

In the
Supreme Court of Ohio 07 - 1462

STATE OF OHIO, : Case No. _____
: :
Plaintiff-Appellant, : On Appeal from the
: : Crawford County
v. : Court of Appeals,
: : Third Appellate District
CHARLES W. BARTHOLOMEW, :
: : Court of Appeals Case
Defendant-Appellee. : No. 3-06-16
: :
:

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT STATE OF OHIO**

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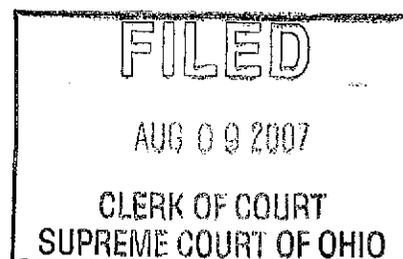


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INTRODUCTION

The dispute in this case might initially seem minor: The court of appeals reversed the trial court's award of \$426 in restitution payable by the defendant to the Victims of Crime Compensation Fund ("Victims Fund"). But the appeals court's rule—that courts may order defendants to pay restitution to the victim and the victim alone, not to the Victims Fund—is contrary to the clear text of two separate statutes. More to the point, it affords a windfall to the offender and deprives the Victims Fund of a substantial and important source of income that threatens to dry up the Victims Fund's diminishing coffers.

Two statutes plainly state that restitution awards may be directed to the Victims Fund. First, the restitution statute provides that "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,*" R.C. 2929.18(A)(1) (emphasis added), and the Victims Fund undeniably is an "agency" of the State. Second, the crime victims compensation statute complements the restitution statute by designating the Victims Fund as "an eligible recipient for payment of restitution." R.C. 2743.72(E). Both of these provisions implement the constitutional command that the State must afford protection to victims of crime. Ohio Const., Art. 1, § 10a.

The appeals court neither addressed nor distinguished these provisions; indeed, it did not even cite them. Instead, it insisted that this Court's decision in *State v. Kreischer*, 109 Ohio St. 3d 391, 2006-Ohio-2706, precluded restitution to the Victims Fund. But *Kreischer* did not even consider the current version of the restitution statute and cannot be held to govern statutory language not before the Court.

The appeals court's mistake not only is obvious, but its consequences are far-reaching. Its decision would eliminate more than \$210,000 in restitution payments pending in the Third

District alone, and it threatens more than \$1.3 million in outstanding restitution awards pending statewide. The Third District's rule also disrupts a statutory scheme that best advances the interests of crime victims by allowing the Victims Fund to provide financial assistance up front, when the victim is most in need, rather than making the victim wait on restitution payments that will come from the offender gradually, if at all.

This seemingly small case, then, has significant ramifications for the State's ability to continue to provide much-needed help to victims of violent crime, and for courts' ability to ensure that convicted criminals take steps to make their victims whole. The Court should grant review and reverse the erroneous judgment of the court of appeals.

STATEMENT OF THE CASE AND FACTS

A. The trial court ordered Bartholomew to pay restitution to compensate for counseling his daughter received after he raped her.

In March 2006, a Crawford County grand jury indicted Charles W. Bartholomew on one count of the rape of his twelve-year-old daughter in violation of R.C. 2907.02(A)(1)(b). He pled guilty. See *State v. Bartholomew* (3d Dist.), 2007-Ohio-3130, at ¶ 3.

After a hearing, the trial court sentenced Bartholomew to ten years in prison and classified him as a sexually oriented offender. *Id.* at ¶ 4. In addition to fees and costs, the court ordered Bartholomew to “pay \$426.00 restitution to the Attorney General’s Victims of Crime for reimbursement to the victim.” *Id.* The amount of the restitution award reflected expenses that Bartholomew’s wife incurred in obtaining counseling for their daughter after the rape. Because the Victims Fund had already reimbursed her for the counseling costs, the court directed payment of the restitution to the Victims Fund. Bartholomew did not object to the restitution award. *Id.* at ¶ 21.

B. The appeals court vacated the restitution award on the ground that the Victims Fund is not an eligible recipient.

On direct appeal, the court of appeals affirmed Bartholomew's prison sentence but vacated the restitution award. Bartholomew argued that the counseling expenses did not constitute "economic loss" within the meaning of the restitution statute. *Id.* at ¶ 20. Noting that Bartholomew had not objected to the restitution award, and the appeals court applied a plain error standard to Bartholomew's claim and sustained his objection under different reasoning. *Id.* at ¶ 21.

