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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-434**

State of Minnesota,
Appellant,

vs.

Theresa Marie Ford,
Respondent.

**Filed March 25, 2008
Affirmed
Hudson, Judge**

Dakota County District Court
File No. K5-05-3542

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, Minnesota 55101; and

James C. Backstrom, Dakota County Attorney, Thomas E. Lockhart, Assistant County Attorney, Dakota County Judicial Center, 1560 Highway 55, Hastings, Minnesota 55033 (for appellant)

Mark D. Nyvold, 332 Minnesota Street, Suite W-1610, St. Paul, Minnesota 55101 (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Hudson, Judge; and Connolly, Judge.

UNPUBLISHED OPINION

HUDSON, Judge

Appellant, the State of Minnesota, challenges the district court's restitution order issued after respondent's conviction of felony theft from her county employer. The state argues that the district court abused its discretion by denying restitution to the county's insurer when the insurer filed a sufficient request for restitution, respondent failed to produce evidence in support of denying the request for restitution, and the district court failed to provide a reason for denying restitution. Because the district court did not abuse its discretion in denying restitution when the insurer failed to show (1) a sufficient factual basis for the out-of-pocket loss claimed and the reasons justifying that loss; and (2) that the entire amount of the loss claimed resulted from respondent's offense, we affirm.

FACTS

Respondent Theresa Ford pleaded guilty to felony theft by swindle from her employer, Dakota County, in violation of Minn. Stat. § 609.52, subds. 2(4) and 3(1) (2004), and Minn. Stat. § 609.101 (2004). The factual basis for respondent's plea established that she took funds exceeding \$35,000, which should have been deposited into an account to cover fees and expenses of inmates incarcerated at the Dakota County jail.

In February 2006, Dakota County filed a form for "Request for Restitution by Business Crime Victim" in Dakota County district court. The form alleged that the county had suffered a total loss of \$119,890.44, and had submitted a theft claim to St. Paul Travelers Insurance Company in the amount of \$109,890.44, for a total out-of-

pocket loss of \$10,000. That same month, St. Paul Travelers also filed a “Request for Restitution” form with the district court, indicating a total loss of \$119,890.44, with the notation that payments should be sent to “Dakota County if claim not pd. or to St. Paul Travelers if it has.”¹

The district court ordered a presentence restitution investigation, which indicated that Dakota County had a \$10,000 out-of-pocket loss and that St. Paul Travelers, which had paid out \$109,890.44, “would like to be included in restitution.” The record shows that respondent’s attorney then wrote to the district court, waiving a restitution hearing on his understanding that Dakota County had incurred an out-of-pocket loss of \$10,000, with any further amounts covered by insurance.

At a combined plea and sentencing hearing, the state argued for an upward departure based on the fact that the restitution investigation showed a loss substantially greater than the minimum amount for the offense. The state also argued for restitution to be paid to St. Paul Travelers based on that investigation. Respondent’s attorney argued that no evidence had been presented to his office on restitution claims from an insurance carrier.

The district court accepted respondent’s plea, declined to depart upward, and stayed imposition of sentence, ordering zero to 20 years’ probation with conditions that

¹ Respondent’s attorney has indicated to this court that he was not aware that St. Paul Travelers had filed a restitution request until after this appeal was filed because a copy of the request was not placed in the file of the county attorney’s office until that time. Respondent’s attorney also argued to the district court at the combined plea and sentencing hearing that “there has been no affidavit of restitution filed by any insurance company in this case.”

included attending gambling treatment, 180 days in jail, a fine, and for respondent to pay restitution to Dakota County in the amount of \$10,000. The district court declined to hear the state's motion for reconsideration, and this appeal follows.

D E C I S I O N

A district court has authority to order restitution to compensate a victim of a crime for a “loss . . . sustained . . . as a result of the offense.” Minn. Stat. § 611A.045, subd. 1(a)(1) (2004). A victim for purposes of restitution may include “a corporation that incurs loss or harm as a result of a crime.” Minn. Stat. § 611A.01 (b)(i) (2004). The district court resolves a dispute over the proper type or amount of restitution by the preponderance of the evidence. Minn. Stat. § 611A.045, subd. 3 (2004). The district court has broad discretion to order restitution. *State v. Thole*, 614 N.W.2d 231, 234 (Minn. App. 2000). Whether a particular claim for restitution falls within the statutory requirements presents a legal question that this court reviews de novo. *In re Welfare of M.R.H.*, 716 N.W.2d 349, 351 (Minn. App. 2006), *review denied* (Minn. Aug. 15, 2006).

At the outset, respondent asserts that the record does not show that the district court was aware of St. Paul Travelers' restitution request at the time of the plea and sentencing hearing. But the “case document display” shows that St. Paul Travelers filed a request-for-restitution form in district court that was date-stamped on February 21, 2006. Therefore, we may assume that the district court examined the filed materials and took them under consideration in issuing its order for restitution. *See Behm v. John Nuveen & Co. Inc.*, 555 N.W.2d 301, 305 (Minn. App. 1996) (assuming for purposes of appellate review that district court examined materials filed in district court); *see also*

Waters v. Fiebelkorn, 216 Minn. 489, 495, 13 N.W.2d 461, 464 (1944) (stating that “on appeal error is never presumed”).

