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IN THE COURT OF APPEALS OF INDIANA

CHRISTIE BARKLEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 92A03-0708-CR-404
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WHITLEY SUPERIOR COURT
The Honorable Michael Rush, Judge
Cause No.92D01-0606-FD-407

January 28, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a guilty plea, Christie Barkley appeals her sentence for theft, a Class D felony. On appeal, Barkley raises three issues, which we consolidate and restate as whether there is sufficient evidence to support the amount the trial court ordered as restitution. We reverse and remand, concluding there is insufficient evidence to support part of the amount the trial court ordered as restitution. We also address two issues that may arise on remand.

Facts and Procedural History

From approximately June 2004 to March 2006, Barkley was the volunteer treasurer for the Churubusco New Era Show Choir at Churubusco High School ("New Era"). On June 30, 2006, the State charged Barkley with theft, a Class D felony, alleging that "[b]etween the dates of June 1, 2004, and March 1, 2006 . . . [Barkley] did exert unauthorized control over the property of [New Era], to-wit: U.S. currency, with the intent to deprive [New Era] of the value or use thereof." Appellant's Appendix at 7. On April 16, 2007, the parties entered into a plea agreement. Barkley agreed to plead guilty, and the State agreed to recommend that Barkley's sentence not exceed eighteen months, with no more than twelve months executed. The plea agreement also stated that if the trial court suspended a portion of Barkley's sentence and ordered probation, the terms of her probation would include that she pay restitution.

The trial court took Barkley's guilty plea under advisement until it reviewed the presentence investigation report and heard evidence on sentencing. At the sentencing hearing, Daniel Hile, Director of New Era, testified that New Era suffered a $23,017.18 loss

as a result of Barkley's theft. Hile's testimony, along with his affidavit, indicate the $23,017.18 loss consisted of the following amounts: $9,556.18 Barkley transferred from New Era's account into her personal account; 2) $1,794 in bank fees; 3) $5,982 Barkley deposited into her personal account on January 30, 2006; and 4) $5,685 Barkley deposited into her personal account at various times during her tenure as treasurer.

After accepting the guilty plea, the trial court sentenced Barkley to eighteen months, with ninety days executed, ninety days on home detention, 180 days on probation, and the remaining portion suspended. The trial court also found the State had proved that New Era suffered a loss for the first three amounts, but not the fourth. Accordingly, the trial court ordered that Barkley pay restitution in the amount of $17,332.18, but stated in its order that "[t]he State may schedule another restitution hearing to present additional evidence for further restitution amounts." Id. at 84. Barkley now appeals.

Discussion and Decision

I. Propriety of Restitution Amount

A. Standard of Review

We review a trial court's order of restitution for an abuse of discretion. Crawford v. State, 770 N.E.2d 775, 781 (Ind. 2002). Abuse of discretion occurs if the trial court's order is clearly against the logic and effects of the facts and circumstances before it. Henderson v. State, 848 N.E.2d 341, 346 (Ind. Ct. App. 2006).

B. Evidence of Loss

Barkley argues the trial court abused its discretion when it included the $5,982 she deposited into her personal account on January 30, 2006, as restitution. To support her argument, Barkley contends no evidence was presented during the sentencing hearing to support a finding that New Era lost this amount. Indiana Code section 35-50-5-3(a) states in relevant part:

> [T]he court may, as a condition of probation or without placing the person on probation, order the person to make restitution to the victim of the crime . . . . The court shall base its restitution order upon consideration of:
>
> . . .
>
> (4) earnings lost by the victim (before the date of sentencing) as a result of the crime . . . .

Consistent with subsection 3(a), this court has stated repeatedly that the amount of restitution ordered must reflect the actual loss sustained by the victim. See Long v. State, 867 N.E.2d 606, 618 (Ind. Ct. App. 2007); Myers v. State, 848 N.E.2d 1108, 1109 (Ind. Ct. App. 2006); cf. Kellett v. State, 716 N.E.2d 975, 980 (Ind. Ct. App. 1999) ("Only actual costs incurred by the victim before the date of sentencing may be considered."). Moreover, "[t]he amount of actual loss is a factual matter which can be determined only upon the presentation of evidence." Kellett, 716 N.E.2d at 980.