The appeals court looked first at the language of the statutory provision authorizing restitution awards. The restitution statute provides:

[T]he court imposing a sentence upon an offender for a felony may sentence the offender to any financial sanction or combination of financial sanctions authorized under this section Financial sanctions that may be imposed pursuant to this section include, but are not limited to, the following:

(1) Restitution by the offender to the victim of the offender's crime or any survivor of the victim, in an amount based on the victim's economic loss. 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.

R.C. 2929.18(A)(1).

The court of appeals then interpreted the restitution statute in light of language in *State v. Kreischer*, 109 Ohio St. 3d 391, 2006-Ohio-2706. In *Kreischer*, this Court considered whether a former version of the restitution statute entitled a third-party medical insurer to restitution of medical costs it paid to a crime victim. 2006-Ohio-2706 at ¶ 2. Before a 2004 amendment, the provision "expressly stated that restitution may include 'a requirement that reimbursement be made to third parties for amounts paid to or on behalf of the victim.'" *Id.* at ¶ 13 (quoting 148 Ohio Laws, Part IV, 8674, 8767). In concluding that the statutory language authorized restitution to the insurer, the *Kreischer* Court observed that its decision would "likely affect only those

cases arising prior to the June 1, 2004 effective date of the statutory change, because on that date, the legislature amended R.C. 2929.18 to delete all references to restitution for third parties.” *Id.* at ¶ 1 (citing 2003 Sub. H.B. No. 52).

Although this statement in *Kreischer* addressed only the potential effect of the 2004 amendment on private third parties such as insurers, the court of appeals in this case nonetheless concluded that *Kreischer* also held that the revised restitution statute did not authorize restitution to the Victims Fund. “Under the current version of R.C. 2929.18,” the appeals court held, “financial sanctions which can be imposed against a felony offender do not include reimbursement to third parties for amounts paid on behalf of the victim.” 2007-Ohio-3130 at ¶ 26. The court therefore determined that “the trial court committed plain error, because it did not have the authority to order Bartholomew to pay restitution to a third party, the Ohio Victim’s of Crimes fund, in the amount of \$426.00.” *Id.* In reaching that holding, the appeals court ignored the other statutory provisions that expressly allowed restitution to be paid to the Victims Fund.

THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

This case warrants the Court's review because the appeals court's ruling undermines the Victims Fund and threatens the State's ability to make crime victims whole. The decision also grants a windfall to convicted criminals, who might now avoid ever having to pay the costs of their crimes. This harmful ruling is not required by statute. Quite the opposite: It runs directly contrary to two plain statutory texts.

The Crime Victims Compensation Program ("Victims Program") helps victims recover from the effects of violent crime by providing financial assistance to victims and the families of victims to alleviate the economic and emotional burdens of victimization. Created by the Ohio General Assembly in 1976, the Victims Fund pays the medical bills, lost wages, and other specified expenses of eligible claimants who would otherwise go uncompensated. See generally Comment, *Reparation Awards to Victims of Crimes in Ohio*, 13 Akron L. Rev. 97 (1979).

The Victims Fund receives deposits from a variety of sources. Of the \$27.5 million received by the Victims Program in 2006, the largest sources of income were court costs (\$16.5 million), federal grants under the Victims of Crime Act (\$6.4 million), and driver's license reinstatement fees (\$3.8 million). See Ohio Attorney General's Office, Crime Victims Section Annual Report 2006, at 8, available at http://www.ag.state.oh.us/victim/pubs/ann_rpt_cv_2006.pdf. The fourth-largest source of income—subrogation collections—includes court-ordered restitution payments collected by the Attorney General's Crime Victims Subrogation and Restitution Unit ("Restitution Unit"). See *id.* at 6. The Restitution Unit collected \$487,000 in 2006.

The notion of restitution as a form of sanction has deep roots. Ancient legal texts from the Torah to the Code of Hammurabi, among others, required the offender to reimburse the victim or his or her family for any loss that the crime caused. See Note, *Victim Restitution in the Criminal*

Process, 97 Harv. L. Rev. 931, 933 & n.18 (1984). Restitution was viewed as “a means by which the offender could buy back the peace he had broken.” *Id.* Many of the earliest American penal codes incorporated some form of restitution, and many states continue to impose restitution as a criminal penalty. *Id.* at 934.

