[Cite as *State v. O'Brien*, 2021-Ohio-4037.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio	Court of Appeals No. WD-20-060
Appellee	Trial Court No. 2019CR0485
v.	
Kelly O'Brien	**DECISION AND JUDGMENT**
Appellant	Decided: November 5, 2021

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
David T. Harold, Assistant Prosecuting Attorney, for appellee.

Donald Gallick, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} Defendant-appellant, Kelly O'Brien, appeals the January 16, 2020 judgment of the Wood County Court of Common Pleas, convicting him of aggravated theft and engaging in a pattern of corrupt activity and sentencing him to 18 years in prison and

restitution of almost $16 million. For the following reasons, we affirm the trial court judgment.

I. Background

{¶ 2} On October 23, 2019, Kelly O'Brien was charged by bill of information with two counts of aggravated theft of one million five hundred thousand dollars or more, a violation of R.C. 2913.02(A)(3) and (B)(2) (Counts 1 and 2); and engaging in a pattern of corrupt activity, a violation of R.C. 2923.32(A)(1) and (B)(1) (Count 3), all first-degree felonies. He entered a plea of guilty and was convicted of all counts. The trial court sentenced O'Brien to ten years' imprisonment on Counts 1 and 2 and eight years' imprisonment on Count 3, with the sentences for Counts 1 and 2 to be served concurrently with each other, but consecutively to the sentence imposed for Count 3. Consistent with the plea agreement between O'Brien and the state, the court ordered restitution to five different victims totaling $15,994,741.06. It imposed five years' post-release control. And it ordered O'Brien to pay costs, including the costs of prosecution and execution.

{¶ 3} O'Brien appealed. He assigns the following errors for our review:

Assignment of Error I

THE TRIAL COURT'S SENTENCE IS CONTRARY TO LAW BECAUSE THE [SIC] IT IMPOSED CONSECUTIVE SENTENCES BEFORE ISSUING THE STATUTORILY-REQUIRED FINDINGS.

Assignment of Error II

THE TRIAL COURT COMMITTED PLAIN ERROR BY IMPOSING A RESTITUTION ORDER OF $15.9 MILLION WITHOUT SUPPORTING DOCUMENTATION AT THE TIME OF THE PLEA, NOR DURING THE SENTENCE HEARING.

Assignment of Error III

APPELLANT SUFFERED A DEPRIVATION OF THE CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION WHEN DEFENSE COUNSEL STIPULATED TO A $15.9 MILLION RESTITUTION ORDER IN LIEU OF AN EVIDENTIARY HEARING.

II. Law and Analysis

{¶ 4} In his first assignment of error, O'Brien challenges the trial court's imposition of consecutive sentences, arguing that the court imposed the sentences before making the required findings. In his second assignment of error, he argues that the trial court committed plain error because it ordered restitution without supporting documentation. And in his third assignment of error, he argues that trial counsel was ineffective for stipulating to the $15.9 million restitution order. We address these assignments of error in turn.

I. Consecutive Sentences

{¶ 5} Under R.C. 2929.14(C)(4), a court may order an offender to serve consecutive sentences so long as it makes certain statutory findings and incorporates those findings into the sentencing entry. The trial court ordered O'Brien to serve the sentences imposed for Counts 1 and 2 consecutively to the sentence imposed for Count 3. In his first assignment of error, O'Brien argues that his sentence is contrary to law because the trial court announced its decision to impose consecutive sentences *before* making the required findings. He contends that the court should have made the findings, *then* announced the sentence.

{¶ 6} We review a challenge to a felony sentence under R.C. 2953.08(G)(2). R.C. 2953.08(G)(2) provides that an appellate court may increase, reduce, or otherwise modify a sentence or may vacate the sentence and remand the matter to the sentencing court for resentencing if it clearly and convincingly finds either of the following:

> (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
>
> (b) That the sentence is otherwise contrary to law.

{¶ 7} Under R.C. 2929.14(C)(4), "[i]If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve

the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

* * *

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

* * *

{¶ 8} At the sentencing hearing, the trial court announced that it was ordering consecutive sentences, then it articulated its reasons for doing so:

The court: Count 3 will be served consecutive to counts 1 and 2. Count 2 will be served concurrent.

