[Cite as *State v. LaChance*, 2015-Ohio-2609.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2014-P-0026**
- vs -	:	
JEFFREY A. LACHANCE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 2013 CR 0378.

Judgment: Modified and affirmed as modified.

Victor v. Vigluicci, Portage County Prosecutor, and *Kristina Drnjevich,* Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Chris Wells, P.O. Box 1487, Stow, OH 44224 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Jeffrey A. LaChance, appeals his sentence in the Portage County Court of Common Pleas, following his guilty plea to operating a vehicle under the influence of alcohol. At issue is whether the trial court committed plain error in imposing restitution for an offense that was dismissed as part of the plea bargain. For the reasons that follow, we modify the sentence and affirm as modified.

{¶2} On June 20, 2013, appellant was charged in a three-count indictment with operating a vehicle under the influence of alcohol (OVI), having previously been

convicted of felony OVI, a felony of the third degree (Count One); operating a vehicle with a prohibited blood-alcohol concentration, having previously been convicted of felony OVI, a felony of the third degree (Count Two); and breaking and entering, a felony of the fifth degree (Count Three). Appellant pled not guilty.

{¶3} On July 3, 2013, Counts One and Two were amended to include a specification that appellant was previously convicted of five or more OVI offenses within 20 years of the current offense, in violation of R.C. 2941.1413. He pled not guilty to the charges in the amended indictment.

{¶4} On July 19, 2013, appellant pled guilty to Count One, OVI, as charged, with the specification of having previously been convicted of five or more OVI offenses within the last 20 years. Pursuant to the plea bargain, the remaining counts were dismissed. The court found appellant guilty, and referred him to the probation department for a pre-sentence investigation and report.

{¶5} At sentencing, which was held on September 3, 2013, the trial court considered the facts as provided by counsel and the police report filed in this case. The victim, Charles LaFrance, and appellant are brothers. They had been quarreling for some time regarding the care of their elderly mother, who suffers from Alzheimer's disease. Charles has his mother's power of attorney, and his application to be appointed her guardian is pending. Appellant is 60 years old. He has a serious alcohol problem and a long history of criminal convictions. He and several "stragglers" had been squatting at his mother's home. Charles filed eviction proceedings against appellant to remove him from the home. A notice of eviction was issued by the court,

and the Portage County Sheriff's Office served it on appellant on May 30, 2013. Charles changed the locks on the doors of their mother's home.

{¶6} On or about June 14, 2013, Charles noticed the door knob and lock assembly had been removed from the entrance door to his mother's house. On May 30, 2013, he discovered that several tools and firearms that had belonged to his father were missing. The day before that, a neighbor told Charles that she saw appellant's truck in his mother's driveway. Charles suspected appellant had stolen these items, and called the Sheriff's Office to report a breaking and entering. A Sheriff's deputy responded. As the deputy was taking Charles' report, Charles saw appellant driving down the street in his truck and yelled, "That's him!" The deputy activated his overhead lights and siren. After the deputy pursued appellant for about one mile, he pulled over. The deputy approached appellant and smelled a strong odor of alcohol emanating from him. The deputy saw appellant's eyes were bloodshot and glassy and appellant had difficulty maintaining his balance. After appellant failed field sobriety tests, he was arrested for OVI and breaking and entering. His passenger was also intoxicated, but released at the scene. Appellant admitted he took the door knob and lock assembly off the front door of his mother's house because his brother had changed the locks. Appellant said he took it to a locksmith to have a key made so he could have access to his mother's house.

{¶7} The deputy found many empty and unopened cans of beer inside appellant's truck. He also found a chainsaw in appellant's truck bed that Charles had reported as missing and the deputy returned it to him. Appellant's BAC test result was .153, nearly twice the legal limit.

{¶8} The probation department stated in its report that the amount of restitution as to Count Three, Breaking and Entering, was $15,025. The report said this amount was "per Victim & Family," but no breakdown was provided.

{¶9} The court noted that appellant scored very high on the Ohio Risk Assessment System test, and found that appellant has a "very high risk of re-offending."

{¶10} The court noted appellant's extensive criminal history. Although the court said this was appellant's sixth OVI conviction, the probation report shows this is his eleventh. The report also shows he has prior convictions for criminal damaging, criminal trespass, telephone harassment, and sexual imposition.

{¶11} The court sentenced appellant to three years in prison for the OVI conviction and three years for the specification, the two terms to be served consecutively to each other, for a total of six years in prison. The court also ordered appellant to pay restitution in the amount of $15,025 to Charles within 15 years. (For reasons unknown, the sentencing entry ordered restitution in the amount of $15,500.)