Waiver

The state argues that respondent waived her right to raise the issue of restitution at the sentencing hearing by waiving a restitution hearing. But the record is unclear as to whether, at the time that the respondent’s attorney waived a restitution hearing, he was aware that St. Paul Travelers had filed a restitution-request form. Under these circumstances, we conclude that respondent did not waive her right to contest restitution at the plea and sentencing hearing. *See State v. Penkaty*, 708 N.W.2d 185, 204 (Minn. 2006) (stating that waiver requires intentional relinquishment).

Specificity of the Loss

One of the statutory requirements for restitution is that the victim requesting restitution must, by affidavit or “other competent evidence . . . describe the elements of loss, itemize the total dollar amounts of restitution claimed, and specify the reasons justifying these amounts.” Minn. Stat. § 611A.04, subd. 1(a) (2004). For the district court to order restitution, the record must provide a factual basis that establishes the “nature and amount of the [victim’s] losses with reasonable specificity.” *Thole*, 614 N.W.2d at 234.

The burden to substantiate the type of restitution and the amount of loss falls on the state. Minn. Stat. § 611A.045, subd. 3; *State v. Keehn*, 554 N.W.2d 405, 407 (Minn. App. 1996), *review denied* (Minn. Dec. 17, 1996). Dakota County produced evidence of a department transfer to cover a loss resulting from the theft of county funds. But the

record contains no evidence of an insurance investigation by which St. Paul Travelers determined to pay a claim to Dakota County, based on losses asserted to be as a result of respondent's conduct. And the state's attorney provided no cancelled check or other proof of payment to show that St. Paul Travelers paid such a claim, or, if it was paid, whether St. Paul Travelers received third-party reimbursement for losses resulting from that claim. Thus, the record contains insufficient evidence to substantiate an amount and reasons for a final, out-of-pocket loss sustained by St. Paul Travelers, and the state failed to carry its burden to show that loss by a preponderance of the evidence.

The Loss Must be a Result of the Offense

In requesting restitution, St. Paul Travelers also has the burden to demonstrate that its losses were incurred "as a result of the offense." Minn. Stat. § 611A.045, subd. 1(a)(1); Minn. Stat. § 611A.045, subd. 3. To show a basis for restitution, a victim's losses must be directly caused by a defendant's criminal conduct. *State v. Latimer*, 604 N.W.2d 103, 105 (Minn. App. 1999). Respondent pleaded guilty to felony theft of an amount over \$35,000. Her plea agreement did not include payment of restitution. But more significantly, the record shows that respondent never admitted to taking the full \$109,809.44, for which St. Paul Travelers requested restitution and the factual basis for her plea does not establish a theft of that amount. Respondent initially told investigators that she thought she took \$50,000, and she cited prior poor record-keeping and the possibility that her predecessor could have been responsible for some of the deficiency. Therefore, the record fails to establish that respondent's conduct directly caused the full amount of restitution requested by St. Paul Travelers.

The state also argues that respondent failed to meet her burden to produce evidence contesting the amount of restitution claimed by St. Paul Travelers. *See* Minn. Stat. § 611A.045, subd. 3 (stating that the offender has “the burden to produce evidence” if he or she challenges the amount of restitution). But, as discussed above, St. Paul Travelers failed to sustain its burden to produce evidence showing the amount of an out-of-pocket loss directly caused by respondent’s conduct. Similarly, because the information presented at the hearing was insufficient to provide a basis for ordering restitution, the district court was not required to make findings as to why it denied restitution to St. Paul Travelers. *See* Minn. Stat. § 611A.04, subd. 1(c) (2004) (stating that district court shall provide reasons for restitution decision “if information relating to restitution has been presented”).

Ability to Pay

Finally, the state argues that the district court abused its discretion by failing to make findings on respondent’s ability to pay more than the \$10,000 restitution ordered to Dakota County. *See* Minn. Stat. § 611A.045, subd. 1(a)(2) (2004) (stating that defendant’s “income, resources, and obligations” are to be considered in determining amount of restitution ordered). The record shows, and respondent’s attorney argued at the hearing, that respondent was working two jobs. We therefore presume that the district court appropriately considered respondent’s income and resources when it ordered the amount of restitution that it did, and the district court’s order sufficiently reflects that consideration. *See State v. Anderson*, 507 N.W.2d 245, 247 (Minn. App. 1993) (upholding restitution order when appellate court surmised that district court

considered the offender's ability to pay even though it did not make specific findings on the issue), *review denied* (Minn. Dec. 22, 1993).

The district court did not abuse its discretion in declining to order restitution to St. Paul Travelers.

Affirmed.