Consecutive sentences are necessary to protect the public from future crime and to punish Mr. O'Brien. The Court also finds that consecutive sentences are not disproportionate to the seriousness of the conduct and the danger that you pose to the public. At least two of the multiple offenses were committed as part of one or more courses of

conduct, and that harm caused by two or more of the multiple offenses so committed is so great or unusual that no single prison term for any of the offense [sic] committed as part of that course of conduct adequately reflect the seriousness of your conduct.

{¶ 9} O'Brien does not argue that the trial court failed to make the required findings under R.C. 2929.14(C)(4) or that the record does not support the sentencing court's findings. Rather, the essence of O'Brien's complaint is that his sentence is contrary to law because the trial court should have announced that it was imposing consecutive sentences *after* it articulated its R.C. 2929.14(C)(4) findings. In other words, he contends that the first sentence uttered by the court in the excerpt above should have been the last sentence uttered.

{¶ 10} To begin with, nothing in R.C. 2929.14(C)(4) states that the findings must be articulated before the sentence. Moreover, the only other Ohio appellate district that has considered O'Brien's argument rejected it.

{¶ 11} Specifically, the Eighth District rejected this argument when defense counsel made it in *State v. Williams*, 8th Dist. Cuyahoga No. 106570, 2018-Ohio-5022. There, quoting an earlier decision in *State v. Romanko*, 8th Dist. Cuyahoga No. 104158, 2017-Ohio-739, the court observed that "'[t]here is nothing in R.C. 2929.14(C)(4) (or otherwise) that requires a trial court to articulate its findings supporting the imposition of consecutive sentences before announcing its decision to impose consecutive sentences at

a sentencing hearing."" *Williams* at ¶ 41, quoting *Romanko* at ¶ 19. The court found "no error in the fact that * * * the court announced [its] sentence before making those findings." *Id. See also State v. Downey*, 8th Dist. Cuyahoga No. 107363, 2019-Ohio-1438, ¶ 14-16, *appeal not allowed*, 156 Ohio St.3d 1466, 2019-Ohio-2892, 126 N.E.3d 1173, ("[T]he consecutive sentence findings do not need to be made immediately preceding or following the court stating its imposing consecutive sentences. The findings only need to be made in open court during sentencing, and then incorporated into the journal entry of conviction."); and *State v. Walker*, 8th Dist. Cuyahoga No. 106571, 2018-Ohio-5172, ¶ 78-79 (where the court rejected the same argument by Williams's co-defendant).

{¶ 12} O'Brien argues that *Williams* conflicts with the Second District's decision in *State v. Mayberry*, 2014-Ohio-4706, 22 N.E.3d 222, ¶ 30 (2d Dist.), and the Third District's decision in *State v. Elliston*, 3d Dist. Shelby No. 17-14-18, 2014-Ohio-5628, ¶ 12, where both courts recognized that a trial court must make required findings before imposing consecutive sentences. He urges us "to adopt the precedent of the Second and Third District opinions."

{¶ 13} Importantly, the *Mayberry* and *Elliston* courts did not consider whether a court must articulate its reasons for imposing consecutive sentences "before" announcing its intention to impose consecutive sentences.[1] And even more importantly, defense

[1] The issue in those cases was whether the court made the required findings. Both courts found that the required findings had been made, however, the *Mayberry* court remanded

counsel already attempted to certify this purported conflict, and the Ohio Supreme Court determined that no conflict exists. *State v. Williams*, 155 Ohio St.3d 1444, 2019-Ohio-1707, 122 N.E.3d 206 ("On review of an order certifying a conflict. It is determined that no conflict exists.").

{¶ 14} In sum, R.C. 2929.14(C)(4) does not require that statutory findings be articulated *before* the court announces its intention to impose consecutive sentences. The only court that has considered this argument has rejected it. And as expressly recognized by the Ohio Supreme Court, no conflict exists among the districts. Accordingly, we find O'Brien's first assignment of error not well-taken.

II. Restitution

{¶ 15} In his second assignment of error, O'Brien argues that the trial court erred by ordering restitution of almost $16 million without documentation to support the amount. He complains that "at no point during the plea did the trial court total these amounts and declare—as part of the plea agreement—'$15,994,641.06' million dollars [sic] in restitution." He also contends that at sentencing, defense counsel repeatedly questioned the accuracy of the victims' financial losses, the victims' statements at sentencing were vague as to their financial losses, and the PSI lacks information as to

---

the matter to the trial court for entry of a nunc pro tunc judgment because the trial court neglected to incorporate its findings made at the sentencing hearing into its judgment entry of conviction.

how the financial losses were calculated. All this, he argues, amounts to a lack of credible, competent evidence to support the restitution award.

