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ATTORNEYS FOR APPELLEE:

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**IN THE
COURT OF APPEALS OF INDIANA**

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No. 01A04-0912-CR-689

APPEAL FROM THE ADAMS SUPERIOR COURT
The Honorable Patrick R. Miller, Judge
Cause No. 01D01-0904-FD-34

May 19, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Brandon M. Beltz appeals his sentence for Class D felony theft and being a habitual offender. Finding no abuse of discretion in the trial court's restitution order and that Beltz's aggregate five-year sentence is not inappropriate in light of the nature of the offense and his character, we affirm.

Facts and Procedural History

In March 2009 Beltz knowingly exerted unauthorized control over a GPS unit belonging to Innovative Concepts Audio & Visual, Inc., with intent to deprive Innovative Concepts of any part of the GPS unit's use or value. In April 2009 the State charged Beltz with Class D felony theft. Ind. Code § 35-43-4-2(a). In September 2009 the State alleged that Beltz was a habitual offender, Ind. Code § 35-50-2-8, based on a 2001 conviction for Class C felony fraud on a financial institution and a 2003 conviction for Class C felony forgery.

Beltz pled guilty to the theft charge and the habitual offender enhancement. During his sentencing hearing, the trial court gave Beltz an opportunity to make corrections and clarifications to his Presentence Investigation Report. Beltz corrected his wife's address and stated that an offense listed under his adult history was a juvenile offense, he had paid fines and costs and did not serve an executed sentence for a check deception conviction, he was going to plead guilty to a theft charge in exchange for the State dismissing a check deception charge and another theft charge, and he had attempted to contact the Allen County courts regarding a warrant issued for a check fraud charge. Beltz also noted that he disagreed with the probation officer's statements that he "is

already facing a significant period of incarceration in the future” and that “it is up to [Beltz] to make the necessary changes in his life.” PSI p. 10.

The PSI included a probable cause affidavit indicating that Innovative Concepts sold a GPS unit to Beltz for \$285.94 and that Beltz paid with a check drawn on a closed account. *Id.* at 14. The PSI also included a copy of an Innovative Concepts invoice charging Beltz \$285.94: \$245.94 for “BAD CHECK #5118” and \$40.00 for “BAD CHECK CHARGE.” *Id.* at 16. The PSI further included the probation officer’s statement that “Innovative Concepts requests restitution of \$285.94” and her subsequent recommendation that Beltz’s sentence include a restitution order for \$285.94. *Id.* at 10. Beltz did not contest any of these items in the PSI.

Regarding mitigating factors, the trial court stated, “I . . . take into consideration the information you’ve provided me and the arguments you’ve made, as well as your testimony, as to your desire to dispose of this matter, to accept responsibility, that you regret what you’ve committed and what you’ve done; and also the fact you’ve had a troubled childhood.” Tr. p. 46-47. As aggravators, the trial court noted Beltz’s significant criminal and juvenile history, past attempts at rehabilitation, multiple probation violations, and the fact that at the time of sentencing he had other cases pending. The trial court noted that because Beltz was on probation for a federal case in the United States District Court, Northern District of Indiana, for felony uttering counterfeit obligations or securities at the time of this offense, Indiana Code section 35-50-2-2(b)(3) required the imposition of mandatory non-suspendible sentences of six months for the Class D felony theft and one and a half years for the habitual offender

enhancement. The trial court found that the aggravators outweighed the mitigators and sentenced Beltz to two and a half years for the Class D felony theft enhanced by two and a half years for the habitual offender status to be served at the Indiana Department of Correction. The trial court also ordered restitution in the sum of \$285.94. Beltz now appeals.

Discussion and Decision

Beltz contends that the trial court abused its discretion in imposing restitution and that his aggregate five-year sentence is inappropriate.

I. Restitution

Beltz first contends that the trial court abused its discretion in imposing \$285.94 in restitution. As a preliminary matter, we note that a defendant who fails to object to the trial court's imposition of restitution at the first opportunity waives his right on appeal. *Markland v. State*, 865 N.E.2d 639, 643-44 (Ind. Ct. App. 2007), *trans. denied*. Because Beltz failed to object when the trial court ordered him to pay restitution in the sum of \$285.94, he has waived the issue.

Waiver notwithstanding, given our preference for resolving a case on its merits, we review his restitution claim on appeal. A trial court has the authority to order a defendant convicted of a crime to make restitution to the victim of the crime. *Wolff v. State*, 914 N.E.2d 299, 303 (Ind. Ct. App. 2009). The purpose of a restitution order is to impress upon the criminal defendant the magnitude of the loss he has caused and to defray costs to the victim caused by the offense. *Id.* An order of restitution is a matter within the sound discretion of the trial court, and we will only reverse upon a showing of

an abuse of that discretion. *Id.* An abuse of discretion occurs if the court’s decision is clearly against the logic and effect of the facts and circumstances before it. *Id.*

Indiana Code section 35-50-5-3 governs orders for restitution and provides in pertinent part:

(a) Except as provided in subsection (i) or (j), in addition to any sentence imposed under this article for a felony or misdemeanor, the court may . . . order the person to make restitution to the victim of the crime The court shall base its restitution order upon a consideration of:

(1) property damages of the victim incurred as a result of the crime, based on *the actual cost of repair (or replacement if repair is inappropriate)*

(Emphasis added). The amount of actual loss sustained by the victim is a factual matter that can be determined only upon the presentation of evidence. *Rich v. State*, 890 N.E.2d 44, 49 (Ind. Ct. App. 2008), *trans. denied*.

