[Cite as *State v. Rosebrook*, 2006-Ohio-734.]

COURT OF APPEALS
THIRD APPELLATE DISTRICT
LOGAN COUNTY

STATE OF OHIO

PLAINTIFF-APPELLEE **CASE NO. 8-05-07**

v.

JOSEPH ROSEBROOK **O P I N I O N**

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.

JUDGMENT: Judgment Affirmed.

DATE OF JUDGMENT ENTRY: February 21, 2006

ATTORNEYS:

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CUPP, J.

{¶1} Defendant-appellant, Joseph Rosebrook (hereinafter "Rosebrook"), appeals the judgment of the Logan County Court of Common Pleas, which sentenced him following convictions for one count of conspiracy to commit aggravated murder, four counts of receiving stolen property, one count of obstructing justice, and three counts of tampering with a vehicle identification number.

{¶2} In July of 2004, a grand jury indicted Rosebrook for one count of engaging in a pattern of corrupt activity in violation of R.C. 2923.32, a felony of the first degree; one count of conspiracy to commit aggravated murder in violation of R.C. 2903.01 and 2923.01, a felony of the first degree; thirteen counts of receiving stolen property in violation of R.C. 2913.51(A), felonies of the fourth and fifth degree; two counts of theft in violation of R.C. 2913.02(A)(1), felonies of the third degree; one count of obstruction of justice in violation of R.C. 2921.32, a felony of the fifth degree; six counts of tampering with a vehicle identification number in violation of R.C. 4549.62(A), felonies of the fifth degree; and one count of possession of criminal tools in violation of R.C. 2923.24, a felony of the fifth degree. Additionally, the indictment included two forfeiture specifications.

{¶3} The July 2004 indictment also included the specific property involved in the receiving stolen property and tampering with a vehicle

identification number offenses. The receiving stolen property offenses involved the following: a 1970 Nova, a 1957 Chevy, a 1957 Chevy transmission, a Melrose Bobcat loader, a New Holland skid loader, a green Ford 350, a G Tractor, antique furniture and goods, a 2003 F-250 Lariat diesel pick-up truck, a 1999 Dodge 3500, and a 1995 Dodge Ram Club Cab Laramie XLT. The theft offenses involved victims over the age of sixty-five and amounts between $5,000 and $100,000. Finally, the tampering with a vehicle identification number offenses involved a Harley Davidson motorcycle, a Ford Truck 250, the Melrose Bobcat loader, the New Holland skid loader, and the G Tractor.

{¶4} In April of 2005, the July 2004 indictment was amended, and Rosebrook entered guilty pleas to nine counts in the amended indictment. Rosebrook pled guilty to conspiracy to commit aggravated murder in violation of R.C. 2923.01, a felony of the first degree; receiving stolen property, which involved the 1970 Nova, in violation of R.C. 2913.51(A), a felony of the fourth degree; receiving stolen property, which involved the 1957 Chevy, in violation of R.C. 2913.51(A), a felony of the fourth degree; receiving stolen property, which included the green Ford 350, in violation of R.C. 2913.51(A), a felony of the fourth degree; receiving stolen property, which involved the 2003 Ford F-250 Lariat diesel pick-up truck, in violation of R.C. 2913.51(A), a felony of the fourth degree; obstructing justice in violation of R.C. 2921.32(A)(4), a felony of the fifth

degree; tampering with a vehicle identification number, which involved the Ford Truck 250, in violation of R.C. 4549.62(A), a felony of the fifth degree; tampering with a vehicle identification number, which involved the New Holland skid loader, in violation of R.C. 4549.62(A), a felony of the fifth degree; and tampering with a vehicle identification number, which involved the G Tractor, in violation of R.C. 4549.62(A), a felony of the fifth degree. Additionally, Rosebrook consented to one of the forfeiture specifications.

