2011 IL App (5th) 090155-U

NO. 5-09-0155

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 06-CF-1985
	)	
TAMARA J. DAVIS,	)	Honorable
	)	Milton S. Wharton,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE CHAPMAN delivered the judgment of the court.
Justices Spomer and Stewart concurred in the judgment.

O R D E R

¶ 1 *Held*: Amount of restitution order was not supported by the evidence. Although the defendant waived her argument, justice requires that the restitution order be amended to reflect the amount of damage actually caused by her actions.

¶ 2 The defendant, Tamara J. Davis, was convicted of criminal damage to government-supported property. Her conviction stemmed from an incident in which she damaged a component of a desk partition in the St. Clair County sheriff's department. The defendant was sentenced to probation and ordered to pay restitution in the amount of $100. On appeal, she argues that the evidence showed property damage in the amount of $60 and that any restitution amount above $60 was, therefore, void. We amend the order.

¶ 3 The defendant went to the St. Clair County sheriff's department to pick up county employee identification cards for herself and some of her coworkers. Deputy Cerether White informed her that there was a warrant for her arrest due to an unpaid traffic ticket. The defendant informed Deputy White that she had paid the ticket. White acknowledged that this

was true, but she told the defendant that the warrant was for failure to appear for a court date. She told the defendant not to leave or she would be arrested. According to White, the defendant became angry and told White that if she had to go to jail to prove she had paid the ticket, she would do so. The defendant was arrested and spent the night in jail.

¶ 4 The defendant was released the following morning. According to the defendant, she asked Deputy White where her car keys were, and Deputy White ignored her question. She then asked the sheriff where her keys were. According to White, the defendant began screaming at the sheriff, as a result of which she was told to leave the premises or she would again be arrested. According to the defendant, she was never told to leave. Three officers attempted to restrain the defendant and take her to the booking area. She attempted to get free by kicking her legs. In doing so, she kicked a desk partition, knocking it over. The partition was torn from the bracket holding it to the wall.

¶ 5 The defendant was charged with one count each of criminal damage to government-supported property (720 ILCS 5/21-4(1)(a) (West 2006)) and resisting a peace officer (720 ILCS 5/31-1(a-7) (West 2006)). She was tried in a bench trial. At trial, the defendant admitted that she kicked the partition, but she testified that she did not intend to knock it over or damage it.

¶ 6 Jeffrey Brown, the maintenance foreman for the St. Clair County jail and sheriff's department, testified regarding the damage to the partition. He stated that the defendant did not damage the partition itself but that she did damage the bracket that attached the partition to the wall. He testified that he replaced the bracket with a bracket the department had in stock, explaining that department had purchased spare parts along with the partitions in case any were damaged. He estimated the value of the bracket to be between $50 and $60. He specifically testified that only one component was damaged.

¶ 7 The court found that the defendant's arrest was "clearly without legal justification."

The court further found that the defendant did not intend to damage the partition. However, the court found her guilty on both charges, explaining that (1) she had no right to resist even an unlawful arrest and (2) there was no need to prove her intent to damage the partition to support the charge of criminal damage to government-supported property.

¶ 8 The court later held a sentencing hearing. The presentence investigation report (PSI) stated, in relevant part, "Available police reports reveal that approximately $100 of damage was sustained to the partition." The PSI did not indicate what those reports were, and none were attached. The court sentenced the defendant to probation and ordered her to pay $100 in restitution. The defendant did not object to this amount at the hearing.

¶ 9 The defendant appeals, arguing that the portion of the restitution that exceeds the damages proven at trial is void and the amount must be reduced. Courts may order a defendant to pay restitution as a part of her sentence. Restitution may only be ordered for "the actual out-of-pocket expenses, losses, damages, and injuries *** proximately caused by [the defendant's] conduct." 730 ILCS 5/5-5-6(b) (West 2006). On appeal, we will not reverse a court's restitution order absent an abuse of discretion. *People v. Stites*, 344 Ill. App. 3d 1123, 1125, 802 N.E.2d 303, 305 (2003). The defendant argues that the court abused its discretion here because the evidence only demonstrated that her actions caused $60 in damage to the partition. We agree. As previously discussed, maintenance foreman Jeffrey Brown testified that only one component was damaged and that component cost approximately $50 or $60. This evidence supports an order of at most $60 in restitution.

