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FILED
Dec 29 2011, 9:14 am
CLERK
of the supreme court, court of appeals and tax court

IN THE
COURT OF APPEALS OF INDIANA

SUMMER BELLI-McINTYRE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 83A01-1101-CR-5
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM VERMILLION CIRCUIT COURT
The Honorable Bruce V. Stengel, Judge
Cause No. 83C01-0911-FB-13

December 29, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Summer Belli-McIntyre appeals her sentence following her guilty plea to Class B felony Neglect of a Dependent.[1] Upon appeal, Belli-McIntyre claims that the trial court based her sentence upon certain improper allegations and statements. Belli-McIntyre also challenges the trial court's restitution order. We affirm.

FACTS AND PROCEDURAL HISTORY

On or about August 5, 2009, Belli-McIntyre knowingly placed her infant daughter, I.G.B-M., who was a dependent in her care, into a situation endangering I.G.B-M.'s life and health. This caused I.G.B-M., who was two months old at the time, to suffer serious bodily injury, including head trauma, multiple skull fractures, retinal hemorrhage, and a fracture of the right tibia. These injuries would not have occurred but for Belli-McIntyre's acts or omissions.

On November 19, 2009, the State charged Belli-McIntyre with Class B felony battery (Count 1). The probable cause affidavit accompanying Count 1 contained conclusions by three doctors that Belli-McIntyre's explanations for I.G.B-M.'s injuries were not consistent with the injuries themselves, and/or that the injuries were consistent with abuse. On October 27, 2010, the State filed an amended information charging Belli-McIntyre with Class B felony neglect of a dependent. (Count 2) That day, Belli-McIntyre entered into a plea agreement with the State in which she agreed to plead guilty to Count 2, and the State agreed to dismiss Count 1. The plea agreement further provided that Belli-McIntyre was to receive a ten-year sentence, that the State would not make a sentencing recommendation and that Belli-McIntyre could argue for a fully

[1] Ind. Code § 35-46-1-4(a)(1) and (b)(2) (2009).

suspended sentence. The plea provided that, in any event, the executed portion of the sentence was not to exceed six years. As an additional term of the plea agreement, Belli-McIntyre agreed to waive the right to appeal any sentence imposed by the court which fell within the permissible range. During the plea hearing, the trial court went over this provision, asking Belli-McIntyre if she understood it. Belli-McIntyre indicated that she did.

During the December 8, 2010 sentencing hearing, Belli-McIntyre objected to two victim impact statements in the pre-sentence investigation report ("PSI") on the grounds that they were prepared by representatives of the State. The trial court denied this objection with respect to a statement by Vermillion County DCS[2] Director Diana Newnum, but it partly sustained this objection as it related to social worker Michelle Davenport's statement. The court expressly limited its consideration of Davenport's statement to the facts regarding I.G.B-M.'s injuries. Belli-McIntyre made no further objections to the PSI, which also included the probable cause affidavit accompanying dismissed Count 1.

The trial court sentenced Belli-McIntyre to the ten-year sentence under the plea agreement, with six years executed and four suspended to probation. In pronouncing this sentence, the trial court relied largely upon the doctors' conclusions in the probable cause affidavit. The trial court also ordered Belli-McIntyre to pay $193,848.64 in damages relating to healthcare and ambulance expenses for I.G.B-M. The trial court

[2] "DCS" refers to the Indiana Department of Child Services.

reduced this damages assessment to a judgment and specifically indicated that it was not a condition of probation. This appeal follows.

DISCUSSION AND DECISION

I. Sentence

Upon appeal, Belli-McIntyre first challenges the trial court's consideration of the probable cause affidavit and the victim impact statements prepared by State representatives. The State argues that Belli-McIntyre has waived this claim. We agree.

In *Creech v. State*, 887 N.E.2d 73, 74 (Ind. 2008), the Indiana Supreme Court held that a defendant may waive the right to appeal a sentence so long as the waiver is knowing and voluntary. In *Creech*, the defendant had entered into a plea agreement containing a provision which waived his right to appeal. *Id.* Following the defendant's plea, at the close of the sentencing hearing, the trial court erroneously advised him that he had the right to appeal. *Id.* Despite this erroneous advisement, the *Creech* court upheld the waiver provision, reasoning that the defendant had already pled guilty and received the benefit of his bargain. *Id.* at 77. In the *Creech* court's view, the erroneous advisement would have had no effect upon the plea transaction. *Id.*

Here, like in *Creech*, Belli-McIntyre's plea agreement specifically provided that she was waiving her right to appeal her sentence. Importantly, the trial court confirmed that she understood this provision, and there is no showing that Belli-McIntyre was misadvised, at any point, regarding her appellate rights. Given the *Creech* court's enforcement of a waiver provision, even in the face of conflicting trial court advisements

which are not present here, we must conclude that Belli-McIntypre's waiver provision is similarly enforceable.

