2015 IL App (2d) 131257-U
No. 2-13-1257
Order filed September 24, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BRIAN WATKINS, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 09-CF-2196 Honorable John R. Truitt, Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant forfeited his request for a reduction in the amount of restitution; but (2) the statute on restitution and the interests of justice require that the restitution order be amended to reflect the amount of the actual out-of-pocket loss proven at trial.

¶ 2 Following a bench trial in the circuit court of Winnebago County, defendant, Brian Watkins, was convicted of two counts of theft (720 ILCS 5/16-1(a)(1), (a)(2) (West 2006), 725 ILCS 5/111-4(c) (West 2006)), three counts of official misconduct (720 ILCS 5/33-3(b) (West 2006)), five counts of forgery (720 ILCS 5/17-3(a)(1), (a)(2) (West 2006)), and two counts of computer fraud (720 ILCS 5/16D-5(a)(2), (a)(3) (West 2006)). After denying defendant's post-

trial motion, the court entered judgment only on one count of theft (720 ILCS 5/16-1(a)(1) (West 2006), 725 ILCS 5/111-4(c) (West 2006)) and two counts of forgery (720 ILCS 5/17-3(a)(1) (West 2006)). Thereafter, the court sentenced defendant to four years' probation on the theft count and a concurrent term of 30 months' probation on the forgery counts. The court also ordered defendant to pay restitution in the amount of $14,256.93. Defendant appeals, asserting that the judgment order should be amended to reduce the restitution amount to $14,054.27, the actual out-of-pocket loss proven at trial. For the reasons set forth below, we amend the restitution order.

¶ 3 Defendant was charged in a 21-count indictment with two counts of theft, three counts of official misconduct, fourteen counts of forgery, and two counts of computer fraud. The charges stemmed from allegations that defendant falsified his time sheets while working for the Rockford Fire Department (Department), resulting in the receipt of overtime pay for hours he did not work.

¶ 4 The evidence presented at trial showed that the inconsistencies in defendant's time sheets were first noticed by the Department's payroll clerk in May 2009. The clerk notified her superiors, and the Department eventually requested an internal investigation of defendant by the Rockford Police Department. The State presented the testimony of Sergeant Michael Ahrens regarding the Department's out-of-pocket loss. Ahrens, who was assigned to the Rockford Police Department's Office of Professional Investigations, testified that at the beginning of the investigation, he was given hard copies of various documents, including signed time sheets for defendant from 2007 through 2009. Upon receiving the time sheets, Ahrens calculated the overtime for which defendant requested payment and looked for any discrepancies. Using People's Exhibit No. 17, a thumb drive containing a spreadsheet for the period from January 2007 through May 2009, and showing defendant's rate of pay, his overtime as it should have

been calculated, and the way it was actually paid out, Ahrens testified that defendant received $14,054.27 which he should not have been paid.

¶ 5 As noted above, the court found defendant guilty of two counts of theft, three counts of official misconduct, five counts of forgery, and two counts of computer fraud.[1] The trial court denied defendant's post-trial motion and the matter proceeded to sentencing. At the sentencing hearing, the parties discussed which counts would merge based on the one-act, one-crime doctrine. Ultimately, the court entered convictions only on count I (theft), count VII (forgery), and count IX (forgery). Regarding the issue of restitution, the State argued for an award in the amount of $18,000. Defense counsel noted that the statement of facts submitted by the State's Attorney's Office to the investigator and set forth in defendant's presentence investigation (PSI) report, provides that defendant was overpaid in the amount of $14,256.93. Defense counsel asserted that that figure "would be the appropriate amount" and was supported by the State's evidence. As noted above, the trial court sentenced defendant to probation and ordered him to pay restitution in the amount of $14,256.93. Defendant filed a timely notice of appeal.

¶ 6 On appeal, defendant asserts that the judgment order should be amended to reflect that the restitution amount should be reduced because the actual out-of-pocket loss was $14,054.27, and not the amount of $14,256.93 ordered by the trial court. The State responds that defendant forfeited this claim by (1) failing to file a motion to reduce his sentence; and (2) agreeing at the sentencing hearing that the amount of restitution he owed was $14,256.93. Alternatively, the

[1] The trial court granted in part defendant's motion for a directed finding at the close of the State's case and dismissed counts XIII through XXI of the indictment, all of which alleged forgery.

State argues that defendant's position fails on the merits because the PSI report reflects that the actual amount of defendant's overcompensation was $14,256.93.

¶ 7 As the State correctly asserts, defendant has forfeited this issue both by failing to file a post-sentencing motion and agreeing at the sentencing hearing that the amount of restitution he owed was $14,256.93. *People v. Gallinger*, 252 Ill. App. 3d 816, 818 (1993) (concluding that defendant waived any challenge to award of restitution by failing to file a motion to reduce sentence); *People v. Beavers*, 141 Ill. App. 3d 790, 797 (1986) (holding that defendant waived claim that restitution was improperly imposed by inviting court to enter particular restitution order). Even so, forfeiture is a limitation on the parties, not on the court, and we may overlook forfeiture and address an issue to reach a just result. *In re Tamera W.*, 2012 IL App (2d) 111131, ¶ 30; *Our Savior Evangelical Lutheran Church v. Saville*, 397 Ill. App. 3d 1003, 1028 (2009). In this regard, we note that one of the purposes behind restitution is to make a victim of crime whole. *People v. Fontana*, 251 Ill. App. 3d 694, 707 (1993). Thus, restitution may only be ordered for "the actual out-of-pocket expenses, losses, damages, and injuries *** proximately caused by the [defendant's] criminal conduct." 730 ILCS 5/5-5-6(b) (West 2006).

