

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

State of Ohio

Court of Appeals No. S-11-028

Appellee

Trial Court No. 11CR115

v.

Nicholas Dahms

**DECISION AND JUDGMENT**

Appellant

Decided: July 13, 2012

\* \* \* \* \*

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

Karin L. Coble, for appellant.

\* \* \* \* \*

**SINGER, P.J.**

{¶ 1} This is an appeal from a judgment of conviction issued by the Sandusky County Court of Common Pleas following appellant's guilty plea to the offense of aggravated arson and tampering with evidence. Because we conclude that the trial court

properly complied with Crim.R. 11 during sentencing, but erred in failing to indicate during sentencing the restitution amount or considering appellant's ability to pay court-appointed counsel fees, we affirm in part and reverse in part.

{¶ 2} Appellant, Nicholas B. Dahms, was initially indicted on ten counts: Counts 1 through 7, attempted murder, in violation of R.C. 2903.02 and 2923.02; Count 8, aggravated arson, in violation of R.C. 2909.02(A)(1); Count 9, aggravated arson, in violation of R.C. 2902.02(A)(2); and Count 10, tampering with evidence, in violation of R.C. 2921.12(A)(1). Ultimately, pursuant to a plea agreement, appellant pled guilty to Counts 9 and 10. Counts 1 through 8 were dismissed. A presentence investigation report was ordered. The trial court sentenced appellant to six years incarceration as to the aggravated arson conviction and to three years incarceration as to the tampering with evidence conviction, to run concurrently. The trial court also ordered appellant to pay \$1,216 in restitution, the cost of prosecution, and court-appointed counsel fees.

{¶ 3} Appellant now appeals from that judgment, arguing the following four assignments of error:

Assignment of Error One: The trial court failed to strictly comply with Crim.R. 11(C)(2)(c) when accepting appellant's guilty plea, rendering appellant's plea invalid.

Assignment of Error Two: The trial court erred in imposing restitution.

Assignment of Error Three: The trial court, in imposing incarceration for the offense, abused its discretion when it failed to properly consider R.C. 2929.11(B).

Assignment of Error Four: The trial court erred in imposing the costs of prosecution and the costs of court-appointed counsel.

I.

{¶ 4} In his first assignment of error, appellant contends that his plea was invalid because the trial court did not “strictly comply” with Crim.R. 11(C)(2)(c) when it accepted his plea. Appellant argues that the trial court violated appellant’s Fifth Amendment rights when it asked appellant to disclose what happened during the events which were the basis of appellant’s offenses.

{¶ 5} Before accepting a guilty plea, a trial court must strictly comply with Crim.R. 11(C)(2)(c) and orally advise a defendant that the plea waives “(1) the right to a jury trial, (2) the right to confront one’s accusers, (3) the right to compulsory process to obtain witnesses, (4) the right to require the state to prove guilt beyond a reasonable doubt, and (5) the privilege against compulsory self-incrimination. When a trial court fails to strictly comply with this duty, the defendant’s plea is invalid.” *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 31. The purpose of the rule is to ensure that the defendant is informed and that the judge can determine that appellant entered the plea knowingly, intelligently, and voluntarily. *Id.* at ¶ 18 and *State v. Ballard*, 66 Ohio St.2d 473, 480, 423 N.E.2d 115 (1981).

{¶ 6} A guilty plea “is a complete admission of the defendant's guilt.” Crim.R. 11(B)(1). By pleading guilty, a defendant waives the right to make the state prove his guilt beyond a reasonable doubt. Crim.R. 11(C)(2)(c). Unlike Fed.R. 11, under the Ohio Rules of Criminal Procedure, when there is no trial and a defendant admits guilt, the trial court is not required to determine whether a factual basis exists to support the guilty plea prior to entering judgment on that plea. *State v. Boynton*, 8th Dist. No. 71097, 1997 WL 570953 (Aug. 14, 1997), citing *State v. Wood*, 48 Ohio App.2d 339, 357 N.E.2d 1106 (1976).

