[Cite as *State v. Savage*, 2015-Ohio-4205.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
MEIGS COUNTY

STATE OF OHIO,	:	Case No. 15CA2
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
JUSTIN SAVAGE,	:	
Defendant-Appellant.	:	**RELEASED: 9/30/2015**

APPEARANCES:

Timothy Young, Ohio Public Defender, and Terrence K. Scott, Ohio Assistant Public Defender, Columbus, Ohio, for appellant.

Colleen S. Williams, Meigs County Prosecuting Attorney, and Jeremy Fisher, Meigs County Assistant Prosecuting Attorney, Pomeroy, Ohio, for appellee.

Harsha, J.

{¶1} Justin Savage was indicted on a charge of grand theft, a felony of the fourth degree, in connection with his taking of his neighbor's prize-winning coon dog. In return for the dismissal of the charge, Savage pleaded guilty to an amended charge of theft, a felony of the fifth degree. As part of the plea agreement Savage stipulated that the trial court would be able to impose restitution consistent with the higher degree of the dismissed grand-theft charge if the evidence established that amount. The trial court sentenced Savage to five years of community control and ordered him to pay $25,000 in restitution to his neighbor and the costs of the proceeding.

{¶2} On appeal Savage asserts that the trial court erred in convicting him on his guilty plea because it was induced by illegal consideration—his agreement that the court was authorized to impose restitution consistent with the dismissed grand-theft charge when he was actually convicted of the lesser amended charge of theft. Because

Savage agreed that the trial court was authorized to do so, he invited the court's purported error. And it is well settled that trial courts may award restitution related to dismissed charges where that restitution is part of the plea agreement. Therefore, we reject Savage's first assignment of error.

{¶3} Savage also contends that the trial court erred in ordering him to pay restitution in an amount that exceeded both the actual economic loss suffered by his neighbor and the limit of restitution that could be imposed for his theft conviction. For the same reasons specified in rejecting his first assignment of error, his contention that the trial court was limited to the amount of restitution reflected by his theft conviction is meritless. Furthermore, the trial court did not abuse its discretion in awarding $25,000 in restitution because the amount was supported by competent, credible evidence. The founder and former owner of the Professional Kennel Club, LLC valued the dog that Savage stole from his neighbor in the $15,000 to $25,000 range and indicated that he had seen many similar dogs that were worth over $25,000. We reject Savage's second assignment of error.

{¶4} Finally, Savage argues that his trial counsel was ineffective for (1) advising him to accept the state's plea offer because it required him to stipulate that he could be ordered to pay restitution in an amount that exceeded what was statutorily permitted for a theft offense, and (2) not objecting to the imposition of court costs when he knew that Savage was indigent. We reject this contention because counsel's decision to advise Savage to plead guilty to a lesser theft offense in return for the dismissal of the greater grand-theft charge fell within the wide range of reasonable professional assistance where the latter charge carries potentially more severe

sanctions than the former charge, and counsel obtained the state's recommendation to community control. Finally, the mere fact that the trial court found him indigent and appointed counsel for him did not preclude the same court from determining that he had the ability to pay costs based on his future ability to obtain employment. We reject Savage's fourth assignment.

{¶5} Because Savage has not established that the trial court committed prejudicial error in accepting his guilty plea, convicting him of theft, and ordering him to pay $25,000 in restitution and costs, we overrule his assignments of error and affirm the judgment of the trial court. However, because of a clerical mistake in the trial court's sentencing entry, we remand this cause to the trial court under App. R. 9(E) for the issuance of a nunc pro tunc sentencing entry.

I. FACTS

{¶6} Savage's neighbor, Duayne McVey, owned a registered Walker coonhound named Track Shake. In July 2009, Savage, who was 18 years old at the time, and two other boys stole the two-year old dog from McVey's yard, removed the dog's collar, which contained a GPS tracking device, and released the dog on a road. McVey never recovered his dog.

{¶7} In September 2009, the Meigs County Grand Jury returned a secret indictment charging Savage with one count of grand theft in violation of R.C. 2913.02(A) with a specification that the value of the property was $5,000 or more and less than $100,000, which constituted a felony of the fourth degree.[1] The trial court found that

[1] This case involves the application of former R.C. 2913.02(B)(2), which specified that if the value of property or services stolen is $5,000 or more and is less than $100,000, the offense is grand theft, a felony of the fourth degree, while if the value of property or services stolen is $500 or more and is less than $5,000, the offense is theft, a felony of the fifth degree. Effective September 30, 2011, the statute

Savage was indigent and appointed him counsel, and Savage entered a plea of not guilty to the charge.

