

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
SANDUSKY COUNTY

State of Ohio

Court of Appeals No. S-09-006

Appellee

Trial Court No. 08 CR 984

v.

Robert L. Coburn

**DECISION AND JUDGMENT**

Appellant

Decided: February 26, 2010

\* \* \* \* \*

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney,  
and Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Christian R. Moore, for appellant.

\* \* \* \* \*

COSME, J.

{¶ 1} Appellant, Robert Coburn, appeals from a judgment issued by the Sandusky County Court of Common Pleas following his guilty plea to grand theft. We conclude that although the plea was properly accepted, the amount of restitution was not sufficiently supported by the record and the trial court failed to make the appropriate

statutory findings prior to imposing the cost of court appointed counsel. Accordingly, we affirm in part, reverse in part, and remand the case to the trial court.

{¶ 2} In September 2008, appellant was indicted on five counts of grand theft, in violation of R.C. 2913.02(A)(1). The charges stemmed from allegations that appellant stole from his employer 27 spools of wire, alleged to be valued at \$83,739. Appellant initially pled not guilty, but ultimately entered into a plea agreement, pleading guilty to Count 1, with the remaining four counts dismissed. Count 1 stated that appellant stole "4 spools of wire, valued at \$1,985.00," in violation of R.C. 2913.02(A)(1). The court accepted the plea and, after considering a presentence investigation report, sentenced appellant to a prison term of 18 months, \$2,500 in fines, \$83,739 in restitution, the costs of prosecution, and court appointed counsel's fees. Appellant now appeals from that judgment, assigning five assignments of error.

## I. RESTITUTION

{¶ 3} In his first assignment of error, appellant contends that:

{¶ 4} "I. The trial court committed reversible error under R.C. § 2929.18 when it sentenced defendant-appellant to pay restitution in the amount of \$83,739.00 without a reasonable degree of certainty based on competent credible evidence."

{¶ 5} We agree.

{¶ 6} An appellate court reviews an order of restitution under an abuse of discretion standard. *State v. Berman*, 8th Dist. No. 79542, 2002-Ohio-1277, ¶ 6, citing *State v. Marbury* (1995), 104 Ohio App.3d 179. "The term 'abuse of discretion' connotes

more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 7} We initially note that, although R.C. 2953.08(D) provides that a defendant may not appeal a jointly recommended sentence imposed by the court, that section specifically provides that it applies only "if the sentence is authorized by law." Where a court imposes a sentence pursuant to a plea agreement and any part of that sentence is not authorized by law, the exception to appealability in R.C. 2953.08(D) does not apply. See *State v. Underwood*, \_\_\_ Ohio St.3d \_\_\_, 2010-Ohio-1, paragraph two of the syllabus and ¶ 18. Therefore, a jointly recommended sentence may be reviewed to determine if it was authorized by law. *Id.*

{¶ 8} We also are aware that agreement to, or failure to dispute or object to, a restitution amount when entering a plea pursuant to a plea agreement has been held to constitute a waiver of the hearing procedures required by R.C. 2929.18(A)(1). See *State v. Cook*, 6th Dist. No. OT-07-020, 2008-Ohio-89, (failure to object to amount at sentencing results in waiver); *State v. Stewart*, 3d Dist. No. 16-08-11, 2008-Ohio-5823 (failure to object to trial court's award of restitution waives all but plain error). Nevertheless, public policy requires that the judiciary charged with sentencing be adequately informed. See *State v. Hess* (Dec. 24, 1991), 4th Dist. No. 515. It is a trial court's duty to ensure that it has the necessary information before it to comply with the sentencing statutes. *State v. Newman*, 11th Dist. No. 2002-A-0007, 2003-Ohio-2916,

¶ 12. Thus, when a defendant has been convicted of a crime, the trial court is required to abide by the statutory requirements in R.C. 2929.18 when imposing restitution, even when accepting the terms of a plea agreement.

