**[Cite as *State v. Blas*, 2018-Ohio-2461.]**

**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. 2017-P-0030** |
| - vs - | : | |
| WILLIAM G. BLAS, | : | |
| Defendant-Appellant. | : | |

Criminal Appeal from the Portage County Court of Common Pleas.
Case No. 2016 CR 00395.

Judgment: Reversed and remanded.

*Victor V. Vigluicci*, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

*Eugene Fehr*, Portage County Public Defender's Office, 209 South Chestnut Street, Suite 400, Ravenna, OH 44266 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

**{¶1}** Appellant, William G. Blas, appeals from the May 22, 2017 restitution order of the Portage County Court of Common Pleas. For the following reasons, the trial court's order is reversed, and the case is remanded.

**{¶2}** On June 10, 2016, appellant was involved in an incident resulting in his striking with his car the digital sign in front of Ravenna High School, damaging the sign and surrounding brickwork.

**{¶3}** As a result of that incident, appellant was indicted by the Portage County Grand Jury on three counts of Felonious Assault, second-degree felonies in violation of R.C. 2903.11(A)(2) (Counts 1-3), and one count of Vandalism, a fifth-degree felony in violation of R.C. 2909.05(B)(2) (Count 4). Appellant initially entered a plea of not guilty to the charges.

**{¶4}** He later entered into a written plea agreement with appellee, the state of Ohio. The plea agreement states appellant is pleading guilty to "Amended Counts 1 & 2 * * * each a charge of 'Endangering Children,' a misdemeanor of the 1st degree * * * [and] Count #4 Vandalism, a felony of the 5th degree in violation of ORC 2909.05(B)(2)." At appellant's plea hearing, the following exchange took place:

> **The Court:** All right. Then regarding counts one and two * * * I will grant the State's motion to amend those two charges, count one and two, to endangering children, misdemeanors of the first degree.
>
> As amended, how do you plea to both of those counts?
>
> **Appellant:** Guilty.
>
> **The Court:** And count four, which is vandalism, a felony of the fifth degree, how do you plea?
>
> **Appellant:** Guilty.

The trial court accepted the guilty plea and ordered a Pre-Sentence Investigation ("PSI").

**{¶5}** The September 7, 2016 judgment entry from the plea hearing states that appellant entered a written plea of guilty to "Amended Counts One and Two * * * and Count Four, 'Vandalism,' a felony of the *fourth* degree, and in violation of R.C. 2909.05(B)(2)." (Emphasis added.)

**{¶6}** At appellant's sentencing hearing, the trial court sentenced appellant to twelve months in the Ohio Department of Corrections for the crime of Vandalism and six

months on each of the two Endangering Children counts in the Portage County Jail to run concurrently with each other and concurrently with the Vandalism for a total of one year. The trial judge suspended appellant's sentence on the condition he completed community control. The parties discussed restitution regarding damages to the Ravenna High School sign. The state recommended the trial court order $37,737.00 to Liberty Mutual Insurance Company and $500 to the Ravenna School District. Those amounts were based on the PSI. Defense counsel questioned whether the court could order restitution to an insurance company. The trial judge stated: "I am going to order the full amount of $37,737.00 to Liberty Mutual and $500.00 to the Ravenna School District. If [defense counsel] provide me information otherwise, then I'll reevaluate that." The record is devoid of any motion regarding restitution filed by defense counsel following the sentencing hearing.

**{¶7}** The trial court filed its entry of sentence on December 21, 2016. The trial court sentenced appellant to community control sanctions through the Portage County Adult Probation Department and ordered appellant to complete the Repeat Offender Cognitive Intervention Program, seek and maintain full-time employment, and continue mental health treatment. The court ordered appellant to pay restitution as stated at the sentencing hearing. Appellant was also ordered to pay court costs.

