[Cite as *In re A.D.S.*, 2015-Ohio-3602.]

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

	:	
IN THE MATTER OF A.D.S.,	:	Case No. 14CA34
	:	
Adjudicated Delinquent Child.	:	DECISION AND JUDGMENT ENTRY
	:	

APPEARANCES:

Timothy Young, Ohio Public Defender, and Sheryl Trzaska, Assistant State Public Defender, Columbus, Ohio, for appellant.[1]

James E. Schneider, Washington County Prosecuting Attorney, and Amy Graham, Washington County Assistant Prosecuting Attorney, Marietta, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT, JUVENILE DIVISION
DATE JOURNALIZED: 8-26-15
ABELE, J.

{¶ 1} This is an appeal from a Washington County Common Pleas Court, Juvenile Division, judgment. A.D.S., a juvenile, admitted to a probation violation and now assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE JUVENILE COURT COMMITTED PLAIN ERROR WHEN IT ORDERED A.D.S. TO PAY RESTITUTION FOR UNREIMBURSED DEPRECIATION, BECAUSE

[1] Different counsel represented A.D.S. during the trial court proceedings.

DEPRECIATION IS NOT AN ECONOMIC LOSS SUFFERED BY THE VICTIM AS A RESULT OF THE OFFENSE."

SECOND ASSIGNMENT OF ERROR:

"THE JUVENILE COURT ABUSED ITS DISCRETION WHEN IT ORDERED A.D.S. TO PAY $6,267.84 IN RESTITUTION WITHIN ONE YEAR, WHEN THE COURT COMMITTED A.D.S TO THE DEPARTMENT OF YOUTH SERVICES FOR A MINIMUM PERIOD OF ONE YEAR."

THIRD ASSIGNMENT OF ERROR:

"THE JUVENILE COURT ERRED WHEN IT FAILED TO CONSIDER COMMUNITY SERVICE IN LIEU OF FINANCIAL SANCTIONS BEFORE ORDERING A.D.S. TO PAY RESTITUTION, IN VIOLATION OF R.C. 2152.20(D)."

FOURTH ASSIGNMENT OF ERROR:

"A.D.S. WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION; ARTICLE I, SECTIONS 10 AND 16, OHIO CONSTITUTION."

{¶ 2} A June 10, 2014 complaint charged A.D.S. with various offenses, including: (1) burglary in violation of R.C. 2911.12(A)(3)&(D), (2) tampering with evidence in violation of R.C. 2921.12(A)(1)&(B), and (3) theft from an elderly person in violation of R.C. 2913.02(A)(1)&(B)(1)(3). A.D.S. originally denied the allegations, but later agreed to admit to the burglary charge in exchange for the dismissal of the other charges. This agreement also included a provision for A.D.S. to pay restitution to his elderly victim.

{¶ 3} At the August 20, 2014 hearing, after the trial court endeavored to ascertain whether A.D.S. understood his rights and that his admission was voluntary, the court accepted his admission. The judgment entry provides: (1) that A.D.S. is guilty of burglary and ordered him committed to the custody of the Ohio Department of Youth Services (ODYS), with the

commitment suspended while the juvenile is committed to the care of the Washington County Juvenile Center, and (2) that A.D.S. must pay $6,267.84 in restitution to Andrew Pittner, his victim, jointly and severally with the other individuals who burglarized his home, within twelve months. The court dismissed the remaining charged offenses and no appeal was taken from that judgment.

{¶ 4} Our review of the record also indicates that A.D.S. was processed at a juvenile center at 10 AM on August 21, 2010. The next morning, at 6:45 AM, he asked to make "a phone call to his attorney." The request was granted, but at some point A.D.S. escaped from the facility. He later surrendered to the authorities.

{¶ 5} At the September 24, 2014 hearing, A.D.S. admitted to both escape and to a violation of the previous terms of his probation. However, before he admitted to the new violations, the trial court informed A.D.S. that it could reimpose the restitution order that is part of the August 21st judgment. A.D.S. then admitted to a probation violation and the court committed him to ODYS custody and re-imposed the restitution order. This appeal followed.

I

{¶ 6} Before we address the assignments of error on their merits, we first consider a threshold jurisdictional argument that the State raises in its brief. All the errors that A.D.S. assigns in the case at bar involve the restitution order to the elderly victim. The State argues that A.D.S. is actually challenging the August 21st judgment that originally imposed the restitution order, rather than the September 24th judgment that A.D.S. cites in his notice of appeal. A.D.S. did not, in fact, file a notice of appeal from the August 21st judgment. Pursuant to App.R. 4(A), the State argues that this Court has no jurisdiction to now consider those issues. A.D.S. counters

in his reply brief that because the trial court re-imposed the restitution order in its September 24th judgment, this is the order being appealed rather than original August 21st judgment that originally imposed restitution. Thus, A.D.S. concludes, this appeal satisfies the App.R. 4(A) time constraints.

