STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 4, 2008
v	No. 272554 Macomb Circuit Court
KEVIN LLOYD KNOTT, Defendant-Appellant.	LC No. 05-001240-FH

Before: Wilder, P.J., and Borrello and Beckering, JJ.

PER CURIAM.

Defendant pled guilty to the charge of failing to return a rented motor vehicle, MCL 750.362a(3)(a). He now appeals by leave granted a restitution order requiring him to pay $6,977.35 to the victim. We affirm.

On March 16, 2004, defendant rented a vehicle from Ode Tire. He failed to return it on March 26, 2004, as he had agreed to do. The police eventually located the vehicle, and on July 7, 2004, returned it to Ode Tire. The vehicle was a total loss. After defendant pled guilty to the noted charge, the trial court sentenced him as a second habitual offender, MCL 769.10, to 12 to 90 months' imprisonment. The court also ordered him to pay restitution to the victim of $6,977.35, which included the value of the vehicle and the rental revenue lost during the theft.

Defendant first contends that the maximum amount of restitution that the trial court was permitted to award was the value of the vehicle itself, and thus, the trial court erred in ordering him to reimburse the victim for the lost rental revenue. We disagree.

We generally review an order of restitution for an abuse of discretion. *In re McEvoy*, 267 Mich App 55, 59; 704 NW2d 78 (2005). We review a trial court's factual findings for clear error. MCR 2.613(C).

The Crime Victim's Rights Act ("CVRA"), MCL 780.751 *et seq.*, provides, in part, that if a felony results in the loss of a victim's property, the trial court may order the defendant to pay to the victim, as restitution, the value of the property that was lost. *People v Gubachy*, 272 Mich App 706, 708; 728 NW2d 891 (2006). "The CVRA 'was enacted to enable victims to be compensated fairly for their suffering at the hands of convicted offenders.'" *Id.* at 710, quoting *People v Crigler*, 244 Mich App 420, 423; 625 NW2d 424 (2001).

At the time defendant was sentenced, MCL 780.766 provided in relevant part:

> (2) Except as provided in subsection (8), when 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 or to the victim's estate.
>
> (3) If a crime results in damage to or loss or destruction of property of a victim of the crime or results in the seizure or impoundment of property of a victim of the crime, the order of restitution may require that the defendant do 1 or more of the following, as applicable:
>
> (a) Return the property to the owner of the property or to a person designated by the owner.
>
> (b) If return of the property under subdivision (a) is impossible, impractical, or inadequate, pay an amount equal to the greater of subparagraph (i) or (ii), less the value, determined as of the date the property is returned, of that property or any part of the property that is returned:
>
> (i) The value of the property on the date of the damage, loss, or destruction.
>
> (ii) The value of the property on the date of sentencing.
>
> (c) Pay the costs of the seizure or impoundment, or both.[1]

In determining the amount of restitution to order under MCL 780.766, "the court shall consider the amount of the loss sustained by any victim as a result of the offense." MCL 780.767(1). The prosecution must prove the amount of the victim's loss by a preponderance of the evidence. MCL 780.767(4).

Defendant argues that, under MCL 780.766(3), the measure of restitution in this case was the value of the vehicle on either the date of the loss or the date of sentencing, less any residual value, i.e., scrap value, existing when the vehicle was returned to the victim. Thus, defendant submits that the trial court erred in ordering him to pay restitution to the victim for lost rental revenue based upon the per diem rental fee set forth in the rental agreement. However, this Court has recently held that "the version of MCL 780.766(3) in effect at defendant's sentencing cannot be considered an exclusive list of remedies." *Gubachy, supra* at 712.

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[1] "2005 PA 184 (effective January 1, 2006) made two amendments to the provisions addressed in this opinion. MCL 780.766(2) was changed to add a provision addressing offenses 'resolved by assignment of the defendant to youthful trainee status . . . .' MCL 780.766(3) was modified to change 'the order of restitution *may* require . . .' to 'the order of restitution *shall* require . . . .' (Emphasis added.). These changes do not affect our analysis." *Gubachy, supra* at 710 n 1.