**{¶8}** A restitution hearing was held on February 13, 2017, at defense counsel's request. William Wisniewski, the Director of Operations for Ravenna School District, testified regarding the damages to the sign, the repairs done, and the costs incurred. He also provided documents corroborating the expenses. The trial court found the total cost of cleanup and repairs was $47,621.04. Mr. Wisniewski testified the Ravenna School District submitted invoices to its insurance company and received a settlement check from

Liberty Mutual Insurance in the amount of $37,237.00. In total, the school district paid $10,384.04 out of pocket. Mr. Wisniewski testified the school district had not received any money from appellant's insurance or directly from appellant.

**{¶9}** The trial court ordered the parties to submit briefs on the issue of restitution. In its brief, the state argued the Ravenna School District was entitled to $47,621.04 in restitution for the full amount of loss suffered, including the amount covered by its insurance provider. In response, appellant argued he should be ordered to pay only $10,384.04, the amount the school district paid out of pocket.

**{¶10}** On May 22, 2017, after the hearing and briefing by the parties, the trial court modified its original restitution order and ordered appellant to pay restitution of $47,621.04 to the Ravenna School District through the Adult Probation Department. The court also considered appellant's ability to pay restitution, stating "that defendant is able to pay or in the future will be able to pay the financial sanction of restitution. The PSI indicates the defendant has been employed previously, and has no present physical ailments which would limit his ability to work."

**{¶11}** Regarding appellant's guilty plea to the charge of Vandalism, the entries from September 7 and December 21, 2016, and the entry from May 22, 2017 state appellant entered a written plea of guilty to felony Vandalism in the *fourth degree*. This statement of the plea is different from the written plea agreement and the trial court's statements at appellant's plea hearing, both of which indicate the charge of Vandalism was a *fifth-degree* felony. Although these discrepancies appear to be clerical errors, we must remand this matter to the trial court for clarification.

**{¶12}** Appellant noticed a timely appeal from the May 22, 2017 restitution order and presents two assignments of error for our review. They state:

> [1.] The trial court erred in ordering Defendant-Appellant to pay restitution that exceeds the victim's economic loss.
>
> [2.] The trial court erred in its determination that Appellant has the ability or will have the ability to pay the restitution amount.

**{¶13}** We believe the standard of review set out in R.C. 2953.08(G)(2) applies to felony sentences that include restitution. *See State v. Thornton*, 1st Dist. Hamilton No. C-160501, 2017-Ohio-4037, ¶7-12; *see also State v. LaChance*, 11th Dist. Portage No. 2014-P-0026, 2015-Ohio-2609, ¶14-15. However, we note some districts review an appeal from an order of restitution for an abuse of discretion. *See*, *e.g.*, *State v. Nitsche*, 8th Dist. Cuyahoga No. 103174, 2016-Ohio-3170, ¶73 and *State v. Spencer*, 5th Dist. Delaware No. 16 CAA 04 0019, 2017-Ohio-59, ¶44.

**{¶14}** R.C. 2953.08(G)(2) states:

> The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.
>
> The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:
>
> (a) That the record does not support the sentencing court's findings under [R.C. 2929.13(B) or (D), R.C. 2929.14(B)(2)(e) or (C)(4), or R.C. 2929.20(I)], whichever, if any, is relevant;
>
> (b) That the sentence is otherwise contrary to law.

*See also State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, ¶10.

**{¶15}** Prior to discussing appellant's assignments of error, we first address the issue of whether the trial court had jurisdiction to modify its sentencing entry with the subsequent restitution order.

**{¶16}** The final judgment in a criminal case is the entry of sentence, which, for a felony, may include an order of restitution pursuant to R.C. 2929.18. *See State v. Danison*, 105 Ohio St.3d 127, 2005-Ohio-781, ¶8. Generally in criminal cases, "a court has no authority to reconsider its own valid final judgments." *State ex rel. Hansen v. Reed*, 63 Ohio St.3d 597, 599 (1992) (citation omitted). However, R.C. 2929.18 gives the trial court authority to modify restitution orders under certain conditions.

