IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DONNA BROWN,	)	
	)	
Appellant,	)	
	)	
v.	)	No. F-2001-687
	)	RE-2001-887
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION
REMANDING MATTER FOR FURTHER
FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

On November 21, 1995, Appellant, represented by court appointed counsel, entered a plea of Nolo Contendere to Uttering Two or More Bogus Checks Exceeding $50.00, in Pottawatomie County District Court, Case No. CF-95-393. The Information listed four $35.00 checks written by Appellant to Pratts' Grocery Store. Appellant's plea was accepted and sentencing was deferred for five (5) years. In addition, Appellant was ordered to pay $6,272.07 in restitution, $198.00 in court costs and $75.00 in attorney fees.

On January 13, 1999, the State filed an Application to Accelerate Deferred Sentence, alleging Appellant had violated the terms and conditions of her deferred sentence. Specifically, the State alleged Appellant had failed to report to her probation officer, failed to make restitution payments and failed to pay court costs. According to the violation report that formed the basis of the Application to Accelerate, "the defendant owes $1,070.00 in court costs" and "$3,726.41 to the Bogus Checks Division of the District Attorneys' Office" and "last made a

payment of $450.00 in May 1998." Finally, it was claimed Appellant was "$220.00 in arrears on probationary fees."

On September 1, 1999, Appellant, represented by court appointed counsel, confessed the State's application and on September 13, 1999, the trial court found Appellant had violated the conditions of her deferred sentence. Sentencing was delayed for various reasons until May 23, 2001. On January 13, 2000, a Supplemental Violation Report was filed in the District Court indicating Appellant "owes $3,964.00 in restitution, $174.00 in court costs and is currently $820.00 in arrears for probation fees."

II.

On March 6, 2000, Appellant, represented by court appointed counsel, entered a plea of guilty to Uttering a Forged Instrument in Pottawatomie County District Court, Case No. CF-99-332.[1] Appellant was sentenced to two (2) years imprisonment, all suspended, plus court costs, a $100.00 Victim's Compensation Assessment and $125.00 for appointed counsel representation. A Summary of Restitution Payments, says the "total amount of restitution is $300.00" which was to be paid in monthly installments of $100.00.

On April 27, 2001, the State filed an Application to Revoke Suspended Sentence, alleging Appellant had violated the terms and conditions of her suspended sentence. Specifically, the State alleged Appellant had failed to report to her probation officer, failed to make restitution payments and failed to pay court costs and probationary fees.

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[1] Appellant was originally charged with five counts. (O.R. 1 – 2) On October 22, 1999, Appellant appeared without counsel for preliminary hearing. She was bound over only on

III.

On May 23, 2001, a combined hearing on both cases was held before the Honorable Glenn Dale Carter. At the conclusion of the hearing, the court found Appellant had violated the terms and conditions of her probation in both cases. In CF-95-393, Appellant's five year deferred sentence was accelerated and she was sentenced to one (1) year in the Pottawatomie County Jail. In addition, Appellant was ordered to pay $140.00 in incarceration fees, $482.00 in court costs and "restitution in the current amount of $5,759.02"

In CF-99-332, Appellant's two year suspended sentence was revoked in full and she was further ordered to pay $560.00 for the costs of prosecution, "sheriff's fees accrued including processing out fee" in the amount of $250.00, $300.00 in restitution and $110.00 in incarceration fees. The sentences were ordered to run concurrently.

It is from these Judgments and Sentences that Appellant appeals. The two cases have been consolidated for purposes of this appeal.

IV.

In the first proposition of error, Appellant contends she should be relieved of the restitution ordered by the trial court because she was ordered to pay restitution to alleged crimes for which she was never charged or convicted. She further argues the trial court did not comply with statutory authority and this Court's requirements for imposing restitution.

Appellant argues she was charged in CF-95-393 with writing four $35.00

Count I. (O.R. 18) Counts II – V were dismissed by the District Attorney. (O.R. 19)

bogus checks to Pratt's Grocery Store on May 19 and 20, 1995. The total of the four checks equaled $140.00. Appellant pleaded nolo contendere to the charges, but yet, was ordered to pay a total restitution of $6,272.07.

Evidently, the basis for that amount of restitution comes from a two-page report found in the original record. The report apparently implicates Appellant in writing 93 bogus checks over a period of several years. Of the 93 checks, the report indicates 36 have been paid, leaving 57 unpaid. The total of those 57 unpaid checks, with bank fees and District Attorney fees is $6,272.07, which equals the restitution imposed upon Appellant.

Four of the 57 unpaid checks are apparently the checks to which Appellant entered a nolo contendere plea in CF-95-393. The total cost for the four checks to which Appellant entered her plea is $432.00. The remaining 53 checks account for $5,840.07 of the restitution imposed.

