

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94639

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

IGNACIO J. ALBERTO

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-528882

BEFORE: Gallagher, J., Blackmon, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: January 20, 2011
ATTORNEYS FOR APPELLANT

Gregory T. Stralka
Crown Centre Suite 600-30
5005 Rockside Road
Cleveland, OH 44131

Scott Eric Bratton
Jason T. Lorenzon
Margaret Wong & Associates Co.
3150 Chester Avenue
Cleveland, OH 44114

Timothy A. Taylor
20800 Center Ridge Road
220 Suburban West Building
Rocky River, OH 44116

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Daniel A. Cleary
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

SEAN C. GALLAGHER, J.:

{¶ 1} Appellant Ignacio Alberto appeals the judgment of the Cuyahoga County Court of Common Pleas. For the reasons set forth herein, we affirm.

{¶ 2} On November 19, 2009, in CR-527474, Alberto pleaded guilty to one count of vandalism, a fifth-degree felony, and the state dismissed one count of possessing criminal tools. On that same date, in CR-528882, Alberto pleaded guilty to six counts of vandalism, all fifth-degree felonies, and 35 counts of criminal damaging, all second-degree misdemeanors. The state dismissed the remaining counts. The trial court stated on the record that as part of the plea deal, Alberto agreed to be jointly and severally liable for restitution in the amount of \$24,845. The trial court ordered a presentence investigation report.

{¶ 3} On December 17, 2009, the trial court held a sentencing hearing. Prior to sentencing, Alberto's attorney spoke on his behalf. She informed the court that Alberto had been working in fast food restaurants, but was now planning to work as a mechanic in order to make more money in order to pay restitution. The court then sentenced Alberto on the vandalism felonies, which included several 12-month sentences, some of which ran concurrent and

some of which ran consecutive, for a total of four years.¹ The court also ordered restitution in the amount of \$24,845, for which Alberto and his codefendant Dennis Bartram would be jointly and severally liable. Alberto filed this appeal, raising two assignments of error for our review.

{¶ 4} “I. The trial court’s imposition of consecutive sentences is contrary to law.”

{¶ 5} In his first assignment of error, Alberto argues that the U.S. Supreme Court’s decision in *Oregon v. Ice* overruled *State v. Foster*, and therefore his consecutive sentences are contrary to law. However, the Ohio Supreme Court recently decided *State v. Hodge*, __ Ohio St.3d __, 2010-Ohio-6320, in which it held, “The United States Supreme Court’s decision in *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517, does not revive Ohio’s former consecutive-sentencing statutory provisions, R.C. 2929.14(E)(4) and 2929.41(A), which were held unconstitutional in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.”² Id. at second paragraph of syllabus.

{¶ 6} Therefore, we find that the trial court’s imposition of consecutive sentences was not error. Alberto’s first assignment of error is overruled.

¹ The trial court sentenced Alberto to 90 days, suspended, on the misdemeanors.

² Alberto’s appeal and brief were filed prior to the Ohio Supreme Court’s ruling in *State v. Hodge* on December 29, 2010.

{¶ 7} “II. The trial court erred by imposing restitution without holding a hearing under R.C. 2929.18.”

{¶ 8} In his second assignment of error, Alberto argues that the trial court erred by imposing restitution without first holding a hearing. After a review of the record, we find this argument is without merit.

{¶ 9} We note that Alberto did not object at his sentencing hearing to the order of restitution or the amount ordered, thus he waived all but plain error. See *State v. Williams*, Cuyahoga App. No. 93625, 2010-Ohio-3418, ¶ 8. Under Crim.R. 52(B), “plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” “Plain error exists only if but for the error, the outcome of the trial clearly would have been otherwise, and is applied under exceptional circumstances and only to prevent a manifest miscarriage of justice.” (Citation and quotations omitted.) *State v. Harrison*, 122 Ohio St.3d 512, 2009-Ohio-3547, 912 N.E.2d 1106, ¶ 61. R.C. 2929.18 allows a trial court to require an offender to pay restitution “to the victim of the offender’s crime or any survivor of the victim, in an amount based on the victim’s economic loss.” The statute further requires that “[i]f the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount.” *Id.* An evidentiary hearing may be required, however, if there is not competent, credible evidence on the record to show the appropriate

amount of restitution. See *State v. Mobley-Melbar*, Cuyahoga App. No. 92314, 2010-Ohio-3177, ¶ 38.

{¶ 10} At the plea hearing, the trial court advised Alberto and his codefendants that part of their plea deal was that they would be ordered to pay restitution to the victims. During its colloquy with all three defendants, the court asked if they understood they would each be responsible for paying restitution as agreed. Each defendant, including Alberto, affirmatively answered that he understood that restitution would be imposed and what his responsibility included.³ At sentencing, Alberto again affirmatively stated that he was being ordered to pay restitution.

{¶ 11} The statute requires a trial court to hold a hearing on restitution only if the offender, victim, or survivor disputes the amount. It is clear from the record that Alberto agreed to the amount at the plea hearing, which stemmed from the agreed plea deal. Furthermore, Alberto acknowledged at sentencing that he intended to work with his father as a mechanic in order to increase his ability to repay the victims.

{¶ 12} In *State v. Myrick*, Cuyahoga App. No. 91492, 2009-Ohio-2030, ¶ 31, this court held that the trial court satisfied the requirements of R.C. 2929.18 when it asked the defendant during the plea colloquy whether she

³ It was agreed that codefendant Carlos Rosario would pay \$4,142, which was separate and apart from the \$24,845 owed by Alberto and Bartram.

understood that restitution had been agreed to between the parties and then stated the amount owed.

{¶ 13} The trial court here engaged Alberto in the identical colloquy, and Alberto acknowledged at both the plea and sentencing hearings that he understood he owed restitution and the amount for which he would be held jointly and severally liable. The trial court did not err in failing to hold a hearing on restitution. Alberto's second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, JUDGE

PATRICIA A. BLACKMON, P.J., and
JAMES J. SWEENEY, J., CONCUR