

[Cite as *State v. Thompson*, 2015-Ohio-2882.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO

Plaintiff-Appellee

V.

MATTIE THOMPSON

Defendant-Appellant

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Appellate Case No. 26380

Trial Court Case No. 2012-CR-1483

(Criminal Appeal from
Common Pleas Court)

OPINION

Rendered on the 17th day of July, 2015.

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WELBAUM, J.

{¶ 1} Defendant-Appellant, Mattie Thompson, appeals from a trial court judgment amending Thompson's termination entry nunc pro tunc to order restitution. In support of her appeal, Thompson contends that the trial court erred by amending the termination entry.

{¶ 2} We conclude that the trial court improperly used a nunc pro tunc order to impose a restitution sanction on Thompson that was not imposed at sentencing or in the sentencing entry. Accordingly, the judgment of the trial court will be reversed, and this cause will be remanded so that the trial court can vacate its amended termination entry.

I. Facts and Course of Proceedings

{¶ 3} In June 2012, Thompson was indicted on three charges arising from events that occurred between July 21, 2011 and February 24, 2012. The charges included one count of forgery (spurious), one count of theft, and one count of grand theft regarding Thompson having obtained currency of Cliff Black c/o Adaptive Development Corporation (ADC) having a value of more than \$7,500 but less than \$150,000 (Indictment A).

{¶ 4} Subsequently, in November 2012, re-indictment B was filed, charging Thompson with various crimes that occurred between April 18, 2012 and April 24, 2012. Indictment B charged Thompson with two counts of forgery (spurious), two counts of forgery (without authority), two counts of forgery (uttering), and two counts of theft, of more than \$1,000.

{¶ 5} On December 19, 2012, Thompson appeared in court and pled no contest to Count III of indictment A, a fourth degree felony, and also pled no contest to Counts VIII

and IX of Indictment B, both fifth degree felonies. The remaining counts in both indictments were dismissed.

{¶ 6} During the plea hearing, the court asked the parties to place the plea agreement on the record. The State indicated that in exchange for the plea, the State had agreed to a cap of 18 months on all charges, plus restitution. When the court asked if there were a “ballpark amount” for restitution, the prosecutor indicated that defense counsel would put that on the record, since she had just handed it to him. At that time, defense counsel indicated that the reason for the no contest plea was that Cincinnati Insurance had paid a claim to one of the victims, and that counsel had provided what the insurance company had given to her. According to defense counsel, the issue of restitution involved possibly the \$500 deductible for one employer. For the second employer, defense counsel stated that she thought the estimate was short when a restitution figure of \$14.21 was provided. Defense counsel then stated that the issue would be whether the insurance policy would cover the full value of the theft. At that point, the following exchange occurred among the prosecutor, defense counsel, and the court:

THE COURT: What was the total theft?

MS. OSTROWSKI: Well, the paperwork that I received was
\$32,000 ---

THE COURT: We’re talking about like less than \$1,000?

MR. AMOS [Prosecutor]: Yes.

MS. OSTROWSKI [Defense Counsel]: Yes.

THE COURT: Okay.

MS. OSTROWSKI: Yeah.

The COURT: I can't say I agree with the law, but that is the law.

So, ma'm, you understand you're going to pay restitution on all the charges, which appears –

MS. OSTROWSKI: Possibly as low as less than \$600.

THE COURT: You understand that?

THE DEFENDANT: Yes, ma'm.

THE COURT: But whatever it is, we'll discuss it at that time.

Transcript of Proceedings, pp. 6-7.

{¶ 7} After this exchange, the court conducted a Crim.R. 11 colloquy. Thompson then pled no contest and signed the plea and waiver form. The court accepted the plea, found Thompson guilty, referred Thompson to Court Services for a presentence investigation, and set final disposition for January 16, 2013.

{¶ 8} The sentencing hearing took place as scheduled on January 16, 2013. At the hearing, no counsel for the State was identified or spoke on the record. Defense counsel spoke briefly on the record, to request that Thompson be given community control. The trial court then made the following remarks:

THE COURT: Okay. Ms. Thompson, you're basically a thief, and you steal from your employers. So there's really no good reason to put you on community control.

In 2003, you stole from an employer back then. In the present cases, the first case, you wrote checks for almost over \$37,000, although I understand that was covered by insurance. And then your story was my

boss made me do it and I gave the money to him. Now, my understanding from your boss is that that almost led them to bankruptcy.

While that's pending, you go work for someone else and you steal some of their checks. Now you were caught before it was too much, you know, before it was as much as the other case.

