

[Cite as *State v. Kruger*, 2006-Ohio-2361.]

IN THE COURT OF APPEALS FOR MIAMI COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. Case No. 2005-CA-19
v.	:	T.C. Case No. 04-CR-456
BENJAMIN KRUGER	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

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OPINION

Rendered on the 12th day of May, 2006.

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FAIN, J.

{¶ 1} Defendant-appellant Benjamin Kruger appeals from his conviction and sentence, following a no-contest plea, for Nonsupport of Dependents, a felony of the fifth degree. Kruger contends that his plea was not knowing and voluntary, because he did not understand that the trial court was free to disregard the recommendation of the State, as part of the plea bargain, that Kruger receive community control sanctions instead of a prison sentence, and because the trial court failed to elicit a recitation, in

the record, of the circumstances of the offense before accepting Kruger's plea and finding him guilty. Kruger also contends that the trial court erred by ordering restitution in the amount of the accrued, unpaid support, because it did not first ascertain his ability to pay restitution.

{¶ 2} We conclude that the trial court ascertained: (1) that Kruger understood that the trial court was not bound to accept the State's representation; and (2) that Kruger understood the nature of the charge against him. We further conclude that the trial court is not required, in accepting a plea of no contest to a felony, to elicit a recitation of the circumstances of the alleged offense. Finally, we conclude that an order of restitution is not limited by the offender's ability to pay, by virtue of R.C. 2929.18. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 3} Kruger was charged by indictment with one count of Nonsupport of Dependents, in violation of R.C. 2919.21(B), which provides as follows:

{¶ 4} "No person shall abandon, or fail to provide support as established by a court order to, another person whom, by court order or decree, the person is legally obligated to support."

{¶ 5} The indictment alleges that Kruger had failed to provide support for a total accumulated period of twenty-six weeks out of one hundred four consecutive weeks, making the offense a fifth-degree felony. R.C. 2919.21(G)(1). Although the indictment does not specify the nature of the support ordered, a pre-sentence

investigation report that is part of the record on appeal indicates that the support was ordered for two minor children, born in 1998 and in 2000.

{¶ 6} Kruger entered into a plea bargain wherein the State agreed to recommend a sentence imposing community control sanctions, in exchange for Kruger's no-contest plea. The trial court accepted the plea, found Kruger guilty, and ordered a pre-sentence investigation. At a sentencing hearing, the trial court imposed a sentence of eleven months imprisonment, with credit for time served. As part of the sentencing entry, the trial court ordered Kruger placed on post-release controls upon his release from prison. These controls included numerous conditions of supervision as well as a number of "special conditions." One of the special conditions is: "4. That Defendant pay \$8,302.55 in arrearages in regular payments."

{¶ 7} From his conviction and sentence, Kruger appeals.

II

{¶ 8} Kruger's First Assignment of Error is as follows:

{¶ 9} "APPELLANT [sic] CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN HE WAS FOUND GUILTY AFTER ENTERING A PLEA THAT WAS NOT MADE KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY."

The Trial Court's Failure to Follow the State's Sentencing Recommendation.

{¶ 10} The State, as part of the plea bargain, recommended the imposition of

community control sanctions, instead of imprisonment. The trial court, after reviewing Kruger's pre-sentence investigation report, imposed a sentence of eleven months imprisonment. Kruger's first argument in support of his First Assignment of Error appears to be that he did not understand that the trial court was not bound by the State's recommendation as to sentence. In support of this argument, Kruger relies upon the following colloquy:

{¶ 11} "THE COURT: Okay. Did you hear the plea bargain in this case?

{¶ 12} "MR. KRUGER: Yes, I did.

{¶ 13} "THE COURT: Is that the entire agreement?

{¶ 14} "MR. KRUGER: Yes, sir.

{¶ 15} "THE COURT: Are there any other terms, conditions, promises or inducements that you're relying on in exchange for your plea of no contest other than that that's been stated here on the record?

{¶ 16} "MR. KRUGER: No, Your Honor.

{¶ 17} "THE COURT: If there are any other deals I'm not aware of them and I'm not bound by them, do you understand that?

{¶ 18} "MR. KRUGER: Yes, Your Honor, I do."

{¶ 19} Kruger argues that the trial court, by informing him that it would not be bound by any *other* deals that had been made, implied that it would be bound by the deal recited in the record as to the imposition of sentence. This might be a plausible argument but for the continuation of the above-quoted colloquy:

{¶ 20} "THE COURT: Also I'm not bound by any recommendations in this case.

There's a recommended sentence here for Community Control, and I don't have to follow that unless I think it's the right thing to do. Do you understand that?

{¶ 21} "MR. KRUGER: Yes, I do, Your Honor."

{¶ 22} We do not see how the trial court could have expressed in any clearer language the fact that it was not bound by the State's sentencing recommendation concerning community control sanctions. Kruger indicated no confusion on this point. We see no basis in the record for concluding that Kruger's no-contest plea was not knowing and voluntary because he did not understand that the trial court was not bound by the State's sentencing recommendation.

{¶ 23} The Determination that Kruger Understood the Nature of the Charge.

