[Cite as *State v. Burns*, 2012-Ohio-4191.]

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

State of Ohio

Appellee

v.

Daniel Burns

Appellant

Court of Appeals Nos. L-11-1192
L-11-1198

Trial Court No. CR0201002476

DECISION AND JUDGMENT

Decided: September 14, 2012

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, Kevin A. Pituch and David F. Cooper, Assistant Prosecuting Attorneys, for appellee.

Karin L. Coble, for appellant.

Lisa E. Pizza and Anastasia K. Hanson, urging affirmance for amicus curiae Board of Education of the Toledo City School District.

* * * * *

YARBROUGH, J.

{¶ 1} In this consolidated appeal, Daniel Burns challenges an order of restitution that was entered after he pleaded guilty to, inter alia, theft in office in violation of R.C. 2921.41, a felony of the third degree. Burns also challenges the trial court's judgment

that ordered the entire restitution amount—$658,428—to be withheld from his pension payouts. For the following reasons, we affirm, in part, and reverse, in part.

I. Facts and Procedural History

{¶ 2} On August 17, 2010, the Lucas County Grand Jury issued a 25-count indictment against Burns, stemming from his actions as business manager of the Toledo City School District ("the school district") from October 2002 to June 2006. During this period, Burns' actions resulted in the theft of approximately $650,000 from the school district. The indictment charged Burns with one count of engaging in a pattern of corrupt activity in violation of R.C. 2923.32(A)(1), a felony of the first degree, one count of theft in violation of R.C. 2913.02(A)(2) or (3), a felony of the second degree, one count of theft in office in violation of R.C. 2921.41(A)(1) or (2), a felony of the third degree, and 22 counts of tampering with records in violation of R.C. 2913.42(A)(1), all felonies of the third degree.

{¶ 3} Pursuant to a plea agreement, Burns pleaded guilty under *North Carolina v. Alford* to the count of engaging in a pattern of corrupt activity, the count of theft in office, and one count of tampering with records. In exchange, the remaining counts were dismissed. As part of the agreement, Burns would make restitution on all counts, including those dismissed, in an amount to be determined by the Lucas County Probation Department. Additionally, the state agreed to recommend that any sentence imposed be ordered to run concurrently to a six-year prison sentence arising from Burns' similar

conduct in Cuyahoga County. Following a detailed plea colloquy, the trial court accepted Burns' plea, and the matter was set for sentencing.

{¶ 4} At the sentencing hearing, the trial court imposed a ten-year prison term, to run concurrently with the term imposed out of Cuyahoga County. The trial court also ordered restitution in the following amounts: $52,429 to the Toledo Board of Education, $180,613 to McNamara & McNamara Cincinnati Insurance, and $425,386 to CNA Insurance. McNamara & McNamara and CNA Insurance are companies that provided surety bonds to Burns during his employment with the school district as required by R.C. 3319.05. The amounts awarded to them represent their disbursements to the school district following Burns' theft. Notably, no objection to the restitution order was made at the time of sentencing.

{¶ 5} Following the sentencing hearing, the school district moved to withhold the full restitution award from any funds held in Burns' name by the Ohio School Employees Retirement System. After a hearing on the motion and further briefing by Burns and the school district, the trial court granted the motion and issued its judgment ordering the $658,428 restitution amount to be withheld.

{¶ 6} Burns timely appealed this judgment. In addition, Burns moved to file a delayed appeal of his conviction and sentence, which we granted. Those two appeals have been consolidated.

II. Analysis

{¶ 7} Burns raises three assignments of error for our review:

I. The order of restitution was contrary to law and is "plain error" warranting reversal.

II. Appellant's trial counsel rendered ineffective assistance at sentencing as to restitution.

III. The trial court erred in granting [the school district's] motion for a withholding order.

A. Burns' Sentence Is Not Appealable under R.C. 2953.08

{¶ 8} In his first assignment of error, Burns challenges the order of restitution to the insurance companies.[1] Burns argues that insurance companies are not authorized to receive restitution in a criminal case, and thus any such order is contrary to law. The state, on the other hand, contends that Burns' argument is barred by R.C. 2953.08(D)(1) because the order of restitution was jointly recommended. Burns counters that he did not agree to pay restitution to the insurance companies. For the reasons discussed below, we agree with the state that R.C. 2953.08(D)(1) bars Burns' argument.

