

[Cite as *State v. McClain*, 2010-Ohio-6413.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2010 CA 00039
JOSEPH MCCLAIN	:	
	:	
	:	
Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Licking County Court of
Common Pleas Case No. 09 CR 00633

JUDGMENT: AFFIRMED IN PART; REVERSED IN
PART; JUDGMENT MODIFIED AND
VACATED IN PART

DATE OF JUDGMENT ENTRY: December 17, 2010

APPEARANCES:

For Defendant-Appellant:

STEPHANIE G. GUSSLER
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For Plaintiff-Appellee:

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Delaney, J.

{¶1} Defendant-Appellant, Joseph McClain, appeals an order of restitution imposed by the Licking County Court of Common Pleas.

{¶2} On December 8, 2009, Appellant pled guilty by way of a Bill of Information to 25 counts of Grand Theft in violation of R.C. 2013.02. Each count is a felony of the fourth degree. The charges arose from Appellant's participation in a mortgage fraud scheme.

{¶3} At the plea hearing, the prosecutor presented the following facts:

{¶4} “ * * * back in around 2007 the Newark Police Department began an investigation in the activities of the defendant and his company. A subsequent investigation found that the defendant had obtained and sold real estate and had obtained moneys from various individuals during his business practice.

{¶5} “Further, it revealed that when obtaining the aforementioned property or selling the aforementioned real estate, the defendant knowingly deceived the individuals he dealt with by making false or misleading representations, by failing to disclose material facts, by withholding material information, by other conduct that created, confirmed, or perpetuated a false impression as to value, state of mind, or other objective or subjective fact.

{¶6} “Now, there are 25 counts here. I'm going to break them down into three categories. The victims involved in this case can be described as being investors, sellers, and buyers.”

{¶7} December 8, 2009 Hearing, T. at 16-17.

{¶8} The prosecutor went on to explain that Appellant took money from investors and represented that he would use that money to fix up various properties he owned and then resell the properties at a profit. He represented to investors that their money was secured by liens on the properties. However, Appellant spent the money on personal purchases and business expenses.

{¶9} Sellers either believed the Appellant had purchased their home or believed that the Appellant was going to help them sell their homes. In the former situation, the sellers signed their homes over to the Appellant, moved out and Appellant took over the home and rented it out to others. Appellant represented he had paid off the seller's mortgage and they were no longer responsible for the home when, in fact, the mortgage was never paid off and remained in the names of the victims. In the latter situation, sellers believed Appellant was going to help them sell their homes and Appellant made representations that he would make their mortgage payments on time to prevent late fees from accruing; however, the Appellant was late on mortgage payments and in some cases even failed to make mortgage payments.

{¶10} Some buyers entered into rent-to-own or land contracts with Appellant when Appellant did not own the homes or did not disclose the investor liens or second mortgages on the homes. Appellant also failed to make the mortgage payments or pay off mortgages on properties with the money he received from the renters and/or buyers

{¶11} On December 22, 2009, the trial court sentenced Appellant to prison for a total of 4 years, 11 months. The issue of restitution was set for hearing on February 1, 2010. Following the restitution hearing, the trial court ordered Appellant to pay a total of \$ 921,821.02 to the victims involved in Appellant's business activities.

{¶12} Appellant raises one Assignment of Error:

{¶13} “I. THE TRIAL COURT ERRED BY FAILING TO ESTABLISH THE AMOUNT OF RESTITUTION TO A DEGREE OF CERTAINTY WHICH REFLECTS A REASONABLE RELATIONSHIP TO THE LOSS SUFFERED.

I

{¶14} Appellant argues that certain victims in this matter failed to provide adequate documentation of damages and/or proximate relation to the commission of the offense or there exists future events that will determine their loss, if any. We agree, in part.

{¶15} R.C. 2929.18(A)(1) permits a trial court, as part of a sentence, 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 and includes * * * any property loss * * * incurred as a result of the commission of any 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 a 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).

{¶16} A court’s order of restitution must be supported by competent, credible evidence. *State v. Warner* (1990), 55 Ohio St.3d 31, 69. This Court reviews the trial court’s award of restitution under an abuse of discretion standard. *State v. Lacey*, 5th

Dist. No. 2006-CA-115, 2007-Ohio-6110. A trial court abuses its discretion when it orders restitution in an amount, which has not been determined to bear a reasonable relationship to the actual loss suffered as a result of the offense for which the defendant was convicted. *Id.* at ¶ 25, citing *State v. Williams* (1986), 34 Ohio App.3d 33, 34, 516 N.E.2d 1270.

