[Cite as *State v. Latimore*, 2015-Ohio-522.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101321

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOHN LATIMORE, III

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-581091-A

BEFORE: McCormack, J., Celebrezze, A.J., and Stewart, J.

RELEASED AND JOURNALIZED: February 12, 2015

ATTORNEY FOR APPELLANT

Kelly A. Gallagher
P.O. Box 45551
Westlake, OH 44145

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor

By: Justine Dionisopoulos
Assistant County Prosecutor
9th Floor, Justice Center
1200 Ontario Street
Cleveland, OH 44113

TIM McCORMACK, J.:

{¶1} Defendant-appellant, John Latimore, III, was convicted of criminal nonsupport. The trial court ordered him to pay the full amount of his child support arrearage as a condition of his community control. On appeal, Latimore claims the trial court actually imposed the payment of support as restitution, and, as such, the amount could not exceed his arrearage during the indictment period. Finding no merit to his claim, we affirm the trial court's decision.

I.

{¶2} Latimore pleaded guilty to criminal nonsupport, an offense in violation of R.C. 2919.21(A)(2), a fifth-degree felony. Latimore's child support arrearage was $6,718 between January 1, 2009, to December 31, 2010, the period covered in the indictment, but his full support arrearage was $8,240.97.

{¶3} The sentencing transcript reflects that the trial court sentenced Latimore to five years of community control and ordered him to pay the entire arrearage of $8,240.97. However, the trial court inadvertently referred to the financial sanction of $8,240.97 as "restitution" at one point at the sentencing hearing. In its judgment entry, the trial court again referred to the payment of $8,240.97 as restitution. The court, however, subsequently issued a nunc pro tunc entry, adding the clarification that the payment of $8,240.97 is a condition of community control.

II.

{¶4} On appeal, Latimore raises one assignment of error: "The trial court committed prejudicial error when it ordered restitution in the amount of $8,240.97, the alleged full amount of the child support arrearage, instead of the amount of non-support during the period of his conviction."

{¶5} The initial issue presented in this appeal is whether the trial court could order the entire child support arrearage to be paid as a condition of community control for a defendant found guilty of criminal nonsupport. The state argues that pursuant to the case law authority, this is permitted. Latimore argues instead that the trial court ordered the payment of $8,240.97 as "restitution," and therefore, could only impose the arrearage accrued during the indictment period.

{¶6} It is well settled that pursuant to R.C. 2929.18(A)(1), when the trial court orders a defendant guilty of nonsupport to pay *restitution* as part of the sentence, the amount could not exceed the child support arrearage that accrued during the time frame of the criminal nonsupport offense. *See State v. Wiley*, 8th Dist. Cuyahoga No. 99576, 2014-Ohio-27, ¶ 80; *State v. Truitt*, 10th Dist. Franklin No. 10AP-795, 2011-Ohio-2271; *State v. Schul*, 12th Dist. Butler No. CA2009-08-215, 2010-Ohio-1285.

{¶7} Several of our sister districts have also concluded that, although the trial court could not order the defendant to pay, as *restitution*, the entire support arrearage, the trial court has the discretion to order the payment of the entire arrearage as a condition of the community control. *State v. Stewart*, 10th Dist. Franklin No. 04AP-761, 2005-Ohio-987, ¶10; *Schul*, *supra*, at ¶ 8; *State v. Scates*, 2d Dist. Montgomery No. 25825, 2014-Ohio-1284, ¶5; *State v. Christenson*, 5th Dist. Delaware No. 99CA-A-02-006, 1999 Ohio App. LEXIS 6544 (Oct. 25, 1999). We find the authority of our sister districts to be persuasive. As the Tenth District reasoned in *Stewart*, in determining whether community control conditions are reasonably related to the goals of community control, the courts consider whether a condition "(1) is reasonably related to rehabilitating the offender, (2) has some relationship to the crime of which the offender was convicted, and (3) relates to conduct which is criminal or reasonably related to future

criminality and serves the statutory ends of probation [community control]." *Stewart* at ¶ 8, quoting *State v. Jones*, 49 Ohio St.3d 51, 53, 550 N.E.2d 469 (1990). Under these criteria, the Tenth District determined that ordering a nonsupport defendant to pay the entire arrearage would be an appropriate condition of community control, even where the payment imposed included child support arrearage accrued outside the time period covered by the indictment. *Stewart* at ¶ 9-10.

{¶8} Pursuant to the case law authority, therefore, whether a defendant could be ordered to pay the entire arrearage — as opposed to the arrearage accrued during the time period of the indictment — depends on whether the trial court ordered the payment as restitution or a condition of community control.

III.

{¶9} The second issue presented in this appeal is: what exactly did the trial court impose in this case — did it order Latimore to pay the entire support arrearage as restitution, or as a condition of his community control?

{¶10} Our review of the transcript of the plea hearing reflects that the trial court advised Latimore that if he pleaded guilty to the offense he would have to pay "restitution" "somewhere in the neighborhood of $8,051.33." Latimore indicated that he understood the consequence of his guilty plea. At sentencing, Latimore's counsel asked the trial court to order restitution equal to the amount owed during the period of the indictment, $6,178. The state, however, requested that the court impose the entire amount of arrearage, $8,240.97, as a condition of his community control sanction.

{¶11} At the sentencing hearing, the trial court ordered Latimore to pay $8,240.97 as part of his community control sanctions and advised him that once he pays off the entire amount, he

could request his community control be terminated early. The trial court, however, inadvertently mixed up the terminology and referred to the payment as "restitution." But, later at the sentencing hearing, the court correctly recited the case law and stated that, pursuant to *Stewart*, "while restitution may be the amount that's included in the indictment, a court is permitted to order the entire arrearage as a condition of [community control]." After citing the case law authority, the trial court clarified that it imposed the entire arrearage as a condition of community control, taking care to state that it was "technically not a restitution." In its judgment entry, however, the trial court again inadvertently referred to the amount of $8,240.97 as restitution. To correct the inadvertent error, the trial court subsequently issued a nunc pro tunc entry to reflect that the amount of $8,240.97 was imposed as a condition of community control.

{¶12} The trial court has the discretion to order the payment of the total support arrearage as a condition of community control. Our review of the sentencing transcript indicates that the trial court in this case exercised that discretion and imposed the full arrearage as part of Latimore's community control sanction. Although it inadvertently referred to the financial sanction as "restitution" in the sentencing entry, its subsequent nunc pro tunc entry correctly reflected what was actually imposed at sentencing.

{¶13} The assignment of error is without merit.

{¶14} Judgment affirmed.

It is ordered that appellee recover of 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. 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.

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TIM McCORMACK, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
MELODY J. STEWART, J., CONCUR