[Cite as *State v. McCants*, 2010-Ohio-854.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-08-214
	:	O P I N I O N
- vs -		3/8/2010
	:	
ABRIAN MCCANTS,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2008-12-2113

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

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RINGLAND, J.

{¶1} Defendant-appellant, Abrian Emil McCants, appeals the restitution portion of his sentence imposed by the Butler County Common Pleas Court. We reverse and remand the trial court's decision as to the restitution order.

{¶2} Appellant was indicted on three separate fifth-degree felony violations of R.C. 2919.21(A)(2), nonsupport of dependents, for failing to support his daughter from November 18, 2002 to July 31, 2004 (Count 1); from August 1, 2004 to July 31, 2006

(Count 2); and from August 1, 2006 to July 31, 2008 (Count 3). Appellant agreed to plead guilty to two counts of first-degree misdemeanor violations of R.C. 2919.21(A)(2), for failing to pay support from August 1, 2004 to July 31, 2006 and from August 1, 2006 to July 31, 2008. The trial court sentenced appellant to a six-month suspended prison term on each count, placed appellant on community control for three years, and ordered appellant to pay $12,585.70 in restitution to the Butler County Child Support Enforcement Agency. Appellant filed a timely appeal raising one assignment of error.

{¶3} "THE TRIAL COURT ERRED IN AWARDING RESTITUTION IN THE AMOUNT OF THE FULL ARREARAGE OWED TO THE BUTLER COUNTY CSEA, $12,585.70, AND NOT JUST THAT PORTION OF THE ARREARAGE THAT ACCRUED BETWEEN AUGUST 1, 2004 AND JULY 31, 2008."

{¶4} In his sole assignment of error, appellant maintains the trial court erred in awarding restitution beyond the amount owed on each count for which he was convicted.

{¶5} R.C. 2929.25(A)(1)(a) authorizes a trial court to impose sanctions on misdemeanor offenders, including financial sanctions ordered pursuant to R.C. 2929.28(A)(1). One of the financial sanctions an offender may be ordered to pay, is restitution to a victim, "in an amount based on the victim's economic loss." R.C. 2929.28(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*.'"[1] (Emphasis sic.) *State v. Peterman*, Butler App. No. CA2009-06-149, 2010-Ohio-211, ¶6, citing *State v. Friend* (1990), 68 Ohio App.3d 241,

1. We recognize that the cases from which we cite this proposition of law are in reference to restitution ordered in felony sentences pursuant to R.C. 2929.18(A)(1). Because we do not believe there is a

243; *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.

{¶6} Appellant argues the trial court abused its discretion when it awarded restitution for economic damages which were not proximately caused by the offense for which he was convicted. Appellant maintains that because he was convicted for the nonpayment of child support over a 48-month period, from August 1, 2004 to July 31, 2008, the trial court had no authority to award restitution for support which accrued outside that period.

{¶7} The state urges this court to affirm the trial court's restitution order, arguing that the trial court may order a defendant to pay the full amount of child support arrearage owed as a condition of community control. In support of this argument, the state cites *State v. Stewart*, Franklin App. No. 04AP-761, 2005-Ohio-987 and *State v. Hubbell*, Darke App. No. 1617, 2004-Ohio-398, and contends the trial court may properly award, as restitution, the entire amount of child support arrearage as a condition of probation or community control. *Stewart* at ¶8-10; *Hubbell* at ¶10.

{¶8} In *Stewart*, the Tenth Appellate District affirmed a trial court's decision imposing payment of a father's entire child support arrearage amount as a condition of his community control, finding the condition satisfied the three criteria set forth by the Ohio Supreme Court in *State v. Jones* (1990), 49 Ohio St.3d 51, 53. *Stewart* at ¶8-10. However, within that opinion the *Stewart* court specifically noted the following:

{¶9} "The trial court did not order the $11,223.72 support arrearage to be paid as 'restitution.' To the contrary, the trial court expressly stated it was *not* ordering

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distinction between restitution ordered pursuant to R.C. 2929.18(A)(1), or restitution ordered pursuant to R.C. 2929.28(A)(1), the same reasoning is applicable to restitution ordered under either subsection.

defendant's payment of the $11,223.72 support arrearage as restitution, but instead was ordering the payment 'as a condition of his probation.'" (Emphasis sic.) Id. at ¶5.

{¶10} In *Hubbell*, the Second Appellate District reversed the trial court's decision ordering restitution in an amount greater than that which accrued within the time period covered by the charge for which the defendant was indicted and ultimately convicted. *Hubbell* at ¶1, 27, 29. The Second District found that a trial court was limited to ordering restitution in an amount equal to the actual loss caused by an offender's criminal conduct. Id. at ¶11. However, the *Hubbell* court also recognized that a trial court could, as a condition of community control, require an offender to pay the total arrearage of child support owed on a felony nonsupport conviction, and not contravene the *Jones* conditions of community control criteria. Id. at ¶13. The Second District was unable to determine whether the support was ordered as restitution or as a condition of community control, and remanded with instructions to reduce the restitution award to the amount which accrued during the time period of the offense, or to make payment of the entire arrearage a condition of Hubbell's community control. Id. at ¶26, 29.

{¶11} Most recently however, this court addressed a similar issue in which a trial court ordered a father, who pled guilty to a felony nonsupport of his son, to pay his entire support arrearage as restitution, even though the offense to which he pled guilty was a failure to pay support for a 24-month period. *Peterman*, 2010-Ohio-211 at ¶2, 7, 9. In *Peterman*, this court found, "the trial court was limited in only ordering restitution for the arrearage which accrued during the time period appellant committed the offense." Id. See, also, *Hubbell* at ¶11, 27; *Friend*, 68 Ohio App.3d at 243; *Warner*, 55 Ohio St.3d at 69-70; *Hicks*, 2003-Ohio-7210 at ¶44.

{¶12} This case does not present a situation like *Stewart* in which the trial court ordered payment of the entire arrearage amount as a condition of community control.

Stewart at ¶3, 5. Instead, the trial court ordered appellant to pay $12, 585.70 in "restitution," an amount which, as appellant claims and the state concedes, represents the entire arrearage and not that which accumulated during the 48-month period covered by appellant's guilty plea and conviction. Inasmuch as the trial court used the term "restitution," rather than making payment of the arrearage a term of community control, we reverse and remand this matter as to the restitution order.

{¶13} Accordingly, where a trial court orders restitution as part of the sentence in a criminal nonsupport case, the amount of restitution is limited to the support arrearage that accrued during the time frame encompassed by the specific charge or charges for which the defendant is convicted. In the alternative, if the defendant is sentenced to a term of community control, the trial court may, as a condition of community control, order the defendant to pay the entire outstanding child support arrearage.

{¶14} As previously stated in *Peterman*, we want to emphasize that our decision in no way relieves appellant of his child support obligation for the amounts that accrued outside the 48-month period; it merely limits the trial court's order of "restitution" to the amount which accrued during the commission of the offense for which he was convicted. *Peterman* at ¶9. See, also, *Hubbell* at ¶12.

{¶15} The assignment of error is sustained, and this case is remanded to the trial court with instructions to modify its sentence accordingly.

{¶16} Judgment reversed and remanded.

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