{¶ 9} At the time of appellant's offense, R.C. 2929.18(A)(1) stated that a court may order restitution "in an amount based on the victim's economic loss" and could base the amount on recommendations "by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information." "Economic loss" is defined as "any economic detriment suffered by a victim as a direct and proximate result of the commission of an offense and includes any loss of income due to lost time at work because of any injury caused to the victim, and any property loss, medical cost, or funeral expense incurred as a result of the commission of the offense. 'Economic loss' does not include non-economic loss or any punitive or exemplary damages." R.C. 2929.01(L).

{¶ 10} Consequently, prior to imposing a restitution order, a trial court must determine the amount of restitution to a reasonable degree of certainty, ensuring that the amount is supported by competent, credible evidence. See *State v. Warner* (1990), 55 Ohio St.3d 31, 69; *State v. Fyffe* (1990), 67 Ohio App.3d 608, 617. The amount of restitution ordered must bear a reasonable relationship to the loss suffered by the victim. *State v. Middleton*, 12th Dist. No. CA2005-11-499, 2006-Ohio-4558, ¶ 16. The restitution amount may be considered supported by the record where the defendant

specifically agrees to the exact amount requested by the victims and the amount is detailed in a PSI report. See *State v. Jarrett*, 8th Dist. No. 90404, 2008-Ohio-4868.

{¶ 11} In this case, although a plea agreement was reached and accepted, the restitution amount still must be reasonably related to the actual amount of damages or losses suffered. Restitution is not intended to be a windfall to the victim, a collateral method for the court to impose punitive damages, nor an opportunity for a defendant to simply pay a large restitution amount, unrelated to the actual loss, in order to avoid a conviction. Thus, we must determine whether the record sufficiently supports the amount imposed by the trial court.

{¶ 12} During appellant's plea hearing, the trial court stated the following to appellant as to his plea to Count 1:

{¶ 13} "THE COURT: Mr. Coburn, do you understand that a plea of guilty is a complete admission of your guilt to the offense charged, that offense in the indictment reads as follows: On or about March 17th, 2008 at 101 Watertower Drive, Clyde, in Sandusky County, Ohio which is the premises of Fisher Paykel Company, you took four spools of wire valued at \$1,985, which was the property of Mr. Paykel and without their consent, in other words, you're guilty of theft of wire having the value of almost \$2,000. It means your [sic] guilty to that count. Do you understand that?

{¶ 14} "THE DEFENDANT: Yes."

{¶ 15} Despite the trial court's thorough explanation of appellant's rights in entering the plea to Count 1, nothing specific was stated about the verification or source

for the \$83,739 value of the damages for purposes of restitution for all the remaining dismissed charges. In addition, the written plea agreement does not specify the amount of restitution or indicate how the amount will be calculated. Rather, paragraph three of the plea agreement provides that appellant understands that he is "also subject to financial sanctions including a fine of \$5,000.00 on a fourth degree felony; restitution to the victim of my crime, if any; reimbursement of the costs of this case and could include reimbursement of the costs incurred in my community sanction, if any." In paragraph eight, the agreement states, "The Defendant will agree to an order of restitution for all counts to the victim." Thus, no actual amount was specified to appellant in the written plea agreement or at the time of his plea.

{¶ 16} Although the prosecutor cursorily reminded the court of the agreed amount at the sentencing hearing, nothing was presented to show the reasonableness of that amount. Finally, the PSI report in this case only states that "four coils of aluminum weighing 160.6 pounds were missing. The value of the missing coils was \$1,985.00." Contrary to the state's suggestion, nothing in the PSI report provides any reference at all to \$83,739 as the actual value of the copper wire appellant allegedly took or whether that amount included wire that was recovered. As a result, the only evidence presented as to the cost of the copper wire in Counts 2, 3, 4 and 5, were the bare allegations in the indictment.

{¶ 17} Under many, if not most, circumstances, we agree that a plea agreement may constitute a waiver of an appellant's challenge to the amount of restitution. In this

instance, however, nothing in the record provides any guidance or evidence from which the trial court could have determined whether the amount of restitution was reasonably related to the loss suffered by the victim. Therefore, we conclude that the restitution amount imposed by appellant's sentence was not authorized by law, and the trial court abused its discretion in imposing the amount of \$83,379 without the verification required under R.C. 2929.18.

{¶ 18} Accordingly, appellant's first assignment of error is well-taken.