¶ 8 In this case, we believe the aforesaid restitution statute and the interests of justice require us to relax the forfeiture rule and reduce the amount of restitution awarded to reflect the actual loss proven at trial. The only witness presented by the State regarding the Department's actual out-of-pocket loss was Sergeant Ahrens. After reviewing hard copies of defendant's time sheets, Ahrens found various discrepancies. Using a spreadsheet covering the period from January 2007 through May 2009, and showing defendant's rate of pay, his overtime as it should have been calculated, and the amount defendant was actually paid, Ahrens calculated that defendant was overcompensated in the amount of $14,054.24. Ordering defendant to pay more than the actual

loss proven at trial is contrary to the purpose of providing restitution in that it makes the Department more than whole. See *Fontana*, 251 Ill. App. 3d at 707. Accordingly, we find that the trial court abused its discretion in awarding $14,256.93 as restitution. See *People v. Stites*, 344 Ill. App. 3d 1123, 1125 (2003) (addressing standard of review on appeal for award of restitution). Pursuant to our authority under Illinois Supreme Court Rule 366(a)(1) (eff. Feb. 1, 1994), we amend the sentencing order to reduce the restitution amount to $14,054.27.

¶ 9 The State acknowledges that the sworn testimony at trial "seemed to establish that the actual loss" was $14,054.27. According to the State, however, trial testimony is not the only valid source to establish one's actual out-of-pocket loss for restitution purposes. In this case, the State, citing to *Gallinger*, 252 Ill. App. 3d 816, asserts that the PSI report supports the trial court's award of $14,256.93 in restitution. We find *Gallinger* distinguishable.

¶ 10 In *Gallinger*, the defendant was convicted of one count of aggravated battery and one count of criminal damage to property. The convictions stemmed from the defendant's attack of a gas station manager and damage to a police squad car. The sentencing order required the defendant to pay restitution to the manager for damages caused to a watch and a pair of prescription eyeglasses. At trial, the manager was called as a witness, but he did not testify that his watch and eyeglasses were damaged in the attack. After the defendant was found guilty, the State represented that the value of the manager's watch was $189 and the value of his eyeglasses was $168. The court stated at the sentencing hearing that it would order restitution for the watch and the eyeglasses "upon proper bills to be presented," and the sentencing order entered required the defendant to pay these amounts as restitution.

¶ 11 On appeal, the defendant argued, *inter alia*, that the restitution order was improper because no sworn testimony supported it. In rejecting this argument, we specifically noted that

the trial court stated at the sentencing hearing that it would order restitution for the damage " 'upon proper bills to be presented.' " *Gallinger*, 252 Ill. App. 3d at 819-20. The bills were apparently not part of the record on appeal. Nevertheless, we presumed that the trial court received and considered them. *Gallinger*, 252 Ill. App. 3d at 820. We also noted that the defendant did not object to information in the PSI report, which expressly referenced that the value of the manager's watch was $189 and the value of his eyeglasses was $168. We concluded that the information in the PSI report itself constituted sufficient evidence of the amount of loss because the information therein was not contested and there was no " 'specific claim of inaccuracy.' " *Gallinger*, 252 Ill. App. 3d at 820 (quoting *People v. Powell*, 199 Ill. App. 3d 291, 295 (1990)).

¶ 12 The PSI report prepared in this case states in relevant part as follows:

> "A detailed analysis of the defendant's time sheets submitted during the time period starting January 1, 2007 thru May 2009 was conducted revealing that 55 of the 62 payroll periods were manually overridden. It was determined that the defendant was overpaid 98.16 hours in 2007 for a total of $5339.56, 128.13hrs [*sic*] in 2008 for a total of $7248.51, and 29.5 hours in 2009 for a total of $1668.86. The total amount paid to the defendant according to his time sheets from 1-1-07 to 5-5-09 was $14,256.93."

The PSI report does not specifically mention Ahrens' testimony and it is not clear to us who conducted the "detailed analysis" referenced in the PSI report or who calculated the amount of restitution set forth therein. Indeed, unlike the situation in *Gallinger* where the value of the damaged items was consistent, the amount of restitution noted in the PSI report directly conflicts with Ahrens' testimony. Given these circumstances, we find that the PSI report does not provide a sufficient evidentiary basis for a restitution order of $14,256.93.

¶ 13 III. CONCLUSION

¶ 14 For the reasons set forth above, we find that the trial court abused its discretion in ordering restitution in an amount exceeding the actual out-of-pocket loss proven at trial. Accordingly, pursuant to our authority under Illinois Supreme Court Rule 366(a)(1) (eff. Feb. 1, 1994), we amend the sentencing order to reduce the restitution amount to $14,054.27.

¶ 15 Affirmed as amended.