

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :
Plaintiff-Appellee : C.A. CASE NO. 24098
v. : T.C. NO. 08CR4596
AUSTEN S. NAYLOR : (Criminal appeal from
Defendant-Appellant : Common Pleas Court)

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OPINION

Rendered on the 4th day of March, 2011.

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DONOVAN, J.

{¶ 1} Defendant-appellant Austen S. Naylor appeals from a decision of the Montgomery County Court of Common Pleas, Criminal Division, ordering him to pay restitution in the amount of \$1,000.00. A hearing was held in this matter on April 30, 2010,

and the trial court filed an amended termination entry on May 20, 2010, setting the amount of restitution to be paid by Naylor at \$1,000.00. Naylor filed a timely notice of appeal with this Court on June 15, 2010.

I

{¶ 2} We set forth the history of the case in *State v. Naylor*, Montgomery App No. 23459, 2010-Ohio-988 (hereinafter “*Naylor I*”), and repeat it herein in pertinent part:

{¶ 3} “On February 5, 2009, Naylor was indicted two counts of receiving stolen property, in violation of R.C. 2913.51(A), felonies of the fourth degree. Naylor pled not guilty. On February 24, 2009, Naylor pled guilty to one count of receiving stolen property, and the other charge was dismissed. ***

{¶ 4} “On March 24, 2009 the Termination Entry was filed, and in addition to the sanctions imposed above, the trial court ordered Naylor to pay restitution in the amount of \$1391.56 to one of the victims.

{¶ 5} “Naylor did not file a direct appeal from that entry.

{¶ 6} “On April 8, 2009, Naylor filed a [‘]Motion for Modification of \$1400 Restitution Order re Sentencing; Request for Hearing if Necessary,[’] arguing that the property at issue had been returned to the victim, making restitution unnecessary. The trial court set a hearing on Naylor’s motion.

{¶ 7} “At the hearing, the State moved the court to dismiss Naylor’s motion. According to the State, ‘At [Naylor’s] sentencing hearing there was no objection made at that time to the restitution amount that was ordered. That restitution amount along with the other conditions of his probation were memorialized in the termination entry filed the next

day, March 24, 2009.

{¶ 8} ““At that point in time the jurisdiction of the Trial Court ceased and the Trial Court was divested of its jurisdiction to modify the restitution later. And the State makes that argument that the Trial Court no longer has jurisdiction to modify the restitution * * * *’

{¶ 9} “Naylor responded, ‘Defense agrees with the State of Ohio with regards to no objections being stated on the record or filed at the time of the sentencing with regards to the restitution amount. Your Honor, we did file the motion for modification prior to the filing of the termination entry, but after the sentencing. So we would of course agree that this Court, going off of the date of sentencing, would no longer have jurisdiction over the issue with regards to restitution. And therefore we would have to seek redress (sic) with the Second District.’

{¶ 10} “The trial court responded in relevant part: ‘ * * * and I think there’s a factual agreement on this, that the Defendant did not raise an objection at the sentencing hearing to the amount that was set at that time. * * * Court does not have jurisdiction to modify the termination entry that was filed on March 24, 2009. This is not a clerical issue. And accordingly, I think the motion is well taken and granted.

{¶ 11} ““And Mr. Shaw, your exception is noted and you can pursue it with the Court of Appeals and see where that leads, okay.’”

{¶ 12} In *Naylor I*, we ultimately reversed the trial court’s order of restitution and remanded the case to the trial court to hold a hearing pursuant to R.C. 2929.18(A)(1) to determine the proper amount of restitution to be paid by Naylor to the victim, Derrick

Sandlin.

{¶ 13} On April 30, 2010, the trial court held a restitution hearing. Based on the testimony of Sandlin regarding the price of the stolen motorcycle, the trial court ordered Naylor to pay restitution in the amount of \$1,000.00.

{¶ 14} It is from this judgment that Naylor now appeals.

II

{¶ 15} Naylor's sole assignment of error is as follows:

{¶ 16} "THE TRIAL COURT'S SENTENCE, WHICH INCLUDES APPROX. \$1,000 IN RESTITUTION, IS AN ABUSE OF DISCRETION SINCE NO COMPETENT NOR CREDIBLE EVIDENCE WAS EVER PRESENTED BY THE STATE OF OHIO OR BY THE VICTIM TO JUSTIFY SAID AMOUNT WHICH WAS DISPUTED BY APPELLANT PER O.R.C. 2929.18(A)."

