

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

State of Ohio

Court of Appeals No. S-11-003

Appellee

Trial Court No. 10 CR 142

v.

Tyree L. Tucker

DECISION AND JUDGMENT

Appellant

Decided: February 17, 2012

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney, and
Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Nathan T. Oswald, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant, Tyree Tucker, brings this appeal from a judgment of conviction for complicity to aggravated robbery, entered on a guilty plea in the Sandusky County Court of Common Pleas. We reverse in part and affirm in part.

{¶ 2} The facts giving rise to this appeal are as follows. On February 2, 2010, appellant was indicted on three counts of complicity to aggravated robbery in violation of R.C. 2911.01(A)(1) and 2923.03, felonies of the first degree. On March 17, 2010, appellant entered a guilty plea to the second count concerning a theft from a McDonald's restaurant. Pursuant to the plea agreement, the other two counts were dismissed.

{¶ 3} On December 21, 2010, appellant was found guilty and was sentenced to seven years in prison. He was also ordered to pay restitution.

{¶ 4} Appellant now appeals setting forth the following Assignments of Error:

I. The trial court committed plain error by sentencing appellant to pay restitution to McDonald's for lost wages.

II. The trial court committed plain error by ordering appellant to pay inconsistent restitution to Mickey Mart.

III. The trial court committed plain error by imposing a different sentence at appellant's sentencing hearing than what the judgment entry states.

IV. The trial court committed plain error by sentencing appellant to pay restitution amounts that lack a reasonable degree of certainty based on competent, credible evidence in the record.

V. Appellant was denied effective assistance of counsel by trial counsel's failure to object to the trial court's improper imposition of restitution.

{¶ 5} In his first four assignments of error, appellant contends that the court's restitution order is faulty. The state concedes these assignments of error.

{¶ 6} We initially note that appellant did not object to the restitution order or to the amount. Moreover, his counsel failed to object to the order of restitution or the amount and, therefore, has waived all but plain error. *State v. Marbury*, 104 Ohio App.3d 179, 181, 661 N.E.2d 271 (8th Dist.1995). Crim.R. 52(B) provides that: "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Plain error is invoked only if the court finds the circumstances of the case to be exceptional, and that reversal of the restitution order is necessary to prevent a manifest miscarriage of justice. *State v. Landrum*, 53 Ohio St.3d 107, 111, 559 N.E.2d 710 (1990).

{¶ 7} Under R.C. 2929.18(A)(1), a trial court may order a defendant to pay restitution as a financial sanction. An order of restitution must be made in open court, and the trial court must determine the amount of restitution at sentencing. *Id.*

{¶ 8} At appellant's sentencing hearing, the court ordered appellant to pay restitution in the amount of \$1,138.60 to McDonald's and \$271.98 to a store called Mickey Mart. The court's judgment entry of sentence once again ordered appellant to pay \$1,138.60 to McDonald's. However, the judgment entry ordered a different amount of restitution to Mickey Mart in the amount of \$317.90.

{¶ 9} It is a fundamental principle of appellate review that the court speaks only through its journal. *Kaine v. Marion Prison Warden*, 88 Ohio St.3d 454, 727 N.E.2d 907

(2000); *State v. Ahmed*, 8th Dist. No. 88315, 2007-Ohio-2639. Accordingly, we shall refer to the amount as reflected in the court's journal.

{¶ 10} 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.*

“To establish the amount of restitution within a reasonable certainty, there must be some competent, credible evidence. Sufficient evidence of the amount of restitution may appear in the record.” *State v. Carrino*, 8th Dist. No. 67696, citing *State v. Warner*, 55 Ohio St.3d 31, 69, 564 N.E.2d 18 (1990).

{¶ 11} In this case, neither the victims nor the offender recommended any amount for restitution. A presentence investigation was completed prior to sentencing, but the report did not show any information with regard to the economic loss suffered by the victims. The record also does not contain any receipts. The only attempt to support the restitution award was made by the prosecutor when she stated that the restitution reflected “lost wages” to McDonald’s. As the parties have correctly pointed out, McDonald’s (the restaurant) may have suffered loss of income but only the employees could have suffered lost wages. The prosecutor made no similar attempt to support the

restitution order to Mickey Mart. Upon a thorough review of the record, we must conclude that the restitution order in this case is not supported by competent, credible evidence. Finding plain error, appellant's first four assignments of error are found well-taken.

{¶ 12} In his fifth assignment of error, appellant contends that his counsel was ineffective in failing to object to the restitution order. Based upon our disposition of appellant's first four assignments of error, the trial court's error in imposing restitution must be corrected on remand. As a result, whether trial counsel was ineffective for not objecting to the error is moot, and we need not address that issue in this appeal.

Appellant's fifth assignment of error is found not well-taken.

{¶ 13} The judgment of the Sandusky County Court of Common Pleas is affirmed in part, and reversed in part. The portion of the sentence relative to restitution is vacated. The cause is remanded for a new sentencing hearing on that matter, and for further proceedings consistent with this decision. Costs of this appeal are assessed to appellee pursuant to App.R. 24(A)(4).

Judgment affirmed in part
and reversed in part.

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

Peter M. Handwork, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

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:
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