[Cite as *State v. Donaldson*, 2012-Ohio-6064.]

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

State of Ohio — Court of Appeals No. L-11-1264

Appellee — Trial Court No. CR0201102028

v.

Kevin Donaldson — **DECISION AND JUDGMENT**

Appellant — Decided: December 21, 2012

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Mark T. Herr, Assistant Prosecuting Attorney, for appellee.

Karin L. Coble, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} This is an appeal from the judgment of the Lucas County Court of Common Pleas, sentencing appellant, Kevin Donaldson, to a five-year term of imprisonment pursuant to his conviction for robbery. For the reasons that follow, we affirm.

A. Facts and Procedural Background

{¶ 2} On June 30, 2011, Donaldson approached Claudia Rode as she was walking to work along Michigan Avenue in Toledo, Ohio. Without warning, Donaldson struck Rode in the face with a closed fist, knocking her down and causing her to hit the back of her head on the cement. Before running off, Donaldson took $50 from Rode, and also stole her purse. While making his escape, Donaldson ran across Michigan Avenue where he was spotted by a police officer and subsequently arrested.

{¶ 3} On July 8, 2011, Donaldson was indicted for one count of robbery in violation of R.C. 2911.02(A)(2), a felony of the second degree. Having reached a plea agreement with the state, Donaldson pleaded no contest to the lesser offense of robbery under R.C. 2911.02(A)(3), a felony of the third degree.

{¶ 4} At sentencing, Donaldson was sentenced to five years in prison, the maximum term for a felony of the third degree. In support of its decision to impose the maximum sentence, the court cited the violent nature of the crime, Donaldson's three prior robbery convictions, the robbery's impact on Rode, and the danger that Donaldson posed to the community. The judge also pointed out that Donaldson had only been released from prison ten days prior to the robbery.

{¶ 5} In addition to the prison term, Donaldson was ordered to pay restitution to Rode in the amount of $680.46. Further, Donaldson was informed that he was required to serve a mandatory three-year term of postrelease control. Finally, Donaldson was

ordered to "pay all or part of the applicable costs of supervision, confinement, assigned counsel, and prosecution."

{¶ 6} Donaldson timely appeals this sentence.

B. Assignments of Error

{¶ 7} Donaldson assigns the following errors for our review:

1. The trial court abused its discretion in imposing the maximum term of incarceration for the offense.

2. The trial court erred in imposing restitution.

3. The trial court erred in imposing the costs of prosecution and the costs of court-appointed counsel.

II. Analysis

A. The Trial Court did not Abuse its Discretion by Imposing the Maximum Sentence

{¶ 8} In his first assignment of error, Donaldson argues that the trial court abused its discretion by imposing the maximum prison term allowable for a felony of the third degree. Essentially, Donaldson claims that the trial court improperly weighed the factors of R.C. 2929.12.

{¶ 9} Appellate courts review assigned errors challenging the sentencing court's application of R.C. 2929.11 and 2929.12 using the method announced in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. In *Kalish*, the Supreme Court established a "two-prong" process for appellate review of felony sentences, stating:

> First, [appellate courts] 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 shall be reviewed under an abuse-of-discretion standard. *Kalish* at ¶ 4.

{¶ 10} Here, Donaldson acknowledges that his sentence falls within the range allowed by statute. A choice of sentence from within the permissible statutory range cannot, by definition, be contrary to law. *Id.* at ¶ 15. Thus, the first prong under *Kalish* is satisfied.

{¶ 11} Under the second prong, we review the trial court's "exercise of its discretion in selecting a sentence within the permissible statutory range," using the sentencing record as the context. *Kalish* at ¶ 17. This prong asks whether, in selecting a specific prison term, the court's decision was "unreasonable, arbitrary or unconscionable." *Id.* at ¶ 20.

{¶ 12} Donaldson argues that the trial court acted unreasonably in its application of R.C. 2929.12. At the outset, we note that a sentencing court has broad discretion to determine the relative weight to assign the factors in R.C. 2929.12. *See State v. Arnett*, 88 Ohio St.3d 208, 215, 724 N.E.2d 793 (2000) (citing *State v. Fox*, 69 Ohio St.3d 183, 193, 631 N.E.2d 124 (1994)). Regarding the import of R.C. 2929.12, we have stated:

> R.C. 2929.12 is a guidance statute. It sets forth the seriousness and recidivism criteria that a trial court "shall consider" in fashioning a felony

sentence. * * * Subsections (B) and (C) establish the factors indicating whether the offender's conduct is more serious or less serious than conduct normally constituting the offense. Subsections (D) and (E) contain the factors bearing on whether the offender is likely or not likely to commit future crimes. While the phrase "shall consider" is used throughout R.C. 2929.12, the sentencing court is not obligated to give a detailed explanation of how it algebraically applied each seriousness and recidivism factor to the offender. Indeed, no specific recitation is required. * * * Merely stating that the court considered the statutory factors is enough. *State v. Brimacombe*, 6th Dist. No. L-10-1179, 2011-Ohio-5032, ¶ 11 (internal citations omitted).