> In our view, the Legislature has clearly manifested an intent to make victims of a crime as whole as they can fairly be made and to leave the determination of how best to do so to the trial court's discretion on the basis of the evidence presented and subject to the prosecuting attorney's burden of proving losses attributable to defendant's crime-related acts. The CVRA was not intended to be narrowly construed merely as a special-purpose replevin action: the focus is consistently not on what a defendant took, but what a victim lost because of the defendant's criminal activity. No other interpretation is consistent with purpose of the act and its specific provisions. [*Id. at* 713.]

Indeed, MCL 780.766(2) provides that defendant "make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction." Contrary to defendant's argument, nothing in MCL 780.766 precluded the trial court from ordering defendant to pay restitution to the victim of the value of the vehicle as well as the rental revenue lost during the theft.

Defendant next contends that plaintiff failed to present sufficient evidence to establish that the victim was entitled to $6,977.35 in restitution. We disagree.

An award of restitution "should be based upon the evidence." *People v Guajardo*, 213 Mich App 198, 200; 539 NW2d 570 (1995). In determining the amount of restitution to which the victim is entitled, the trial court may order the probation officer to obtain information pertaining to the amount of the loss sustained by the victim as a result of the offense. MCL 780.767(2). The probation officer shall include the information in the presentence investigation report ("PSIR") or in a separate report, and the court shall disclose, to both the defendant and the prosecutor, all portions of the PSIR or other report pertaining to the amount of the loss sustained by the victim as a result of the offense. MCL 780.767(2); MCL 780.767(3). "A judge is entitled to rely on the information in the presentence investigation report, which is presumed to be accurate[,] unless the defendant effectively challenges the accuracy of the factual information." *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997).

In this case, the PSIR contained three references to the amount of the loss sustained by the victim: "In regard to restitution, on #05-1240-FH, victim, Darren Ode, is requesting $5,000 for the value of the stolen vehicle and loss rental revenue of $44.99 per day. Therefore, restitution is being requested in the amount of $5,977.35." Similarly, the victim's impact statement section of the PSIR provided:

> Victim, Larry Ode, indicated that this offense has made the rental company more cautious of renters, even if they have a good ID. He is requesting that the defendant pay $5,000 which [is] the value of the missing rental vehicle, and los[t] rental revenue of $44.99 per day. Therefore, restitution is being requested in the amount of $5,977.35.

In the PSIR, the probation officer recommended that the trial court order defendant to pay $6,977.35. At the sentencing hearing, defense counsel failed to address the discrepancy in the PSIR between the amount of restitution that the victim requested and the probation officer's recommendation. The trial court ordered defendant to pay $6,977.35 to the victim as a condition of parole.

Later defendant, with new counsel,[2] moved for partial resentencing on the basis that the restitution order was not supported by the evidence, and that the trial court failed to advise the parties of the evidentiary basis for its determination regarding the amount of the loss sustained by the victim, as required by MCL 780.767. Defense counsel argued that the probation officer's recommendation, that defendant pay $6,977.35 in restitution to the victim, was the result of a clerical error and that the restitution order should be reduced to $5,977.35, the amount of restitution that the victim actually requested.

In response, plaintiff presented an invoice to the trial court, which indicated that the value of the totaled vehicle was $2,675. The invoice also indicated that the victim lost $4,364.95 in rental revenue during the theft, and incurred an impound fee of $75 and a pick up fee of $80. With sales tax, the final charge to defendant was $7,617.35. The invoice reflected that defendant paid a $490 deposit, and that $150 was charged to his credit card to extend the due date for the vehicle. Thus, the unpaid balance was $6,977.35.

