

Case Summary

Willie L. Jackson appeals the sentencing court's order that he pay \$1767 in restitution.

We affirm.

Issues

Jackson raises two issues, which we restate as follows:

- I. Whether the sentencing court committed fundamental error in ordering Jackson to pay \$1767 in restitution; and
- II. Whether Jackson received ineffective assistance of counsel because defense counsel failed to object to the restitution order.

Facts and Procedural History

In April of 2009,¹ Jackson knowingly exerted unauthorized control over a 2001 Chevrolet Trailblazer, owned by Captain Muffler Center and Garage ("Captain Muffler"), with the intent to deprive Captain Muffler of any part of its use or value. Pursuant to a plea agreement executed and filed in June, Jackson pled guilty to Theft, as a Class D felony.² The agreement provided as follows:

Restitution, including whether to order restitution and the amount of restitution, is left to the discretion of the Court unless otherwise expressly set forth in this Agreement and may include restitution for counts dismissed or specifically not charged as part of this Agreement.

Appendix at 58.

On December 1, the State filed a restitution claim form signed by Bob Captain, the

¹ All dates refer to 2009.

² Ind. Code § 35-43-4-2(a).

owner of Captain Muffler, in which Captain requested \$1767 in restitution. Attached were several receipts, one of which stated that the “Date of Tow” was May 1, 2009. App. at 78. Also included was a summary of expenses for which there was no receipt. The costs are as follows:

Receipts

| <u>Date</u> | <u>Location</u> | <u>Business</u> | <u>Purpose</u> | <u>Cost</u> |
|---------------------|------------------|-------------------------------|----------------|-------------|
| April 13 | Berne, IN | First Bank of Berne | fee | \$ 5.00 |
| May 1 in pm | Bluffton, IN | Short Stop | gas | \$22.01 |
| May 2 at 4:04am | Mt. Vernon, KY | Hardy’s BP | gas | \$22.00 |
| May 2 at 9:47am | Newberry, SC | One Stop 6 | gas | \$22.20 |
| May 2 at 1:01pm | Myrtle Beach, SC | Auto Body Works | tow | \$85.00 |
| May 2 & 3 | three locations | three businesses ³ | food | \$61.32 |
| May 2 to 3 | Myrtle Beach | Holiday Inn | hotel | \$67.20 |
| May 3 at 6:35am | Myrtle Beach | Kangaroo Exp | gas | \$24.50 |
| May 3 at 6:36am | Myrtle Beach | Kangaroo Exp | gas | \$17.35 |
| May 3 at 11:08am | Spartanburg, SC | One Stop Sunoco | gas | \$26.00 |
| May 3 at 11:08am | Spartanburg | One Stop Sunoco | gas | \$17.24 |
| [unclear] at 1:44pm | Bernstadt, KY | “er Truck Stop” | gas | \$42.24 |
| May 3 at 8:31pm | Portland, IN | Village Pantry | gas | \$15 |

³ These three food purchases were made at a gas station in Bluffton, Indiana, Fuddrucker’s in Myrtle Beach, South Carolina on May 2 at 3:48 p.m., and McDonald’s in Portland, Indiana on May 3 at 8:36 p.m. The date, time, and amount of the gas station food purchase were unclear in the Appellant’s Appendix.

| | | | | |
|--------|--------------|------------------|--|------------|
| May 26 | Bluffton, IN | Miller Body Shop | body work | \$300.00 |
| | | | Receipts subtotal | \$727.06 |
| | | | <u>No Receipt</u> | |
| | | | three additional meals | \$60.00 |
| | | | decreased value on Grand Am for 1600 miles to pick up Blazer | \$200.00 |
| | | | decreased value of Blazer for 4258 unauthorized miles | \$600.00 |
| | | | oil change on Blazer “in our shop” | \$30.00 |
| | | | cleaning and detailing on Blazer “done in our shop” | \$150.00 |
| | | | No-Receipt subtotal | \$1,040.00 |
| | | | TOTAL | \$1,767.06 |

Id. at 76-81.