{¶ 7} App.R. 4(A) requires that a notice of appeal be filed within thirty days of the final judgment. This rule, as the State correctly points out, is jurisdictional. See *State v. Blankenship*, 4th Dist. Ross No. 13CA3364, 2013-Ohio- 5261, at ¶4. The State contends that the arguments that A.D.S. now raises are all directed to the August 21, 2014 judgment and can no longer be appealed under App.R. 4(A). Thus, the State concludes, A.D.S. is attempting to circumvent the Ohio Rules of Appellate Procedure.

{¶ 8} The counter-argument that A.D.S. advances is that the trial court re-entered the language that originally appeared in its August 21st judgment in its September 24th judgment. Thus, this is an entirely new ruling and can now be challenged in the appeal of the latter entry.

{¶ 9} The first issue before us is how to treat a portion of a sentence from a previous final judgment that is past the App.R. 4(A) notice of appeal deadline, when the court re-imposed that portion of the sentence in a subsequent judgment. The State cites *State v. Mason*, 10th Dist. Franklin No. 01AP-847, 2002-Ohio-2803, for the proposition that we have no jurisdiction to consider this appeal. However, *Mason* did not involve the re-imposition of a previous sentence, as is present in the case sub judice. It is true, as our Ninth District colleagues noted, "[t]he proper remedy for alleged errors or irregularities in sentencing, as well as in trial proceedings, is by appeal. To allow defendant to challenge the validity of the conditions of his probation now would, in effect, permit a circumvention of appellate rules requiring that an appeal be taken within thirty

days." *State v. Lepley*, 24 Ohio App.3d 237, 238, 495 N.E.2d 40 (9th Dist. 1985). (Citations omitted.) However, it is equally true, as A.D.S. points out in this case, that the court re-imposed that portion of his original sentence that he challenges in this appeal.

{¶ 10} Other Ohio courts have considered this issue. In *State v. Smith*, 3rd Dist. Auglaize No. 2-10-28, 2011-Ohio-410, the Third District indicated that the appropriate time to take issue with a sentence is "the point at which the trial court actually issued the prison sentence not when it reimposed that sentence." Id. at ¶8. The Court went on to suggest that the appellant's failure to do so violates App.R. 4(A). Id. at ¶10.[2]

{¶ 11} In *State v. Miller*, 5th Dist. Stark No. 2006CA284, 2007-Ohio- 2548, the Stark County Court of Appeals held that an appellant could not challenge the reimposition of a sentence in a nunc pro tunc entry when there is no indication of any clerical error. Id. at ¶¶9-10. Thus, the Court dismissed the case for lack of jurisdiction. Id. at ¶11.[3]

{¶ 12} Thus, it certainly appears that support exists for the State's position that we should dismiss this appeal for lack of jurisdiction. However, given the particular facts and circumstances of this case, another approach exists. In *State v. Byrd*, 3rd Dist. Defiance Nos. 4-05-17 & 4-05-18, 2005-Ohio-5613, our Third District colleagues were confronted, once again,

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[2] The holding in Smith is somewhat problematic. If the Court believed that it had no jurisdiction to consider the sole assignment of error, then the proper disposition would be to dismiss the appeal. Instead, the Court affirmed the judgment. 2011-Ohio-410 at ¶10. Affirmance is an action a Court takes if it has jurisdiction to consider the appeal.

[3] In *State v. Davis*, 8th Dist. Cuyahoga No. 88189, 2007- Ohio-1305, the Cuyahoga County Court of Appeals held that alleged errors in sentencing must be challenged at the time they are imposed, rather than when the sentence is re-imposed after violation of community control. ¶¶3, 8-9. That decision was on appeal of a denial of postconviction relief pursuant to R.C. 2953.21.

with an appeal of a re-imposed sentence. Although the Court held that the appellant had not appealed the terms of the original sentence within the App.R. 4(A) time requirements, rather than dismiss the appeal for lack of jurisdiction it held that the appellant was barred from challenging the reimposed sentence under the doctrine of res judicata. Id. at ¶¶10-11 & 14. In this context, res judicata bars the raising any issue in a subsequent appeal that could have been, or should have been, raised in a first appeal of right. See generally *State v. Myers*, 4th Dist. Hocking No. 14CA21, 2015-Ohio-2143, at ¶10; *State v. Owens*, 4th Dist. Scioto No. 14CA3641, 2015-Ohio-1509, at ¶15; *State v. Harper*, 4th Dist. Lawrence No. 14CA18, 2014-Ohio-5849, at ¶11.