{¶ 24} Crim. R. 11(C)(2)(a) requires the trial court, before accepting a guilty or no-contest plea in a felony case, to determine that the defendant understands the nature of the charges, among other things. R.C.2937.07 requires an explanation of the circumstances of the offense whenever a plea of guilty or no contest is tendered to a misdemeanor charge, but there is no similar requirement in felony cases.

{¶ 25} Shortly after the colloquy quoted in Part II-A, above, the trial court admonished Kruger as follows:

{¶ 26} "THE COURT: Now I'm gonna go through quite a bit of information here and it's very important to me that you understand everything that I'm going to tell you. So if at any time during these proceedings you don't entirely understand everything that I'm telling you, will you promise to stop me immediately?"

{¶ 27} “MR. KRUGER: Yes, I will.

{¶ 28} “THE COURT: If you stop me because you don’t understand something, I’ll do whatever it takes to make sure that you understand all the information. I’ll slow down for you, I’ll repeat the information, I’ll explain it in a different way, I’ll answer your questions, or whatever else I need to do to make sure that you understand everything entirely. Is that agreed between us?

{¶ 29} “MR. KRUGER: Yes, sir.

{¶ 30} “THE COURT: If at any time you wish to speak with your Attorney, you go right ahead and do so. You talk to him at any time you want to for as long as you want to and when you’re finished, you let me know and then I’ll start up again, okay?

{¶ 31} “MR. KRUGER: All right.”

{¶ 32} Later, during the plea hearing, the following colloquy ensued:

{¶ 33} “THE COURT: Have you read the charges set forth in the Indictment alleging non-support, a felony of the fifth degree?

{¶ 34} “MR. KRUGER: Yes, I did, Your Honor.

{¶ 35} “THE COURT: Did you discuss the meaning of that charge with your Attorney?

{¶ 36} “MR. KRUGER: Yes, I did, Your Honor.

{¶ 37} “THE COURT: From your reading the charge and your discussions with your Attorney, do you entirely understand the substance, meaning, and nature of the charge that you’re entering a plea of no contest to here today?

{¶ 38} “MR. KRUGER: Yes, I do, Your Honor.

{¶ 39} “THE COURT: Do you have any questions about the charge and what it means?

{¶ 40} “MR. KRUGER: No, I do not, Your Honor.”

{¶ 41} Kruger argues that without a recitation of the circumstances of the offense, the trial court could not properly determine that he understood the nature of the charge. Although best practice might include a recitation of the circumstances of the offense, Crim. R. 11(C)(2)(a) merely requires that the trial court determine that the defendant who is tendering a plea of guilty or no contest understands the nature of the charge or charges to which he is pleading. In our view, the colloquy quoted above, in its entirety, is a sufficient basis for the trial court to have determined that Kruger understood the nature of the non-support charge. At no point during the plea hearing did Kruger indicate any confusion about the nature of the charge.

{¶ 42} Kruger’s First Assignment of Error is overruled.

III

{¶ 43} Kruger’s Second Assignment of Error is as follows:

{¶ 44} “THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO PAY RESTITUTION WITHOUT FIRST DETERMINING HIS ABILITY TO PAY.”

{¶ 45} Kruger relies upon R.C. 2929.18(B)(6). We have examined this subdivision of the statute in detail, and we find nothing therein that limits the ability of the trial court to impose any kind of financial sanction upon a defendant, based upon a determination of the defendant’s ability to pay.

{¶ 46} R.C. 2929.18(A)(1) deals with restitution. It limits the amount of restitution that may be ordered, not by the defendant's ability to pay, but by the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense. R.C. 2929.18(A)(2) deals with fines. It seems to provide that the amount of the fine shall be "based on a standard percentage of the offender's daily income over a period of time determined by the court and based upon the seriousness of the offense," but not to exceed the maximum amount of fine otherwise established in the statute. The term "fine" is evidently being used in subdivision (A)(2) of the statute as distinct from the term "restitution," which is used in subdivision (A)(1) of the statute.

{¶ 47} The only limitations upon a financial sanction based upon an offender's ability to pay, that we have been able to find in R.C. 2929.18, are: (1) the limitation on reimbursement of the costs of sanctions to the government found in R.C. 2929.18(A)(5)(a)(ii); and (2) the provision in R.C. 2929.18(B)(1) that a mandatory fine shall not be imposed upon an offender who is found to be an indigent person and unable to pay the mandatory fine.

{¶ 48} R.C. 2929.18(E) provides that: "A court that imposes a financial sanction upon an offender may hold a hearing if necessary to determine whether the offender is able to pay the sanction or is likely in the future to be able to pay it." We construe this division of the statute as merely providing that in any situation where a financial sanction is, by law, limited by the offender's ability to pay, the trial court may hold a hearing as necessary to determine the offender's ability to pay. We do not construe

this division of the statute as imposing a limitation, based upon the offender's inability to pay, upon any financial sanction, including, for example, restitution, that is not otherwise so limited by law.

{¶ 49} In short, we have found nothing in R.C. 2929.18 that would limit an order of restitution by the offender's ability to pay. Kruger has not directed our attention to any other legal authority in support of the proposition of law upon which his Second Assignment of Error depends.

{¶ 50} Kruger's Second Assignment of Error is overruled.

IV

{¶ 51} Both of Kruger's assignments of error having been overruled, the judgment of the trial court is Affirmed.

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BROGAN, and WOLFF, JJ., concur.

Copies mailed to:

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