[Cite as *State v. Walker*, 2016-Ohio-8615.]

walkerCOURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. W. Scott Gwin, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09CA88
	:	
GARY D. WALKER	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas, Case No. 2009 CR 0052 D
JUDGMENT:	AFFIRMED IN PART, VACATED IN PART, AND REMANDED
DATE OF JUDGMENT ENTRY:	December 16, 2016

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
BAMBI COUCH PAGE RICHLAND CO. PROSECUTOR DANIEL M. ROGERS 38 S. Park St. Mansfield, OH 44902	PAUL MANCINO, JR. 75 Public Square, Ste. 1016 Cleveland, OH 44113-2098

Delaney, J.

{¶1} Appellant Gary D. Walker appeals from the June 2, 2009 Sentencing Entry of the Richland County Court of Common Pleas. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} This case arose from a scheme in which appellant directed others to cash forged federal stimulus checks at Wal-Marts throughout Ohio. The case has a lengthy factual and procedural history; the following is relevant to appellant's assignments of error.

{¶3} On January 9, 2009, appellant was charged by indictment with one count of engaging in a pattern of corrupt activity pursuant to R.C. 2923.32(A)(1), a felony of the second degree [Count 1]; 46 counts of forgery pursuant to R.C. 2913.31(A)(2) and 2913.31(A)(3), all felonies of the fifth degree [Counts 2 through 47];[1] and one count of grand theft pursuant to R.C. 2913.02(A)(3), a felony of the fourth degree [Count 48].

{¶4} Each incident of forgery was charged as two counts: the even-numbered counts, beginning with Count 2, are charged pursuant to R.C. 2913.31(A)(2) [forging]. The odd-numbered counts, beginning with Count 3, are charged pursuant to R.C. 2913.31(A)(3) [uttering]. Count 47 stands alone because appellant did not utter, i.e. cash that check.

{¶5} The indictment as amended states the following:

> [Appellant], on or about a period from June 12, 2008, through November 30, 2008, in a continuing course of conduct in Richland, Ashland, Summit, Stark, Cuyahoga, Holmes, Tuscarawas, and

[1] Appellee later dismissed Count 44, forgery, prior to trial.

Wayne Counties, [appellant] did, while employed by or associated with an enterprise, to wit: [appellant] and/or Starisia Moore, and/or other identified and unidentified individuals did conduct or participate in, either directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity. [Appellant] engaged in, conspired to engage in, attempted to engage in or coerced another to engage in violations of the law including but not limited to forgery and theft as set out in the subsequent counts and incorporated as if fully restated herein. This enterprise functioned to create forged Federal Government stimulus checks using an account number assigned to actual stimulus checks. Individuals with identification and the ability to cash the checks were recruited, made payees of the forged checks, and driven to Wal-Mart stores in the aforementioned counties in order to cash the forged checks. Payees were compensated with a small portion of the proceeds of the check upon cashing it, with the remainder of the proceeds going to [appellant] and/or Starisia Moore. The aggregate value of these thefts is $32,538. As a result of the actions of the enterprise, [appellant] was convicted of three counts of Complicity to Commit Forgery, in Ashland County, Ohio Common Pleas case number 08-CRI-108 on October 6, 2008.

* * * *.

{¶6} In pretrial discovery, appellee disclosed appellant's prior adult criminal record including: 1) three counts of complicity to forgery in Ashland County Court of Common Pleas case no. 08-CRI-108, to which appellant was sentenced to a term of 10 months on each count to be served concurrently, and an additional one-year term for violations of post-release control, to be served consecutively; and 2) Cuyahoga County Court of Common Pleas case nos. 08-CR-512655 and 08-CR-507670-A. Appellee also disclosed appellant's record of prior convictions including "* * *3/30/04 Cuyahoga CPC, convicted of Trafficking in Drugs, Possession of Drugs, and Unauthorized Use of Motor Vehicle, 2 years; 4/24/06 CC CPC, convicted of Failure to Comply with Signal of Police Officer and Trafficking in Drugs, 1 year; 10/23/06 CC CPC, convicted of Resisting Arrest, 1 year; 5/08 or thereafter, Felony Theft, Cuyahoga County CPC #08-CR-512655 & #08-CR-507670-A, 12 months additional to Ashland County sentences." (Appellee's "Continance to Answer to Discovery," *sic*, May 22, 2009.)

