

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 22, 2011
APPROVED FOR
PUBLICATION
January 24, 2012
9:00 A.M.

v

REGINA MARIE ALLEN,

Defendant-Appellant.

No. 299267
Oakland Circuit Court
LC No. 10-231161-FH

Before: M. J. KELLY, P.J., and SAAD and O'CONNELL, JJ.

PER CURIAM.

Defendant Regina Marie Allen appeals by delayed leave granted the trial court's order requiring her to pay restitution. After Allen pleaded guilty to attempting to commit prescription fraud, see MCL 333.7407a(1); MCL 333.7407(1)(c), the trial court sentenced Allen under a sentencing agreement to serve one year of probation and ordered her to pay \$5,753.88 in restitution to Blue Cross Blue Shield. The sole question on appeal is whether the trial court erred when it found that Blue Cross had suffered a loss as a result of Allen's course of criminal conduct. Because we conclude that the trial court did not clearly err when it found that Blue Cross suffered such a loss, we affirm the trial court's order of restitution.

I. BASIC FACTS AND PROCEDURAL HISTORY

In November 2009, Allen attempted to purchase a controlled substance from a pharmacy using a fraudulent prescription. The prescription contained a legitimate Blue Cross contract number. The pharmacy alerted Blue Cross to the attempted purchase later that same month.

At the time, Allen was a customer service representative with a Blue Cross vendor, Allegra Direct. Through her employment, Allen had access to two major databases. These databases contained private information for Blue Cross subscribers; the information included the subscribers' contract numbers, Social Security numbers, dates of birth, home addresses, and physician records.

Nina Burnett testified at Allen's restitution hearing that she was a field investigator with Blue Cross and that her department investigates fraud. Burnett investigated Allen's attempt to

purchase the controlled substance. Burnett determined that Allen used an actual Blue Cross subscriber's name on the fraudulent prescription. As a result, Burnett feared that Allen might have defrauded Blue Cross in prior incidents. Indeed, after she learned that Allen had access to protected Blue Cross information, Burnett extended the investigation to determine whether Allen misused confidential information. Burnett stated that Blue Cross had a legal obligation to investigate whether its subscribers' health information had been compromised.

Burnett investigated whether Blue Cross had paid for similar prescriptions written by the same physician that Allen listed on the fraudulent prescription. As part of her investigation, Burnett met with the physician's staff, obtained video from various pharmacies, and examined signature logs. Additionally, Blue Cross' information technology department investigated Allen's use of the Blue Cross subscriber database. Burnett was not able to definitively connect Allen to any other fraudulent prescriptions.

Burnett testified that her investigation into Allen's fraudulent prescription was significantly more time-consuming and detailed than other "ordinary" investigations because Allen had access to patients' confidential information. Burnett stated that Blue Cross spent \$5,738 to investigate Allen's fraud and whether she misused subscriber information. She said that she determined this amount by multiplying an hourly rate of \$130.77, which was determined by dividing her department's annual budget by the number of hours the department's investigators spent investigating claims, and multiplying that by the 44 hours that she spent working on the investigation. She stated that this rate did not include the cost of assistance by other departments; therefore, the research by the information technology staff was not included in the hourly rate.

Burnett testified that she is a salaried employee and would have been paid the same amount of money without regard to Allen's attempted fraud. Burnett nevertheless stated that Blue Cross suffered a loss because the money that it otherwise spent investigating Allen's fraud could have been spent on claims or controlling premiums. Burnett explained that Blue Cross generally attempts to recoup money from the perpetrators of fraud.

The trial court ultimately determined that Blue Cross was entitled to the requested restitution and ordered Allen to pay \$5,753.88 to Blue Cross as part of her sentence.

II. RESTITUTION

A. STANDARD OF REVIEW

Allen argues on appeal that the trial court erred in ordering her to pay Blue Cross for the costs associated with investigating her fraud. Trial courts do not have discretion to order a convicted defendant to pay restitution; they must order the defendant to pay restitution and the amount must fully compensate the defendant's victims. See *People v Gahan*, 456 Mich 264, 270

n 6; 571 NW2d 503 (1997).¹ Whether and to what extent a loss must be compensated is a matter of statutory interpretation; and this Court reviews de novo the proper interpretation of statutes. *People v Bemer*, 286 Mich App 26, 31; 777 NW2d 464 (2009). However, this Court reviews the findings underlying a trial court’s restitution order for clear error. MCR 2.613(C). A finding is clearly erroneous if this Court is left with the definite and firm conviction that a mistake has been made. *People v Atkins*, 259 Mich App 545, 564; 675 NW2d 863 (2003).

Article 1, § 24 of the Michigan Constitution provides that crime victims have the “right to restitution.” Const 1963, art 1, § 24. Additionally, with the Crime Victim’s Rights Act, MCL 780.751 *et seq.*, the Legislature required trial courts to order convicted defendants to pay restitution:

[W]hen 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 the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction...
[MCL 780.766(2).]

For the purposes of MCL 780.766(2), the term “victim” includes “a sole proprietorship, partnership, corporation, association, governmental entity, or any other legal entity that suffers direct physical or financial harm as a result of the crime.” MCL 780.766(1). To determine the amount of restitution, “the court shall consider the amount of the loss sustained by any victim as a result of the offense.” MCL 780.767(1). The term “course of conduct,” must be given “a broad construction” to best effectuate the intent of the Legislature. *Gahan*, 456 Mich at 271. Further, with the Victims Right’s Act, the Legislature plainly intended to shift the burden of losses arising from criminal conduct—as much as practicable—from crime victims to the perpetrators of the crimes; thus, it is “remedial in character and should be liberally construed to effectuate its intent.” *See People v Gubachy*, 272 Mich App 706, 710; 728 NW2d 891 (2006).

Allen argues that Blue Cross’ investigation did not amount to a financial harm because the costs would have been incurred regardless of her course of criminal conduct. She asserts that Burnett would have received the same salary and worked the same hours even in the absence of Allen’s attempt to fraudulently purchase a controlled substance. Thus, Blue Cross did not suffer a loss within the meaning of the Victim’s Rights Act.

The evidence showed that Burnett was a salaried, full-time employee in a department dedicated to investigating fraud. Nevertheless, Burnett’s department had an indefinite number of claims to investigate and she plainly could have spent the forty-four hours investigating Allen’s fraud on other matters. Accordingly, Blue Cross essentially lost the time-value of the forty-four hours that Burnett had to spend investigating Allen’s fraud, rather than some other fraud. That

¹ It is, for that reason, inaccurate to state that trial courts have discretion to award restitution after the Legislature’s decision to require restitution. Further, because the statute plainly requires the trial court to order “full” restitution, see MCL 780.766(2), it necessarily follows that a trial court abuses its discretion when it orders restitution other than full restitution.

is, the loss to Blue Cross is *not* Burnett's salary or the department's budget; Blue Cross would likely have incurred these costs regardless of Allen's criminal conduct. Rather, it is the loss of time that amounts to a direct financial harm, which can be measured by assigning a value to the hours spent on the investigation. Accordingly, the trial court did not clearly err when it found that Blue Cross suffered a direct financial loss as a result of Allen's course of criminal conduct. And Allen has not challenged the trial court's finding that this loss should be valued at \$5,753.88.

On this record, we cannot conclude that the trial court erred when it ordered Allen to pay Blue Cross restitution in the amount of \$5,753.88.

Affirmed.

/s/ Michael J. Kelly
/s/ Henry William Saad
/s/ Peter D. O'Connell