IN THE COURT OF APPEALS OF IOWA

000484

No. 6-730 / 96-506

FILED
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CLERK SUPREME COURT

STATE OF IOWA,
Appellee,

vs.

ROBIN LYNN TUTOR,
Appellant.

Appeal from the Iowa District Court for Scott County, Patrick J. Madden, Judge.

Robin Lynn Tutor appeals the district court's restitution order following her Alford plea to first-degree fraudulent practice in violation of Iowa Code sections 714.9, 239.14, 249A.7 and 714.8(3). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Annette L. Hitchcock and John Priester, Assistant State Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, William E. Davis, County Attorney, and Kelly Raines, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Streit and Vogel, JJ.

VOGEL, J.

Background facts. Robin Lynn Tutor submitted false affidavits to the Iowa Department of Human Resources stating she did not know the identity of her children's father. She then received public assistance in the form of aid to dependent children (ADC)(now "FIP" benefits), food stamps, and Title XIX medical benefits for five years while the children's father was employed as a police officer by the city of Eldridge, Iowa.

Robin pleaded guilty to first-degree fraudulent practice. The written plea agreement obligated Robin to "make full victim restitution with regard to overpayments for both children." At sentencing, the district court imposed $72,748.97 in restitution.

In her first appeal, Robin argued that despite her false affidavits, the children would still have been eligible for some benefits and the amount of restitution was excessive. *See State v. Tutor*, 538 N.W.2d 894 (Iowa App. 1995). We found "the trial court erred in finding the plea agreement established the amount of restitution and, consequently, failed to properly exercise its discretion in determining the amount of pecuniary damages causally connected to the fraudulent act committed by Robin." *Id.* at 897. We reversed and remanded the case for further hearing on the restitution amount. *Id.*

Following a second restitution hearing, the district court reduced the restitution amount to $28,400.84 which consisted of $21,427.00 of FIP benefits and $6973.84 in medical benefits. Tutor appeals this judgment.

Tutor argues 1) the trial court abused its discretion in determining the amount of restitution and 2) in allowing exhibits into evidence over hearsay objections.

Scope of review. Appellate review of a restitution order is on error. *State v, Ihde*, 532 N.W.2d 827, 829 (Iowa App. 1995); *State v. Johnson*, 473 N.W.2d 236, 237 (Iowa App. 1991). A party seeking reversal or vacation of a restitution order must show the sentencing court abused its discretion. *State v. Wagner*, 484 N.W.2d 212, 216 (Iowa App. 1992). We will find an abuse of discretion only when the trial court's discretion is exercised on grounds clearly untenable or to an extent clearly unreasonable. *Golden Circle Air, Inc. v. Sperry*, 543 N.W.2d 629 (Iowa App. 1995).

I. ***Admission of evidence.*** There were three exhibits compiled for use by a welfare fraud investigator and by the Department of Human Services, (DHS), supervisor, who both testified at the hearing and were familiar with Tutor's case and file. Exhibit 1 contained the amount the DHS paid for medical benefits; Exhibit 2 was a letter from the City of Eldridge with the father's wages for the period of benefits received; Exhibit 3 was a breakdown of Tutor's medical benefits, payments, child support, and rebate. The trial court, while recognizing the hearsay nature of the exhibits, allowed them into evidence in part because of the difficulty in "parading into court" everyone who had contributed over several years to the various reports for a

restitution hearing, when those familiar with the reports and using the reports were there to testify.

While it is true that rules of evidence prescribed in civil procedure apply to criminal proceedings as far as applicable and consistent with the statutes and rules (Iowa R. Crim. P. 20), we are dealing here with a phase of sentencing. In *State v. Delano*, 161 N.W.2d 66, 69 (Iowa 1968) the court stated:

> [O]nce the guilt of the accused has been properly established, the sentencing judge, in determining the kind and extent of punishment to be imposed, is not restricted to evidence derived from the examination and cross-examination of witnesses in open court but may, consistently with the Due Process Clause of the Fourteenth Amendment, consider responsible unsworn or 'out-of-court' information relative to the circumstances of the crime and the convicted person's life and characteristics.

The trial court, in the restitution hearing, focused on the amount of restitution as part of defendant's sentencing. In so doing, the trial court was not required to adhere strictly to evidentiary rules. *Id.* Accordingly, we find that the trial court did not abuse its discretion by admitting the exhibits.

II. Restitution. Restitution is authorized by statute and is a mandatory part of sentencing. *Wagner*, 484 N.W.2d at 215; Iowa Code § 910.2 (1995). Restitution includes damages sustained by the victim of a crime which, with some exceptions, would be recoverable against the offender in a civil action. Iowa Code § 910.1(2) (1995). Consequently, in each instance, a causal connection must exist between the

criminal act and the injury to the victim. *State v. Holmberg*, 449 N.W.2d 376, 377 (Iowa 1989).

a. Medical benefits. Iowa Code section 239.5(6) provides the child shall still be provided with "assistance" even if the parent is ineligible for assistance. Such assistance is defined as "a money payment made . . . on behalf of the dependent child." See Iowa Code section 239.1. It does not include medical benefits. Hence, the state maintains the medical benefits Robin and the children received during the period of ineligibility was properly ordered as part of the restitution. We agree.

b. FIP benefits. Tutor argues the court abused its discretion by adopting the state's calculation for restitution while admitting it was "somewhat confused by the information." Tutor concedes she owes the state restitution for FIP payments but claims the amount should be $16,253, which is the amount the trial court found to be the overpayment at the first restitution hearing. The state concedes that Tutor is not required to repay FIP benefits for Samatha and Ryan, but argues Tutor owes $21,427.00 which was the amount the court found as the overpayment at the second restitution hearing.

The court had a great deal of information and numbers to process in deciding the restitution amount. In its ruling the court stated:

> I accept the numbers set forth by the State on Exhibit 3 and Exhibit 1 as not only good faith, but their best faith attempt to respond to the Court of Appeals decision. And I think the amount that they are requesting of $28,400.84 has been established as an appropriate amount of restitution to my satisfaction.

Randy Dodson, a criminal investigator with the State of Iowa Department of Inspections and Appeals, testified for the State. He gathered wage and health benefits information from the father's former employer. That information was used by Kirk Fuller, a Child Support Recovery Unit supervisor, to calculate what the father's child support would have been had Tutor identified the father to the state. Dodson then took those figures to an overpayment specialist in the Department of Human Services to recalculate the overpayment.

One of the State's witness, Diane Gomez, is a supervisor with the Iowa Department of Human Services in the Income Maintenance Section. She supervised the workers who processed the figures Dodson had gathered and calculated the FIP overpayment. Gomez was not able to answer every question on cross- examination relating to the overpayment figures. After Tutor's attorney voir dired Ms. Gomez on her knowledge of the supporting figures, the court ruled that any attacks on the veracity of the numbers would go to the weight not the admissibility of Ms. Gomez's testimony. The court also asked many questions of both Dodson and Gomez in an apparent effort to understand the process of determining an overpayment. After lengthy testimony, Gomez, in answer to the court's inquiry whether she had any reason to question the amount of overpayment calculated to be $21,427, replied, "No."

Considering all the testimony and evidence, we find the trial court did not abuse its discretion in setting the amount of restitution at $28,400.84 ($21,427 FIP benefits and $6973.84 medical benefits).

Having considered all other issues and arguments, we affirm the trial court.

AFFIRMED.