STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 23, 2000
v	No. 210120 Berrien Circuit Court
DARRELL LYNN LISTER, Defendant-Appellant.	LC No. 97-401923-FH

Before: Zahra, P.J., and Kelly and McDonald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of resisting and obstructing a police officer, contrary to MCL 750.479b; MSA 28.747, and three counts of assault and battery on three individual police officers, contrary to MCL 750.81; MSA 28.276. Defendant was acquitted of malicious destruction of police property, MCL 750.377b; MSA 28.609(2). Defendant was sentenced as a third-offense habitual offender to concurrent terms of 18 to 48 months' imprisonment on the resisting and obstructing a police officer conviction and 90 days on each assault conviction, with credit for 41 days served. Defendant was also ordered to pay $272.90 in restitution and $60 to the crime victim's rights fund. Defendant appeals as of right. We affirm.

Defendant first contends that the court erred by not granting defendant's motion for a directed verdict because police entry into defendant's home was made in violation of defendant's Fourth Amendment rights. Defendant argues that because police entered his home in violation of his Fourth Amendment rights, he had the right to use reasonable force against the illegal entry or any other illegal conduct by the police and, therefore, defendant could not legally be convicted of the crimes with which he was charged.

The right against unreasonable searches and seizures is guaranteed by both the United States and Michigan Constitutions. US Const, Am IV; Const 1963, art 1, § 11; *In re Forfeiture of $176,598*, 443 Mich 261, 264-265; 505 NW2d 210 (1993); *People v Zahn*, 234 Mich App 438; 594 NW2d 120 (1999). Under the emergency aid exception to the warrant requirement, officers may enter dwellings without warrants and without probable cause under circumstances in which they reasonably believe, based on specific, articulable facts, that some person within the dwelling is in need

of immediate aid. *People v Davis*, 442 Mich 1, 20, 25-26; 497 NW2d 910 (1993). The entry must be limited to the justification for it, and the officer may not do more than is reasonably necessary to determine whether someone is in need of assistance, and to provide the assistance. *Id*. at 26. Where entry is gained because of an emergency, the officer must be motivated primarily by the perceived need to render aid rather than to seize evidence. *City of Troy v Ohlinger*, 438 Mich 477, 483; 475 NW2d 54 (1991).

In this case, there was no warrant. Rather, a 9-1-1 call came into the Niles police department from a female stating that her stepfather was about to assault her mother. The state police picked up the call from the dispatcher and headed to the address given by the caller. While en route, the caller called back and stated that the police were no longer needed. Even though the officers were informed that the caller had called back, it is department policy to proceed to the address whenever there is a possibility of domestic violence to make sure that the caller was not forced to call back under duress, when in fact someone had been or was being injured.

When the police arrived at the residence, defendant opened the door, saw the officers in full police uniform, turned his back on them and walked inside the house. When asked who was in the house, defendant stated that he was alone. This was suspect because the caller was a female and identified herself as being the daughter of a woman who was about to be assaulted. In addition, one of the officers heard some noise coming from a back room. Therefore, it was reasonably prudent of the officers to think that, because of the 9-1-1 call and because defendant lied about being alone, there may have been an injured person somewhere in the house. Therefore, the warrantless entry into the dwelling was valid under the emergency aid exception and defendant's resistance of the police officers was without justification.

Next, defendant argues that his sentence should be vacated because the prosecutor failed to adequately and promptly charge defendant as an habitual offender under MCL 769.13; MSA 28.1085, which provides:

> (1) In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under section 10, 11, or 12 of this chapter, by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense.
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> (2) A notice of intent to seek an enhanced sentence filed under subsection (1) shall list the prior conviction or convictions that will or may be relied upon for purposes of sentence enhancement. The notice shall be filed with the court and served upon the defendant or his or her attorney within the time provided in subsection (1). The notice may be personally served upon the defendant or his or her attorney at the arraignment on the information charging the underlying offense, or may be served in the manner provided by law or court rule for service of written pleading. The prosecuting attorney shall file a written proof of service with the clerk of the court.

On April 2, 1997, the prosecutor filed the information which listed on page 1, five offenses followed by "+supp." Page 1 also contained the details of counts 1, 2, and 3 and stated "continued on page 2" at the bottom of the page. Page 2 provided the details of counts 4 and 5, gave a "third offense notice," listed two prior convictions with specificity, and provided that defendant was subject to the penalties of MCL 769.11; MSA 28.1083, which raised the maximum sentence to eight years.