{¶17} At the hearing, 41 victims claimed entitlement to restitution, many were married couples. The trial court award restitution to the victims based upon the separate counts of the Bill of Information. The Appellant stipulated to some amounts. The trial court did not order restitution as to 3 individuals: Mary and James Jewell (count 6) and Kim Richards (count 23). On appeal, Appellant only challenges the restitution awards made to 22 victims, as follows:

{¶18} Mary Kay Andrews (count 2): \$79,659.80

{¶19} David Mohr (count 3): \$10,000.00

{¶20} John and Sharon Wallace (count 4): \$11,799.00

{¶21} Ron and April Gillham (count 5): \$10,200.00

{¶22} Albert and Ethel Cogam (count 8): \$6,225.00

{¶23} William and Kelly Hamilton (count 9): \$9,700.00

{¶24} Amy and Brian Wolford (count 10): \$75,200.00

{¶25} William and Melissa Hieronimus (count 14): \$105,633.82

{¶26} Benjamin and Carolyn Burkam (count 15): \$126,000.00

{¶27} Laura McClain (count 16): \$56,158.81

{¶28} Daniel and Shannon Edwards (count 18): \$3,500.00

{¶29} Melody Bader (count 19): \$13,000.00

{¶30} We will separately address Appellant's contention as to each restitution award in light of the testimony and exhibits produced at hearing.

{¶31} Mary Kay Andrews: Andrews entered into an agreement with Appellant to sell her home. Appellant also gave Andrews a Promissory Note in the amount of \$4,400 for improvements Andrews made to the property and was to be reimbursed by Appellant when the home was sold. Appellant failed in his plan to relieve Andrews of her home and mortgage. Foreclosure proceedings were instituted against Andrews. Appellant eventually sold the home by short sale and incurred a significant loss, attorneys fees, and damages related to eviction proceeding against the tenant procured by Appellant. Documentary evidence was introduced in support of the damages. The trial court awarded Andrews \$79,659.80 and such an award is supported by the evidence.

{¶32} Accordingly, we affirm the restitution order in favor of Andrews for \$79,659.80.

{¶33} David Mohr: Mohr entered into a written option to purchase a home with Appellant and paid Appellant \$10,000 for the option and monthly rent in the amount of \$1,500. Mohr was unable to purchase the property because Appellant did not own the property and sought return of the \$10,000. Appellant argues Mohr was not entitled to \$10,000 because he missed a few months of rental payments, however, the evidence establishes Mohr caught up on the payments in subsequent months and was current on rent until the identity of the true owner, Mary Andrews, was discovered. He then paid rent to Ms. Andrews although he was ultimately evicted.

{¶34} Accordingly, we affirm the restitution order in favor of Mohr for \$10,000.

{¶35} John and Sharon Wallace: The Wallaces invested \$10,000 in return for a Promissory Note from Appellant which was secured by a mortgage on one of Appellant's properties. According to the terms of the Note in the record, interest was to accrue at a rate of 14% per annum. The Wallaces sought return of the \$10,000, plus interest in the amount of \$1, 799. The trial court awarded \$11,799 although Appellant claims the interest was speculative. However, the terms of the Note reflect Appellant's agreement to this interest rate.

{¶36} Accordingly, we affirm the restitution order in favor of the Wallaces for \$11,799.

{¶37} Ron and April Gillham: The Gillhams also invested \$10,000 in return for a Promissory Note from Appellant. Ms. Gillham withdrew \$10,000 from a CD because Appellant told her it was worth paying the penalty for withdrawing the CD since she was going to get 14% interest on the Note. She paid a penalty of \$200 for the early withdrawal. The trial court awarded \$10,200. Appellant claims Ms. Gillham failed to produce documentation as to the early penalty. However, we find the unrebutted testimony of the victim was sufficient on this issue. R.C. 2929.18(A)(1) allows the trial court to rely upon the amount of restitution recommended by the victim, and does not require written documentation.

{¶38} We affirm the restitution order in favor of the Gillhams for \$10,200.

{¶39} Albert and Ethel Cogan: The Cogans entered into an installment land contract with Appellant for the sale of their home. Appellant agreed to purchase the home for \$135,000, payable in monthly installments of \$1,079 until paid in full. The contract provides that the Appellant was responsible for all repairs and maintenance of

the property. When the Cogans regained possession of their home, the contract was in arrears \$2,000 and the home was in need of repairs which totaled \$4,225. Appellant also claims the Cogans failed to produce documentation as to these amounts. However, we find the testimony of the victim was sufficient on this issue. Appellant also challenges the credibility of Ms. Cogan's testimony; however, the trial court is the in best position to judge credibility and credited Ms. Cogan's testimony.

{¶40} We affirm the restitution order in favor of the Cogans for \$6,225.

