

[Cite as *State v. Peterman*, 2010-Ohio-211.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-06-149
	:	
- vs -	:	<u>OPINION</u>
	:	1/25/2010
	:	
RICHARD PETERMAN,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2008-07-1319

Robin N. Piper III, Butler County Prosecuting Attorney, Gloria J. Sigman, Government Services Center, 315 High Street, 11th Floor, Hamilton, OH 45011-6057, for plaintiff-appellee

Scott N. Blauvelt, 246 High Street, Hamilton, OH 45011, for defendant-appellant

POWELL, J.

{¶1} Defendant-appellant, Richard Peterman, appeals the Butler County Court of Common Pleas' award of restitution after appellant pled guilty to nonsupport of dependents.

{¶2} Appellant was indicted on two counts of nonsupport of dependents for failing to support his son, a violation of R.C. 2919.21(A)(1), and failing to pay court-

ordered support, a violation of R.C. 2919.21(B), from July 1, 2006 to June 30, 2008. Appellant agreed to plead guilty to a violation of R.C. 2919.21(A)(1), while the second count was "merged." The trial court sentenced appellant to nine months in prison, and ordered appellant to pay \$34,971.79 in restitution to the Butler County Child Support Enforcement Agency. Appellant filed a timely appeal arguing two assignments of error.

{¶3} Assignment of Error No. 1:

{¶4} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN IMPOSING AS PART OF HIS SENTENCE \$34,971.79 IN CHILD SUPPORT ARREARAGES AS RESTITUTION."

{¶5} In his first assignment of error, appellant challenges the trial court's order that he pay \$34,971.79 in restitution, because the amount the trial court ordered is greater than the amount owed pursuant to the crime for which his was convicted; and because the trial court failed to find that he had the present and future ability to pay the restitution order. We agree.

{¶6} "R.C. 2929.18(A) authorizes trial courts to impose financial sanctions on felony offenders." *State v. Simms*, Clermont App. No. CA2009-02-005, 2009-Ohio-5440, ¶7. This includes ordering an offender to pay restitution to a victim, "in an amount based on the victim's economic loss." R.C. 2929.18(A)(1). The amount of restitution ordered by the trial court must be based on the actual loss caused by the offender's criminal conduct, therefore "[r]estitution can be ordered only for those acts that constitute the crime for which the defendant was convicted and sentenced." (Emphasis added.) *State v. Friend* (1990), 68 Ohio App.3d 241, 243, citing *State v. Irvin* (1987), 39 Ohio App.3d 12, 13; *State v. Williams* (1986), 34 Ohio App.3d 33, 34.

See, also, *State v. Warner* (1990), 55 Ohio St.3d 31, 69-70; *State v. Hicks*, Butler App. No. CA2002-08-198, 2003-Ohio-7210, ¶44. Lastly, there must be competent and credible evidence, in the record, to support the trial court's restitution order. See *Warner* at 69-70.

{¶7} Appellant argues that there is nothing in the record to support the trial court's decision to impose a \$34,971.79 order for restitution. Appellant maintains that he was indicted for and pled guilty to a violation of R.C. 2919.21(A)(1), in which he was charged with and later admitted to not paying monthly child support for 26 weeks out of 104 weeks, from July 1, 2006 to June 30, 2008. In order to accumulate \$34,971.79 over a two-year period, appellant asserts that his child support obligation would have been almost \$1,500 per month, an improbable figure in light of appellant's circumstances. Appellant cites *State v. Hubbell*, Darke App. No. 1617, 2004-Ohio-398, in support of his contention that the trial court erred in ordering restitution in an amount exceeding the arrearage which accumulated during the two-year time period in which he admittedly committed the nonsupport of dependents offense.

{¶8} In *Hubbell*, the Second Appellate District explained, "[i]f a trial court requires a defendant to pay restitution as a part of his sentence for felony nonsupport of dependents, *the court is limited to the amount of arrearage that accrued within the time period included in the indictment.*" (Emphasis added.) Id. at ¶11. The Second District opined that Hubbell had failed to pay child support over several years which resulted in a considerable arrearage; however, the economic loss suffered by the victim in that case was only the unpaid child support payments for the two-year period in which the offense was committed. Id. at ¶27. The *Hubbell* court found that

if "the trial court ordered Hubbell, to pay restitution which accrued outside the time period included in the indictment," the trial court erred in making such an order. *Id.*

{¶9} It appears from the record that the trial court ordered appellant to pay an amount of restitution greater than the amount which accrued during the two-year period from July 1, 2006 to June 30, 2008. We find the trial court was limited to only ordering restitution for the arrearage which accrued during the time period appellant committed the offense. Accord *Hubbell* at ¶11, 27. See, also, *Friend*, 68 Ohio App.3d at 243; *Warner*, 55 Ohio St.3d at 69-70; *Hicks*, 2003-Ohio-7210 at ¶44. Therefore, on remand, the trial court must modify the amount of restitution to reflect the amount of unpaid support accrued from July 1, 2006 to June 30, 2008.

