

[Cite as *State v. LaFever*, 2009-Ohio-5471.]

COURT OF APPEALS
MORROW COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

MELANIE LAFEVER

Defendant-Appellant

JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. John W. Wise, J.

Hon. Patricia A. Delaney, J.

Case No. 2009CA0003

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,
Case No. 08CR0044

JUDGMENT:

Affirmed/Reversed in Part & Remanded

DATE OF JUDGMENT ENTRY:

October 13, 2009

APPEARANCES:

For Plaintiff-Appellee

CHARLES HOWLAND
60 East High Street
Mount Gilead, OH 43338

For Defendant-Appellant

JOSEPH A NIGH
SIOBHAN R. BOYD
536 South High Street
Columbus, OH 43215

Farmer, P.J.

{¶1} On March 19, 2008, the Morrow County Grand Jury indicted appellant, Melanie LaFever, on twenty counts which included identity fraud, forgery, misuse of credit card, and passing bad checks. On August 6, 2008, appellant pled guilty to nine of the counts. By judgment entry sentencing nunc pro tunc filed March 3, 2009, the trial court sentenced appellant to an aggregate term of nine years and ten months in prison, and ordered appellant to pay \$70,000.00 in restitution.

{¶2} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶3} "APPELLANT'S GUILTY PLEA WAS NEITHER VOLUNTARILY, KNOWINGLY NOR INTELLIGENTLY MADE IN VIOLATION OF OHIO CRIM.R. 11(C) BECAUSE SHE WAS DENIED HER RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE 6TH AMENDMENT OF THE U. S. CONSTITUTION."

II

{¶4} "THE COURT ERRED BY SENTENCING APPELLANT TO MAKE RESTITUTION IN AN AMOUNT WHICH EXCEEDED THE ECONOMIC LOSS TO THE VICTIMS WHICH WAS NOT SUPPORTED BY CREDIBLE EVIDENCE."

I

{¶5} Appellant claims her plea of guilty was not voluntarily, knowingly or intelligently made because she was denied the effective assistance of trial counsel. We disagree.

{¶6} The standard this issue must be measured against is set out in *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraphs two and three of the syllabus, certiorari denied (1990), 497 U.S. 1011. Appellant must establish the following:

{¶7} "2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623; *Strickland v. Washington* [1984], 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.)

{¶8} "3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different."

{¶9} Appellant does not challenge the trial court's colloquy at the time of the plea. Instead, appellant argues her counsel was ineffective because during the September 30, 2008 sentencing hearing at 11, he stated to the trial court, "The arguments concerning these years I'll leave to your Honor since I don't see how - - I have never been able to figure out this concurrent and consecutive and then coming up with something that makes no sense to me."

{¶10} Appellant argues this statement viewed in a vacuum is evidence of defense counsel's deficiencies and she did not understand the consequences of her plea.

{¶11} Prior to the complained of statement, the prosecutor stated the following at 6-7:

{¶12} "On Counts 1 and 3, which are both felonies of the 3rd degree, we are going to ask the Court to impose a sentence of four years on that. We are not opposed to that sentence being concurrent to one another though for a total of four years for those two counts.

{¶13} "As to Counts 2 to 4, we would ask for 17 months on each one of those counts. Again, not opposed that those counts be concurrent with one another, but we would ask that they be consecutive with 1 and 3.

{¶14} "Then Counts 9, 10, and 11, all forgeries, we'd ask for 11 months. All those counts concurrent with one another and consecutive to Counts 1 and 3 and Counts 2 and 4.

{¶15} "Count 16, rather, which is misuse of the credit card, 17 months. Ask that to be consecutive to 1, 3, 2, 4, and also to 9, 10, and 11. Count 16, I believe is the or 20 rather, is passing bad checks. We ask for 11 months, consecutive to 1, 2, 4, 9, 10, and 11 and 16. My calculation is that comes up to eight years and eight months and we believe she should go to the institution, your Honor."

{¶16} We find this relatively contorted sentencing recommendation was the genesis of defense counsel's statement. Further, during the plea hearing, the trial court informed appellant in detail of the sentences available on each count, and appellant stated she understood and did not need any further explanation. August 6, 2008 T. at 4-7, 13-14.

{¶17} Upon review, we do not find any deficiency by trial counsel.

{¶18} Assignment of Error I is denied.

II

{¶19} Appellant claims the trial court's determination on the amount of restitution was against the manifest weight of the evidence. We agree.

{¶20} R.C. 2929.18 governs financial sanctions. Subsection (A)(1) states a trial court may order restitution "by the offender to the victim of the offender's crime or any survivor of the victim, in an amount based on the victim's economic loss." "The amount of restitution must be supported by competent, credible evidence from which the court can discern the amount of the restitution to a reasonable degree of certainty." *State v. Sommer*, 154 Ohio App.3d 421, 2003-Ohio-5022.

{¶21} By judgment entry sentencing nunc pro tunc filed March 3, 2009, the trial court ordered appellant to pay restitution of \$70,000.00.

{¶22} From a review of the sentencing hearing transcript, it is clear that the amount of restitution was unknown:

{¶23} "Mr. Desmond: ***It is just that now I'm dealing with someone who owes money to both her family and we have, as far as I know, is there any restitution number?

{¶24} "Mr. Yager: It is about \$50,000 to \$70,000.

{¶25} "The Court: Got a question mark for the total.

{¶26} "Mr. Desmond: Yes, sir. It is this, okay, I'll go with that. It doesn't really matter at this point. You can order restitution. And you could sentence Miss LaFever to prison and hold that in abeyance until and such time as she made that restitution order monthly." September 30, 2008 T. at 9.

{¶27} Neither the presentence report nor the victim report statement is included in the record. We find insufficient evidence to support the \$70,000 restitution order.

{¶28} Assignment of Error II is granted. The matter is remanded for a restitution hearing.

{¶29} The judgment of the Court of Common Pleas of Morrow County, Ohio is hereby affirmed in part and reversed in part.

By Farmer, P.J.

Wise, J. and

Delaney, J. concur.

s/ Sheila G. Farmer

s/ John W. Wise

s/ Patricia A. Delaney

JUDGES

IN THE COURT OF APPEALS FOR MORROW COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

MELANIE LAFEVER

Defendant-Appellant

:
:
:
:
:
:
:
:
:
:
:

JUDGMENT ENTRY

CASE NO. 2009CA0003

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Morrow County, Ohio is affirmed in part and reversed in part, and the matter is remanded to said court for a restitution hearing. Costs to be divided equally between the parties.

s/ Sheila G. Farmer

s/ John W. Wise

s/ Patricia A. Delaney

JUDGES