{¶ 17} In his sole assignment, Naylor contends that the trial court erred when it ordered him to pay restitution in the amount of \$1,000.00 to Sandlin.

{¶ 18} Restitution is based upon the victim's economic loss. R.C. 2929.18(A)(1) provides in pertinent part:

{¶ 19} "Restitution by the offender to the victim of the offender's crime or any survivor of the victim, in an amount based on the victim's economic loss. *** If the court imposes restitution, at sentencing, the court shall determine the amount of restitution to be made by the offender. 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 economic loss suffered by the victim as a direct and proximate result of the commission of the offense. If the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount.”

{¶ 20} An order of restitution must be supported by competent, credible evidence in the record. *State v. Warner* (1990), 55 Ohio St.3d 31, 69. “It is well settled that there must be a due process ascertainment that the amount of restitution bears a reasonable relationship to the loss suffered.” *State v. Williams* (1986), 34 Ohio App.3d 33, 34. “A sentence of restitution must be limited to the actual economic loss caused by the illegal conduct for which the defendant was convicted.” *State v. Banks*, Montgomery App. No. 20711, 2005-Ohio-4488. “Implicit in this principle is that the amount claimed must be established to a reasonable degree of certainty before restitution can be ordered.” *State v. Golar*, Lake App. No. 2002-L-092, 2003-Ohio-5861.

{¶ 21} The amount of restitution should, if necessary, be substantiated through documentary or testimonial evidence. *State v. Summers*, Montgomery App. No. 21465, 2006-Ohio-3199. The trial court is authorized to base the amount of restitution on an amount recommended by the victim. *State v. Pillow*, Greene App. No. 07CA095, 2008-Ohio-6046; R.C. 2929.18(A)(1).

{¶ 22} A trial court abuses its discretion in ordering restitution in an amount that was not determined to bear a reasonable relationship to the actual loss suffered. *State v. Williams* (1986), 34 Ohio App.3d 33. Thus, we review the trial court’s decision under an abuse of discretion standard. An abuse of discretion “connotes more than an error of law or

judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio St. Med. Bd.* (1993), 66 Ohio St.3d 619, 621. With respect to Naylor's sole assignment of error, we find no abuse of discretion.

{¶ 23} In the instant case, Sandlin testified that his 2000 Suzuki RMI 125 motorcycle was in "mint" condition prior to it being stolen. Specifically, Sandlin testified that he originally bought the motorcycle for \$500.00 and then paid approximately \$4,000.00 in parts and labor to have the motorcycle repaired. After he fixed the motorcycle, Sandlin testified that it was in "mint" condition. Sandlin, however, became unemployed and was forced to attempt to sell the motorcycle. Sandlin testified that at the time that the motorcycle was stolen in late 2008, he had it listed for sale at \$1,500.00.

{¶ 24} Sandlin further testified that once the police recovered his motorcycle at the end of November of 2008, there were parts missing, it "knocked heavily" when someone attempted to start it, and the clutches were no longer operable. Sandlin testified that he brought the motorcycle to a repair shop called Dick's Suzuki on March 19, 2009, for a repair estimate. The estimate Sandlin received, which only included tear-down of the engine and replacement parts, totaled \$1,391.56. Sandlin testified that he could not afford to have the motorcycle repaired at that price, so he was ultimately forced to sell it for \$500.00.

{¶ 25} In fashioning the restitution order of \$1,000.00, the trial court simply deducted the sale price of the motorcycle after it was stolen and returned (\$500.00) from Sandlin's original sale price before the motorcycle was stolen (\$1,500.00). In addition to

his own testimony, Sandlin submitted the repair estimate from Dick's Suzuki of \$1,391.56. Sandlin testified that although documentation existed regarding the transfer of title to the motorcycle when he sold it for \$500.00, he did not have a receipt for the transaction. Although Naylor testified at the hearing, he was unable to refute Sandlin's testimony regarding the value of the motorcycle before and after it was stolen.

{¶ 26} After a thorough review of the record as well as the testimony of Sandlin, we conclude that the State presented competent, credible evidence which established the amount of restitution to be \$1000.00 to a reasonable degree of certainty. Thus, the trial court did not abuse its discretion when it ordered Naylor to pay restitution in the amount of \$1,000.00 to Sandlin.

{¶ 27} Naylor's sole assignment is overruled.

III

{¶ 28} Naylor's sole assignment of error having been overruled, the judgment of the trial court is affirmed.

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FROELICH, J. and HALL, J., concur.

Copies mailed to:

Johnna M. Shia
Byron K. Shaw
Hon. Timothy N. O'Connell