In seeking to preserve her claim, Belli-McIntyre argues in her reply brief that the trial court's sentencing considerations constituted fundamental error in violation of her due process rights. Yet even constitutional rights can be waived in a plea agreement. *See United States v. Ashe*, 47 F.3d 770, 775-76 (6th Cir. 1995) (cited in *Creech* for proposition that constitutional rights may be waived in a plea agreement); *United States v. Feichtinger*, 105 F.3d 1188, 1190 (7th Cir. 1997) (same). Given Belli-McIntyre's clear waiver of her right to appeal her sentence, and *Creech*'s holding such waivers to be fully enforceable, we must conclude that her claim is waived.

II. Restitution

Belli-McIntyre also argues that the trial court abused its discretion by ordering her to pay restitution without requiring proper presentation of evidence such that the defense could challenge its accuracy, or inquiring into her ability to pay. A trial court has the authority to order a defendant convicted of a crime to make restitution to the victim of the crime. *Wolff v. State*, 914, N.E.2d 299, 303 (Ind. Ct. App. 2009). An order of restitution is within the sound discretion of the trial court, and will only be reversed upon a showing of an abuse of that discretion. *Id.* An abuse of discretion occurs if the court's decision is clearly against the logic and effect of the facts and circumstances before it. *Id.*

Indiana Code section 35-50-5-3 (2009) permits the trial court to order a defendant to pay restitution to her victim as follows:

> (a) Except as provided in subsection (i) or (j), in addition to any sentence imposed under this article for a felony or misdemeanor, the court may, as a condition of probation or without placing the person on probation, order the person to make restitution to the victim of the crime, the victim's estate, or the family of a victim who is deceased. The court shall base its restitution order upon a consideration of:
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> ***
>
> (2) medical and hospital costs incurred by the victim (before the date of sentencing) as a result of the crime;

A restitution order must be supported by sufficient evidence of actual loss sustained by the victim(s) of a crime. *Rich v. State*, 890 N.E.2d 44, 49 (Ind. Ct. App. 2008), *trans. denied*. The amount of actual loss sustained by the victim is a factual matter that can be determined only upon the presentation of evidence. *Id*. (quotation omitted). A State entity may be considered a victim for purposes of the restitution statue. *See Ault v. State*, 705 N.E.2d 1078 (Ind. Ct. App. 1999) (affirming restitution order requiring defendant to pay State for Medicaid payments State made on behalf of child victim).

We are unpersuaded that the facts supporting the judgment of restitution were somehow improperly presented or immune from challenge by the defense. The trial court's restitution award was based upon facts contained in DCS Director Newnum's victim-impact statement contained in the PSI, which was discussed at the sentencing hearing. While Belli-McIntyre challenged the contents of the PSI in several respects, she raised no specific objection regarding costs. Indeed, Newnum was available at the sentencing proceedings for cross-examination, yet defense counsel—who cross-examined her—did not question her assessment of costs.

DCS Director Newnum indicated that the monthly cost of full-time residential placement for I.G.B-M. in a facility capable of handling her needs was $11,015.54, and the cost of transportation by ambulance to Riley Children's Hospital, which I.G.B-M. used several times a month, was $1,100. As of the December 8, 2010 sentencing hearing, I.G.B-M had been in residential treatment for sixteen months.[3] In entering judgment against Belli-McIntyre in the amount of $193,848.64, the trial court assessed $17,600 in ambulance fees ($1,100 X 16) and $176,248.64 in residential treatment fees ($11,015.54 X 16). The court's judgment was soundly based upon Newnum's facts. To the extent the information contained in the PSI may not have constituted a "presentation of evidence" in the technical sense, the rules of evidence are relaxed at sentencing. *See* Ind. Evid. R. 101(c)(2). We find no abuse of discretion.

As for Belli-McIntyre's claim that the trial court should have inquired into her ability to pay, there is no such requirement for restitution orders which are not made a condition of probation. *See Pearson v. State*, 883 N.E.2d 770, 773 (Ind. 2008) (finding no inquiry into ability to pay is necessary when restitution is part of executed sentence rather than being a condition of probation). Here, the trial court specifically indicated that Belli-McIntyre's restitution order was not a condition of her probation. We find no abuse of discretion.

The judgment of the trial court is affirmed.

KIRSCH, J., and BARNES, J., concur.

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[3] Indiana Code section 35-50-5-3 permits restitution for medical and hospital costs incurred before the date of sentencing.