Appellant avers that imposing restitution for crimes she was never charged and convicted is improper. Citing 22 O.S. § 991(f)(C)(1), Appellant argues she must first be **convicted** of a crime before restitution can be ordered for the offense. Appellant cites *United States v. Cook*, 952 F.2d 1262, 1263 for authority that a court may only order restitution for the crimes for which a defendant is convicted.

Appellant also argues the trial court failed to determine whether she could pay the restitution without her family or herself suffering "manifest hardship" as required by statute, and this Court's holding in *Honeycutt v. State*, 1992 OK CR 36, 834 P.2d 993, 999 – 1001.

Finally, Appellant argues the record is completely unclear regarding how much restitution is actually due and owing. Appellant was initially ordered to pay $6,272.07 in restitution. Later, in January and March 2000, the Probation and Parole Department reported Appellant owed $3,964.60 in restitution. Then, the May 23, 2001, Judgment and Sentence ordered Appellant to pay $5,759.02 in restitution.

While not contesting the merits of Appellant's arguments, the State argues such arguments have been waived. As the State observes, Appellant has not sought to withdraw her nolo contendere plea in CF-95-393, but rather, is only challenging the restitution imposed. Citing Rules 1.2(D)(5)(a) and 1.2(D)(a)(i), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2001), the State contends that in order to have appealed the restitution imposed, Appellant must have complied with the rules governing regular misdemeanor and felony appeals.

While waiver can certainly bar consideration of an issue, we are concerned this case may involve possible fundamental error, which cannot be waived. In CF-95-393, Appellant was charged and pled nolo contendere to a total of $140.00 in Bogus Checks. However, she was ordered to pay $6,272.07 in restitution. The record is unclear what authority the District Court relied on in ordering Appellant to pay restitution for offenses for which she was neither charged nor convicted. Section 991f(C) provides that "upon conviction . . . the individual(s) criminally responsible shall be sentenced to make restitution." Further, 991f(E) requires a crime victim's restitution claim to be presented to the

court at the time of the conviction. Moreover, the record does not reveal whether a determination was made by the trial court concerning Appellant's means to pay the restitution without manifest hardship being imposed on her or her family. Finally, there is no dispute the record contains three different amounts of restitution.

Based on the record before this Court, we **FIND** this matter should be **REMANDED** to the District Court for further findings of fact and conclusions of law regarding 1) under what authority Appellant was ordered to pay restitution for offenses she was neither charged or convicted, 2) whether Appellant has the means to pay restitution without manifest hardship and 3) what amount of restitution was Appellant legally required to pay, how much has she paid, and what amount is owed, or even, whether she has paid too much.

Further, the record is unclear whether the State met its burden of showing Appellant's failure to pay was willful. The testimony elicited only reflects that payments were not made. In *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983), the Supreme Court held that an indigent defendant's probation could not be revoked for failure to pay restitution, absent evidence and findings that the defendant was responsible for this failure and that alternative forms of punishment would be inadequate to meet the State's interest in punishment and deterrence. We **FIND** this issue should also be addressed on remand.

V.

In her second assignment of error, Appellant contends the imposition of

incarceration fees pursuant to Okla. Stat. tit. 22, § 979(A) violated her Fourteenth Amendment rights because the costs imposed appear not to be the actual costs of incarcerating her. Furthermore, Appellant asserts the fees were not imposed in accordance with the applicable statutory requirements.

On November 30, 2000, Appellant was arrested on a warrant for failure to appear in Case No. CF-95-393. She was incarcerated from November 30 until December 1, 2000, and assessed $140.00 in incarceration fees. Appellant asserts the imposition of these fees violated her right to due process for several reasons.

Initially, Appellant asserts the State's own evidence establishes the actual costs of incarcerating her over the twenty-four hour period amounted to $30.00, not $140.00. Next, Appellant contends there is no evidence in the record to support how the amount of $140.00 was calculated. Citing 22 O.S.2000, § 979(A), Appellant argues a defendant is obligated to pay only the "actual costs" of incarceration. Finally, Appellant argues that in contravention of the guidelines of § 979(A), the prosecutor never asked for incarceration fees to be assessed against her and there was no consideration given, or evidence adduced, regarding whether such fees would constitute a manifest hardship on Appellant.

Based on the record before this Court, we **FIND** this matter should be **REMANDED** to the District Court for findings of fact and conclusions of law regarding 1) the actual costs of incarceration for Appellant, 2) the evidence supporting such actual costs, and 3) evidence regarding whether such fees constitute a manifest hardship for Appellant.

In CF-99-332, the trial court assessed incarceration fees in the amount of $1,100.00, of which $860.00 represents housing costs and $250.00 represents the costs of processing Appellant out of jail. Appellant again asserts the imposition of these fees violated her right to due process for several reasons.