{¶12} Appellant did not timely file a direct appeal. Instead, more than eight months after his sentence, on May 23, 2014, he filed a motion for leave to file a delayed appeal and a notice of appeal. This court granted his motion. Appellant now appeals, asserting the following for his sole assignment of error:

{¶13} "The trial court committed error when it ordered restitution in this case, when Defendant-Appellant's sole conviction was a charge of DUI (with specification) and the restitution was related to a Breaking and Entering charge, which was dismissed."

{¶14} The only portion of appellant's sentence that he appeals is the court's order of restitution.

{¶15} Following the enactment of H.B. 86, this court adopted the standard of review set forth in R.C. 2953.08(G)(2) when reviewing felony sentences. *State v. Moore*, 11th Dist. Geauga No. 2014-G-3183, 2014-Ohio-5182, ¶25-29. R.C. 2953.08(G)(2) provides that an appellate court can modify a sentence or vacate the sentence and remand the matter to the sentencing court for resentencing if the appellate court clearly and convincingly finds that the record does not support the sentencing court's findings or that the sentence is otherwise contrary to law.

{¶16} R.C. 2929.18(A) permits a trial court imposing a sentence for a felony to order the offender to pay any financial sanction authorized by law. Among the sanctions R.C. 2929.18(A) authorizes is restitution. R.C. 2929.18(A)(1) allows the sentencing court to order "restitution by the offender to the victim of the offender's crime * * * in an amount based on the victim's economic loss."

{¶17} "Generally, an offender cannot be ordered to pay restitution for damages attributed to an offense for which the offender was charged, but not convicted." *State v. Strickland*, 10th Dist. Franklin No. 08AP-164, 2008-Ohio-5968, ¶11; *State v. Ellis*, 4th Dist. Washington No. 02CA48, 2003-Ohio-2243, ¶8. "Accordingly, as a general rule, restitution is limited to the economic loss caused by the illegal conduct for which the defendant was convicted." *Strickland, supra*.

{¶18} However, the law allows restitution for damages related to dismissed charges where restitution is part of a defendant's plea bargain. *Id*. at ¶12; *Ellis, supra*. Ohio courts have upheld a trial court's order that a defendant pay restitution relating to

dismissed charges where (1) the defendant entered a plea bargain in which he agreed to plead guilty to some charges contained in the indictment in exchange for the dismissal of others, and (2) the defendant agreed, as part of the plea bargain, to pay restitution to the victim for damages caused by his conduct for which criminal charges were dismissed under the plea bargain. *Strickland, supra*, citing *State v. Rosebrook*, 3d Dist. Logan No. 8-05-07, 2006-Ohio-734, ¶20 (affirming restitution order where defendant pled guilty to nine counts of indictment in exchange for dismissal of 16 counts and defendant agreed to pay restitution in connection with the dismissed counts); *State v. Weatherholtz*, 3d Dist. Auglaize No. 2-04-47, 2005-Ohio-5269, ¶6 (affirming restitution order where defendant pled guilty to misuse of credit card in exchange for dismissal of theft charge and he agreed to pay restitution as to all charges).

{¶19} Appellant did not object to the trial court's restitution order at sentencing. He therefore waived the issue, except for plain error. *State v. Leslie*, 4th Dist. Hocking Nos. 10CA17 and 10CA18, 2011-Ohio-2727, ¶27. In *Leslie*, the Fourth District applied this standard of review to a restitution order to which the defendant did not object at the trial court level, holding the defendant waived all but plain error. *Id*. As a result, we review appellant's argument on appeal under the plain-error standard of review. "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B).

{¶20} Plain error exists only where there is a deviation from a legal rule; the error constitutes an "obvious" defect in the trial proceeding; and the error affected a defendant's "substantial rights." *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002).

{¶21} Because the court ordered restitution for breaking and entering, which was dismissed pursuant to the plea bargain, the trial court committed plain error by ordering appellant to pay restitution. Thus, the court's order of restitution was contrary to law.

{¶22} We note that in appellant's Written Plea of Guilty, he stated: "I understand that the Court can impose financial sanctions including, but not limited to, ordering me to pay court costs and make restitution." However, while the written plea states that the court can order appellant to pay restitution, this is standard language in the written guilty plea form and did not reflect an agreement between the parties. In fact, nothing in the guilty plea transcript or the sentencing transcript suggests the parties agreed that appellant would be required to pay restitution.

{¶23} Moreover, the state agrees the trial court erred in ordering appellant to pay restitution, and asks this court to remand for the trial court to address the restitution order. However, we see no need for a remand. Because we hold the trial court's order of restitution is contrary to law and appellant does not challenge the remainder of his sentence, we hereby modify appellant's sentence by vacating the restitution order. The remainder of appellant's sentence shall remain in full force and effect.

{¶24} For the reasons stated in the opinion of this court, it is the judgment and order of this court that the judgment of the Portage County Court of Common Pleas is hereby modified and affirmed as modified.

THOMAS R. WRIGHT, J.,

COLLEEN MARY O'TOOLE, J.,

concur.