[Cite as *State v. Hardwick*, 2015-Ohio-1748.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 26283
	:	
v.	:	Trial Court Case No. 2013-CR-1064
	:	
ANDRE A. HARDWICK	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 8th day of May, 2015.

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WELBAUM, J.

{¶ 1} Defendant-appellant, Andre A. Hardwick, appeals from his conviction and sentence in the Montgomery County Court of Common Pleas after pleading no contest to one count of nonsupport of dependents. Hardwick contends that the trial court erred in finding him statutorily ineligible for intervention in lieu of conviction (ILC) and in ordering him to pay court-appointed attorney fees as a condition of community control. For the reasons outlined below, we find no merit in Hardwick's arguments and the judgment of the trial court will be affirmed.

Facts and Course of Proceedings

{¶ 2} On March 31, 2014, Hardwick was indicted on two counts of nonsupport of dependents in violation of R.C. 2919.21(B), both felonies of the fifth degree. The indictment alleged that Hardwick failed to pay child support between September 1, 2010 and August 31, 2012. The child support was for two children he had in 1997 and 1998 with Shakira Johnson. Hardwick initially pled not guilty to the charges and subsequently filed an application for ILC on grounds that his use of drugs and alcohol was a factor leading to his nonsupport offenses. Thereafter, an ILC eligibility report was prepared and submitted to the trial court. According to the report, Hardwick had over $10,000 in child support arrearages. The amount of restitution for the indicted offenses was $2,401.

{¶ 3} The ILC eligibility report indicates that in December 2005, Hardwick was initially ordered to pay $25 a month in child support for each of his children. In January 2009, he was held in contempt for failing to make the payments as ordered. The jail sentence for his contempt was suspended as long as he made payments toward his

arrearages. In June 2009, Hardwick's support was raised to $182.82 a month for each child plus an additional monthly payment of $22 toward arrearages. Thereafter, Hardwick again failed to make the child support payments as ordered, and in February 2010, he was found guilty of violating his previously suspended contempt. As a result, Hardwick was sentenced to 60 days in jail.

{¶ 4} The ILC eligibility report also indicates that Hardwick has acknowledged his obligation to pay child support for both children. He claimed that his child support obligation was based on full time employment with Domino's Pizza, which he lost due to car troubles. Hardwick also advised that his occasional marijuana use caused problems with finding new employment. The ILC eligibility report further indicates that Hardwick has no physical or mental disabilities that prevent him from working. At the time of the report, Hardwick was involved in an unpaid internship where he was being trained as a maintenance man.

{¶ 5} On June 13, 2014, a brief hearing was held concerning Hardwick's ILC eligibility. While the ILC eligibility report generally indicated that Hardwick was eligible for ILC, the trial court found that Hardwick was ineligible because placing him on ILC would demean the seriousness of his nonsupport offenses and would not prevent him from committing future violations. The court based its decision on the fact that Hardwick had previously been held in contempt twice and served a jail sentence for his failure to pay child support.

{¶ 6} On June 17, 2014, Hardwick pled no contest to one count of nonsupport pursuant to a plea agreement. As part of the agreement, the State dismissed the second nonsupport charge and Hardwick agreed that he owed a total of $2,401 in restitution.

During the plea hearing, the court advised Hardwick that he was subject to mandatory community control since he had no prior felonies. Following Hardwick's plea, the trial court sentenced him to community control sanctions not to exceed five years. One of the conditions of his community control was to pay $130 in court-appointed attorney fees.

{¶ 7} Hardwick now appeals from his conviction and sentence, raising three assignments of error for our review.

First Assignment of Error

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

STATE V. TAYLOR DOES NOT RENDER APPELLANT INELIGIBLE FOR I.L.C.

{¶ 9} Under his First Assignment of Error, Hardwick generally contends that we should revisit our decision in *State v. Taylor*, 2014-Ohio-2821, 15 N.E.3d 900 (2d Dist.). In *Taylor*, we discussed the problems with the current statutory scheme governing ILC eligibility and resolved them in part by reworking the language in R.C. 2929.13(B)(2). Hardwick contends that we should have instead reworked the language in R.C. 2951.041(B)(1) and claims that if we had done so in the manner he suggests, he would be statutorily eligible for ILC.

