

No. 1-14-1912

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 13 CR 3571
)	
AAISHA HARRIS,)	Honorable
)	Jorge Luis Alonso,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Cunningham and Justice Connors concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant was denied effective assistance of trial counsel in regards to challenging her restitution order. Accordingly, the order of restitution imposed by the circuit court of Cook County is vacated and the proceedings are remanded for a new restitution hearing.

¶ 2 Following a bench trial, defendant Aaisha Harris was convicted of theft and sentenced to 48 months of probation conditioned upon payment of \$14,472 in restitution within that period.

On appeal, defendant challenges various aspects of the court's restitution order. Defendant concedes that she failed to preserve her claim of sentencing error but argues that the alleged errors constituted plain-error. Defendant also maintains that her defense counsel's assistance was ineffective in failing to preserve this claim. For the following reasons, we vacate the restitution order and remand for further proceedings consistent with this order.

¶ 3

JURISDICTION

¶ 4 The trial court sentenced defendant on May 22, 2014. Notice of appeal was timely filed the same day. Accordingly, this court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution and Illinois Supreme Court Rule 603 and 606, governing appeals from a final judgment of conviction in a criminal case entered below. Ill. Const. 1970, art. VI, § 6; Ill. S. Ct. Rs. 603, 606 (eff. Feb. 6, 2013).

¶ 5

BACKGROUND

¶ 6 Defendant was charged with one count of theft under section 5/16-1 of the Criminal Code (720 ILCS 5/16-1(a)(1) (West 2012)) in that she, in furtherance of a single intention and design, knowingly obtained unauthorized control of the property of Continental Currency Exchange, having a value of more than \$10,000 but less than \$100,000, intending to permanently deprive the currency exchange of the use or benefit of said property. She was also charged with three counts of forgery in that she, with intent to defraud, knowingly delivered documents to the currency exchange drawn on the United States Treasury knowing that they were altered and apparently capable of defrauding another. 720 ILCS 5/17-3(a)(2) (West 2012). Because defendant does not challenge her conviction, a detailed account of the evidence is not required.

¶ 7 The evidence shows, in relevant part, that between October 2012 and December 2012, defendant received \$742 per month for herself and \$65 per month for her son from the Social

Security Administration. The Social Security Administration pays benefits once monthly and the amount of benefits paid to defendant remained the same throughout 2012. On October 3, 2012, defendant cashed a social security check for \$3,765 made out to her as payee for her son. On October 5, 2012, defendant cashed a social security check for \$5,742 made out to her as payee. On November 5, 2012, defendant cashed a social security check for \$4,965 made out to her as payee for her son. She cashed all three checks at the same currency exchange with the same teller, Yesenia Mendoza.

¶ 8 Each time, the teller verified that the name, address, and signature on the state identification defendant presented matched the information on the check. The teller checked that the picture on the identification matched defendant, copied the identification next to the check, and dispensed the funds. The teller identified defendant in a four-person lineup on January 28, 2013. At trial, the teller identified defendant on a surveillance video from the currency exchange dated November 5, 2012. The video showed defendant approach the teller's window, where there is some activity, and then defendant exits the currency exchange. The teller learned the checks were altered when they bounced. The checks were entered into evidence.

¶ 9 After the State rested, the court denied defendant's motion for a directed finding. Ellen Schuetzner, a forensic document examiner, testified for the defense that she examined the checks and compared them with exemplars of defendant's handwriting. Schuetzner concluded that the writer of the samples probably did not endorse the checks. She based her conclusion on indications that the endorsements were slowly executed and possibly traced, which tended to show the attempted simulation of an authentic signature. Although there were 11 similarities, her conclusion was also based on fundamental differences in handwriting habits between the endorsements and the samples.

¶ 10 After closing arguments, the court found defendant guilty on all counts. The court found, in relevant part, that the checks had been altered and that the teller's testimony identified defendant. The court subsequently denied defendant's motion to reconsider or, in the alternative, for a new trial.

¶ 11 In aggravation, the State argued that defendant's certificate in cosmetology showed that her crime was motivated by greed and not necessity. Her crime was difficult to execute and caused the currency exchange to suffer a loss in excess of \$14,000. Defendant was eligible for probation in light of her lack of criminal history. The State recommended a sentence of probation with community service and payment of \$14,472 in restitution to the currency exchange for the cumulative total of the forged checks.

¶ 12 In mitigation, defense counsel noted that defendant was 36 years old, had 11 siblings, and grew up in a poverty-stricken, gang and drug infested area. Defendant did not have an arrest record and she had lived with her boyfriend and their son for 16 years. In 2005, defendant had been diagnosed with an autoimmune neuromuscular disorder that resulted in multiple hospitalizations and regular doctor visits. Despite defendant's cosmetology certificate, her disorder made work an extreme hardship and she would have to pay restitution out of her disability benefits. Defendant cut hair part-time in her home for an unknown amount of money. Defense counsel requested a sentence of probation and community service in lieu of restitution. Defendant did not speak in allocution.

