

[Cite as *State v. Holt*, 2011-Ohio-1582.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95520

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JACK HOLT

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-522760

BEFORE: E. Gallagher, J., Boyle, P.J., and Jones, J.

RELEASED AND JOURNALIZED: March 31, 2011
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EILEEN A. GALLAGHER, J.:

{¶ 1} Appellant, Jack Holt, appeals from the trial court's July 9, 2010 journal entry ordering him to pay restitution in favor of his former employer, New Directions, in the amount of \$2,700 for rebuilding its computer system's security. Appellant argues that the trial court erred by ordering restitution for expenses that were not actually incurred by the victim, were not supported by competent credible evidence, and did not bear a reasonable relationship to

the crime for which appellant was convicted. For the following reasons, we reverse and remand.

{¶ 2} Appellant previously worked as the manager of information systems for New Directions. Subsequent to appellant's termination, New Directions accused appellant of accessing its website and computer system without permission. Appellant was indicted on April 1, 2009 on five counts of unauthorized use of property in violation of R.C. 2913.04(B) for crimes allegedly committed between April 4, 2008 and October 3, 2008. On June 1, 2010 appellant reached a plea agreement with the state of Ohio and pled guilty to two counts of attempted unauthorized use of property as amended under Counts 3 and 5.

{¶ 3} The trial court held a sentencing hearing on July 9, 2010. The trial court recognized that appellant disputed a portion of the restitution sought by the State. Appellant did not oppose, and, in fact "voluntarily agreed" to the restitution amount of \$3,775.25 relating to attorneys fees expended by New Directions. Beyond this amount, New Directions sought \$15,000, according to the state of Ohio, to "resecure the system, as well [as] to continue going on forward with their project of updating the system and allowing for these electronic health records." (Sentencing tr., p. 7.) The state of Ohio sought, at a minimum, \$2,700 to stabilize New Directions' current servers and verify security. The State, not New Directions, indicated at the hearing that the security rebuild was roughly ninety percent

complete. (Sentencing tr., p. 27.)

{¶ 4} In reaching its decision on restitution, the trial court heard from both appellant and New Directions and considered a settlement agreement from the appellant’s civil litigation with New Directions, the victim impact statement, and the presentence report that included a supplemental information packet. The State concedes on appeal that the documentation referenced and relied upon by the trial court at the hearing was not made part of the record. The State did file a motion to supplement the record on appeal that this court granted pending the trial court’s decision on a related motion to supplement the record with the relevant documentation. As of this date, the trial court has not ruled upon that motion. Based on the documentation before the court, the trial court ordered \$2,700 in restitution in addition to the undisputed attorney fees stating, “I am going to award New Directions the \$2,700 for that time frame and for the idea that they will fix the security.” (Sentencing tr., at p. 22.) The trial court’s journal entry of the same day reflected \$2,700 in restitution for, “the rebuilding and stabilization of the current computer servers and to verify security, including any changes in the active directory of the computer system at New Directions. Removal of all inactive accounts, changing service accounts and removing all unnecessary local accounts.” It is from this July 9, 2010 journal entry that appellant now appeals, raising the three assignments of error contained in the appendix to this opinion.

{¶ 5} We review an order of restitution for an abuse of discretion. *State v. Cicerchi*, 182 Ohio App.3d 753, 762, 2009-Ohio-2249, 915 N.E.2d 350, citing *State v. Marbury* (1995), 104 Ohio App.3d 179, 181, 661 N.E.2d 271. As appellant’s first and third assignments of error present essentially the same legal argument, we address them jointly. In his first assignment of error, appellant argues that the trial court erred in ordering appellant to pay restitution for expenses that were not actually incurred by victim and which were speculative and arbitrary to New Directions’ actual loss. In his third assignment of error, appellant argues that the trial court erred by awarding restitution in an amount that was not supported by competent, credible evidence and documentation.

{¶ 6} Generally, the right to order restitution is limited to the actual damage or loss caused by the offense of which the defendant is convicted. *State v. Williams* (1986), 34 Ohio App.3d 33, 516 N.E.2d 1270, at syllabus. There must be sufficient evidence in the record from which the court can ascertain the amount of restitution to a reasonable degree of certainty. *State v. Warner* (1990), 55 Ohio St.3d 31, 69, 564 N.E.2d 18. An order of restitution must be supported by competent, credible evidence in the record. *Id.* Documentary and/or testimonial evidence must be introduced to demonstrate the victim’s economic loss. *State v. Waiters*, Cuyahoga App. No. 93897, 2010-Ohio-5764, ¶17, citing *State v. Webb*, 173 Ohio App.3d 547, 2007-Ohio-5670, 879 N.E.2d 254; *Marbury*. A trial

court abuses its discretion in ordering restitution in an amount that has not been determined to bear a reasonable relationship to the actual losses suffered. *Williams*, at syllabus.

{¶ 7} In the present instance, New Directions presented no evidence or testimony at the sentencing hearing that it had actually incurred \$2,700 in damages as a result of appellant's acts. New Directions did not offer testimony that the proposed security work was done or being done. Nor did New Directions explain why the proposed security work was necessary to prevent further harm from appellant or how it was related to the crime for which he was convicted. Appellant's first and third assignments of error are well taken. As we can find no basis in the record to support the trial court's award of restitution beyond the amount agreed to by the appellant, we must reverse and vacate the additional \$2,700 restitution order.

{¶ 8} Our analysis of appellant's first and third assignments of error render moot appellant's second assignment of error, and, therefore we will not address it.

{¶ 9} Judgment reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover of appellee 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 common pleas court 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.

EILEEN A. GALLAGHER, JUDGE

MARY J. BOYLE, P.J., and
LARRY A. JONES, J., CONCUR

Appendix

Assignment of Error No. 1:

“The trial court erred in ordering defendant to pay restitution for expenses not properly substantiated and not actually incurred by the alleged victim and which were speculative and arbitrary to the alleged victim’s actual loss. Restitution is limited to the actual loss that the offender’s criminal conduct caused.”

Assignment of Error No. 2:

“The trial court violated defendant’s right to substantive and procedural due process guaranteed by Article I, Section 10 of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution by ordering restitution that does not bear a reasonable relationship to the crime for which defendant was convicted.

As a matter of due process, the court must ascertain that the amount of restitution bears a reasonable relation to the amount of loss suffered and is supported by actual economic loss.”

Assignment of Error No. 3:

“The trial court committed reversible error by awarding restitution in an amount that was not supported by competent, credible evidence and/or documentation. The record

must contain competent, credible evidence to show the amount of restitution to a reasonable degree of certainty. The victim's loss must be substantiated through documentary evidence or testimony.”