

[Cite as *State v. Fuller*, 2015-Ohio-523.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101325

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

AARON SHORT FULLER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-577887-A

BEFORE: Boyle, J., Keough, P.J., and E.A. Gallagher, J.

RELEASED AND JOURNALIZED: February 12, 2015

ATTORNEY FOR APPELLANT

Thomas A. Rein
Leader Building, Suite 940
526 Superior Avenue
Cleveland, Ohio 44114

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor
BY: Justine Dionisopoulos
Assistant County Prosecutor
9th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

MARY J. BOYLE, J.:

{¶1} Defendant-appellant, Aaron Fuller, appeals from his sentence, raising the following two assignments of error:

I. The trial court committed prejudicial error when it ordered restitution in the amount of \$29,603.44, the alleged full amount of the child support arrearage, instead of the amount of non-support during the period of his conviction.

II. The trial court erred by ordering appellant to make child support payments in the amount of \$500.62 per month without properly determining appellant's ability to pay.

{¶2} We affirm the trial court's judgment but remand for the limited purpose to correct the sentencing entry by a nunc pro tunc to accurately reflect the court's decision at the sentencing hearing.

Procedural History and Facts

{¶3} In September 2013, Fuller was indicted on a single count of criminal nonsupport in violation of R.C. 2919.21(B), a fifth-degree felony. The indictment alleged that Fuller recklessly failed to provide support, as established by a court order, to his daughter from October 1, 2005 to September 30, 2007.

{¶4} In February 2014, Fuller pleaded guilty to the single count of the indictment. At the plea hearing, the state indicated that it would be seeking restitution in the amount of \$29,593.63, but that the parties had not reached an agreement as to that amount. After accepting Fuller's guilty plea, the trial court referred the matter to the court's probation department to prepare a presentence investigation report prior to sentencing.

{¶5} On April 2, 2014, one day prior to the sentencing hearing, the state filed a sentencing memorandum, asking the court to impose the maximum term of five years of community control sanctions and require Fuller to pay \$500.62 per month for child support

(\$490.80 towards the arrears and \$9.82 per month for administrative fees). The state also requested that Fuller “as a condition of his supervision, pay his child support arrears in the amount of \$29,603.44.”

{¶6} At the sentencing hearing, the court indicated that it had reviewed the presentence investigation report and asked if any corrections needed to be made to the report. Fuller’s counsel indicated “none” to her knowledge. The presentence investigation report states that Fuller has a total of “\$29,603.44 in back child support” for his daughter, who is now emancipated. According to information received from the child support enforcement agency, Fuller is ordered to pay a monthly amount of \$500.62 for the arrearage and administrative fee.

{¶7} The trial court heard arguments from each side as to the appropriate sentence, including a restitution order. Fuller argued that any restitution order for child support arrearage was limited to the two-year time period covered in the indictment. The state conceded that the trial court could not order the full amount of arrearage as *restitution* but urged the court to order payment of the total arrearage as a condition of community control. Fuller objected to the trial court’s authority to impose an order of payment that may conflict with another court’s order and further requested that the trial court hold a hearing on his ability to pay if it was inclined to order payment of the total arrearage.

{¶8} The court indicated that it would not be necessary to conduct a hearing on Fuller’s ability to pay because “it would be directly contrary to what the Juvenile Court has determined his arrearages to be and what he should be able to pay.”

{¶9} The prosecutor clarified the state’s position, indicating that the state wants the trial court to order Fuller to follow the juvenile order as a part of his community control sanctions.

{¶10} After addressing Fuller, the trial court stated that

if and when the Juvenile Court modifies the order, which may include reducing the monthly payment based upon the W-2 that you're supposed to be supplying to them at the hearing on the 28th then, as [prosecutor] has indicated, that information will come back to the Probation Department here at which time an adjustment can be made. This court will be notified of any reduction in the monthly requirement and we can consider that in terms of any potential probation violation.

{¶11} The trial court then proceeded to sentence Fuller to five years of community control under the supervision of the adult probation department. The court further ordered full payment of the arrearages of \$29,603.44, which would require that monthly payment of \$500.62.

The court further indicated that it is not ordering the total arrearage payment as restitution but as a condition of community control.

{¶12} Following the sentencing hearing, the trial court issued a journal entry, sentencing Fuller to five years of community control, under the supervision of the adult probation department's nonsupport unit with several conditions, including the "making of monthly child support payments as directed." The court further stated that "violation of the terms and condition may result in more restrictive sanctions, or a prison term of 12 months as approved by law." The court further ordered that "\$500.62 must be paid per month in accordance with the order of the Juvenile Court." Contrary to what the trial court stated at the sentencing hearing, the trial court also ordered that Fuller pay restitution in the amount of \$29,603.34.

Restitution

{¶13} In his first assignment of error, Fuller argues that the trial court abused its discretion in ordering him to pay restitution in the amount of \$29,603.44 — the alleged full amount of child support arrearage — instead of the amount of arrearage that accrued solely during the period of the offense as stated in the indictment.

