2011 Ill. App. (2d) 100450-U
Nos. 2-10-0450; 2-10-0451; 2-10-0452
Order filed September 19, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RENEE M. GARZA, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. Nos. 07-CF-1106 08-CF-21 08-CF-2134 Honorable Kathryn E. Creswell, Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Schostok concurred in the judgment.

ORDER

Held: Defendant's challenge to order of restitution was properly before this court, and counsel provided ineffective assistance in failing to challenge restitution order where the factual basis for the order was questionable.

¶ 1 Defendant, Rene M. Garza, appeals an order of the circuit court of Du Page County insofar as it imposed restitution against her in the amount of $1293.50. She raises a number of arguments, asserting that the victim, the retailer Target, had not been shown to suffer any actual out-of-pocket loss. In turn, she contends that the order was void and that her trial attorney was ineffective in

failing to contest the imposition of restitution. We agree that defendant received ineffective assistance of counsels; therefore, we vacate the portion of the trial court's order imposing restitution and remand for further proceedings.

¶ 2 On December 1, 2008, defendant entered an open guilty plea to one count of forgery (720 ILCS 5/17-3 (West 2006)) and two counts of retail theft (720 ILCS 5/16A-3(a) (West 2008)). The factual basis for the first count of retail theft (case no. 08-CF-21) was as follows. A loss-prevention officer employed by Target would testify that he observed defendant place numerous miscellaneous items in a shopping cart. She then pushed the cart into the parking lot without paying for the items. A police officer was in the parking lot. Defendant stated that she intended to pay for the items. Another police officer would testify that defendant admitted using bad judgment in taking the items. Additionally, evidence would be presented that the value of the items was approximately $894.61.

¶ 3 As for the second count of retail theft (case no. 08-CF-2134), a security agent from Target would testify that he observed defendant place several items in a shopping cart and walk out the south doors of the store without paying for them. Defendant was stopped and police were summoned. The value of these items was $398.89. The presentence report for this offense states that the items were recovered.

¶ 4 Following defendant's plea, a sentencing hearing was held. The trial court imposed a sentence of two-years probation for each offense, contingent upon the completion of the Treatment Alternatives for Safer Communities program (TASC). It also ordered restitution in the total amount of $1293.50 for both counts of retail theft.

¶ 5 On October 19, 2009, the State filed a petition to revoke defendant's probation, alleging that defendant had failed to report to her probation officer on two occasions and that she had not started substance-abuse treatment. Following a hearing, the trial court found that defendant had violated

her probation. It imposed the consecutive two-year sentences, and it stated that "[t]here will be an unsatisfied judgment" in the amount of the earlier restitution order. Defendant now appeals, contending that the portion of the order concerning restitution should be vacated.

¶ 6 As a threshold matter, we must determine whether the restitution order is properly before this court. The orders of restitution for the two counts of retail theft were initially entered in December 2008 after defendant's open plea of guilty. No appeal was taken at that time. Typically, "When no direct appeal is taken from an order of probation and the time for appeal has expired, a reviewing court is precluded from reviewing the propriety of that order in an appeal from a subsequent revocation of that probation, unless the underlying judgment of conviction is void." *People v. Johnson*, 327 Ill. App. 3d 252, 256 (2002). However, an exception exists. When a court revokes a defendant's probation, it imposes a new sentence. *People v. Felton*, 385 Ill. App. 3d 802, 804 (2008). If, in the course of imposing that sentence, the trial court again imposes restitution, the restitution order can be challenged. This is because the "defendant is not challenging a condition of her prior probation but rather part of her new sentence imposed after the revocation of probation." *Felton*, 327 Ill. App. 3d at 804. Thus, defendant can challenge the restitution order in this case only if the trial court reimposed it.

¶ 7 Here, the trial court clearly reimposed the restitution orders. It stated:

> "The judgment of the Court will be that on each of these cases the defendant will be sentenced to 2 years in the Illinois Department of Corrections. The sentences do run consecutive to one another.
>
> Originally[,] there was some restitution that was ordered. There will be an unsatisfied judgment as to the restitution orders. No discretionary fines, only those fines, fees and assessments mandated by law and DNA has been collected previously."

The State characterizes the trial court's action as merely memorializing the earlier restitution orders. We find this contention unpersuasive. The trial court did not use the past tense when referring to the unsatisfied judgment ("There *will be* an unsatisfied judgment as to the restitution orders." (emphasis added)). Furthermore, it made this statement in the course of imposing defendant's sentence, between setting the term of years she was to serve and addressing the fines for which she was obligated. Accordingly, the propriety of restitution is properly before this court.