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[1] The state disputes Burns' characterization of the companies as "insurance companies," and instead emphasizes that they are "bonding companies." For the purposes of our discussion, this distinction is irrelevant. What is relevant is that the companies are non-victim third parties, a fact on which both Burns and the state agree.

{¶ 9} R.C. 2953.08 provides, in relevant part,

> (A) In addition to any other right to appeal and except as provided in division (D) of this section, a defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right the sentence imposed upon the defendant on one of the following grounds:
>
> * * *
>
> (4) The sentence is contrary to law.
>
> * * *
>
> (D)(1) A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge.

"In other words, a sentence that is 'contrary to law' is appealable by a defendant; however, an agreed-upon sentence may not be if (1) both the defendant and the state agree to the sentence, (2) the trial court imposes the agreed sentence, and (3) the sentence is authorized by law. R.C. 2953.08(D)(1). If all three conditions are met, the defendant may not appeal the sentence." *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 16.

{¶ 10} Here, since Burns' sentence was obviously imposed by a sentencing judge, we are left to determine (1) whether Burns and the state agreed to the sentence, and (2)

whether the sentence is authorized by law. We will first address whether the sentence is authorized by law.

{¶ 11} Prior to our analysis, we think it is important to recognize that the order of restitution can be broken into two components. The first is the order of restitution to the school district. The second is the order of restitution to the insurance companies.

1. Burns' Sentence is Authorized by Law

{¶ 12} Two statutes are relevant to the restitution in this case. The more specific theft in office statute provides,

> * * * A court that imposes sentence for a violation of this section based on conduct described in division (A)(1) of this section—[the offender using his or her office in aid of committing the theft offense][2]—and that determines at trial that * * * a political subdivision of this state if the offender is a public official * * * suffered actual loss as a result of the offense shall require the offender to make restitution to the * * * political subdivision * * * for all of the actual loss experienced, in addition to the term of imprisonment and any fine imposed. R.C. 2921.41(C)(2)(a).

Likewise, the general restitution statute, R.C. 2929.18(A)(1), provides,

> (A) [T]he court imposing a sentence upon an offender for a felony may sentence the offender to any financial sanction or combination of

[2] Although Burns was convicted of theft in office in violation of R.C. 2921.41(A)(1) *or* (2), the language in the indictment mirrored division (A)(1). The state has conceded on appeal that division (A)(1), not division (A)(2), is the appropriate statutory provision.

financial sanctions authorized under this section * * *. 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 * * * provided that the amount the court orders as restitution shall not exceed the amount of economic loss suffered by the victim as a direct and proximate result of the commission of the offense.

{¶ 13} In his brief, Burns spends considerable effort explaining that the order of restitution to the insurance companies is contrary to law. He points out that the theft in office statute requires restitution to political subdivisions, not insurance companies. In addition, he cites to case law which holds that the general restitution statute, R.C. 2929.18(A)(1), does not authorize trial courts to order the payment of restitution to third parties. For example, in *State v. Didion*, the Third District reversed an award of $130,000 in restitution to the victim's insurance company for its payment of medical expenses. *State v. Didion*, 173 Ohio App.3d 130, 2007-Ohio-4494, 877 N.E.2d 725, ¶ 31. In its reasoning, the Third District relied on the 2004 amendment to R.C. 2929.18(A)(1), in which the General Assembly deleted the provision, "The order may include a requirement that reimbursement be made to third parties for amounts paid to or on behalf of the victim or any survivor of the victim for economic loss resulting from the offense." The court concluded, "R.C. 2929.18(A)(1) used to allow restitution to third parties, but it

no longer does. Therefore, we hold that R.C. 2929.18(A)(1) authorizes trial courts to order the payment of restitution to crime victims but not to third parties." *Didion* at ¶ 29. *See also State v. Colon*, 185 Ohio App.3d 671, 2010-Ohio-492, 925 N.E.2d 212, ¶ 5-7 (2d Dist.); *State v. Haney*, 180 Ohio App.3d 554, 2009-Ohio-149, 906 N.E.2d 472, ¶ 28-30 (4th Dist.).

