

[Cite as *State v. Naylor*, 2010-Ohio-988.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23459
	:	T.C. NO. 08-CR-4596
AUSTEN NAYLOR	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

OPINION

Rendered on the 12th day of March, 2010.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Austen S. Naylor, filed June 5, 2009. Naylor appeals from the trial court’s grant of the State’s motion to dismiss Naylor’s post-sentence motion to modify restitution.

{¶ 2} On February 5, 2009, Naylor was indicted on two counts of receiving stolen

property, in violation of R.C. 2913.51(A), felonies of the fourth degree. Naylor pled not guilty. On February 24, 2009, Naylor pled guilty to one count of receiving stolen property, and the other charge was dismissed. The transcript of the plea proceeding is not before us. On March 23, 2009, the trial court sentenced Naylor as follows:

{¶ 3} “THE COURT: * * * Based on the presentence investigation report and statements, also considering the purposes and principles of sentencing as set forth in Ohio Revised Code Section 2929.11, and considering the seriousness and recidivism factors as set forth in Revised Code Section 2929.12 in this case 08-CR-4596, Court sentences Austen Seth Naylor to the following community control sanctions not to exceed five years.

{¶ 4} “First a term of basic probation supervision.

{¶ 5} “Second, a requirement that Mr. Naylor pay court costs as determined by the Montgomery County Clerk of Courts and a supervision fee of \$50.

{¶ 6} “Third, a requirement that Mr. Naylor pay attorney fees of \$130.

{¶ 7} “Fourth, require that Mr. Naylor - - and I understand * * * you are employed. Is that correct, is that still the case?

{¶ 8} “THE DEFENDANT: Yes, Sir.

{¶ 9} “THE COURT: * * * You were involved somewhat in construction residential interior construction?

{¶ 10} “THE DEFENDANT: Flooring.

{¶ 11} “THE COURT: Flooring, okay. You’re required to maintain that verifiable legitimate employment. You’re required to have no contact with the victims in this case. * * * You’re required to have no contact with those individuals or come within 1,000 feet of their

person, their residence, or their place of employment.

{¶ 12} “Sixth, you’re required to attend the theft clinic.

{¶ 13} “Seventh, you’re required to work toward obtaining your GED.

{¶ 14} “And eighth and finally, you’re required to serve 100 hours of community service work.

{¶ 15} “Sir, if you violate any condition of this sanction, if you violate any law, or if you leave the state without permission, the Court can impose a longer time under the same sanction. Impose a more restrictive sanction, or a prison term of 17 months.

{¶ 16} “Good luck to you, sir.”

{¶ 17} On March 24th, the Termination Entry was filed, and in addition to the sanctions imposed above, the trial court ordered Naylor to pay restitution in the amount of \$1391.56 to one of the victims.

{¶ 18} Naylor did not file a direct appeal from that entry.

{¶ 19} On April 8, 2009, Naylor filed a “Motion for Modification of \$1400 Restitution Order re Sentencing; Request for Hearing if Necessary,” arguing that the property at issue had been returned to the victim, making restitution unnecessary. The trial court set a hearing on Naylor’s motion.

{¶ 20} At the hearing, the State moved the court to dismiss Naylor’s motion. According to the State, “At [Naylor’s] sentencing hearing there was no objection made at that time to the restitution amount that was ordered. That restitution amount along with the other conditions of his probation were memorialized in the termination entry filed the next day, March 24th of 2009.

{¶ 21} “At that point in time the jurisdiction of the Trial Court ceased and the Trial

Court was divested of its jurisdiction to modify the restitution later. And the State makes that argument that the Trial Court no longer has jurisdiction to modify the restitution * * * *.”

{¶ 22} Naylor responded, “Defense agrees with the State of Ohio with regards to no objections being stated on the record or filed at the time of the sentencing with regards to the restitution amount. Your Honor, we did file the motion for modification prior to the filing of the termination entry, but after the sentencing. So we would of course agree that this Court, going off of the date of sentencing, would no longer have jurisdiction over the issue with regards to restitution. And therefore we would have to seek redress (sic) with the Second District.”

{¶ 23} The trial court responded in relevant part: “ * * * and I think there’s a factual agreement on this, that the Defendant did not raise an objection at the sentencing hearing to the amount that was set at that time. * * * Court does not have jurisdiction to modify the termination entry that was filed on March 24, 2009. This is not a clerical issue. And accordingly, I think the motion is well taken and granted.

{¶ 24} “And Mr. Shaw, your exception is noted and you can pursue it with the Court of Appeals and see where that leads, okay.”

{¶ 25} Naylor’s first assignment of error is as follows:

{¶ 26} “THE TRIAL COURT’S SENTENCE, WHICH INCLUDES APPROX. \$1400 IN RESTITUTION, IS AN ABUSE OF DISCRETION SINCE NO EVIDENTIARY HEARING WAS EVER HAD NOR EVIDENCE PRESENTED BY THE STATE OF OHIO OR BY THE VICTIM TO JUSTIFY SAID AMOUNT WHICH WAS DISPUTED BY APPELLANT PER O.R.C. 2929.18(A).”

{¶ 27} R.C. 2929.18(A)(1) provides in part, “If the court decides to impose restitution,

the court shall hold a hearing on restitution if the offender * * * disputes the amount.” Since no restitution was ordered at sentencing, Naylor was denied the opportunity to dispute the amount thereof. While the statute allows an offender to “file a motion, for modification of the payment terms of any restitution ordered,” there is ordinarily no mechanism in place for Naylor’s post-sentence motion to modify the amount of restitution. One proper remedy for Naylor would have been a direct appeal from the trial court’s March 24, 2009 Termination Entry, filed, pursuant to App.R. 4, within 30 days of the entry imposing sentence. However, another proper vehicle to correct the Termination Entry, which reflected a restitution amount, since no restitution was ordered at disposition, would have been a motion to correct the clerical error regarding the sanction. “Clerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight, or omission, may be corrected by the court at anytime.” Crim.R. 36. Since the trial court’s Termination Entry is incorrect, a nunc pro tunc entry could have been utilized to correct the error. “‘*Nunc pro tunc*’ means ‘now and for then,’ and * * * is a common device used by all courts to make the record of the proceedings accord with what actually occurred. This power is inherent in the courts, both at law and equity, and is not dependent for its existence on any statute. *Heacock v. Byers* (1929), 120 Ohio St. 621, * * *.” *State v. Murnahan* (1996), 117 Ohio App.3d 71, 81. “[T]he power to file an entry nunc pro tunc is restricted to placing on the record a judicial action that has already been taken but was omitted due to some mechanical mistake.” *State v. Arnold*, Montgomery App. No. 22856, ¶ 57.

{¶ 28} The record reveals that at the time Naylor’s motion came on for hearing, the trial court found that an amount of restitution was set at disposition but the transcript of sentencing belies this conclusion.

{¶ 29} Accordingly, the assignment of error is sustained and the matter reversed and remanded for a determination by the trial court of what amount of restitution, if any, it intended to order.

{¶ 30} Judgment reversed and remanded.

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BROGAN, J. and FAIN, J., concur.

Copies mailed to:

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