{¶ 10} "[I]n order for an offender to be statutorily eligible for ILC, the trial court must find that all ten of the criteria set forth in R.C. 2951.041(B) are met." *State v. Branch*, 2d Dist. Montgomery No. 25261, 2013-Ohio-2350, ¶ 15. *Taylor* involved the criteria enumerated under section (B)(1) of the statute, which states that an offender is ILC eligible if, among other things, the offender is "charged with a felony for which the court,

upon conviction, would impose a community control sanction on the offender under division (B)(2) of section 2929.13 of the Revised Code[.]" R.C. 2951.041(B)(1).

{¶ 11} In *Taylor*, we were presented with the question of whether Taylor had been sentenced to community control under division (B)(2) or (B)(1) of R.C. 2929.13, as his ILC eligibility depended on community control being imposed under (B)(2). *Taylor* at ¶ 8. In making this determination, we analyzed the language in R.C. 2929.13(B), which reads, in pertinent part, as follows:

> (B)(1)(a) Except as provided in division (B)(1)(b) of this section, if an offender is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence or that is a qualifying assault offense, the court shall sentence the offender to a community control sanction of at least one year's duration if all of the following apply:
>
> (i) The offender previously has not been convicted of or pleaded guilty to a felony offense.
>
> (ii) The most serious charge against the offender at the time of sentencing is a felony of the fourth or fifth degree.
>
> (iii) If the court made a request of the department of rehabilitation and correction pursuant to division (B)(1)(c) of this section, the department, within the forty-five-day period specified in that division, provided the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court.
>
> (iv) The offender previously has not been convicted of or pleaded guilty to a

misdemeanor offense of violence that the offender committed within two years prior to the offense for which sentence is being imposed.

(b) The court has discretion to impose a prison term upon an offender who is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence or that is a qualifying assault offense if any of the following apply:

[List of factors omitted.]

(2) If division (B)(1) of this section does not apply, * * * in determining whether to impose a prison term as a sanction for a felony of the fourth or fifth degree, the sentencing court shall comply with the purposes and principles of sentencing under section 2929.11 of the Revised Code and with section 2929.12 of the Revised Code.

R.C. 2929.13(B)(1)-(B)(2).

{¶ 12} After analyzing R.C. 2929.13(B) in *Taylor*, we found two problems with the statutory scheme and explained them as follows:

> First, as written, the ILC statute excludes from eligibility those offenders seemingly best suited for ILC—i.e., defendants who committed the least egregious offenses and, therefore, would receive mandatory community control under R.C. 2929.13(B)(1)(a). Because they would be sentenced to mandatory community control under division (B)(1)(a), they would not be sentenced to community control under division (B)(2), as required for ILC eligibility. Therefore, the current scheme curiously strips ILC eligibility from a group for whom it seems most beneficial.

> The second problem with the current scheme is that, as written, it provides a trial court with no guidance how to exercise its discretion on an offender under R.C. 2929.13(B)(1)(b). Because Taylor's offense involved possession of a firearm, he fit under R.C. 2929.13(B)(1)(b)(i). This means the trial court retained discretion to sentence him to prison or community control. But nothing in R.C. 2929.13(B)(1)(b) guides a trial court's exercise of that discretion. Such guidance is found in R.C. 2929.13(B)(2), which directs a trial court considering prison or community control for a fourth of fifth-degree felony to consider the purposes and principles of sentencing as well as the statutory seriousness and recidivism factors.
>
> On its face, however, R.C. 2929.13(B)(2) applies only if R.C. 2929.13(B)(1) does not. Here R.C. 2929.13(B)(1)(b)(i) applied to Taylor because of his firearm possession. Thus, a literal reading of R.C. 2929.13(B)(2) would leave the trial court in a dilemma. It would have discretion to impose community control or a prison term on Taylor because (B)(1)(b)(i) applied, but would have no guidance in the exercise of that discretion because (B)(2) only applies if (B)(1) does not.

Taylor, 2014-Ohio-2821, 15 N.E.3d 900 at ¶ 9-11.

