

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
HANCOCK COUNTY**

STATE OF OHIO

CASE NUMBER 5-04-10

PLAINTIFF-APPELLEE

v.

OPINION

MICHAEL J. HEUSER

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: October 4, 2004.

ATTORNEYS:

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For Appellee.**

Shaw, P.J.

{¶1} Defendant-appellant, Michael J. Heuser, appeals the February 19, 2004 conviction and sentence of the Court of Common Pleas, Hancock County, Ohio. Heuser was found guilty of one count of vandalism in violation of R.C. 2909.05(B)(1)(b) and one count possession of criminal tools in violation of R.C. 2923.24(A), both fifth degree felonies. The trial court sentenced Heuser to concurrent eleven month prison terms.

{¶2} In the early morning hours of July 14, 2003 officers of the Findlay Police Department discovered “fresh damage” to pop machines at Rawson Park in Findlay, Ohio and observed a Ford Probe parked across the street pull out and drive away at a high rate of speed. Officers stopped the vehicle, which was driven by Emory Coombs, and contained one passenger, Michael Heuser. The officers observed bolt cutters and a black utility bar on the back seat of the vehicle in plain sight. They also detected a strong odor of marijuana emanating from the vehicle, and observed Coombs’ eyes to be “bloodshot and glassy.” Coombs denied having marijuana in the vehicle and consented to a police request to search the vehicle. They noted that Heuser was sweating profusely and was breathing heavily, and they detected alcohol on Heuser’s breath.

{¶3} When searching the vehicle, the officers discovered marijuana in the center console ashtray. They also discovered \$51.00 in one dollar bills in a large

wad stuffed between the left side of the passenger seat and the center console. They also found several unopened cans of beer on the floor of the passenger side.

{¶4} A search of the area surrounding the pop machines produced a large black bag. The bag contained a check stub with the name “Michael Heuser” on it and an Altoids container containing suspected marijuana and paraphernalia in it.

{¶5} Heuser was taken into custody, and charged with vandalism, a fifth degree felony, and possession of criminal tools, also a fifth degree felony. A jury trial was held on these charges, and the jury returned a verdict of guilty as to both counts on December 10, 2003. The trial court then sentenced Heuser to separate eleven month prison terms on each count, and ordered that they be served concurrently. The trial court also ordered Heuser to pay restitution to Coca Cola for \$2,552.16 for damage to the pop machines. Heuser now appeals, asserting three assignments of error.

First Assignment of Error

In an abuse of its discretion, in the presence of the jury, the trial court volitionally responded to the defense’s resting of its case by stating, “I guess that takes care, gentlemen, of the issue of any rebuttal testimony,” so pejoratively commenting, by direct inference, on the burden of proof and on the quantity and quality of the defense evidence, by its lack thereof, and on the Defendant’s invoking of the privilege against self-incrimination, thereby denying the defendant’s substantial rights to invoke the privilege against self-incrimination, and denying a fair and impartial jury trial, as fundamentally guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and by Section 10, Article I of the Constitution of

the State of Ohio, and so resulting in plain error under Rule 52(B) of the Ohio rules of Criminal Procedure.

{¶6} Under Evid.R. 611, the court has discretion to control the flow of the trial. Our review of a trial court's comments must determine whether the trial court abused that discretion. *State v. Davis* (1992), 79 Ohio App.3d 450, 607 N.E.2d 543; see also *State v. Prokos* (1993), 91 Ohio App.3d 39, 44, 631 N.E.2d 684. We must determine whether the trial court, through its statements at trial, conveyed its opinion regarding the quality of evidence. See *State ex rel. Wise v. Chand* (1970), 21 Ohio St.2d 113, 119-120, 256 N.E.2d 613.

{¶7} The Ohio Supreme Court has articulated a five part test to determine whether a trial judge's actions and remarks are so prejudicial as to violate a criminal defendant's constitutional rights:

(1) The burden of proof is placed upon the defendant to demonstrate prejudice, (2) it is presumed that the trial judge is in the best position to decide when a breach is committed and what corrective measures are called for, (3) the remarks are to be considered in light of the circumstances under which they are made, (4) consideration is to be given to their possible effect upon the jury, and (5) to their possible impairment of the effectiveness of counsel.

