[Cite as *State v. Smith*, 2021-Ohio-2486.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

DAVID W. SMITH,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 20 BE 0022

Criminal Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 20 CR 42

BEFORE:
Cheryl L. Waite, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed in part.
Reversed and Remanded in part.

Atty. Robert F. Smith, Special Prosecuting Attorney, Office of the Auditor of State, 88 East Broad Street, Tenth Floor, Columbus, Ohio 43215, for Plaintiff-Appellee

Atty. Grace L. Hoffman, 151 W. Main Street, St. Clairsville, Ohio 43950, for Defendant-Appellant.

Dated: July 6, 2021

WAITE, J.

{¶1} Appellant David W. Smith appeals two Belmont County Court of Common Pleas judgment entries dated August 13, 2020 and September 25, 2020. Appellant argues the trial court improperly imposed a maximum prison term where the R.C. 2929.12 factors supported imposition of only a community control sanction. Appellant also argues that the record in this matter does not support the amount of restitution imposed. For the reasons provided, Appellant's arguments pertaining to his prison sentence are without merit and this portion of his sentence is affirmed. However, his arguments as to restitution have merit in part. As such, the matter is remanded for an evidentiary hearing to determine the amount of restitution owed by Appellant.

Factual and Procedural History

{¶2} On February 6, 2020, Appellant was indicted on one count of tampering with records, a felony of the third degree in violation of R.C. 2913.42(A)(1), (2); theft in office, a felony of the third degree in violation of R.C. 2921.41(A)(1), (2); and two counts of conflict in interest, misdemeanors of the first degree in violation of R.C. 102.03(D), (E).

{¶3} The facts of this case are limited due to the fact that Appellant entered into a plea agreement. However, we can determine that Appellant served as the elected mayor of the Village of Bridgeport, Belmont County. While serving as mayor, he instructed his secretary to deposit sums of money obtained from mayor's court into his personal bank account. Those deposits totaled $880. Appellant fired his secretary around the time she alerted authorities as to these deposits. After an investigation, the

auditor's office discovered that a total of $24,467 was missing from the mayor's court account. It appears this account held funds received from fines paid by citizens who appeared in mayor's court.

{¶4} On July 8, 2020, Appellant pleaded guilty to one count of theft in office and one count of conflict of interest. The remaining two counts of the indictment were dismissed. The state agreed to remain silent at sentencing and the parties agreed restitution would be addressed at the sentencing hearing.

{¶5} On August 13, 2020, the trial court sentenced Appellant to the maximum sentence of thirty-six months of incarceration for theft in office and six months for conflict of interest. The court ordered the sentences to run concurrently. As part of his sentence, Appellant is barred from holding public office in a position of trust. At the sentencing hearing, the parties agreed to postpone the issue of restitution to a later hearing.

{¶6} On September 12, 2020, the restitution hearing was held. The sole witness to testify was Melissa Barnett, a forensic audit manager for the State of Ohio Auditor's Office. Although Barnett testified that she had definitive evidence that Appellant took $880 of the missing funds, she stated that a total of $24,467 was missing from the account and it appears the money could not be removed by anyone other than Appellant, based on access to the account. (9/12/20 Restitution Hrg., p. 21.) The trial court ordered Appellant to pay restitution in the amount of $26,927, which included the amount of money missing from the account ($24,467) and the cost of the audit ($2,467). It is from these judgment entries that Appellant timely appeals.

ASSIGNMENT OF ERROR NO. 1

> The trial court erred in sentencing the defendant-appellant, David W. Smith, to a maximum prison term of thirty-six (36) months following his conviction for the offense of "theft in office," a felony of the third degree.

{¶7} Appellant asserts that a prison term was not mandatory in this case. Thus, he argues that the R.C. 2929.12 factors were critical to the determination of his sentence. He contends that these factors weighed in favor of a community control sanction as opposed to a prison term. He also argues that a prison term impedes his ability to pay restitution whereas, if he served a community control sanction, he could immediately begin to make restitution payments.

{¶8} In response, the state cites to *State v. Lee,* 7th Dist. Belmont No. 19 BE 0018, 2020-Ohio-3580 and *State v. McIver,* 4th Dist. Franklin No. 04CA594, 2005-Ohio-1296. The state argues that the *Lee* Court similarly reviewed a maximum sentence imposed after the appellant was convicted of similar offenses and affirmed the sentence. The state argues the *McIver* court acknowledged that the defendant's status as an elected official can make an offense more egregious.

{¶9} In *Lee,* the appellant pleaded guilty to several offenses stemming from conduct committed while she served in public office. In affirming the sentence, the court relied on the fact that the public suffered economic harm as a result of her actions as well as the fact that she was entrusted to serve the public and instead used her office to facilitate the crimes. *Id.* at ¶ 20, 23.

{¶10} In *McIver,* the appellant was also convicted of theft while in public office, although she was not an elected official. When reviewing her sentence, the *Mciver* court noted the financial impact that the offenses would have on the public. *Id.* at ¶ 13.

Although the appellant had not been elected, the court noted that she held a position of trust.

{¶11} It appears that Appellant challenges his sentence solely as it pertains to his felony theft in office conviction. He does not dispute his sentence for conflict of interest, which is a misdemeanor. An appellate court is permitted to review a felony sentence to determine if it is contrary to law. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1.

{¶12} The Ohio Supreme Court recently held "[n]othing in R.C. 2953.08(G)(2) permits an appellate court to independently weigh the evidence in the record and substitute its judgment for that of the trial court concerning the sentence that best reflects compliance with R.C. 2929.11 and 2929.12." *State v. Jones*, -- Ohio St.3d --, 2020-Ohio-6729, -- N.E.3d --, ¶ 42.

{¶13} Although Appellant's sentence represents the maximum, it falls within the statutory guidelines. Pursuant to *Jones,* we may not review the manner in which the trial court weighed the R.C. 2929.12 factors. Instead, we look to see whether the trial court properly considered the statute. We note that Appellant's brief preceded the *Jones* decision.

{¶14} The trial court provided an in-depth analysis of the R.C. 2929.12 factors within its judgment entry. In the entry and at the sentencing hearing, the court emphasized that Appellant committed the offense while serving as an elected official and used the office to steal public money. The court recognized the effect Appellant's actions had on his secretary, fired by Appellant. As a whistleblower, she suffered mental harm and was ostracized, in addition to the fact that she lost her job and her benefits. The court

also noted that the conduct occurred over a period of four years and that Appellant has only now shown remorse. The court acknowledged Appellant's former military service and that he had no prior criminal record.

{¶15} Based on this record, the trial court conducted a thorough analysis of the relevant sentencing factors. Again, we are not permitted to independently weigh these factors and substitute our judgment for that of the trial court. This record is devoid of any evidence to show that Appellant's sentence is contrary to law. Accordingly, Appellant's first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

> The trial court erred in calculating the amount of restitution owed by the defendant-appellant, David W. Smith which was in the amount of $24,467.00

{¶16} Appellant asserts that restitution cannot exceed the amount of economic loss suffered by the victim. Thus, it was error for the court to impose restitution in the amount of $26,927 where the state's auditor admitted that there was only direct evidence to prove Appellant stole $880 from the Village. Appellant additionally argued that the trial court ignored testimony that he deposited $14,000 of his personal funds into the account in November of 2019.

{¶17} The state responds by arguing that Appellant pleaded guilty to a theft offense of the third degree, an element of which requires the amount of the theft to be at least $7,500. In addition, the state argues that the record shows $24,467 was missing from the Village's account and there is no evidence that anyone other than Appellant had

access to this account. The state also points to evidence that Appellant made several unexplained, large cash deposits into his personal bank account during the relevant time period. Although those amounts do not total $24,467, the state explains that Appellant may have spent some of the money, instead of depositing all of the cash.

{¶18} Pursuant to R.C. 2929.18(A):

> Except as otherwise provided in this division and in addition to imposing court costs pursuant to section 2947.23 of the Revised Code, the court imposing a sentence upon an offender for a felony may sentence the offender to any financial sanction or combination of financial sanctions authorized under this section or, in the circumstances specified in section 2929.32 of the Revised Code, may impose upon the offender a fine in accordance with that section. Financial sanctions that may be imposed pursuant to this section include, but are not limited to, the following:
>
> (1) Restitution by the offender to the victim of the offender's crime or any survivor of the victim, in an amount based on the victim's economic loss. * * * If the court imposes restitution, at sentencing, the court shall determine the amount of restitution to be made by the offender. If the court imposes restitution, the court may base the amount of restitution it orders on an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss

suffered by the victim as a direct and proximate result of the commission of the offense.