{¶7} On June 2, 2009, in the midst of a jury trial,[2] appellant withdrew his pleas of not guilty and entered counseled guilty pleas to the remaining 47 counts in the indictment. The trial court proceeded to immediate sentencing.[3] The parties agreed the 45 counts of forgery were allied offenses of similar import and the trial court could only impose sentence upon one count of each pair of forgery charges. At the plea hearing, appellant was given an "Admission of Guilt/Judgment Entry" describing his pleas, the associated penalties, and the rights he waived upon entering the pleas.

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[2] The appellate record contains transcripts of the change-of-plea and sentencing hearing on June 2, 2009, and a re-sentencing hearing on December 30, 2009.

[3] The record does not contain any mention of a pre-sentence investigation and appellee suggests no P.S.I. was initiated. (Appellee Brief, 4).

{¶8} Appellant was sentenced to a prison term of 7 years upon Count 1, engaging in a pattern of corrupt activity, and a term of 12 months upon Count 48, grand theft. During the sentencing hearing, the trial court also stated:

> THE COURT: * * * *.
>
> You have an engaging in a pattern of corrupt activity. For that particular charge, I sentence you to seven years in prison. That really is sort of the framework in which all this stuff takes place, this enterprise you had of cashing forged checks.
>
> On the theft counts, I'm sentencing you to a year for the theft counts, twelve months, in other words. For each of the forgeries I'm sentencing you to twelve months in prison.
>
> I am making Counts 1, 48, 2, 4, 6 and 8 consecutive, the rest are concurrent. That means your total sentence is twelve years prison. That will be consecutive to your other sentence.
>
> * * * *.

{¶9} Appellant was also ordered to make restitution to Wal-Mart in the amount of $32,538. The trial court ordered forfeiture of three vehicles pursuant to specifications in the indictment.

{¶10} The sentencing entry states as follows: * * *. "Count 2, 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 26, 28, 30, 32, 34, 36, 38, 40, 42, 45 & 47: 12 mos. each count." * * *, and further: "If there is more than one count, or if there are other cases, the sentences will be served consecutively on counts 1, 2, 4, 6, 8, and 12 and on sentences from other courts; concurrently on other counts. The total sentence in this case is 12 years prison."

{¶11} On July 1, 2009, appellant filed a notice of direct appeal. On September 4, 2009, appellant filed a motion to dismiss the appeal, which we granted on September 24, 2009.

{¶12} On September 28, 2009, appellant filed a "Motion for Sentencing" arguing the trial court did not properly notify him of the consequences of a violation of post-release control; appellee agreed that the matter should be remanded for the limited purpose of resentencing pursuant to R.C. 2929.19(B)(3)(e). The record contains a transcript of the resentencing hearing held on December 30, 2009. On July 28, 2010, the trial court filed a "Judgment Entry on Defendant's Motions" and "Findings and Journal Entry" stating that although appellant was not personally advised in open court of the consequences of a post-release control violation at the original sentencing, he received written notification in the sentencing entry and the court corrected any error when it properly advised appellant during a video conference pursuant to R.C. 2929.191(C).

{¶13} Appellant filed a number of motions to reactivate or reopen his appeal, all of which were denied.

{¶14} On March 15, 2016, the U.S. District Court for the Southern District of Ohio, Western Division granted appellant a conditional writ of habeas corpus, ordering that appellant was to be released unless he was granted a new direct appeal of the Richland County conviction with appointed counsel within 180 days. *Walker v. Warden, Lake Erie Correctional Institution*, S.D.Ohio No. 1:13cv159 (Mar. 15, 2016), 16.

{¶15} We reopened appellant's direct appeal on April 12, 2016.

{¶16} Appellant raises eight assignments of error:

ASSIGNMENTS OF ERROR

{¶17} "I. THE TRIAL COURT ERRED WHEN IT FAILED TO MERGE THE FORGERIES IN VIOLATION OF R.C. 2913.31(A)(2) AND THE FORGERIES IN VIOLATION OF R.C. 2913.31(A)(3), AND ORDERED THE SENTENCES TO BE SERVED CONCURRENTLY WHEN THESE OFFENSES WERE ALLIED OFFENSES OF SIMILAR IMPORT, THEREBY VIOLATING WALKER'S RIGHTS TO THE DOUBLE CLAUSE TO THE UNITED STATES CONSTITUTION AND R.C. 2941.25(A)." (*sic*).