The only matter argued at the sentencing hearing was whether the term of imprisonment would be served concurrently or consecutively to a sentence imposed five months earlier in Adams County. The Wells County presentence investigation report contained the following reference to the Adams County sentence:

According to the defendant’s sentencing order in Adams County, if his sentence imposed in Wells County is concurrent to his Adams County sentence, then restitution owed in Wells County shall also be made a condition of his probation in Adams County.

PSI at 8. Jackson’s attorney argued as follows:

Your Honor, we’re asking you to run it concurrent. I think if you look on page 8 of the Presentence Report, the most compelling argument that I can make is in regard to [the information quoted above]. I would note that the Adams County matter has a sentence of eight years on a fraud count with all

but four years suspended, so there is a four year jail sentence hanging over his head if he's not able to make the restitution to Mr. Captain.

Tr. at 6. Later, the sentencing court and defense counsel discussed restitution:

Court: The court will in fact then also order restitution in the amount of I usually write that on my work copy, but I did not have a work copy of this.

Defense: I saw it, it's on page 8 of 13 [of the presentence report], \$1767.00.

...

Court: And because of the incarceration we're not ordering you to reimburse the County for any attorney fees, but the restitution will remain a judgment. I have never had this before, but I think Adams County was anticipating that you would be on probation and you see that they said that any restitution ordered in this case would be a condition of their probation, so you should be aware of that. But this Court is not . . .

Defense: Just for clarity Your Honor, that said only if it ran concurrent to this, to their matter would it be a condition.

Court: Okay, alright, okay so it's not a condition. It is a judgment and the victim can pursue you, but as the prosecutor said the prosecutor believes that it would be a tactic futility and that in fact may be and that's the reason I asked if the victim was here to give an opportunity to the victim to make statements. Are there any other questions? Judgment will be accordingly.

Sentencing Transcript at 11. In its written order, the sentencing court required Jackson to pay \$1767 in restitution.

Jackson now appeals.

Discussion and Decision

I. Fundamental Error

Jackson challenges the order that he pay \$1767 in restitution. Acknowledging that he failed to object to restitution, he argues that the sentencing court committed fundamental error.

Under the doctrine of invited error, a party may not take advantage of an error that he commits, invites, or which is the natural consequence of his own neglect or misconduct. Wright v. State, 828 N.E.2d 904, 907 (Ind. 2005). As noted above, defense counsel directed the sentencing court to the page of the presentence report addressing restitution and identified the precise amount of restitution as \$1767. Having done so, Jackson cannot now complain that the restitution order constituted fundamental error.

II. Ineffective Assistance of Trial Counsel

Jackson also argues that he received ineffective assistance of trial counsel because his attorney did not object to the order that he pay \$1767 in restitution. For a claim of ineffective assistance of counsel, the defendant must prove that counsel's performance is below the objective standard of reasonableness and that there is a reasonable probability that, but for counsel's failure to meet prevailing professional norms, the result would have been different. Harris v. State, 861 N.E.2d 1182, 1186-87 (Ind. 2007) (citing Strickland v. Washington, 466 U.S. 668 (1984)). The choice of defenses is a matter of strategy. Overstreet v. State, 877 N.E.2d 144, 153-54 (Ind. 2007), reh'g denied, cert. denied, 129 S. Ct. 458 (2008).

As noted above, defense counsel's "most compelling argument" for a concurrent

sentence was that paying \$1767 in restitution was a condition of probation in the Adams County order. Tr. at 6. Jackson's trial counsel determined that consenting to restitution was the best strategy to avoid the consecutive sentencing of the Wells and Adams County sentences. Jackson has failed to demonstrate that counsel's strategic decision fell below an objective standard of reasonableness. See Overstreet, 877 N.E.2d at 154.

Conclusion

The trial court did not commit fundamental error by ordering Jackson to pay \$1767 in restitution. Jackson did not receive ineffective assistance of counsel.

Affirmed.

MAY, J., and BARNES, J., concur.