{¶ 13} We emphasize that nothing in this opinion should be construed as a rejection of the State's argument that courts lack jurisdiction to consider appeals of sentences re-imposed from earlier, unappealed judgments. Rather, we simply hold that under the facts and circumstances of this case, and when we examine the errors that A.D.S. assigns, we prefer to apply the doctrine of res judicata.

II

{¶ 14} We jointly consider appellant's first, second and fourth assignments of error because they can be resolved on the same principle. A.D.S. argues that the trial court erred by originally calculating the amount of restitution to be paid[4] and by not considering the imposition of community service on him in lieu of restitution. A.D.S. also argues that trial counsel was

[4] The basis for this argument is that restitution is based on the Victim Impact Statement that explained the amount for which the victim's insurance's company would not reimburse him for damages. That amount purportedly included "depreciation." A.D.S. argues that this is not a proper category to include in restitution. Although the Victim Impact Statement was not made a part of the record on appeal, its absence has no bearing on our decision.

ineffective for not challenging the calculation of restitution.[5]

{¶ 15} First, we point out that the August 20, 2014 change of plea hearing transcript shows that the agreement between A.D.S. and the State explicitly included the requirement that the juvenile make restitution to the victim. Negotiated pleas are not generally subject to an appeal. See *State v. Powell*, 4th Dist. Lawrence No. 14CA5, 2014-Ohio-4834, at ¶10; *State v. Stump*, 4th Dist. Athens No. 13CA10, 2014–Ohio– 1487, at ¶6. Second, the record suggests that A.D.S. agreed to the restitution in exchange for the State dismissing two of the three charges against him. To the extent that any error occurred in that negotiation, the "invited error doctrine" prohibits A.D.S. from now raising that error on appeal. See *State v. Canterbury*, 4th Dist. Athens No. 13CA34, 2015-Ohio-1926, at ¶40; *State v. Hardie*, 4th Dist. Washington No. 14CA24, 2015-Ohio-1611, at ¶¶11-12. Third, these arguments could have been, and should have been, raised in an appeal from the trial court's August 21, 2014 judgment. They were not. Therefore, the doctrine of res judicata bars this argument from being raised at this time.

{¶ 16} Accordingly, we hereby overrule appellant's first, second and fourth assignment of errors.

III

{¶ 17} In his third assignment of error, A.D.S. argues that the trial court erred by re-imposing the August 21, 2014 order of restitution, particularly insofar as it ordered him to make restitution within one year (when he is still under ODYS custody). We reject this assignment of error for the same reasons we rejected the other three, but discuss it separately to

[5] The underlying premise for this assignment of error is the same as underlies the first assignment of error discussed supra in footnote 1.

insert a special caveat.

{¶ 18} If a defendant fails to comply with the terms of community control, including the payment of restitution, Ohio law allows a trial court to impose sanctions. See R.C. 2929.15(B)(1). However, those sanctions are independently appealable and reviewed for an abuse of discretion. See e.g. *State v. Rudin*, 1st Dist. Hamilton No. C–110747, 2012-Ohio-2643, at ¶¶1 & 8; *State v. Williams*, 5th Dist. Stark Nos. 2006CA351 & 2006CA352, 2007-Ohio- 6799, at ¶10. Generally, an abuse of discretion implies that a trial court's attitude is unreasonable, arbitrary or unconscionable. *State v. Clark*, 71 Ohio St.3d 466, 470, 644 N.E.2d 331 (1994); *State v. Moreland*, 50 Ohio St.3d 58, 61, 552 N.E.2d 894 (1990).

{¶ 19} We cite these principles for two reasons. First, the record in the case sub judice shows that A.D.S. perpetrated his original offenses with several other individuals. The trial court ordered A.D.S. to pay restitution jointly and severally with those other individuals and, presumably, ordered them to do the same. The objective of restitution is to make the victim whole, and if the other miscreants involved in this case do so without the participation of appellant, than A.D.S. suffers no prejudice. Thus, it is premature at this juncture to rule on this portion of the sentence that the trial court imposed on A.D.S. If, however, the victim has not been made whole at the end of the one year period, the court could: (1) do nothing and allow A.D.S. additional time to reimburse his victim, or (2) impose an additional sanction under Ohio law. That subsequent sanction, if any, would be reviewable at that time under the abuse of discretion standard.

{¶ 20} While our opinion is not intended to suggest that any future sanction should be deemed an abuse of discretion, we simply acknowledge that valid arguments could exist,

depending upon the peculiar facts and circumstances at that time. Thus, we leave that question for another day when it is more ripe for review.

{¶ 21} For these reasons, we find no merit to any of the errors that A.D.S. assigns in his brief and we hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered the judgment be affirmed and appellant to recover of appellee 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 Washington County Common Pleas Court, Juvenile Division, 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.

Hoover, P.J.: Concurs in Judgment & Opinion
McFarland, A.J.: Dissents

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.