{¶ 14} However, notwithstanding Burns' detailed analysis, the relevant inquiry is not whether the sentence is "contrary to law," but whether it is "authorized by law." The Ohio Supreme Court has held that "a sentence is 'authorized by law' and is not appealable within the meaning of R.C. 2953.08(D)(1) only if it comports with all mandatory sentencing provisions. A trial court does not have the discretion to exercise its jurisdiction in a manner that ignores mandatory statutory provisions." *Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, at ¶ 20. Further, the court clarified that "authorized by law" is not simply the inverse of "contrary to law." *Id.* at ¶ 21. This situation illustrates the distinction between the two terms. Here, although the sentence may be contrary to law in that it orders restitution to the insurance companies, it is nonetheless authorized by law because it complies with the applicable mandatory sentencing provisions.

a. The Sentence Complies with the Mandatory Provisions in R.C. 2921.41

{¶ 15} As to the theft in office statute, we first note that R.C. 2921.41(C)(2)(a) does not contain any mandatory provisions prohibiting restitution to third parties. However, R.C. 2921.41(C)(2)(a) does contain a mandatory provision for restitution to the

victim: "A court that imposes sentence for a violation of this section * * * *shall require* the offender to make restitution to the * * * political subdivision * * * for all of the actual loss experienced." (Emphasis added.) Thus, for the sentence to be authorized by law, the order of $52,429 in restitution to the school district must equal all of the loss the school district experienced.

{¶ 16} In their briefs, the parties engage in some discussion regarding the school district's actual loss experienced. Burns argues that the actual loss experienced is the amount of the theft minus the amount paid under the surety bonds. In other words, the school district was victimized by the theft of $658,428, the insurance companies then disbursed $605,999 to the school district for the theft, therefore, the school district only "lost" $52,429. On the other hand, the state argues that the actual loss is the full amount taken from the school district, or $658,428.

{¶ 17} Ironically, the parties' positions are contrary to their goals on appeal. If the state is correct in its assertion, then Burns' sentence would not be authorized by law because the award of $52,429 in restitution to the school district would not equal all of the loss experienced by the school district as required under the statute. Thus, Burns would not be prohibited from appealing his sentence as contrary to law. Inversely, if Burns is correct in his assertion, then his sentence would be authorized by law because it orders restitution in the amount of the actual loss experienced by the school district. Therefore, he would be prohibited from appealing his sentence as long as it was the sentence to which he agreed.

{¶ 18} A review of the case law supports Burns' position that the actual loss experienced by the school district is only $52,429. "It is well settled that restitution may not exceed a crime victim's economic loss and, as a result, must be reduced by any insurance payment received." *State v. Colon*, 185 Ohio App.3d 671, 2010-Ohio-492, 925 N.E.2d 212, ¶ 7 (2d Dist.). For example, in *State v. Martin*, 140 Ohio App.3d 326, 337, 747 N.E.2d 318 (4th Dist.2000), the court noted that a victim who suffered property loss resulting from a felony offense, "did not suffer any 'economic detriment,' since he was fairly compensated for his losses by his insurance carrier." The court concluded, "appellant cannot properly be ordered to pay restitution to the victim, since it would result in an economic windfall." *Id. See also State v. Mobley-Melbar*, 8th Dist. No. 92314, 2010-Ohio-3177, ¶ 41 ("Since the victim's economic loss would be her total medical expenses less any amount paid by her insurance carrier, awarding restitution without considering any insurance payments was plain error."); *State v. Castaneda*, 168 Ohio App.3d 686, 2006-Ohio-5078, 861 N.E.2d 601, ¶ 27 (5th Dist.) ("[O]n remand, we note that the [victims] are not entitled to reimbursement from appellant for any damage to their door that was paid for by their insurance carrier."). Although the theft in office statute speaks in terms of "actual loss" instead of "economic loss," we think the principle of not permitting an economic windfall still applies. Thus, the school district's actual loss is $52,429. Because the full amount of this loss was ordered as restitution to the school district, Burns' sentence complies with the mandatory provision in the statute. Therefore, since the mandatory provision in the statute is satisfied, and because the

statute does not expressly prohibit restitution to third parties, Burns' sentence is authorized by law under R.C. 2921.41.