During the sentencing hearing, the State presented Hile's affidavit and testimony to prove that New Era suffered a $5,982 loss. Hile's affidavit stated in relevant part that New Era held an annual fundraising event in January 2006 (the "Event"), that previous events "always resulted in a profit of many thousands of dollars," that Barkley handled "a large amount of cash" during the Event, and that several days after the Event, Barkley "made a

cash deposit into her personal account of $5,982." Appellant's App. at 70. Hile's testimony on direct examination clarified that New Era held the Event on January 28, 2006, that Barkley made cash deposits of $4,482 and $1,500 on January 29 and 30, 2006, respectively,[1] and that Hile had no personal knowledge of any source besides the Event's proceeds from which Barkley could have obtained $5,982. On cross-examination, Hile admitted he did not know whether Barkley's deposits consisted of proceeds from the Event:

> Q: What evidence do you have today that shows a later deposit to Mrs. Barkley's account came from [the Event]?
> A: We do not have specific evidence to trace those figures in cash.
> Q: How did you come up with that number?
> A: It was in her bank statement.
> Q: This is a deposit that was made in Mrs. Barkley's account?
> A: Correct.
> Q: And there is nothing here to trace that money to the [Event]. Is that true?
> A: That is true.

Transcript at 18. This evidence is insufficient to support a finding that New Era suffered a $5,982 loss. In this respect, we reject the State's argument that Barkley's handling of cash and deposit of $5,982 shortly after the Event sufficiently supports such a finding.[2] Assuming New Era had lost that amount, such evidence would have been probative of whether Barkley was the source of the loss. Absent evidence New Era suffered a loss in the first place,

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[1] Barkley filled out the dates on the deposit slips as "1/29/06" and "1/30/06," but the receipts for both deposits are stamped "1/30/06." Id. at 80, 81.

[2] The State also argues sufficient evidence supports the trial court's finding because Barkley admitted to committing theft between June 2004 and March 2006 and because "based on [Barkley's] financial situation, it is unlikely that a substantial deposit of almost $6,000.00 was related to any type of employment." Appellee's Brief at 6. Barkley, however, did not specifically admit she stole proceeds from the Event, nor does the fact that her deposits were unrelated to employment sufficiently bolster the State's evidence to support a finding that New Era suffered a $5,982 loss.

however, we are not convinced the State presented sufficient evidence to carry its burden.[3] Thus, it follows the trial court abused its discretion when it included the $5,982 Barkley deposited into her personal account on January 30, 2006, as restitution.

II. Procedure on Remand

Although we reverse and remand with instructions to the trial court to vacate part of its restitution amount, we also address two issues that may arise on remand.

A. Sentencing Order on Restitution

The first issue concerns the nature of the trial court's sentencing order as it pertains to restitution. Barkley argues it "is not entirely clear as to whether restitution was imposed as a civil, monetary judgment, or as a term of probation," appellant's brief at 9, while the State argues "it appears that the [trial] court is making restitution a condition of probation," appellee's br. at 8. The distinction is significant because if restitution is ordered as a condition of probation, the trial court is required to conduct a hearing to determine the defendant's ability to pay. See Ind. Code § 35-38-2-2.3(a)(5); Ladd v. State, 710 N.E.2d 188, 192 (Ind. Ct. App. 1999). Otherwise, restitution is considered a money judgment and no hearing is required. See Ind. Code § 35-50-5-3(a) and (b); Ladd, 710 N.E.2d at 192.

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[3] We recognize it would have been difficult for the State to establish that New Era suffered a loss from the Event if its theory was that Barkley exclusively handled the proceeds from the Event and pocketed a portion of the proceeds before recording the gain in New Era's books. The State, however, did not pursue such a theory, and other evidence in the record that was not admitted into evidence during the sentencing hearing indicates Barkley's control over the proceeds was not exclusive. See Appellant's App. at 11-12 (police report indicating one of the investigating officers agreed to obtain statements from two individuals who were at the Event to the effect that "they had counted the cash received from the Show Choir Invitational, hosted by Churubusco High School on January 28, 2006. This cash was turned over to CHRISTIE BARKLEY in white envelopes with the dollar amounts written on the envelope. These [individuals] would have an idea how much cash was generated from the competition.").