{¶5} In exchange for Rosebrook's guilty pleas, the State dismissed the remaining sixteen counts in the original indictment as well as the second forfeiture specification. Additionally, Rosebrook entered into a written plea agreement prior to entering his guilty pleas. The plea agreement contained the following provision:

> **I understand and agree that I am responsible for and will be ordered to pay for my fair share of restitution as determined by the Court in connection with the Count/s [sic] that are being dismissed as a result of any underlying agreement.**

{¶6} The trial court held a sentencing hearing after Rosebrook pled guilty. At the hearing, the trial court noted it did not believe that it could order restitution on the counts to which Rosebrook did not plead guilty. However, both the State and defense counsel brought to the trial court's attention the clause in the plea agreement, which stated that Rosebrook would be responsible for restitution for all counts, including those which were dismissed.

{¶7} The trial court subsequently allowed the State to make its arguments for restitution as to all counts. The State then began with one of the counts of tampering with a vehicle identification number. At that point, Rosebrook's defense counsel stated:

> **The plea agreement says—did say he would be responsible for restitution. We understood that would be as to what he plead guilty, tampering with VIN number and damages as a result of that, he should pay them. The defendant pled to the receiving stolen property and we had no numbers. We agree, Your Honor, as a part of that plea agreement that restitution—there has to be a nexus between the plea and the actual damage. I take it there is damage as a result of the altering a VIN number. How much damage, is it 50 or 100 dollars, we don't know, to replace the proper VIN plate, I guess. I don't know.**

{¶8} In response, the State and the trial court directed defense counsel's attention to the language contained in the plea agreement. Defense counsel acknowledged the agreement as to restitution and allowed the State to continue without further objection. Following the State's argument on restitution as well as the sentence to be imposed, Rosebrook apologized to the victims and stated that he wished to take responsibility for what he had done.

{¶9} The trial court then sentenced Rosebrook and ordered the restitution requested by the State. Thereafter, the trial court journalized Rosebrook's sentence and ordered that restitution totaling $87,882.13 be paid among eleven victims.

{¶10} It is from this decision that Rosebrook appeals and sets forth two assignments of error for our review. For purposes of clarity, we consider Rosebrook's assignments of error out of order.

ASSIGNMENT OF ERROR NO. 2

> **The trial court erred in failing to conduct a hearing on restitution pursuant to Section 2929.18(A)(1) of the Revised Code, when the Defendant disputed the amount sought by the State.**

{¶11} In his second assignment of error, Rosebrook asserts that the trial court erred in failing to conduct a hearing on the issue of restitution. For the reasons that follow, we find Rosebrook's assertion unavailing.

{¶12} R.C. 2929.18(A) permits a trial court that is imposing a sentence for a felony conviction to sentence the offender to any financial sanction or combination of financial sanctions authorized by law. However, R.C. 2929.18(A)(1) expressly provides that a trial court "shall hold a hearing on restitution if the *offender*, victim, or survivor *disputes the amount*." (Emphasis added.)

{¶13} Rosebrook argues that his defense counsel raised an objection to the amount of the restitution requested by the State. As noted above, Rosebrook's defense counsel stated:

> **The plea agreement says—did say he would be responsible for restitution. We understood that would be as to what he plead guilty, tampering with VIN number and damages as a result of**

> **that, he should pay them. The defendant pled to the receiving stolen property and we had no numbers. We agree, Your Honor, as a part of that plea agreement that restitution—there has to be a nexus between the plea and the actual damage. I take it there is damage as a result of the altering a VIN number. How much damage, is it 50 or 100 dollars, we don't know, to replace the proper VIN plate, I guess. I don't know.**

Following this comment, the State and the trial court directed defense counsel's attention to the restitution agreement contained in the plea agreement. At that point, Rosebrook's defense counsel acknowledged the agreement as to restitution and remained silent for the remainder of the hearing.

{¶14} We cannot find that Rosebrook's defense counsel's initial comment, which questioned the amount of restitution on one of nine counts without disputing any of the remaining counts, rose to the level necessary to trigger a hearing under R.C. 2929.18(A)(1). Although Rosebrook's defense counsel disputed this one amount, he subsequently acknowledged the plea agreement and remained silent. Moreover, Rosebrook himself did not dispute any of the restitution amounts argued by the State.

{¶15} We must, therefore, conclude that Rosebrook waived his right to a hearing on the amount of restitution. Accordingly, Rosebrook's second assignment of error is overruled.