{¶ 16} The state responds that we cannot consider O'Brien's challenge to the amount of restitution under R.C. 2953.08(D)(1) because "[a] sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge." Because O'Brien agreed to the amount of restitution, the state argues, he cannot now challenge it on appeal.

{¶ 17} Generally, we review a trial court's imposition of restitution as part of a felony sentence under R.C. 2953.08(G)(2)(b). *State v. Jordan*, 6th Dist. Lucas No. L-19-1165, 2021-Ohio-333, ¶ 7, citing *State v. Young*, 6th Dist. Lucas No. L-19-1189, 2020-Ohio-4943, ¶ 11. This requires us to determine whether the order for restitution was contrary to law. *Id.*

{¶ 18} Under R.C. 2929.18(A)(1), a "court may base the amount of restitution it orders on an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information, provided that the 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." This court has recognized that "criminal defendants can stipulate to the amount of restitution to be ordered as a part of a

sentence under R.C. 2929.18(A)(1)" and "the stipulation itself provides a sufficient basis for the restitution amount under the statute." *State v. Speweike*, 6th Dist. Wood No. L-10-1198, 2011-Ohio-493, ¶ 39. *See also State v. Myrick,* 8th Dist. Cuyahoga No. 91492, 2009-Ohio-2030, ¶ 31; *State v. Biggins*, 9th Dist. No. 17CA0043-M, 2018-Ohio-1878, 111 N.E.3d 1198, ¶ 11 (finding that where an offender stipulates to the amount of restitution, he or she waives any arguments concerning the reasonableness of that amount). In fact, as the state argues, in *State v. Bonish*, 6th Dist. Wood No. WD-20-036, 2021-Ohio-2436, ¶ 11-12, we found that where a defendant stipulates to the amount of restitution as part of a plea agreement, he or she is precluded under R.C. 2953.08(D)(1) from raising the issue on appeal—his or her assent to the amount is sufficient to support the trial court's restitution award.

{¶ 19} Here, O'Brien stipulated to the amount of restitution several times. In the plea agreement at paragraph 8, section a, O'Brien agreed to pay restitution of $4,020,100.00 to Victim 1; $8,800,000.00 to Victim 2; $1,380,600.00 to Victim 3; $1,429,662.06 to Victim 4; and $364,379.00 to Victim 5. These stipulated amounts are repeated at paragraph 10, sections (1)(c), (2)(c), and 3(c) of the plea agreement. They were recited at the plea hearing, at which time the court specifically questioned O'Brien as to the amount he stipulated would be paid as restitution to each victim:

The court: * * * And I do want to indicate that with the plea agreement itself, that there is the stipulation that you would pay * * * $4,020,000 to [Victim 1] and $8,000,800 to [Victim 2].

Defense counsel: I believe that's [$]8,800,000.

* * *

The court: There you go. All right. $8,800,000 to [Victim 2]. Do you understand that?

The defendant: I do.

The court: You've also agreed and stipulated to paying $1,380,000 to [Victim 3]. Do you understand that?

The defendant: Yes, ma'am.

The court: And do you understand that you're also stipulating to the payment of $1,429,662.06 to [Victim 4]? Do you understand that, sir?

The defendant: Yes, ma'am.

The court: You've also stipulated to paying restitution in the amount of $364,379 to [Victim 5]. Do you understand that, sir?

The defendant: Yes, ma'am.

{¶ 20} Because O'Brien stipulated—as part of the plea agreement—to the amount of restitution he would pay, he has waived any argument concerning the accuracy or

reasonableness of that amount. We, therefore, find his second assignment of error not well-taken.

III. Ineffective Assistance of Counsel

{¶ 21} In his third assignment of error, O'Brien argues that trial counsel was ineffective for allowing him to stipulate to restitution in lieu of an evidentiary hearing. He argues that defense counsel suggested that the actual financial losses were unknown and implied that some of the monies lost were actually recouped by the victims. Citing *State v. Kingsbury*, 8th Dist. Cuyahoga No. 102973, 2016-Ohio-590, *State v. Becraft*, 2d Dist. Clark No. 2013-CA-54, 2015-Ohio-3911, and *State v. Burns*, 2012-Ohio-4191, 976 N.E.2d 969 (6th Dist.), he contends that "some appellate districts have found counsel to be ineffective for failing to object to unsupported restitution orders."