{¶18} "II. THE TRIAL COURT DENIED WALKER DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN THE COURT IMPOSED AN AMBIGUOUS CONSECUTIVE SENTENCE, AND THEN SUBSEQUENTLY MODIFIED WALKER'S SENTENCE BY IMPOSING CONSECUTIVE SENTENCE(S) IN THE JUDGMENT ENTRY IN VIOLATION OF RULE 43 OF THE OHIO RULES OF CRIMINAL PROCEDURE."

{¶19} "III. THE TRIAL COURT ERRED IN ACCEPTING MR. WALKER'S PLEAS IN NON-COMPLIANCE WITH CRIM.R. 11(C)(2)(a) WHEN THE TRIAL COURT FAILED TO DETERMINE PRIOR TO ACCEPTING WALKER'S PLEA IF WALKER UNDERSTOOD THAT HE WAS INELIGIBLE FOR COMMUNITY CONTROL AT SENTENCING THEREBY RENDERING WALKER'S PLEAS UNKNOWINGLY, UNINTELLIGENTLY, AND INVOLUNTARILY ENTERED IN VIOLATION OF THE DUE PROCESS CLAUSE UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION."

{¶20} "IV. THE TRIAL COURT ERRED IN ACCEPTING WALKER'S PLEAS WHEN THE TRIAL COURT MISINFORMED WALKER ABOUT HIS ELIGIBILITY FOR JUDICIAL RELEASE, AND STATED TO [WALKER] THAT HE WOULD BE ELIGIBLE FOR JUDICIAL RELEASE AND THEN SENTENCED WALKER TO TWELVE CUMULATIVE YEARS MAKING HIM INELIGIBLE FOR JUDICIAL RELEASE WHICH RENDERED WALKER'S PLEA INVALID AND IN VIOLATION OF THE DUE PROCESS CLAUSE UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION."

{¶21} "V. THE TRIAL COURT ERRED IN NON-COMPLIANCE WITH CRIM.R. C(2)(A) [*SIC*] WHEN IT ACCEPTED WALKER'S PLEA TO ENGAGING IN A PATTERN OF CORRUPT ACTIVITY WITHOUT FIRST DETERMINING THAT WALKER WAS MAKING THE PLEA WITH AN UNDERSTANDING OF THE NATURE OF THE CHARGE, RENDERING WALKER'S PLEAS UNKNOWINGLY, UNINTELLIGENTLY, AND INVOLUNTARILY AND ALSO IN VIOLATION OF THE DUE PROCESS CLAUSE UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION."

{¶22} "VI. THE TRIAL COURT ERRED BY ACCEPTING WALKER'S GUILTY PLEAS WHERE THE COURT FAILED TO DETERMINE THAT WALKER UNDERSTOOD THE MAXIMUM PENALTIES INVOLVED (MANDATORY FORFEITURE), AS REQUIRED BY CRIM.R. 11(C)(2) RENDERING WALKER'S PLEAS UNKNOWINGLY, UNINTELLIGENTLY, AND INVOLUNTARILY AND ALSO IN VIOLATION OF THE DUE PROCESS CLAUSE UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION."

{¶23} "VII. THE TRIAL COURT ACCEPTED WALKER'S PLEAS IN NON-COMPLIANCE WITH CRIM.R. 11(C)(2)(a) WHEN THE COURT FAILED TO DETERMINE IF COUNT 48, THEFT BY DECEPTION IN VIOLATION OF R.C. 2913.02(A)(3) WAS AN ALLIED OFFENSE WITH THE TWENTY-THREE COUNTS OF FORGERY IN VIOLATION OF R.C. 2913.02(A)(3) "UTTERING" PRIOR TO ACCEPTING WALKER'S PLEAS THEREBY RENDERING WALKER'S PLEAS UNCONSTITUTIONALLY INFIRM AND IN VIOLATION OF THE DUE PROCESS CLAUSE TO THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION."

{¶24} "VIII. THE TRIAL COURT COMMITTED REVERSIBLE AND PLAIN ERROR IN ASSESSING COURT COSTS AGAINST WALKER WHEN IT DID NOT IMPOSE THOSE COSTS IN OPEN COURT AND WITHOUT COMPLYING WITH R.C. 2947.23(A), AND ORDERING WALKER TO PAY RESTITUTION WITHOUT CONSIDERING WALKER'S PRESENT AND FUTURE ABILITY TO PAY AS REQUIRED UNDER R.C. 2929.15(B)(5)."

ANALYSIS

I.

{¶25} In his first assignment of error, appellant argues the trial court erred in failing to merge the pairs of forgery convictions for sentencing, despite the parties' agreement that the offenses were allied offenses of similar import. We disagree with appellant's characterization of his sentence and thus overrule the first assignment of error.

{¶26} The parties agreed Counts 2 through 46 involved allied offenses of similar import. Each "pair" of forgery charges merged for purposes of sentencing. A defendant

may be indicted and tried for allied offenses of similar import, but may be sentenced on only one of the allied offenses. *State v. Carr,* 5th Dist. Perry No. 15-CA-00007, 2016-Ohio-9, 57 N.E.3d 262, ¶ 42, citing *State v. Brown,* 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 42. R.C. 2941.25 states:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶27} The trial court's R.C. 2941.25 determination is subject to de novo review. *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 12.

{¶28} In the instant case, the trial court did in fact determine the pairs of forgery charges merged with each other for sentencing, as the parties agreed. Appellant argues, though, that the trial court effectually failed to merge the sentences due to the statement, ""I am making Counts I, 48, 2, 4, 6, and 8 consecutive, **the rest are concurrent**." We disagree and find that in the context of the trial court's statements during the sentencing hearing, together with the sentence imposed in the judgment entry, the trial court did merge each "pair" of forgery counts.

{¶29} We do not find the trial court's sentencing ambiguous, but appellant raised a number of sentencing arguments in post-conviction motions that resulted in the trial court clarifying the sentence via judgment entry. On July 16, 2009, in an "Order Explaining Sentencing Entry," the trial court wrote:

> This defendant in this case pled guilty to 48 (*sic*) counts relating to a scheme to generate and cash fraudulent payroll checks at WalMarts in several counties. For each of the checks that was generated and cashed, the defendant was charged with two counts of forgery—one for forging the check by writing it and one for forging the check by uttering it.
>
> The parties agreed at sentencing that the two charges for each forged check were allied offenses of similar import and that defendant could only be sentenced for one forgery for each check. Consequently, no sentence is being imposed on odd numbered counts 3 through 43 or counts 44 and 46. The sentencing entry filed in this case on 6-2-09 is consequently the complete sentencing entry in this case.
>
> * * * *.

{¶30} The entry of July 16, 2009 was served upon the parties and upon the Bureau of Sentence Computation.

{¶31} It is evident the trial court did not impose sentences upon allied offenses of similar import. Instead, the trial court merged the forgery offenses and imposed sentence upon one count of each "pair," as the parties agreed.

{¶32} Appellant's first assignment of error is denied.

II.

{¶33} In his second assignment of error, appellant argues the trial court imposed an "ambiguous consecutive sentence" which failed to indicate the sequence of sentences. We disagree.

{¶34} In addition to the Richland County sentence, appellant faced imposed prison terms from Ashland and Cuyahoga counties as well. Appellant argues the sentence of the trial court here does not state whether the Richland County sentence is to be served consecutively to the Ashland County sentence or to the Cuyahoga County sentences. Again, we fail to perceive the alleged ambiguity appellant relies upon in making his argument. In the instant case, on the record at the sentencing hearing, appellant points to the following statement by the trial court: [after sentencing appellant to one year for the grand theft and seven years for the engaging in a pattern of corrupt activity] "For each of the forgeries I'm sentencing you to twelve months in prison. I am making Counts I, 48, 2, 4, 6, and 8 consecutive, the rest are concurrent. That means your total sentence is twelve years prison. **That will be consecutive to your other sentence**." (emphasis added). The sentencing entry states: "If there is more than one count, or if there are other cases, the sentences will be served **consecutively on counts 1, 2, 4, 6, 8, and 12 and on sentences from other courts**; concurrently on other counts. The total sentence in this case is 12 years prison." (emphasis added). Appellant perceives a conflict between "sentence" on the record and "sentences" in the entry, concluding the trial court did not indicate which sentence(s) it referred to and thus all of the sentences are concurrent.

{¶35} We find the sentence in the instant case to be unambiguous: appellant is to serve 12 years, consecutive to any sentences from any other courts. The entries from Ashland and Cuyahoga counties are similarly comprehensible. As appellee points out, appellant's argument overlooks his own Exhibit B, the pertinent Ashland County sentencing entry, imposed October 6, 2008, and Exhibit C, the pertinent Cuyahoga County sentencing entry, filed December 12, 2008. The latter entry states the sentence imposed is " * * * consecutive to [another Cuyahoga County case] and any other cases the defendant may presently be serving. * * * *." The Cuyahoga term was thus consecutive to the Ashland term. In the instant case, whether the trial court references "sentence" or "sentences," we find it is clear and consistent the Richland term is consecutive with the other cases.