Restitution is an indispensable part of Ohio’s statutory scheme for victim compensation. The statute provides that “[t]he payment of an award of reparations from the [Victims Fund] . . . creates a right of reimbursement, repayment, and subrogation in favor of the [Victims Fund] from an individual who is convicted of the offense that is the basis of the award of reparations.” R.C. 2743.72(A). The statute specifies that the Victims Fund “is an eligible recipient for payment of restitution,” R.C. 2743.72(E), and that its right to repayment is “automatic,” R.C. 2743.72(K).

The statutorily authorized restitution payments serve three important goals in the State’s criminal justice and victim compensation systems. First, restitution advances the objectives of the criminal law in deterring, rehabilitating, and punishing offenders while bringing justice to victims. “Restitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused.” *Kelly v. Robinson* (1986), 479 U.S. 36 , 49 n.10. Because the calculations are based on the actual harm to the victim, restitution also has a “more precise deterrent effect than a traditional fine.” *Id.* And restitution plays a vital role in affording crime victims a sense that justice has been served by holding the offender financially accountable for the economic costs of his or her crime.

Second, directing restitution payments to the Victims Fund as reimbursement rather than directly to the victim ensures that the victim receives the prompt financial assistance he or she needs. Restitution payments are typically slow in coming: They are paid out by the offender over a matter of years while he serves time in prison or on parole or probation. This trickle of

payments does little good for the victim, who needs immediate help to pay medical or counseling bills and to meet other expenses incurred as a result of the crime. These financial obligations often accrue while the victim is unable to work and draw an income because of the crime. The victim is therefore best served when the Victims Fund compensates him or her immediately and then waits for gradual restitution from the offender.

Third, restitution payments are critical to the financial integrity of the Victims Fund because they restore a portion of the funds paid out to victims. By working with courts, prosecutors, and other agencies to increase the number of cases where restitution is ordered, the Restitution Unit has secured more than a quarter of a million dollars in subrogation and restitution payments each year since 2001, the first full year in which restitution payments to the Victims Fund were authorized by statute. In 2006, the unit's collections of restitution and other payments totaled more than \$487,000. See *id.* At present, at least 282 restitution accounts remain open, meaning that courts have ordered restitution and the Restitution Unit is awaiting payment. Those pending accounts total \$1,344,872.46. More than \$210,000 in outstanding restitution awards are pending in the Third District alone.

As these numbers show, a single restitution award may seem small in isolation, but, taken together, the restitution payments constitute an important stream of reimbursement to the Victims Fund. Since the General Assembly restructured the Victims Program by statute in 2000, the number of claims on the Victims Fund's coffers has increased, and the amount of deposits has not kept pace. As a result, the Victims Fund is under increasing strain, and that strain means that restitution reimbursements are critical to maintaining the solvency of the Victims Fund.

In addition to further burdening the financially stressed Victims Fund, the decision of the court of appeals is contrary to the statute's plain text. The court focused entirely on this Court's

observation in *Kreischer* that the legislature had amended the restitution statute in 2004. But that amendment while limiting payments to private third parties such as insurers, had no effect on the clear statutory authorization of restitution payments “to another agency designated by the court.” R.C. 2929.18(A)(1). Nor did the amendment touch either the crime victims compensation statute, which specifies that the Victims Fund “is an eligible recipient for payment of restitution,” R.C. 2743.72(E), or the constitutional provision that requires protection of crime victims, Ohio Const., Art. 1, § 10a. The court of appeals ignored all of these provisions. Its judgment cannot stand.

ARGUMENT

Appellant State of Ohio's Proposition of Law:

The restitution statute, R.C. 2929.18(A)(1), and the crime victims compensation statute, R.C. 2743.72(E), authorize the trial court to designate the Attorney General's Crime Victims Fund as the agency to receive the restitution payment.

The restitution statute expressly authorizes trial courts to order defendants to pay restitution either to the victim directly or to the Victims Fund as reimbursement. The statute provides that “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.*” R.C. 2929.18(A)(1) (emphasis added). The italicized clause was part of the statute both before and after the legislature amended the provision in 2004 to remove the discussion of reimbursement to third parties. Compare *id.* with *Kreischer*, 2006-Ohio-2706 at ¶ 10 (quoting prior version of R.C. 2929.18(A)(1)).¹

The Victims Fund is an “agency” that can be designated under the restitution statute. Ohio law defines an “agency,” in pertinent part, as “the functions of any administrative or executive officer, department, division, bureau, board, or commission of the government of the state.” R.C. 119.01(A)(1). “Undisputedly, the Attorney General’s office is an agency within the meaning of R.C. 119.01(A)” *Ohio Boys Town, Inc. v. Brown* (1982), 69 Ohio St. 2d 1, 4. The crime victims compensation statute specifically provides that “[t]he attorney general shall make awards of reparations for economic loss arising from criminally injurious conduct, if satisfied by a preponderance of the evidence that the requirements for an award of reparations have been met.”

