

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

State of Ohio

Court of Appeals Nos. F-12-011  
F-12-014

Appellee

Trial Court No. 12CRB00023

v.

Fay Rush

**DECISION AND JUDGMENT**

Appellant

Decided: March 1, 2013

\* \* \* \* \*

Scott A. Haselman, Fulton County Prosecuting Attorney,  
for appellee.

Clayton M. Gerbitz, for appellant.

\* \* \* \* \*

**YARBROUGH, J.**

**I. Introduction**

{¶ 1} Appellant, Fay Rush, appeals from the judgments of the County Court of Fulton County, Eastern District, which sentenced him to 90 days in jail, and ordered him to pay a \$1,000 fine, court costs, and \$907.39 in restitution. We affirm, in part, and reverse, in part.

### **A. Facts and Procedural Background**

{¶ 2} Appellant was the longtime treasurer of Ai Union Church. It is alleged that during his tenure, appellant took a substantial amount of money from the church by paying his personal expenses from the church's account. Related to these allegations, on January 27, 2012, a complaint was filed that charged appellant with one count of misusing a credit card in one or more transactions on or about May 27, 2010, in violation of R.C. 2913.21(B)(2), a misdemeanor of the first degree. Appellant agreed to plead no contest to the charge in exchange for the state agreeing not to file any additional charges related to appellant's role with the church. The trial court accepted the plea, found the defendant guilty, ordered a presentence investigation report, and set the matter for a sentencing hearing.

{¶ 3} At the sentencing hearing, the trial court heard from a representative of the victim, who estimated that the loss to the church totaled approximately \$28,000 over the 10 years that appellant was treasurer. Appellant also spoke on his own behalf in mitigation, saying only, "I have no money. I'm bankrupt, and I'm on Social Security." Thereafter, the trial court sentenced appellant to 90 days in jail, and ordered him to pay a \$1,000 fine and court costs. The court also scheduled a hearing to determine restitution.

{¶ 4} At the restitution hearing, appellant stipulated to the authenticity of a credit card statement of Ai Union Church for the period of May 1, 2010, to May 28, 2010. The statement contained charges totaling \$907.39. Appellant further stipulated that the

charges on the statement were not authorized by the church. Based on this, the trial court ordered that appellant pay \$907.39 in restitution.

### **B. Assignments of Error**

{¶ 5} Appellant now appeals, assigning two errors:<sup>1</sup>

I. THE TRIAL COURT ABUSED ITS DISCRETION BY IMPOSING A 90 DAY JAIL TERM, \$1000.00 FINE AND COURT COSTS.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY IMPOSING RESTITUTION BASED UPON AN ENTIRE CREDIT CARD STATEMENT.

### **II. Analysis**

{¶ 6} We review misdemeanor sentences for an abuse of discretion. *State v. Ostrander*, 6th Dist. No. F-10-011, 2011-Ohio-3495, ¶ 28. An abuse of discretion connotes that the trial court's attitude is arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

#### **A. Jail Term, Fine, and Court Costs**

{¶ 7} Under his first assignment, appellant presents two arguments in support of his conclusion that the trial court abused its discretion in sentencing him to a 90-day jail term and imposing a \$1,000 fine and court costs.

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<sup>1</sup> Appellant separately appealed the judgment of conviction and the judgment ordering restitution. Those appeals have been consolidated for our review.

{¶ 8} First, appellant argues that the court failed to consider the sentencing factors under R.C. 2929.22(B), and instead considered information not related to the offense to which he pleaded no contest. When sentencing an offender for a misdemeanor offense, a trial court must consider the principles and purposes of misdemeanor sentencing as set forth in R.C. 2929.21, as well as the sentencing factors set forth in R.C. 2929.22. The failure to do so constitutes an abuse of discretion. *State v. Dominijanni*, 6th Dist. No. WD-02-008, 2003-Ohio-792, ¶ 6. However, “when a misdemeanor sentence is imposed within the statutory limits, a reviewing court will presume that the judge followed the statutes, absent evidence to the contrary.” *Ostrander* at ¶ 28, citing *Toledo v. Reasonover*, 5 Ohio St.2d 22, 213 N.E.2d 179 (1965), paragraph one of the syllabus.

{¶ 9} R.C. 2929.22(B)(1) identifies the factors a trial court is to consider when determining an appropriate sentence for a misdemeanor:

- (a) The nature and circumstances of the offense or offenses;
- (b) Whether the circumstances regarding the offender and the offense or offenses indicate that the offender has a history of persistent criminal activity and that the offender’s character and condition reveal a substantial risk that the offender will commit another offense;
- (c) Whether the circumstances regarding the offender and the offense or offenses indicate that the offender’s history, character, and condition reveal a substantial risk that the offender will be a danger to others and that the offender’s conduct has been characterized by a pattern

of repetitive, compulsive, or aggressive behavior with heedless indifference to the consequences;

(d) Whether the victim's youth, age, disability, or other factor made the victim particularly vulnerable to the offense or made the impact of the offense more serious;

(e) Whether the offender is likely to commit future crimes in general, in addition to the circumstances described in divisions (B)(1)(b) and (c) of this section.