{¶36} As provided in Ohio Adm.Code 5120-2-03.1(F), in determining the length of stated prison terms when multiple terms or sentences are imposed, "[w]hen consecutive stated prison terms are imposed, the term to be served is the aggregate of all of the stated prison terms so imposed." Appellant's argument that the trial court's references to sentence/sentences somehow results in concurrent terms upon cases in three jurisdictions is thus unavailing.

{¶37} Appellant's second assignment of error is overruled.

III., IV., V., VI., VII.

{¶38} Appellant's third, fourth, fifth, sixth, and seventh assignments of error are related because appellant argues his guilty pleas were not knowingly, intelligently, and voluntarily entered. We disagree.

{¶39} Generally, a defendant knowingly and voluntarily enters a guilty plea if the trial court advised the defendant of the nature of the charge and the maximum penalty involved, the effect of entering a plea to the charge, and that the defendant will be waiving certain constitutional rights by entering his plea. *State v. Kelley,* 57 Ohio St.3d 127, 128-129, 566 N.E.2d 658 (1991).

{¶40} Crim.R. 11(C)(2) details the trial court's duty in a felony plea hearing to address the defendant personally and to convey certain information to such defendant; the Rule prohibits acceptance of a plea of guilty or no contest without performing these duties. *State v. Holmes,* 5th Dist. Fairfield No. 09 CA 70, 2010–Ohio–428, ¶ 10; *State v. Dansby*, 5th Dist. Tuscarawas Nos. 2009AP120065, 2009AP120066, 2010-Ohio-4538, ¶ 11. Although literal compliance with Crim. R. 11 is preferred, the trial court need only "substantially comply" with the rule when dealing with the non-constitutional elements of Crim.R. 11(C). *State v. Dunham,* 5th Dist. Richland No.2011–CA–121, 2012–Ohio–2957, ¶ 11, citing *State v. Ballard,* 66 Ohio St.2d 473, 475, 423 N.E.2d 115 (1981) and *State v. Stewart,* 51 Ohio St.2d 86, 364 N.E.2d 1163 (1977).

{¶41} In *State v. Griggs,* 103 Ohio St.3d 85, 2004–Ohio–4415, 814 N.E.2d 51, ¶ 12, the Ohio Supreme Court pronounced the following test for determining substantial compliance with Crim.R. 11:

> Though failure to adequately inform a defendant of his constitutional rights would invalidate a guilty plea under a presumption that it was entered involuntarily and unknowingly, failure to comply with non-constitutional rights will not invalidate a plea unless the defendant thereby suffered prejudice. *State v. Nero,* 56

> Ohio St.3d 106, 108, 564 N.E.2d 474 (1990). The test for prejudice is 'whether the plea would have otherwise been made.' *Id.* Under the substantial-compliance standard, we review the totality of circumstances surrounding [the defendant's] plea and determine whether he subjectively understood [the effect of his plea]. *See State v. Sarkozy,* 117 Ohio St.3d 86, 2008–Ohio–509, 881 N.E.2d 1224 at ¶ 19–20.

{¶42} We thus review the totality of the circumstances surrounding appellant's guilty pleas and determine whether he subjectively understood the effects of those pleas. In the instant case, the record demonstrates the trial court had a meaningful dialogue with appellant, fully apprising him of the rights he was waiving. See, *State v. Tillman,* 6th Dist. Huron No. H–02–004, 2004–Ohio–1967, ¶ 20. Nothing in the record indicates that appellant was under the influence of any drug or other substance that would prohibit his understanding of the court's questions. Moreover, there is no evidence in the record showing that if the court had advised appellant any differently, appellant would not have pled guilty and instead would have insisted on continuing the jury trial already in progress.

{¶43} A review of the plea hearing reveals the trial court advised appellant of his constitutional rights, the potential penalties for each offense, and the possibility of post-release control.[4] Further, the trial court inquired as to the voluntariness of appellant's plea of guilty. In short, the trial court complied with Crim.R. 11. *See, State v. Broyles,* 5th Dist. Ashland No. 14–COA–037, 2015–Ohio–4778, ¶ 10–13; *State v. Reed,* 5th Dist. Ashland

[4] As noted in the procedural history, any errors in the trial court's notification of post-release control were addressed in the resentencing hearing on December 30, 2009 memorialized in the entries of July 28, 2010.