On the day of trial, there was a substitution of defense counsel,[1] who informed the court that the previous attorney had never been served with page 2 of the information. The prosecutor then provided to defense counsel an unsigned copy of page 2 of the information. The trial court checked the court file and found that page 2 of the information was also missing from the court file. The prosecution also provided a copy of page 2 to the court.[2]

Before sentencing, defendant filed a motion contesting his sentencing as an habitual offender because the prosecution had failed to comply with the statutorily mandated timing requirements for filing the information. At the motion hearing, the court held that the "+Supp" on page 1 of the information and the reference in the "Proof of Service that a copy of the information containing supplemental charges was served upon defendant's attorney" provided sufficient notice to defendant, particularly where it should have been evident to counsel that page 2 was missing.

There was no factual dispute that the filing of page 1 of the information itself was timely and that the notation "+Supp" on page 1 of the information put defendant on notice that the prosecutor filed habitual offender charges. Also, the possibility of dropping the habitual charge was discussed during plea negotiations, so defendant was in fact aware that he was being charged as an habitual offender. Defendant had actual notice of the habitual offender charge. We find defendant's argument to be without merit because "defendant was properly put on notice of the possibility of habitual offender supplementation from the outset of the case." *People v Hart*, 129 Mich App 669, 672-673; 341 NW2d 864 (1983).

Finally, defendant argues that under the plain meaning of the statutes and under case law, restitution is not authorized for charged conduct that ultimately led to an acquittal. Specifically, defendant argues that he could not be ordered to pay restitution because he was acquitted on the malicious destruction of police property charge. In this case defendant was charged with malicious destruction of police property but was acquitted. The claimed destruction was that defendant vomited and spit mucus and blood in the car, which resulted in a cleaning cost of $272.90. At sentencing, the court ordered defendant to pay restitution in that amount and also to pay $60 to the Crime Victim's Rights Fund. At sentencing the court stated:

> Although you were not convicted of the malicious destruction of the police property, it was your assaultive behavior towards the police in spitting on the officers that caused them to react and thereby caused all of these other problems.

MCL 780.766(2); MSA 28.1287(766)(2) provides:

> (2) Except as provided in subsection (8), when sentencing a defendant convicted of a crime, the court shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate.

Under subsection (2) above, the term "victim" includes a government entity that suffers direct physical or financial harm as a result of a felony or misdemeanor. MCL 780.766(1); MSA 28.1287(766)(1). Under the plain language of the Crime Victim's Rights Act, MCL 780.766(2); MSA 28.1287(766)(2), the sentencing court may order a criminal defendant to pay restitution to any and all victims even if the factual predicate for the conviction was not those specific losses. *People v Gahan*, 456 Mich 264, 270-271; 571 NW2d 503 (1997). The term "course of conduct" is to be given a broad construction and criminal defendants may be ordered to pay restitution that exceeds the losses attributable to the specific charges that resulted in the defendant's conviction. *Id.* at 271.

In this case, the cleaning charges were a result of defendant's assaultive behavior upon the police officers. He struggled with them, he spit in their faces and because of his conduct he was sprayed with pepper spray which ultimately caused him to spit up blood and mucus. Although defendant was acquitted on the charge of malicious destruction of police property, "defendant should compensate for all the losses attributable to the illegal scheme that culminated in his conviction, even though some of the losses were not the factual foundation of the charge that resulted in conviction." *Id.* at 272. Therefore, we find that the trial court did not err when it ordered defendant to pay restitution.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Kelly
/s/ Gary R. McDonald

[1] Attorney Mark Herman substituted in for Attorney Jeffrey Slocombe on the day of trial. The court and prosecutor knew several weeks prior to trial that Mr. Herman would be trying the case. Mr. Slocombe was handling the pretrial appearances for Mr. Herman due to scheduling conflicts.

[2] This Court's review of the lower court file reveals that an unsigned and undated copy of page 2 of the information is contained in the file. However, because the trial judge stated on the record that page 2 was missing from the court file, this Court will assume that the copy that is currently in the file was filed and made part of the record on the first day of trial when the prosecution provided a copy to the court.