

[Cite as *State v. Kinser*, 2015-Ohio-684.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101409

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BRANDEN KINSER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-11-554942-A, CR-11-554943-A, and CR-11-555045-B

BEFORE: Boyle, J., McCormack, P.J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: February 26, 2015

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MARY J. BOYLE, J.:

{¶1} Defendant-appellant, Branden Kinser, appeals his sentence in connection with three separate cases, raising the following single assignment of error:

The trial court erred by imposing a community control sanction in the form of restitution without first ordering and reviewing a presentence investigation report as required by R.C. 2951.03(A)(1) and Crim.R. 32.2.

{¶2} Finding no merit to the appeal, we affirm.

Procedural History and Facts

{¶3} Kinser was indicted in three separate cases with aggravated robbery, aggravated burglary, having weapons while under disability, kidnapping, breaking and entering, grand theft, vandalism, and possessing criminal tools.

{¶4} Kinser and the state reached a global plea agreement with respect to all three cases, which involved different victims and separate offenses. In Cuyahoga C.P. No. CR-11-554943, Kinser pleaded guilty to an amended charge of robbery, a violation of R.C. 2911.02(A)(1), which carried a one-year firearm specification, and having weapons while under disability, a violation of R.C. 2923.13(A)(3).

{¶5} In Cuyahoga C.P. No. CR-11-554942, Kinser pleaded guilty to an amended charge of robbery, a violation of R.C. 2911.02(A)(1), which carried a one-year firearm specification. Kinser also agreed to pay \$800 in restitution to the victim. In Cuyahoga C.P. No. CR-11-555045, he pleaded guilty to an amended charge of breaking and entering, a violation of R.C. 2911.13, and grand theft, a violation of R.C. 2913.02. Due to the damage and items stolen from the victim's jewelry store, Kinser also agreed as part of his plea deal to pay full restitution in the amount of \$88,000.

{¶6} Prior to accepting Kinser's guilty plea, the trial court inquired as to his level of education, learning that Kinser attended school until the 10th grade. After fully complying with

Crim.R. 11, the trial court accepted Kinser's guilty plea in each case and proceeded directly to sentencing.

{¶7} Before imposing a sentence, the trial court heard from Kinser and his attorney. The record reveals that prior to picking up the charges in each case, Kinser was employed doing home improvement work.

{¶8} The trial court ultimately imposed a seven-year prison sentence and informed Kinser that he was subject to three years of postrelease control. The trial court further ordered that Kinser pay restitution in the amount of \$88,000 in Case No. CR-11-555045 and \$800 in Case No. CR-11-554942 as agreed by the parties.

{¶9} Kinser now appeals his sentence.

Presentence Investigation Report

{¶10} In his sole assignment of error, Kinser argues that the trial court erred in ordering him to pay restitution without first ordering a presentence investigation report. He contends that the order of restitution was a community control sanction that is subject to R.C. 2951.03(A)(1) and Crim.R. 32.2. Kinser's argument, however, is misplaced.

{¶11} R.C. 2951.03(A)(1) provides that "[n]o person who has been convicted of or pleaded guilty to a felony shall be placed under a community control sanction until a written presentence investigation report has been considered by the court." Similarly, Crim.R. 32.2 states that "[i]n felony cases the court shall * * * order a presentence investigation and report before imposing community control sanctions or granting probation."

{¶12} Kinser's argument is based on the faulty premise that the trial court imposed community control sanctions, including an order of restitution as a condition of such community control sanctions. But this is simply not the case. The trial court here imposed a seven-year

prison term under R.C. 2929.14, along with an order of restitution under R.C. 2929.18. The court, however, did not impose a sentence of community control sanctions (in lieu of prison) under R.C. 2929.15, which then would have required it first obtaining a presentence investigation report.

{¶13} As observed by the Ohio Supreme Court, “the plain text of Crim.R. 32.2 and R.C. 2951.03(A)(1) * * * places an unavoidable duty on the trial court to obtain a presentence investigation report in every felony case in which a prison sentence is not imposed.” *State v. Amos*, 140 Ohio St.3d 238, 2014-Ohio-3160, 17 N.E.3d 528, ¶ 15. The *Amos* court specifically identified felony cases where a prison term is not imposed. *Id.* The *Amos* holding does not apply when the trial court imposes a prison term.

{¶14} Here, R.C. 2929.18 allows a trial court to order restitution as part of the sentence. The statute places no affirmative duty on the trial court to order a presentence investigation report. R.C. 2929.19(B)(6) requires that, before imposing a financial sanction under R.C. 2929.18, the trial court “shall consider the offender’s present and future ability to pay * * *.” The record before us reveals that the trial court did this before ordering Kinser to pay the restitution. Indeed, the trial court confirmed that Kinser agreed to pay the restitution amount. That evidence coupled with other evidence related to Kinser’s ability to work reveals that the trial court satisfied the requirement of R.C. 2929.19(B)(6) before ordering the restitution.

{¶15} The sole assignment of error is overruled.

{¶16} Judgment affirmed.

It is ordered that appellee recover from appellant 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 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.

MARY J. BOYLE, JUDGE

TIM McCORMACK, P.J., and
EILEEN T. GALLAGHER, J., CONCUR