[Cite as *Bell v. Teasley*, 2011-Ohio-2744.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Lee J. Bell,	:	
Plaintiff-Appellee,	:	
		No. 10AP-850
v.	:	(C.P.C. No. 09CV-0304544)
James Teasley, Jr.,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 7, 2011

Wolfe Legal Services, and *George M. Wolfe*, for appellee.

Steven A. Larson, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶1} Defendant-appellant, James Teasley, Jr. ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas in which the trial court granted judgment in favor of plaintiff-appellee, Lee J. Bell ("appellee"), on a promissory note ("note") in the amount of $10,130, plus statutory interest from February 15, 2000. For the following reasons, we reverse.

{¶2} On March 26, 2009, appellee, a victim in Franklin County Court of Common Pleas criminal case No. 98CR-5156, filed a complaint to collect upon a note signed by appellant. In the original criminal matter, the trial court accepted appellant's guilty plea and convicted him of engaging in a pattern of corrupt activity, a second-degree felony. (See Feb. 23, 2005 Entry from case No. 98CR-5156, attached to the complaint.) On

February 14, 2000, the trial court suspended appellant's prison sentence and placed him on community control for a period of five years. (Feb. 23, 2005 Entry.) The sentencing entry from the original criminal case is not included in the record before this court; however, the transcript in the present matter indicates that, as a condition of appellant's community control, the trial court ordered appellant to pay restitution to the victims of his crime. (Tr. 4.) This amount included $10,760 to appellee for the loss of his motorcycle.

{¶3} The record reflects that appellant made payments to the Franklin County Probation Department for a period of five years in the amount of $100 per month, totaling $6,000. From these funds, appellee received restitution payments in the amount $630, leaving a balance owed of $10,130.

{¶4} On February 8, 2005, one week prior to the end of appellant's five-year period of community control, appellant signed a note in the amount of $31,263.10. The note was presented by the probation department in order to secure the remainder of appellant's restitution payments. The record indicates that the probation officer told appellant to either sign the note or "go to jail." (Tr. 29.) Further, the probation officer witnessed appellant signing the note in the probation office without counsel present. (Tr. 30.) At trial, the court noted that such practice was "the habit of [the] court" and that the court ordered "as it usually does" that the note be signed rather than revoking community control and imposing prison for failure to pay restitution. (Tr. 4.)

{¶5} The note states, in relevant part:

> For value received, the undersigned promises to pay to the order of Thirty-one thousand, two-hundred and sixty-three dollars and ten cents ($31,263.10) in equal monthly installments of one hundred Dollars ($100.00) each, beginning on the 28th day of February, 2005 and continuing until the full amount has been paid.

> In the event of any default in payment of any installment on this note when the same becomes due, then at the option of the holder of this note, the entire amount of principal remaining unpaid shall at once become due and payable without notice, and the undersigned hereby authorizes any attorney-at-law to appear in any court of record in the State of Ohio or any other state or territory of the United States after the above obligation becomes due, and waived the issuing and service of process and confess a judgment against any or all of the undersigned in favor of Franklin County Clerk of Courts (on behalf of the victims in this case), or any holder of this note, for the amount then appearing due, together with costs of suit; and thereupon to release all error and waive all rights of appeal.

{¶6} On February 23, 2005, the trial court discharged appellant from community control, stating that "said defendant has complied with the terms of his Community Control, except that the court restitution, fine, and costs are not paid." (See Feb. 23, 2005 Entry.)

{¶7} Four years later, in an effort to collect on the note, appellee filed the complaint herein. Although the note at issue purports to be a cognovit note, the trial court did not treat it as such. Therefore, on May 4, 2010, the trial court held a hearing regarding the enforceability of the note. On August 9, 2010, the trial court, "after consideration of the totality of the evidence presented," journalized his judgment in favor of appellee. (See Aug. 9, 2010 Judgment Entry.)

{¶8} On September 8, 2010, appellant filed a timely notice of appeal, setting forth the following four assignments of error for our consideration:

> [1.] THE TRIAL COURT ERRED IN GRANTING INTEREST FROM THE DATE OF FEBRUARY 15, 2000, THE DATE OF THE JUDGMENT ENTRY OF APPELLANT'S CRIMINAL CASE, AS OPPOSED TO INTEREST DATING FROM FEBRUARY 8, 2005, THE DATE THE PROMISSORY NOTE WAS SIGNED[.]