¶ 10 The State argues, however, that the court properly considered evidence in the PSI report as additional evidence of the actual loss caused by the defendant's actions. The PSI indicated that there was "approximately $100" of damage to "components" of the partition. The State is correct that the court may consider additional evidence–including the contents of the PSI report–in determining an appropriate amount of restitution. See *People v.*

Gallinger, 252 Ill. App. 3d 816, 820, 624 N.E.2d 399, 402 (1993) (explaining that a PSI can be sufficient evidence); see also *People v. Sharp*, 185 Ill. App. 3d 340, 347, 541 N.E.2d 689, 692-93 (1989) (reviewing the transcript from the sentencing hearing to determine if sufficient evidence supported the restitution order, *abrogated on other grounds by People v. Lowe*, 153 Ill. 2d 195, 606 N.E.2d 1167 (1992)). However, this court has previously held that the State must prove the amount of actual loss caused by the defendant. *Sharp*, 185 Ill. App. 3d at 348-49, 541 N.E.2d at 694.

¶ 11 In support of its position that the PSI in this case was sufficient, the State cites *People v. Gallinger* and *People v. Powell*, 199 Ill. App. 3d 291, 556 N.E.2d 896 (1990). We find *Gallinger* distinguishable, and we decline to follow the Fourth District's decision in *Powell*.

¶ 12 In *Gallinger*, the defendant was convicted of aggravated battery for attacking a gas station manager. *Gallinger*, 252 Ill. App. 3d at 817, 624 N.E.2d at 400. The sentencing order required him to pay restitution to the manager for damage caused to a watch and a pair of eyeglasses. *Gallinger*, 252 Ill. App. 3d at 818, 624 N.E.2d at 400. At trial, the manager testified, but he did not testify that his watch and eyeglasses were damaged in the attack. *Gallinger*, 252 Ill. App. 3d at 817, 624 N.E.2d at 400. On appeal, the defendant argued that the restitution order was improper because no sworn testimony supported it. *Gallinger*, 252 Ill. App. 3d at 818, 624 N.E.2d at 400.

¶ 13 In rejecting this argument, the appellate court 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, 624 N.E.2d at 402. Apparently the bills were not a part of the record on appeal, but the appellate court presumed that the trial court received and considered them. *Gallinger*, 252 Ill. App. 3d at 820, 624 N.E.2d at 402.

¶ 14 The court also noted that the PSI report included specific amounts attributable to the

damage to the watch and eyeglasses, which were not contested. The court found that the information in the PSI report itself can be sufficient evidence of the amount of loss if it is uncontested and there is no " 'specific claim of inaccuracy.' " *Gallinger*, 252 Ill. App. 3d at 820, 624 N.E.2d at 402 (quoting *Powell*, 199 Ill. App. 3d at 295, 556 N.E.2d at 899).

¶ 15 Here, by contrast, the PSI is not supported by any evidence, and it contains only a vague reference to unspecified "available police reports." Unlike the PSI at issue in *Gallinger*, the PSI here does not even purport to provide a precise amount of damage; rather, it provides an approximate figure. Moreover, the amount of damage noted in the PSI directly conflicts with the maintenance foreman's testimony at trial. Thus, the PSI here does not provide a sufficient evidentiary basis for the $100 restitution order.

¶ 16 *Powell* presents a far more analogous scenario. There, a defendant was convicted of state benefits fraud. *Powell*, 199 Ill. App. 3d at 293, 556 N.E.2d at 897. In the PSI, the State indicated that it intended to request restitution in the amount of $5,710. *Powell*, 199 Ill. App. 3d at 294, 556 N.E.2d at 898. The defendant did not raise any objection to the PSI at her sentencing hearing. *Powell*, 199 Ill. App. 3d at 295, 556 N.E.2d at 898. On appeal, however, she argued that the evidence at trial proved actual losses of only $1,928. *Powell*, 199 Ill. App. 3d at 293, 556 N.E.2d at 898.