ASSIGNMENT OF ERROR NO. 1

> **The trial court erred in ordering the Defendant to pay restitution relating to dismissed charges.**

{¶16} In his first assignment of error, Rosebrook argues that the trial court erred in ordering him to pay restitution on counts that were dismissed following his change of plea. For the reasons that follow, we find Rosebrook's argument lacks merit.

{¶17} We note initially, based on our analysis above, that Rosebrook failed to object to the restitution amount at the sentencing hearing and failed to request an evidentiary hearing. Therefore, Rosebrook's failure to object waives his right to raise this issue on appeal absent plain error. Crim.R. 52(B).

{¶18} We recognize plain error " 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus. Consequently, plain error exists only where there is a deviation from a legal rule, the error constitutes an "obvious" defect in the trial proceeding, and the error affected a defendant's "substantial rights." *Barnes*, 94 Ohio St.3d at 27.

{¶19} The trial court imposed the restitution order at issue as part of the sentence pursuant to R.C. 2929.18(A)(1), which reads in pertinent part:

> **Financial sanctions that may be imposed * * * *include, but are not limited to* * * *:**

> **(1) Restitution by the offender to the victim of the offender's crime * * * in an amount based on the victim's economic loss.** (Emphasis added.)

{¶20} In the case sub judice, Rosebrook agreed to plead guilty to some charges contained in the indictment in exchange for the dismissal of other charges for which he was indicted. More particularly, as part of the consideration for the plea agreement, Rosebrook also agreed to provide restitution to the victims of his conduct for which the resulting criminal charges were dropped under the plea agreement. There is no legal barrier in statute or case law preventing a defendant from negotiating this result, if it is voluntarily entered into, nor prohibiting a court from ordering such agreed upon restitution.

{¶21} The financial sanction statute, R.C. 2929.18(A)(1), explicitly states that the sentencing court is "not limited to" the listed financial sanctions. Therefore, the statute does not exclude an order of restitution which may not in all respects fit the specific language of (A)(1).

{¶22} Prior case law does not limit restitution to the offense for which a defendant has been charged and convicted.[1] Specifically, the facts in the cases of *State v. Williams*, 3d Dist. No. 8-03-25, 2004-Ohio-2801; *State v. Hafer* (2001), 144 Ohio App.3d 345, 760 N.E.2d 56; and *State v. Ellis*, 4th Dist. No. 02CA48, 2003-

[1] In fact, this court recently noted in dicta that a trial court may order a defendant to pay restitution on counts for which the defendant had not been convicted when the defendant agreed to plead guilty to one charge and pay restitution for all charges in exchange for the dismissal of another. *State v. Weatherholtz*, 3d Dist. No. 2-04-47, 2005-Ohio-5269, at ¶6.

Ohio-2243, are all distinguishable. In *Williams*, the defendant was acquitted by the jury of the forgery charge for which the trial court improperly imposed restitution anyway. In both *Hafer* and *Ellis*, it was held that the trial courts improperly imposed restitution for crimes which were dismissed as part of the plea agreements. However, in those cases the defendants did not agree to provide restitution. The plea agreements were silent about restitution, and thus did not include it.

{¶23} The present case presents a far different situation. A plea agreement in which some charges are dropped in exchange for a guilty plea to other charges, does not, of course, equate to an acquittal. And, the plea agreement at issue in the present case expressly includes an agreement by the defendant to pay restitution for the loss he caused to the victims even though the criminal charges arising from his conduct in those situations were dismissed as part of the overall case settlement. Rosebrook could reasonably have concluded that a restitution order was preferable to conviction, or the possibility of conviction, on the charges dropped by virtue of the plea agreement. Nothing in the law prevents him from making that choice.

{¶24} For the foregoing reasons, we find the trial court did not err in ordering Rosebrook to pay restitution on counts that were dismissed following Rosebrook's change of plea. Accordingly, Rosebrook's first assignment of error is overruled.

{¶25} Having found no error prejudicial to the appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed.

BRYANT, P.J., concurs.
ROGERS, J., dissents in part and concurs in part.

{¶26} **ROGERS, J. dissent in part, concur in part.** While I concur with the position of the majority as to the second assignment of error, I would sustain Rosebrook's first assignment of error. Accordingly, I must respectfully dissent from the majority's opinion on that assignment of error.