{¶ 22} The state responds that if a restitution hearing had been demanded, there was a possibility that O'Brien would have received an even longer prison sentence than what was imposed. It maintains that in similar cases, we have found that defense counsel was not ineffective for failing to object to the amount of restitution or requesting a restitution hearing. It claims that the amount of restitution bore a direct relation to civil judgments "in-force or soon to be in-force against him." And it points out that O'Brien expressed satisfaction with counsel's representation.

{¶ 23} In order to prevail on a claim of ineffective assistance of counsel, an appellant must show that counsel's conduct so undermined the proper functioning of the

adversarial process that the trial court cannot be relied on as having produced a just result. *State v. Shuttlesworth*, 104 Ohio App.3d 281, 287, 661 N.E.2d 817 (7th Dist.1995). To establish ineffective assistance of counsel, an appellant must show "(1) deficient performance of counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the proceeding's result would have been different." *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶ 204, citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Sanders*, 94 Ohio St.3d 150, 151, 761 N.E.2d 18 (2002).

{¶ 24} Properly licensed Ohio lawyers are presumed competent. *State v. Banks,* 9th Dist. Lorain No. 01CA007958, 2002-Ohio-4858, ¶ 16. To establish ineffective assistance of counsel, the defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defendant so as to deprive him of a fair trial. *Strickland* at 688-692. As recognized in *Strickland,* there are "countless ways to provide effective assistance in any given case." *Id.* at 689. "Judicial scrutiny of counsel's performance must be highly deferential." *State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989), quoting *Strickland* at 689.

{¶ 25} Here, our review of the record convinces us that restitution was an integral part of the plea agreement. The cases O'Brien cites do not support his claim for

ineffective assistance of counsel. In *Kingsbury,* 8th Dist. Cuyahoga No. 102973, 2016-Ohio-590, at ¶ 23, the amount of restitution was not stipulated to as part of the plea agreement. In *Becraft*, 2d Dist. Clark No. 2013-CA-54, 2015-Ohio-3911, ¶ 31, there was no claim for ineffective assistance of counsel. And in *State v. Burns*, 2012-Ohio-4191, 976 N.E.2d 969, ¶ 42, we *rejected* defendant's claim of ineffective assistance of counsel.

{¶ 26} In any event, as we recognized in *Burns,* to satisfy the "prejudice" requirement of an ineffective assistance claim, O'Brien would have to show "'that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Id.* at ¶ 23, quoting *Hill v. Lockhart,* 474 U.S. 52, 58–59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). We found that a defendant cannot simply attack one aspect of the plea agreement, as O'Brien seeks to do here ("Appellant moves this Court to vacate the restitution order and to remand for a de novo restitution hearing."). *Id.* Rather, he must demonstrate that he would not have entered into the plea agreement. O'Brien has not asserted that but for counsel's alleged error, he would not have entered into the plea agreement. He has, therefore, failed to demonstrate prejudice.

{¶ 27} We find O'Brien's third assignment of error not well-taken.

III. Conclusion

{¶ 28} The trial court did not err by articulating its R.C. 2929.14(C)(4) findings after announcing its intention to impose consecutive sentences. We find O'Brien's first assignment of error not well-taken.

{¶ 29} O'Brien stipulated to the amount of restitution as part of his plea agreement and cannot now challenge that amount on appeal. His stipulation to the amount was sufficient to support the trial court's restitution award and he waived any challenge to its reasonableness. We find O'Brien's second assignment of error not well-taken.

{¶ 30} The stipulated restitution award was an integral part of O'Brien's plea agreement. Counsel was not ineffective for permitting O'Brien to stipulate to the amount and O'Brien has failed to establish prejudice. We find O'Brien's third assignment of error not well-taken.

{¶ 31} We affirm the January 16, 2020 judgment of the Wood County Court of Common Pleas. O'Brien is ordered to pay the costs of this appeal under App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

_____
JUDGE

Thomas J. Osowik, J.

_____
JUDGE

Gene A. Zmuda, P.J.
CONCUR.

_____
JUDGE