{¶10} In reaching this judgment, we want to emphasize that our decision in no way relieves appellant of the child support obligation he has accrued with respect to his son.¹ See *Hubbell* at ¶12. Instead, our resolution of this matter merely restricts the trial court from ordering restitution in amount greater than that which accrued during the commission of the offense for which appellant was convicted.

{¶11} Appellant also argues the trial court failed to determine appellant had the present and future ability to pay the amount of restitution the court ordered. In particular, appellant maintains he has been unemployed for approximately five years and has physical disabilities which prohibit him from seeking employment.

{¶12} "[B]efore a trial court may impose a financial sanction [pursuant to R.C. 2929.18], the court must consider the offender's present and future ability to pay the financial sanction." *Simms*, 2009-Ohio-5440, at ¶7, citing R.C. 2929.19(B)(6).

1. Although not a part of the record before this court, we may assume from the original indictment, which charged appellant with a violation of R.C. 2919.21(B), that a valid and enforceable support order exists in a domestic relations or juvenile court.

"[T]here are no express factors that must be taken into consideration or findings regarding the offender's ability to pay that must be made on the record." *State v. Martin*, 140 Ohio App.3d 326, 338, 2000-Ohio-1942. "However, there must be some evidence in the record to show that the trial court acted in accordance with the legislative mandate." *Simms* at ¶8, citing *State v. Adkins* (2001), 144 Ohio App.3d 633, 647. "[C]ompliance with R.C. 2929.19(B)(6) can be shown through the trial court's use of a Presentence Investigation Report (PSI), which often provides financial and personal information, in order to aid the court in making its determination."² *Simms* at ¶9, citing *State v. Patterson*, Warren App. No. CA2005-08-088, 2006-Ohio-2133, ¶21; *State v. Dandridge*, Butler App. No. CA2003-12-330, 2005-Ohio-1077, ¶6; *State v. Back*, Butler, CA2003-01-011, 2003-Ohio-5985, ¶21.

{¶13} In *Simms*, this court found "the information before the trial court, in the form of statements made by [Simms] and the trial court, and the court's reference to the PSI in the sentencing hearing and journal entry, indicates that the court complied with R.C. 2929.19(B)(6) before ordering restitution." *Id.* at ¶13. Although the trial court in *Simms* did not mention Simms' present or future ability to pay the sanction during the sentencing hearing, the court "stated in its final judgment entry that it considered the record, oral statements, victim impact statement, and presentence report, as well as appellant's present and future ability to pay any financial sanctions which may be imposed." *Id.* at ¶11. In particular, Simms' PSI "contain[ed] information regarding his age, education level, family/marital status, physical and mental health, his alcohol and drug use, and his previous employment * * *

2. We also noted in *Simms*, "however, that reference to a PSI is not the only means by which a trial court may comply with R.C. 2929.19(B)(6)." *Id.* at ¶9.

information regarding an existing restitution order * * * and noted that [Simms] had financial difficulties." Id. Additionally, there was further support for the trial court's compliance with R.C. 2929.19(B)(6) through statements elicited by the trial court at Simms' plea colloquy and sentencing which indicated, inter alia, his age, employment history and education. Id. at ¶12. Lastly, this court stated, "there is nothing in the record which would indicate that [Simms] would be unable to obtain some type of employment upon his release from confinement." Id.

{¶14} As in *Simms*, the trial court in the instant case made no reference at the sentencing hearing to appellant's present or future ability to pay the financial sanction the court imposed. Instead, like *Simms*, the trial court stated in its final judgment entry that it "considered the record, the charges, the defendant's Guilty Plea, and findings as set forth on the record and herein, oral statements, any victim impact statement and pre-sentence report * * * and the defendant's present and future ability to pay the amount of any sanction * * *." Although, appellant's PSI contained information regarding his age, education level, and family/marital status, it also indicated that appellant suffered from physical ailments, had been unemployed for several years, and had no financial assets. Prior to sentencing, the trial court also learned that appellant had not worked since 2004, made several filings for Social Security benefits, had back problems and chronic obstructive pulmonary disease, had been living with his parents, and had no income. Thus, unlike the situation in *Simms*, there is evidence in the record to suggest that upon appellant's release from confinement he may be unable to seek employment. Based on the record before this court, we are unable to determine if the trial court complied with the requirements of R.C. 2929.19(B)(6) before ordering restitution. On remand, the trial court must

ensure that it considers appellant's present and future ability to pay restitution, and in so doing, provide some evidence that it acted in accordance with the legislative mandate of R.C. 2929.19(B)(6). Appellant's first assignment of error is therefore sustained.

{¶15} Assignment of Error No. 2:

{¶16} "APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL TO HIS PREJUDICE AND IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION."

{¶17} In his second assignment of error, appellant maintains his trial counsel was ineffective for failing to object to the court's restitution order. Based upon our resolution of appellant's first assignment of error, his second assignment of error is rendered moot. See App.R. 12(A)(1)(c).

{¶18} Therefore, we vacate the trial court's order of restitution and reverse and remand this matter to trial court for further proceedings in accordance with this opinion.

{¶19} Judgment reversed and remanded.

BRESSLER, P.J., and HENDRICKSON, J., concur.