b. The Sentence Complies with the Mandatory Provisions in R.C. 2929.18

{¶ 19} In contrast to the theft in office statute, the general restitution statute, R.C. 2929.18(A), does not contain a provision mandating restitution, but rather leaves the award of financial sanctions to the court's discretion as indicated by the use of the word "may" not "must": "[T]he court imposing a sentence upon an offender for a felony *may* sentence the offender to any financial sanction or combination of financial sanctions authorized under this section." (Emphasis added.) However, where restitution to the victim is imposed, the statute mandates, "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." R.C. 2929.18(A)(1). Here, as discussed above, the restitution award to the school district equals its economic loss. Thus, that portion of the sentence complies with the mandatory provision of R.C. 2929.18(A)(1).

{¶ 20} As to the restitution award to the insurance companies, an examination of R.C. 2929.18(A)(1) reveals that it does not contain a mandatory prohibition against restitution to third parties. Instead, courts have relied on the deletion of the language authorizing payments to third parties to conclude that such payments are no longer

permitted.[3] Moreover, courts have approved of restitution orders to third parties where they are negotiated for as part of a plea agreement. *See State v. Stewart*, 3d Dist. No. 16-08-11, 2008-Ohio-5823 (upholding restitution of $120 to sheriff's department for drug buy money where specifically agreed to in the plea agreement); *State v. Johnson*, 2d Dist. No. 24288, 2012-Ohio-1230, ¶ 15 ("R.C. 2929.18(A)(1) does not prohibit an award of restitution to an insurance company when the award is made pursuant to the express plea agreement between the State and the defendant.") Finally, it is not disputed that the amount awarded to the insurance companies is equivalent to the amount they disbursed to the school district. Therefore, because the restitution award to the insurance companies is not contrary to any existing provision in the statute, we conclude that portion of Burns' sentence complies with the mandatory provisions of R.C. 2929.18(A)(1).

{¶ 21} Accordingly, under both the theft in office statute and the general restitution statute, Burns' sentence is "authorized by law."

2. Burns Agreed to the Imposed Sentence

{¶ 22} We must now determine whether Burns agreed to the imposed sentence. As a starting point, the parties concur that Burns agreed to pay restitution "on all counts" in an amount to be determined by the Lucas County Adult Probation Department. Burns, however, argues that his agreement to pay restitution "to all counts of the indictment," is

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[3] Interestingly, when the 2004 amendment deleted the provision allowing for payments to third parties, it also deleted language which provided, "The court shall not require an offender to repay an insurance company for any amounts the company paid on behalf of the offender pursuant to a policy of insurance."

not equivalent to agreeing to pay any amount beyond the victim's actual loss, in this case $52,429. Burns also argues that restitution to non-victim, third-party insurance companies was not a term of the negotiated plea agreement. We disagree, and find Burns' current interpretation of the agreement is not supported by the record.

{¶ 23} The record reveals the following from the plea hearing,

> THE COURT: But there is also an agreement that you're going to pay restitution on all of the counts, even the ones that you haven't pled guilty to. And do you have any idea roughly what the restitution order is?
>
> [THE STATE]: About $650,000.
>
> THE COURT: $650,000. Now, the State, if you do not agree to that amount, the State at the sentencing hearing will have to present evidence in order for the Court to order you to pay restitution, but presume that restitution will be ordered and you're looking at somewhere around 650,000 or potentially more or less, but if you do not enter into an agreement as to the amount, the State has to prove that at the sentencing hearing and your lawyer will have an opportunity to challenge that amount. But presume an order will be imposed and so you understand with this plea it could total about 650,000.
>
> [THE STATE]: $650,000.
>
> THE COURT: $650,000. Do you understand that, Mr. Burns?
>
> MR. BURNS: Yes, ma'am.