Transcript of Proceedings, p. 15.

{¶ 9} After sentencing Thompson to a total of 12 months in prison and disapproving shock incarceration, intensive program prison, and risk reduction sentence, the court made the following comments about restitution:

Restitution to Caliber Machine & Tool is \$21.52. I believe everything else was recovered. And you are to pay court costs in this case as to each of the three counts separately.

Transcript of Proceedings, p. 16.

{¶ 10} After making these remarks, the court discussed post-release control, and then, without asking for any further comments from the State or defense, remanded Thompson to the custody of the sheriff and concluded the hearing.

{¶ 11} On January 18, 2013, the court filed a termination entry reflecting the matters discussed during the sentencing hearing. The only mention of restitution was the following statement:

The Defendant is ordered to pay complete restitution to CALIBER MACHINE AND TOOL for economic loss in the amount of \$21.52, upon which execution is hereby awarded to be paid through the Montgomery County Clerk of Courts.

January 18, 2013 Termination Entry, p. 1.

{¶ 12} Subsequently, on July 3, 2013, the State filed a motion to amend the termination entry. In the motion, the State pointed out that there were two separate victims, Caliber Machine and Tool, and ADC. The State indicated that ADC had been deprived of about \$90,000, and insurance had paid \$50,000 of that amount. According to the State, this information had been given to the pre-sentence investigator and was attached to the Pre-sentence Investigation (PSI) report. However, the information was not included in the recommendation paragraph of the PSI, which is the paragraph the trial court reads during sentencing. The State, therefore, asked the court to amend the termination entry pursuant to Crim.R. 36, to include the amount owed to ADC. The State reiterated these facts at a hearing held on October 2, 2013.

{¶ 13} At the hearing, the defense objected, contending that the trial court could not amend the termination entry. In this regard, the defense noted ADC had not been mentioned during the sentencing hearing. Defense counsel also noted that PSIs are not always given to the defense, and that restitution had been a contentious issue, with numerous conversations having occurred with the prosecuting attorney about the issue.

{¶ 14} On November 8, 2013, the trial court filed a decision and entry sustaining the State's motion to amend the termination entry. The court concluded that omission of the information from the PSI recommendation and from the termination entry was a clerical error that the court could correct under Crim.R. 36. The trial court, therefore, ordered that Thompson would be required to pay ADC the amount of \$40,109.60, and further ordered the State to submit an amended termination entry, reflecting that amount, to the court within five days.

{¶ 15} No amended termination entry was submitted or filed. Thompson filed a notice of appeal from the court's decision, but we dismissed the appeal for lack of a final appealable order. See *State v. Thompson*, 2d Dist. Montgomery No. 26023, 2014-Ohio-3648. We expressed serious reservations in our decision about whether the trial court would be permitted to file a nunc pro tunc termination entry to add restitution, but stated that we would express no opinion because no final appealable order was before us. *Id.* at ¶ 7-8.

{¶ 16} The trial court then filed an amended termination entry, nunc pro tunc, on August 29, 2014. In the amended entry, the trial court added the following language to the sentencing entry:

The Defendant is ordered to pay complete restitution to **ADAPATIVE DEVELOPMENT CORPORATION** for economic loss in the amount of **\$40,109.60**, upon which execution is hereby awarded to be paid through the Montgomery County Clerk of Courts.

(Emphasis sic.) Doc. #3, p. 1.

{¶ 17} Thompson now appeals from the amended termination entry.

II. Alleged Error in Amending the Termination Entry

{¶ 18} Thompson's sole assignment of error states that:

The Trial Court Erred When It Amended Its Termination Entry Over a Year and a Half After It Had Been Filed to Order the Defendant to Pay Restitution.¹

¹ Thompson has stated her assignment of error in three different ways in her brief, but

{¶ 19} Under this assignment of error, Thompson contends that the trial court lacked authority to amend its former judgment because the error was not a clerical mistake that could be corrected under Crim.R. 36, but was a substantive legal decision. The State argues that Thompson agreed to pay restitution for the losses to both victims as part of her plea agreement, and that the trial court was not altering the sentence, but was correcting an inadvertent omission.

{¶ 20} Crim.R. 36 provides that:

Clerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission, may be corrected by the court at any time.