¶ 17 The *Powell* court rejected this contention for two reasons. First, the court held that a sentencing court may rely on any information in a PSI "to the extent the judge finds the information probative *and reliable*." (Emphasis added.) *Powell*, 199 Ill. App. 3d at 294, 556 N.E.2d at 898. The court further held that information in a PSI is sufficient evidence to support a restitution order unless there is a "specific claim" that the PSI is inaccurate. *Powell*, 199 Ill. App. 3d at 295, 556 N.E.2d at 899. Second, the court found that the defendant had waived her objection to any claimed inaccuracy in the PSI. This is because she not only failed to call it to the trial court's attention, she specifically argued at her

sentencing hearing that it would be inappropriate to impose $5,710 in restitution on a defendant of limited means. *Powell*, 199 Ill. App. 3d at 295, 556 N.E.2d at 898.

¶ 18 We first note that the *Powell* case does not entirely support the State's position. As discussed, the court held that information in a PSI is sufficient to support a restitution order *if* the court finds the information to be reliable and there is no claim that it is inaccurate. Here, the PSI included only an approximate amount of damage, which directly conflicted with uncontroverted trial testimony. Nevertheless, the *Powell* court appeared to overlook these two limitations in applying its holding to the facts before it. The PSI there contained only a statement indicating the amount of restitution the State intended to request, and the defendant contended that the amount was inaccurate because it conflicted with the evidence introduced at her trial. To the extent that *Powell* holds that any statement in a PSI provides sufficient proof to support a restitution award even if it conflicts with evidence at trial, we do not find the decision persuasive. See *People v. Pineda*, 373 Ill. App. 3d 113, 120, 867 N.E.2d 1267, 1274 (2007) (explaining that we are not required to follow the holdings of other districts of the appellate court). In addition, we note that the *Powell* court specifically declined to follow this court's decision in *Sharp*. *Powell*, 199 Ill. App. 3d at 295, 556 N.E.2d at 899. To the extent *Powell* is inconsistent with precedent of this court, we need not follow its holding.

¶ 19 The State, however, argues that the PSI here did not conflict with the evidence at trial. Rather, the State contends, considering the PSI together with the trial evidence supports the restitution award because it demonstrates that two brackets were damaged, each of which was worth $50 to $60. We are not persuaded. The State points out that Jeffrey Brown circled two areas on a photograph showing where the defendant damaged the partition and that the PSI refers to damaged "components" (plural). However, as we have already emphasized, Brown specifically testified that only one component was damaged. The

reference to multiple components in the PSI directly conflicts with his testimony. The State's argument also misconstrues the significance of the two circled areas on the photograph. At trial, Brown was shown the photograph, and he was asked to circle "the areas where [he is] describing where damage was made to the bracket." Thus, we conclude that the evidence did not support a restitution order of more than $60.

¶ 20 The defendant acknowledges that she did not challenge the amount of restitution ordered at the sentencing hearing. She argues, however, that the portion of the restitution order exceeding $60 is void and may therefore be challenged for the first time on appeal. *People v. Felton*, 385 Ill. App. 3d 802, 805, 896 N.E.2d 910, 913 (2008) (citing *People v. Thompson*, 209 Ill. 2d 19, 23, 805 N.E.2d 1200, 1203 (2004)). We find the cases that she cites for this proposition to be distinguishable.

¶ 21 In *People v. Thornton*, a defendant convicted of cruelty to animals was ordered to pay restitution to the county agency that provided care to a badly neglected dog that was seized from the defendant. *People v. Thornton*, 286 Ill. App. 3d 624, 631, 676 N.E.2d 1024, 1029 (1997). The appellate court found that the restitution order was not authorized because neither the dog nor the agency that provided care to the dog were "victims" within the meaning of the restitution statute. *Thornton*, 286 Ill. App. 3d at 635, 676 N.E.2d at 1031. Because restitution was not authorized by statute, the order was void and could be challenged at any time. *Thornton*, 286 Ill. App. 3d at 632, 676 N.E.2d at 1030. Similarly, in *People v. Fox*, the court found that a restitution order was void because the restitution statute in effect at the time did not authorize a sentence of restitution for the offense on which the defendant was convicted. *People v. Fox*, 298 Ill. App. 3d 926, 929, 700 N.E.2d 152, 154 (1998).