¹ The court of appeals noted that the restitution statute was amended effective April 1, 2007, and explained that it was “consider[ing] the statute in effect when the offense occurred.” *Bartholomew*, 2007-Ohio-3130 at ¶ 24 n.1. In fact, the legislature has amended the provision twice since Bartholomew’s offense. See 2005 Ohio HB 461; 2006 Ohio HB 241. Neither amendment affected the language of the restitution statute at issue here.

R.C. 2743.52(A). As an arm of the Attorney General's office authorized to make reparations payments, then, the Victims Program is an "agency" under Ohio law.

The court of appeals entirely ignored the operative statutory language allowing a court to order restitution "to another agency designated by the court" and instead focused exclusively on the suggestion in *Kreischer* that "the legislature amended R.C. 2929.18 to delete all references to restitution for third parties." 2006-Ohio-2706 at ¶ 1. But that language in *Kreischer* is beside the point in this case. First, the dispute in *Kreischer* implicated only the old statute; the Court had no occasion to consider the amended statute. *Kreischer's* holding therefore cannot govern the meaning of the current statutory language, which was not before the Court.

Second, and more important, to the extent *Kreischer* sheds any light on the meaning of the revised restitution statute, it speaks only to reimbursement to a nongovernmental third party—namely, a medical insurance carrier—not a state agency. The language that was removed by the 2004 amendment had provided that "restitution . . . may include a requirement that reimbursement be made *to third parties* for amounts paid to or on behalf of the victim . . . for economic loss resulting from the offense." *Kreischer*, 2006-Ohio-2706 at ¶ 10 (quoting 148 Ohio Laws, Part IV, 8674, 8767). A state agency, however, stands in different shoes from a third-party insurer, because, as noted above, the statute—both before and after the 2004 amendment—explicitly authorizes restitution to an "agency designated by the court." R.C. 2929.18(A)(1). Thus, it might well be true that the insurance carrier in *Kreischer* would not be entitled to reimbursement as a third party under the amended law. But that change has no bearing on the Victims Fund's entitlement to payment as an "agency" under language still in force.

The text of the restitution statute provides further support for treating private third parties differently from state entities when it comes to reimbursement. The statute allows the restitution

payment to go to the victim himself or herself, “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.” R.C. 2929.18(A)(1). The General Assembly contemplated that the victim may have been compensated by a state agency and wanted to ensure reimbursement to the public coffers. It accordingly listed the possible state entities and provided a catch-all for other agencies that the court might name. Private third parties, however, are differently situated. Their payments to a victim are not a product of the State’s efforts to restore the victims of violent crime through its largess; they are instead checks cut by commercial entities, typically insurers, that are contractually obligated to compensate policy holders. There are strong reasons, therefore, why the General Assembly would choose to treat restitution to private third parties differently from restitution to the Victims Fund, and the 2004 amendment reflects that choice.

Even if the restitution statute, standing alone, were not enough to allow restitution to the Victims Fund—and it is—it is not the only statutory text that authorizes restitution payments to the Attorney General. The crime victims compensation statute specifies that the Victims Fund “is an eligible recipient for payment of restitution.” R.C. 2743.72(E). In enacting this provision, the General Assembly determined that the Victims Fund should receive reimbursement for monies paid out to victims, and that the simplest form of repayment would be restitution awards against defendants. It therefore stated in plain terms that “payment of restitution” could be directed to the Victims Fund.

This provision fits naturally with the language of the restitution statute allowing restitution payments to state agencies. Indeed, read together, the provisions are complementary: Courts are authorized to award restitution to state agencies; the Attorney General is an agent of the State who oversees the Victims Fund; and the Fund is authorized to receive restitution payments.

Thus, when the Victims Fund gives money to a victim for costs caused by a crime, the restitution statute and the crime victims compensation statute work together to ensure that the State gets its money back from the offender for the expenses he or she created.

These clear provisions must also be read in light of the Ohio Constitution's command to respect the rights of crime victims. The Constitution provides in part:

Victims of criminal offenses shall be accorded fairness, dignity, and respect in the criminal justice process, and, as the general assembly shall define and provide by law, shall be accorded rights to reasonable and appropriate notice, information, access, and protection and to a meaningful role in the criminal justice process.

