Cite as 2023 Ark. App. 188

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CR-22-345

DANIELLE SMITH APPELLANT V. STATE OF ARKANSAS APPELLEE	OPINION DELIVERED APRIL 5, 2023 APPEAL FROM THE CLARK COUNTY CIRCUIT COURT [NO. 10CR-20-48] HONORABLE BLAKE BATSON, JUDGE AFFIRMED

ROBERT J. GLADWIN, Judge

Danielle Smith appeals from the March 22, 2022 judgment of restitution entered by the Clark County Circuit Court. The issue on appeal is whether the circuit court erred in ordering restitution that exceeds the amount permitted under the applicable statutes.

I. *Facts and Procedural History*

While Smith was employed at DeGray Liquor, Nikki Goff, the owner of the store, contacted the Clark County Sheriff's Department reporting that he believed that Smith was stealing from him. Goff told the investigator that he had been monitoring the store's inventory and deposits, and there appeared to be a pattern of inventory being scanned into the system, but the money was not being deposited into the register for cash transactions. The investigator then took two $20 bills that had been photographed and the serial numbers

noted and used them to purchase a bottle of liquor. The investigator noticed that when Smith took the cash, she laid it across the register but did not close the register door. When Smith was arrested at the end of her shift, she had one of the $20 bills in her purse.

On March 24, 2020, Smith was charged with one count of theft of property valued between $5,000 and $25,000, a Class C felony. On January 11, 2022, Smith pleaded guilty to the charged offense and received a sentence of eighty-four months' supervised probation and was ordered to pay $1,090 in fines and costs. Among the conditions of her probation was the requirement that she pay restitution to Goff, although at the time of her guilty plea, the amount of restitution remained to be determined at a later date.

The circuit court held a separate restitution hearing on March 3. At the hearing, Goff testified that between 2015 and 2020, which coincided with Smith's employment, there had been a weekly cash shortfall—product was sold, but the cash from those transactions never made it into the cash register. Goff explained:

> I was ordering the same amount of product, but the account wasn't adding up equal to the amount of product being purchased. So, I was having to come out of my pocket regularly for monthly, thousands of dollars, ranging from 2,000 to 10,000 any particular month, in order to see that checks didn't bounce from distributor as well as being able to make sure that the sales tax [was] paid.

Specifically, Goff testified that he infused $100,968 of his money into the store to keep it solvent during the time that Smith was working for him.

Goff testified that the first year Smith worked for him, the store had total deposits of $940,068; the next year, as Smith's hours at the store increased, deposits fell to $899,593. Between February and November 2018, Smith took a different job, and Goff stated that

during that time, he did not have to make any personal deposits into the store account. He claimed that according to his daily calculations of inventory compared to how much money should have been in the registers, Goff estimated that, on average, between $553 and $2,100 disappeared during Smith's shifts.

Goff explained that he had worked with his bookkeeper to calculate the differences between deposits and inventory. No statements of either deposits or inventory were presented to the circuit court. The only written exhibit presented was a "financial review" that was prepared by the bookkeeper, who did not testify. Over Smith's hearsay objection, the exhibit was admitted. The exhibit provides dates and mathematical calculations, including the "additional cash input by Nikki Goff (required due to bank balance)," but it did not substantiate the math by providing the requisite foundation of purchase statements, inventory statements, shortfalls of cash deposits, or scheduling records. The exhibit indicated cash infusions during the periods of time when Smith worked at the store and also noted that no such inputs had been required during the times when she was not working there. The total amount, which was added in Goff's handwriting, came to $100,968.

In response, Smith's counsel questioned other employees about the store. Christina Davis, a prior store manager, testified that she suspected a different employee of stealing during her time there. Smith herself testified about two other employees' thefts from the store, and Davis confirmed that she had known about one of the other thefts. There was undisputed testimony presented to the circuit court that "everybody" had access to the cash

deposit bag. Davis explained that employees other than Smith were also responsible for counting out the register at the end of the day.

Testimony also indicated that the point-of-sale computer system "at times" malfunctioned, which required employees to track sales and inventory by hand. There was also testimony from Davis that a competing liquor store had opened during Smith's employment that hurt sales "quite a lot."