## II. ABILITY TO PAY RESTITUTION

{¶ 19} In his second assignment of error, appellant contends that:

{¶ 20} "II. The trial court committed reversible error under R.C. § 2929.19 when it sentenced defendant-appellant to pay restitution because it failed to consider the present and future ability of defendant-appellant to pay restitution."

{¶ 21} Appellant's second assignment of error is not well-taken.

{¶ 22} Ordinarily, when imposing sanctions pursuant to R.C. 2929.18, a trial court must consider a defendant's ability to pay restitution. R.C. 2929.19. Under a plea agreement that includes restitution, however, the defendant waives the issue of whether he or she is able or will be able in the future to pay the amount agreed upon. See *State v. Myrick*, 8th Dist. No. 91492, 2009-Ohio-2030, ¶ 30. When the agreement to pay restitution to the victim is part and parcel of a plea agreement, there is no reversible error in imposing a financial sanction, without first determining the defendant's ability to pay. *State v. Agbesua* (Jan. 5, 2001), 2d Dist. No. 2000 CA 23.

{¶ 23} In this case, appellant agreed to pay restitution as a central part of the plea agreement, even for the charges which were dismissed. Unlike the *amount* of restitution, which we previously determined was improperly imposed, the overall agreement to pay some sort of restitution at all was included in and considered by appellant before entering his plea. Appellant's knowledge is further supported by the fact that, at the sentencing hearing, trial counsel noted for the record that appellant's agreement to pay restitution was contingent on his being employed. Therefore, we conclude that the trial court did not err in accepting appellant's plea agreement to pay restitution to the victim, without determining his ability to pay.

{¶ 24} Appellant's second assignment of error is not well-taken.

### III. APPOINTED COUNSEL FEES

{¶ 25} In his third assignment of error, appellant argues that:

{¶ 26} "III. The trial court committed reversible error under R.C. § 2941.51 when it sentenced defendant-appellant to pay the cost of his court appointed counsel because it failed to consider the present and future ability of defendant-appellant to pay such costs." We agree.

{¶ 27} R.C. 2947.23 provides that in "all criminal cases \* \* \* the judge or magistrate shall" impose the costs of prosecution as part of a defendant's sentence. Court appointed counsel fees, however, are not included in the costs of prosecution. *State v. Holmes*, 6th Dist. No. L-01-1459, 2002-Ohio-6185, ¶ 20. Reimbursement for appointed counsel fees may be imposed only pursuant to R.C. 2941.51(D), which provides, in



pertinent part that such fees "approved by the court under this section *shall not be taxed as part of the costs and shall be paid by the county*. However, if the person represented has, or reasonably may be expected to have, the means to meet some part of the cost of the services rendered to the person, the person shall pay the county an amount that the person reasonably can be expected to pay." (Emphasis added.) Thus, before an indigent defendant may be required to pay his attorney fees, the court must make an affirmative determination on the record as to the defendant's ability to pay. See, e.g., *State v. Groom* (Oct. 19, 2001), 6th Dist. No. L-00-1104; *State v. Watkins* (1994), 96 Ohio App.3d 195, 198.

{¶ 28} In this case, as we noted previously, the only reference to "financial sanctions" in the written plea agreement indicated generally, "reimbursement of the costs of this case \* \* \*." The phrase "costs of this case" is vague, and, consequently, we must construe it against the state. See *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, ¶ 52. In addition, the trial court did not discuss payment of court appointed counsel fees as a possible sanction at the plea hearing, and only made a brief and belated reference to it at the very end of the sentencing hearing.

{¶ 29} Nothing in the record demonstrates that appellant was provided with a specific amount as to the cost of attorney fees or that he might be subject to paying for them under the plea agreement. Although the court was within its authority to assess such fees, it was first required to determine whether appellant was able to pay or could reasonably be expected to pay the cost of his court appointed counsel. Therefore, we

conclude that the trial court erred in assessing those costs without first determining that appellant had the ability to pay.

{¶ 30} Accordingly, appellant's third assignment of error is well-taken.