**{¶17}** Pursuant to R.C. 2929.18(A)(1): "If the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount." R.C. 2929.18(A)(1) further provides: "The victim or survivor may request that the prosecutor in the case file a motion, or the offender may file a motion, for modification of the payment terms of any restitution ordered. If the court grants the motion, it may modify the payment terms as it determines appropriate."

**{¶18}** Here, at the original sentencing hearing, counsel for appellant objected to any order of restitution to the victim's insurance carrier. After that objection, the trial court should have held the restitution hearing prior to ordering restitution. Instead, the trial court issued a sentencing entry on December 21, 2016, with an order of restitution, which was a final order.

**{¶19}** Although appellant did not file a motion requesting modification of the payment terms, the trial court ordered briefing from the parties and indicated a restitution hearing was held at defense counsel's request. The May 22, 2017 restitution order reflects the trial court considered those briefs in modifying the payment terms of the restitution ordered in the December 21, 2016 sentencing entry. R.C. 2929.18(A)(1) allows for modification of the payment terms of any restitution that has been ordered. Therefore, based on the facts of this case, we will construe the hearing was held in response to a

request for modification of the December 21, 2016 restitution order, and we find the trial court had jurisdiction to modify that order pursuant to R.C. 2929.18(A)(1).

**{¶20}** Under his first assignment of error, appellant does not dispute the total cost of repairs and out of pocket costs. He maintains that although $47,621.04 was the total cost to replace the sign, the school district only suffered an economic loss to the extent it paid for the repairs out of pocket. Appellant argues the trial court was not permitted to order appellant to pay restitution to the school district for the entire amount of damages resulting from the offense, including the amount covered by Liberty Mutual Insurance.

**{¶21}** R.C. 2929.18(A)(1) authorizes the trial court to order restitution, based upon the victim's economic loss, as part of the sentence for a felony offense. The General Assembly amended R.C. 2929.18 in 2004 and removed language that authorized the sentencing court to order the offender to reimburse a third party for an amount paid to or on behalf of the victim for economic loss resulting from the offense. *State v. Kreischer*, 109 Ohio St.3d 391, 2006-Ohio-2706, ¶1, ¶10. The current version of the statute provides, in part:

> If the court imposes restitution, the court shall order that the restitution be made to the victim in open court, to the adult probation department that serves the county on behalf of the victim, to the clerk of courts, or to another agency designated by the court. * * * [T]he amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense. If the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount.

R.C. 2929.01(L) defines "economic loss" as "any economic detriment suffered by a victim as a direct and proximate result of the commission of an offense and includes * * * any property loss * * * incurred as a result of the commission of the offense. 'Economic loss' does not include non-economic loss or any punitive or exemplary damages."

**{¶22}** "The victim of the offense is '[a] person who is identified as the victim of a crime * * * in a police report or in a complaint, indictment, or information that charges the commission of a crime and that provides the basis for the criminal prosecution * * * .'" *State v. Thornton*, 1st Dist. Hamilton No. C-160501, 2017-Ohio-4037, ¶15, quoting R.C. 2930.01(H)(1). "[U]nless the person or entity is a named victim as described in R.C. 2903.01(H)(1), the trial court may not order a defendant to pay restitution to that third party." *Id.*, citing *State v. Aguirre*, 144 Ohio St.3d 179, 2014-Ohio-4603, ¶1.

**{¶23}** We cannot ignore the clear statement the Ohio Supreme Court made in *Aguirre* about the impact of the amendment. In discussing a conflict in a pre-amendment restitution case, it stated:

> We note, however, that the conflict arises from a former version of Ohio's restitution statute, R.C. 2929.18(A)(1), which permitted a court to award restitution to third parties, including insurers. *See* former R.C. 2929.18(A)(1), 148 Ohio Laws, Part III, 5767, 5785 (an order of restitution 'may include a requirement that reimbursement be made to third parties for amounts paid to or on behalf of the victim or any survivor of the victim for economic loss resulting from the offense'). The General Assembly removed that language from the restitution statutes, effective June 1, 2004. 150 Ohio Laws, Part III, 3914 (deleting language from R.C. 2929.18(A)(1) for felonies) and 3922 (deleting language from R.C. 2929.28(A)(1) for nonfelonies). Given these deletions, 'the legislature's intent to disallow payment to victims' insurance companies is clear.' *State v. Johnson,* 1st Dist. Hamilton No. C–100702, 2011-Ohio-5913, 2011 WL 5620184, ¶ 5. In cases in which sentencing occurs after June 1, 2004, '[a] court may not order a defendant to pay restitution to a victim's insurance company.' Baldwin's Ohio Practice, Criminal Law, Section 119:6 (2013). Thus, that portion of our analysis dealing with restitution to third parties is limited to cases in which an offender was sentenced prior to June 1, 2004.

*Aguirre*, *supra*, at ¶1; *see also State v. Colon*, 2d Dist. Clark No. 09-CA-09, 2010-Ohio-492, ¶5-6, citing *State v. Christman*, 12th Dist. Preble Nos. CA2009-03-007 & C2009-03-008, 2009-Ohio-6555, ¶18; *State v. Allen*, 8th Dist. Cuyahoga No. 98394, 2013-Ohio-

1656, ¶18; and *State v. Bartholomew*, 119 Ohio St.3d 359, 2008-Ohio-4080, ¶14 (holding that under the current version of R.C. 2929.18, the trial court retains discretion to order restitution be paid to third parties listed in the statute i.e., the adult probation department, the clerk of courts, or another agency designated by the court).

**{¶24}** Restitution may only be ordered for the "victim" of the offense as defined by statute. The award of restitution to the victim is limited to the economic loss of the victim. *See Thornton*, *supra*, at ¶19, quoting *State v. Bowman*, 2d Dist. Miami No. 08CA4, 2009-Ohio-1281, ¶12, and citing *State v. Clayton*, 2d Dist. Montgomery No. 22937, 2009-Ohio-7040, ¶56; *State v. Hebb*, 5th Dist. Ashland No. 2010-COA-038, 2011-Ohio-4566, ¶90; *State v. Waiters*, 8th Dist. Cuyahoga No. 93897, 2010-Ohio-5764, ¶18. Based on the record before us, the only designated "victim" in this case was the Ravenna School District, and the economic loss to the victim was $10,384.04. We therefore find it was error for the trial court to order appellant to pay restitution to the school district in the amount of $47,621.04.

**{¶25}** Appellant's first assignment of error has merit.

**{¶26}** Accordingly, we reverse the modified restitution order in the amount of $47,621.04 and remand to the trial court to order restitution to the Ravenna School District in the amount of $10,384.04.

**{¶27}** Under his second assignment of error, appellant argues the trial court's determination of appellant's ability to pay the ordered restitution was not supported by sufficient evidence. Appellant maintains the trial court should have granted defense counsel's request for additional evidence to be presented on the issue.

**{¶28}** "Before imposing a financial sanction under [R.C. 2929.18] * * * the court shall consider the offender's present and future ability to pay the amount of the sanction

or fine." R.C. 2929.19(B)(5). "R.C. 2929.18 does not require a court to hold a hearing on the issue of the defendant's ability to pay; rather, a court is merely required to consider the offender's present and future ability to pay." *State v. Bielek*, 11th Dist. No. 2010-L-029, 2010-Ohio-5402, ¶11, citing *State v. Martin*, 140 Ohio App.3d 326, 338 (4th Dist.2000); *see also* R.C. 2929.18(E).

**{¶29}** The restitution order reflects the trial court reviewed the PSI and considered appellant's present and future ability to pay restitution. The trial court was not required to hold a hearing on the issue or make any further inquiry. Appellant's argument is not well taken.

**{¶30}** Appellant's second assignment of error is without merit.

**{¶31}** For the foregoing reasons, the judgment of the Portage County Court of Common Pleas is reversed and remanded for the trial court to clarify the degree of the charge of Vandalism and to enter a restitution order consistent with this opinion.

THOMAS R. WRIGHT, P.J.,

COLLEEN MARY O'TOOLE, J.,

concur.