State v. Wade (1978), 53 Ohio St.2d 182, 188, 373 N.E.2d 1244; see also *State v. Hopfer* (1996), 112 Ohio App.3d 521, 537, 679 N.E.2d 321. Moreover, that Court made clear that "the failure to object . . . constitute[s] a waiver of the error . . . , for, absent an objection, the trial judge is denied an opportunity to give corrective

instructions as to the error.” Id., citing *State v. Williams* (1974), 39 Ohio St.2d 20, 313 N.E.2d 859, *State v. Childs* (1968), 14 Ohio St.2d 56, 236 N.E.2d 545; *Smith v. Flesher* (1967), 12 Ohio St.2d 107, 233 N.E.2d 137.

{¶8} In the instant case, Heuser failed to object to the statements made by the trial court, thereby waiving any claim of error. Heuser has failed to preserve this claim for appeal.

{¶9} However, even if Heuser had preserved this claim for appeal, the statement made by the trial court did not prejudice Heuser’s rights. At the close of the State’s case in chief, Heuser’s counsel notified the court, in the presence of the jury, that he did not wish to present any evidence or testimony on Heuser’s behalf. It was at this point, after defense counsel indicated he was not presenting evidence, that the trial court stated, “I guess that takes care, gentlemen, of the issue of any rebuttal testimony.” Under these circumstances, we think it clear that a reasonable juror would understand that the State could not present rebuttal testimony when there was no evidence to rebut. It does not imply, as Heuser argues, that rebuttal was not necessary, but rather that the ability to present rebuttal testimony was unavailable because Defendant had not presented any evidence.

{¶10} The court’s statement, under these circumstances, would have a minimal, if any, affect on the jury. It could not affect defense counsel’s

effectiveness, because Defendant had already rested his case. In sum, the statement in no way impaired Heuser's right to a fair and impartial trial or his privilege against self-incrimination. Accordingly, Heuser's first assignment of error is overruled.

Second Assignment of Error

As being contrary to law, the trial court violated Ohio Revised Code sentencing guidelines, specifically under R.C. 2953.08(A)(2) & (4), R.C. 2929.13(B), and R.C. 2929.14(B), when said trial court sentenced the defendant-appellant, with no prior felony convictions to this case, to prison terms of eleven months each on two counts of fifth degree felony property crimes, with no physical harm to any person.

{¶11} Through his second assignment of error, Heuser challenges the imposition of the two eleven month prison terms. Heuser asserts that the prison sentences imposed are contrary to law due to the fact that none of the factors outlined in R.C. 2929.13(B)(1) are applicable to this case.

{¶12} Sentencing of those convicted of fifth degree non-drug related felonies is governed by R.C. 2929.13(B). The court is required to impose a prison term if the trial court finds: (1) that any one of nine factors set forth in R.C. 2929.13(B)(1) apply; (2) that, upon consideration of the seriousness and recidivism factors set forth in R.C. 2929.12, a prison term is consistent with the purposes and principles of sentencing as set forth in R.C. 2929.11; and (3) that the

offender is not amenable to available community control sanctions. R.C. 2929.13(B)(2)(a).

{¶13} Conversely, Community control is mandatory if the trial court does not find the existence of any one of the factors set forth in R.C. 2929.13(B)(1), and finds, after considering the seriousness and recidivism factors set forth in R.C. 2929.12, that community control is consistent with the principles and purposes of sentencing set forth in R.C. 2929.11. R.C. 2929.13(B)(2)(b).

{¶14} When neither prison nor community control is specifically mandated, the trial court should comply with the purposes and principles of sentencing set forth in R.C. 2929.11 and should consider the seriousness and recidivism factors set forth in R.C. 2929.12 to determine whether to impose a term of imprisonment or community control sanctions. R.C. 2929.13(B)(2). However, whenever the trial court imposes a sentence of imprisonment for a fourth or fifth degree felony, it must make a finding on the record giving its reasons for selecting the sentence imposed. R.C. 2929.19(B)(2)(a); see also, *State v. Edmonson* (1999), 86 Ohio St.3d 324, 715 N.E.2d 131.

{¶15} In the case sub judice, the trial court did not find that any of the nine factors in R.C. 2929.13(B)(1) applied, and the presentence report specifically

indicates that none of these factors were applicable.¹ Therefore, the court was not required to impose a prison sentence.

{¶16} However, the judgment entry reflects that the trial court did balance the seriousness and recidivism factors outlined in R.C. 2929.12 prior to imposing a prison sentence. Specifically, the court found that the victim suffered serious economic harm, indicating that the conduct is more serious than conduct normally constituting the offense, R.C. 2929.12(B)(2), while none of the relevant factors indicating a less serious offense were applicable.