{¶8} The parties subsequently entered into a plea agreement in which the state dismissed the grand-theft charge and Savage pleaded guilty to a lesser amended charge of theft, a felony of the fifth degree. As part of the plea agreement the state agreed to recommend a five-year term of community control. In addition the parties stipulated that Savage would "make restitution to the victim, in an amount to be determined prior to sentencing but may range above $5,000.00 with a maximum of $25,000.00 according to the victim [with] the [defendant] alleging it is not more than $1,000.00." Savage thus agreed that if the evidence established it, the trial court was authorized to award restitution consistent with the dismissed grand-theft charge.

{¶9} The trial court held a hearing where it engaged Savage in a detailed colloquy and accepted his plea after determining that he was making it knowingly, voluntarily, and intelligently. The trial court convicted Savage of theft based on his guilty plea.[2]

{¶10} Because Savage disputed the amount requested by the state for restitution, the trial court conducted a hearing on the matter. McVey testified that he purchased the dog for $1,500 and that she had won $2,000 in prize money since he had owned her. McVey received a statement from the founder and former owner of the Professional Kennel Club, LLC, that: (1) Track Shake was eligible for the World Championship; (2) Track Shake had earned the highest title of Grand Nite Champion in

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was amended to increase the monetary amounts for the offenses by substituting $1,000 for $500 and $7,500 for $5,000.

the United Kennel Club and the title of State Champion with the American Kennel Club; (3) he had seen many hounds of Track Shake's quality earn more than $25,000; (4) hounds of Track Shake's quality are rare and carry a heavy price; and (5) he would place her value in the $15,000 to $25,000 range. According to McVey, his stolen dog was worth $20,000 "easily" and he based the valuation on the dog's potential future winnings from competitive hunts. McVey further testified that he could get $20,000 from the dog's puppies alone.

{¶11} The trial court sentenced Savage to five years of community control with several conditions, including that he enter into and successfully complete a rehabilitation program, that he obtain employment, and that he perform 500 hours of community service. In addition, the trial court ordered Savage to pay the sum of $25,000 for restitution to the victim and pay the costs of the proceeding. After a series of post judgment proceedings in both the trial court and this court, Savage perfected this appeal.

III. ASSIGNMENTS OF ERROR

{¶12} Savage assigns the following errors for our review:

> 1. A contract may not be enforced if the consideration given for it is illegal. Mr. Savage's plea agreement was induced upon illegal consideration and as such, is unenforceable and invalid.
>
> 2. Mr. Savage was ordered to pay restitution to the victim in an amount that exceeded both the actual economic loss suffered by the victim and the limit of restitution that could be imposed for a fifth-degree felony theft offense. The court's order imposing restitution was erroneous because the amount arrived at was not based upon credible evidence that established the value of the victim's actual economic loss to a reasonable degree of certainty. Fourteenth Amendment of the United States Constitution; Article I Section 10, of the Ohio Constitution; R.C. 2929.18(A)(1); R.C. 2913.02(A)(2).

> 3. Mr. Savage's trial counsel rendered constitutionally ineffective assistance when counsel advised Mr. Savage to accept the State's plea offer, which required him to be sentenced to more than what was statutorily allowed for a fifth-degree-felony theft offense, and when counsel knew that Mr. Savage was indigent but did not object to the imposition of court costs. Sixth Amendment to the United States Constitution; *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

III. LAW AND ANALYSIS

A. Plea Agreement

{¶13} In his first assignment of error Savage asserts that the trial court erred in accepting his guilty plea, convicting him of theft, and ordering him to pay $25,000 in restitution because his plea agreement was induced by illegal consideration—his stipulation that the trial court was authorized to impose restitution in the amount consistent with the original dismissed charge of grand theft, if proven by the state.