THE COURT: And knowing that do you maintain your guilty pleas?

MR. BURNS: Yes, ma'am.

{¶ 24} Prior to sentencing, the trial court afforded Burns the opportunity to withdraw his *Alford* plea in light of the letters it received from Burns' friends and family proclaiming his innocence. Burns, however, indicated that he wished to maintain his plea. The trial court then recited the potential penalties and again asked Burns if he wished to maintain his plea. Relevant here, the court asked,

> THE COURT: But as I understand it also, the State and the defense * * * you are agreeing to make restitution now is the total, and correct me if I'm wrong, $658,428?
>
> [THE STATE]: That's the correct total, Judge.
>
> THE COURT: All right. And that includes reimbursement to Toledo Public Schools as well as to insurance companies that the school system had bonds with for criminal or corrupt activity with their employees. So that figure is correct, [defense counsel], that figure is correct?
>
> [DEFENSE COUNSEL]: Yes, Your Honor.
>
> THE COURT: All right. Very good. And knowing that you maintain your Alford guilty pleas; is that correct?
>
> MR. BURNS: Yes, ma'am.

a. Burns Agreed to Pay $658,428 in Restitution

{¶ 25} Regarding Burns' first argument—that he did not agree to pay any restitution above the school district's actual loss—a plain reading of the transcript reveals that, contrary to his assertion otherwise, Burns and the state contemplated a restitution award approximating $650,000 at the plea hearing. The exact amount of his theft was later established to be $658,428. This amount was and is uncontested. Thus, we find untenable his argument that when he agreed to pay restitution "to all counts of the indictment," he only intended to pay $52,429 for the school district's actual loss.

{¶ 26} Additionally, we find Burns' reliance on our holding in *State v. Coburn* to be misplaced. In *Coburn*, we reversed an agreed-upon order of restitution because the amount imposed was not reasonably related to the victim's loss. *State v. Coburn*, 6th Dist. No. S-09-006, 2010-Ohio-692, ¶ 17. Burns argues that *Coburn* is analogous, because in both cases the plea agreement was to make restitution for "all counts," and did not specify the amount of restitution to be ordered. In *Coburn*, the defendant was indicted on five counts of grand theft for allegedly stealing 27 spools of wire valued at $83,739. *Id.* at ¶ 2. The defendant pleaded guilty to one count, which alleged that he took four spools of wire valued at $1,985. As part of the plea agreement, the defendant agreed to "an order of restitution for all counts to the victim." *Id.* at ¶ 15. At sentencing, the trial court imposed $83,739 as restitution. On appeal, we reversed the order of restitution as an abuse of discretion because nothing in the record, aside from the bare allegations in the indictment, supported the conclusion that a restitution award of $83,739

was reasonably related to the victim's loss. *Id.* at ¶ 17. In reaching our conclusion, we noted that the amount was not stated in the plea agreement, the court was only cursorily reminded of the amount at sentencing, and the presentence investigation report contained no reference to $83,739 as the actual value of the wire the defendant allegedly took. We held,

> Under many, if not most, circumstances, we agree that a plea agreement may constitute a waiver of an appellant's challenge to the amount of restitution. In this instance, however, nothing in the record provides any guidance or evidence from which the trial court could have determined whether the amount of restitution was reasonably related to the loss suffered by the victim. Therefore, we conclude that the restitution amount imposed by appellant's sentence was not authorized by law, and the trial court abused its discretion in imposing the amount of $83,379 [sic] without the verification required under R.C. 2929.18. *Id.*

{¶ 27} Here, however, it was specifically noted on the record that part of the plea agreement was that Burns agreed to pay restitution on all counts totaling approximately $650,000; the presentence investigation report described that Burns was able to steal $658,428 from the school district; and the amount of $658,428 was later confirmed by Burns at the sentencing hearing. Thus, the record is sufficient to support a determination that the amount of restitution is reasonably related to the amount of Burns' theft. Therefore, we find the present situation to be distinguishable from that in *Coburn*.

b. Burns Agreed to Pay Restitution to the Insurance Companies

{¶ 28} Burns also argues that he did not agree to pay restitution to the insurance companies, as evinced by the fact they were not discussed at the plea hearing. This presents an issue that has previously been addressed in the context of restitution to police departments for money used in drug buys.