> [2.] THE COURT VIOLATED THE DEFENDANT-APPELLANT'S RIGHT TO DUE PROCESS WHEN IT COMPELLED APPELLANT TO SIGN A PROMISSORY NOTE WHICH EXTENDED THE COURT'S PUNISHMENT OF APPELLANT BEYOND THE FIVE YEAR STATUTORY PERIOD OF THE COURT'S JURISDICTION[.]
>
> [3.] APPELLEE IS NOT A HOLDER IN DUE COURSE OF THE NOTE, PLAINTIFF'S EXHIBIT 1[.]
>
> [4.] THE APPELLANT-OBLIGOR [IS] ENTITLED TO ASSERT A DEFENSE TO THE APPELLEE'S COLLECTION OF THE NOTE EVEN IF THE APPELLEE IS A HOLDER IN DUE COURSE[.]

{¶9} Appellant's fourth and second assignments of error address alleged defenses. In his fourth assignment of error, appellant asserts the defenses of duress, lack of legal capacity, illegality of the transaction and fraud. (Appellant's brief at 8.) However, these defenses are no longer available because appellant failed to raise them in his pleadings or at trial.

{¶10} In *State ex. rel. Plain Dealer Publishing Co. v. Cleveland* (1996), 75 Ohio St.3d 31, 33, the Supreme Court of Ohio held that "[a]n affirmative defense is waived under Civ.R.12(H), unless it is presented by [1] motion before pleading pursuant to Civ.R.12(B), [2] affirmatively in a responsive pleading under Civ.R.8(C), or [3] by amendment under Civ.R.15." See *Hoover v. Sumlin* (1984), 12 Ohio St.3d 1, 4. Here, there is no record of appellant moving for dismissal pursuant to Civ.R. 12(B), and, therefore, appellant did not present his defenses pursuant to the first manner afforded in *Plain Dealer Publishing Co.*

{¶11} Nor did appellant present his defenses pursuant to the second manner afforded in *Plain Dealer Publishing Co*. Civ.R. 8(C) states, in relevant part: "In pleading to a preceding pleading, a party shall set forth affirmatively * * * duress * * * want of

consideration for a negotiable instrument, fraud, [or] illegality." Appellant filed two answers of record. Appellant's first answer did not include any affirmative defenses. (See May 11, 2009 Answer.) Appellant's second answer included the affirmative defense of statute of limitations. (See Mar. 30, 2010 Answer.) Neither of appellant's answers raised the affirmative defenses of duress, lack of legal capacity, illegality or fraud.

{¶12} Finally, appellant did not present his defenses pursuant to the third manner afforded in *Plain Dealer Publishing Co.* Civ.R. 15(B) states, in relevant part, that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." The record reflects no effort to try the affirmative defenses of lack of legal capacity, illegality or fraud. Appellant's counsel did, however, present evidence of possible duress during redirect examination of appellant and again raised the issue during closing argument. (Tr. 29-30; 33-34.) Nevertheless, in oral argument before this court, appellant's counsel conceded to not raising, and not proceeding upon, the affirmative defense of duress.

{¶13} Because "[a]ffirmative defenses not raised in the pleadings or an amendment to the pleadings are waived," we are precluded from considering these defenses and must uphold the trial court's judgment. *Geo. Byers Sons, Inc. v. Smith* (Aug. 10, 1999), 10th Dist. No. 98AP-1117, citing *Jim's Steak House, Inc. v. Cleveland* (1998), 81 Ohio St.3d 18, 20. Therefore, we cannot consider the substantive merits of appellant's fourth assignment of error.

{¶14} Appellant's fourth assignment of error is overruled.

{¶15} Appellant's second assignment of error contends that the trial court violated appellant's due process rights by compelling him to sign a note which extended community control beyond the five-year statutory period of the trial court's jurisdiction. As

noted above, appellant waived the affirmative defense of illegality by not raising it in a motion to dismiss, in his answers, or at trial. Furthermore, appellant did not present this particular due process argument at the trial level. Parties cannot raise any new issues for the first time on appeal, and the failure to raise an issue at the trial level waives it on appeal. *Gangale v. Bur. of Motor Vehicles*, 10th Dist. No. 01AP-1406, 2002-Ohio-2936, ¶58. In this assignment of error, appellant attempts to distinguish his argument because it is a due process challenge. We reject appellant's reasoning because even "[w]hen a constitutional issue is not raised before the trial court, it will not be addressed in the first instance by the court of appeals." See *In re Andy-Jones*, 10th Dist. No. 03AP-1167, 2004-Ohio-3312, ¶20, citing *Bouquett v. Ohio State Med. Bd.* (1997), 123 Ohio App.3d 466, 474. See also *In re Hinkle*, 10th Dist. No. 04AP-509, 2004-Ohio-6071, ¶32. Therefore, we find that appellant has also waived the defense presented in his second assignment of error.