{¶ 13} Having discussed the aforementioned issues with the ILC scheme, we concluded that "there is an obvious error of omission in R.C. 2929.13(B)(2)" and resolved the error by reworking that division of the statute in the following manner:

> Instead of saying "[i]f division (B)(1) of this section does not apply," a court considering community control or a prison term must consider the

purposes and principles of sentencing and the statutory seriousness and recidivism factors, we believe R.C. 2929.13(B)(2) necessarily was intended to begin, "If division (B)(1)(a) of this section does not apply, * * *[.]" Referring specifically to division (B)(1)(a), rather than to division (B)(1) as a whole, avoids some absurd results while making the statute coherent and internally consistent.

We reach this conclusion for at least two reasons. First, excluding division (B)(1)(a) from division (B)(2) makes perfect sense given the nature of the two provisions. Division (B)(1)(a) mandates community control for the least egregious F4 and F5 offenders. That being so, it would be impossible for a trial court to exercise "discretion" under division (B)(2), by considering the purposes and principles of sentencing and the seriousness and recidivism factors, to determine whether defendants falling under division (B)(1)(a) should receive community control. For those defendants, community control is automatic. A trial court has no discretion. Second, reading division (B)(2) as excluding only defendants subject to mandatory community control under division (B)(1)(a) resolves the dilemma a trial court faces with regard to a defendant like Taylor, who falls under R.C. 2929.13(B)(1)(b) by virtue of his firearm possession and, therefore, could be sentenced to community control or prison. If division (B)(2) applies where division (B)(1)(a) does not, then the trial court here could exercise its discretion under division (B)(2) to sentence Taylor to community control. This is so because, as explained above, Taylor did not fit within R.C.

2929.13(B)(1)(a).

> In short, the only reasonable interpretation of R.C. 2929.13(B)(2) is that the legislature intended (B)(2) to apply whenever R.C. 2929.13(B)(1)(a) [mandatory community control] did not. * * *

(Footnote omitted.) *Taylor*, 2014-Ohio-2821, 15 N.E.3d 900 at ¶ 12-14.

{¶ 14} We noted in *Taylor* that our analysis did "not resolve the problem that, on its face, the ILC statute, R.C. 2951.041(B)(1), precludes from eligibility the least egregious offenders who would receive mandatory community control under R.C. 2929.13(B)(1)(a) and, therefore, would not be sentenced under R.C. 2929.13(B)(2)." *Taylor* at fn. 4. However, because Taylor did not fit within the scope of R.C. 2929.13(B)(1)(a), we decided to "leave that problem for another day." *Id.*

{¶ 15} Hardwick contends the present case raises the problem that *Taylor* did not resolve since he meets all the requirements for mandatory community control under R.C. 2929.13(B)(1)(a). He claims that the problem could be resolved if we were to rework the language in R.C. 2951.041(B)(1). Specifically, Hardwick proposes that R.C. 2951.041(B)(1) should be read to state that an offender is ILC eligible if the offender is "charged with a felony for which the court, upon conviction, would impose a community control sanction on the offender *under division [(B)] of section 2929.13 of the Revised Code*" as opposed to "under division (B)(2)." Under Hardwick's suggested reading of R.C. 2951.041(B)(1), the least egregious offenders who are sentenced to mandatory community control under (B)(1)(a) would no longer be precluded from ILC eligibility.

{¶ 16} Hardwick claims that if his suggested reading of R.C. 2951.041(B)(1) is adopted and applied by this court, he would be statutorily eligible for ILC. However,

Hardwick fails to account for the fact that there are nine other factors that he must satisfy under R.C. 2951.041(B) in order to be eligible for ILC. One of those factors states that:

> The offender's drug usage, alcohol usage, mental illness, or intellectual disability, or the fact that the offender was a victim of a violation of section 2905.32 of the Revised Code, whichever is applicable, was a factor leading to the criminal offense with which the offender is charged, intervention in lieu of conviction would not demean the seriousness of the offense, and intervention would substantially reduce the likelihood of any future criminal activity.

R.C. 2951.041(B)(6).

