

[Cite as *In re T.C.*, 2015-Ohio-4384.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102632

IN RE: T.C.
A MINOR CHILD

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. DL 14114733

BEFORE: Stewart, P.J., Boyle, J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: October 22, 2015

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MELODY J. STEWART, P.J.:

{¶1} Defendant-appellant, T.C., appeals from the juvenile court's judgment of delinquency that ordered T.C. committed to the Ohio Department of Youth Services ("ODYS") and made him responsible for restitution. On appeal, T.C. raises two assignments of error concerning only the magistrate's order of restitution. Finding merit to the appeal, we reverse.

{¶2} In November 2014, Cleveland police filed a complaint in juvenile court alleging that T.C., a seventeen-year-old minor, was delinquent of numerous criminal violations. The complaint accused T.C. of receiving stolen property, in violation of R.C. 2913.51(A); carrying a concealed weapon, in violation of R.C. 2923.12(A); failure to comply, in violation of R.C. 2921.331(B), (all fourth-degree felonies if committed by an adult); possessing criminal tools, in violation of R.C. 2923.24(A), (a fifth-degree felony if committed by an adult); and assault, in violation of R.C. 2903.13(A), (a first-degree misdemeanor if committed by an adult).

{¶3} The complaint stemmed from the following facts contained in the police report which were summarized and read into the record by the prosecutor at T.C.'s adjudication hearing.

{¶4} On November 20, 2014, Cleveland police officers observed T.C. and three codefendants traveling in a stolen 1998 Dodge Stratus. The officers followed the car in an attempt to stop the vehicle but eventually called off the pursuit for safety reasons when the driver ignored all indications to pull over. Soon, the police spotted the vehicle stopped on the side of the road. T.C. and his codefendants had exited the vehicle and were walking down the street in different directions. T.C. and the codefendants began to run after the police ordered them to stop. During the foot chase, a civilian attempted to stop T.C., but T.C. assaulted the civilian and broke free. Police eventually apprehended T.C. and found him to be in possession of a screwdriver and a stolen, loaded firearm. Police identified T.C. as the driver of the vehicle, and the police report indicated that the screwdriver was used to “punch”¹ the ignition.

{¶5} T.C. eventually admitted to the allegations contained in the complaint, and the court adjudicated him delinquent. At the dispositional hearing, the court ordered T.C. to consecutive six-month terms of commitment, with the possibility of extension up until T.C.’s 21st birthday, at ODYS on the receiving stolen property charge and the concealed weapon charge. T.C. was ordered to serve concurrent six-month terms at ODYS on the remaining charges and also ordered to pay \$2,600 in restitution. Defense counsel did not object to the order or the amount of restitution.

¹ Although the prosecutor did not define the term “punched” at the adjudication hearing, it appears to refer to the process of using a screwdriver or other hard object to forcibly turn the car’s ignition key to start the engine.

{¶6} T.C. raises two assignments of error on appeal. His first is that the trial court committed reversible error when it failed to ensure that the restitution amount was based on competent and credible evidence of the actual amount of harm caused to the vehicle, and second, that his counsel was ineffective for failing to object to the order of restitution.

{¶7} In Ohio, R.C. 2152.20(A)(3) gives juvenile courts authority to order restitution in juvenile delinquency cases. The statute states that the court may base the restitution order on “an amount recommended by the victim * * * a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and any other information * * *.” *Id.* The statute further provides that the amount of restitution “shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the delinquent act * * *.” *Id.* R.C. 2929.01(L) defines economic loss as “any economic detriment suffered by a victim as a direct and proximate result of an offense and includes * * * any property loss[.]” “In determining the amount of restitution, the definition of economic loss must be strictly construed against the State and in favor of the of the accused.” *State v. Love*, 3d Dist. Marion No. 9-13-09, 2014-Ohio-437, ¶ 58.

{¶8} As this court previously recognized, “[w]hile the statute^[2] authorizes the court to impose restitution, it is well settled that the record must contain sufficient

² We note that *State v. Large*, 8th Dist. Cuyahoga No. 81278, 2002-Ohio-6335, refers to the criminal statute R.C. 2929.18(A)(1), not 2152.20(A)(3), the juvenile sentencing provision applicable here. However, both statutes are identical in language and effect.

