[Cite as *State v. Humes*, 2010-Ohio-2173.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-10-057
	:	O P I N I O N
- vs -		5/17/2010
	:	
SCOTT FITZGERALD HUMES,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2009CR00212

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, 123 N. Third Street, Batavia, Ohio 45103-3033, for plaintiff-appellee

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HENDRICKSON, J.

{¶1} Defendant-appellant, Scott Fitzgerald Humes, appeals his sentence from the Clermont County Court of Common Pleas for his convictions of aggravated robbery and felonious assault.

{¶2} On March 25, 2009, the Clermont County Grand Jury returned a 14-count indictment against appellant, charging him in counts 1 through 13 with aggravated robbery, pursuant to R.C. 2911.01(A)(1), and charging him in count 14 with felonious

assault, pursuant to R.C. 2903.11(A)(2). On September 14, 2009, appellant entered guilty pleas to Counts 10 through 14 in exchange for the dismissal of the other nine counts at sentencing and the state's recommendation of a 20-year prison sentence.

{¶3} On September 29, 2009, the trial court sentenced appellant to serve 48 years in prison: 10 years for each of Counts 10 through 13, and eight years for Count 14. The court ordered all terms to be served consecutively.

{¶4} These convictions arose from five robberies that took place in April 2008 and February 2009. In April 2008, appellant was armed with a knife when he entered a Taco Bell restaurant in Clermont County and demanded money from an employee. Although appellant obtained no money, he cut the employee with his knife, causing injury. A co-defendant, Anthony Cacaro, aided appellant by serving as his getaway driver.[1]

{¶5} On February 5, 2009, appellant, who was again aided by Cacaro, robbed a CVS Pharmacy in Hamilton County. He entered the pharmacy with a handgun and took $335 in cash.

{¶6} The next day, on February 6, 2009, appellant was armed with a handgun and entered a Huntington Bank in Clermont County. He left the bank with $2995 in cash.

{¶7} On February 10, 2009, appellant robbed a US Bank in Hamilton County. He was again armed with a handgun and took an undisclosed amount of money from the bank.

{¶8} The final robbery occurred on February 18, 2009. Appellant, with the aid of Cacaro, robbed a PNC Bank located in Clermont County. Appellant entered the bank with a handgun and made off with over $5,000.

{¶9} Appellant timely appeals his sentence, asserting three assignments oferror. For ease of discussion, we will address appellant's first two assignments of error together.

{¶10} Assignment of Error No. 1:

{¶11} "THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING APPELLANT TO THE MAXIMUM TERM OF IMPRISONMENT ON FOUR COUNTS OF AGGRAVATED ROBBERY AND ONE COUNT OF FELONIOUS ASSAULT."

{¶12} Assignment of Error No. 2:

{¶13} "THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO CONSECUTIVE PRISON TERMS AS THE RECORD DOES NOT SUPPORT SUCH A SENTENCE."

{¶14} Appellant first argues that his sentence is excessive and fails to achieve the overriding principles of felony sentencing. He also argues the court's imposition of consecutive prison terms is not supported by the record and is therefore contrary to law.

{¶15} First, we note that appellant failed to object to his prison sentence in the trial court; therefore, he has forfeited all but plain error. *State v. Addis*, Brown App. No. CA2009-05-019, 2010-Ohio-1008, ¶8; *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶15.

{¶16} Crim.R. 52 governs harmless and plain error, stating that "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Ohio law recognizes that plain error does not exist unless, but for the error, the outcome of the trial would have been different. *State v. Cox*, Butler App. No. CA2005-12-513, 2006-Ohio-6075, at ¶21, citing *State v. Haney*, Clermont App. No.

1. Cacaro is referred to as "Pickero" in the transcripts.

CA2005-07-068, 2006-Ohio-3899, ¶50. Further, "notice of plain error is to be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." Id.

{¶17} "Trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶100. "In applying *Foster* * * * appellate courts must apply a two-step approach. First, they must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard." *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶4.

{¶18} A sentence is not clearly and convincingly contrary to law, where the trial court "consider[s] the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12, * * * properly applie[s] postrelease control, and * * * sentence[s] [appellant] * * * within the permissible range." Id. at ¶18. In addition, so long as the trial court gives "careful and substantial deliberation to the relevant statutory considerations" the court's sentencing decision is not an abuse of discretion. Id. at ¶20.

{¶19} In this case, we find the trial court's sentence is not clearly and convincingly contrary to law. In its judgment entry, the trial court expressly stated that it "considered *** the principles and purposes of sentencing under Ohio Revised Code Section 2929.11, and [balanced] the seriousness and recidivism factors under Ohio Revised Code Section 2929.12." Furthermore, the trial court informed appellant that he is subject to five years of mandatory postrelease control. In addition, the court sentenced appellant to a prison term of ten years for each count of aggravated robbery

count and eight years for the felonious assault. These sentences are within the permissible time range for each offense. See R.C. 2929.14.

