[Cite as *State v. West*, 2015-Ohio-2139.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 14CA7
vs.	:	
TABITHA WEST,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: Susan Zurface Daniels, Peterson Law Offices, 116 North Walnut Street, Wilmington, Ohio 45117

COUNSEL FOR APPELLEE: Anneka P. Collins, Highland County Prosecuting Attorney, and Ross Greer, Highland County Assistant Prosecuting Attorney, 112 Governor Foraker Place, Hillsboro, Ohio 45133

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:5-6-15
ABELE, J.

{¶ 1} This is an appeal from a Highland County Common Pleas Court judgment that extended the community control sanction that the court had previously imposed on Tabitha West, defendant below and appellant herein. Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN REVOKING DEFENDANT'S PROBATION SOLELY ON THE GROUNDS OF FAILING TO PAY RESTITUTION WHEN THERE WAS NO EVIDENCE THAT THE FAILURE TO PAY WAS WILLFUL OR

INTENTIONAL AND WHEN THERE WAS NO EVIDENCE THAT SHE HAD THE ABILITY TO PAY."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN IMPOSING A SANCTION ORDERING DEFENDANT TO PAY $125.00 PER MONTH TOWARD HER RESTITUTION WHEN THERE WAS EVIDENCE THAT SHE WAS UNABLE TO MAKE ANY FURTHER RESTITUTION PAYMENTS AND WITHOUT INQUIRY AS TO HER FUTURE ABILITY TO MAKE SAID PAYMENTS AS REQUIRED BY REVISED CODE 2929.19(B)(5)."

{¶ 2} On November 2, 2010, the Highland County Grand Jury returned an indictment that charged appellant with (1) breaking and entering in violation of R.C. 2911.13(B), and (2) theft in violation of R.C. 2913.02(A)(1). Appellant later pled guilty to these charges. On April 1, 2011, the trial court sentenced appellant, inter alia, to serve three years of community control and to pay $4,100 in restitution jointly and severally with her "co-defendants.[1] No appeal was taken from that judgment.

{¶ 3} It appears that appellant made restitution payments through January 2013, but then stopped. At the March 14, 2014 hearing, defense counsel expressed appellant's position that "she believed she had paid her portion, and did not intend to pay any more" restitution. The court reminded appellant and counsel that restitution was owed jointly and severally between appellant and her "co-defendants." Consequently, the court (1) ordered appellant to pay $125 per month on the restitution order, (2) to help her meet her obligation, deleted the $50 per month

[1] There are no transcripts from these initial proceedings, thus we have no information as to (1) the identities of these "co-defendants" or (2) the underlying facts and circumstances that surround these charges for which appellant was found guilty and sentenced.

"supervision fee" that had been previously imposed, (3) reminded appellant that she could sue her "co-defendants" for their share of restitution, and (4) extended appellant's community control to five years rather than the previous three. This appeal followed.

I

{¶ 4} For ease of discussion, we jointly consider both assignments of error. At the outset, we point out that this is not an appeal of an original sentence, but rather an appeal of a judgment that found that appellant violated community control and extended that community control sanction. To the extent that our typical standard of review would apply to the sentence before us, this court has held that we will not alter a challenged sentence unless (1) the record does not support the trial court's findings under the specified statutory provisions, or (2) the sentence is otherwise contrary to law. See *State v. Brewer*, 4th Dist. Meigs No. 14CA1, 2014–Ohio–1903, 11 N.E.3d 317, at ¶ 37; *State v. Philpot*, 4th Dist. Washington No. 14CA6. 2014-Ohio-5839, at ¶7; *State v. Marcum*, 4th Dist. Gallia No. 13CA11, 2014–Ohio–4048, at ¶ 22. Moreover, in any appeal, including this appeal, the appellant bears the burden to demonstrate error on the part of the trial court. See *State v. Johnson*, 4th Dist. Adams No. 13CA988, 2014-Ohio-3027, at ¶9; *State v. Tauch*, 10th Dist. Franklin No. 13AP–327, 2013-Ohio-5796, at ¶12; *State v. Pettygrove*, 4th Dist. Adams No. 12CA941, 2013-Ohio-1062, at ¶7.