The trial court denied defendant's motion for resentencing. The court concluded that the victim sustained a loss of $6,977.35, as indicated by the invoice presented by plaintiff, and therefore, the restitution order was proper. But the trial court recognized the inconsistencies in the PSIR, and those between the PSIR and the invoice, and informed defense counsel that, if he requested an evidentiary hearing on the issue of restitution, the court would grant it. Defense counsel did not request an evidentiary hearing.

MCL 780.767(4) "affords defendant an evidentiary hearing when the amount of restitution is contested and further provides that the prosecution bears the burden of establishing the proper amount." *People v Gahan*, 456 Mich 264, 276; 571 NW2d 503 (1997). However, when a defendant fails to request an evidentiary hearing regarding the amount of restitution imposed, this is "a waiver of his opportunity for an evidentiary hearing." *Id.*

> It is incumbent on the defendant to make a proper objection and request an evidentiary hearing. Absent such objection, the court is not required to order, sua sponte, an evidentiary proceeding to determine the proper amount of restitution due. Instead, the court is entitled to rely on the amount recommended in the presentence investigation report "which is presumed to be accurate unless the defendant effectively challenges the accuracy of the factual information." [*Id.* at 276 n 17 (citations omitted).]

Thus, under the circumstances, where the trial court invited defendant to request an evidentiary hearing, his failure to do so on the issue of restitution constituted a waiver of his opportunity for an evidentiary hearing. Waiver is the intentional relinquishment or abandonment of a known right. *People v James*, 272 Mich App 182, 195; 725 NW2d 71 (2006). Defendant's waiver extinguished any alleged error stemming from the trial court's determination of the amount of loss sustained by the victim as a result of defendant's criminal activity. "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights,

[2] The new defense trial counsel also represents defendant in this appeal.

for his waiver has extinguished any error." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (citation omitted).

Defendant finally argues that he is entitled to relief because he was deprived of his constitutional right to counsel. Defendant argues that defense counsel was ineffective for failing to request an evidentiary hearing below. We disagree. Because no hearing was held under *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973), review is limited to errors apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

The United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." US Const, Am VI. Similarly, the Michigan Constitution provides: "In every criminal prosecution, the accused shall have the right . . . to have the assistance of counsel for his or her defense . . . ." Const 1963, art 1, § 20.[3] It is too well established to require citation of authority that these provisions not only protect the right of an accused to hire counsel, but affirmatively require the government to provide counsel for the defense of an indigent accused. In addition, these provisions have been interpreted, under the common law of the constitution, to require that the attorney provided by the government must provide "effective" assistance. E.g., *Strickland v Washington*, 466 US 668; 104 S Ct 2052, 80 L Ed 2d 674 (1984); *Schriro v Landrigan*, 550 US 465; 127 S Ct 1933, 1939; 167 L Ed 2d 836 (2007).

A constitutional claim of ineffective assistance of counsel is reviewed under the standard established in *Strickland*, which requires the defendant to show that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney guaranteed under the Sixth Amendment. *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993). The right to counsel under the Michigan Constitution does not impose a more restrictive standard than that established in *Strickland*. *People v Pickens*, 446 Mich 298, 318-319; 521 NW2d 797 (1994).

Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To succeed on a claim of ineffective assistance of counsel, the defendant must show that, but for an error by counsel, the result of the proceedings would have been different and that the proceedings were fundamentally unfair or unreliable. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). The defendant bears a "heavy burden" on these points. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Garza, supra*, at 255.

[3] Interestingly, article 1, section 20 goes on to provide that an accused also has a right "to have an appeal as a matter of right, except as provided by law *an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court* . . . ." Const 1963, art 1, § 20 (emphasis added).

Defense counsel's failure to request an evidentiary hearing in this case did not fall below an objective standard of reasonableness. Given the value of the vehicle loss as established by the invoice submitted by the victim, we find no reasonable probability that, had defense counsel requested the evidentiary hearing, the result of the proceeding would have been different. In other words, the failure to request an evidentiary hearing on the issue of restitution was not "sufficient to undermine confidence in the outcome." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Stephen L. Borreollo
/s/ Jane M. Beckering