{¶ 29} In *State v. Samuels*, 4th Dist. No. 03CA8, 2003-Ohio-6106, the defendant was ordered to pay $880 in restitution to the sheriff's department. On appeal, the Fourth District reversed, recognizing that the sheriff's department was not a "victim," and rejecting the argument that the defendant agreed to pay restitution in exchange for a lesser sentence. In determining whether an agreement existed to pay restitution to the sheriff's department, the Fourth District quoted the following from the sentencing hearing:

> "THE COURT: * * * Imposition of sentence in this case was-do you wish to make a statement, [prosecutor]?
>
> "[PROSECUTOR]: No, Your Honor, other than we would ask-and I think it's probably in the pre-sentence-ask the Defendant be made to pay restitution to the Sheriff's Office for the monies extended for the two drug purchases that Mr. Samuels was involved in, including the one he pled to. That's all.
>
> "* * *

> "[DEFENSE COUNSEL]: * * * *Obviously, Mr. Samuels needs to pay his share or whatever he's responsible for*." (Emphasis sic.) *Id.* at ¶ 7.

Based on that record, the Fourth District held there was nothing to support the prosecution's argument that the defendant agreed to pay restitution in return for a reduced sentence. *Id.* at ¶ 8. The court noted that although defendant acknowledged that he needs to pay whatever he is responsible for, what he is responsible for is limited to that required by statute. The court concluded,

> [A]bsent an explicit agreement by the parties concerning the type and the amount of restitution requested in the instant case, we are unwilling to conclude that the trial court require the appellant to make restitution to the police agency. This is a matter that could have been explicitly addressed in a negotiated plea agreement, however. Again, we recognize the prosecution's argument that the plea agreement in the instant case did in fact address the restitution issue. In our view, however, that agreement did not adequately or clearly provide for the type of restitution ordered in this case. *Id.* at ¶ 10.

{¶ 30} In contrast, the Third District reached the opposite result in *State v. Stewart*, 3d Dist. No. 16-08-11, 2008-Ohio-5823. There, the plea agreement specifically provided, "[b]y agreement, Defendant shall reimburse the Wyandot County Sheriff's Office for buy monies in the amount of $80 and drug testing fees in the amount of $40." *Id.* at ¶ 3. Thus, because there was an express agreement to pay restitution to the sheriff's

department, the Third District distinguished the situation before it from that in *Samuels*, and upheld the sentence. *Id.* at ¶ 13, 15.

{¶ 31} Recently, the Third District again addressed this issue in *State v. Baker*, 3d Dist. No. 1-11-49, 2012-Ohio-1890. In that case, Baker entered into a plea agreement that stated, "[d]efendant will agree to pay restitution of $4,150.00 in exchange for no recommendation of sentence." *Id.* at ¶ 11. The trial court subsequently ordered Baker to pay $4,150.00 in restitution to the drug task force. Baker appealed on the grounds that the drug task force was not a "victim" under R.C. 2929.18. The Third District upheld the sentence, reasoning,

> While it is true that the plea agreement did not mention the [drug task force] by name, it is clear that Baker would have realized that the restitution would be payable to a governmental entity since the State indicated prior to Baker's change of plea that the $4,150.00 in restitution "represent[ed] buy money that was spent in the investigation." Since it was obvious that the restitution would be payable to a governmental entity (regardless of which governmental entity) for funds it expended during its investigation, the potential error was obvious prior to Baker changing his plea and the trial court's sentencing—yet Baker never objected. Even when the trial court ordered that Baker pay the restitution to the [drug task force] at the sentencing hearing, Baker still failed to object. The logical conclusion is that Baker never objected because he agreed to the restitution

order being paid to a governmental entity. Viewing the record as a whole, it is clear Baker invited the very error he now raises on appeal. (Internal citations omitted.) *Id.*