Ohio Const. Art. 1, § 10a. Restitution payments directed to the State discharge the State's constitutional duty to protect victims in two ways. First, the restitution payments create a mechanism by which the State can provide prompt financial assistance to victims in times of need. Second, such payments help to ensure that the Victims Fund remains solvent—and available to assist future victims—by obtaining at least some reimbursement for its outlays.

This Court need go no further than the text of the restitution and crime victims compensation statutes to see the error in the decision below. Even if the text were not clear, the Ohio Constitution requires an interpretation that allows the State to continue to provide help to victims of violent crime. The appeals court's decision wiped out more than the \$426 restitution award in this case and afforded a windfall to a convicted offender. The ruling also jeopardizes \$210,507.60 in outstanding restitution payments in the Third District alone, and \$1,344,872.46 statewide. With no basis in the statute, the court of appeals' decision needlessly places the Victims Fund at financial risk, and it must be reversed.

CONCLUSION

For the above reasons, the Court should review this case and reverse the decision below.

Respectfully submitted,

August 9, 2007



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction of Appellant State of Ohio was served by U.S. mail this 9th day of August 2007 upon the following counsel:

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EXHIBIT 1

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO
CRAWFORD COUNTY

STATE OF OHIO,

CASE NUMBER 3-06-16

PLAINTIFF-APPELLEE,

JOURNAL

v.

ENTRY

CHARLES W. BARTHOLOMEW,

DEFENDANT-APPELLANT.

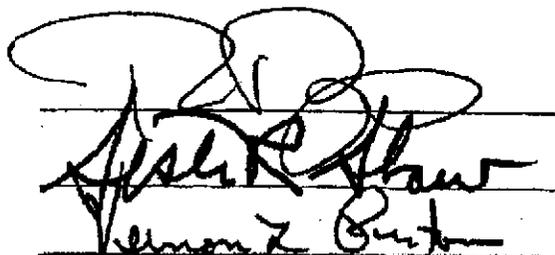
FILED IN THE COURT OF APPEALS

JUN 25 2007

SUE SEEVERS
CRAWFORD COUNTY CLERK

For the reasons stated in the opinion of this Court rendered herein, it is the judgment and order of this Court that the judgment of the trial court is affirmed in part and reversed in part with costs to be divided equally between the parties for which judgment is rendered and this cause is remanded to that court for further proceedings consistent with the opinion and judgment of this Court.

It is further ordered that the Clerk of this Court certify a copy of this judgment to that court as the mandate prescribed by Appellate Rule 27 or by any other provision of law, and also furnish a copy of any opinion filed concurrently herewith directly to the trial judge and parties of record.



JUDGES

DATED: June 25, 2007

EXHIBIT 2

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
CRAWFORD COUNTY**

FILED IN THE COURT OF APPEALS

JUN 25 2007

SUE SEEVERS
CRAWFORD COUNTY CLERK

STATE OF OHIO,

CASE NUMBER 3-06-16

PLAINTIFF-APPELLEE,

v.

OPINION

CHARLES W. BARTHOLOMEW,

DEFENDANT-APPELLANT.

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.

JUDGMENT: Judgment affirmed in part and judgment reversed in part and cause remanded.

DATE OF JUDGMENT ENTRY: June 25, 2007

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Rogers, P.J.,

{¶1} Defendant-Appellant, Charles W. Bartholomew, appeals his sentence from the Crawford County Court of Common Pleas, wherein he was sentenced to ten years in prison after pleading guilty to one count of rape. On appeal, Bartholomew argues that the trial court erred in sentencing him to the maximum sentence of ten years; that his incarceration is an unnecessary burden on government resources and is disproportionate to his criminal act; that the trial court failed to properly apply *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856; that the trial court improperly considered uncharged conduct, which he allegedly committed; that the trial court failed to consider his advanced age when it sentenced him; and, that the trial court erred in ordering him to pay restitution in the form of counseling expenses. Finding that the trial court properly sentenced Bartholomew, but committed plain error when it ordered him to pay restitution, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

{¶2} In March 2006, the Crawford County Grand Jury indicted Bartholomew on one count of rape in violation of R.C. 2907.02(A)(1)(b), a felony of the first degree. Bartholomew pled not guilty.

{¶3} In May 2006, Bartholomew moved to withdraw his former plea of not guilty and to enter a plea of guilty to the charge in the March 2006 indictment.

The trial court found Bartholomew's motion well taken, accepted his guilty plea, found Bartholomew guilty on one count of rape in violation of R.C. 2907.02(A)(1)(b), a felony of the first degree, and found Bartholomew to be a sexually oriented offender.

{¶4} In June 2006, the trial court held a sentencing hearing. In July 2006, the trial court filed its sentencing judgment entry, which provided in pertinent part:

The Court has considered the record, oral statements, any victim impact statement and presentence report prepared, as well as the principles and purposes of sentencing under Ohio Revised Code section 2929.11, and has balanced the seriousness and recidivism factors (Sic.) Ohio Revised Code section 2929.12.

Upon consideration of the pre-sentence investigation and attachments, the purposes and principles of sentences, the record and the statements/exhibits of counsel; the State requesting prison:

It is ORDERED that the defendant shall be sentenced to a prison term of ten (10) years. The defendant was determined a sexually oriented offender as contained in the file-stamped May 4, 2006 separate Judgment Entry and Notice of Duties to Register as an Offender of a Sexually Oriented or Child-Victim Offense. The defendant shall pay \$426.00 restitution to the Attorney General's Victims of Crime for reimbursement to the victim. The defendant shall pay the costs of this case and any fees permitted pursuant to Revised Code section 2929.18(a).

(July 2006 Judgment Entry pp. 1-2).

{¶5} It is from this judgment Bartholomew appeals, presenting the following assignments of error for our review.

Assignment of Error No. I

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO PRISON FOR A MAXIMUM SENTENCE OF TEN YEARS.

Assignment of Error No. II

THE TRIAL COURT ERRED BY INCARCERATING THE DEFENDANT FOR TEN YEARS, WHERE SUCH INCARCERATION IS AN UNNECESSARY BURDEN ON GOVERNMENT RESOURCES AND IS DISPROPORTIONATE TO HIS CRIMINAL ACT.

Assignment of Error No. III

THE TRIAL COURT ERRED BY INCARCERATING THE DEFENDANT FOR TEN YEARS, WHERE THE TRIAL COURT FAILED TO PROPERLY APPLY STATE V FOSTER WHEN SENTENCING THE DEFENDANT.

Assignment of Error No. IV

THE TRIAL COURT ERRED BY IMPROPERLY CONSIDERING UNCHARGED CONDUCT ALLEGEDLY COMMITTED BY DEFENDANT.

Assignment of Error No. V

THE TRIAL COURT ERRED BY INCARCERATING THE DEFENDANT FOR TEN YEARS, WHERE THE TRIAL COURT FAILED TO PROPERLY CONSIDER THE ADVANCED AGE OF THE DEFENDANT.

Assignment of Error No. VI

THE TRIAL COURT ERRED BY ORDERING THE DEFENDANT TO PAY RESTITUTION IN THE FORM OF COUNSELING EXPENSES.

Assignments of Error Nos. I & III

{¶6} In his first assignment of error, Bartholomew argues that the trial court erred in sentencing him to ten years in prison. In his third assignment of error, Bartholomew argues that the trial court failed to properly apply *Foster*, when he was sentenced. Specifically, Bartholomew asserts that the trial court failed to use its judicial discretion. We disagree.

{¶7} The Ohio Supreme Court in *Foster*, supra, 2006-Ohio-856, at paragraph seven of the syllabus, held that “[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences.” In addition, the Court stated “[o]ur remedy does not rewrite the statutes, but leaves courts with full discretion to impose prison terms within the basic ranges of R.C. 2929.14(A) based upon a jury verdict or admission of the defendant without the mandated judicial findings of fact that *Blakely* prohibits.” *Id.* at ¶102. “Courts shall consider these portions of the sentencing code that are unaffected by today’s decision and impose any sentence within the appropriate felony range. If an offender is sentenced to multiple prison terms, the court is not barred from requiring those terms to be served consecutively.” *Id.* at ¶105.

{¶8} In addition, *Foster* altered the appellate court's standard of review for most sentencing appeals from "clear and convincing" to "abuse of discretion." *Id.* at ¶¶100 & 102; see *State v. Ramos*, 3d Dist. No. 4-06-24, 2007-Ohio-767, ¶23 (noting "the clear and convincing evidence standard of review set forth under R.C. 2953.08(G)(2) remains viable with respect to those cases appealed under the applicable provisions of R.C. 2953.08(A), (B), and (C)"). Accordingly, we must review this sentence under the abuse of discretion standard. In order to find an abuse of discretion, we must find that the trial court acted unreasonably, arbitrarily, or unconscionably. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, a reviewing court may not simply substitute its judgment for that of the trial court. *Id.*

{¶9} The range of sentences for a first degree felony is three to ten years in prison. R.C. 2929.14(A)(1). While the trial court sentenced Bartholomew to the statutory maximum of ten years in prison, we cannot say that the trial court abused its discretion when it sentenced Bartholomew within the statutory range. Accordingly, McDaniel's first and third assignments of error are overruled.

