

No. 1-09-1870

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

FIFTH DIVISION
May 13, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS)	
ILLINOIS,)	
)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
)	Cook County.
v.)	
)	No. 09 CR 5301
BRADFORD S. TEMEN,)	
)	The Honorable
)	Carol A. Kipperman,
Defendant-Appellant.)	Judge Presiding.
)	

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Joseph Gordon
concurring in the judgment.

O R D E R

HELD: Where the defendant entered a negotiated guilty plea to forgery in that he altered a \$200 check to display the sum of \$1,200, and the agreed disposition included the payment of \$1,200

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in restitution, the trial court did not exceed its authority in ordering the defendant to pay \$1,200 in restitution to the victim, a currency exchange.

Following a negotiated guilty plea, defendant Bradford S. Temen was found guilty of forgery, and he was placed on probation for 30 months, was ordered to perform community service, and was ordered to pay restitution in the amount of \$1,200, as well as fees and fines. Restitution, to be paid from the proceeds of the bond, was part of the agreed disposition. On appeal, defendant contends that the amount of restitution should have been \$1,000, not \$1,200, because the check that was issued to him was for \$200 and he illegally gained \$1,000 by altering that check to display the sum of \$1,200.

The parties stipulated that if the case proceeded to trial, the forgery allegations would be proved beyond a reasonable doubt.

Pursuant to the factual basis for the guilty plea, if Jimmy Katsaros were called as a witness, he would testify as follows. Katsaros issued check number 16655 on behalf of his company, A & K Auto Sales, Inc., to defendant, whom Katsaros would identify in court. The original check was written for \$200. Katsaros did not give consent or authority to defendant to alter the check to make it \$1,200.

If Louis Tufano of the Brookfield Currency Exchange, 9450 Ogden Avenue in Brookfield, were called as a witness, he would

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testify as follows. On or about January 19, 2009, Tufano or one of his agents received an altered \$1,200 check. Tufano would identify defendant in court as the man who presented the check at that location. Defendant was given \$1,200 in cash in exchange for cashing that check at that location.

If Officer Palos were called as a witness, he would testify that, during the investigation, he contacted Jimmy Katsaros, who admitted that the check was written for only \$200 and that defendant must have altered the check.

"The State" would testify that all of the events happened in Cook County.

Restitution to be paid from the proceeds of the bond was part of the agreed disposition of the forgery prosecution. The assistant State's Attorney asserted that defendant owed \$1,200 in restitution and that it should be paid entirely from the bond. Neither defendant nor defense counsel objected. Defense counsel observed that the balance should be refunded to the surety.

The trial court observed that the agreed sentence was 30 months of probation with 20 days of community service, and that the restitution would come out of the bond, but that defendant also had \$660 in court costs and fines. Defense counsel informed the court that defendant was currently unemployed and requested waiver of the probation fees. The court reduced the probation fees to \$25 per month.

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On appeal, defendant argues that \$200 constitutes excess restitution and is void because the statute does not authorize \$1,200 in restitution for a \$1,000 crime, and therefore he was not required to file a Rule 604(d) (Ill. S. Ct. R. 604(d) (eff. July 1, 2006)) motion to withdraw the guilty plea to avoid a waiver on appeal. Defendant asks this court to reduce the restitution to \$1,000.

The State responds that the issue was waived because defendant failed to file a motion to withdraw the guilty plea, and the State maintains that the appeal should be dismissed. The State further responds that the restitution order was valid because it reflected the victim's loss from defendant's criminal activity. The State maintains that the trial court correctly ordered restitution in the amount of the \$1,200 value obtained from the victim, the currency exchange. According to the State, defendant should have to pay \$1,200 in restitution because he cashed an altered check at the currency exchange and received \$1,200. The State argues that defendant failed to produce evidence to support a reduction in the amount of the restitution.

Defendant replies that no additional evidence is required to show that he legitimately received \$200 of the \$1,200, and that \$1,000 was the value he received from the victim as a result of the criminal conduct.

Defendant was not required to file a motion to withdraw his

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guilty plea to challenge the allegedly excessive amount of restitution (*People v. Exum*, 307 Ill. App. 3d 1000, 1003 (1999)), because a portion of a restitution order that was not authorized by statute is void (*People v. Felton*, 385 Ill. App. 3d 802, 805-06 (2008) (plea agreement did not provide for restitution for dismissed charges)).

"For purposes of calculating restitution, the loss to the victim is the value of that which was obtained from the victim as a result of the criminal conduct."
People v. Behm, 154 Ill. App. 3d 987, 998 (1987).

The amount of restitution is the total loss to the victim, without regard to any insurance proceeds. *People v. Abraham*, 89 Ill. App. 3d 786, 788 (1980). Review is *de novo*. *Felton*, 385 Ill. App. 3d at 805.

In *Behm*, 154 Ill. App. 3d at 998, the amount of restitution was the amount of a forged check written on a closed account.

In *People v. Bradford*, 207 Ill. App. 3d 436, 438-39 (1991), the cause was remanded for reduction of restitution because the amount of restitution exceeded the amount in the indictment, and the order was erroneous as to the excess.

We conclude that although defendant did not need to file a Rule 604(d) motion to challenge an allegedly void portion of a

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restitution order, the record discloses that the plea agreement here, unlike the plea agreement in *Felton*, provided for the amount of restitution that was ordered, namely, \$1,200 in restitution. The indictment charged that defendant had made or altered a check in the sum of \$1,200. Defendant pleaded guilty to forging a check in the sum of \$1,200. Defense counsel stated that there was an agreed disposition, including restitution to be paid from the proceeds of the bond. The assistant State's Attorney said that defendant owed \$1,200 in restitution and that it should come entirely out of the bond. Defense counsel observed that the balance would be refunded to the surety.

Furthermore, the victim entitled to restitution in this case is the currency exchange. The currency exchange cashed the \$1,200 check and turned the \$1,200 in proceeds over to defendant on an altered check. Thus, the currency exchange lost \$1,200 due to the altered check, not \$1,000, and consequently is entitled to, and not unjustly enriched by, restitution in the amount of \$1,200. Although defendant argues that he is entitled to \$200, the \$200 would be owed by the third party, Katsaros.

Given these circumstances, we cannot say that the trial court lacked authority to order \$1,200 in restitution or that it lacked authority to order a \$200 portion of that restitution. We have considered, and rejected, defendant's other arguments on appeal.

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The judgment of the circuit court is affirmed.

Affirmed.