{¶ 32} We think the present situation is most analogous to *Baker*. Here, unlike *Stewart*, but similar to *Baker*, the insurance companies were not mentioned by name in the plea agreement. Nevertheless, as part of the plea agreement, Burns agreed to pay approximately $650,000 in restitution, unlike the defendant in *Samuels*. This amount is equivalent to the amount Burns stole from the school district. Because the amount of restitution to the school district is limited to its actual loss, the balance of the agreed-upon restitution was awarded to the insurance companies that disbursed money to the school district pursuant to the surety bond agreements. Although Burns now claims that at the time of the plea hearing he did not know the insurance companies would be the recipients of the restitution, Burns assented to this application of the agreement at the sentencing hearing:

> THE COURT: But as I understand it also, the State and the defense * * * you are agreeing to make restitution now is the total, and correct me if I'm wrong, $658,428?
>
> [THE STATE]: That's the correct total, Judge.
>
> THE COURT: All right. And that includes reimbursement to Toledo Public Schools as well as to insurance companies that the school system had bonds with for criminal or corrupt activity with their

employees. So that figure is correct, [defense counsel], that figure is correct?

[DEFENSE COUNSEL]: Yes, Your Honor.

THE COURT: All right. Very good. And knowing that you maintain your Alford guilty pleas; is that correct?

MR. BURNS: Yes, ma'am.

Thus, like *Baker*, we think Burns' assent at the sentencing hearing and his failure to object to the sentence leads to the logical conclusion that he agreed to the restitution order being paid to the insurance companies.

{¶ 33} Therefore, because the sentence the trial court imposed was authorized by law and was agreed to by Burns and the state, R.C. 2953.08(D)(1) bars Burns from challenging it on appeal. Accordingly, Burns' first assignment of error is dismissed.

B. Burns Received Effective Assistance of Counsel

{¶ 34} In his second assignment of error, Burns argues that his trial counsel was ineffective for failing to object to the order of restitution at the sentencing hearing. To demonstrate ineffective assistance of counsel, appellant must satisfy the two-prong test developed in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That is, appellant must show counsel's performance fell below an objective standard of reasonableness, and a reasonable probability exists that but for counsel's error, the result of the proceedings would have been different. *Strickland* at 687-688, 696. Under the first prong, "[j]udicial scrutiny of counsel's performance must be highly

deferential. * * * [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance * * *." *State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989), quoting *Strickland* at 689. Here, Burns has failed to overcome the presumption that trial counsel's conduct was reasonable.

{¶ 35} Burns first argues that counsel's failure to object to a sentence that was contrary to law constituted ineffective assistance. To the contrary, counsel's actions in negotiating this plea deal, which Burns agreed to, resulted in the dismissal of 22 felony counts and an agreement that any prison sentence imposed would run concurrently with the prison sentence out of Cuyahoga County. Thus, we cannot say that counsel's failure to object, and thereby jeopardize the deal that had been reached, was unreasonable.

{¶ 36} Burns additionally argues that the only logical explanation to why counsel did not object to the sentence was that counsel did not know or understand the law regarding restitution at the time of the sentencing hearing. Burns does not point to any direct evidence from the record to support this conclusion, but instead infers it from the lack of objection at the sentencing hearing, and counsel's later argument at the withholding hearing that restitution could only be ordered in the amount of "actual loss." We find that Burns' argument, which can best be described as conjecture, is insufficient to overcome the presumption that "[a] properly licensed attorney in Ohio is * * * competent." *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985).

{¶ 37} Therefore, having failed to satisfy the first prong in his ineffective assistance of counsel claim, Burns' second assignment of error is not well-taken.

C. The Trial Court Erred in Ordering the Entire Restitution Amount to be Withheld from Burns' Pension

{¶ 38} As his final assignment of error, Burns argues the trial court's judgment ordering $658,428 to be withheld from his pension payouts is contrary to law. We agree. R.C. 2921.41(C)(2), although lengthy, is relatively straightforward. It provides, in relevant part,