evidence for the court to ascertain the amount of restitution to ‘a reasonable degree of certainty.’” *Large* at ¶ 16, quoting *State v. Warner*, 55 Ohio St.3d 31, 69, 564 N.E.2d 18 (1990). This is because due process mandates that the amount of restitution bear a reasonable relationship to the loss suffered. *Id.*, citing *State v. Williams*, 34 Ohio App.3d 33, 516 N.E.2d 1270 (2d Dist.61986); *State v. Hansen*, 8th Dist. Cuyahoga No. 56778, 1990 Ohio App. LEXIS 1071 (Mar. 22, 1990) (holding it is an abuse of discretion to order restitution based upon unsubstantiated amounts claimed in a victim impact statement). A reasonable relationship involves “ensuring that the [restitution] amount is supported by competent, credible evidence.” *State v. Rox*, 8th Dist. Cuyahoga No. 98838, 2013-Ohio-2529, ¶ 7, citing *Warner* at 69.

{¶9} Generally, courts review an order of restitution for an abuse of discretion. *State v. Pollard*, 8th Dist. Cuyahoga No. 97166, 2012-Ohio-1196, ¶ 7. However, because T.C. failed to object or otherwise contest the amount of restitution ordered at sentencing, T.C. has waived all but plain error. *See* Crim.R. 52(B).

{¶10} Crim.R. 52(B) provides that “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” On appeal, the accused bears the burden of proving plain error in the record. *State v. Rogers*, Slip Opinion No. 2015-Ohio-2459, ¶ 22. This involves showing “‘an error, i.e., a deviation from a legal rule’ that constitutes an ‘obvious’ defect in the trial proceedings,” *Id.*, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). In addition to establishing an obvious defect, the accused must show that the error

prejudiced him. *Id.* Proving prejudicial error requires a showing that there was a reasonable probability that but for the error, the results of the proceeding would have been different. *See id.* “Notice of plain error is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *State v. Davis*, 8th Dist. Cuyahoga No. 99023, 2013-Ohio-2539; *Rogers* at ¶ 23.

{¶11} A court commits plain error when it orders restitution that is not based on competent, credible evidence proving the victim’s economic loss, because the defendant has a due process right to a determination that the amount of restitution bears a reasonable relationship to the loss suffered. *See State v. Marbury*, 104 Ohio App.3d 179, 181, 661 N.E.2d 271 (8th Dist.1995), citing *Williams*, 34 Ohio App.3d at 34, 516 N.E.2d 1270.

{¶12} The court first inquired about restitution at a hearing held on December 3, 2014, prior to the eventual adjudication hearing on December 15, 2014. The following exchange occurred on the record.

The court: All right. You’ll be remanded to the Detention Center until the next hearing. Gina, how much restitution is involved in this?

Ms. Gina: The car estimate was for \$2,900 I believe. Either 2,900 or 2,500 and there were other miscellaneous items stolen from the car and I don’t have the exact figure for those yet.

The court: Okay.

Ms. Gina (to the prosecutor): Was the car totaled?

The prosecutor: No. It wasn’t totaled, but there was a lot of damage done to it.

Defense counsel: There was [sic] four kids.

The prosecutor: Right. \$2,700 was the estimate for the damage to the car.

The court: What? There was no insurance?

The prosecutor: I guess not. I'll call the victim again and ask that specific question. But he told me yesterday —

The court: What type of car was it?

The prosecutor: It was an older car. It was a '98 Dodge Stratus, but he said there was less than, like 50,000 miles on it when he bought it a couple of years ago.

(Discussion had off the record.)

{¶13} We find it important to note that the above discussion provides us with no explanation as to who “Ms. Gina” is, her relationship to T.C.’s case, or how she came to know of the victim’s alleged economic damages. The transcript appendix is equally as mystifying as it does not contain a “Ms. Gina” on the list of those who appeared or were present during the hearing.

{¶14} The next time the court mentioned restitution was at the adjudication hearing.

The court: Well, in terms of restitution, what is the restitution?

* * *

The prosecutor: In this case, the restitution on the stolen vehicle, the victim on that charge took it in to get an estimate, and it was estimated as \$2,741.60.

The court: That’s for the car, right?

The prosecutor: That’s for the car.

The court: And you don’t know about medical expenses.

The prosecutor: No. I don't know about medical expenses yet.³

{¶15} The final time the court mentioned restitution was at the January 8, 2014 dispositional hearing where the court made no further inquiries but instead ordered T.C. to pay \$2,600 in restitution.

