

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. Julie A. Edwards, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09 CAA 06 0055
MICHELLE WHITLOCK	:	
	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Delaware County Court of
Common Pleas Court Case No. 06 CR I 04
0160

JUDGMENT: REVERSED AND REMANDED

DATE OF JUDGMENT ENTRY: December 28, 2009

APPEARANCES:

For Plaintiff-Appellee:

DAVID A. YOST
DELAWARE COUNTY PROSECUTOR

MARIANNE T. HEMMETER
140 N. Sandusky Street
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For Defendant-Appellant:

JOHN R. CORNELLY
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Delaney, J.

{¶1} Appellant-defendant Michelle Whitlock appeals the restitution order imposed as part of her sentence in the Delaware County Court of Common Pleas.

{¶2} On April 7, 2006, Whitlock was indicted on one count of attempted theft pursuant to R.C. 2913.02(A)(1), a felony of the fifth degree. Whitlock entered a plea of not guilty to the charge at arraignment. On January 22, 2007, Whitlock was placed into the prosecuting attorney's diversion program and the case was placed on inactive status. She was terminated from the program on February 26, 2008, for failing to comply with the diversion program rules. She failed to appear for hearing on April 30, 2008, and a warrant was issued for her arrest. Whitlock was subsequently arrested on February 16, 2009. She pled guilty to the indictment on March 4, 2009.

{¶3} On May 19, 2009, the trial court sentenced Whitlock to fifteen days in jail and three years probation. In addition, the sentencing hearing transcript reflects the following colloquy:

{¶4} "The Court: And my understanding is according to the PSI not only did you put money on a credit card or attempt to but you also took \$42 from an employee's cash fund that was going to be used for someone's birthday present; is that correct?"

{¶5} "The Defendant: That's what they assumed, sir.

{¶6} "The Court: I didn't ask that, I said is that correct?"

{¶7} "The Defendant: Yes, sir.

{¶8} "The Court: And there was also \$330 missing out of the petty case; is that true?"

{¶9} "Mr. Cornely: If you didn't do it, you didn't do it.

{¶10} “The Defendant: I’m not aware of that, sir.

{¶11} “The Court: They attribute it all to you because it all happened on the same day.

{¶12} “Mr. Cornely: Your Honor, she advised me just about the credit card, she denied the other.

{¶13} “The Court: But she just admitted as to the \$42 for the birthday; is that right?

{¶14} “Mr. Cornely: I think what she meant was yes, she knew they had alleged that but she’s not, she denies the \$42 and \$330, Your Honor.

{¶15} “The Court: It’s just a coincidence that it was at the same desk that she was sitting at.

{¶16} * * *

{¶17} “The Court: Whether or not you like it, you will pay as restitution the \$330 on the petty case and the \$42 for the birthday funds. You’ll pay that on the schedule worked out by Adult Court Services; do you understand?

{¶18} * * *

{¶19} “Mr. Cornely: Your Honor, just for the record, we would object to the imposition of the 372 in restitution.

{¶20} “The Court: Your objection is noted.”

{¶21} Sentencing Transcript of May 18, 2009, at pp. 6-7, 12.

{¶22} The May 19th sentencing entry also states: “[p]ursuant to Section 2929.18 of the Ohio Revised Code, the Defendant shall pay restitution in full in the sum of Three Hundred Seventy Two Dollars (\$372.00) on a schedule to be determined by Adult Court

Services. Restitution shall be paid to the offices of the Clerk of Court's office and disbursed to Abrasive Technology." Sentencing Entry of May 19, 2009, at ¶13.

{¶23} Whitlock filed a timely appeal and raises one Assignment of Error:

{¶24} "I. THE SENTENCE IMPOSED BY THE TRIAL COURT IS CONTRARY TO LAW AS THE TRIAL COURT ORDERED APPELLANT TO PAY RESTITUTION FOR ACTS SHE WAS NOT CHARGED WITH NOR CONVICTED OF."

I.

{¶25} Whitlock contends on appeal the trial court erred by ordering her to pay restitution for acts she was not charged nor convicted of, citing R.C. 2929.18(A)(1), which reads, in pertinent part:

{¶26} "[T]he court imposing a sentence upon an offender for a felony may sentence the offender to any financial sanction or combination of financial sanction authorized under this section ... (1) 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."

{¶27} Whitlock further contends, and the State agrees, she pled guilty to attempting to "reverse charge" \$5,000 to her credit card from Abrasive Technology. Although Abrasive Technology filed a report with the Delaware County Sheriff's office stating that \$42 in cash was also missing from a birthday fund and \$330 in cash was missing from petty cash, Whitlock was never charged with crimes relating to the missing cash. Therefore, both Whitlock and the State submit the trial court erred in sentencing her to pay the \$370 because the restitution is neither a direct or proximate cause of the offense she pled guilty.

{¶28} Challenges to a restitution order must be raised via direct appeal or timely post-conviction petition. *State v. Russell*, 5th Dist. No. 08 CA 82, 2009-Ohio-2692, ¶17. A trial court's decision on restitution is discretionary, although the amount must bear a reasonable relationship to the actual loss suffered. *Id.* Restitution, therefore, is limited to the actual damage or loss caused by the offense of which the defendant is convicted. *State v. Toler*, 174 Ohio App.3d 335, 2007-Ohio- 6967, 882 N.E.2d 28, citing *State v. Hooks* (2000), 135 Ohio App.3d 746, 735 N.E.2d 523. See also, *State v. Stokes*, (November 28, 2001), 5th Dist. No. 01CA018, 2001 WL 1518756.

{¶29} The parties agree this matter should be remanded for modification of the restitution order to conform to the offense for which Whitlock was convicted.

{¶30} Accordingly, we sustain Whitlock's assignment of error.

{¶31} The restitution order is reversed and cause remanded.

By: Delaney, J.

Hoffman, P.J. and

Edwards, J. concur.

JUDGE PATRICIA A. DELANEY

JUDGE WILLIAM B. HOFFMAN

JUDGE JULIE A. EDWARDS

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

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Plaintiff-Appellee	:	
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-vs-	:	JUDGMENT ENTRY
	:	
MICHELLE WHITLOCK	:	
	:	
Defendant-Appellant	:	Case No. 09 CAA 06 0055
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the restitution order of the Delaware County Court of Common Pleas is reversed and this cause is remanded for further proceedings consistent with this Opinion and in accordance with the law. Costs assessed to Appellee.

JUDGE PATRICIA A. DELANEY

JUDGE WILLIAM B. HOFFMAN

JUDGE JULIE A. EDWARDS