1. Invited Error

{¶14} Because Savage agreed that the trial court was authorized to impose this restitution if the state could prove it, he invited any potential error by the trial court in doing so. "Under the invited-error doctrine, a party is not entitled to take advantage of an error that he himself invited or induced the trial court to make." (Emphasis omitted.) *State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, 12 N.E.3d 1112, ¶ 243, citing *State ex rel. Kline v. Carroll*, 96 Ohio St.3d 404, 2002-Ohio-4849, 775 N.E.2d 517, ¶ 27; *see also Lester v. Leuck*, 142 Ohio St. 91, 50 N.E.2d 145 (1943), paragraph one of the syllabus. "Courts, including the Supreme Court of Ohio and this court, have applied this doctrine to cases in which a defendant entered into a plea agreement covering the alleged error claimed on appeal." *State v. Hardie*, 4th Dist. Washington No. 14CA24, 2015-Ohio-1611, ¶ 11, citing *State v. Rohrbaugh*, 126 Ohio St.3d 421, 2010-Ohio-3286,

934 N.E.2d 920, ¶ 10 (defendant invited any error, including plain error, in a conviction on an amended charge when he bargained for the amendment and pleaded guilty to the amended charge as part of a plea agreement), and *State v. Marcum*, 4th Dist. Hocking Nos. 12CA22 and 12CA26, 2013-Ohio-2189, ¶ 1011, and cases cited therein (the invited-error "doctrine applies to errors arising from a negotiated plea agreement"). These cases include those in which the defendant raises an argument on appeal that the trial court lacked authority to impose restitution. *See, e.g., State v. Williams*, 8th Dist. Cuyahoga Nos. 102220, 102221, 102222, and 102223, 2015-Ohio-2522, ¶ 12, quoting *State v. Jackson*, 8th Dist. Cuyahoga No. 99059, 2013-Ohio-3136, ¶ 15 (" 'any argument that the trial court had no authority to impose restitution * * * is contrary to appellant's position at sentencing and precluded by [the invited-error] doctrine' "). Therefore, Savage waived the error she asserts on appeal. *Hardie* at ¶ 13, citing *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 15.

2. The plea bargain was authorized by law

{¶15} Moreover, assuming arguendo that Savage claims a jurisdictional error occurred that evades waiver, a proposition that appears questionable because the voidness doctrine is inapplicable to most sentencing challenges under *State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382, ¶ 8, his claim is meritless.

{¶16} " 'Principles of contract law are generally applicable to the enforcement and interpretation of plea agreements.' " *State v. Billingsley*, 133 Ohio St.3d 277, 2012-Ohio-4307, 978 N.E.2d 135, ¶ 26, quoting *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, ¶ 50; *State v. Moore*, 4th Dist. Adams No. 13CA965, 2014-

Ohio-3024, ¶ 15. The essential elements of a contract are an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), manifestation of mutual assent, and legality of the object and consideration. *See generally Williams v. Ormsby*, 131 Ohio St.3d 427, 2012-Ohio-690, 966 N.E.2d 255, ¶ 14; *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶ 16; *Moore* at ¶ 15. " 'Courts of law and courts of equity will decline to enforce obligations created by contract if the contract is illegal or the consideration given is illegal, immoral, or against public policy.' " *Rinehart v. Martin*, 11th Dist. Portage No. 2013-P-0036, 2013-Ohio-4966, ¶ 16, quoting *Langer v. Langer*, 123 Ohio App.3d 348, 354, 704 N.E.2d 275 (2d Dist. 1997).

{¶17} Savage asserts that the trial court had a duty to reject the plea agreement because it was based on illegal consideration—his stipulation that the trial court was authorized to award restitution to the victim based on the amounts corresponding to the dismissed fourth-degree felony charge of grand theft.

{¶18} Savage is correct that as a general rule, a defendant cannot pay restitution for damages attributable to an offense for which he was charged, but not convicted. *State v. Smallwood*, 4th Dist. Meigs No. 15CA1, 2015-Ohio-2725, ¶ 15; *State v. Durham*, 4th Dist. Meigs Nos. 13CA2 and 13CA3, 2014-Ohio-4915, ¶ 26; *State v. Ellis*, 4th Dist. Washington No. 02CA48, 2003-Ohio-2243, ¶ 8-9.

