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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-397

No. COA21-100

Filed 7 June 2022

Wilson County, Nos. 16CRS53147, 18CRS51280, 18CRS51282-84, 18CRS51289, 18CRS51292, 18CRS51917, 18CRS52365-66

STATE OF NORTH CAROLINA

v.

DENNIS MONTRELL HARRIS, Defendant.

Appeal by defendant from judgments entered 13 October 2020 by Judge Walter H. Godwin Jr. in Wilson County Superior Court. Heard in the Court of Appeals 19 October 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Jeanne Hill Washburn, for the State-appellee.

Dylan J.C. Buffum for defendant-appellant.

GORE, Judge.

¶ 1 Defendant Dennis M. Harris appeals from judgments entered upon his guilty pleas pursuant to *Alford*. Defendant petitions this Court for issuance of a writ of certiorari to obtain review of the trial court's imposition of costs and awards of restitution. In our discretion, we grant defendant's petition. On appeal, defendant argues eight of the twelve restitution orders were not supported by the evidence.

Additionally, defendant contends the trial court imposed duplicative costs contrary to the requirements of N.C. Gen. Stat. § 7A-304. We agree, vacate the orders containing these errors, and remand for further proceedings consistent with this opinion.

I. Factual and Procedural Background

¶ 2 The evidence presented at trial tends to show the following: from August 2016 to March 2018 defendant engaged in various methods of deprivation of property giving rise to twelve different underlying indictments including 25 different criminal charges. Defendant's victims included stores, banks, and an individual.

¶ 3 These cases were pled before the Honorable Walter H. Godwin, Jr., Superior Court Judge presiding during the 12 October 2020 administrative session of the Wilson County Superior Court. On 13 October 2020, defendant entered *Alford* pleas to one count of felony larceny, three counts of larceny of chose in action, seven counts of uttering a forged instrument, nine counts of obtaining property by false pretenses ("OPBFP"), and three counts of forgery of an instrument. The State dismissed two habitual felon indictments and three unindicted district court charges. Defendant stipulated and agreed that there were facts to support his pleas and consented to allow the Court to hear a summary of the evidence. The State presented supporting documentation including copies of stolen and forged checks and various receipts.

¶ 4 The trial court consolidated the charges into three judgments—16 CRS 53147,

18 CRS 51292, and 18 CRS 51284—and imposed three active sentences in the presumptive range of 15-27 months' imprisonment, two to run concurrently and one to run consecutively. Defendant stipulated to a prior record level V for felony sentencing purposes.

¶ 5 Pertinent to this appeal, the trial court ordered defendant to pay restitution, court costs, and attorney's fees. Each written judgment imposed $552.50 in costs. The first judgment imposed $1,050.00 in stipulated attorney's fees and $2,108.46 in restitution. The second judgment imposed $1,305.04 in restitution. The third judgment imposed $3,501.32 in restitution. On 20 October 2020, defendant filed written notice of appeal.

II. Jurisdiction

¶ 6 "A defendant entering an *Alford* plea has no statutory right to appeal the trial court's judgment." *State v. Williams*, 265 N.C. App. 657, 659, 829 S.E.2d 518, 521 (2019) (citing N.C. Gen. Stat. § 15A-1444(e) (2017)). Consequently, defendant seeks review of the final judgments entered against him by writ of certiorari, pursuant to N.C. Gen. Stat. § 15A-1444(e) and N.C.R. App. P. 21.

¶ 7 The issues raised by defendant on appeal do not fall within the purview of Appellate Rule 21, which provides limited "enumerated bases for issuance of the writ." *State v. Jones*, 253 N.C. App. 789, 796, 802 S.E.2d 518, 523 (2017). However, N.C. Gen. Stat. § 15A-1444(e) provides a statutory right to apply for writ of certiorari

that "is not abridged by Appellate Rule 21." *Id.* (citation omitted); *see* N.C. Gen. Stat. § 15A-1444(e) (2020). "The decision concerning whether to issue a writ of certiorari is discretionary, and thus, the Court of Appeals may choose to grant such a writ to review some issues that are meritorious but not others for which a defendant has failed to show good or sufficient cause." *State v. Ross*, 369 N.C. 393, 400, 794 S.E.2d 289, 293 (2016) (citation omitted).

