

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2009-04-115
 :
 - vs - : OPINION
 : 5/3/2010
 :
 SHAWN RAY STAMPER, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2008-10-1911

Robin N. Piper, III, Butler County Prosecuting Attorney, Gloria J. Sigman, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

Scott N. Blauvelt, 246 High Street, Hamilton, Ohio 45011, for defendant-appellant

YOUNG, P.J.

{¶1} Defendant-appellant, Shawn Ray Stamper, appeals an order of restitution imposed by the Butler County Court of Common Pleas as a result of his conviction for grand theft. For the reasons outlined below, we reverse and remand the trial court's decision.

{¶2} On November 26, 2008, appellant was indicted on one count of grand theft in violation of R.C. 2913.02(A)(1), a felony of the fourth degree, after it was alleged that on or about July 22 and 23, 2008, appellant entered a construction site in West

Chester, Ohio and removed two generators and a plate compactor belonging to Ronald E. Schweitzer of the R.E. Schweitzer Construction Company (Schweitzer).

{¶13} Appellant pled guilty to the charge on February 2, 2009, and at the March 16, 2009 sentencing hearing, the trial court imposed a 17-month prison term and continued the issue of restitution for a further hearing. Shortly thereafter, on March 19, 2009, the court issued a judgment entry of conviction. The judgment entry set forth appellant's prison sentence and continued the issue of restitution for a hearing on March 23, 2009.

{¶14} Following the restitution hearing, the trial court ordered appellant to pay \$9,390.00 to Schweitzer in its March 26, 2009 restitution entry.

{¶15} Appellant appealed the March 19 and March 26, 2009 decisions of the trial court in his notice of appeal dated April 21, 2009. An amended judgment entry of conviction combining the sentencing and restitution entries was filed by the trial court on April 2, 2010.¹

{¶16} Appellant has raised four assignments of error for our review on appeal. For purposes of expediency, we will address the assignments of error out of order.

{¶17} Assignment of Error No. 4:

{¶18} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT, IN VIOLATION OF [THE] DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO [THE] UNITED STATES CONSTITUTION, WHEN IT MODIFIED THE SENTENCE TO IMPOSE A RESTITUTION ORDER AFTER EXECUTION OF [THE] SENTENCE HAD COMMENCED."

{¶19} In his fourth assignment of error, appellant contends that the trial court

1. As a result of the trial court's issuance of the amended judgment entry of conviction, we will consider appellant's April 21, 2009 notice of appeal as premature. See App.R. 4(C); *State v. Baker*, Butler App. No.

lacked subject matter jurisdiction to order restitution in its March 26, 2009 entry once it journalized its initial judgment entry of conviction on March 19, 2009. Appellant argues that the subsequent restitution order improperly modified his initial sentence in violation of the Double Jeopardy Clause of the Fifth Amendment. We disagree with this contention.

{¶10} The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution protects individuals against multiple punishments for the same offense. *North Carolina v. Pearce* (1969), 395 U.S. 711, 717-718, 89 S.Ct. 2072. Its primary purpose is to preserve the finality or integrity of judgments. *United States v. DiFrancesco* (1980), 449 U.S. 117, 128, 1010 S.Ct. 426. "An individual's legitimate expectation of finality in his or her sentence is a key factor in determining whether or not double jeopardy protections are implicated." *State v. Bell*, Franklin App. No. 03AP-1282, 2004-Ohio-5256, ¶12.

{¶11} Upon review, we find that no double jeopardy violation occurred in this case, as appellant did not have an expectation of finality from the March 19, 2009 sentencing entry. Although the entry did not order restitution, it alluded to the possibility that restitution would be imposed by providing: "A [r]estitution [h]earing in this case shall be held on March 23, 2009 at 1:00 p.m." Contrary to appellant's assertion, this case does not concern the trial court's imposition of an additional or increased amount of restitution, such as "when a trial court sets forth a definite sum in restitution but later amends the original sentence to increase the amount of restitution or impose an additional sum in restitution." *State v. Patterson*, Warren App. No. CA2005-08-088, 2006-Ohio-2133, ¶9. As a result, it cannot be said that appellant's criminal penalty was enhanced by the trial court's subsequent restitution order.

