

[Cite as *State v. Butler*, 2012-Ohio-3704.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	No. 11AP-661
Plaintiff-Appellee,	:	(C.P.C. No. 11CR-05-2439)
v.	:	No. 11AP-844
Kevin A. Butler,	:	(C.P.C. No. 10CR-03-1969)
Defendant-Appellant.	:	(REGULAR CALENDAR)

---

D E C I S I O N

Rendered on August 16, 2012

---

*Ron O'Brien*, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

*Todd W. Barstow*, for appellant.

---

APPEALS from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶ 1} Defendant-appellant, Kevin A. Butler ("appellant"), appeals from sentences imposed by the Franklin County Court of Common Pleas. For the following reasons, we affirm.

**I. BACKGROUND**

{¶ 2} In case No. 11AP-844, appellant pleaded guilty to one count of failure to comply with an officer's order, a third-degree felony, and two counts of receiving stolen property, fifth-degree felonies. The trial court sentenced him to community control and

ordered him to pay restitution. Appellant was subsequently charged with breaking and entering, a fifth-degree felony, in case No. 11AP-661. He pleaded guilty to the charge, and he stipulated that he violated community control by committing the offense. The trial court accepted the plea and revoked community control.

{¶ 3} The court held a sentencing hearing for the offenses in case Nos. 11AP-661 and 11AP-844. The court noted that it had informed defense counsel that it would sentence appellant to four years and 11 months in prison. Appellant asked if he could stop making restitution payments while in prison. He claimed that he needed his prison stipend to buy extra food. The court said that appellant should not "care about crackers and candy over the restitution." (11AP-661 Tr. 32; 11AP-844 Tr. 91.) The court also concluded from appellant's comment that he is unable to "get the message that we're trying to give." (11AP-661 Tr. 32; 11AP-844 Tr. 92.) The court said that it would not impose the sentence it previously discussed. Instead, it imposed six years and 11 months imprisonment. Specifically, in case No. 11AP-661, the court sentenced appellant to 11 months in prison for breaking and entering. In case No. 11AP-844, it sentenced appellant to four years in prison for failure to comply and 12 months in prison for each receiving stolen property offense. The court ordered appellant to serve the prison terms consecutively.

## **II. ASSIGNMENT OF ERROR**

{¶ 4} Appellant appeals and assigns the following as error:

THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY IMPROPERLY SENTENCING HIM TO TERMS OF INCARCERATION FOR FELONIES OF THE FIFTH DEGREE IN CONTRAVENTION OF OHIO'S SENTENCING STATUTES.

## **III. DISCUSSION**

{¶ 5} In his single assignment of error, appellant argues that it was improper for the trial court to sentence him to prison for his fifth-degree felonies. We disagree.

{¶ 6} Appellant contends that the trial court failed to determine whether former R.C. 2929.13(B)(1) permitted a prison sentence for his fifth-degree felonies. Because appellant did not raise this issue in the trial court, he forfeited all but plain error. *See*

*State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶ 21-24. Plain error exists when there is error, the error is an obvious defect, and the error affects the outcome of the trial court's proceedings. *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). A court recognizes plain error with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *Id.* With that standard in mind, we now review the merits of appellant's argument.

{¶ 7} Former R.C. 2929.13(B)(1) listed nine factors that weighed in favor of prison, rather than community control, for a fifth-degree felony. *State v. Massien*, 125 Ohio St.3d 204, 2010-Ohio-1864, ¶ 8. A court was not required to make findings under that statute, however, before sentencing a defendant to prison for a fifth-degree felony. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶ 69-70. Nevertheless, according to appellant, the trial court indicated that it sentenced him to prison because of his statement about wanting to delay restitution payments. Appellant notes that this reason is not a factor under former R.C. 2929.13(B)(1). But the court did not say that it imposed a prison sentence because of appellant's statement about restitution. In fact, the court had already decided to sentence him to prison before he made that statement. Therefore, we conclude that the trial court did not commit plain error when it sentenced appellant to prison for his fifth-degree felonies. We overrule appellant's single assignment of error.

#### **IV. CONCLUSION**

{¶ 8} Having overruled appellant's single assignment of error, we affirm the judgments of the Franklin County Court of Common Pleas.

*Judgments affirmed.*

BROWN, P.J., and DORRIAN, J., concur.

---