{¶ 17} In this case, the trial court indicated on the record that Hardwick was not eligible for ILC given that ILC would demean the seriousness of Hardwick's offenses and would not reduce the likelihood of future violations. In making this determination, the court considered the fact that Hardwick was previously sentenced for failing to comply with his child support obligation and specifically stated that Hardwick "has been given numerous opportunities to comply with his child support order, has been found in contempt a number of times and has continued to fail to pay that support." Trans. (June 13, 2014), p. 2. As discussed more fully under Hardwick's Second Assignment of Error, we do not find error in the trial court's eligibility determination. Therefore, since Hardwick is ineligible for ILC for reasons other than failing to satisfy R.C. 2951.041(B)(1), we need not address his proposed reading of that statute, as it would not change the fact that he is ineligible under R.C. 2951.041(B)(6).

{¶ 18} Hardwick's First Assignment of Error is overruled.

Second Assignment of Error

{¶ 19} Hardwick's Second Assignment of Error is as follows:

THE TRIAL COURT ERRED BY FINDING APPELLANT INELIGIBLE FOR I.L.C.

{¶ 20} Under his Second Assignment of Error, Hardwick claims the trial court erred in finding him ineligible for ILC because, in doing so, the court imposed stricter eligibility criteria than required by R.C. 2951.041. Specifically, Hardwick contends it was improper for the trial court to base its eligibility determination on the fact that he had been previously held in contempt for failure to pay his child support obligations when that is not a factor set forth in the statute.

{¶ 21} In support of his argument, Hardwick cites *State v. Fullenkamp*, 2d Dist. Darke No. 2001 CA 1543, 2001 WL 1295372 (Oct. 26, 2001). In *Fullenkamp*, we concluded that the trial court had "impermissibly engrafted a more stringent predicate condition for eligibility," and that "the trial court acted arbitrarily and contrary to the legislative intent expressed in R.C. 2951.041(A)(1) when it denied ILC solely because Fullenkamp's alcohol problem was not serious enough." *Id*. at *2. R.C. 2951.041(A)(1) only requires drug or alcohol usage to be a factor leading to the offender's criminal behavior, and there was no doubt that it was a factor in Fullenkamp's case. *Id.*

{¶ 22} The present case is distinguishable from *Fullenkamp*. Unlike *Fullenkamp*, the trial court in this case did not deny ILC on grounds that appellant lacked a serious alcohol problem. Rather, the trial court determined that Hardwick was ineligible for ILC under R.C. 2951.041(B)(6) because it found ILC would demean the seriousness of his

nonsupport offenses and not prevent him from committing future violations. The trial court's determination was based on Hardwick's continued failure to pay child support after being held in contempt, failing to take advantage of an opportunity to purge his contempt by making arrearage payments, and serving a 60-day jail sentence. We fail to see how the trial court's decision engrafts a stricter requirement than set forth in R.C. 2951.041(B)(6), as that statute specifically requires the court to consider whether ILC would demean the seriousness of the offense and substantially reduce the likelihood of any future criminal activity. The trial court's considerations were directly in line with that criteria.

{¶ 23} " 'Eligibility determinations are matters of law subject to de novo review.' " *State v. Smith*, 2d Dist. Montgomery No. 24812, 2012-Ohio-3395, ¶ 7, quoting *State v. Baker*, 2d Dist. Montgomery No. 24510, 2012-Ohio-729, ¶ 8. Specifically, whether the trial court has improperly expanded or interpreted the statutory eligibility determinations is reviewed de novo. In contrast, the trial court must exercise its discretion based on the facts of each case when determining whether ILC would not demean the seriousness of the offense or substantially reduce the likelihood of any future criminal activity, as those determinations are more fact sensitive and subjective than the other qualifying factors. For example, in *State v. Bruner*, 2d Dist. Montgomery No. 26241, 2015-Ohio-893, we recently reversed a trial court's decision finding a defendant statutorily ineligible for ILC under a de novo standard of review for expanding the statutory exclusions. The trial court had determined that the accused was ineligible under the two criteria at issue here because he would be subject to sex offender reporting requirements, rather than focusing on the particular facts of that case. *Id*. at ¶ 15-17.

