

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOUGLAS DON BARBOUR,

Defendant-Appellant.

UNPUBLISHED

January 20, 2011

No. 295079

Cass Circuit Court

LC No. 09-010005-FH

Before: SAWYER, P.J., and WHITBECK and WILDER, JJ.

PER CURIAM.

Defendant Douglas Barbour appeals as of right his jury conviction of four counts of receiving and concealing stolen firearms,¹ conspiracy to break and enter an unoccupied building,² attempted breaking and entering of an unoccupied building,³ conspiracy to receive and conceal stolen property valued at more than \$1,000 but less than \$20,000,⁴ receiving and concealing stolen property valued at more than \$1,000 but less than \$20,000,⁵ four counts of possession of a firearm during the commission of a felony (felony firearm),⁶ delivery of methamphetamine,⁷ conspiracy to deliver methamphetamine,⁸ and unlawful use of a registration plate.⁹

¹ MCL 750.535b(2).

² MCL 750.157a(a) and MCL 750.110(1).

³ MCL 750.92 and MCL 750.110(1).

⁴ MCL 750.157a(a) and MCL 750.535(3)(a).

⁵ MCL 750.535(3)(a).

⁶ MCL 750.227b.

⁷ MCL 333.7401(2)(b)(i).

⁸ MCL 750.157a(a) and MCL 333.7401(2)(b)(i).

⁹ MCL 257.256(1).

The trial court sentenced Barbour to 23 months to 10 years in prison for the four counts of receiving and concealing stolen firearms, and conspiracy to break and enter an unoccupied building; 23 months to 5 years in prison for attempted breaking and entering of an unoccupied building, conspiracy to receive and conceal stolen property valued at more than \$1,000 but less than \$20,000, and receiving and concealing stolen property valued at more than \$1,000 but less than \$20,000; and 4 to 20 years in prison for delivery of methamphetamine and conspiracy to deliver methamphetamine. The trial court ordered that Barbour serve those sentences consecutive to one of the felony-firearm convictions, but concurrent to the remaining three felony-firearm convictions. The trial court further ordered Barbour to pay costs for his unlawful use of a registration plate conviction. Finally, the trial court ordered Barbour to pay restitution in the amount of \$138,751.12. We affirm.

I. FACTS

In September 2006, Joseph Dvorak filed a breaking and entering complaint with the Cass County Sheriff's Department. The complaint stemmed from numerous break-ins that occurred on his mother's property, where he stored equipment and tools related to his roofing business. At trial, Dvorak explained that he estimated that his mother's home and outbuildings had been broken into 17 times. The first time he learned of a break-in was in approximately January 2004 when his mother was hospitalized and dying. Dvorak called the police that time, but he admitted that he did not call the police every time. Instead, Dvorak attempted to secure his mother's home and outbuildings. Despite his efforts, the break-ins continued. Dvorak filed another complaint in October 2006; a window had been broken, but Dvorak could not tell what was taken.

In January 2007, Bernadette and Thomas Calkins reported that their home had been broken into and that nine guns were taken. Also in January 2007, Dvorak filed another complaint. The back door of his mother's house has been kicked in.

In February 2007, Barbour was arrested near the scene of another break-in and, as a result, police executed a search warrant at Barbour's house. Ninety-nine tools were recovered, including some that belonged to Dvorak. Dvorak also identified several other items found in Barbour's home as items taken from his mother's home. In Barbour's garage, police found four of the Calkins' firearms.

Because of Barbour's involvement in numerous break-ins and other extensive criminal dealings, which need not be detailed here, the jury convicted him as stated previously. Prior to sentencing, the Calkins and Dvorak submitted victim impact statements that were included in the presentence report. Dvorak calculated his losses to be worth \$133,229. The Calkins valued their losses to be worth \$5,522.12. Accordingly, the trial court ordered that Barbour pay restitution in the amount of \$138,751.12. Barbour now appeals.

II. RESTITUTION AMOUNT

A. STANDARD OF REVIEW

Barbour argues that the trial court abused its discretion when it ordered an arbitrary amount of restitution by accepting two of the victims' requested amounts, when the amounts were excessive on their face, and the trial court failed to seek the probation officer's review or

recommendation or conduct a restitution hearing. This Court generally reviews a trial court's order of restitution for an abuse of discretion.¹⁰

B. ANALYSIS

As stated, the general rule regarding the standard of review for an order of restitution is abuse of discretion. However, absent a defendant's timely objection to the amount of restitution, a trial court is "not required to hold a separate hearing or to make express findings on the record in respect to the amount of restitution[.]"¹¹ "A judge is entitled to rely on the information in the presentence report, which is presumed to be accurate unless the defendant effectively challenges the accuracy of the factual information."¹² Further, when a defendant fails to object and request an evidentiary hearing to determine the proper amount of restitution, a trial court is not required to order such a hearing *sua sponte*.¹³

Here, Barbour did not object to the amount of claimed losses, he did not request a hearing on the issue, and he did not offer any information or evidence to support any other figure contrary to the amount of restitution claimed and imposed. Thus, Barbour's failure to challenge the amount of restitution constitutes a waiver of his opportunity for an evidentiary hearing.¹⁴

In reaching its decision, the trial court properly relied on the information in the presentence report to determine the amount of restitution. Accordingly, we hold that the trial court did not err in determining the amount of restitution.

III. EFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

Barbour argues that defense counsel was ineffective for failing to challenge the restitution amount and failing to request a restitution hearing. Because it is unpreserved, we will consider Barbour's claim only to the extent that defense counsel's claimed mistakes are apparent on the record.¹⁵

To prove a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient to the extent that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) that counsel's deficient performance

¹⁰ *People v Bell*, 276 Mich App 342, 345; 741 NW2d 57 (2007).

¹¹ *People v Grant*, 455 Mich 221, 244; 565 NW2d 389 (1997).

¹² *Id.* at 233-234; see also *People v Gahan*, 456 Mich 264, 276 n 17; 571 NW2d 503 (1997).

¹³ *Gahan*, 456 Mich at 276 n 17.

¹⁴ *Id.* at 276.

¹⁵ *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

so prejudiced the defendant that it deprived him of a fair trial, i.e., that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.¹⁶ In proving these elements, the defendant must overcome a strong presumption that defense counsel's performance constituted sound trial strategy.¹⁷

B. ANALYSIS

While an attorney's failure to object to an order of restitution could amount to deficient performance, Barbour has failed to offer any argument to counter the strong presumption in favor of defense counsel's conduct as being a matter of strategy. Barbour contends that the amount of restitution was excessive. However, it is just as likely that defense counsel chose not to challenge the amount in the hope that no additional amounts of restitution would be ordered.

Moreover, Barbour contends that he cannot show that his counsel's alleged deficient performance was prejudicial because he "is now in no position to require evidence and documentation from the victims to show and prove their restitution entitlements." However, in submitting their claims, the Calkins submitted a victim impact statement, receipts, and insurance information. To support his claim, Dvorak submitted a detailed, itemized list of his losses. Yet, despite the availability of this information, Barbour has provided nothing to challenge any of these amounts directly. Therefore, Barbour has failed to meet his burden of showing that his counsel's failure to object to the amount of restitution prejudiced him.

We affirm.

/s/ David H. Sawyer
/s/ William C. Whitbeck
/s/ Kurtis T. Wilder

¹⁶ *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

¹⁷ *People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003).