In addition, a court may also “consider any other factors that are relevant to achieving the purposes and principles of sentencing set forth in section 2929.21 of the Revised Code.” R.C. 2929.22(B)(2).

{¶ 10} Appellant argues that the trial court impermissibly considered several years' worth of financial documents from the church, and that this was the only reason the trial court sentenced a 75-year-old man, with no prior criminal history, to a 90-day jail term for a misdemeanor theft offense. We disagree, and conclude that the trial court properly considered the financial documents. Appellant's alleged history of taking money from the church is relevant to the nature and circumstances of the offense, his character, and the likelihood that he will commit future offenses. R.C. 2929.22(B)(1)(a)-(c); *see also State v. Townsend*, 5th Dist. No. 09-CAA-11-0096, 2010-Ohio-4417, ¶ 27 (“[A]ppellate courts have consistently held that evidence of other crimes, including

crimes that never result in criminal charges being pursued, may be considered at sentencing.’’) Therefore, we find appellant’s first argument to be without merit.

{¶ 11} Appellant’s second argument is that the trial court abused its discretion when it imposed a \$1,000 fine and court costs because the court failed to determine whether appellant was able to pay, or was likely to be able to pay in the future, the fine and costs. R.C. 2929.28(B) provides, “the 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.” Notably, the imposition of court costs is mandatory, and the trial court is not required to hold a hearing or otherwise determine appellant’s ability to pay before ordering him to pay costs. *State v. Rhoda*, 6th Dist. No. F-06-007, 2006-Ohio-6291, ¶ 13. Regarding the fine, “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.’” *Id.* at ¶ 15, quoting *State v. Reigsecker*, 6th Dist. No. F-03-022, 2004-Ohio-3808, ¶ 11.

{¶ 12} Appellant argues that the only evidence in the record concerning his ability to pay is his own statement at the sentencing hearing that, “I have no money. I’m bankrupt, and I’m on Social Security.” However, the presentence investigation report indicates that in the prior tax year, appellant claimed \$12,000 in social security benefits, and earned an additional \$5,850 from Fay Rush and Associates and the church.

Therefore, we hold that the trial court did not abuse its discretion in ordering appellant to pay the \$1,000 fine and court costs.

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

### **B. Restitution**

{¶ 14} In his second assignment of error, appellant argues that the trial court abused its discretion when it ordered him to pay restitution in the amount of \$907.39.

{¶ 15} The misdemeanor restitution statute, R.C. 2929.28, provides,

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.* (Emphasis added.) R.C. 2929.28(A)(1).

{¶ 16} Appellant, reiterating the same objection he raised in the trial court, argues that requiring him to pay the entire balance from the May 2010 credit card statement is an abuse of discretion because the amount of restitution exceeds the amount of economic loss directly suffered by the victim as a result of his commission of one count of misdemeanor misuse of a credit card. The state, on the other hand, identifies that the narrative of the complaint alleged that “*on or about May 27, 2010,*” appellant used a credit card “*in one or more transactions.*” (Emphasis added.) Thus, the state concludes

that the trial court could award restitution based on all the transactions in the May 2010 statement. We disagree with the state.

{¶ 17} Here, appellant was not charged with multiple counts of misuse of a credit card, nor was he charged with one count based on a series of transactions between two dates. Rather, he was charged with one count for an event that occurred on or about May 27, 2010. The police reports included in the record only reference one incident that occurs in May 2010: a May 27, 2010 charge to Swanton Auto Repair in the amount of \$173.31. Thus, it is clear from the record that this is the offense for which appellant was being charged, and to which appellant pleaded no contest. Therefore, because “a sentence of restitution must be limited to the actual economic loss caused by the illegal conduct for which the defendant was convicted,” the maximum amount the trial court could have awarded in restitution was \$173.31.<sup>2</sup> *State v. Hafer*, 144 Ohio App.3d 345, 348, 760 N.E.2d 56 (4th Dist.2001); *see also* R.C. 2929.28(A)(1). Accordingly, we hold that the trial court abused its discretion when it ordered appellant to pay restitution based on the entire credit card statement.

{¶ 18} Appellant’s second assignment of error is well-taken.

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<sup>2</sup> Notably, as part of the plea agreement, the defendant may agree to pay a greater amount in restitution. *See, e.g., State v. Burns*, 6th Dist. Nos. L-11-1192, L-11-1198, 2012-Ohio-4191, 976 N.E.2d 969 (6th Dist.). However, the record in this case does not reveal that restitution was part of the plea agreement.

### III. Conclusion

{¶ 19} For the foregoing reasons, the judgments of the County Court of Fulton County, Eastern District, are affirmed, in part, and reversed, in part. Pursuant to our authority in App.R. 12(A)(1)(a), we modify the amount of the restitution order to \$173.31. All other aspects of appellant's sentence are affirmed. Costs are to be split evenly between the parties pursuant to App.R. 24.

Judgments 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.

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.  
CONCUR.

JUDGE

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:  
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