Assignment of Error No. II

{¶10} In his second assignment of error, Bartholomew argues that the trial court erred by incarcerating him for ten years, because his prison term places an

unnecessary burden on government resources, under R.C. 2929.13(A), and is disproportionate to his criminal act, under R.C. 2929.11(B).

{¶11} In support, Bartholomew claims that only the worst offenders should be placed in prison and since he is not a worst offender, his placement in jail places an unnecessary burden on government resources and is disproportionate to his criminal act. However, Bartholomew directs this Court to no precedent in support of his argument. Moreover, the trial court stated, during Bartholomew's sentencing hearing, "I have considered the effect of my sentence on the community resources. I've also considered my responsibility to this community to protect it. And, quite frankly, your conduct, that you've admitted to, that I read in the pre-sentence report is so far outside the bounds that any civilized society could, could (Sic.) tolerate, that words literally fail me." (Tr. p. 6). Therefore, we cannot find that Bartholomew's ten year prison sentence constitutes an unnecessary burden upon state or local government or is incommensurate with or demeaning to the seriousness of the conduct.

{¶12} Accordingly, Bartholomew's second assignment of error is overruled.

Assignment of Error No. IV

{¶13} In his fourth assignment of error, Bartholomew argues that the trial court improperly considered uncharged conduct, which he allegedly committed.

Specifically, Bartholomew argues that the trial court should not have relied upon information contained within the pre-sentence investigation report. We disagree.

{¶14} As we stated in *State v. Wentling*, 3d Dist. No. 16-06-03, 2007-Ohio-217, ¶10,

In *Mathis*, decided the same day as *Foster*, the Ohio Supreme Court provided:

As we have held in *Foster*, however, trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences. Now that such findings are no longer mandated, on resentencing, the trial court will have discretion to sentence within the applicable range, following R.C. 2929.19 procedures. R.C. 2929.19 provides that “[t]he court shall hold a sentencing hearing before imposing a sentence * * * and before *resentencing* an offender who was convicted of or pleaded guilty to a felony and whose case was remanded.”

***Mathis*, 2006-Ohio-955, (Sic.) at ¶37, citing R.C. 2929.19(A)(1) (emphasis in original). Additionally, the [Ohio Supreme] Court noted that a trial court “shall consider the record, any information presented at the hearing, any pre-sentence investigation report, and any victim-impact statement.” Id. citing R.C. 2929.19(B)(1).**

{¶15} As in *Wentling*, it is undisputed that, as required, the trial court considered the record, information presented at the sentencing hearing, the pre-sentence investigation report, and the victim impact statement when it sentenced Bartholomew. As a result, Bartholomew’s argument is without merit.

{¶16} Accordingly, Bartholomew’s fourth assignment of error is overruled.

Assignment of Error No. V

{¶17} In his fifth assignment of error, Bartholomew argues that the trial court failed to properly consider his advanced age when it sentenced him to ten years in prison. We disagree.

{¶18} In support, Bartholomew relies on the “catch-all” phrase of R.C. 2929.12(A), which provides, “in addition, [the trial court] may consider any other factors that are relevant to achieving those purposes and principles of sentencing.” However, Bartholomew fails to provide us with any case law supporting his contention and failed to raise this matter in the trial court. Since this issue was not raised in the trial court, it will not be considered here. *State v. Park*, 3d Dist. No. 3-06-14, 2007-Ohio-1084, ¶9.

{¶19} Accordingly, Bartholomew’s fifth assignment of error is overruled.

Assignment of Error No. VI

{¶20} In his sixth assignment of error, Bartholomew argues that the trial court erred by ordering him to pay restitution for counseling expenses. Specifically, Bartholomew argues that counseling expenses of the victim do not constitute an “economic loss.” We agree with Bartholomew that the trial court erred by ordering him to pay restitution for counseling expenses, but for a different reason.