{¶ 7} In this case, the record reveals that the trial court advised appellant of all the rights and consequences of a guilty plea as listed in Crim.R. 11(C). Therefore, the trial court strictly complied with the Crim.R. 11 requirements. Appellant claims, however, that under the rationale espoused in *Mitchell v. U.S.*, 526 U.S. 314, 119 S. Ct. 1307, 143 L.Ed.2d 424 (1999), the trial court did not comply because it violated appellant’s Fifth Amendment right to remain silent by questioning him about the offenses, prior to the court’s acceptance of his guilty plea. Appellant’s reliance on *Mitchell* is misplaced.

{¶ 8} In *Mitchell*, a defendant pled guilty to drug charges. *Id.* at 318. At sentencing, the court relied on testimony of codefendants to determine the amounts of cocaine she allegedly had carried. *Id.* at 319. The defendant asserted her Fifth Amendment right against self-incrimination and did not refute those statements. *Id.* When imposing sentence, the trial court *specifically told* the defendant that it held it

against her that she did not “come forward and explain your side of this issue.” The Court of Appeals for the Third Circuit affirmed the trial court’s decision.

{¶ 9} On appeal, the United States Supreme Court addressed the following two issues: (1) “whether, under the federal criminal system, a guilty plea waives the privilege in the sentencing phase of the case, either as a result of the colloquy preceding the plea or by operation of law when the plea is entered” and (2) “whether, in determining facts about the crime which bear upon the severity of the sentence, a trial court may draw an adverse inference from the defendant’s silence.” *Id.* at 316-317. The *Mitchell* court ultimately held in the negative on both issues, stating that a guilty plea is not a waiver of the privilege at sentencing and that the trial court may not draw an adverse inference against a defendant who chooses to remain silent during sentencing. *Id.*

{¶ 10} *Mitchell* also noted that it is “well established that a witness, in a single proceeding, may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details.” *Id.* at 321, citing to *Rogers v. United States*, 340 U.S. 367, 373, 71 S.Ct. 438, 95 L.Ed. 344 (1951). The privilege is “waived for the matters to which the witness testifies, and the scope of the ‘waiver is determined by the scope of relevant cross-examination.’ ” *Mitchell, supra*, at 321, citing *Brown v. United States*, 356 U.S. 148, 154-155, 78 S.Ct. 622, 2 L.Ed.2d 589 (1958).

{¶ 11} In the present case, the trial court’s inquiry did not violate appellant’s Fifth Amendment right to remain silent. First, appellant did not object to answering the court’s questions. In addition, appellant had already agreed to testify against a co-defendant at

trial later that week, which constituted a waiver as to any privilege as to the facts surrounding the charged offenses. Moreover, the questioning did not exceed the scope of the offenses to which appellant had pled guilty. Had the court asked questions which might have opened up criminal liability for other crimes, appellant could have re-asserted his Fifth Amendment privilege as a reason to not answer or as a defense to any subsequent charges based on the additional statements.

{¶ 12} The court did not ask any questions beyond the scope of the events related to appellant's plea and, consequently, appellant did not object to the court's inquiry. Furthermore, unlike the defendant in *Mitchell*, appellant did not assert the right to remain silent, but voluntarily answered the court's questions. Therefore, there is no "silence" from which the court could have drawn an adverse inference, and *Mitchell* simply does not apply to the facts of this case.

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

## II.

{¶ 14} In his second assignment of error, appellant argues that the trial court erred in imposing restitution.

{¶ 15} Appellate courts review an order of restitution under the abuse of discretion standard. *State v. Naughton*, 11th Dist. No. 2011-L-083, 2012-Ohio-1271, ¶ 28; *State v. Burns*, 8th Dist. No. 95465, 2011-Ohio-4230, ¶ 37. R.C. 2929.18 permits a trial court to impose financial sanctions on a defendant, including restitution and reimbursements, subject to the defendant's opportunity to dispute the amounts imposed. Before imposing

a financial sanction under R.C. 2929.18, the trial court “shall consider the offender's present and future ability to pay the sanction or fine.” R.C. 2929.19(B)(6).