{¶19} However, as Savage concedes a well-settled exception to this general rule authorizes restitution for damages related to dismissed charges where restitution is part of a defendant's plea bargain. *State v. LaChance*, 11th Dist. Portage No. 2014-P-0026, 2015-Ohio-2609, ¶ 18; *Ellis* at ¶ 8-9. Appellate courts have upheld trial court orders for

defendants to pay restitution related to dismissed charges when (1) the defendant entered into a plea agreement in which he or she agreed to plead guilty to some charges contained in the indictment in exchange for the dismissal of other charges in the indictment, and (2) the defendant agreed as part of the consideration for the plea agreement, to provide restitution for damages caused by the conduct that formed the basis of the dismissed criminal charges. *See State v. Strickland*, 10th Dist. Franklin No. 08AP-164, 2008-Ohio-5968, ¶ 12, citing *State v. Rosebrook*, 3d Dist. Logan No. 8-05-07, 2006-Ohio-734 (affirming restitution order where defendant pleaded guilty to nine counts of indictment in exchange for the dismissal of 16 counts of the indictment and defendant expressly agreed to pay restitution as determined by the court in connection with the dismissed counts), and *State v. Weatherholtz*, 3d Dist. Auglaize No. 2-04-47, 2005-Ohio-5269 (affirming restitution order where defendant entered guilty plea to one charge in exchange for dismissal of another charge and defendant agreed to make restitution on all counts of the indictment). This exception permits a trial court to order restitution consistent with the higher degree of the dismissed theft offense when the defendant pleaded guilty to a lesser theft charge and agreed to pay restitution in connection with the dismissed higher charge. *See State v. Wickline*, 3d Dist. Logan No. 8-10-20, ¶ 16.

{¶20} In *State v. Lalain*, 136 Ohio St.3d 248, 2013-Ohio-3093, 994 N.E.2d 423, ¶ 19, the Supreme Court of Ohio noted that the case presented two issues, including "whether restitution for a theft offense is limited to the property value corresponding to the degree of the theft conviction." Although the court did not expressly rule on this

issue, it appeared to suggest in dicta at ¶ 23-24, that restitution is not limited to the property value corresponding to the degree of the theft conviction:

> The certified question merges the above statutory requirements with the concept of the plea agreement and needlessly confuses the matter. *The statute contains no statement about incorporating restitution into plea agreements, so that is not a statutory mandate. Rather, the statute vests the trial court with discretion to impose restitution and to base it on listed statutory factors and other information, but restitution may not exceed the amount of economic loss suffered as a direct and proximate result of the commission of the offense.* A hearing is mandated only if the offender, victim, or survivor disputes the amount.
>
> In addition, *we recognize that the amount of restitution is not correlated to the degree of the theft offense*.

(Emphasis added.)

{¶21} Even the two dissenting Justices in *Lalain* recognized that a defendant can enter into a plea agreement containing a provision in which he or she agreed to pay restitution in an amount corresponding to a dismissed higher-degree theft offense. *Lalain* at ¶ 35 (Lanzinger, J., dissenting).

{¶22} Although one appellate court recognized that the statement in the majority opinion in *Lalain* that "the amount of restitution is not correlated to the degree of the theft offense" constituted dicta, *see State v. Perkins*, 3d Dist. Marion No. 9-13-52, 2014-Ohio-2242, fn. 3, another appellate court referred to this language as a holding and relied on it to reject a defendant's claim that the trial court could not order restitution in an amount that exceeded the amount designated as an element of the theft offense. *State v. Mendez*, 7th Dist. Mahoning No. 13 MA 86, 2014-Ohio-2601, ¶ 1, 6-7.

{¶23} Regardless, it is apparent that under the overwhelming persuasive authority, the consideration given by the defendant for the plea agreement was not illegal and the agreement was enforceable. In fact, the dismissal of the higher grand-

theft charge constituted sufficient legal consideration for the plea agreement, and because some consideration exists for the agreement, we cannot inquire into its adequacy. *See State v. Moore*, 4th Dist. Adams No. 13CA965, 2014-Ohio-3024, ¶ 19 and 22; *State v. McMahon*, 2d Dist. Clark No. 2014-CA-98, 2015-Ohio-2878, ¶ 22, 24. We overrule Savage's first assignment of error.

B. Restitution

{¶24} In his second assignment of error Savage contends that the trial court erred in ordering him to pay restitution in an amount that exceeded both the actual economic loss suffered by the victim and the limit of restitution that could be imposed for a fifth-degree felony theft conviction. We reject the second contention for the same reasons identified in rejecting it in his first assignment of error—he invited any purported error and precedent authorizes a trial court to impose restitution relating to dismissed charges when the defendant enters into a plea agreement allowing it.

{¶25} His remaining contention is that the trial court erred in ordering restitution in an amount exceeding the economic loss incurred by the victim. "Generally, a decision to award restitution lies in a trial court's sound discretion and its decision will not be reversed on appeal absent an abuse of discretion." *State v. Stump*, 4th Dist. Athens No. 13CA10, 2014-Ohio-1487, ¶ 11; *State v. Maddox*, 8th Dist. Cuyahoga No. 1021333, 2015-Ohio-2859, ¶ 13. An abuse of discretion is an unreasonable, arbitrary, or unconscionable use of discretion, i.e., a view or action that no conscientious judge could honestly have taken. *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶ 67; *State v. Gavin*, 4th Dist. Scioto No. 13CA3592, 2015-Ohio-2996, ¶ 20. " '[T]he amount of the restitution must be supported by competent, credible evidence in

the record from which the court can discern the amount of the restitution to a reasonable degree of certainty.' " *State v. Jackson*, 4th Dist. Ross No. 11CA3263, 2012-Ohio-4235, ¶ 9, quoting *State v. Johnson*, 4th Dist. Washington No. 03CA11, 2004-Ohio-2236, ¶ 10.

{¶26} R.C. 2929.28(A)(1) authorizes a trial court to award "[r]estitution in an amount based on the victim's economic loss." " 'Economic loss' means any economic detriment suffered by a victim as a direct and proximate result of the commission of an offense * * *." R.C. 2929.01(L). Competent, credible evidence at the restitution hearing supported the trial court's award of $25,000 in restitution.[3] The founder and former owner of the Professional Kennel Club, LLC sent McVey a statement specifying that he valued his stolen dog in the $15,000 to $25,000 range and that he had seen many similarly gifted hounds earn more than $25,000 in competitions. *See State v. Davis*, 4th Dist. Highland No. 13CA6, 2013-Ohio-5633, ¶ 8 (although this evidence may normally be considered inadmissible hearsay, the Rules of Evidence are inapplicable to sentencing proceedings, including ones involving restitution); Evid.R. 101(C)(3). Therefore, the trial court did not abuse its broad discretion in ordering Savage to pay $25,000 in restitution for the hunting dog he stole. We overrule Savage's second assignment of error.

C. Ineffective Assistance of Counsel

{¶27} In his third assignment of error Savage argues that his trial counsel provided ineffective assistance. To prevail on a claim of ineffective assistance of

[3] Although McVey requested only $20,000 in restitution for his dog, nothing in R.C. 2929.28(A)(1) prevents a trial court from ordering a greater amount as long as the evidence supports the amount awarded.

counsel, a criminal defendant must establish (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. Short*, 129 Ohio St.3d 360, 2011–Ohio–3641, 952 N.E.2d 1121, ¶ 113; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Knauff*, 4th Dist. Adams No. 13CA976, 2014–Ohio–308, ¶ 23. The defendant has the burden of proof because in Ohio, a properly licensed attorney is presumed competent. *State v. Gondor*, 112 Ohio St.3d 377, 2006–Ohio–6679, 860 N.E.2d 77, ¶ 62. Failure to satisfy either part of the test is fatal to the claim. *Strickland* at 697; *State v. Bradley*, 42 Ohio St.3d 136, 143, 538 N.E.2d 373 (1989).

{¶28} Savage claims that his trial counsel was ineffective when he advised Savage to accept the state's plea offer because it required him to stipulate that he could be ordered to pay restitution in an amount that was more than what was statutorily allowed for a theft conviction. In evaluating Savage's claim we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *State v. Tyson*, 4th Dist. Ross No. 12CA3343, 2013-Ohio-3540, ¶ 25, quoting *Strickland* at 689. Savage cannot overcome this strong presumption here because based on his counsel's advice, he pleaded guilty to a lesser theft charge in return for the dismissal of the greater grand-theft charge, which generally carried the potential of more severe sentencing sanctions. *See, e.g., State v. Marcum*, 5th Dist. Ashland No. 01-COA-01411, 2002 WL 109520, *4 (Jan. 8, 2002) (decision to plead

guilty to certain charges in return for the dismissal of other charges may constitute a valid trial strategy and does not constitute ineffective assistance of counsel). Likewise, counsel was also able to obtain the state's recommendation for a community control sanction.