{¶16} Here, we cannot conclude that the court's restitution order was supported by competent and credible evidence that established that the amount of restitution bore a reasonable relationship to the amount of loss suffered by the owner of the car. The entire award of restitution in this case appears to be based on unsubstantiated hearsay statements of the prosecutor and another unidentified individual in the record named Ms. Gina. The prosecutor never explained to the court what damage to the car proximately resulted from T.C.'s actions. In fact, the only reference to potential damage caused by T.C. is the reference to the "punched" ignition in the police report. The prosecutor never explained to the court that the punched ignition necessitated repairs nor did she state that the victim's estimate for repairs reflected costs involved in repairing or replacing the ignition column.

{¶17} Moreover, Ms. Gina provided the court with estimated costs different than what the prosecutor stated, and Ms. Gina stated that part of the estimate might reflect miscellaneous items that were stolen from the vehicle. It should be noted that the state's recitation of facts did not include any mention of miscellaneous stolen items, and

³ We assume that the medical expenses refers to the victim of the assault and not the victim of the car theft.

according to the allegations in the complaint, the receiving stolen property charge only related to the stolen 1998 Dodge Stratus and nothing else. Ohio courts have repeatedly held that generally “restitution can only be ordered for those acts that constitute the crime for which the defendant has been convicted and sentenced.” *State v. Miller*, 12th Dist. Butler No. CA2007-11-295, 2008-Ohio-5661, ¶11, quoting *State v. Smith*, 12th Dist. Butler No. CA2004-11-275, 2005-Ohio-6551, ¶ 25; *State v. Strickland*, 10th Dist. Franklin No. 08AP-164, 2008-Ohio-5968, ¶ 11; *State v. Hafer*, 144 Ohio App.3d 345, 348, 760 N.E.2d 56 (4th Dist.2001). Therefore, any suggestion that the restitution amount contains the costs of replacing items that were not set forth in the complaint and that T.C. did not admit to, would undermine the validity of the requested restitution amount.

{¶18} Lastly, the court’s own statements on the record seem to question the accuracy of the requested amount. When told by the prosecutor at the December 3, 2014 hearing that restitution for the car was \$2,700, the court responded, “[w]hat? [t]here was no insurance?” The prosecutor told the court that she did not think that the victim had insurance but that she would check with him. From what we can discern from the record, the question of whether the victim had insurance that might cover all or part of the cost of repairs remained unresolved at the time the court awarded restitution. The resolution of this question was necessary because restitution amounts should reflect only the victim’s out-of-pocket economic losses and should not include amounts covered by insurance carriers. *State v. Mobley-Melbar*, 8th Dist. Cuyahoga No. 92314, 2010-Ohio-3177, ¶ 41; *see also State v. Aguire*, Slip Opinion No. 2014-Ohio-4603.

Indeed, in *Mobley-Melbar* this court found plain error when the trial court ordered restitution to the victim without considering possible insurance coverage. *Id.* On that basis, we reversed and remanded for a restitution hearing. *Id.*

{¶19} Likewise, in this case, we find that the juvenile court committed plain error by awarding restitution without competent and credible evidence that resolved the discrepancies in the requested restitution amounts, what damage to the vehicle T.C. proximately caused, whether the restitution amounts reflected the damage that resulted from T.C.'s actions, and whether the victim's expenses were covered, in whole or part, by his insurance carrier.⁴ The reversal of the order of restitution and a remand for a restitution hearing, renders as moot T.C.'s second assignment of error regarding his claim of ineffective assistance of counsel. *Accord State v. Kellogg*, 2013-Ohio-4702, 1 N.E.3d 457, ¶ 18 (8th Dist.); *State v. Mapes*, 8th Dist. Cuyahoga No. 86225, 2006-Ohio-294, ¶ 28.

{¶20} This cause is reversed and remanded to the trial court for further proceedings consistent with this opinion.

It is ordered that appellant recover of said appellee costs herein taxed.

⁴ The prosecution argues that because juvenile dispositional hearings have relaxed evidentiary standards, *see* Juv.R. 34(B)(2), the prosecutor's indication of damages based on the victim's estimate is enough to sustain the order of restitution. We find no merit to this argument. Although we agree that juvenile courts have more latitude to admit evidence that is traditionally excluded in criminal proceedings, this does not discharge the juvenile court's duty to award restitution based on competent and credible evidence. Here, it can hardly be said that the prosecutor's statements are competent and credible given her uncertainty about whether the victim had insurance and Ms. Gina's statements which undermine both the amount of restitution and what precisely the restitution covers.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the common pleas court — juvenile division 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.

MELODY J. STEWART, PRESIDING JUDGE

MARY J. BOYLE, J., CONCURS;
SEAN C. GALLAGHER, J., CONCURS IN JUDGMENT ONLY