{¶ 24} In this case, the trial court denied ILC on grounds that it would demean the seriousness of Hardwick's offenses and would not reduce the likelihood of future violations. In reaching this conclusion, the trial court relied on Hardwick's previous failures to comply with his child support order. In January 2009, Hardwick was held in contempt for failing to pay child support and the trial court gave him a second chance to comply by suspending his sentence for contempt as long as he continued to make arrearage payments. However, in February 2010, Hardwick again failed to pay child support as ordered, and as a result he served 60 days in jail. Despite the second chance to make his payments and his subsequent incarceration, Hardwick still failed to make payments as ordered between September 2010 and August 2012, and now owes $2,401 in restitution for that offense.

{¶ 25} We note that the nonsupport offense at issue in this case is by comparison less serious than those we have previously reviewed in similar ILC-eligibility cases. *See State v. Brown*, 2d Dist. Montgomery No. 24813, 2012-Ohio-3177, ¶ 8 (finding no error in trial court's determination that ILC would demean the seriousness of nonsupport offense due to appellant owing $18,756 in child support); *State v. Smith*, 2d Dist. Montgomery No. 24812, 2012-Ohio-3395, ¶ 10 (finding no error in trial court's determination that ILC would demean the seriousness of appellant's nonsupport offense due to appellant owing $11,768.25 in child support). Nevertheless, given that Hardwick had been given multiple opportunities to comply with his child support order and had not responded favorably to prior sanctions imposed, we do not find that the trial court erred in finding Hardwick ineligible for ILC.

{¶ 26} Hardwick's Second Assignment of Error is overruled.

Third Assignment of Error

{¶ 27} Hardwick's Third Assignment of Error is as follows:

THE TRIAL COURT ERRED BY ORDERING APPELLANT TO PAY $130 FOR ATTORNEY FEES.

{¶ 28} Under his Third Assignment of Error, Hardwick contends that it was error for the trial court to order him to pay $130 in court-appointed attorney fees as a condition of community control. Specifically, he claims that R.C. 2941.51(D) requires the fees to be pursued through a separate civil action.

{¶ 29} R.C. 2941.51(D) allows "a county to seek reimbursement of court-appointed counsel fees if a defendant has the means to pay for some or all of the costs of services provided to him, but we have held that the right of action it confers 'must be prosecuted in a civil action.' " *State v. Breneman*, 2d Dist. Champaign No. 2013 CA 15, 2014-Ohio-1102, ¶ 5, quoting *State v. Miller*, 2d Dist. Clark No. 08CA0090, 2010-Ohio-4760, ¶ 61. (Other citations omitted.) Therefore, requiring a defendant to pay his court-appointed attorney fees as part of his sentence is not condoned under R.C. 2941.51. *State v. Crenshaw*, 145 Ohio App.3d 86, 90, 761 N.E.2d 1121 (8th Dist.2001). *Accord State v. Louden,* 2d Dist. Champaign No. 2013 CA 30, 2013 CA 31, 2014-Ohio-3059, ¶ 5, 28-29 (finding the trial court erred in ordering appellant to pay court-appointed attorney fees as part of his sentence after his community control sanctions were revoked, as attorney fees "must be pursued in a separate civil action").

{¶ 30} Nevertheless, pursuant to R.C. 2929.15(A)(1), the trial court has broad discretion to impose community control sanctions, as it may "impose residential,

nonresidential, and financial sanctions, *as well any other conditions the court deems appropriate*." (Emphasis added.) *State v. Rogers*, 2d Dist. Montgomery No. 24848, 2012-Ohio-4753, ¶ 21, citing *State v. Talty*, 103 Ohio St.3d 177, 2004-Ohio-4888, 814 N.E.2d 1201, ¶ 10. "[T]he tests for reasonableness of a [community control] sanction are those announced in [*State v. Jones*, 49 Ohio St.3d 51, 550 N.E.2d 469 (1990)] regarding reasonableness of a condition of probation." *State v. Lacey*, 2d Dist. Montgomery No. 23261, 2009-Ohio-6267, ¶ 12, citing *Talty*.

