply with them, and I understand that violation of any of these conditions may result in the revocation of my community control which may result in additional imposed sanctions including imprisonment.

{¶ 22} "In addition, I understand that I will be subject to the foregoing conditions until I receive a Journal Entry from the Court stating that I have been

discharged from supervision." (Underlined, bolded material in original.)

{¶ 23} Hupp appeals from the restitution order in his termination entry.

II

{¶ 24} Hupp's sole assignment of error is as follows:

{¶ 25} "THE TRIAL COURT ERRED IN ORDERING APPELLANT TO PAY RESTITUTION IN THE AMOUNT OF $81,541, PLUS THE COSTS OF THE SPECIAL AUDIT CONDUCTED BY THE AUDITOR OF STATE, AS THIS RESTITUTION ORDER WAS NOT BASED ON ACTUAL DAMAGE OR LOSS CAUSED BY AN OFFENSE AND WAS NOT AUTHORIZED BY R.C. 2919.18 OR ANY OTHER PROVISION OF OHIO LAW."

{¶ 26} With respect to the $81,541 restitution ordered, Hupp appears to base his argument upon the assumption that it represents a business opportunity that he wrongfully usurped from Clark County, and that none of it represents actual loss to a victim that is authorized to be the subject of restitution under R.C. 2929.18(A)(1). This assumption is inconsistent with the trial court's findings in its restitution entry of March 19, 2009. That entry includes the following findings, which are supported by evidence in the record:

{¶ 27} "For several years, the Clark County Emergency Management Agency (CCEMA) produced and distributed data directories at no cost to local businesses and governmental agencies. This activity ceased in the early nineties due to the county's budget difficulties.

{¶ 28} "In 1993 there was an oral agreement reached between Clark County,

by and through its County Administrator Darrell Howard, and CCEMA, by and through the defendant, with regards to resuming the production and distribution of data directories.[1] Essentially, the agreement, according to the testimony of Darrell Howard, was that, given the county's economic downturn, CCEMA could resume the production and distribution of the items so long as they were sold in order to cover production and distribution costs. In other words, the county did not want to be responsible for any net expenditure associated with production and/or distribution of the items. Darrell Howard further testified that he never consented to the defendant retaining profits for his personal use.

{¶ 29} "In September 1993, the defendant, acting as the Director of CCEMA, obtained a vendor's license as 'Data Directory' and resumed production and distribution of the items pursuant to the above-referenced agreement. He produced and distributed the items while on county time and with county resources, thus rendering the sale proceeds 'public money' as provided by the Ohio Revised Code.[2] Nevertheless, he deposited the sale proceeds into Data Directory's private business checking account instead of the county treasury.

{¶ 30} "With this structure in place, the defendant, as the owner of Data Directory, was able to submit invoices to CCEMA and to unilaterally approve those

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[1] "While perhaps that agreement may not have explicitly addressed the production of map books and accountability tags, it appears that they were contemplated by the parties along with data directories and implicit in their agreement.

[2] "Section 117.01(C) of the Ohio Revised Code defines public money as 'any money received, collected by, or due a public official under color of office, as well as any money collected by any individual on behalf of a public office or as a purported representative or agent of the public office.'

invoices as the CCEMA Director without the knowledge or consent of the county administrator. The defendant, acting as the Director of CCEMA, embarked upon years of (1) expending Data Directory bank account records for personal expenses, and (2) approving expenditure of CCEMA funds to his private company, Data Directory.

{¶ 31} "The Court finds, pursuant to the special audit, that between January 1, 2001 and July 20, 2007, the defendant received sale proceeds in the amount of $90,571.00. The defendant expended a total of $9,030.00 to produce and distribute the items, leaving a balance of $81,541.00 for public money collected by the defendant.[3]

{¶ 32} "Pursuant to the 1993 agreement, the county's net expenditure associated with the production and distribution of the items should have been zero. In other words, sale proceeds were to be used to cover all costs. However, according to the special audit, Clark County's net expenditure associated with the production and distribution of the items between January 1, 2001 and July 20, 2007 was $49,855.93.[4]

{¶ 33} "Therefore, even if the defendant was somehow under the impression that, pursuant to the agreement, he was entitled to keep profits for his personal use, he certainly would have understood his obligation to earmark $49,855.93 from the $81,541.00 in sale proceeds to reimburse the county for its net expenditure, leaving

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[3] "This figure does not even account for public money collected by the defendant during the seven-year period between September 1993 and December 2000.

[4] "Total paid by the county for data directories was $47,668.38 and total paid by the county for accountability tags was $2,187.55 for a total of $49,855.93.

him with a profit of $31,685.07. Tellingly, he never reimbursed the county. Instead, the defendant kept all of the $81,541.00 in sale proceeds for his personal use.