{¶19} R.C. 2929.01(L) defines economic loss as "any economic detriment suffered by a victim as a direct and proximate result of the commission of an offense and * * * and the cost of any accounting or auditing done to determine the extent of loss if the cost is incurred and payable by the victim."

{¶20} "A trial court has discretion to order restitution in an appropriate case * * * but the amount ordered cannot be greater than the amount of economic loss suffered as a direct and proximate result of the commission of the offense." *State v. Lalain*, 136 Ohio St.3d 248, 2013-Ohio-3093, 994 N.E.2d 423, syllabus. "[I]t is the victim's, or the survivor's, burden to prove at the evidentiary hearing the economic loss they have suffered by a preponderance of the evidence." *State v. Simmons*, 2017-Ohio-1348, 88 N.E.3d 651, ¶ 56 (10th Dist.), citing R.C. 2929.28.

{¶21} An appellate court reviews a trial court's restitution order for an abuse of discretion. *Simmons*, *supra*, ¶ 45, citing *State v. Jones*, 10th Dist. Franklin No. 14AP-80, 2014-Ohio-3740, ¶ 22; *State v. Norman*, 2013-Ohio-1908, 992 N.E.2d 432, ¶ 67 (10th Dist.). "A trial court abuses its discretion when it orders restitution in an amount that has not been determined to bear a reasonable relationship to the actual loss suffered as a result of the defendant's offense." *Simmons* at ¶ 45, citing *Jones, supra*; *State v. Aliane*, 10th Dist. Franklin No. 03AP-840, 2004-Ohio-3730, ¶ 15; *State v. Moore-Bennett*, 8th Dist. Cuyahoga No. 95450, 2011-Ohio-1937, ¶ 18.

{¶22} Melissa Barnett, forensic auditor for the State of Ohio Auditor's Office, testified that she conducted an audit in this matter. She explained that the Village's

account contained deposits from money collected from mayor's court, which typically involves traffic citations and other local rule violations. (9/12/20 Restitution Hrg., p. 8.) As part of her investigation, she interviewed the court's clerk who provided information regarding the fees collected, receipts for money collected, and deposits made into the account. From January 2, 2016 through September 25, 2019, bank records demonstrate that $24,467 went missing from the mayor's court account. (9/12/20 Restitution Hrg., p. 10.) She testified that she could definitively prove that Appellant deposited $880 of the money he obtained from mayor's court into his personal account. She testified that she obtained this figure from text messages from Appellant directing his secretary to deposit the mayor court's money into his personal account. As to the remaining money, the following exchange occurred:

> [Defense Counsel]: The way I read this, that $880 is the only amount of money that you can definitively say was in the possession of the Village of Bridgeport and then ended up in [Appellant's] account, right?
>
> [Barnett]: Okay. Yes.
>
> * * *
>
> [Defense Counsel]: So the way I read it, then, $23,587 is purely speculative and you can't prove that it went from the Village of Bridgeport to [Appellant], right?
>
> [Barnett]: Yes, I guess.

(9/12/20 Restitution Hrg., p. 21.)

{¶23} Barnett also testified that Appellant deposited a total of $16,922 in cash into his personal account during the relevant time period. While she conceded that there is no direct proof that these cash deposits were obtained from mayor's court, she testified that this conclusion was reached due to the large amounts deposited. (9/12/20 Restitution Hrg., p. 18.)

{¶24} We note that R.C. 2921.41(B) provides that if the property is valued between $7,500 and $150,000, the theft constitutes a felony of the third degree. As such, the amount of restitution ordered by the court falls within the statutory guidelines for this felony. As noted by the state, Appellant pleaded guilty to a felony of the third degree. Thus, his plea amounts to an admission that he stole at least $7,500. However, the trial court ordered restitution in the amount of $24,467, plus the cost of completing the audit.