{¶ 5} In the case sub judice, appellant's brief appears to argue both of the aforementioned reasons for reversing the trial court's judgment. In other words, appellant asserts that (1) the record does not support the trial court's judgment, and (2) the 2014 sentencing entry is contrary to law. For the following reasons, we disagree with appellant on both points.

II

{¶ 6} Appellant first argues that the trial court incorrectly revoked her probation. However, we believe that the record instead shows that the court extended appellant's community control term from three to five years. Appellant does not specifically challenge this ruling as error, and we do not consider it.

{¶ 7} The second issue that appellant argues is that the trial court failed to consider her ability to pay the ordered restitution. Indeed, appellant devoted the bulk of her second assignment of error to the argument that the court did not consider whether appellant had the "future ability to pay the amount" as R.C. 2929.19(B)(5) requires. The flaw in this argument is that the court's restitution order (imposed jointly and severally with the other "co-defendants" in this case) was part of the court's 2011 sentencing entry. No appeal was taken from that judgment. Thus, even if we assume, arguendo, that the trial court failed to consider the mandated criteria in R.C. 2929.19(B)(5), the alleged failure should have been challenged in an appeal from that judgment. It was not. Consequently, the doctrine of res judicata now bars this matter from consideration at this date. See, generally, *State v. Johnson*, 2nd Dist. Montgomery No. 26323, 2015-Ohio-347, at ¶9; *State v. Kelly*, 4th Dist. Scioto No. 14CA3637, 2014-Ohio-5840, at ¶17; *State v. Harper*, 4th Dist. Lawrence No. 14CA18, 2014-Ohio-5849, at ¶11.

{¶ 8} We further point out that the same principle applies to that part of the order that designated appellant liable for all restitution, jointly and severally, with her co-defendants. Appellant's argument at the March 14, 2014 hearing appears to assert that appellant has paid her one-third share of the restitution and that she should not be liable for the obligations of her

"co-defendants" who paid less than her. However, the trial court's April 2011 sentencing entry makes clear that she and her "co-defendants" are jointly liable for that amount. Obviously, appellant could have appealed that judgment at that time. Appellant, however, did not appeal that judgment and any challenge to that ruling is, again, barred by the doctrine of res judicata.

{¶ 9} Appellant further argues the trial court erred by ordering her to pay $125 per month "when there was evidence that she was unable to make any further restitution payments . . ." However, the only evidence introduced during the 2014 hearing was from Barbara Shoemaker, an employee of the Highland County Prosecutor's Office Victim Witness Program, who testified on behalf of the State as to payments that appellant previously made. Appellant, however, offered no evidence of her own. Although arguments of counsel are not evidence, the only explanation offered as to why appellant refused to pay restitution is that she believed that she has paid her fair share, as opposed to her "co-defendants" who had not. Although we understand her argument, we remind appellant that (1) the trial court ordered restitution to be paid jointly and severally with her "co-defendants," (2) as the court aptly noted, she has a right to bring an action against those co-defendants, and (3) the court ordered her $50 "monthly supervision fee" terminated so that she could apply that money toward restitution. In other words, Highland County has helped appellant with forty percent (40%) of her future restitution payments. Still, appellant maintains that she has been treated unfairly. We are not persuaded.

{¶ 10} These factors notwithstanding, appellant has not convinced us that her sentence is either unsupported by the record or is contrary to law. Appellant has also failed to persuade us of any other error in the trial court's 2014 judgment.

{¶ 11} For all these reasons, we hereby overrule appellant's two assignments of error and

affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed. Appellee to recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Highland County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. & McFarland, A.J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.