{¶ 31} The Supreme Court held in *Jones* that a trial court may impose conditions upon a defendant's probation that relate to the interests of doing justice, rehabilitating the offender, and insuring his good behavior. *Jones* at 52, citing former R.C. 2951.02(C). In making this determination, "courts should consider whether the condition (1) is reasonably related to rehabilitating the offender, (2) has some relationship to the crime of which the offender was convicted, and (3) relates to conduct which is criminal or reasonably related to future criminality and serves the statutory ends of probation." (Citations omitted.) *Id.* at 53.

{¶ 32} In following *Jones*, it has been held that "[a] convicted defendant's repayment of attorney fees for court-appointed counsel fits within this three-part test" and that a "trial court can impose and enforce repayment of attorney fees as a valid special condition of probation." *State v. McLean*, 87 Ohio App.3d 392, 396-397, 622 N.E.2d 402 (1st Dist.1993). *Accord State v. Barnes*, 9th Dist. Lorain No. 06CA009034, 2007-Ohio-2460, ¶ 8; *State v. Drew*, 8th Dist. Cuyahoga No. 83563, 2004-Ohio-3609, ¶ 9; *State v. Trembly*, 137 Ohio App.3d 134, 144, 738 N.E.2d 93 (8th Dist.2000).

{¶ 33} Given that Hardwick was ordered to pay court-appointed attorney fees as a

condition of community control, which is governed by R.C. 2929.15(A), and said condition meets the three-part test for reasonableness under *Jones*, it is unnecessary for the fees to be recouped through a separate civil action as provided under R.C. 2941.51(D). Rather, the attorney fees were properly ordered to be paid as a condition of community control under R.C. 2929.15(A).

{¶ 34} Hardwick's Third Assignment of Error is overruled.

Conclusion

{¶ 35} Having overruled all three assignments of error raised by Hardwick, the judgment of the trial court is affirmed.

. . . . . .

FROELICH, P.J., concurs.

DONOVAN, J., dissenting:

{¶ 36} I disagree.

{¶ 37} In my view, the trial court erred in denying an ideal candidate, Hardwick, ILC. In my view, the trial court created non-statutorily eligible criteria, which we have cautioned against in *Fullenkamp*. There is a distinction between an offender who is statutorily ineligible and one who is not a good candidate. In the first scenario, our standard of review is de novo. In the latter, our standard of review is abuse of discretion. The majority uses an abuse of discretion standard which is contrary to our most recent jurisprudence in *State v. Bruner*, 2d Dist. Montgomery No. 26241, 2015-Ohio-893. This

is so because the trial court twice, once at the status conference and again at plea, found Hardwick statutorily ineligible, referencing the language in R.C. 2951.04(B)(6).

{¶ 38} As this Court noted in *Bruner*:

> "In order for an offender to be statutorily eligible for ILC, the trial court must find that all ten of the criteria set forth in R.C. 2951.041(B) are met." *State v. Branch*, 2d Dist. Montgomery No. 25261, 2013-Ohio-2350, ¶ 15. One of those prerequisites is that "[t]he offender's drug usage, alcohol usage, mental illness, or intellectual disability, whichever is applicable, was a factor leading to the criminal offense with which the offender is charged, intervention in lieu of conviction would not demean the seriousness of the offense, and intervention would substantially reduce the likelihood of any future criminal activity." (Emphasis added.) R.C. 2951.041(B)(6).
>
> " 'Eligibility determinations are matters of law subject to de novo review.' " *Branch* at ¶ 15, quoting *State v. Baker*, 2d Dist. Montgomery No. 24510, 2012-Ohio-729, ¶ 8. Therefore, we conduct a de novo review of the trial court's finding that ILC would demean the seriousness of Bruner's offense. *Id.*

Bruner, ¶ 10.

{¶ 39} Furthermore, the trial court's rationale is not supported by the record, i.e., there are not "numerous" contempt findings.[1] At best, there appears to be an initial

[1]The sentence was suspended as long as he made payments toward his arrearages. On June 25, 2009, Mr. Hardwick's support was raised to $182.82 a month for each child, with an additional $22 a month payment toward arrearages. On February 2, 2010, Mr. Hardwick was found guilty for violating his previously suspended contempt and he was sentenced to 60 days in jail.