¶ 8 Upon review of the record and the arguments contained in both parties' briefs, we conclude defendant presents "good and sufficient cause" as to warrant review of the trial court's judgment. *Williams*, 265 N.C. App. at 660, 829 S.E.2d at 521 (quoting *Ross*, 369 N.C. at 400, 794 S.E.2d at 293). In our discretion, we grant defendant's petition for writ of certiorari to address his first issue presented on appeal, whether eight of the twelve restitution awards are supported by competent evidence. *See id.*

III. Restitution

¶ 9 Defendant argues that the trial court erred by imposing eight of the twelve restitution orders without supporting evidence. We agree.

¶ 10 Pursuant to N.C. Gen. Stat. § 15A-1340.34, "[w]hen sentencing a defendant convicted of a criminal offense, the court shall determine whether the defendant shall be ordered to make restitution to any victim of the offense in question." § 15A-1340.34(a) (2020). The trial court shall "require that the defendant make restitution to the victim or the victim's estate for any injuries or damages arising directly and

proximately out of the offense committed by the defendant." § 15A-1340.34(b).

¶ 11 "On appeal, we review *de novo* whether the restitution order was supported by evidence adduced at trial or at sentencing." *State v. Wright*, 212 N.C. App. 640, 645, 711 S.E.2d 797, 801 (2011) (citation and quotation marks omitted).

> A restitution worksheet, unsupported by testimony or documentation, is insufficient to support an order of restitution. Unsworn statements of a prosecutor also cannot support an order of restitution. When no evidence supports the award, the award of restitution will be vacated. If there is specific testimony or documentation to support the award, the award will be affirmed. The quantum of evidence needed to support a restitution award is not high. When a restitution award is vacated, the typical remedy is to remand the restitution portion of the sentence for a new sentencing hearing.

State v. Hunt, 250 N.C. App. 238, 253, 792 S.E.2d 552, 563 (2016) (*purgandum*). "The amount of restitution must be limited to that supported by the record . . . ." N.C. Gen. Stat. § 15A-1340.36(a) (2020).

¶ 12 The State concedes there is no supporting or corroborating evidence in the record substantiating the trial court's award of restitution in 16 CRS 53147 (OPBFP), 18 CRS 51292 (OPBFP), and counts two and three in 18 CRS 52366 (two counts of Forgery of an Instrument). Accordingly, we vacate and remand these restitution awards to the trial court for additional proceedings.

¶ 13 Next, defendant argues that there is insufficient evidence to support the award in 18 CRS 51282, 18 CRS 51283, and 18 CRS 51284, because the State failed to

present evidence establishing the monetary loss incurred by the victim in these cases, CresCom Bank. We agree.

¶ 14 In 18 CRS 51282—Uttering Forged Instrument and OPBFP— the trial court awarded $410.29 in restitution to CresCom Bank. As a factual basis, the State alleged that "a check was taken from Ronald Langley" and "used to withdraw money from an ATM" at CresCom Bank. The State submitted a copy of a check from Langley's Landscaping & Lawn Care written out in the value of $410.29.

¶ 15 In 18 CRS 51283—Uttering Forged Instrument and OPBFP— the trial court awarded $265.83 in restitution to CresCom Bank. As a factual basis, the State alleged that "a check was taken from Eleanor Matthews. The actual victim in that case again was CresCom Bank where [defendant] used it at an ATM to withdraw money." The State submitted a copy of a check from Eleanor B. Matthews written out in the value of $265.83.

¶ 16 In 18 CRS 51284—Uttering Forged Instrument and OPBFP— the trial court awarded $973.23 in restitution to CresCom Bank. As a factual basis, the State alleged "a check taken from the account of Nancy Avery and that was also used at an ATM. So CresCom Bank would be the victim in that case as well." The State submitted a copy of a check from Nancy C. Avery written out in the value of $973.23.

¶ 17 Here, CresCom Bank is the named victim; "the term 'victim' mean[ing] a person directly and proximately harmed as a result of the defendant's commission of

the criminal offense." § 15A-1340.34(a). While CresCom Bank allegedly suffered a loss based on the withdrawal of cash from the ATMs, the State's exhibits show only the amount of money deposited into that bank account, not taken from it.