{¶25} Barnett testified that she could directly prove that Appellant stole $880. On cross-examination, she agreed that the remaining $16,967 was "purely speculative." We must note that this witness is a layperson, and may not entirely understand what "speculative" means in terms of an evidentiary hearing. She went on to testify that although she could not definitely state where the cash Appellant deposited into his personal bank account came from as there is no paper trail, she testified that Appellant made cash deposits into his personal account amounting to $16,922, not including the undisputed $880. Again, the amount of money missing from the mayor's court account is $24,467. Although the amounts are not identical, there is not a great deal of difference between the missing mayor's court money and the cash deposits into Appellant's account, and some of the missing money may have been spent instead of deposited.

{¶26} From Barnett's testimony, it is clear that she relied on the fact that the cash deposited into Appellant's personal account is very close to the amount missing from the mayor's court account. Considering the high amount of these deposits and the fact that they were cash deposits, and that Appellant had easy access to the mayor's court account, it is reasonable to assume that Appellant's deposits were taken from the mayor's court account. Importantly, there is no evidence to show that anyone other than Appellant had access to this account, other than his whistleblower secretary, or that anyone else had ever taken money from the account. While Barnett testified that she could definitively prove that Appellant took only $880 with direct evidence, it is clear from her testimony that she relied on a plethora of circumstantial evidence in reaching her conclusion.

{¶27} In summation, the state presented evidence that a total of $24,467 was missing from the Village's bank account. Appellant admitted to stealing at least $7,500 of that amount by pleading guilty. The record does not contain evidence that any other person had access to or had an opportunity to take the remaining money. In addition, the amount of cash Appellant deposited into his personal bank account is close to the amount that remains missing from the mayor's court account. This record reflects that the state presented sufficient evidence to demonstrate that Appellant stole the entire amount. We note that the total restitution amount of $26,927 includes the $2,467 cost of completing the audit, which is authorized by R.C. 2921.41(A).

{¶28} The remaining question is the possible repayment or restitution of some of the missing money. Barnett acknowledged that Appellant deposited checks from his personal account and some of his payroll checks into the mayor's account. (9/12/20 Restitution Hrg., pp. 9-10.) The record suggests that Appellant deposited $1,800 into the

Village's account. On appeal, he argues that he deposited an additional $14,000 into the account. It is unclear from the record on what basis Appellant claims the $14,000 deposit.

{¶29} When asked about Appellant's payments into the mayor's court account, Barnett stated that she did not know the purpose of the payments and did not want to assume it was a partial repayment. She did not offer any alternative purpose for the deposit of Appellant's personal funds into the mayor's court account. Appellant did not testify at the hearing.

{¶30} Because there is no other plausible reason for these deposits, we can only come to the conclusion that they were partial repayments. As provided by R.C. 2929.18(A), "restitution shall not exceed the amount of the economic loss suffered by the victim." Because some of the missing money was replaced, it must be considered as repayment and be deducted from the restitution award. As the record is unclear as to the amount of the repayments, we remand this matter for a limited hearing to determine the amount of the partial repayments which must then be deducted from the restitution amount.

{¶31} Appellant does not appear to dispute that he is responsible for the costs of the audit. Regardless, R.C. 2921.41(A) provides that "the court may order restitution for any amount of the victim's costs of accounting or auditing provided that the amount of restitution is reasonable and does not exceed the value of property or services stolen or damaged as a result of the offense." Thus, the court did not err in adding the cost of the audit in the amount of $2,460 to Appellant's restitution order.

{¶32} Accordingly, Appellant's second assignment of error has partial merit and is sustained.

Conclusion

{¶33} Appellant argues the trial court improperly sentenced him to the maximum prison term where the R.C. 2929.12 factors supported a community control sanction. Appellant also argues that the record did not support the amount of restitution imposed. Appellant's arguments as to his prison sentence are without merit and the judgment of the trial court is affirmed in this aspect. However, Appellant's arguments on restitution have merit in part. As such, we remand the matter for a limited hearing to determine the correct amount of restitution.

Donofrio, P.J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, Appellant's first assignment of error pertaining to his sentence is overruled and his second assignment pertaining to his restitution is sustained. It is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is affirmed in part and reversed in part. We hereby remand this matter to the trial court for an evidentiary hearing to determine Appellant's restitution amount according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellee.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.