{¶41} William and Kelly Hamilton: The Hamiltons entered into an option to purchase a home (which actually belonged to the Cogans) and paid Appellant \$2,000 for the option and paid monthly rent in the amount of \$1,195. Ms. Hamilton testified that she would have paid only \$600 in rent had she not entered into the option contract. The Hamiltons resided in the home for 7 months and sought the difference in rent ($\$595 \times 7 = \$4,195$), in addition to recovery of the \$2,000 due to their inability to purchase the home as a result of Appellant's actions. This amount totals \$6,195. However, the trial court erroneously awarded \$9,700, which is not supported by the evidence.

{¶42} Pursuant to App.R. 12(B), this court modifies the restitution order in favor of the Hamiltons to reflect \$6,195 as the correct amount in light of the evidence.

{¶43} Amy and Brian Wolford: The Wolfords signed over their home to Appellant who was to make the mortgage payments until the sale of their home. Appellant received for \$90,000 the "sale" of the home¹ but did not pay off the mortgage. The Wolfords are still liable for the mortgage and owe \$73,840. The Wolfords have fallen behind on the mortgage payments but the house has not yet gone into foreclosure or

¹ The Appellant stipulated restitution is owed to the "buyers" James and Ann Clark in the amount of \$89,000 (count 11).

sold. Ms. Wolford admitted that is unknown how much the house will sell for and the amount that will ultimately be paid on the mortgage. Nevertheless, the trial court awarded the Wolfords \$75,200. We find this amount is not supported by the evidence and is speculative.

{¶44} Accordingly, we vacate the restitution order in favor of the Wolfords.

{¶45} William and Melissa Hieronimus: The Hieronimus entered into an agreement with Appellant to sell their home. The home sold and Appellant retained the proceeds and did not pay off the Hieronimus' mortgage in the amount of \$105,633.82. The Hieronimus are still liable on the mortgage although they no longer own the home. The trial court awarded the Hieronimus \$105,633.82

{¶46} We affirm the restitution order in favor to the Hieronimus for \$105,633.82

{¶47} Benjamin and Carolyn Burkam: The Burkams purchased the Hieronimus' home which is now still subject to the Hieronimus' mortgage. In order to purchase the home, the Burkams took out a mortgage on the property for \$126,000 and the Burkams are paying on that mortgage. However, they fear the Hieronimus' mortgage lender will foreclose on the property because payments are not being made on that mortgage. The trial court awarded the Burkams \$126,000, the full amount of their mortgage even though the testimony reflects the Burkams have paid down the mortgage to \$119,000. We find the award of \$126,000 is not supported by the evidence and is speculative.

{¶48} Accordingly, we vacate the restitution order in favor of the Burkams.

{¶49} Laura McClain: McClain invested \$20,000 with Appellant in return for liens on two parcels of real estate. Appellant also took a home equity line of credit on their home without her knowledge for \$10,500. Incurred legal fees of \$6,335, and incurred

Additional expenses of \$19,331.81 related to the purchase of a 4 acre parcel. The trial court awarded \$56,158.81, however, the correct calculation should be \$56,166.81 in light of the evidence.

{¶50} Therefore, this Court modifies the restitution order in favor of McClain to be \$56,166.81.

{¶51} Daniel and Shannon Edwards: The Edwards entered into an agreement with Appellant to sell their home and Appellant agreed to keep the mortgage payments current. The Edwards moved to an apartment while Appellant had possession of their home. When Appellant's business failed, the Edwards broke their lease and moved back to their home, which was two months in arrears in the mortgage payments. The Edwards sought \$3,217.90 in damages for breaking the apartment lease and \$1,200 for the mortgage arrearage but was willing to accept \$3,500 in restitution. Accordingly, the trial court awarded the Edwards \$3,500.

{¶52} We find the testimony supports the restitution order in favor of the Edwards for \$3,500 and affirm that amount.

{¶53} Melody Bader: Bader purchased a home from Appellant and subsequently discovered a lien on the home for \$15,000 which remains on the property due to the Appellants conduct. The trial court awarded Bader \$13,000 which does not conform to the evidence.

{¶54} Pursuant to App.R 12(B), we modify the restitution order in favor of Bader to \$15,000.

{¶55} In light of the discrepancies between the record and the trial court's restitution order, we vacate and modify portions thereof and affirm in all other respects.

{¶56} Appellant's assignment of error is sustained in part, and overruled, in part.

The judgment of the Licking County Court of Common Pleas is affirmed, in part; modified, in part; and vacated, in part.

By: Delaney, J.

Farmer, P.J. and

Wise, J. concur.

S/HON. PATRICIA A. DELANEY

S/HON. SHEILA G. FARMER

S/HON. JOHN W. WISE

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
JOSEPH MCCLAIN	:	
	:	
Appellant	:	Case No. 2010 CA 00039
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Court of Common Pleas is affirmed, in part; reversed, in part; judgment modified and vacated in part. Costs taxed to Appellant.

S/HON. PATRICIA A. DELANEY

S/HON. SHEILA G. FARMER

S/HON. JOHN W. WISE