{¶ 21} In *State v. Miller*, 127 Ohio St.3d 407, 2010-Ohio-5705, 940 N.E.2d 924, the Supreme Court of Ohio held that “[a] court may not use a nunc pro tunc entry to impose a sanction that the court did not impose as part of the sentence.” *Id.* at syllabus. Upon review, the facts in *Miller* are virtually indistinguishable from those of the present case. In *Miller*, the defendant agreed to pay restitution as part of his plea agreement. *Id.* at ¶ 1. However, the judge did not impose restitution during the sentencing hearing or in the sentencing entry. *Id.* at ¶ 2. About two months later, the State moved the court for a restitution hearing, stating that restitution to the victim of more than \$20,000 was part of the plea agreement, but had been “ ‘inadvertently omitted from the plea and sentencing orders.’ ” *Id.* at ¶ 4. The trial court then ordered that the original sentencing entry be amended to include the restitution amount. This is the same process that occurred in the case before us, with the exception that the trial court did order restitution to one victim,

each statement of the assignment of error alleges basically the same thing, i.e., that the trial court erred or abused its discretion in ordering Thompson to pay restitution to ADC.

Caliber Machine and Tool. However, restitution to the remaining victim, ADC, was not mentioned at the sentencing hearing or in the sentencing entry.

{¶ 22} On appeal, the Supreme Court of Ohio reversed the court of appeals, which had concluded that the trial court retained jurisdiction to include restitution. *Id.* at ¶ 6. In this regard, the Supreme Court of Ohio first stated that:

A clerical error or mistake refers to “ ‘a mistake or omission, mechanical in nature and apparent on the record, which does not involve a legal decision or judgment.’ ” [*State ex rel. Cruzado v. Zaleski*], 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 19, quoting *State v. Brown* (2000), 136 Ohio App.3d 816, 819-820, 737 N.E.2d 1057. “Although courts possess inherent authority to correct clerical errors in judgment entries so that the record speaks the truth, ‘nunc pro tunc entries “are limited in proper use to reflecting what the court actually decided, not what the court might or should have decided.” ’ ” *Cruzado*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 19, quoting *State ex rel. Mayer v. Henson*, 97 Ohio St.3d 276, 2002-Ohio-6323, 779 N.E.2d 223, ¶ 14, quoting *State ex rel. Fogle v. Steiner* (1995), 74 Ohio St.3d 158, 164, 656 N.E.2d 1288. The amended journal entry in this case may reflect what the trial court *should have decided* at sentencing. It does not reflect what the trial court did decide but recorded improperly. Thus, the use of the nunc pro tunc entry to impose restitution upon Miller was improper because it does not reflect the events that actually occurred at the sentencing hearing (Emphasis sic.) *Miller* at ¶ 15.

{¶ 23} After making these remarks, the Supreme Court of Ohio went on to state that:

Notably, the determination of restitution entails a substantive legal decision or judgment and is not merely a mechanical part of a judgment. Restitution is a financial sanction, based on a victim's economic loss, that is imposed by a judge as part of a felony sentence. See R.C. 2929.18(A)(1). See also *State v. Danison*, 105 Ohio St.3d 127, 2005-Ohio-781, 823 N.E.2d 444, syllabus. It is not an order that is so “mechanical in nature” that its omission can be corrected as if it were a clerical mistake. *Londrico v. Delores C. Knowlton, Inc.* (1993), 88 Ohio App.3d 282, 285, 623 N.E.2d 723. As the dissenting judge stated, a nunc pro tunc order cannot cure the failure of a judge to impose restitution in the first instance at sentencing. [*State v.*] *Miller*, [8th Dist. Cuyahoga No. 91543,] 2009-Ohio-3307, ¶ 24. Accord *Caprita v. Caprita* (1945), 145 Ohio St. 5, 30 O.O. 238, 60 N.E.2d 483, paragraph two of the syllabus (a nunc pro tunc entry corrects a judicial record that fails to show a correct order or judgment of the court because the order or judgment was not recorded properly in the first place). We agree and therefore hold that a court may not use a nunc pro tunc entry to impose a sanction that the court did not impose as part of the sentence

Miller at ¶ 16.

{¶ 24} In view of the similarity between the present case and *Miller*, we sustain Thompson's assignment of error. The trial court improperly used a nunc pro tunc order to add restitution on behalf of ADC. Accordingly, the trial court must vacate its nunc pro

tunc order and the order of restitution to ADC. *Miller*, 127 Ohio St.3d 407, 2010-Ohio-5705, 940 N.E.2d 924, at ¶ 17.

III. Conclusion

{¶ 25} Thompson's sole assignment of error having been sustained, the judgment of the trial court is reversed, and this cause is remanded to the trial court for further proceedings consistent with our opinion.

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DONOVAN, J. and HALL, J., concur.

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