

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA11-360
NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 2011

STATE OF NORTH CAROLINA

v.

Johnston County
No. 09 CRS 55100

EDWARD CLYNER ICENHOUR

Appeal by defendant from judgment entered 5 August 2010 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 17 October 2011.

Attorney General Roy Cooper by Assistant Attorney General Karissa J. Davan, for the State.

Paul Mediratta for defendant-appellant.

McCULLOUGH, Judge.

On 7 June 2010, a grand jury indicted defendant for possession with intent to sell and deliver a Schedule VI controlled substance, obtaining property by false pretense, and extortion. On 5 August 2010, pursuant to a plea agreement, defendant pled guilty to obtaining property by false pretense. The trial court sentenced defendant to a term of six to eight months' imprisonment. The sentence was suspended and defendant

was placed on supervised probation for 60 months. Additionally, the trial court ordered defendant to pay a fine in the amount of \$100.00 and to pay restitution in the amount of \$30,000.00. Defendant filed notice of appeal on 13 August 2010.

On appeal, defendant argues (1) the trial court erred in awarding restitution without sufficient evidence that defendant had received any funds from the alleged victim, and (2) the trial court erred in awarding restitution in the amount of \$30,000.00 when defendant's income and assets did not support the award.

In determining the amount of restitution to be made, the court shall take into consideration the resources of the defendant including all real and personal property owned by the defendant and the income derived from the property, the defendant's ability to earn, the defendant's obligation to support dependents, and any other matters that pertain to the defendant's ability to make restitution, but the court is not required to make findings of fact or conclusions of law on these matters. The amount of restitution must be limited to that supported by the record, and the court may order partial restitution when it appears that the damage or loss caused by the offense is greater than that which the defendant is able to pay. If the court orders partial restitution, the court shall state on the record the reasons for such an order.

N.C. Gen. Stat. § 15A-1340.36(a) (2009). "[T]he amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing." *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995). "If there is 'some evidence as to the appropriate amount of restitution, the recommendation will not be overruled on appeal.'" *State v. Freeman*, 164 N.C. App. 673, 677, 596 S.E.2d 319, 322 (2004) (quoting *State v. Hunt*, 80 N.C. App. 190, 195, 341 S.E.2d 350, 354 (1986)).

In this case, defendant pled guilty to the charge of obtaining property by false pretense. The issue before the trial court for determination was the amount of restitution. The State sought restitution in the amount of \$178,165.00. The State offered evidence in the form of the victim's sworn testimony, bank statements, and the victim's handwritten notes documenting the amounts of money given to defendant. The victim testified that at some point in 2008, he asked defendant to purchase marijuana for him. Thereafter, defendant claimed he was stopped by law enforcement and had to go to court. Defendant claimed that every time he went to court and refused to give the victim's name he was fined for withholding evidence from the court. The victim started giving defendant money to

keep him from getting in trouble. The victim testified that "[i]t started out small amounts, three or \$400, and just kept going up from there." Accordingly, we conclude there was sufficient evidence that defendant received funds from the victim.

After hearing all the evidence, the trial court ordered partial restitution in the amount of \$30,000.00. The trial court found:

The court conducted a hearing pursuant to GS 15A-1340.36(a) and considered the resources of the defendant including all real and personal property owned by the defendant, his ability to earn money and to make restitution, and the fact that his sole income is a disability check of approximately \$850/month. The court moreover finds that the damages caused by this offense are greater than the defendant is able to pay.

It is clear from the transcript and the trial court's findings that the trial court considered the factors enumerated in N.C. Gen. Stat. § 15A-1340.36(a). Moreover, we conclude there is some evidence regarding an appropriate amount of restitution as the State presented the sworn testimony of the victim and bank statements. Accordingly, the order of restitution is affirmed.

Affirmed.

Judges McGEE and ELMORE concur.

Report per Rule 30(e).