{¶ 34} "The items on which the defendant expended that public money included, but were not limited to, the following:

"Amount	Use
"$15,273	credit card bills
"$10,093	taxes
"$9,453	college tuition
"$8,374	automobile repairs
"$6,631	his spouse
"$4,855	himself
"$3,833	child's wedding expenses
"$3,699	home repairs
"$1,205	ATM/cash withdrawals
"947	eye care
"745	jewelry
"614	Sam's Club

{¶ 35} "A specific issue for the Court to decide is whether restitution should be ordered for (1) the total amount of public money collected by the defendant ($81,541.00) or (2) only that amount of the county's net expenditure for production and distribution of the items ($49,855.93).

{¶ 36} "The Court finds that, had the defendant deposited the sale proceeds in the county treasury as expected, the county would now have a surplus in the amount

of $31,685.07. The defendant did not deposit the sale proceeds into the county treasury. Instead, he deposited them into his private account and expended them for his personal use. In effect, the county has been deprived of $31,685.07 and the Court finds that this amount should be added to the county's net expenditure of $49,855.93 for a total restitution figure of $81,541.00.

{¶ 37} "Accordingly, the Court hereby finds that restitution due and owing Clark County from the defendant for the crimes of theft (F4) and two counts of having an unlawful interest in a public contract (F4) is **$81,541.00**. The defendant is also responsible for all costs of prosecution including, but not necessarily limited to, the cost of the special audit conducted by the Auditor of State." (Footnotes and bolding in original.)

{¶ 38} In short, the trial court found, not that Hupp usurped a business opportunity of his employer, the county, but that the county approved the sale and distribution of the items, through Hupp as its agent, and that Hupp wrongfully withheld the proceeds of these sales, which were public moneys, and converted the proceeds to his own account, for his personal use and benefit. By doing so, Hupp committed a theft offense under R.C. 2921.41(A)(2), wherein he stole, or converted, moneys that belonged to the county.

{¶ 39} R.C. 2921.41(C)(2)(a) not merely permits, but requires, a trial court to order restitution, in a Theft in Office case, of all of the property "that is the subject of the offense":

{¶ 40} "No public official or party official shall commit any theft offense, as defined in division (K) of section 2913.01 of the Revised Code, when either of the

following applies:

{¶ 41} "(1) * * * *

{¶ 42} "(2) The property or service involved is owned by this state, any other state, the United States, a county, a municipal corporation, a township, or any political subdivision, department, or agency of any of them, is owned by a political party, or is part of a political campaign fund.

{¶ 43} "(B) * * * *

{¶ 44} "(C)(1) * * * *

{¶ 45} "(C)(2)(a) A court that imposes a sentence for a violation of this section based on conduct described in division (A)(2) of this section shall require the public official or party official who is convicted of or pleads guilty to the offense to make restitution for all of the property or the service that is the subject of the offense, in addition to the term of imprisonment and any fine imposed. * * * * ."

{¶ 46} The $81,541 proceeds from the sale and distribution of the items, public moneys of the county that Hupp converted to his own use, constitute the property "that is the subject of the offense." Consequently, the trial court properly ordered restitution of this money. Hupp's reference, in his brief, to R.C. 2929.18(A)(1), a general provision for restitution, is inapposite.

{¶ 47} We agree with Hupp that neither R.C. 2929.18(A)(1), the general restitution provision, nor R.C. 2921.41(C)(2)(a), the restitution provision applying specifically in Theft in Office cases, covers the cost of the special audit. But the order from which Hupp appeals is not an unconditional order of restitution; it is an order of restitution imposed as a condition of admitting Hupp to community control

sanctions, instead of imprisonment in the penitentiary. A similar order of restitution, in a Theft in Office case, has been approved, as a condition of probation, since it did not unconditionally order restitution, but gave the defendant the choice of complying with the conditions of her probation, which included restitution, or going to prison. *State v. Donnelly* (1996), 109 Ohio App.3d 604, 607. The court found that payment of the cost of an audit that had uncovered her theft was an appropriate condition of probation. Id., at 608. We agree, and see no reason to distinguish this case because it involves a condition of the imposition of a community control sanction, rather than a condition of probation. In each case, the restitution of the cost of the audit is ordered as a condition of avoiding imprisonment in the penitentiary.

{¶ 48} We approve and follow *State v. Donnelly*, supra.

{¶ 49} Hupp's sole assignment of error is overruled.

III

{¶ 50} Hupp's sole assignment of error having been overruled, the judgment of the trial court is Affirmed.

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DONOVAN, P.J., and BROGAN, J., concur.

Copies mailed to:

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