Smith repeatedly denied that she had stolen more than $2,500 over a period of "six months to a year," not over six years. Smith testified she knew this because she knew what she had used the stolen cash for.

During closing argument, the State asserted that the evidence supported a finding that Smith stole $116,130 from the store. According to the financial statement of cash infusions, "the revenue was down anywhere from $200,000 to $350,000." The State asked for restitution in an amount starting at $100,968 (the sum of Goff's cash infusions) and up to an amount "as high as the Court wants to go."

Smith responded that the relevant restitution statute does not authorize restitution of a certain amount unless the defendant is both charged and convicted of the conduct. Accordingly, Smith requested a restitution order between $5,000 and $25,000, the amount charged and to which she had pleaded guilty.

The circuit court requested written posttrial briefs regarding the amount of restitution. Following the receipt of those submissions, on March 22, the circuit court

ordered restitution in the amount of $100,968, payable to DeGray Liquor in installments of $250 a month until paid in full. Smith filed a timely notice of appeal on March 30.

II. *Standard of Review and Applicable Law*

Smith entered a guilty plea to one count of theft of property, and generally, there is no right to appeal from a guilty plea. *Harris v. State*, 2021 Ark. App. 465, at 2, 635 S.W.3d 538, 539; Ark. R. App. P.–Crim. 1. Where, however, an appeal from a guilty plea raises only an issue of sentencing rather than requiring a review of the plea itself, this court will entertain such an appeal. *Bailey v. State*, 348 Ark. 524, 74 S.W.3d 622 (2002) (citing *Hill v. State*, 318 Ark. 408, 887 S.W.2d 275 (1994)). Accordingly, when a defendant pleads guilty, and as here, a separate restitution hearing is held, an appeal is properly before this court. *See Bushnell v. State*, 2020 Ark. App. 566, 614 S.W.3d 476.

In this appeal, Smith does not specifically challenge the sufficiency of the evidence supporting the amount of restitution ordered. Rather, at issue is whether the sentencing statutes permit a restitution order that is significantly higher than the maximum amount of the specific theft statute with which she was charged. This is a question of statutory interpretation, which we review de novo. *See Phillips v. State*, 2017 Ark. App. 320, 525 S.W.3d 8 (no deference shown where circuit court ordered restitution on conduct for which the defendant had been neither charged nor convicted); *see also* Ark. Code Ann. § 5-4-205(a)(1) (Supp. 2021).

Penal statutes are to be strictly construed with all doubts resolved in favor of the defendant. *Mason v. State*, 2022 Ark. 47, at 3, 639 S.W.3d 348, 351. Strict construction

means narrow construction and requires that nothing be taken as intended that is not clearly expressed. *Id.* The first rule in considering the meaning and effect of a statute is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Id.* Sentencing is entirely a matter of statute. *Id.* However, we will not engage in statutory interpretations that defy common sense and produce absurd results. *J.L. v. State*, 2018 Ark. App. 629, 567 S.W.3d 80.

A defendant who is found guilty or who enters a plea of guilty or nolo contendere to an offense may be ordered to pay restitution. Ark. Code Ann. § 5-4-205(a)(1). The sentencing authority, whether a circuit court or a jury, shall make a determination of the actual economic loss caused to a victim by the offense. *Id.* § 5-4-205(b)(1). When an offense has not resulted in bodily injury to a victim, a restitution order may require that the defendant reimburse the victim for income lost by the victim as a result of the offense. *Id.* § 5-4-205(b)(3). The amount of the loss is a factual question to be decided by the preponderance of the evidence presented to the sentencing authority during the sentencing phase of the trial. *Id.* § 5-4-205(b)(4)(A).

The relevant restitution statute requires a determination of "actual economic loss caused to a victim *by the offense*." *Id.* § 5-4-205(b)(1) (emphasis added). The statutory language "by the offense" requires a logical, legal, and factual nexus to the crime charged. *Tumlison v. State*, 93 Ark. App. 91, 101, 216 S.W.3d 620, 626 (2005) (holding restitution was excessive where it compensated for self-incurred expenses); *Phillips*, 2017 Ark. App. 320, at 3, 525 S.W.3d at 9 (holding that restitution is, by statute, connected with an adjudication of guilt).