{¶20} We also find that the court did not abuse its discretion in ordering appellant to serve the maximum sentence for each count. It is evident from the record that the trial court gave careful and substantial deliberation to the relevant statutory considerations. Specifically, the trial court carefully considered appellant's prior record, which includes another "rampage" where appellant served a lengthy prison term for kidnapping, aggravated robbery and breaking and entering. The court also noted that protecting the public was of tantamount concern in this case, given the nature of the offenses, and that incarceration was the only way to succeed in protecting the public from appellant. We find there is nothing in the record to indicate that the trial court's decision to sentence appellant to the maximum sentence for each count of aggravated robbery and felonious assault was unreasonable, arbitrary, or unconscionable. See *State v. Elliott*, Clermont App. No. CA2009-03-020, 2009-Ohio-5926, ¶12.

{¶21} In applying the *Kalish* analysis to appellant's second assignment of error, we find that the trial court's decision to run appellant's sentences consecutively is not clearly and convincingly contrary to law. As noted above, the trial court's entry stated that it complied with R.C. 2929.11 and 2929.12 in reaching its decision. We also find no abuse of discretion in the trial court's decision to run appellant's sentences consecutive to one another. In addition to the facts considered above, the trial court observed that since appellant's release from prison in 2006 following his lengthy prison term, he has since been convicted of domestic violence, felony domestic violence, vandalism, disorderly conduct, and failing to stop after an accident. We cannot say that the trial court's decision to impose consecutive sentences was unreasonable, arbitrary, or unconscionable. See id.; *State v. Linz*, Clermont App. No. CA2008-05-052, 2009-Ohio-

1652, ¶20. Therefore, appellant's first and second assignments of error are overruled.

{¶22} Assignment of Error No. 3:

{¶23} "THE TRIAL COURT ERRED IN ORDERING APPELLANT TO PAY RESTITUTION."

{¶24} Appellant argues the trial court abused its discretion in ordering him to pay restitution because it failed to adequately assess appellant's present and future ability to pay.

{¶25} R.C. 2929.18(A) authorizes trial courts to impose financial sanctions on felony offenders. This includes ordering the offender to pay restitution to the victim, or the victim's survivor, "in an amount based on the victim's economic loss." R.C. 2929.18(A)(1). Before a trial court may impose a financial sanction, however, the court must consider the offender's present and future ability to pay the financial sanction. R.C. 2929.19(B)(6).

{¶26} "[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. There must be some evidence in the record, however, to show that the trial court acted in accordance with the legislative mandate. See *State v. Adkins* (2001), 144 Ohio App.3d 633, 647.

{¶27} We have consistently held that compliance 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. *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. We note, 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). See, e.g., *Martin* at 327; *State v. Culver,* 160 Ohio App.3d 172, 2005-Ohio-1359, ¶59 (inquiries made at the sentencing hearing regarding present employment, employment history, the ability to maintain employment, and assets); *State v. Sillett,* Butler App. No. CA2000-10-205, 2002-Ohio-2596.

{¶28} Appellant argues that the trial court did not mention at the sentencing hearing that it reviewed the PSI to determine whether appellant had the ability to pay such an order. Also, appellant argues there was not enough information in the PSI to allow the trial court to make any meaningful analysis under R.C. 2929.19(B)(6). Although there is no mention in the transcript of the sentencing hearing of appellant's present or future ability to pay the financial sanction, the trial 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 that may be imposed. Although the PSI did not list any of appellant's assets, it did contain information regarding his age, education level, family/marital status, physical and mental health, his alcohol and drug use, and his previous employment.

{¶29} We find that the information before the trial court, in the form of statements made by appellant 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. See *State v. Simms*, Clermont App. No. CA2009-02-005, 2009-Ohio-5440, ¶12-13.

{¶30} Appellant does not contest the amount of restitution he was ordered to pay; however, we recognize, and the state concedes, that the trial court erred in ordering restitution on counts that were dismissed pursuant to the plea bargain.

{¶31} The amount of restitution ordered by the trial court must be based on the

actual loss caused by the offender's criminal conduct. Therefore, restitution can be ordered only for those acts that constitute the crimes for which appellant was convicted and sentenced. *State v. Peterman*, Butler App. No. CA2009-06-149, 2010-Ohio-211, ¶6. It is apparent from the record that the trial court ordered appellant to pay restitution to victims relating to counts that were dismissed by the state. We therefore sustain appellant's third assignment of error. On remand, the trial court must modify the amount of restitution to reflect an amount based upon the actual loss caused by appellant's criminal conduct for which he was convicted.

{¶32} We hereby vacate the trial court's order of restitution and remand this matter to trial court for further proceedings in accordance with this opinion.

{¶33} Judgment affirmed in part, reversed in part, and remanded.

YOUNG, P.J., and POWELL, J., concur.