#### IV. INEFFECTIVE ASSISTANCE OF COUNSEL

{¶ 31} In his fourth assignment of error, appellant contends that:

{¶ 32} "IV. Defendant-appellant's constitutional right to effective assistance of counsel was violated when said counsel failed to object during sentencing to the amount of restitution and ability of defendant-appellant to pay restitution and attorney's fees."

Appellant's fourth assignment of error is not well-taken.

{¶ 33} In order to prove ineffective assistance of counsel, a defendant must show: (1) that defense counsel's representation fell below an objective standard of reasonableness and (2) that counsel's deficient representation was prejudicial to defendant's case. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus. See, also, *Strickland v. Washington* (1984), 466 U.S. 668, 694.

{¶ 34} In the present case, we have already determined that the trial court erred in imposing restitution without verification of the amount and appointed counsel fees before determining appellant's ability to pay. As to those errors, although an objection may have been prudent, we cannot say that the failure to do so fell below an objective standard of care. Rather, in this case, the trial court was required to make sure the proper evidence was before it and to follow the statutory requirements. Therefore, appellant cannot demonstrate the first prong to establish a claim of ineffective assistance of counsel.

{¶ 35} Accordingly, appellant's fourth assignment of error is not well-taken.

## V. SENTENCING

{¶ 36} In his fifth assignment of error, appellant contends that:

{¶ 37} "V. The trial court abused its discretion when [sic] participated in impermissible judicial fact finding and sentenced defendant to a maximum prison sentence that was unsupported by the record."

Appellant's fifth assignment of error is not well-taken.

{¶ 38} In *State v. Foster*, the Supreme Court of Ohio, in striking down parts of Ohio's sentencing scheme, held that "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." 109 Ohio St.3d 1, 2006-Ohio-856, paragraph seven of the syllabus. More recently, in *State v. Kalish*, the Supreme Court of Ohio stated that, when reviewing felony sentences and applying *Foster* to the remaining sentencing statutes, appellate courts must use a two-step approach. 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 4. The *Kalish* court said, "First, they must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision in imposing the term of imprisonment shall be reviewed under an abuse of discretion standard." *Id.*

{¶ 39} As we noted previously, an abuse of discretion implies that the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore*, supra. When applying an abuse of discretion standard, an appellate court may not generally substitute its judgment for that of the trial court. See *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶ 40} To comply with *Foster* and *Kalish*, in addition to the permissible statutory ranges, a trial court must consider the purposes and principles of felony sentencing and the seriousness and recidivism factors under R.C. 2929.11 and 2929.12. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 38. R.C. 2929.11(A) provides that, when sentencing an offender for a felony conviction, a trial court must be guided by the "overriding purposes of felony sentencing \* \* \* to protect the public from future crime by the offender and others and to punish the offender." R.C. 2929.11(B) states that a felony sentence "must be reasonably calculated to achieve the purposes set forth under R.C. 2929.11(A), commensurate with and not demeaning to the seriousness of the crime and its impact on the victim, and consistent with sentences imposed for similar crimes committed by similar offenders." Finally, R.C. 2929.12 sets forth factors concerning the seriousness of the offense and recidivism factors which the court must consider.

{¶ 41} In this case, appellant pled to and was found guilty on one count of grand theft, a fourth degree felony. R.C. 2929.14(A)(4) provides, in pertinent part, that, for a conviction for a felony of the fourth degree, a court shall impose a prison term that "shall be six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen,

seventeen, or eighteen months." Therefore, although appellant's sentence was the maximum allowed, pursuant to *Foster* and *Kalish*, supra, we cannot say that it was an abuse of the trial court's discretion.

{¶ 42} Accordingly, appellant's fifth assignment of error is not well-taken.

{¶ 43} The judgment of the Sandusky County Court of Common Pleas is affirmed in part and reversed in part, and is remanded to determine the appropriate amount of restitution and appellant's present or future ability to pay his court appointed attorney fees. Appellant and appellee are each ordered to pay one-half of the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED IN PART  
AND REVERSED IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

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JUDGE

Arlene Singer, J.

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JUDGE

Keila D. Cosme, J.  
CONCUR.

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JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <a href="http://www.sconet.state.oh.us/rod/newpdf/?source=6">http://www.sconet.state.oh.us/rod/newpdf/?source=6</a>.</p>
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