{¶29} Savage next claims that his trial counsel was ineffective because he did not object to the imposition of court costs when he knew that Savage was indigent. In all criminal cases the court must include costs in the sentencing entry. R.C. 2947.23(A). This statute requires trial courts to assess costs against all criminal defendants, even indigent ones. *State v. Clevenger*, 114 Ohio St.3d 258, 2007–Ohio–4006, 871 N.E.2d 589, ¶ 3. Nevertheless, a trial court may waive the payment of court costs if the defendant makes a motion to waive court costs at the time of sentencing. Id. at paragraph two of the syllabus; *State v. Threatt*, 108 Ohio St.3d 277, 2006–Ohio–905, 843 N.E.2d 164, paragraph two of the syllabus ("A motion by an indigent criminal defendant for waiver of payment of court costs must be made at the time of sentencing"). Savage's trial counsel did not file a motion to waive court costs at sentencing.

{¶30} "When considering a claim that trial counsel was ineffective based on a failure of counsel to seek waiver of court costs, the test applied by Ohio courts is whether a reasonable probability exists that the trial court would have found appellant indigent had such waiver been sought." *State v. Hawkins*, 4th Dist. Gallia No. 13CA3, 2014-Ohio-1224, ¶ 19. This determination requires that the court consider both the defendant's present and future ability to pay. *Id.*

{¶31} The mere fact that the trial court found Savage indigent and appointed counsel for him did not preclude the same court from finding that he had the ability to pay his theft victim costs and restitution in the future. *See State v. Brewer*, 2014-Ohio-1903, 11 N.E.3d 317, ¶ 46 (4th Dist.) ("The mere fact that the trial court found him indigent and appointed counsel for him did not preclude the same court from finding that he had the ability to pay his burglary victim restitution of $1,000 in the future").

{¶32} Moreover, R.C. 2947.23 was amended, effective March 22, 2013, and now provides that "[t]he court retains jurisdiction to waive, suspend, or modify the payment of the costs of prosecution, including any costs under section 2947.231 of the Revised Code at the time of sentencing *or at any time thereafter*." (Emphasis added.) *See State v. Farnese,* 4th Dist. Washington 15CA11, 2015-Ohio-3533, ¶¶ 15-16. Therefore, Savage is not precluded from now seeking waiver of the payment of costs based on claimed indigency.

{¶33} At the time of the sentencing hearing, Savage was working part-time at a department store. And in its sentencing order the trial court imposed a five-year term of community control and ordered that Savage obtain employment, which he did. Presumably, Savage has been paying the restitution and costs ordered while the parties waited for the trial court to enter a final, appealable order. Under these circumstances, Savage has not established that his trial counsel was ineffective for failing to seek a waiver of court costs. We overrule Savage's third assignment of error.

IV. CONCLUSION

{¶34} Savage has not established that the trial court committed reversible error in accepting his plea, convicting him of theft, and ordering him to pay $25,000 in

restitution and court costs as part of his sentence. Having overruled his assignments of error, we affirm the judgment of the trial court. In its sentencing entry, the trial court mistakenly referred to the conviction being for grand theft, but it is manifest that based on the specification that the conviction was for a felony of the fifth degree, the conviction was for theft rather than grand theft. The parties agree that Savage's conviction was for theft. Therefore, we remand this cause to the trial court under App.R. 9(E), and we instruct the trial court to correct its sentencing entry by issuing a nunc pro tunc entry specifying that Savage's conviction was for theft rather than grand theft in accordance with Crim.R. 36. *See, e.g., State v. Frye*, 4th Dist. Scioto No. 14CA3604, 2014-Ohio-5016, ¶ 20.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that THIS CAUSE IS REMANDED WITH INSTRUCTIONS to prepare a nunc pro tunc entry. However, the JUDGMENT IS AFFIRMED. Appellant shall pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Meigs County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hoover, P.J. & Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.