{¶17} Additionally, the court found that several factors existed which tend to show that Heuser is likely to commit future crimes. The court noted that Heuser has a criminal history. R.C. 2929.12(D)(2). The court also recognized that Heuser has a demonstrated pattern of drug and alcohol abuse that is related to the offense, that he refuses to acknowledge that he has demonstrated such a pattern, and that he has refused treatment. R.C. 2929.12(D)(4). Heuser also shows no genuine remorse for the offense. R.C. 2929.12(D)(5). These factors all indicate that Heuser has a high likelihood of recidivism.

¹ The record does indicate that Heuser has past criminal convictions in other states, but there is no indication whether or not he served prison terms for those convictions. If Heuser had previously served a prison time, R.C. 2929.13(B)(1)(g) would be applicable and the trial court would be required to impose a prison sentence. R.C. 2929.13(B)(2)(a).

{¶18} The record also reflects that the court considered the possibility of community control sanctions, and determined that Heuser was not amenable to those sanctions. At the sentencing hearing, the court stated:

The Court finds that the pre-sentence report in this case just plain flat reflects the fact that the Defendant is not amenable to community controlled sanctions. He doesn't want to give up the marijuana smoking. He don't [sic] know how to handle himself at the Justice Center. He was interviewed for the R.O.C. Program, and quite frankly, they will not accept him into that program. And based upon that, the Court finds that . . . the offender is not amenable to available community controlled sanctions.

Based on these findings, the court found that a prison term was consistent with the purposes of the Revised Code as outlined in R.C. 2929.11. The sentence imposed is consistent with these principles and the statutory requirements.

{¶19} We find that Heuser's sentence is not contrary to law. Appellant's second assignment of error is overruled.

Third Assignment of Error

As being contrary to law, the trial court violated Ohio Revised Code financial sanctions and restitution guidelines, specifically under R.C. 2953.08(A)(4) and R.C. 2929.18 and also violated the equal protection clause of the Fourteenth Amendment to the United States Constitution, when said trial court imposed the sentencing sanctions of restitution and court costs upon the defendant-appellant, whom the trial court had determined as being indigent.

{¶20} The trial court, in its judgment entry, ordered Heuser to pay "all costs of prosecution, restitution in the amount of Two Thousand Five Hundred

Fifty-two and 16/100 dollars (\$2,552.16) to Coca Cola, and any fees permitted pursuant to Revised Code, Section 2929.18(A)(4).” Heuser argues that the trial court did not consider his present or future ability to pay the financial sanctions, did not conduct a hearing pursuant to R.C. 2929.18(E) to determine his ability to pay, and previously found him to be indigent.

{¶21} R.C. 2929.18 authorizes a trial court to impose financial sanctions and restitution costs when sentencing a person convicted of a felony. R.C. 2929.18(E) permits a trial court to hold a hearing “if necessary” to determine the offender’s ability to pay, although the statute does not require that a hearing be held. *State v. Wells*, Seneca App. No. 13-02-17, 2002-Ohio-5318, at ¶7. However, before imposing sanctions, R.C. 2929.19(B)(6) requires the court to consider “the offender’s present and future ability to pay the amount of the sanction or fine.” Nonetheless, there are no express factors that must be considered or specific findings that must be made by the trial court. *Id.*, citing *State v. Southerland* (Apr. 22, 2002), 12th Dist. No. CA2001-06-153, 2002 WL 649372, at *7. The statute only requires the trial court to *consider* his present and future ability to pay. *State v. Martin* (2000), 140 Ohio App.3d 326, 338. Moreover, a previous determination of indigency for purposes of receiving appointed counsel does not preclude imposing financial sanctions pursuant to R.C. 2929.18. *State v. Johnson* (1995), 107 Ohio App.3d 723, 728.

{¶22} The record in this case clearly demonstrates that the trial court considered Heuser’s present and future ability to pay restitution and court costs. The trial court noted that it was “[a]ware of the financial situation, the employment history, [and the] current circumstances.” The court also considered the presentence report, which included information pertaining to his recent employment history and his financial situation. The court also considered defense counsel’s statements at the sentencing hearing, in which counsel referred to Heuser’s work history and stated that “[h]e’s willing to seek employment, and that he has a potential prospect with Pioneer Packing. He’s willing to make restitution.”

{¶23} As previously noted, R.C. 2929.18(E) does not require the trial court to conduct a hearing, and therefore its failure to do so is not error. The record reflects that the trial court fulfilled the requirements of R.C. 2929.19(B)(6) and considered Heuser’s ability to pay financial sanctions. Heuser’s third assignment of error is overruled.

{¶24} Based on the foregoing, the judgment and sentence of the trial court is affirmed.

Judgment Affirmed.

CUPP and BRYANT, JJ., concur.
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