

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Court of Appeals No. WD-08-070

Appellee

Trial Court No. 2007CR0476

v.

Tonja Broud aka Tonja Kolb

DECISION AND JUDGMENT

Appellant

Decided: June 19, 2009

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, Aram Ohanian and Jacqueline M. Kirian, Assistant Prosecuting Attorneys, for appellee.

Edward L. Schimmel and Scott J. Hoffman, for appellant.

* * * * *

WILLAMOWSKI, J.

{¶ 1} Appellant, Tonja Broud, a.k.a. Tonja Kolb, appeals the judgment of the Wood County Court of Common Pleas. After a jury trial, she was convicted of theft, a violation of R.C. 2913.02(A)(2) and a felony of the fourth degree. At sentencing, she

was given community control and ordered to pay restitution in the amount of \$44,947.31. From that judgment, Broud asserts the following error for review:

{¶ 2} "The trial court's order setting the amount of restitution at \$44,947.31 is against the manifest weight of the evidence, and without an accounting of actual loss constitutes an abuse of discretion for which reversal and remand is appropriate."

{¶ 3} "In an order of restitution, the amount of restitution must bear a reasonable relationship to the loss suffered. *State v. Marbury* (1995), 104 Ohio App.3d 179, 181; see, also, R.C. 2929.18(A)(1). Thus, it is held that restitution is limited to the actual loss caused by the defendant's criminal conduct for which he was convicted. *State v. Brumback* (1996), 109 Ohio App.3d 65, 82. There must be competent and credible evidence in the record from which the court may ascertain the amount of restitution to a reasonable degree of certainty. *Id.* at 83; *State v. Warner* (1990), 55 Ohio St.3d 31, 69." *State v. Riley*, 6th Dist. No. WD-03-076, 2007-Ohio-879, ¶ 45, quoting *State v. King* (Feb. 27, 1998), 6th Dist. No. WD-97-015.

{¶ 4} R.C. 2929.18 governs the imposition of financial sanctions. R.C. 2929.18(A)(1) provides for the imposition of restitution "in an amount based on the victim's economic loss." It further provides:

{¶ 5} "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." (Emphasis added.)

{¶ 6} A transcript of Broud's sentencing hearing demonstrates that she disputed the amount of restitution. Broud's counsel stated that Broud acknowledged an amount of \$18,000 at trial, and claimed that the presentence investigation report stated the amount of loss as \$18,000. The prosecution claimed a proven amount of \$44,947.31, and claimed that the presentence investigation report stated the same, but submitted no evidence aside from referring to trial events. The prosecution also claimed that the victim suffered additional damages and asserted that the state could have requested "closer to 50-plus." When asked for a statement, the victim claimed that the amount of his loss "actually comes out to \$72,000." No evidence supporting the award of restitution was taken at the sentencing hearing.

{¶ 7} The trial court did not hold an evidentiary hearing, but instead ordered the amount of economic loss stated by the prosecution. The state, in its brief, concedes that Broud's disputation of the amount obligated the trial court to hold an evidentiary hearing.

{¶ 8} Because no competent, credible evidence supports the award of restitution, and because Broud disputed the amount of restitution, the trial court was obligated to hold an evidentiary hearing. To fail to do so is reversible error. *State v. Purnell*, 171 Ohio App.3d 446, 2006-Ohio-6160, ¶ 16; *State v. Williams* (1986), 34 Ohio App.3d 33. Additionally, the trial court is obligated, pursuant to R.C. 2929.19(B)(6), to consider "the offender's present and future ability to pay the amount of the sanction or fine." See *State v. Heyman*, 6th Dist. No. S-04-016, 2005-Ohio-6244.

{¶ 9} Accordingly, appellant's assignment of error is well-taken. The judgment of the Wood County Court of Common Pleas is reversed and this matter is remanded for further proceedings consistent with this decision and the applicable law. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

John R. Willamowski, J.
CONCUR.

JUDGE

Judge John R. Willamowski, Third District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.