

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
MARION COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 9-14-13

v.

MICHAEL TODD RADEBAUGH,

OPINION

DEFENDANT-APPELLANT.

Appeal from Marion County Common Pleas Court
Trial Court No. 13-CR-325

Judgment Reversed and Cause Remanded

Date of Decision: March 30, 2015

APPEARANCES:

Brian G. Jones for Appellant

David J. Stamolis for Appellee

WILLAMOWSKI, J.

{¶1} Defendant-appellant Michael Radebaugh (“Radebaugh”) brings appeal from the judgment of the Court of Common Pleas of Marion County imposing sentence and ordering restitution. Radebaugh challenges the imposition of restitution. For the reasons set forth below, the judgment is reversed and the matter is remanded for further proceedings consistent with this appeal.

{¶2} On July 3, 2013, the Marion County Grand Jury indicted Radebaugh on six counts: 1) Possession of Heroin in violation of R.C. 2925.11(A)/(C)(6), a felony of the fifth degree; 2) Attempted Tampering with Evidence in violation of R.C. 2923.02/2921.12(A)(1), a felony of the fourth degree; 3) Possession of Heroin in violation of R.C. 2925.11(A)/(C)(6), a felony of the fifth degree; 4) Tampering with Evidence in violation of R.C. 2921.121(A)(1), a felony of the third degree; 5) Theft in violation of R.C. 2913.02(A)(1) , a felony of the fifth degree; and 6) Forgery in violation of R.C. 2913.31(A)(3), a felony of the fifth degree. Doc. 3. Radebaugh entered pleas of not guilty to all charges on July 8, 2013. Doc. 8. On September 19, 2013, Radebaugh filed a motion for Intervention in Lieu of Conviction. Doc. 33. A hearing was held on the motion on October 30, 2013. Doc. 40. At that time, Radebaugh entered a guilty plea to Counts One, Two and Five. *Id.* The trial court granted the motion on November 8, 2013, and the guilty plea was ordered held in abeyance pending the successful completion of the

intervention. *Id.* Also at that time, the trial court ordered that restitution be paid to Commercial Savings Bank (“CSB”). *Id.* at 2.

{¶3} On March 11, 2014, Radebaugh’s probation officer filed a notice of violation with the trial court. Doc. 43. A hearing was held on the violations on March 18, 2014. On March 24, 2014, the trial court entered a judgment entry sentencing Radebaugh pursuant to his guilty plea. Doc. 54. The trial court then ordered that restitution be paid in the amount of \$7,834.82 to CSB and in the amount of \$5,035.91 to Walmart. *Id.* Radebaugh filed his notice of appeal on April 17, 2014. Doc. 58. On appeal, Radebaugh raises the following assignments of error.

First Assignment of Error

The trial court committed an abuse of discretion when it ordered the defendant to pay restitution to third parties.

Second Assignment of Error

The trial court violated [Radebaugh’s] rights to due process, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sec. 16 of the Ohio Constitution, and Indictment by a grand jury as guaranteed by Article I, Sec. 10 of the Ohio Constitution when it held, sua sponte, that third parties, unnamed in the indictment were victims of theft.

{¶4} In response to the assignments of error, the State argues solely that they should not be addressed because they are barred by the doctrine of *res*

judicata. “The doctrine of res judicata establishes that ‘a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment.’ ” *State v. Wilson*, 129 Ohio St.3d 214, 2011–Ohio–2669, ¶ 30, quoting *State v. Perry*, 10 Ohio St.2d 175 (1967), paragraph nine of the syllabus. The State claims that the judgment granting intervention in lieu of conviction was a final appealable order and that Radebaugh had to raise the issue of restitution on a direct appeal from that judgment. We disagree.

{¶5} For a judgment to be subject to appellate review, it must be a final order. *In re Adams*, 115 Ohio St.3d 86, 2007-Ohio-4840, 873 N.E.2d 886, at ¶ 26. The determination whether to grant or deny a motion for intervention in lieu of conviction does not affect a substantial right of the defendant and is thus not a final appealable order.¹ See *State v. Dempsey*, 8th Dist. Cuyahoga No. 82154, 2003-Ohio-2579 and *State v. Chalender*, 99 Ohio App.3d 4, 649 N.E.2d 1254 (2d Dist. 1994). In making this determination, the court notes that R.C. 2951.041 is

¹ However, if it were the State appealing the granting of the motion, it would affect the substantial right of the State to seek a conviction if the intervention were successfully completed, and thus would be a final appealable order for the purposes of the State. See *State v. Fisher*, 3d Dist. Seneca No. 13-97-40, 1998 WL 195678 (Apr. 21 1998) and *State v. Casto*, 12th Dist. Clinton No. CA2008-08-033, 2009-Ohio-791.

permissive in nature, the court is not required to grant it, and a defendant need not agree to the terms.

Instead, [the defendant] could have opted to have his case treated as any other criminal case. That is, he could have pleaded guilty and received a sentence, or pleaded not guilty and received a trial, after which he would have either been acquitted or found guilty and sentenced accordingly.

Dempsey at ¶ 10. Since the judgment granting the motion for intervention in lieu of conviction was not a final order subject to appeal by Radebaugh, the doctrine of *res judicata* does not apply in this case.

{¶6} Even if the judgment were a final appealable order, the doctrine of *res judicata* would not apply because the appeal came from the sentencing entry after Radebaugh violated the terms of his intervention by failing to report and by testing positive for drug use. This judgment entry entered its own order of restitution which was not the same as the one entered in the prior order. The prior order did not specify the amount owed to Commercial Savings Bank and did not mention Walmart at all. Since the entries contain different terms, Radebaugh could not have raised his assignments of error in a direct appeal from the judgment entry granting his motion for intervention in lieu of conviction. Thus, the doctrine of *res judicata* is not applicable in this case.

