

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC EUGENE COLEMAN,

Defendant-Appellant.

UNPUBLISHED
December 3, 2009

No. 286017
Wayne Circuit Court
LC No. 08-000307-FH

Before: Shapiro, P.J., and Jansen and Beckering, JJ.

SHAPIRO, J. (*concurring in part and dissenting in part*).

I concur with the majority in its affirmance of defendant's convictions and its remand for resentencing. However, I respectfully dissent from its decision regarding restitution.

At sentencing, the assistant attorney general argued that the \$31,819 listed as restitution was in error and that the correct amount should have been \$49,230. The prosecutor argued that although defendant had been acquitted of two of the counts, the trial court could still assess restitution as to the losses at issue in those counts. Defense counsel argued that the restitution amounts should not include the amounts arising out of counts as to which defendant was acquitted. The trial court ordered "that restitution be paid in an amount to be determined[] to be correct between the amount of \$31,819 and \$49,230."¹ The trial court indicated that it would assume the correct amount was \$49,230 but would "allow the defense, if it requests a hearing, and to be heard on the issue, that it should be a lower amount that be allowed." Defense counsel immediately requested a hearing. However, no hearing occurred.²

¹ Although somewhat unclear from the record, it appears that the amounts defendant contested were \$3,760 and \$14,664, for a total of \$18,424, which should have made the lower amount \$30,806, rather than the \$31,819 in the presentence report. Accordingly, I have used the amount \$18,424 throughout this opinion as the disputed amount. However, my use of this number should not be read to limit the rights of either party to dispute this figure.

² About eight months after defendant's appeal was filed with this Court, defendant requested a remand for an evidentiary hearing on the amount of restitution. This Court determined that it could decide the issue based on the record already before it and denied the motion.

The majority relies on *People v Gahan*, 456 Mich 264, 266; 571 NW2d 503 (1997) for the principle that restitution may be ordered as to all amounts which the trial court finds, by a preponderance of the evidence, are attributable to the criminal scheme. I initially note that *Gahan* did not deal with restitution on counts for which the defendant was *acquitted*, but on counts for which defendant was never bound over. Although there may ultimately be no difference between an uncharged count and an acquitted count, as both represent crimes for which a defendant has not been found guilty beyond a reasonable doubt, I do not believe that *Gahan* necessarily requires that leap. However, even assuming that it does, *Gahan* makes clear that MCL 780.767(4):

requires that the prosecution must establish the appropriate amount of restitution by a preponderance of the evidence. Thus, the statute 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. [*Id.* at 276.]

It is undisputed that defendant contested the amount of restitution and requested a hearing but that the hearing did not take place. Further, the trial court never made a determination on the record that the prosecution had shown by a preponderance of the evidence that the \$18,424 which related to the counts ending in acquittal were “losses attributable to the illegal scheme that culminated in [defendant’s] conviction” such that restitution could be ordered. *Id.* at 272. Instead, the trial court stated that it simply assumed the prosecution’s position to be accurate and did not conduct an evidentiary hearing. Our Supreme Court was clear that it was the existence of such hearing that prevented a due process violation. *Id.* at 275. Therefore, I conclude that the absence of the requested hearing in this case was a violation of defendant’s due process rights. Accordingly, I would vacate the amount of restitution and remand for an evidentiary hearing for the court to determine whether the prosecution has shown, by a preponderance of the evidence, that the \$18,424 which related to the counts ending in acquittal were losses attributable to the illegal scheme that culminated in defendant’s conviction and for entry of an order of restitution consistent with that determination.

/s/ Douglas B. Shapiro