

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2014-09-197
	:	
- vs -	:	<u>OPINION</u>
	:	6/1/2015
	:	
CRAIG E. BALLARD,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2014-05-0750

Michael T. Gmoser, Butler County Prosecuting Attorney, Lina N. Alkamdawi, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

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

PIPER, P.J.

{¶ 1} Defendant-appellant, Craig Ballard, appeals the sentence imposed upon him by the Butler County Court of Common Pleas after Ballard pled guilty to one count of trafficking in cocaine.

{¶ 2} After an investigation that included a controlled buy of narcotics from Ballard, the Hamilton Police Department executed a search warrant on Ballard's residence. Within Ballard's residence, police located powder cocaine, crack cocaine, \$658 in cash, and ten

Alprazolam pills. Ballard was charged with possession of cocaine, trafficking in cocaine, illegal use or possession of drug paraphernalia, possession of drugs, and accompanying forfeiture specifications. Ballard agreed to plead guilty to trafficking in cocaine and the accompanying forfeiture specification, and the other counts were dismissed.

{¶ 3} After accepting Ballard's valid plea, the trial court ordered a presentence investigation report and scheduled a sentencing hearing. The trial court imposed a four-year mandatory prison sentence, and ordered \$42 in restitution to the Hamilton Police Department to reimburse the department for the buy money used during the investigation. Ballard now appeals his conviction and restitution order, raising the following assignments of error.

{¶ 4} Assignment of Error No. 1:

{¶ 5} THE SENTENCING COURT ABUSED ITS DISCRETION IN IMPOSING A FOUR-YEAR PRISON TERM.

{¶ 6} Ballard argues in his first assignment of error that the trial court erred in sentencing him to four years in prison.

{¶ 7} Despite Ballard's argument that an abuse of discretion standard applies, this court has stated multiple times that the standard of review set forth in R.C. 2953.08(G)(2) shall govern all felony sentences. *State v. Crawford*, 12th Dist. Clermont No. CA2012-12-088, 2013-Ohio-3315, ¶ 6. Pursuant to R.C. 2953.08(G)(2), when hearing an appeal of a trial court's felony sentencing decision, "the appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing." However, as explicitly stated in R.C. 2953.08(G)(2), "[t]he appellate court's standard for review is *not whether the sentencing court abused its discretion*." (Emphasis added.)

{¶ 8} Instead, an appellate court may only take action authorized by R.C. 2953.08(G)(2) if the court "clearly and convincingly finds" that the sentence is contrary to law.

A sentence is not clearly and convincingly contrary to law where the trial court considers the purposes and principles of R.C. 2929.11, as well as the seriousness and recidivism factors listed in R.C. 2929.12, and sentences appellant within the permissible statutory range. *Crawford* at ¶ 9; *State v. Elliott*, 12th Dist. Clermont No. CA2009-03-020, 2009-Ohio-5926, ¶ 10.

{¶ 9} After reviewing the record, the trial court's sentence is not contrary to law. The trial court stated at the sentencing hearing that it had considered the "principles and purposes of Ohio [sic] sentencing statute," and also expressly stated in its entry that it had considered the purposes and principles of sentencing according to R.C. 2929.11 as well as the seriousness and recidivism factors within R.C. 2929.12. While the trial court did not expressly cite R.C. 2929.11 and R.C. 2929.12 during the sentencing hearing, its statement that it had considered the principles and purposes of Ohio's sentencing statute clearly indicates that the trial court considered these important factors before sentencing Ballard. This is especially true where the trial court also included the specific citations to R.C. 2929.11 and R.C. 2929.12 in its sentencing entry. See *State v. Back*, 2d Dist. Clark No. 2013-CA-62, 2014-Ohio-1656, ¶ 14 (affirming a sentence where the trial court failed to cite R.C. 2929.11 or 2929.12 during the sentencing hearing but stated in its judgment entry of conviction that it had considered the principles and purposes of sentencing pursuant to R.C. 2929.11 and balanced the seriousness and recidivism factors pursuant to R.C. 2929.12); and *State v. Lancaster*, 12th Dist. Butler No. CA2007-03-075, 2008-Ohio-1665 (affirming a sentence where the trial court did not state at the sentencing hearing that the court considered R.C. 2929.11 or R.C. 2929.12 specifically, but stated its consideration of both statutes in its judgment entry of conviction). Based on the record, it is clear that the trial court gave the proper consideration to the purposes and principles of sentencing as well as the seriousness and recidivism factors as required by Ohio's sentencing statutes.