¶ 18 "[W]hen there is some evidence as to the appropriate amount of restitution, the recommendation will not be overruled on appeal." *State v. Hardy*, 242 N.C. App. 146, 159, 774 S.E.2d 410, 419 (2015) (citation omitted). However, to support a restitution award, "there must be something more than a guess or conjecture as to an appropriate amount of restitution. Restitution is not intended to punish defendants, but to compensate victims. There is no predetermined fine or presumption of damages." *State v. Daye*, 78 N.C. App. 753, 758, 338 S.E.2d 557, 561 (1986). Evidence of stolen and forged checks deposited into defendant's bank account fosters speculation as to the monetary loss CresCom Bank incurred resulting from defendant's criminal conduct. However, the State must present some documentation or testimony establishing the appropriate compensation for the loss CresCom Bank suffered when defendant withdrew a portion of the amount deposited.

¶ 19 Finally, defendant challenges the restitution award for one count of OPBFP in 18 CRS 52366, arguing this award is not supported by competent evidence as it is duplicative of the supported award in 18 CRS 52365 (Larceny of Chose in Action; Uttering a Forged Instrument; OPBFP). We agree.

¶ 20 In 18 CRS 52365, the State alleged as a factual basis for defendant's plea, a

check in the amount of $470.84 was "taken from a Hilton Barnes Smith and altered and used at Wal-Mart in that amount." The trial court awarded $470.84 in restitution to Wal-Mart. Defendant concedes there is competent evidence in the record to support this restitution award. The state submitted a receipt, Exhibit "C," showing a purchase in the amount of $470.84 at Wal-Mart.

¶ 21 In 18 CRS 52366, the trial court also awarded restitution in the amount of $308.44 to Wal-Mart based on a subsequent transaction. In its brief, the State asserts "between the State's arguments and State's Exhibit 'C' it can be adduced that the Defendant returned some of the merchandise that he illegally obtained for $308.44 in cash." However, "it is axiomatic that the arguments of counsel are not evidence." *State v. Hardy*, 250 N.C. App. 225, 232, 792 S.E.2d 564, 568 (2016) (citation omitted). Thus, the prosecutor's remarks reciting the factual basis for defendant's plea is not competent evidence upon which to base a restitution award. The only evidence supporting this award is the same receipt used to support the initial $470.84 purchase in 18 CRS 52365. While defendant returned a portion of the goods from that transaction and received cash, the total loss Wal-Mart incurred did not exceed the initial $470.84. Accordingly, the restitution award in 18 CRS 52366, one count of OPBFP, is duplicative and not based on competent evidence in the record.

IV. Clerical Error

¶ 22 Defendant further argues the trial court's written judgments awarding

restitution contain a clerical error creating ambiguity as to the collection of monies in this matter.

¶ 23 "A clerical error is an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination." *State v. Lark*, 198 N.C. App. 82, 95, 678 S.E.2d 693, 702 (2009) (*purgandum*). "When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record 'speak the truth.'" *Id.* at 95, 678 S.E.2d at 702 (citation and quotation marks omitted).

¶ 24 During sentencing the trial court stated, "As a part of post-release supervision, [defendant] is to reimburse the people set forth on the restitution worksheet. The cost and the attorney's fees are otherwise to be paid by virtue of a civil judgment." However, all three written judgments include the ambiguous orders, "MONEY SET AS A CIVIL JUDGMENT. MONEY TO BE PAID AS PART OF POST RELEASE SUPERVISION." Defendant argues this ambiguous phrasing fails to distinguish which payments are a condition of post-release supervision, and which are set aside as a civil judgment.

¶ 25 A written judgment and commitment form are controlling, effectively modifying earlier orders orally mandated at sentencing. *See State v. Buchanan*, 108 N.C. App. 338, 341, 423 S.E.2d 819, 821 (1992). However, the language used in the

written orders does not clearly indicate a departure from the trial court's initial ruling. There is no indication the restitution awards were intended to be imposed as a civil judgment. On remand, the trial court should distinguish which payments are to be docketed as a civil judgment, and which are to be recommended as a condition of post-release supervision.

V. Conclusion

¶ 26 We vacate and remand the restitution awards from case numbers 16 CRS 53147, 18 CRS 51282, 18 CRS 51283, 18 CRS 51284, 18 CRS 51292, and 18 CRS 52366 for a new restitution hearing with instructions to correct the clerical error in the written portion of the judgments to be consistent with the trial court's ruling.

VACATED AND REMANDED.

Chief Judge STROUD and Judge INMAN concur.

Report per Rule 30(e).