{¶7} On appeal, Radebaugh argues in both assignments of error that the trial court erred by requiring him to pay restitution to third parties. Since the

argument is the same in both assignments of error, we will address them together.

The imposition of restitution as a criminal sanction is governed by R.C. 2929.18.

Financial sanctions that may be imposed pursuant to this section include, but are not limited to, the following:

(1) Restitution by the offender to the victim of the offender's crime or any survivor of the victim, in an amount based on the victim's economic loss. If the court imposes restitution, the court shall order that the restitution be made to the victim in open court, to the adult probation department that serves the county on behalf of the victim, to the clerk of courts, or to another agency designated by the court. If the court imposes restitution, at sentencing, the court shall determine the amount of restitution to be made by the offender. If the court imposes restitution, the court may base the amount of restitution it orders 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. If the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount. All restitution payments shall be credited against any recovery of economic loss in a civil action brought by the victim or any survivor of the victim against the offender.

R.C. 2929.18(A)(1). Although the former version of the statute permitted restitution orders to third-parties, that language was removed by the Ohio Legislature from the current version. *State v. Dull*, 3d Dist. Seneca No. 13-12-33, 2013-Ohio-1395. “Pursuant to the plain language of R.C. 2929.18(A)(1), restitution may not be ordered payable to a third party.” *Id.* at ¶11. *See Also State*

v. *Didion*, 173 Ohio App.3d 130, 2007-Ohio-4494, 877 N.E.2d 725 (3d Dist.) at ¶ 29.

{¶8} In this case, the trial court ordered restitution to be paid to CSB and Walmart. In doing so, the trial court *sua sponte* determined that these entities were victims of the crime because they cashed the forged checks. A victim of an offense is statutorily defined as one of the following.

(1) A person who is identified as the victim of a crime * * * in a police report or in a complaint, indictment, or information that charges the commission of a crime and that provides the basis for the criminal prosecution * * *.

(2) A person who receives injuries as a result of a vehicle, streetcar, trackless trolley, aquatic device, or aircraft accident that is proximately caused by a violation described in division (A)(3) of this section or a motor vehicle accident that is proximately caused by a violation described in division (A)(4) of this section and who receives medical treatment as described in division (A)(3) or (4) of this section, whichever is applicable.

R.C. 2930.01. The second section is not applicable to this case, thus we must determine who was a victim pursuant to the first section. The relevant charge in the indictment in this case did not identify who the owner of the property was for the theft charge. Doc. 3. The forgery charge was dismissed as part of the plea agreement and the plea agreement did not provide that Radebaugh would be responsible for paying restitution for charges dismissed.² Doc. 39. All of the

² The plea agreement did not address restitution at all other than to say restitution “may be imposed” in the boilerplate language of the form. Doc. 39.

parties agreed that the theft charge was based upon Radebaugh stealing checks from his father's business. The completing the checks and cashing them was the basis of the forgery charge which was dismissed. The trial court even found that CSB and Walmart were victims of the forgery. See Tr. 19, 22, 23, and 24. Generally, the amount of restitution is limited to the offenses for which a defendant is convicted. *State v. Wickline*, 3d Dist. Logan No. 8-10-20, 2011-Ohio-3004, ¶ 13. “[A]s a matter of law, an offender cannot be ordered to pay restitution for damage arising from a crime of which he was not convicted.” *State v. Williams*, 3d Dist. Logan No. 8-03-25, 2004-Ohio-2801, ¶ 23. Thus, Radebaugh cannot be ordered to pay restitution for any damages arising from the forgery.³

{¶9} Another issue with the restitution order is that no evidence was presented that CSB and Walmart suffered any economic harm. The trial court just determined that they likely were the entities that suffered economic harm because they were the entities that accepted the forged checks and under the law of commercial paper, they bear the loss. While this may be what happened, there was no evidence presented to support this conclusion. A review of the hearing indicated that the trial court did not have a victim impact statement in the PSI and the PSI did not provide a restitution calculation. Tr. 18. No witnesses testified at

³ No agreement as to restitution was entered by Radebaugh and the State. The fact that Radebaugh cannot be ordered to pay restitution does not preclude CSB or Walmart from seeking a judgment against Radebaugh in a civil suit.

the hearing to put forth any evidence as to the amount of financial damages suffered or who actually suffered those damages. The trial court's judgment was based solely on assumptions made by the trial court. Although the prosecutor stated that he thought that CSB had returned the money to the account owner, statements by the prosecutor are not evidence and are not statutorily allowed to form the basis of the restitution.⁴ See R.C. 2929.18(A)(1).

{¶10} Additionally, the amounts for the restitution ordered were determined by adding the face value of the forged checks. There was no evidence presented that CSB and Walmart were actually economically damaged by that amount. The statute provides that the amount of restitution "shall not exceed the amount of the economic loss suffered by the victim." R.C. 2929.18(A)(1). At best we have the prosecutor's statement that he believed CSB had refunded the money to the account upon which the forged checks were drawn. There was also no evidence presented that CSB or Walmart had not recovered any of the funds paid out. The trial court also did not address whether CSB had already recouped some of its losses from the prior order of restitution, which would have been in effect for several months at that time. Without some evidence to prove what the actual amount of economic loss was, the trial court abused its discretion in ordering

⁴ No statement concerning Walmart was made.

Case No. 9-14-13

restitution as was done in this case. For these reasons, the first and second assignments of error are sustained.

{¶11} Having found error prejudicial to Appellant, the judgment of the Court of Common Pleas of Marion County is reversed and the matter is remanded for further proceedings in accord with this opinion.

*Judgment Reversed and
Cause Remanded*

ROGERS, P.J. and PRESTON, J., concur.

/jlr