¶ 8 Defendant argues that the restitution order is void because it was not authorized by the controlling statute. Defendant points out that the section 5-5-6 of the Unified Code of Corrections requires a loss before restitution is ordered. See 730 ILCS 5/5-5-6 (West 2008). However, it is now well settled that jurisdiction comes from the constitution rather than from a legislative enactment. *People ex rel. Graf v. Village of Lake Bluff*, 206 Ill. 2d 541, 553 (2003). Thus, the failure to comply with a statutory requirement renders an order voidable rather than void.

¶ 9 Defendant also argues that she received ineffective assistance of counsel in that his trial attorney failed to challenge the restitution order. In assessing such a claim, we apply the two part test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 694 (1984), which our supreme court adopted by in the case of *People v. Albanese*, 104 Ill. 2d 504, 527 (1984). Under that test, we must determine whether trial counsel's performance was objectively unreasonable in light of prevailing professional standards and if defendant was prejudiced by counsel's performance. *People v. Petrenko*, 237 Ill. 2d 490, 496-97 (2010). To show prejudice, a defendant must establish a reasonable probability that the outcome of the proceeding would have been different. *People v. Manning*, 227 Ill. 2d 403, 418 (2008). A reasonable probability is one sufficient to undermine confidence in the outcome of the proceeding. *People v. Garcia*, 405 Ill. App. 3d 608, 617 (2010). Defendant has satisfied both prongs.

¶ 10 As for the first prong, it is well established that matters of trial strategy cannot form the basis of a claim of ineffectiveness. See *People v. Wright*, 111 Ill. 2d 18, 26-27 (1986). Thus, it has been previously held that the failure to present a viable defense constitutes ineffectiveness where it does not result from trial strategy. *People v. Haynes*, 408 Ill. App. 3d 684, 689 (2011). We can perceive no strategy that could have been the basis of counsel's decision not to contest the restitution order where the record is unclear as to whether a loss was even sustained by the victim. Restitution was an isolated part of the case, and challenging it would have had no effect on anything else of substance. As such, competent representation would have included contesting restitution.

¶ 11 Regarding the second prong, we begin by emphasizing that, to prevail here, defendant need only show a reasonable probability that the result of the proceeding would have been different– that is, a probability sufficient to undermine confidence in the outcome. *People v. Gillespie*, 407 Ill. App. 3d 113, 132 (2010). Given that the factual basis of the pleas to both counts of retail theft indicate that defendant was apprehended at the store from which the theft occurred, our confidence in the result of the proceeding with regard to restitution is sufficiently undermined such that defendant has established prejudice. Quite simply, the restitution statute provides that "[i]n fixing the amount of restitution to be paid in cash, the court shall allow credit for property returned in kind." 730 ILCS 5/5-5-6 (West 2008). Given that the property was recovered while still on the victim's premises, there is certainly a reasonable probability that the property was restored to the victim. Further, we note that the presentence report for one of the counts flatly states that the items were recovered.

¶ 12 The State argues that "the record does not prove that the restitution award was in error" and that defendant cannot establish prejudice for this reason. The State's argument misses the mark. As explained above, defendant need only establish a reasonable probability that the result of the

proceeding would have been different. *Manning*, 227 Ill. 2d at 418. If we were to accept the State's argument, a defendant would be required to establish this proposition with certitude.

¶ 13 We also reject the State's contention that defendant forfeited any challenge to the restitution order. The State bases this assertion on the fact that defendant did not raise the issue before the trial court. It cites *People v. Reed*, 177 Ill. 2d 389, 394 (1997), for the proposition that sentencing issues not raised before the trial court are forfeited. While this is generally true, the ineffective assistance of counsel provides a well-recognized exception to the wavier rule. See *People v. Smith*, 326 Ill. App. 3d 831, 840-41 (2001). In this argument, defendant challenges counsel's failure to contest the restitution order. Obviously, the failure to contest the restitution order is not a valid basis to find counsel's failure to contest the restitution order forfeited. If this were the law, such omissions by counsel would be beyond meaningful appellate review.

¶ 14 Accordingly, we conclude that defendant has established that trial counsel was ineffective. Therefore, we vacate that portion of the trial court's order requiring defendant to make restitution. However, though our confidence in the propriety of the restitution order is sufficiently undermined to support a claim of ineffective assistance of counsel, we cannot say with certainty that the restitution order was erroneous. We therefore remand for further proceedings on this issue. The balance of the trial court's sentencing order is affirmed.

¶ 15 Affirmed in part and vacated in part; cause remanded.