No. 14–COA–010, 2015–Ohio–3534, ¶ 12; *State v. Curry*, 5th Dist. Muskingum No. CT2015-0005, 2016-Ohio-401, ¶ 21.

{¶44} Appellant argues, however, that his guilty pleas were not knowingly, intelligently, and voluntarily entered for several reasons, and we will examine each argument in turn.

{¶45} First, appellant makes two arguments premised upon R.C. 2929.13(F)(6);[5] he argues that because he had a prior second-degree felony conviction in Cuyahoga County in 2004, he was subject to a mandatory prison term in the instant case. He further argues that the trial court's advisements that he was eligible for community control and judicial release were in error and thus rendered his pleas involuntary. We disagree on both counts.

{¶46} In support of these arguments, appellant urges us to take judicial notice of a Journal Entry attached to his brief citing Cuyahoga County Court of Common Pleas case number CR 446954, indicating on March 12, 2004 appellant entered guilty pleas to unauthorized use of a motor vehicle, a fifth-degree felony, and possession of drugs, a second-degree felony. Appellant cites to, e.g., *In re Helfrich*, 5th Dist. Licking No. 13CA20, 2014-Ohio-1933, ¶ 35, appeal not allowed, 140 Ohio St.3d 1498, 2014-Ohio-4845, 18 N.E.3d 1252, for the proposition that we may take judicial notice of filings readily accessible from a court's online docket. Id. However, as *Helfrich* makes clear, we may only do so if it is clear those filings were first before the trial court. Id. In the instant case,

[5] That section states in pertinent part: "* * * [T]he court shall impose a prison term or terms * * * for any of the following offenses: Any offense that is a first or second degree * * * if the offender previously was convicted of or pleaded guilty to * * * any first or second degree felony * * *."

as detailed in the procedural history supra, the record demonstrates that the criminal history available to the trial court at sentencing was limited in pertinent part to the following: "* * * 3/30/04 Cuyahoga CPC, convicted of Trafficking in Drugs, Possession of Drugs, and Unauthorized Use of Motor Vehicle, 2 years." Contrary to appellant's assertions, we cannot ascertain that the trial court was aware appellant had a prior conviction upon a second-degree felony. We do not conclude, therefore, that appellant was subject to R.C. 2929.13(F)(6) and we do not find appellant's guilty pleas to be involuntary on this basis. Appellant argues he suffered prejudice because he "might" have been coerced into entering guilty pleas "because of the possibility of probation." As appellee points out, "probation," community control, and judicial release were not raised as options in this case, and the record is devoid of any evidence appellant was misled by any belief in the possibility of any alternatives to imprisonment.

{¶47} Next, appellant argues his guilty plea to the offense of engaging in a pattern of corrupt activity was not knowing, intelligent, or voluntary because the trial court's advisement of the nature of the offense was inadequate, citing *State v. Hall*, 2nd Dist. Montgomery No. 6770, unreported, 1981 WL 5319 (Jan. 27, 1981) for the proposition that the mere statement of the name of the charge does not establish a defendant understands the "nature" of the charge. Appellant does not specify what more the trial court should have done and summarily argues engaging in a pattern of corrupt activity is a "very complex charge."

{¶48} We are to discern appellant's understanding of the nature of the charge from the entire record. In *State v. Eakin,* 5th Dist. Licking No. 01–CA–00087, 2002–Ohio–4713, ¶ 21, we recognized that "[t]he record must demonstrate that the defendant

acquired an understanding of the nature of the charges against him, from whatever source, be it from the trial court itself, the prosecutor, or some other source, such that the trial court can determine that the defendant understands the charges to which he is pleading guilty." Furthermore, "[w]hen a defendant is represented by counsel, there is a presumption * * * that the defense counsel did inform the defendant of the nature of the charges * * *." Id. at ¶ 23, citing *State v. Carter,* 60 Ohio St.2d 34, 38, 396 N.E.2d 757 (1979).

{¶49} In the instant case, our review of the plea transcript reveals the presence of defense counsel, the existence of a written plea form, and detailed descriptions of appellant's conduct included in the indictment and the bill of particulars. Moreover, appellant entered his guilty pleas after three days of trial by jury, making it more difficult for us to assume that appellant did not understand the nature of all of the charges against him, including the count of engaging in a pattern of corrupt activity. We find the trial court substantially complied with the pertinent aspects of Crim.R. 11(C)(2)(a), particularly as to advising appellant of the nature of the charges and of the maximum penalty involved with each count. See, *State v. Agee*, 5th Dist. Fairfield No. 13 CA 71, 2014-Ohio-3215, ¶ 46.