{¶ 13} In this case, the trial court's consideration of the requisite factors is evidenced by the following statement made at the sentencing hearing:

I rarely impose a maximum sentence in a case unless it's under the most egregious circumstances. And this clearly fits that category. This Defendant has been convicted of three prior robbery offenses. I understand he blames it on drugs. He's had the opportunity for the last twenty years to address his drug problem and he chooses not to address the drug problem.

The impact on the victim was serious. This Defendant by his behavior, his fourth robbery conviction here, shows that he is dangerous to the community. And that only the maximum sentence here is – the

> maximum sentence here – the maximum sentence is necessary to protect the public from this defendant's criminal behavior.

{¶ 14} In his attempt to minimize the statement above, Donaldson states that "[o]nly one of the 'more serious' factors of R.C. 2929.12(B) applies." Additionally, Donaldson argues that "only one of the 'recidivism' factors of R.C. 2929.12(D) applies." Further, he points out that two of the factors of R.C. 2929.12(D) actually weigh in his favor.

{¶ 15} However, we need not address the relative weight that should have been given to the factors Donaldson points to. Instead, "[m]erely stating that the court considered the statutory factors is enough" to pass muster under R.C. 2929.12. *Brimacombe* at ¶ 11. The sentencing transcript reflects that the court considered Donaldson's extensive criminal record, prior robbery convictions, and the impact on the victim. In addition, the judgment entry states:

> The Court has considered the record, oral statements, any victim impact statement and presentence report prepared, as well as the principles and purposes of sentencing under R.C. 2929.11, and has balanced the seriousness and recidivism factors under R.C. 2929.12.

{¶ 16} Upon examination of the sentencing transcript and the corresponding judgment entry, it is clear that the court considered all the factors under R.C. 2929.12. However, Donaldson argues that the fact that he showed remorse and acknowledged his drug problem requires the court to impose a lesser sentence. Donaldson's argument is

without merit in that it seeks to replace the court's obligation to *consider* the mitigating factors with an obligation to *reduce a sentence* when any mitigating factors are present. A similar argument was set forth in *State v. Barnhart*, 6th Dist. No. OT-10-032, 2011-Ohio-5685, where we stated:

> [T]he premise of Barnhart's argument confuses the statutory mandate *to consider* any mitigating factor that might exist (such as an isolated statement by Cassel which appears favorable on the issue of recidivism) with a concomitant obligation automatically *to assign* that factor the same qualitative weight as another factor the court deemed unfavorable. *Id.* at ¶ 21.

{¶ 17} As with the statement made in *Barnhart*, "the court could reasonably assign little or no mitigating weight" to Donaldson's self-serving statements regarding his remorse and his desire to secure assistance with his drug problem. *Id.* The court was merely required to consider the factors, not assign a particular weight to any one of them. That the court here weighed the factors is clear. Further, the record reveals Donaldson's extensive criminal record, prior robbery convictions, and the impact on the victim. In light of these facts, we cannot say that the trial court abused its discretion by imposing the maximum sentence. Accordingly, Donaldson's first assignment of error is not well-taken.

B. The Trial Court did not Err by Imposing Restitution

{¶ 18} In his second assignment of error, Donaldson argues that the trial court erred when it required him to pay restitution to Rode in the amount of $680.46. Donaldson asserts that no evidence was submitted to support the award of restitution. We disagree.

{¶ 19} As part of a felony sentence, a court may order restitution to a victim based on the victim's economic loss.

> If the court imposes restitution, the court may base the amount of restitution it orders on an amount recommended by the victim, the offender, *a presentence investigation report*, estimates or receipts indicating the cost of repairing or replacing property, and other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense. If the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount. (Emphasis added.) R.C. 2929.18(A)(1).

{¶ 20} By the clear language of the restitution statute, a court is permitted to order restitution based on information contained in a presentence investigation report. Here, the presentence investigation report clearly recommended restitution, as did the prosecutor and the victim via her victim impact statement. Further, the presentence

investigation report contained copies of Rode's medical bills totaling $680.46. Therefore, the restitution did not exceed Roe's economic loss resulting from the offense.

{¶ 21} Notably, Donaldson failed to raise any objection in the trial court. "Normally, an appellate court need not consider an error that was not called to the attention of the trial court at a time when the error could have been avoided or corrected by the trial court." *State v. Hill*, 92 Ohio St.3d 191, 196, 749 N.E.2d 274 (2001), citing *State v. Williams*, 51 Ohio St.2d 112, 117, 364 N.E.2d 1364 (1977). Consequently, absent plain error, any error is deemed waived. Crim.R. 52(B) provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." For an error to affect a substantial right, it must affect the outcome of the trial. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240. The record reveals no error in the manner in which the court imposed restitution. Accordingly, Donaldson's second assignment of error is not well-taken.