{¶16} We have considered that this court has discretion to review a constitutional issue not raised at the trial court level under the plain error doctrine. See *In re Andy-Jones* at ¶20; *Palo v. Palo*, 11th Dist. No. 2003-A-0049, 2004-Ohio-5638, ¶20.

{¶17} "Although in *criminal* cases '[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court,' Crim.R. 52(B), no analogous provision exists in the Rules of *Civil* Procedure. * * * In applying the doctrine of plain error in a civil case, reviewing courts must proceed with the utmost caution, limiting the doctrine strictly to those extremely rare cases where exceptional circumstances require its application to prevent a manifest miscarriage of justice[.]" *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 1997-Ohio-401. (Emphasis sic.) "[A]ppellate courts must proceed * * * only * * * where the error seriously affects the basic

fairness, integrity, or public reputation of the judicial process itself." *Skydive Columbus Ohio, L.L.C. v. Litter*, 10th Dist. No. 09AP-563, 2010-Ohio-3325, ¶13, citing *Unifund CCR Partners v. Hall*, 10th Dist. No. 09AP-37, 2009-Ohio-4215, ¶22, quoting *Goldfuss* at 121. "Indeed, the plain error doctrine implicates errors in the judicial process where the error is clearly apparent on the face of the record and is prejudicial to the appellant." Id., citing *Reichert v. Ingersoll* (1985), 18 Ohio St.3d 220, 223.

{¶18} The present matter does not represent this kind of exceptional case. "While invocation of the plain error doctrine is often justified in order to promote public confidence in the judicial process, '[it is doubtful that] the public's confidence in the * * * system is undermined by requiring parties to live with the results of errors that they invited, even if the errors go to "crucial matters." In fact, the idea that parties must bear the cost of their own mistakes at trial is a central presupposition of our adversarial system of justice.' " *Goldfuss* at 121-22, quoting *Montalvo v. Lapez* (1994), 77 Hawaii 282, 305, 884 P.2d 345. "[I]t is well established that failure to follow procedural rules can result in forfeiture of rights. Parties in civil litigation choose their own counsel who, in turn, choose their theories of prosecuting and defending. The parties, through their attorneys, bear responsibility for framing the issues and for putting both the trial court and their opponents on notice of the issues they deem appropriate for * * * resolution." Id., citing *Gallagher v. Cleveland Browns Football Co.* (1996), 74 Ohio St.3d 427, 433, 436.

{¶19} Appellant failed below to frame and put the court and appellee on notice of the defense it now raises in the second assignment of error. Therefore, we decline to invoke plain error and will not consider the substantive merits of appellant's due process argument.

{¶20} Notwithstanding the foregoing, we do find this case troubling for many reasons. Furthermore, requiring probationers to sign promissory notes is an unnecessary practice as the General Assembly has provided mechanisms for victims to collect restitution. R.C. 2929.18(D)[1] states: "A financial sanction of restitution * * * is an order in favor of the victim of the offender's criminal act that can be collected through execution [as described in this section] and the offender shall be considered for purposes of the collection as the judgment debtor." The statute then sets forth a series of collection actions, which victims may pursue to collect restitution, including, but not limited to: (1) executing against the property of the defendant pursuant to R.C. Chapter 2329, (2) holding a judgment debtor exam pursuant to R.C. 2333.09 to 2333.12, (3) filing a creditor's suit pursuant to R.C. 2333.01, and/or (4) filing a wage garnishment pursuant to R.C. 1321.33. Further, pursuant to R.C. 2929.18(H), "[n]o financial sanction imposed under this section or section 2929.32 of the Revised Code shall preclude a victim from bringing a civil action against the offender." However, troubling though it may be, we cannot consider appellant's defenses.

{¶21} Appellant's second assignment of error is therefore overruled.

{¶22} In his third assignment of error, appellant contends that the trial court erred in granting judgment in favor of appellee because, pursuant to R.C. 1303.32, appellee is not a holder in due course and, therefore, is "not entitled to the benefits and protections of the status of a holder in due course when enforcing the note." (Appellant's brief at 8.)

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[1] It appears that appellee attempted to avail himself of this remedy within the context of this civil case by filing a Motion to Reduce the Criminal Restitution Order to a Judgment. The trial court denied the request, having determined that it lost jurisdiction of the criminal case when appellant's community control was terminated. The trial court noted that it would have entertained the motion had it been timely filed in the original criminal case. (Tr. 7, 40.)