{¶ 16} The trial court need not conduct a hearing on the issue of financial sanctions and there are no express factors that the court must take into consideration or make on the record. *State v. Russell*, 2d Dist. No. 23454, 2010–Ohio–4765, ¶ 62, citing *State v. Culver*, 160 Ohio App.3d 172, 2005–Ohio–1359, 816 N.E.2d 367, ¶ 57 (2d Dist.). A trial court need not even state that it considered an offender's ability to pay, but the record should contain some evidence that the trial court considered the offender's ability to pay. *Russell, supra*, at ¶ 62.

{¶ 17} In this case, as part of his plea agreement, appellant agreed to “an order of restitution.” Neither the written plea agreement nor the plea colloquy in court, however, specified the amount of the restitution. During the sentencing hearing, the trial court did not address either the amount of restitution or appellant’s ability to pay such restitution. As part of his plea agreement, however, appellant had already agreed to some amount of restitution. Consequently, as to the general order of restitution, appellant waived any requirement that the court consider his ability to pay.

{¶ 18} Nevertheless, the trial court should have disclosed the restitution amount it intended to impose during sentencing, which would have provided appellant the opportunity to dispute the amount. Therefore, we conclude that the trial court erred in failing to indicate the amount of restitution it was imposing during the sentencing hearing.

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

### III.

{¶ 20} In his third assignment of error, appellant claims that the trial court failed to properly consider R.C. 2929.11(B) and abused its discretion when it imposed a sentence of incarceration. Specifically, appellant argues that the trial court failed to consider whether his sentence is consistent with sentences imposed on similarly-situated offenders for similar crimes.

{¶ 21} The consistency and proportionality requirements of R.C. 2929.11(B) require that sentencing courts impose punishment and sentence "consistent with the sentences imposed for similar crimes committed by similar offenders." Consistency does not necessarily mean uniformity; rather, consistency has a goal of similar sentences for similar offenses. *See State v. Battle*, 10th Dist. No. 06AP-863, 2007-Ohio-1845. As a result, consistency includes a range of sentences, taking into consideration a trial court's discretion to weigh the relevant statutory factors. *Id.* Even though offenses may be similar, "distinguishing factors may justify dissimilar sentences." *Id.* at ¶ 24; *State v. King*, 5th Dist. No. CT06-0020, 2006-Ohio-6566, ¶ 23.

{¶ 22} In addition, consistency in sentencing does not result from a case-by-case comparison, but by the trial court's proper application of the statutory sentencing guidelines. *State v. Hall*, 179 Ohio App.3d 727, 2008-Ohio-6228, 903 N.E.2d 676, ¶ 10 (10th Dist.). An offender cannot simply present other cases in which an individual convicted of the same offense received a lesser sentence to demonstrate that his sentence



is disproportionate. *State v. Hayes*, 10th Dist. No. 08AP–233, 2009–Ohio–1100, ¶ 10, citing *State v. Battle*, 10th Dist. No. 06AP–863, 2007–Ohio–1845, ¶ 23. Rather, to demonstrate that a sentence is inconsistent, an offender must show that the trial court did not properly consider applicable sentencing criteria found in R.C. 2929.11 and 2929.12. *State v. Holloman*, 10th Dist. No. 07AP–875, 2008–Ohio–2650, ¶ 19.

{¶ 23} In this case, during the sentencing hearing, the court indicated that it was considering “the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender and making restitution to the victim of an offense, the public or both.” The court further noted that the sentence imposed “shall be reasonably calculated to achieve the two overriding purposes of felony sentencing as set forth in the law, commensurate with, and not demeaning to the seriousness of the offender’s conduct, and its impact on the victim, and *consistent with sentences imposed for similar crimes committed by similar offenders.*” (Emphasis added.)

