

[Cite as *State v. Miller*, 2017-Ohio-961.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 104427 and 104428

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DONALD K. MILLER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-15-597601-B and CR-15-601335-D

BEFORE: S. Gallagher, J., Boyle, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: March 9, 2017

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SEAN C. GALLAGHER, J.:

{¶1} Donald K. Miller appeals his convictions in two, consolidated cases. With regard to both cases, we affirm in part and reverse in part.

{¶2} Miller was convicted of engaging in a pattern of corrupt activity and three burglaries with notice of prior conviction and repeat violent offender specifications in Cuyahoga C.P. No. CR-15-597601-B. Miller was also convicted of ten burglaries, ten grand thefts, possession of criminal tools, and associated firearm specifications in Cuyahoga C.P. No. CR-15-601335-D. The convictions occurred following a no-contest plea.

{¶3} Miller took part in a criminal enterprise involving several other codefendants that perpetrated numerous theft-based crimes around the state of Ohio — the prosecution being proper in Cuyahoga County under R.C. 2901.12(H).¹ One of those codefendants, Buford Johnson, was arrested near the scene of a burglary and provided police with information regarding Miller's activities and whereabouts. Johnson led police directly to Miller, who was a passenger in a van driven by another codefendant, Barbara Lydston. When officers approached Lydston and Miller and removed them from the van, Lydston claimed to have borrowed the van for the purpose of moving her household goods.

¹Miller filed a pro se brief seeking to challenge the jurisdiction of the trial court with respect to the out-of-county crimes. A defendant such as Miller has no right to hybrid representation. *State v. Young*, 8th Dist. Cuyahoga No. 102202, 2015-Ohio-2862, ¶ 13. Miller was represented by appointed counsel, and therefore, the arguments advanced in the pro se supplemental brief are disregarded.

There was an issue regarding whether Lydston consented to the subsequent search of her vehicle.

{¶4} Lydston and Miller each filed a motion to suppress the evidence, consisting of stolen property found in the van. The motions were denied. Miller pleaded no contest and was convicted in both cases. In a sentencing memorandum filed in advance of the sentencing hearing, the state attached a summary of the value of damage caused by Miller's active participation in the crime ring, totaling over \$160,000. Miller was sentenced to a ten-year aggregate term, and the trial court imposed \$51,563.98 in restitution, awarded to several victims and to be paid jointly and severally by the codefendants. The restitution was based on the value of the stolen items less any insurance proceeds, as recommended by the victims.

{¶5} In this timely appeal, Miller claims the trial court erred by (1) denying the motion to suppress because Lydston did not consent to the search; (2) ordering an amount of restitution that was not established to a reasonable degree of certainty; and (3) failing to consider Miller's present or future ability to pay restitution because he was indigent and serving a ten-year prison term. Miller also claims that he was denied his right to effective assistance of counsel after his trial counsel failed to request a restitution hearing under R.C. 2929.18(A)(1) and denied his right to due process in having court costs imposed in the journal entry but not at the sentencing hearing.

{¶6} The state concedes that court costs were not properly imposed at the sentencing hearing and agrees with Miller that we must reverse the imposition of court

costs and remand for the limited purpose of allowing Miller the opportunity of objecting. *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278, ¶ 22. Miller's remaining arguments, however, are without merit.

{¶7} Miller lacked standing to challenge the search of the van. Miller was a passenger, and the evidence demonstrated that Lydston was in possession of the vehicle and was the only person with standing to contest the search of the vehicle. It is an elementary concept that in order to challenge the lawfulness of a search, the defendant must have standing. Standing, based on the facts of this case, is conferred through either ownership or permission to operate a searched vehicle. *State v. Carter*, 69 Ohio St.3d 57, 1994-Ohio-343, 630 N.E.2d 355, citing *Rakas v. Illinois*, 439 U.S. 128, 148, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). From the evidence presented at the suppression hearing, Miller neither owned nor had permission to operate the vehicle in this case; he was merely a passenger in a vehicle driven by Lydston, who had lawful possession. As a result, Miller lacked standing to contest the validity of the search of that vehicle. *See, e.g., State v. Robinson*, 8th Dist. Cuyahoga No. 77981, 2001 Ohio App. LEXIS 3096, 5-6 (July 12, 2001), citing *Carter* (despite having possession of the car keys, the defendant lacked standing to challenge the search of the vehicle without evidence of a valid possessory interest in the vehicle).

{¶8} This is not to suggest that Miller cannot challenge any aspect of his initial encounter with the police officers. Miller, for example, would have standing to contest his detention and the legality of the stop, but he has not raised any such error in this

appeal. *Carter* at 63 (“[b]oth passengers and the driver have standing regarding the legality of a stopping because when the vehicle is stopped, they are equally seized, and their freedom of movement is equally affected.”). Further, Miller failed to identify any evidence obtained as a result of his arrest. The only issue raised at the suppression hearing was Lydston’s consent and the search of the vehicle.