finding of contempt in Juvenile Court, subject to purging which did not result in total payment, but rather a second finding of contempt based upon failure to purge. Whether a single or two contempt findings, it is hardly "numerous." More importantly, to suggest such contempt finding(s) render Hardwick ineligible engrafts a more stringent rule upon eligibility than the legislature contemplated. Nothing in the ILC statute contemplates using Domestic Relations or Juvenile Court quasi-criminal contempt as a basis to exclude a defendant from the benefits of ILC. In practical effect, this would exclude virtually all defendants subject to non-support indictments, as contempt remedies in Domestic Relations and Juvenile Courts are commonly sought before a felony indictment. In fact, the ILC statute permits individuals with prior felonies which are not offenses of violence (and subject to community control sanctions) to be given ILC upon recommendation of the State under R.C. 2951.041(B)(1). Significantly, the State did not oppose ILC for Hardwick.

{¶ 40} The ILC report generated by the Adult Probation Dept. recommends ILC, noting Hardwick is 34, has no history of juvenile delinquency, no misdemeanor criminal offenses, and no felony record. His marijuana use has posed an impediment to stable employment and he desires drug treatment. Hardwick has no record of prior drug treatment which has proven unsuccessful. Furthermore, Hardwick had paid some $1,000.00 toward the indictment amount due of approximately $2,401.00, made his Crisis Care appointments and fully cooperated. This fact distinguishes Hardwick's case from *Brown*, wherein we held a large amount of restitution owed, $18,756.00, would justify the court's conclusion that ILC would demean the seriousness of the offense. We also noted *Brown* had an inability to pay. Unlike *Brown*, Hardwick demonstrated an ability to pay

with $1,000 in restitution already made, as well as a documented job history and an ongoing internship at the time of the ILC report. It was confirmed in the ILC report that he was being trained for a paid maintenance position by Chico Pye, the owner of Pye Property Management. It is self-evident that a felony conviction, in lieu of ILC, will create yet one more barrier to his employability and the State's goal of assuring Hardwick financially supports his three children. The approach adopted by the trial court not only conflated statutory eligibility with appropriate candidate consideration but is contrary to legislative intent, shortsighted and arbitrary. In enacting the statute, the legislature determined that when drug abuse was the cause or a precipitating factor in the commission of the crime, it would be "'beneficial to the individual and the community as a whole to treat the cause rather than punish the crime.'" *State v. Niesen-Pennycuff*, 132 Ohio St.3d 416, 2012-Ohio-2730, 973 N.E.2d 221, ¶ 7, quoting *State v. Massien*, 125 Ohio St.3d 204, 2010-Ohio-1864, 926 N.E.2d 1282, ¶ 10.

{¶ 41} Given the fact that R.C. 2951.041 is a remedial statute, it should be liberally construed to achieve its intended benefit. It is hard to fathom how the contempt order(s) somehow demean the seriousness of the non-support conviction for purposes of the grant of ILC yet the virtually identical community control sanctions Hardwick was given do not demean the seriousness and do not deter future criminality. The record establishes that the Adult Probation Department recommended ILC for Hardwick with conditions just as stringent. As was discussed in *Fullenkamp*, the trial court cannot create its own criteria for an individual even to be eligible for ILC. Likewise, if the court concluded Hardwick was a poor candidate, I would find this an abuse of discretion on this record.

{¶ 42} Furthermore, I would not construe *Taylor* to reach an absurd result such

that those least egregious offenses (offenders) and those subject to mandatory community control can be simply denied ILC by shifting focus to the language the trial court used at sentencing which referenced a combination of R.C. 2929.13(B)(1)(a) and R.C. 2929.13(B)(2).

{¶ 43} Finally, I would follow our jurisprudence set forth in *Louden* and *State v. Miller*, 2d Dist. Clark No. 08-CA-0090, 2010-Ohio-4760, and find the trial court erred in assessing the cost of appointed counsel. As we said in *Miller* at ¶ 59, quoting *State v. Hill*, 2d Dist. Clark No. 04-CA-0047, 2005-Ohio-3877, ¶ 4, " 'R.C. 2929.18 prescribes the financial sanctions a court may impose upon conviction for a felony. The cost of or fees paid to court-appointed counsel are not among them.' " Accordingly, I would reverse and remand for imposition of ILC with no assessment of court-appointed counsel fees.

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