{¶27} Many courts of this State, including this Court, have recognized that restitution must be limited to the offenses for which a defendant is charged and convicted. *State v. Williams*, 3d Dist. No. 8-03-25, 2004-Ohio-2801, ¶ 23; *State v. Hafer* (2001), 144 Ohio App.3d 345, 348; *State v. Hooks* (2000), 135 Ohio App.3d 746, 749; *State v. Brumback* (1996), 109 Ohio App. 3d 65; *State v. Friend* (1990), 68 Ohio App. 3d 241.

{¶28} A trial court must limit its award of restitution to the actual economic loss caused by the crime for which the offender was convicted. *Williams*, 2004-Ohio-2801, at ¶23, citing *Hafer*, 144 Ohio App.3d at 348. "[A]s a matter of law, an offender cannot be ordered to pay restitution for damages arising from a crime of which he was not convicted." *Williams*, 2004-Ohio-2801, at ¶23.

{¶29} The majority tries to distinguish these cases. Specifically, the majority claims that in *Williams,* the defendant was acquitted of charges for which the trial court erroneously imposed restitution, and in *Ellis* and *Hafer* the defendant never agreed to provide restitution for dismissed counts, as in this case. However, the plain language of the *Williams* case states that "*as a matter of law*" restitution can never arise from a crime that a defendant has not been convicted. 2004-Ohio-2801, at ¶23 (emphasis added). I simply cannot read this sentence to mean anything other than that a defendant can never under any circumstances be ordered to pay restitution for charges for which he or she has been acquitted or for charges which have been dismissed, regardless of what negotiations might have occurred.

{¶30} Additionally, I would disagree with the Fourth District's holding in *Ellis*. In *Ellis*, the Forth District states the following:

> **In *State v. Hafer*, we interpreted the part of R.C. 2929.18(A) that deals with restitution. We held that, absent a plea agreement, a trial court abuses its discretion when it orders a defendant to pay restitution for damages attributable to an offense for which he was charged, but not convicted. In *Hafer*, the grand jury indicted the defendant for burglary, vandalism, and receiving stolen property. Pursuant to a plea agreement, the defendant pled guilty to receiving stolen property and the remaining charges were dismissed. The trial court ordered the defendant to pay restitution relating to the vandalism charge. We reversed.**

2003-Ohio-2243, at ¶8. However, upon review of *Hafer*, it is clear that the Fourth District in *Hafer* never imposed the "absent a plea agreement" restriction.

Accordingly, I would find that based on this Court's holding in *Williams* as well as the Fourth District's holding in *Hafer*, the imposition of restitution for a non-convicted offense is never allowable as a matter of law.

{¶31} Furthermore, there is analogous authority that even a negotiated plea and acquiescence by the defendant cannot justify a penalty not authorized by statute. See *In Re: Khary Ingram*, 8th Dist. No. 79808, 2002-Ohio-806. Thus, because R.C. 2929.18, which governs a sentencing court's authority to order restitution, only allows for restitution to be imposed for convicted offenses, such a penalty is not authorized by statute. *Hooks*, 135 Ohio App.3d at 749.

{¶32} Finally, in applying all of these principals, I would point out that we must strictly construe statutes against the State. See *Brecksville v. Cook*, 75 Ohio St.3d 53, 57, 1996-Ohio-171. As such, I would find that in light of the fact that because there is no statutory authority to specifically impose restitution where charges have been dismissed, such authority cannot and should not be read into the statute. By allowing the State to "negotiate" economic sanctions for matters which have not been proven, or to which a defendant has not pled guilty, opens a door whereby the prosecutor's office becomes a tool for the collection of civil debts, which could be interpreted as a disciplinary violation. I would not endorse or permit the use of the State's power to prosecute in this manner and believe that this is exactly what the majority's position allows and encourages.

{¶33} Because restitution cannot be imposed for a crime for which the defendant is not convicted, the imposition of such restitution in the defendant's case is contrary to law and rises to the level of plain error. Accordingly, I would reverse on the issue of restitution and remand for resentencing.

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