{¶9} Miller next argues that the trial court erred by ordering an amount of restitution that was not established to a reasonable degree of certainty and, in the alternative, that his trial counsel was ineffective for failing to request a restitution hearing under R.C. 2929.18(A) so that the state “would have been required to provide the trial court with information regarding actual losses and what portion of those losses were covered by insurance.” The state presented victim impact statements, and included in those statements were the value of the stolen property and the value of any insurance proceeds received to compensate the victims. The trial court considered the victims’ recommendations and imposed restitution based on the values represented, less any insurance proceeds. This comports with Ohio law.

{¶10} Before restitution can be imposed, the court must determine the amount of restitution that bears a reasonable relationship to the loss suffered. *State v. Roberts*, 8th Dist. Cuyahoga No. 99755, 2014-Ohio-115, ¶ 8, citing *State v. Borders*, 12th Dist. Clermont No. CA2004-12-101, 2005-Ohio-4339. That amount must be supported by “competent, credible evidence from which the court can discern the amount of restitution to a reasonable degree of certainty.” *Id.*, quoting *State v. Gears*, 135 Ohio App.3d 297,

300, 733 N.E.2d 683 (6th Dist.1999). Unlike in *Roberts*, in which the trial court ordered restitution “in an indefinite amount for payment of the victim’s medical bills[,]” there is competent, credible evidence of a specific value for the stolen property in this case as demonstrated by the specific amounts awarded to several, individual victims, totaling \$51,563.98. The panel’s conclusion to reverse the imposition of restitution in *Roberts* is inapplicable.

{¶11} The victims provided, for the purposes of sentencing, evidence of their losses. R.C. 2929.18(A)(1) provides the trial court with authority to accept the amount of restitution recommended by the victim, provided that the restitution amount does not exceed the economic loss suffered by that victim. The trial court considered the recommendations and offset any losses suffered by the amount, if any, of insurance proceeds the particular victim received. The trial court considered all that was required by law and also complied with R.C. 2929.18.

{¶12} As a result of that conclusion, we cannot find that Miller’s trial counsel’s performance was deficient in failing to formally request a restitution hearing. Miller is not disputing the specific value of the stolen property from the individual victims, only that the victims’ statements were not sufficient to substantiate the amount of restitution because it is “not clear from the sentencing memorandum what amount the victims were reimbursed from their insurance companies.” The state presented the victims’ recommendations for restitution based on the specific value of the stolen property along with any applicable insurance proceeds. If a particular victim omitted any reference to

insurance proceeds, that omission is not per se error as Miller suggests. Miller's argument rests on the faulty presumption that all of the victims had insurance and received proceeds for at least part of what was lost through Miller's criminal conduct. The record demonstrates that the trial court considered that which Miller claims a hearing would have demonstrated. The victims specifically identified the value of their individual losses and any applicable insurance proceeds that offset those losses. The hearing Miller claims he was denied would have duplicated that which occurred during the sentencing hearing.

{¶13} Finally, Miller claims the trial court erred by failing to consider Miller's future and present ability to pay restitution because he was declared indigent for the purpose of appointing counsel and he is a 47-year-old serving a ten-year sentence.

{¶14} The mere fact that a court finds a defendant indigent and appoints counsel does not preclude that same court from finding the defendant had the ability to pay his theft victim costs and restitution in the future. *State v. Savage*, 4th Dist. Meigs No. 15CA2, 2015-Ohio-4205, ¶ 31, citing *State v. Brewer*, 2014-Ohio-1903, 11 N.E.3d 317, ¶ 46 (4th Dist.); *State v. Collins*, 2015-Ohio-3710, 41 N.E.3d 899, ¶ 46 (12th Dist.). Further, the trial court was advised that "there was no agreement by Mr. Miller to pay restitution. And just in considering whether or not to order that from him, he will be serving a significant prison term and is indigent, has no means to make those payments." Tr. 199:5-15. The trial court considered Miller's future and present ability to pay the

restitution that was imposed jointly and severally with Miller's codefendants. Miller's final argument as presented is overruled.

{¶15} We affirm in part, reverse in part upon the conceded error, and remand to the trial court for the limited purpose of considering the imposition of court costs.

It is ordered that appellant and appellee share 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. Case remanded to the lower court for further proceedings consistent with this opinion.

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

SEAN C. GALLAGHER, JUDGE

MARY J. BOYLE, P.J., and
ANITA LASTER MAYS, J., CONCUR