{¶ 24} Appellant does not dispute that the sentence imposed is within the authorized statutory range. Rather, appellant argues that his sentence is allegedly harsher than sentences imposed on other offenders who have committed similar crimes. As required, the court considered the particular facts surrounding the offender and his crime. Appellant had a lengthy criminal history involving drugs, theft, and probation violations. Prior attempts to resolve his drug problems through rehabilitation programs were unsuccessful. The court acknowledged appellant’s sincere remorse, but, ultimately determined that the seriousness of the offense and impact on the victims outweighed any

mitigating factors. Therefore, we cannot say that the trial court failed to consider all the required factors in imposing sentence.

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

#### IV.

{¶ 26} In his fourth assignment of error, appellant asserts that the trial court erred when it imposed the costs of prosecution and the costs of court-appointed counsel.

{¶ 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. In criminal cases, costs “are assessed at sentencing and are included in the sentencing entry; costs are not punishment, but are more akin to a civil judgment for money.” *State v. McDaniel*, 4th Dist. No. 09CA677, 2010–Ohio–5215, ¶ 21, quoting *State v. Joseph*, 125 Ohio St.3d 76, 2010–Ohio–954, 926 N.E.2d 278 ¶ 20, and *State v. Threatt*, 108 Ohio St.3d 277, 2006–Ohio–905, 843 N.E.2d 164, ¶ 15. Although a trial court may, in its discretion, waive those costs for the indigent defendant, it is not required to do so. *State v. White* (2004), 103 Ohio St.3d 580, 2004–Ohio–5989, 817 N.E.2d 393, ¶ 14.

{¶ 28} In addition, R.C. 2929.18, as referenced previously, which authorizes the imposition of financial sanctions, does not include the costs of or fees paid to court-appointed counsel. Court-appointed counsel fees are also 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.”

{¶ 29} Thus, before an indigent defendant may be required to pay his attorney fees pursuant to R.C. 2941.51(D), the court must make an affirmative determination on the record that the defendant has the ability to pay. *See State v. Knight*, 6th Dist. No. S-05-007, 2006–Ohio–4807; *State v. Phillips*, 6th Dist. No. F-05-032, 2006–Ohio–4135, ¶ 20; *State v. Fisher*, 12th Dist. No. CA98-09-190, 2002–Ohio–2069. Although the court need not hold a hearing, the finding that a criminal defendant has the ability to pay court-appointed counsel's costs must be supported by clear and convincing evidence. R.C. 2953.08(G)(2)(b); *State v. Lamonds*, 6th Dist. No. L-03-1100, 2005-Ohio-1219, at ¶ 42. “Before imposing a financial sanction under section 2929.18 of the Revised Code \* \* \*, the court shall consider the offender's present and future ability to pay the amount of the sanction or fine.” And, although preferred on appellate review, “a trial court need not explicitly state in its judgment entry that it considered a defendant's ability to pay a financial sanction.” *State v. Berry*, 4th Dist. No. 04CA2961, 2006-Ohio-244, at ¶ 43. An appellate court will look to the totality of the record to determine whether the requirement has been satisfied. *Id.*

{¶ 30} In this case, the court was statutorily required to impose the costs of prosecution on appellant, without consideration of his ability to pay. As to the appointed

counsel fees, however, the court was required to make an affirmative statement on the record or the record must support appellant's ability to pay. The trial court judge did not make such a finding at the sentencing hearing, nor did he inquire of appellant as to his past employment or skills which would indicate appellant's future ability to pay any sanction. As a result, there was no opportunity for appellant to object to the imposition of such fees and no evidence in the record which would support such a finding in the judgment entry. Therefore, reviewing the totality of the record, we conclude that the trial court erred during the sentencing hearing in failing to inquire as to appellant's future ability to pay or indicate it even intended to impose attorney fees.

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

{¶ 32} The judgment of the Sandusky County Court of Common Pleas is affirmed in part, and reversed in part. This case is remanded to the trial court for the court to address the issue of restitution and to consider and make a finding on the record as to appellant's 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.

Peter M. Handwork, J.

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JUDGE

Arlene Singer, P.J.

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JUDGE

Stephen A. Yarbrough, 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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