Again, Appellant argues the State's evidence establishes the actual cost of incarcerating her amounted to $30.00 per day, not $110.00 or even $35.00 as she was charged on occasion.[2] With that calculation, Appellant avers her "actual incarceration costs" should have been $540.00, not $1,100.00. Next, Appellant argues that in violation of § 979(A), the State presented no evidence to support the imposition of $250.00 for a "processing out fee" which was assessed against Appellant at the time the trial court revoked her suspended sentence. Finally, Appellant argues again that in contravention of the guidelines of § 979(A), the prosecutor never asked for incarceration fees to be assessed against her and there was no consideration given, or evidence adduced regarding whether such fees would constitute a manifest hardship on Appellant.

Based on the record before this Court, we **FIND** this matter should be **REMANDED** to the District Court for findings of fact and conclusions of law regarding, 1) the actual costs of incarceration for Appellant, 2) the evidence supporting such actual costs, 3) the legal authority for a "processing out fee," and 4) evidence regarding whether such fees constitute a manifest hardship to Appellant.

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[2] Appellant points out that for reasons unexplained by the record, she was charged $110.00 per day while being incarcerated on July 14 and 16 of 1999, and May 21 of 2001, but $35.00 per

VI.

Appellant next contends she should be relieved of some restitution ordered by the trial court because the amount of the victim's loss was not determined with reasonable certainty, and therefore, recovery has been waived. Exhibit A of Appellant's Judgment and Sentence in CF-99-332 states that she is to pay $300.00 in restitution. However, Appellant claims there was no evidence presented, nor was a hearing ever held, concerning the imposition of that restitution. Citing 22 O.S.2001, § 991f, Appellant argues the District Court failed to follow the mandatory requirements for the imposition of restitution.

Appellant further avers there is no record evidence this ordered restitution has anything to do with "actual economic loss suffered by a particular victim as a direct result of the defendant's criminal act." Contrary to §§ 991f(3) and 991f(E)(4), Appellant complains the District Attorney never presented any restitution claim, completed and signed by the victim, to the District Court to be filed in the case. As such, Appellant claims this restitution represents a windfall to the District Court.

Once again, we **FIND** this matter must be **REMANDED** to the District Court for further findings of fact and conclusions of law regarding what evidence supports the ordered restitution of $300.00 and whether such restitution is from an actual economic loss. Further, it should be determined whether a restitution claim was properly presented by the District Attorney.

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day while being incarcerated from May 23 to June 6, 2001. (O.R. 70, 71, 91, 101).

VII.

Finally, Appellant asserts the District Court abused its discretion in taxing her with court costs and the costs of prosecution, which she claims, are excessive. On March 8, 2000, Appellant was ordered to pay $253.00 in court costs. On May 23, 2001, Appellant was further ordered to pay $560.00 for the costs of her prosecution, for a total of $813.00. Appellant asserts the court costs and costs of prosecution are excessive because they exceed the amount allowed by law. Appellant asserts that only the costs authorized by statute may be assessed as costs of prosecution. See 28 O.S.2001, §§ 81, 101, 153 and 157; 22 O.S.2001, § 718; and 59 O.S.2001, § 1332(F).

Specifically, Appellant attacks $60.00 of the $253.00 assessed against her on March 8, 2000, for court costs. The $60.00 represents charges to be paid to the Court Fund for the filing of "minutes of hearing." However, Appellant asserts that 28 O.S.2001, § 153(A) states that the flat rate of $103.00 for felony convictions "shall cover docketing of the case, filing of all papers, issuance of process . . ." Thus, Appellant states the amount assessed against her, $253.00, should be reduced by $60.00, for a total of $193.00.

Next, Appellant asserts that on May 23, 2001, she was ordered to pay $560.00 for the costs associated with prosecuting her case. However, Appellant contends the docket sheet reveals the total prosecution as authorized by statute to be imposed upon her equals $75.00. Appellant claims part of the $560.00 assessment includes the "double billing" for incarceration fees of $220.00 and $110.00, which were independently imposed upon her at other times.

The State replies Appellant was not ordered to pay $813.00 in total costs, but only $560.00. The State asserts the $560.00 represents the court costs accrued in the prosecution, including the $253.00 imposed as part of Appellant's predicate conviction. In that vein, the State argues Appellant was not "double billed" because the $560.00 in accrued court costs do not include the incarceration fees listed on the docket sheet.

Based on the record before this Court, we **FIND** this matter should be **REMANDED** to the District Court for further findings of fact and conclusions of law regarding whether Appellant was "double billed" and whether Appellant was taxed costs not authorized by statute.

For the reasons expressed above, **IT IS THE ORDER OF THIS COURT** that this matter be **REMANDED** to the District Court for further proceedings consistent with this opinion. The District Court's order containing findings of fact and conclusions of law shall be forwarded to this Court within forty-five (45) days of the date of this Order.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 30th day of April, 2002.

GARY L. LUMPKIN, Presiding Judge

CHARLES A. JOHNSON, Vice Presiding Judge

CHARLES S. CHAPEL, Judge

RETA M. STRUBHAR, Judge

STEVE LILE, Judge

ATTEST:

Clerk