{¶12} Appellant's fourth assignment of error is therefore overruled.

{¶13} Assignment of Error No. 2:

{¶14} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT AND ABUSED ITS DISCRETION BY ENTERING A RESTITUTION ORDER WITHOUT COMPETENT, CREDIBLE EVIDENCE WITH WHICH TO DETERMINE A RESTITUTION AMOUNT TO A REASONABLE DEGREE OF CERTAINTY."

{¶15} In his second assignment of error, appellant argues that the trial court abused its discretion in ordering him to pay \$9,390 in restitution to Schweitzer because the amount awarded was not supported by evidence in the record.

{¶16} R.C. 2929.18(A)(1) permits a trial court, as part of a sentence, to order restitution to the victim of the offender's crime in an amount based on the victim's economic loss. "Economic loss" is defined as "any economic detriment suffered by a victim as a direct and proximate result of the commission of an offense and includes * * * any property loss * * * incurred as a result of the commission of an offense." R.C. 2929.01(L). The trial 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." R.C. 2929.18(A)(1).

{¶17} Due process requires that the amount of restitution ordered bear a reasonable relationship to the actual loss suffered by the victim. *State v. Bowman*, 181 Ohio App.3d 407, 2009-Ohio-1281, ¶10, citing *State v. Williams* (1986), 34 Ohio App.3d 33, 34. Accordingly, a trial court must "determine the amount of restitution to a reasonable degree of certainty, ensuring that the amount is supported by competent,

credible evidence." *State v. Foster*, Butler App. No. CA2005-09-415, 2006-Ohio-4830, ¶8. An order of restitution that does not bear a reasonable relationship to the actual loss suffered by the victim constitutes an abuse of a trial court's discretion. *Bowman* at ¶11. An abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Jackson*, 107 Ohio St.3d 53, 2008-Ohio-5981, ¶181.

{¶18} At the initial sentencing hearing on March 16, 2009, appellant's trial counsel advised the court that the restitution issue remained outstanding, as counsel had received information that the stolen construction equipment may have been recovered by Schweitzer. At the subsequent restitution hearing, the state represented to the court that it had obtained "written confirmation" from Schweitzer that none of the stolen equipment had been recovered, and that this confirmation had been faxed to appellant's trial counsel prior to the hearing. The state further represented that appellant's trial counsel had indicated that appellant would not "contest it," and that Schweitzer need not attend the restitution hearing. However, appellant's trial counsel did not appear at the restitution hearing to confirm the state's representations. The state indicated on the record that the cost of replacing the stolen equipment was \$9,390, and the court ordered restitution for that amount.

{¶19} Based on the foregoing, we find that the trial court's restitution order was not supported by competent, credible evidence, as there was no documentary or testimonial evidence introduced at the hearing to demonstrate Schweitzer's economic loss. See *Bowman*, 2009-Ohio-1281 at ¶12 (documentary and/or testimonial evidence must be introduced to demonstrate a victim's economic loss). Without testimony or documentation regarding the replacement cost of the stolen equipment, it cannot be said that the amount of restitution ordered bore a reasonable relationship to

Schweitzer's actual loss. We therefore find that the trial court abused its discretion in ordering appellant to pay \$9,390 in restitution.

{¶20} Appellant's second assignment of error is sustained.

{¶21} Assignment of Error No. 1:

{¶22} "THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO THE PREJUDICE OF APPELLANT IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION, THE FOURTEENTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN IT CONDUCTED A CRITICAL STAGE OF THE PROCEEDINGS IN THE ABSENCE OF A DEFENDANT'S COUNSEL."

{¶23} Assignment of Error No. 3:

{¶24} "APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL TO HIS PREJUDICE AND IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION."

{¶25} In his first and third assignments of error, appellant contends that he was denied his constitutional right to the effective assistance of counsel at the March 23, 2009 restitution hearing because his trial counsel was not present at the hearing. Based on our resolution of appellant's second assignment of error, his first and third assignments of error are overruled as moot.

{¶26} As a result of the foregoing, the trial court's order of restitution is set aside and the cause is remanded for resentencing on the issue of restitution.

{¶27} Judgment reversed and caused remanded.

POWELL and RINGLAND, JJ., concur.