¶ 22 In *People v. Felton*, the defendant was charged with four counts of forgery for forging four checks, but two counts were dismissed pursuant to a plea agreement. *Felton*, 385 Ill. App. 3d at 803, 896 N.E.2d at 912. The defendant was ordered to pay restitution for three

of the checks, including one that served as the basis for one of the counts that was dismissed. *Felton*, 385 Ill. App. 3d at 805, 896 N.E.2d at 913. Because a portion of the restitution was based on a charge that had been dismissed, it was not authorized by statute and was, therefore, void. *Felton*, 385 Ill. App. 3d at 806, 896 N.E.2d at 914.

¶ 23 *People v. Exum* also involved the amount of restitution that could properly be ordered in a forgery case. There, although there was evidence that the defendant had forged three checks (*People v. Exum*, 307 Ill. App. 3d 1000, 1002, 719 N.E.2d 342, 344 (1999)), she was charged with only one count of forgery for forging one of the three checks (*Exum*, 307 Ill. App. 3d at 1003, 719 N.E.2d at 345). On appeal, the court found that any portion of the restitution order attributable to uncharged conduct was unauthorized and therefore void. *Exum*, 307 Ill. App. 3d at 1003, 719 N.E.2d at 345.

¶ 24 The difference between the case before us and both *Thornton* and *Fox* is immediately apparent. Those cases involved situations where restitution was not authorized as a sentence. Here, there is no dispute that a court is authorized to order restitution from a defendant convicted of criminal damage to property. There is likewise no dispute that the sheriff's department is a victim that can be compensated. We also do not agree with the defendant that the instant case is analogous to *Felton* and *Exum*. The issue here is not whether she has been ordered to pay restitution for uncharged conduct or conduct underlying a charge that was dismissed. Rather, the issue is whether the evidence supported an implicit factual finding that her charged conduct–damaging the partition–caused $100 in damage. As the State correctly notes, a defendant can waive her argument that a sentence is excessive due to a mistake of fact or law. *People v. Fouts*, 319 Ill. App. 3d 550, 552, 745 N.E.2d 1284, 1286 (2001). We thus agree with the State that the court's order was voidable rather than void.

¶ 25 The State argues that the defendant has waived her challenge to the amount of

restitution ordered by failing to object at the sentencing hearing. Although the State is correct, we note that waiver is a limitation on the parties, not the court. *People v. Wheeler*, 392 Ill. App. 3d 303, 309, 912 N.E.2d 681, 687 (2009). We may relax the waiver rule in the interest of justice. *People v. Fontana*, 251 Ill. App. 3d 694, 704-05, 622 N.E.2d 893, 901 (1993). Here, the restitution was a major component of the sentence imposed, and the amount ordered is nearly twice the largest amount supported by the evidence. Moreover, the department replaced the damaged bracket with a spare part it already had in stock. One purpose behind restitution is to make crime victims whole. *Fontana*, 251 Ill. App. 3d at 707, 622 N.E.2d at 903. This purpose is not served by requiring the defendant to pay $100 restitution for a $50 to $60 component the victim did not actually need to purchase to replace. In light of all these factors, we believe that justice requires us to relax the waiver rule and reduce the restitution to reflect the actual loss proven at trial.

¶ 26 We conclude that the court abused its discretion in ordering restitution in an amount that exceeded the proven damage by a substantial amount. Pursuant to our authority under Supreme Court Rule 366(a)(1) (eff. Feb. 1, 1994), we amend the sentencing order to include $60 in restitution. We affirm the order as amended.

¶ 27 Order affirmed as amended.