{¶50} Next, appellant argues his pleas are involuntary because the trial court failed to ascertain he understood the maximum penalties involved, including the forfeiture of three vehicles. Appellant claims he failed to plead to the forfeiture specifications at all. Again, we find the record belies appellant's arguments.

{¶51} The indictment included three forfeiture specifications for three vehicles. The following conversation took place at the change of plea and sentencing hearing:

* * * *.

THE COURT: * * * *. Is there anything else I have overlooked?

[PROSECUTOR:] Just the issue concerning the specifications as far as he's not claiming any interest in the vehicles for purposes of the forfeiture order.

THE COURT: You are not claiming any interest in the vehicles?

[APPELLANT:] No.

THE COURT: So the vehicles are forfeited subject to the right of the owners who've raised their claims pursuant to Subsection B of that statute.

[PROSECUTOR:] Correct, Your Honor. I will follow through with the Court on that.

THE COURT: Okay. I will ask you to prepare the appropriate entry for that.

* * * *.

T. Change of Plea and Sentencing Hearing, 22.

{¶52} The indictment and bill of particulars contain descriptions of the subject vehicles in the forfeiture specifications pursuant to R.C. 2981.02. Appellant was represented at the change of plea and sentencing hearing and disavowed any interest in the vehicles. We fail to perceive, and appellant does not point out, any evidence appellant would not have entered his pleas of guilty but for the mandatory forfeitures he never bothered to defend against.

{¶53} Finally, appellant argues the trial court erred in accepting his guilty plea upon the count of grand theft because the trial court did not determine whether it is an allied offense subject to merger with the forgery offenses. Count 48 is one count of grand theft pursuant to R.C. 2913.02(A)(3), representing the grand total of $32,538 obtained by the check fraud enterprise. Other courts have found theft and forgery not to be allied offenses of similar import. The "act of obtaining another's property is distinct from the act of fabricating documents." *State v. Russell*, 6th Dist. Lucas Nos. L–15–1002, L–15–1003, 2015-Ohio-2802, ¶ 19, citing *State v. Smith,* 11th Dist. Geauga No.2014–G–3185, 2014–Ohio–5076. See also, *State v. Haddox*, 6th Dist. Erie No. E-15-017, 2016-Ohio-3368, ¶ 20. We find the same to be true in the instant case. Appellant's animus in creating and uttering the fake stimulus checks is distinguishable from the collection of over $32,000 resulting in the theft count.

{¶54} Appellant's guilty pleas were knowing, voluntary, and intelligent. Upon our review of the totality of circumstances surrounding appellant's pleas, we conclude he subjectively understood the effect of the pleas. *Sarkozy,* supra, 2008–Ohio–509 at ¶ 19–20. We further conclude his arguments do not establish that but for the alleged errors of the trial court, the pleas would not have been made. Id. Appellant's third, fourth, fifth, sixth, and seventh assignments of error are therefore overruled.

VIII.

{¶55} In his eighth assignment of error, appellant argues the trial court erred in imposing court costs and restitution. We agree.

{¶56} A defendant's indigence does not shield him from the payment of court costs. *State v. Threatt,* 108 Ohio St.3d 277, 2006–Ohio–905, 843 N.E.2d 164, ¶ 1. Court

costs must be assessed against all defendants. Id*.; State v. White,* 103 Ohio St.3d 580, 2004–Ohio–5989, 817 N.E.2d 393; R.C. 2947.23. Although a judge has discretion to waive court costs assessed against an indigent defendant, such a person ordinarily "must move a trial court to waive payment of costs at the time of sentencing. If the defendant makes such a motion, then the issue is preserved for appeal and will be reviewed under an abuse-of-discretion standard. Otherwise, the issue is waived and costs are res judicata." *Threatt,* supra at ¶ 22.

{¶57} We are unable to find in the record any affidavit of indigence filed by appellant, and appellant apparently concedes in his reply brief that none was filed (Reply, 10-11). There is an indication that at arraignment, appellant was found to be indigent and counsel was appointed. Regardless, it is undisputed that the trial court did not mention imposition of court costs at the sentencing hearing on the record. Court costs were imposed, however, in the sentencing entry. Appellant never had an opportunity to argue for waiver of costs. Under similar circumstances we have vacated orders to pay court costs and remanded to the trial court for the limited purpose of permitting a defendant to request a waiver of costs. See, *State v. Sizemore*, 5th Dist. Richland No. 15CA18, 2016-Ohio-1529.