{¶21} At Bartholomew's sentencing hearing, the victims advocate noted "the Attorney General's office has asked that you would direct restitution payment in the amount of four hundred twenty-six dollars (\$426.00). That was bills from counseling that [victim's mother] had received originally, that she's since been reimbursed through the [Ohio Victim's of Crime fund]" and the trial court ordered him to pay "restitution to the Ohio Victim's of Crime fund in the amount of Four Hundred Twenty-six dollars (\$426.00)." (Tr. p. 6). At the outset, we note that Bartholomew failed to enter an objection to the restitution ordered at the time of the hearing. Although it is a long-standing general rule that an appellate court need not consider alleged errors which were not objected to in the trial court, *State v. Williams* (1977), 51 Ohio St.2d 112, we find it necessary to examine this issue on the basis of plain error.

{¶22} Relevant case law states that plain error exists only in the event that it can be said that "but for the error, the outcome of the trial would clearly have been otherwise." *State v. Biros*, 78 Ohio St.3d 426, 431, 1997-Ohio-204; see *State v. Johnson*, 3d Dist. No. 2-98-39, 1999-Ohio-825. For the following reasons, we conclude that plain error exists in this instance.

{¶23} R.C. 2743.52 permits the Attorney General to make awards of reparations to victims for economic losses arising from criminally injurious conduct. R.C. 2743.52(A). Here, it is undisputed that the Attorney General paid

the victim's mother \$426.00 out of the Ohio Victim's of Crime fund, under R.C. 2743.52, and has sought reimbursement through an award of restitution in this criminal action.

{¶24} R.C. 2929.18(A)¹ provides financial sanctions, which can be imposed against a felony offender. Specifically, R.C. 2929.18(A) provides in pertinent part:

[T]he court imposing a sentence upon an offender for a felony may sentence the offender to any financial sanction or combination of financial sanctions authorized under this section * * *. Financial sanctions that may be imposed pursuant to this section include, but are not limited to, the following:

(1) *Restitution by the offender to the victim of the offender's crime* * * *, in an amount based on the victim's economic loss. 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.

(Emphasis added).

{¶25} In *State v. Kreischer*, 109 Ohio St.3d 391, 2006-Ohio-2706, the Ohio Supreme Court reviewed a former version of R.C. 2929.18(A)(1) and provided: "our resolution of this case will likely affect only those cases arising prior to the June 1, 2004 effective date of the statutory change, because on that date, the legislature amended R.C. 2929.18 to delete all references to restitution for third

parties. See 2003 Sub.H.B. No. 52.” Id. at ¶1. Specifically, the Court noted, “former R.C. 2929.18(A)(1) expressly stated that restitution may include ‘a requirement that reimbursement be made to third parties for amounts paid to or on behalf of the victim.’ 148 Ohio Laws, Part IV, 8674, 8767. * * * Accordingly, the General Assembly authorized trial courts to exercise discretion when imposing financial sanctions on a defendant and permitted those sanctions to include reimbursement to third parties for amounts paid on behalf of a victim.” Id. at ¶13. Further, the Court held, “[i]n this case, the trial court exercised its discretion and ordered payment to the medical-insurance provider in accordance with former R.C. 2929.18(A)(1). Therefore, although our decision is limited in scope because this portion of the Revised Code has since been amended, we answer the certified question in the affirmative because at the time of its ruling, the trial court had discretion to include reimbursement to third parties for amounts paid on behalf of the victim * * *.” Id. See also, *State v. Christy*, 3d Dist. No. 16-06-01, 2006-Ohio-4319, ¶13 (“We note that, under former R.C. 2929.18(A)(1), a trial court may order a felony offender to pay the [Ohio Victim’s of Crimes fund] for money the [Fund] paid on a victim’s behalf.”)

{¶26} Thus, under the current version of R.C. 2929.18, financial sanctions which can be imposed against a felony offender do not include reimbursement to

¹ We note that R.C. 2929.18(A)(1) was amended effective April 4, 2007 under 2006 H 461. Therefore, we will consider the statute in effect when the offense occurred, which was February 2006, and all references

third parties for amounts paid on behalf of the victim. Therefore, the trial court committed plain error, because it did not have the authority to order Bartholomew to pay restitution to a third party, the Ohio Victim's of Crimes fund, in the amount of \$426.00.

{¶27} Accordingly, Bartholomew's sixth assignment of error is sustained.

{¶28} Having found no error prejudicial to the appellant herein, in the particulars assigned and argued in his first, second, third, fourth, and fifth assignments of error, but having found error prejudicial to the appellant herein, in the particulars assigned and argued in his sixth assignment of error, we affirm in part, reverse in part, and remand the matter for further proceedings consistent with this opinion.

*Judgment Affirmed in Part and
Reversed in Part and Cause Remanded.*

SHAW and PRESTON, JJ., concur.

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