{¶ 10} Ballard was convicted of trafficking in cocaine in violation of R.C. 2925.03(A)(2), which is a second-degree felony. According to R.C. 2929.14(A)(2), "for a felony of the second degree, the prison term shall be two, three, four, five, six, seven, or eight years." Also, and according to R.C. 2929.13(F)(5), the sentence was mandatory. As such, Ballard's four-year sentence was within the sentencing range for a second-degree felony, and the mandatory nature of the sentence was properly imposed.

{¶ 11} After reviewing the record, we find that Ballard's sentence was not clearly and convincingly contrary to law where the trial court considered the purposes and principles of sentencing according to R.C. 2929.11, as well as the seriousness and recidivism factors listed in R.C. 2929.12, and sentenced Ballard within the permissible statutory range. As such, Ballard's sentence was not contrary to law, and his first assignment of error is overruled.

{¶ 12} Assignment of Error No. 2:

{¶ 13} THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN ORDERING PAYMENT OF RESTITUTION AT SENTENCING.

{¶ 14} Ballard argues in his second assignment of error that the trial court erred in ordering him to pay restitution of \$42 to the Hamilton Police Department as a return of the "buy money" the police used during the investigation.

{¶ 15} According to R.C. 2929.18(A)(1), a trial court may order "restitution by the offender to the victim of the offender's crime or any survivor of the victim, in an amount based on the victim's economic loss." In certain circumstances, a government entity may be considered a victim of a crime pursuant to R.C. 2929.18(A)(1), such as when government funds are embezzled or when government property is vandalized. *State v. Pietrangelo*, 11th Dist. Lake No. 2003-L-125, 2005-Ohio-1686, ¶ 15. However, when law enforcement initiates the use of its funds to perform a controlled purchase of narcotics during an investigation,

such law enforcement is not a victim as contemplated within R.C. 2929.18(A)(1).¹ *State v. Samuels*, 4th Dist. Washington No. 03CA8, 2003-Ohio-6106, ¶ 5.²

{¶ 16} As conceded by the state, the Hamilton Police Department chose to use \$42 of its own funds to conduct a controlled purchase of narcotics from Ballard, and is therefore not a victim contemplated within the restitution statute. As such, the trial court erred in ordering Ballard to pay restitution of \$42 to the Hamilton Police Department. Accordingly, Ballard's second assignment of error is sustained, and the trial court's order of restitution is hereby vacated.

{¶ 17} The judgment of the trial court is reversed to the extent the order of restitution for \$42 is hereby vacated. In all other respects, the judgment of the trial court is hereby affirmed.

S. POWELL and M. POWELL, JJ., concur.

1. The *Pietrangelo* court recognized that in addition to Ohio courts, "federal courts have uniformly held that investigatory agencies conducting undercover operations involving the use of government funds to purchase drugs are not 'victims' as contemplated by the federal restitution statute." 2005-Ohio-1686 at ¶ 16.

2. Some courts have stated that restitution orders to law enforcement are valid if the defendant specifically agrees to pay restitution as part of a plea agreement. *State v. Baker*, 3d Dist. Allen No. 1-11-49, 2012-Ohio-1890; *State v. Ferguson*, 10th Dist. Franklin No. 13AP-891, 2014-Ohio-3153, ¶ 29. However, the \$42 ordered as restitution in the case sub judice was not a part of the plea agreement, was not discussed at all during the plea hearing, and did not appear as a condition on Ballard's plea form. Therefore, we are not asked in this case to decide whether a restitution order made as a result of a plea negotiation will be upheld.