{¶23} R.C. 1303.36(B) states that "a plaintiff producing the instrument is entitled to payment, unless the defendant proves a defense or claim in recoupment. *If the defendant proves a* defense or claim in recoupment, the right to payment of the plaintiff is subject to the defense or claim, except to the extent the plaintiff proves that the plaintiff has rights of a holder in due course that are not subject to the defense or claim." (Emphasis added.) Interpreting a prior version of R.C. 1303.36, the Supreme Court of Ohio held that "[w]hether one is a holder in due course is an issue which does not arise unless it is shown a defense exists. Once it is established that a defense exists, the holder has the full burden of proving holder in due course status in all respects." *Arcanum Natl. Bank v. Hessler* (1982), 69 Ohio St.2d 549, 551.[2]

{¶24} As explained above, we find that in the present case, appellant did not allege, much less prove a claim or defense. Therefore, appellee had no burden to prove holder in due course status.

{¶25} Accordingly, appellant's third assignment of error is overruled.

{¶26} Lastly, in his first assignment of error, appellant contends that the trial court erred in granting interest from February 15, 2000, the date of the sentencing entry in case No. 98CR-5156. We agree.

{¶27} Appellee argues that, pursuant to R.C. 1343.03(A), he is entitled to prejudgment interest from the date of sentencing in the original criminal case. Pursuant to R.C. 1343.03(A), "when money becomes due and payable upon any bond, bill, note, or other instrument of writing * * * the creditor is entitled to interest at the rate per annum

[2] *Arcanum Natl. Bank* cites to former R.C. 1303.36(C) which read: "[a]fter it is shown that a defense exists a person claiming the rights of a holder in due course has the burden of establishing that he or some person under whom he claims is in all respects a holder in due course." This text was deleted by the General

determined pursuant to section 5703.47 of the Revised Code." *Royal Elec. Constr. Corp. v. Ohio State Univ.* (1995), 73 Ohio St.3d 110, 117, 1995-Ohio-131. "Prejudgment interest under R.C. 1343.03(A) is awarded from the time the amount at issue becomes 'due and payable.' " *Miller v. Wikel Mfg. Co., Inc.* (1989), 46 Ohio St.3d 76. Further, where money becomes due under a contract, interest accrues from the time that the money due *should have been paid*. *Braverman v. Spriggs* (1980), 68 Ohio App.2d 58.

{¶28} Once a party has a judgment for a contract claim, he is entitled to interest as a matter of law. *Dwyer v. Elec., Inc. v. Confederated Builders, Inc.* (Oct. 29, 1998), 3d Dist. No. 3-98-18. After this initial hurdle, the trial court must make the factual determinations of "*when* interest commences to run, i.e., when the claim becomes 'due and payable' " and "*what* legal rate of interest should be applied." *Miller v. Lindsay-Green, Inc*., 10th Dist. No. 04AP-848, 2005-Ohio-6366, quoting *Royal Elec. Constr. Corp.* at 115 (emphasis sic). An appellate court reviews these two factual determinations under an abuse of discretion standard. Id. citing *Dwyer Elec., Inc.*

{¶29} In this case, the trial court simply noted that it was "going to award interest from the date that the judgment was made in the criminal case." (Tr. 41-42.) No factual determination was made regarding when the claim became due and payable. The record shows that appellant was indeed making restitution payments during the period of community control. (Tr. 11, 21, 41.) During this period of time, restitution payments were being made as ordered by the trial court when they should have been paid. Therefore, to conclude that prejudgment interest should begin on the date of sentencing in the original criminal case was error. Furthermore, the note itself states: "In the event of any default

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Assembly in 1994; however, the same requirement was incorporated into Division (B) of R.C. 1303.36(C) as noted above.

* * * the entire amount of principal remaining unpaid shall at once become due and payable." For this reason we remand this case to the trial court to determine when the note became due and payable. In the event the trial court finds that prejudgment interest is not appropriate, pursuant to R.C. 1343.03(B), "interest on a judgment * * * rendered in a civil action based on * * * a contract * * * shall be computed from the date the judgment * * * is rendered." In either instance, because the promissory note was silent as to interest, the rate of interest shall be at the rate determined pursuant to section 5703.47 of the Revised Code. R.C. 1342.03(A) and (B).

{¶30} Appellant's first assignment of error is sustained.

{¶31} For the foregoing reasons, appellant's first assignment of error is sustained, and his second, third and fourth assignments of error are overruled. The judgment of the Franklin County Court of Common Pleas is affirmed in part and reversed in part, and this cause is remanded to that court for further proceedings in accordance with law and consistent with this decision.

Judgment affirmed in part, reversed in part, and cause remanded with instructions.

BRYANT, P.J., and SADLER, J., concur.

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