III. *Discussion*

Initially, we note that although Smith makes comments in her brief that suggest a challenge to the sufficiency of the evidence, she did not challenge the sufficiency of the evidence presented by the State below regarding DeGray Liquor's and Goff's economic losses; therefore, she cannot raise the issue on appeal. *See Baugh v. State*, 2021 Ark. App. 400, at 6, 635 S.W.3d 9, 13 (citing *Milton v. State*, 83 Ark. App. 42, 43, 137 S.W.3d 402, 403 (2003)). Accordingly, we do not address her arguments about what the evidence did or did not prove at the restitution hearing and focus our analysis on the sole issue raised below and that is now before us—whether, as a matter of law, a person charged with theft of property valued between $5,000 and $25,000 can be ordered to pay restitution in excess of $25,000.

Smith points out that "[t]he purpose of the restitution statute is to make the victim whole in relation to the crime committed not to put the victim in a better position than before the crime occurred." *Simmons v. State*, 90 Ark. App. 273, 279, 205 S.W.3d 194, 198 (2005). Smith was charged with—and pled guilty to—stealing between $5,000 and $25,000. She submits that she was therefore properly convicted of stealing between $5,000 and $25,000, not the $100,968 she was ordered to pay in restitution. She submits that Goff wanted to recoup all the cash infusions he had put into his store for the past six years and that the circuit court erroneously measured the losses by his cash infusions rather than proof of inventory versus sales versus cash deposits.

Smith argues that the State failed to present the requisite proof of an "actual economic loss" as required by Ark. Code Ann. § 5-4-205(b)(1), and *Phillips*, *supra* (holding it

is erroneous for a court to order a defendant to pay restitution for offenses with which he or she has not been charged or to which he or she did not plead guilty or no contest).

Smith acknowledges *Nix. v. State*, 54 Ark. App. 302, 925 S.W.2d 802 (1996), in which this court affirmed an order for restitution in excess of the statutory maximum on the disputed valuation of four stolen horses. *Id.* She attempts to distinguish *Nix*, in which this court affirmed an order exceeding the statutory maximum, because the appellant failed to cite "any authority" to support the argument of a legal cap on restitution. *Id.* Smith asserts that since *Nix* was decided, at least four courts have found such a cap does exist and that the restitution order must be connected to an adjudication of guilt. *See Phillips*, *supra*; *Bogard v. State*, 2014 Ark. App. 700, 450 S.W.3d 690; *Simmons*, *supra*; *Fortson v. State*, 66 Ark. App. 225, 989 S.W.2d 553 (1999). Accordingly, Smith argues that *Nix* is outdated and inapposite.

The *Nix* court found that "there was evidence" the victim sustained damages in excess of the then-applicable statutory cap. *Nix*, 54 Ark. App. at 304, 925 S.W.2d at 804. The evidence included detailed and corroborated testimony about the nature of the stolen property—registered horses—that credibly substantiated the judgment. *Id.* The court reasoned that the value of the horses to the owner went beyond the horses' fair market value. *Id.* at 304, 925 S.W.2d at 803–04. But here, Smith reiterates that she pled guilty to, and was convicted of, stealing no more than $25,000 cash. She argues that the value of cash is easily quantified as its face value. Smith maintains that because *Nix* involved the disputed valuation of the property stolen, it is easily distinguishable.

Nix argued that because the statute under which he was convicted applied to property valued at less than $2,500, he could not be ordered to pay more in restitution than that amount. The *Nix* court was not convinced and ruled that "there was evidence that the victim sustained damages in excess of $2,500 as a result of the theft; consequently, we hold that the evidence is sufficient to support the trial court's order of restitution." *Id.* at 304, 925 S.W.2d at 804. Thus, even though other findings in *Nix* have been subsequently overturned, Smith acknowledges that it remains Arkansas law that one may be ordered to pay restitution in excess of the statutory limits under which he or she was charged. Yet she urges us to hold that this law is wrong.