{¶14} Under R.C. 2929.18(A)(1), an order of restitution is limited to the amount of economic loss suffered by the victim as a result of the offender's commission of the offense. As this court has previously recognized, the permissible amount of restitution in criminal nonsupport cases is limited to the child support arrearage that accrued during the time frame of the charges of which the defendant was convicted. *State v. Wiley*, 8th Dist. Cuyahoga No. 99576, 2014-Ohio-27, ¶ 80. Thus, a trial court cannot order as restitution any amount of child support arrearage that exceeds the time period of the offense as stated in the indictment. *Id.*

{¶15} Several of our sister courts have recognized, however, that the total amount of child support arrearage — even that which exceeds the time period of the offense — may be ordered as a condition of community control. *See, e.g., State v. Teegarden*, 2d Dist. Montgomery No. 24960, 2012-Ohio-3488; *State v. Turns*, 10th Dist. Franklin No. 10AP-740, 2011-Ohio-1497; *State v. Schul*, 12th Dist. Butler No. CA2009-08-215, 2010-Ohio-1285; *State v. Christenson*, 5th Dist. Delaware No. 99CA-A-02-006, 1999 Ohio App. LEXIS 6544 (Oct. 25, 1999). Indeed, “[a] trial court has discretion to impose conditions of community control that (1) relate reasonably to rehabilitating the offender, (2) relate to the crime for which the offender was convicted, and (3) relate to conduct that is criminal or to future criminality and serve the ends of probation.” *State v. Stewart*, 10th Dist. Franklin No. 04AP-761, 2005-Ohio-987, ¶ 12, citing *State v. Jones*, 49 Ohio St.3d 51, 53, 550 N.E.2d 469 (1990). These courts recognize that the requirement that an offender of felony nonsupport make payments on his total arrearage would satisfy the *Jones* criteria, even though such an amount goes beyond a permissible amount of restitution. *Teegarden* at ¶ 12.

{¶16} In *Wiley*, this court did not address the issue of whether a trial court can order the full payment of child support arrearage, even if it exceeds the indictment period, as a condition of

community control sanctions. We find the rationale of our sister courts persuasive and choose to follow it.

{¶17} Here, the trial court's statements at the sentencing hearing indicate that it intended the payment of the total arrearage as a condition of the community control sentence and not to be a restitution order. The journal entry, however, includes an order of restitution for the total amount of arrearage.

{¶18} Fuller asks this court to reverse and remand with instructions for the trial court to impose restitution limited to the two-year period covered in the indictment. Given the trial court's statements at sentencing, however, we remand this matter to the trial court for it to correct its order through a nunc pro tunc entry to reflect what it stated at sentencing. *See State v. Francys*, 8th Dist. Cuyahoga Nos. 101069, 101070, and 101071, 2014-Ohio-3597, ¶ 5, citing *State v. Steinke*, 8th Dist. Cuyahoga No. 81785, 2003-Ohio-3527, ¶ 47 ("clerical errors may be corrected at any time in order to conform to the transcript of the sentencing hearing"); *see also State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 30 (sentencing entry may be corrected nunc pro tunc when the trial court made findings at sentencing hearing but inadvertently failed to incorporate them in journal entry). And contrary to Fuller's argument on appeal, the trial court acted within its authority by ordering the payment of the total child support arrearage as a condition of Fuller's community control sanctions.

{¶19} The first assignment of error is sustained in part and overruled in part.

Ability to Pay

{¶20} In his second assignment of error, Fuller argues that the trial court erred by ordering him to make child support payments in the amount of \$500.62 per month without first determining his ability to pay. We find this argument to lack merit.

{¶21} In support of his argument, Fuller relies on R.C. 2929.18 and 2929.19, which he claims prohibits a trial court from ordering restitution beyond the economic loss suffered by the victim and that a trial court must consider the offender's present and future ability to pay the amount of the sanction or fine. Fuller's argument, however, confuses the trial court's order.

{¶22} Here, the trial court did not unilaterally determine that Fuller should pay \$500.62 per month as a restitution order. Instead, the trial court ordered Fuller, as a condition of his community control sanctions, to comply with the juvenile court order that requires him to pay that amount for his child support arrearage. We find no basis to conclude that the trial court abused its discretion in imposing such a condition. *See Teegarden*, 2d Dist. Montgomery No. 24960, 2012-Ohio-3488 (the requirement that defendant pay court-ordered support is simply a specific application of R.C. 2929.15(A)(1), which already requires that "the offender must abide by the law" during the period of community control sanctions). Notably, according to the record, this amount was predetermined by the child support enforcement agency — the proper entity to determine such a payment. *See State v. Marcum*, 7th Dist. Columbiana No. 06-CO-46, 2008-Ohio-1038 (recognizing that the CSEA — not the sentencing court — is to set the amount of the payments on child support arrearage, even when the payment is ordered as a condition of probation). The trial court has no duty to consider Fuller's ability to pay his court-ordered support when ordering him to pay it as a condition of his community control sanctions.

{¶23} The second assignment of error is overruled.

{¶24} Judgment affirmed. Having sustained the first assignment of error in part, we remand for the trial court to issue a nunc pro tunc order to reflect what it said at sentencing, ordering that Fuller pay the full amount of child support arrearage as a condition of his

community control sanctions and not as a separate restitution order.

It is ordered that appellee and appellant share the 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 Cuyahoga County Court of Common Pleas to carry this judgment into execution.

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

MARY J. BOYLE, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
EILEEN A. GALLAGHER, J., CONCUR