¶ 13 Before announcing sentence, the court stated that it had reviewed the PSI, and that "[defendant] is a good candidate for probation. She has no convictions. She's 36. She has a son, but I believe that restitution is appropriate and it's going to be a condition." The State represented that there was nothing speculative about the amount of \$14,472 as it was the sum total of all

three checks. The court merged the forgery counts with her conviction for theft, sentenced defendant to 48 months of probation conditioned on payment of restitution in the amount of \$14,472 within that period. Defendant did not challenge the restitution order in a post-sentencing motion.

¶ 14

ANALYSIS

¶ 15 On appeal, defendant challenges the trial court's restitution order. Defendant concedes that she did not preserve her challenge to the restitution order post-trial motion but contends that we should address her claims regardless of her forfeiture. Alternatively, defendant maintains the trial court's sentencing errors constitute plain-error under both the first and second prong. Defendant also contends that her trial counsel was ineffective for failing to preserve the claim of error in the restitution order for review. Importantly, a claim of ineffectiveness of counsel is not subject to forfeiture on direct appeal. *People v. Jackson*, 205 Ill. 2d 247 (2001).

¶ 16 In order to establish a claim for ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that prejudice resulted from that deficiency. *People v. Bailey*, 232 Ill. 2d 285, 289 (2009) citing *Strickland v. Washington*, 466 U.S. 668 (1984). The attorney's performance must be evaluated from counsel's perspective at the time the contested action was taken and will be considered constitutionally deficient only if it is objectively unreasonable under prevailing professional norms. *Strickland*, 466 U.S. at 687-89.

¶ 17 The record demonstrates that while the checks at issue add up to \$14,472, the uncontested testimony of the check cashing employee established that the victim, Continental Currency Exchange, retained a percentage of the money as a fee for processing the check. At sentencing, the State argued that there was nothing speculative about \$14,472 and the public defender did nothing to challenge that assertion despite clear testimony to the contrary. Moreover, the record

further demonstrates that defendant's attorney was well aware that defendant would have difficulty paying the \$14,472, yet made no objection seeking an offset at the time it was entered or in a motion to reconsider.

¶ 18 Defendant also contends that her attorney was ineffective for failing to challenge the restitution order when the one entered against her failed to comply with the applicable statutory requirements. Section 5-5-6(f) provides, "[t]aking into consideration the ability of the defendant to pay, * * * the court shall determine whether restitution shall be paid in a single payment or in installments * * * within which payment of restitution is to be paid in full." 730 ILCS 5/5-5-6(f) (West 2012). The Act further provides that if the period for payment is more "than 6 months, the court shall order that the defendant make monthly payments; the court may waive this requirement of monthly payments only if there is a specific finding of good cause for waiver." 730 ILCS 5/5-5-6(f) (West 2012).

¶ 19 The trial court ordered defendant to pay \$14,472 before the end of her 48 month probation period. It did not order her to make monthly payments, nor did it make a specific finding of good cause for waiving such a requirement. A restitution amount of \$14,472 is not a small sum of money especially for someone who relies on social security benefits as a primary means of support. Our supreme court has previously found that when a trial court fails to specify a payment schedule, it can be inferred that restitution is to be made in a single payment. *People v. Brooks*, 158 Ill. 2d 260, 272 (1994). Despite knowing defendant's poor financial situation and that any restitution ordered would come primarily from her disability benefits, defense counsel failed to challenge the payment schedule. Furthermore, defense counsel's failure to bring the issue to the trial court's attention in a motion to reconsider resulted in defendant forfeiting the issue on appeal. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (preserving an issue for appeal

requires the filing of a post-trial motion so the trial court may have a chance to correct it). Based on this and the other facts pertaining to the restitution order, we fail to see a reasonable defense strategy in failing to challenge the restitution order. Accordingly, we find defense counsel's performance in challenging the restitution was deficient.

¶ 20 The second prong for ineffectiveness requires a finding of prejudice resulting from the deficient representation; in other words, that there is a reasonable probability that the outcome of the proceedings would have been different. *Strickland*, 466 U.S. at 687. Given the problems with the restitution order mentioned above, we agree with defendant that she was prejudiced by the trial counsel's deficiencies. Had defense counsel raised the fee issue at sentencing or in a motion to reconsider, the trial court would then have held a hearing to determine the actual amount of damage incurred. Given the amount of money ordered to be repaid and defendant's limited financial means, any reduction in the amount would be to her benefit. Defendant was also prejudiced when trial counsel failed to have the order corrected so it would comply with section 5-5-6(f). Finally, defense counsel failure to raise the issue in a post-trial motion resulted in defendant forfeiting her ability to challenge the restitution order on appeal. Thus, the second prong of the *Strickland* test is satisfied.

¶ 21 Therefore, we determine that defense counsel was ineffective and the ineffectiveness resulted in prejudice to the defendant. Accordingly, we vacate the restitution order and remand for a new restitution hearing where the trial court shall properly account for the fees retained by the victim and conform its order to section 5-5-6(f). Since we have determined that defense counsel was ineffective, we need not address the claim of plain-error.

¶ 22

CONCLUSION

¶ 23 For the foregoing reasons, the part of the sentencing order related to defendant's restitution is vacated and the trial court is directed to hold a hearing on the retained fees and enter a new restitution order that conforms to the statutory requirements.

¶ 24 Reversed in part and remanded.