

[Cite as *State v. Posa*, 2010-Ohio-5355.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94255

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ERIC POSA

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-525047

BEFORE: Sweeney, J., Gallagher, A.J., and McMonagle, J.

RELEASED AND JOURNALIZED: November 4, 2010

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JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Eric Posa (“defendant”), appeals the judgment ordering him to pay \$4,500 in restitution as part of his sentence for assault. After reviewing the facts of the case and pertinent law, we affirm.

{¶ 2} On September 28, 2009, defendant pled guilty to assault of a peace officer. The court sentenced him to nine months in prison and ordered him to pay \$4,500 in restitution to the victim.

{¶ 3} Defendant appeals and raises one assignment of error for our review.

{¶ 4} “I. The sentencing record does not contain competent, credible evidence to support an award of restitution.”

{¶ 5} When imposing a felony sentence, a court may order a defendant to pay restitution to the victim of the crime. R.C. 2929.18(A)(1). “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.” *Id.*

{¶ 6} Ordinarily, we review restitution awards for an abuse of discretion. However, when a party fails to object to an issue at the trial court level, he or she waives all but plain error regarding that issue on appeal. See *State v. Mobley-Melbar*, Cuyahoga App. No. 92314, 2010-Ohio-3177, ¶37. Plain error under Crim.R. 52(B) requires an obvious defect in the trial court proceedings that affected “substantial rights.”

{¶ 7} In the case before us, not only did defendant fail to object to the court ordered restitution, he requested it. Under the invited error doctrine, “a party is not entitled to take advantage of an error that he himself invited or induced the court to make.” *State ex rel. Kline v. Carroll*, 96 Ohio St.3d 404,

2002-Ohio-4849, 775 N.E.2d 517, ¶27. In an effort to avoid imposition of a prison term, defendant suggested various options to the court at sentencing, such as: “step up and take responsibility”; “step up and get some help * * * in AA”; “apologize”; and “fulfill any civil or restitution obligation to the officer’s family.” Notwithstanding the invited error doctrine and in the interest of justice, we review this case for plain error.

{¶ 8} Defendant argues that “the court did not hold a hearing on the matter of restitution as required by statute.” R.C. 2929.18(A)(1) states, in part, that “the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount.” As stated previously, defendant did not dispute the restitution amount in the lower court. Nonetheless, defendant’s argument is without merit, as the court heard evidence regarding restitution at defendant’s sentencing hearing. On appeal, defendant filed a transcript of this hearing, at which the State, defense counsel, defendant, and the victim addressed the court. Additionally, the court reviewed defendant’s presentence investigation report. The basis of defendant’s appeal is that the evidence presented at this hearing was not “specific, credible, or competent” enough to support the restitution order.

{¶ 9} At defendant’s sentencing hearing, the court asked the victim what he lost in terms of “income and other restitution” as a result of defendant

assaulting him, explaining that, “to make a finding of restitution I need some kind of specific figure.”¹

{¶ 10} The victim responded that he lost between \$1,500 and \$1,800 per month for the five months that he was unable to work. He explained that this lost income was based on overtime with the city and part time work at special events during the summer.

{¶ 11} Defense counsel also spoke at the sentencing hearing, asking that defendant “be allowed to * * * repay his debt to society and to fulfill any civil or restitution obligation to the officer’s family. * * * And [defendant] will work to make right by any medical bills, lost income, or restitution that might be worked out.” Defense counsel also stated the following: “With regard to restitution * * * or anything that can be done to help the officer’s family, I will stand here, Your Honor, and ask that the man be allowed to help [the officer’s family] * * *. I’d ask that the Court allow him to prove * * * that he can do * * * more for * * * the officer, the officer’s family, * * * by being given an opportunity to prove that you can learn by owning up to your mistakes, taking responsibility and continuing to work and pay restitution.”

¹ Although defendant did not file a transcript of his plea hearing, the docket reflects that restitution may have been part of plea discussions in this case. The September 30, 2009 entry journalizing defendant’s guilty plea includes the following: “Restitution for hospital medical bills and damage to truck.” However, at defendant’s sentencing hearing, no mention was made of the victim’s medical bills or damage to a truck. Evidence was presented about the victim’s lost wages, and the court ordered restitution based on this evidence. Defendant neither objected to nor challenged this. Accordingly, our analysis focuses on the restitution ordered as part of defendant’s sentence.

{¶ 12} When ordering restitution, the court stated as follows: “The officer in this case, Officer Koehl, broke his ankle, requiring internal fixation, he has a permanent injury, permanent limp. He lost several months of wages. This occurred in early June, it’s now late October; conservatively, I’m assigning him three months of lost overtime which he estimates to be \$1,500 a month. I’m going to order \$4,500 in restitution.”

{¶ 13} The court then stated that it considered defendant’s ability to make restitution, finding that defendant’s prior work history shows that he is “employable at wages between \$28 and \$33 an hour.”

{¶ 14} The victim’s testimony established the value of his loss and the restitution award bore a reasonable relationship to this testimony. As there was credible evidence in the record supporting the \$4,500 restitution award, we find no error in the court’s judgment. Compare *State v. Scott*, Cuyahoga App. Nos. 84381 - 84384, 84389, 2005-Ohio-3690, ¶22 (finding “plain error because neither the state nor any victims offered any evidence of compensable loss before the court ordered defendant to pay restitution”). See, also, *In re Hatfield*, Lawrence App. No. 03CA14, 2003-Ohio-5404, ¶9 (holding that “[n]o absolute requirement exists that the victim demonstrate the loss through documentary evidence”).

{¶ 15} Accordingly, defendant’s sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant its 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 Court of Common Pleas to carry this judgment into execution.

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

JAMES J. SWEENEY, JUDGE

SEAN C. GALLAGHER, A.J., and
CHRISTINE T. McMONAGLE, J., CONCUR