Although we agree with the State that the restitution ordered probably is a condition of probation, see appellee's br. at 8 ("The plea proposal, which was accepted by the [trial] court, has 'pay restitution' marked under the section for terms of the suspended sentence and probation." (citing appellant's appendix at 67-68)), because we already are remanding the case, we instruct the trial court on remand to clarify whether restitution is a condition of probation. If so, the trial must conduct a hearing to determine Barkley's ability to pay and must "fix the amount, which may not exceed the amount the person can or will be able to pay, and shall fix the manner of performance." Ind. Code § 35-38-2-2.3(a)(5). If the trial court concludes restitution is not a condition of probation, it may order restitution in the form of a money judgment and in an amount consistent with this opinion.

B. Presentation of Additional Evidence

The second issue concerns the trial court's statement in its sentencing order that "[t]he State may schedule another restitution hearing to present additional evidence for further restitution amounts." Appellant's App. at 84. This statement was made in reference to the trial court's explanation during the sentencing hearing that "I cannot conclude you owe $5,685 at this point but I'm going to leave that issue open for further litigation at a later time. And therefore, I just needed more evidence on that." Tr. at 39. The trial court further explained that it was allowing the State to present additional evidence on this amount pursuant to Indiana Trial Rule 60(B).

In Wilson v. State, 688 N.E.2d 1293, 1296 (Ind. Ct. App. 1997), a panel of this court concluded the trial court did not have authority to attach restitution to the defendant's theft

conviction where such restitution was originally part of the defendant's sentence for a burglary conviction that was vacated on appeal. The court based its conclusion on the principle that "[a]fter a final judgment a court retains only such continuing jurisdiction as is permitted by the judgment itself, or as is given the court by statute or rule." Id. at 1295 (quoting Marts v. State, 478 N.E.2d 63, 65 (Ind. 1985)). After noting that the trial court entered final judgment when it sentenced the defendant and that its sentencing order "did not purport to retain any continuing jurisdiction over [the defendant]," the court stated it found "no statutory provision which would give the trial court jurisdiction to enhance [the defendant's] sentence by entering a restitution order after a sentence has already been pronounced." Id. Accordingly, the court held "that the trial court lacked authority to enter such an order." Id.

Here, the trial court's sentencing order and its statements during the sentence hearing indicate it purported to retain jurisdiction pursuant to Trial Rule 60(B). Applying the principle stated in Wilson that "[a]fter a final judgment a court retains only such continuing jurisdiction as is permitted by the judgment itself, or as is given the court by statute or rule," id., we observe Indiana Criminal Procedure Rule 21 states that "[t]he Indiana rules of trial . . . procedure shall apply to all criminal proceedings so far as they are not in conflict with any specific rule adopted by this court for the conduct of criminal proceedings." Indiana Trial Rule 60(B) permits a trial court to relieve a party from final judgment for several reasons, including, "any ground for a motion to correct error, including without limitation newly discovered evidence, which by due diligence could not have been discovered in time to move

for a motion to correct errors under Rule 59 . . . ." We do not discern any conflict between Trial Rule 60(B) and our rules of criminal procedure. Thus, to the extent the State demonstrates it is entitled to relief under Trial Rule 60(B) (and, by extension, Trial Rule 59), the trial court may permit relief consistent with that rule.

Conclusion

The trial court abused its discretion when it included the $5,982 Barkley deposited into her personal account on January 30, 2006, as restitution. Accordingly, we reverse and remand with instructions to the trial court to reduce restitution by that amount. We also instruct the trial court to clarify whether restitution is a condition of probation. If so, the trial court must conduct a hearing to determine Barkley's ability to pay and take other action as required by Indiana Code section 35-38-2-2.3(a)(5). Finally, the trial court may permit relief from its sentencing order to the extent Trial Rule 60(B) permits such relief.

Reversed and remanded.

FRIEDLANDER, J., and MATHIAS, J., concur.