Smith contends that if the State wanted to hold her accountable for the full $100,968 alleged by Goff, then the State should have charged her for theft under Arkansas Code Annotated section 5-36-103(b)(1)(A) (Supp. 2021)—theft of property valued over $25,000—and obtained a conviction under that statute. As *Phillips* plainly states: "In *Simmons*, we reversed a restitution order, noting that even a preponderance standard does not allow the State . . . to allege that the victim is entitled to recover based on additional conduct [with] which the defendant has not been charged." *Phillips*, 2017 Ark. App 320, at 4, 525 S.W.3d at 10. The *Phillips* court continued, "If the State believes that it can prove appellant stole additional items, *it must first obtain a conviction related to those charges, and then seek restitution based on that conviction*." *Id.* at 4, 525 S.W.3d at 10 (citing *Simmons*, 90 Ark. App. at 279, 205 S.W.3d at 198) (emphasis in original).

We disagree and hold that restitution in excess of the value of stolen property charged is specifically allowed under Arkansas law. A criminal defendant who is found guilty or pleads guilty to an offense may be ordered to pay restitution for any "actual economic loss caused to a victim by the offense." Ark. Code Ann. § 5-4-205(a)(1) and (b)(1). The goal of restitution is to make the victim whole and "accurately reflect the amount of economic loss" the victim suffered. *Jester v. State*, 367 Ark. 249, 254, 239 S.W.3d 484, 489 (2006). Smith incorrectly argues that, when one is convicted of theft of property valued between $5,000 and $25,000, the "actual economic loss caused by the offense," as a matter of law, can never be more than $25,000.

While the relevant statute does not define "economic loss," Arkansas courts and the Arkansas General Assembly have provided guidance on what constitutes economic loss for purposes of restitution. It includes, but is not limited to, the cost of repair or replacement of stolen or damaged property, lost profits and wages, medical expenses, funeral expenses, counseling expenses, and other remedial measures caused by the criminal conduct. *See* Ark. Code Ann. § 9-27-303(51)(B) (Supp. 2021).

Because the economic loss must be caused "by the offense" pursuant to section 5-4-205(b)(1), the restitution ordered must be related to an adjudication of guilt and cannot be ordered for conduct for which the defendant was not charged or convicted. *See, e.g.*, *Fortson*, 66 Ark. App. at 229, 989 S.W.2d at 556. However, Smith's assumption that, in a theft case, the language "by the offense" in the restitution statute limits recovery to the amount listed in the particular theft statute is incorrect and previously has been rejected by this court. *See*

Tumlison, 93 Ark. App. at 100, 216 S.W.3d at 626 (holding that when compensating a victim for actual losses suffered, compensation may include an amount over and above the actual value of the interest that is the subject of the case).

In this case, Smith was charged with a single count of theft of property. The felony or misdemeanor class of theft of property depends on the value of the property stolen, and Class C felony theft of property is thus a lesser included offense of Class B felony theft of property, *see Turley v. State*, 32 Ark. App. 89, 796 S.W.2d 851 (1990). It is not an entirely different offense. Accordingly, the fact that one has been charged and convicted with theft of property valued between certain amounts does not necessarily limit restitution to an amount within that range.

Evidence was presented that Smith was stealing cash in two distinct ways—she would pocket cash used by patrons to buy product, and she also would steal cash directly out of the cash register. Goff specifically testified that because of Smith's thefts, he was required to inject over $100,000 of his own money into the business to keep checks from bouncing and to pay sales tax in order to stay open for business. This was direct testimony of remedial expenses incurred due to Smith's thefts, and such remedial expenses caused by the offense are allowed as restitution. *See, e.g.*, *Brown v. State*, 375 Ark. 499, 503, 292 S.W.3d 288, 290–91 (2009). As this court has stated, the value of the stolen property, while relevant, is not the end-all-be-all determiner of "economic loss caused by the offense." *See Tumlison*, 93 Ark. App. at 100, 216 S.W.3d at 626.

On the basis of the record before us and the specific limited statutory-interpretation argument raised by Smith in this appeal, we hold that the circuit court did not commit reversible error in awarding restitution in the amount of $100,968. Accordingly, we affirm.

Affirmed.

ABRAMSON and THYER, JJ., agree.

Crown Law, by: *Matt Kezhaya*, for appellant.

Leslie Rutledge, Att'y Gen., by: *Walker K. Hawkins*, Ass't Att'y Gen., for appellee.