> * * * A court that imposes sentence for a violation of this section based on conduct described in division (A)(1) of this section and that determines at trial that this state or a political subdivision of this state if the offender is a public official * * * suffered actual loss as a result of the offense shall require the offender to make restitution to the * * * political subdivision * * * for all of the actual loss experienced, in addition to the term of imprisonment and any fine imposed.
>
> (b)(i) In any case in which a sentencing court is required to order restitution under division (C)(2)(a) of this section and in which the offender, at the time of the commission of the offense or at any other time, was a member of * * * the school employees retirement system * * *, the entity to which restitution is to be made may file a motion with the sentencing court specifying any retirement system * * * of which the offender was a member * * * and requesting the court to issue an order requiring the specified retirement system * * * to withhold the amount

required as restitution from any payment that is to be made under a pension * * *. A motion described in this division may be filed at any time subsequent to the conviction of the offender or entry of a guilty plea. * * *

(ii) In any case in which a sentencing court is required to order restitution under division (C)(2)(a) of this section and in which a motion requesting the issuance of a withholding order as described in division (C)(2)(b)(i) of this section is filed, the offender may receive a hearing on the motion by delivering a written request for a hearing to the court prior to the expiration of thirty days after the offender's receipt of the notice provided pursuant to division (C)(2)(b)(i) of this section. * * * A hearing scheduled under this division shall be limited to a consideration of whether there is good cause, based on evidence presented by the offender, for the requested order not to be issued. If the court determines, based on evidence presented by the offender, that there is good cause for the order not to be issued, the court shall deny the motion and shall not issue the requested order. If the offender does not request a hearing within the prescribed time or if the court conducts a hearing but does not determine, based on evidence presented by the offender, that there is good cause for the order not to be issued, the court shall order the specified retirement system * * * to withhold the amount required as restitution under division (C)(2)(a) of this section from any payments to be made under a pension, * * * and to

> continue the withholding for that purpose, in accordance with the order, out of each payment to be made on or after the date of issuance of the order, until further order of the court. Upon receipt of an order issued under this division, the * * * school employees retirement system * * * shall withhold the amount required as restitution, in accordance with the order, from any such payments and immediately shall forward the amount withheld to the clerk of the court in which the order was issued for payment to the entity to which restitution is to be made.

{¶ 39} Thus, a plain reading of the statute reveals that a political subdivision that has been awarded restitution in the amount of its actual loss may seek to withhold that restitution award from the offender's pension payments. Here, the sentencing entry clearly awards restitution to the school district in the amount of $52,429. As we have discussed above, this amount is equal to the school district's actual loss when the payments from the insurance companies are considered. Therefore, the school district is entitled to seek to withhold $52,429 from Burns' pension payments.

{¶ 40} However, rather than seeking to withhold $52,429, the school district sought to withhold the full restitution amount, including the amount awarded to the non-victim insurance companies. The trial court, perhaps understandably wanting to facilitate the collection of the restitution award, granted the school district's motion. Nevertheless, this is contrary to the statute, which authorizes the court to "order the specified retirement system * * *to withhold *the amount required as restitution under division (C)(2)(a) of*

this section from any payments to be made under a pension." (Emphasis added.) R.C. 2921.41(C)(2)(b)(ii). Withholding from pension payments for restitution to non-victim, non-political-subdivision insurance companies is not provided for in the statute. Therefore, the trial court erred when it ordered $658,428 to be withheld from Burns' pension.[4]

{¶ 41} Accordingly, Burns' third assignment of error is well-taken.

III. Conclusion

{¶ 42} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas convicting Burns and sentencing him to pay restitution to the school district and to the insurance companies is affirmed. The judgment ordering the entire restitution amount, $658,428, to be withheld from Burns' pension payments is reversed. The cause is remanded to the trial court for further proceedings consistent with this decision, including for the school district to file a proper motion for withholding if it so wishes. Costs of this appeal are to be split evenly between the parties pursuant to App.R. 24.

Judgment affirmed, in part,
and reversed, in part.

[4] Through our holding, we do not mean to suggest that the insurance companies will never be able to recover from Burns' pension the amount owed to them. We only note that R.C. 2921.41 does not provide such an avenue.

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

Arlene Singer, P.J. _______________________________
JUDGE

Thomas J. Osowik, J.

Stephen A. Yarbrough, J. _______________________________
CONCUR.
JUDGE

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JUDGE

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.