{¶58} In *State v. Joseph,* 125 Ohio St.3d 76, 2010–Ohio–954, 926 N.E.2d 278, the Supreme Court held that it is reversible error under Crim.R. 43(A) for a trial court to impose costs in its sentencing entry when it did not impose those costs in open court at the sentencing hearing. Id*.* at ¶ 22. The Court reasoned that the defendant was denied the opportunity to claim indigence and to seek a waiver of the payment of court costs before the trial court because the trial court did not mention costs at the sentencing

hearing. Id. The same is true in the instant case. Here, appellant was not given an opportunity at the sentencing hearing to seek a waiver of the payment of costs because the trial court did not mention costs at the sentencing hearing. *Joseph,* 2010–Ohio–954 at ¶ 13. We thus vacate the order to pay costs and remand the matter to the trial court to permit appellant to argue for waiver of court costs.

{¶59} Appellant further argues the trial court did not consider his present and future ability to pay restitution. R.C. 2929.18(A)(1) permits a trial court to impose a financial sanction and fine upon an offender who has committed a felony. However, before doing so, pursuant to R.C. 2929.19(B)(6), the trial court is required to consider the offender's present and future ability to pay the amount of sanction or fine. Further, under R.C. 2929.18(E), a trial court 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 have previously noted the statute only requires a trial court judge to hold a hearing if there is an objection to the amount of restitution or the ability to pay. In the instant case, appellant did not object to restitution, did not request a hearing, and made no argument regarding his ability to pay.

{¶60} Nonetheless, R.C. 2929.19(B)(6) requires a court to consider the offender's present and future ability to pay, and failure to make the requisite inquiry constitutes an abuse of discretion. *State v. Horton*, 85 Ohio App.3d 268, 272, 619 N.E.2d 527 (10th Dist.1993). We have previously observed that while the better practice is for a trial court to explain on the record that it considered an offender's financial circumstance, courts have consistently held that a trial court need not explicitly state in its judgment that it considered a defendant's ability to pay a financial sanction. *State v. Moody*, 5th Dist.

Licking No. 09 CA 90, 2010-Ohio-3272, ¶ 51. Rather, courts look to the totality of the record to see if this requirement has been satisfied. Id. It has been held that a court complies with Ohio law if the record shows that the court considered a pre-sentence investigation report that provides all pertinent financial information regarding an offender's ability to pay restitution. Id., citing *State v. Henderson,* 4th Dist. Vinton No. 07CA659, 2008-Ohio-2063, ¶ 7 ("We have explained that the trial court complies with R.C. 2929.19(B)(6) when the record shows that the court considered a pre-sentence investigation report that provides pertinent financial information regarding the offender's ability to pay restitution.").

{¶61} In the instant case, we are unable to determine from the record that the trial court made any inquiry into appellant's ability to pay restitution because the record is devoid even of any reference to a pre-sentence investigation. We are thus constrained to vacate the restitution order and remand this matter to the trial court for consideration of appellant's present and future ability to pay. *Moody*, supra, 2010-Ohio-3272, at ¶ 55. A review of the record does not demonstrate the trial court complied with R.C. 2929.19(B)(6). *State v. Woods*, 5th Dist. Licking No. 12-CA-192013-Ohio-1136, ¶ 51. See also, *State v. Caudill*, 5th Dist. Ashland No. 03-COA-031, 2004-Ohio-2803.

{¶62} Appellant's eighth assignment of error is sustained to the extent that the orders to pay court costs and restitution are vacated. The matter is remanded to the trial court for the limited purposes of 1) allowing appellant to move the court to waive payment of court costs, and 2) permitting the trial court to consider appellant's present and future ability to pay $32,538 in restitution. *Joseph,* supra, 2010–Ohio–954 at ¶ 23; *Sizemore*, supra, 2016-Ohio-1529 at 36.

CONCLUSION

{¶63} Appellant's first, second, third, fourth, fifth, sixth, and seventh assignments of error are overruled. Appellant's eighth assignment of error is sustained. The trial court's orders to pay restitution and court costs are hereby vacated and the matter is remanded to the trial court for further proceedings pursuant to this opinion.

By: Delaney, J. and

Farmer, P.J.

Gwin, J., concur.