The State concedes that it did not present independent evidence of Innovative Concept’s actual cost of replacing the GPS unit. However, Indiana Code section 35-38-1-8.5 requires the probation officer conducting the presentence investigation to send written notification to the victim and prepare a victim impact statement for inclusion in the report. Here, under the heading, “Victim Impact Statement,” Beltz’s PSI states, “Undersigned sent a letter & victim information to Innovative Concepts, which was followed up with a telephone call, & per the attached, Innovative Concepts requests restitution of \$285.94.” PSI p. 6. “[T]he attached” is a copy of the Innovative Concepts invoice charging Beltz \$285.94. *See id.* at 16.

A defendant generally has the onus of pointing out any factual inaccuracies in a presentence investigation report. *Carter v. State*, 711 N.E.2d 835, 840 (Ind. 1999). Thus,

he or she is given the opportunity to review the report and to controvert the material contained in it. Ind. Code § 35-38-1-12(b). Although Beltz reviewed his PSI and corrected various aspects of it, he made no corrections with regard to the restitution amount. *See* Tr. p. 34-39.

Beltz argues that the portions of the PSI referring to Innovative Concept's request for \$285.94 in restitution "do not provide sufficient evidentiary support for the restitution order because the State failed to admit them into evidence as proof of the replacement cost of the GPS unit at issue." Appellant's Br. p. 10. We disagree. The rules of evidence, other than those with respect to privileges, do not apply in sentencing proceedings. *See* Ind. Evidence Rule 101(c)(2). The rationale for the relaxation of the evidentiary rules at sentencing is that, unlike at trial, the evidence is not confined to the narrow issue of guilt. *Kellett v. State*, 716 N.E.2d 975, 983 n.5 (Ind. Ct. App. 1999). Instead, the task is to determine the type and extent of punishment. *Id.* Thus, it was proper for the trial court to rely on Beltz's PSI as evidence even though the State did not admit it as such.

We thus conclude that the trial court did not abuse its discretion by relying on the PSI to order restitution in the amount of \$285.94.

II. Inappropriate Sentence

Beltz also contends that his aggregate five-year sentence is inappropriate. Although a trial court may have acted within its lawful discretion in imposing a sentence, Article 7, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Indiana Appellate Rule 7(B), which provides

that a court “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh’g*, 875 N.E.2d 218 (Ind. 2007)). The defendant has the burden of persuading us that his or her sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

Beltz pled guilty to a Class D felony and being a habitual offender. The statutory range for a Class D felony is between six months and three years, with the advisory sentence being one and a half years. Ind. Code § 35-50-2-7(a). A person found to be a habitual offender will be sentenced to “an additional fixed term that is not less than the advisory sentence for the underlying offense nor more than three (3) times the advisory sentence for the underlying offense.” Ind. Code § 35-50-2-8(h). In addition, the trial court found that pursuant to Indiana Code section 35-50-2-2(b)(3), it was required to impose mandatory non-suspendible sentences of six months for the Class D felony and one and a half years for the habitual offender enhancement.

Although the underlying facts are sparse because of the limited factual basis presented during the guilty plea hearing, it appears that Beltz bought a GPS unit from Innovative Concepts with a personal check drawn on a closed account. The nature of the offense is not particularly egregious.

Regarding Beltz’s character, we acknowledge his acceptance of responsibility. However, his criminal record alone justifies the sentence imposed by the trial court. As a

juvenile, Beltz was adjudicated a delinquent for auto theft, operation by an individual never receiving a license, curfew violation, and minor consumption of alcohol. As an adult, Beltz has already accumulated three misdemeanors and six felonies for violations of state law: Class A misdemeanor check deception, Class B misdemeanor false informing, Class A misdemeanor driving while suspended, two convictions for Class C felony fraud on a financial institution, two convictions for Class C felony forgery, and two convictions for Class D felony theft. Additionally, he has a conviction in federal district court for felony uttering counterfeit obligations or securities. At the time of sentencing, Beltz had three pending cases for Class A misdemeanor check deception, two counts of Class D felony theft, and Class D felony check fraud. Many of his previous convictions and pending charges are related to his theft conviction here. Beltz has multiple violations of probation. Particularly relevant to our consideration is the fact that Beltz was on probation for the federal case at the time he committed this offense.

Beltz has failed to persuade us that his aggregate five-year sentence for Class D felony theft and being a habitual offender is inappropriate in light of the nature of the offense and his character.

Affirmed.

NAJAM, J., and BROWN, J., concur.