C. The Trial Court did not Err When It Imposed the Costs of Prosecution and the Costs of Court-Appointed Counsel

{¶ 22} In his third assignment of error, Donaldson argues that the trial court erroneously imposed the costs of prosecution and the costs of court-appointed counsel. First, Donaldson argues that the trial court did not provide him with adequate notification as required by R.C. 2947.23(A)(1).

{¶ 23} R.C. 2947.23(A)(1) provides:

> In all criminal cases, * * * the judge or magistrate shall include in the sentence the costs of prosecution * * * and render a judgment against the defendant for such costs. At the time the judge or magistrate imposes sentence, the judge or magistrate shall notify the defendant of both of the following:
>
> (a) If the defendant fails to pay that judgment or fails to make timely payments toward that judgment under a payment schedule approved by the court, the court may order the defendant to perform community service in an amount of not more than forty hours per month until the judgment is paid or until the court is satisfied that the defendant is in compliance with the approved payment schedule.
>
> (b) If the court orders the defendant to perform the community service, the defendant will receive credit upon the judgment at the specified hourly credit rate per hour of community service performed, and each hour of community service performed will reduce the judgment by that amount.

{¶ 24} In *State v. King*, 6th Dist. No. WD-09-069, 2010-Ohio-3074, ¶ 12, this court held that the failure to provide the defendant with the required R.C. 2947.23(A)(1) notification in regard to the possible imposition of community service constitutes reversible error. Here, the court provided Donaldson with the requisite notification.

{¶ 25} At the sentencing hearing, Donaldson was presented with a form entitled "Notification at Sentence Pursuant to R.C. 2929.19." On page two of this form, the notice contained in R.C. 2947.23(A)(1)(a) and (b) are reproduced almost verbatim. Donaldson's signature appears at the bottom of that page, as does his counsel's signature. Further, the judge confirmed that Donaldson signed the form at the sentencing hearing by asking Donaldson personally whether he had signed it. Donaldson replied that he did in fact sign the form, and that he understood what he signed. Accordingly, we disagree with Donaldson that the trial court failed to provide him with proper notification under R.C. 2947.23 prior to imposing costs of prosecution.

{¶ 26} Donaldson also argues that the trial court failed to find that he was able to pay the costs of confinement and court-appointed counsel before imposing those costs.

{¶ 27} R.C. 2929.28 governs the imposition of costs of confinement. Pursuant to R.C. 2929.28(B), the trial court "may hold a hearing to determine whether the offender is able to pay the financial sanction imposed pursuant to this section or court costs or is likely in the future to be able to pay the sanction or costs." Ohio courts have interpreted R.C. 2929.28(B) to mean that a hearing to determine ability to pay is not required; however, there must, at minimum, "be some evidence in the record that the court considered the defendant's present and future ability to pay the sanction imposed." *State v. Reigsecker*, 6th Dist. No. F-03-022, 2004-Ohio-3808, ¶ 11; *State v. Cole*, 6th Dist. Nos. L-03-1163, L-03-1162, 2005-Ohio-408, ¶ 26.

{¶ 28} In addition, the payment of court-appointed counsel fees is governed by R.C. 2941.51(D), which states in relevant part:

> The fees and expenses 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 in an amount that the person reasonably can be expected to pay. * * *

{¶ 29} Before court-appointed attorney fees are imposed on a defendant pursuant to R.C. 2941.51(D), "there must be a finding on the record that the offender has the ability to pay." *State v. Phillips*, 6th Dist. No. F-05-032, 2006-Ohio-4135, ¶ 20; *State v. Knight*, 6th Dist. No. S-05-007, 2006-Ohio-4807; *State v. Fisher*, 12th Dist. No. CA98-09-190, 2002-Ohio-2069.

{¶ 30} Here, the record contains numerous references to the trial court's finding that Donaldson is able to pay the costs. First, the court stated such during the sentencing hearing. The court stated, "I'll make a finding this defendant is not amenable to community control. I'll further find that he is able to pay all fees and costs associated with this case." Second, the judgment entry reiterates the finding that Donaldson is able to pay the costs by stating: "Defendant found to have, or reasonably may be expected to have, the means to pay all or part of the applicable costs of supervision, confinement, assigned counsel, and prosecution as authorized by law."

{¶ 31} Donaldson argues that the court's conclusion that he is able to pay these costs is not supported by the evidence. We disagree. While it may be true that Donaldson has only a 10th grade education and a history of substance abuse, the record also reflects that he has held jobs in the past and is only 41 years old. With his age and prior work history, both of which are contained in the presentence investigation report, there is reason to believe Donaldson will be able to pay the costs of confinement and court-appointed attorney fees.

{¶ 32} In light of the foregoing, it is clear that the trial court did not err when it determined that Donaldson has, or is reasonably expected to have, the ability to pay the costs of prosecution and his court-appointed attorney fees. Accordingly, Donaldson's third assignment of error is not well-taken.

III. Conclusion

{¶ 33} The judgment of the Lucas County Court of Common Pleas is affirmed. Costs are hereby assessed to the appellant in accordance with App.R. 24.

Judgment affirmed.

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.

JUDGE

Arlene Singer, P.J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE