

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-01-005
- vs -	:	<u>OPINION</u>
	:	8/29/2011
SCOTT ROBERT WELDEN,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 08CR25030

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Scott Robert Welden, 2406 Grandview Avenue, Cincinnati, Ohio 45206, defendant-appellant, pro se

HENDRICKSON, J.

{¶1} Defendant-appellant, Scott Robert Welden, appeals pro se an order of restitution imposed by the Warren County Court of Common Pleas following its decision granting appellant's request for intervention in lieu of conviction. We affirm the decision of the trial court.

{¶2} On May 12, 2008, appellant was indicted on eight fifth-degree felony counts of

practicing medicine or surgery without a certificate in violation of R.C. 4731.41. The state alleged that from July 2007 through February 2008, appellant, a medical doctor, performed cosmetic procedures for which he was not properly licensed on two patients.

{¶13} Appellant pled not guilty to the charges and in August 2008, moved for intervention in lieu of conviction ("ILC"). After a hearing on the matter, the trial court concluded appellant was eligible for ILC and granted his motion in June 2009. Appellant withdrew his previous plea and entered a guilty plea to each of the eight felony counts. The trial court's entry ordering ILC also incorporated an intervention plan, which was to be implemented under the supervision of the Warren County Adult Probation Department. Pursuant to the terms and conditions of the plan, appellant agreed to pay restitution to the victims "in accordance with a payment plan established by [his] probation officer." The probation department subsequently assessed restitution in the amount of \$1,300.

{¶14} In October 2009, appellant filed a pro se motion seeking a hearing on the amount of restitution imposed. He argued that the amount assessed against him exceeded the amount of economic loss suffered by the victims. The trial court held an evidentiary hearing on the matter and in its January 6, 2011 entry, determined that the restitution amount calculated by the probation department was proper. The court ordered appellant to pay \$1,300 as a condition of ILC.

{¶15} Appellant appeals the trial court's restitution order, raising four assignments of error for our review. For purposes of discussion, we have elected to consolidate the assignments of error.

{¶16} Assignment of Error No. 1:

{¶17} "THE TRIAL COURT ERRED BY FAILING TO DETERMINE THE AMOUNT OF RESTITUTION AT THE TIME OF SENTENCING."

{¶18} Assignment of Error No. 2:

{¶9} "THE TRIAL COURT ERRED BY DELEGATING TO THE PROBATION DEPARTMENT THE TASK OF DETERMINING THE AMOUNT OF RESTITUTION OWED."

{¶10} Assignment of Error No. 3:

{¶11} "THE TRIAL COURT ERRED BY ORDERING RESTITUTION IN AN AMOUNT THAT WAS NOT LIMITED TO THE ACTUAL ECONOMIC LOSS RESULTING FROM THE CRIMES FOR WHICH THE DEFENDANT WAS CONVICTED."

{¶12} Assignment of Error No. 4:

{¶13} "THE TRIAL COURT ERRED IN ORDERING RESTITUTION WITHOUT A CONVICTION WHEN APPELLANT WAS GRANTED INTERVENTION IN LIEU OF CONVICTION."

{¶14} Appellant's assignments of error challenge multiple aspects of the trial court's restitution order. In his first, second, and fourth assignments, appellant claims that procedural errors were made by the court with regard to the order. Specifically, he contends that the court was required to determine the amount of restitution at the February 2009 hearing on his ILC motion,¹ or in the court's entry ordering ILC. He also claims that the court erred in imposing restitution without first finding him guilty of the underlying offense and that it improperly delegated the restitution determination to the probation department.

{¶15} ILC is a "statutory creation that allows a trial court to stay a criminal proceeding and order an offender to a period of rehabilitation if the court has reason to believe that drug or alcohol usage was a factor leading to the offense." *State v. Massien*, 125 Ohio St.3d 204, 2010-Ohio-1864, ¶9, citing R.C. 2951.041(A)(1). Division (D) of the statute provides that if a trial court grants an offender's request, the court "shall place the offender under the general control and supervision of the county probation department, the adult parole authority, or

1. We note that a transcript of the hearing on appellant's ILC motion is not included in the record on appeal.

another appropriate local probation or court services agency, * * * as if the offender was subject to a community control sanction imposed under section 2929.15, 2929.18, or 2929.25 of the Revised Code. The court shall establish an intervention plan for the offender. The terms and conditions of the intervention plan * * * may include * * * terms and conditions similar to community control sanctions, which may include community service or *restitution*, that are ordered by the court." (Emphasis added.) If an offender successfully complies with the terms and conditions of the intervention plan, the trial court "shall dismiss proceedings against the offender without an adjudication of guilt." *Massien* at id., citing R.C. 2951.041(E).

{¶16} R.C. 2929.18 provides for financial sanctions, including restitution, which may be ordered by the trial court as part of an offender's sentence. Division (A)(1) of the statute states, in part, that "[i]f the court imposes restitution, * * * at sentencing, the court shall determine the amount of restitution to be made by the offender."

{¶17} Contrary to appellant's claim that restitution cannot be ordered prior to a finding of guilt by the trial court, R.C. 2951.041(D) specifically provides that a court may include an order of restitution in an intervention plan. In addition, although appellant contends that he was prejudiced by the court's failure to set forth an amount of restitution in the ILC entry, the intervention plan incorporated into the entry provided that as a term and condition of ILC, appellant was required to pay restitution. It appears appellant placed his initials next to this particular condition, and in signing the plan, acknowledged that he "fully under[stood]" the conditions and agreed to comply with them. Moreover, we note that because he was placed on ILC, he was not yet "sentenced" for purposes of R.C. 2929.18.

{¶18} Nevertheless, even if we were to conclude that the court erred in failing to determine the amount of restitution at the time ILC was ordered, appellant has failed to establish that his substantial rights were adversely affected in light of the restitution hearing held on the issue. R.C. 2929.18(A)(1) provides that if the court decides to impose restitution,

it must hold a hearing if the offender disputes the amount. In this case, the trial court held an evidentiary hearing pursuant to appellant's request. Accordingly, any error on the part of the trial court is harmless. See Crim.R. 52(A).

{¶19} Appellant also argues that the trial court erred in delegating to the probation department the determination of the amount of restitution he was required to pay. He correctly points out that it is the responsibility of the trial court to determine the amount of restitution, and a court may not delegate this responsibility. R.C. 2929.18(A)(1); *State v. Sheehan*, Butler App. No. CA2006-10-285, 2008-Ohio-2737, ¶19. However, appellant has failed to argue that he was prejudiced by the probation department's initial restitution calculation, and we similarly find that this error was harmless in light of the evidentiary hearing held on the matter.

{¶20} In his third assignment of error, appellant challenges the amount of restitution ordered by the trial court. He argues that the court's \$1,300 order was in excess to the actual economic loss suffered by the victims.

{¶21} As discussed above, R.C. 2929.18(A)(1) permits a trial court to order restitution to the victim of the offender's crime in an amount based on the victim's economic loss. "Economic loss" is defined as "any economic detriment suffered by a victim as a direct and proximate result of the commission of an offense." R.C. 2929.01(L). The trial court may base the amount of restitution it orders on "an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense." R.C. 2929.18(A)(1).

{¶22} Due process requires that the amount of restitution ordered bear a reasonable relationship to the actual loss suffered by the victim. *State v. Bowman*, 181 Ohio App.3d

407, 2009-Ohio-1281, ¶10, citing *State v. Williams* (1986), 34 Ohio App.3d 33, 34. Accordingly, a trial court must "determine the amount of restitution to a reasonable degree of certainty, ensuring that the amount is supported by competent, credible evidence." *State v. Foster*, Butler App. No. CA2005-09-415, 2006-Ohio-4830, ¶8. An order of restitution that does not bear a reasonable relationship to the actual loss suffered by the victim constitutes an abuse of a trial court's discretion. *Bowman* at ¶11. A trial court abuses its discretion if its decision is unreasonable, arbitrary or unconscionable. *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶181.

{¶23} At the restitution hearing, the state presented documentary and testimonial evidence demonstrating the economic loss suffered by the victims. Kelly Szekeresh, a county probation officer, testified as to how the department calculated the initial \$1,300 restitution amount. Szekeresh testified that the computation was based on victim impact statements and receipts provided by the victims showing payments made to appellant's business, SKIN Cosmetic Laser Center. One victim, known as V.R., produced receipts totaling \$1,200 for laser hair removal treatments. Receipts and information provided by the second victim, L.R., indicated that her out-of-pocket costs totaled \$100.

{¶24} Both at the hearing and on appeal, appellant claims that the \$1,200 portion of the restitution order relating to the laser hair removal procedure did not bear a reasonable relationship to the actual loss suffered by V.R. Appellant argues that the procedure was comprised of a series of nine treatments, and that although he may have performed one of the procedures, there was no evidence to establish that he performed the remaining eight. Appellant opined that there were other physicians working at the center who could have completed the remaining treatments.

{¶25} Contrary to appellant's claim, however, we note that at no point did he deny performing the procedures in question. In addition, on cross-examination, appellant testified

that he had no reason to dispute whether he had participated in them. Appellant testified, "I don't have any evidence that shows whether I did or did not participate in those. I don't, you know, I don't know that I performed any procedure myself."

{¶26} Based on the foregoing, we conclude that the trial court's restitution order bore a reasonable relationship to the victims' losses and was supported by competent, credible evidence. We therefore find no abuse of discretion on the part of the trial court in ordering appellant to pay \$1,300 in restitution as a condition of ILC.

{¶27} Appellant's assignments of error are overruled.

{¶28} Judgment affirmed.

POWELL, P.J., and PIPER, J., concur.