

ORIGINAL

IN THE SUPREME COURT OF OHIO

10-2225

STATE OF OHIO

Plaintiff-Appellee,

Case No. \_\_\_\_\_

On Appeal from the Clark County  
Court of Appeals Second Appellate  
District

vs.

RICHARD MILLER, II

C.A. Case No. 2008 CA 90

Defendant-Appellant.

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MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT RICHARD MILLER, II

---

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**EXPLANATION PF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL  
INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTION QUESTION**

This case presents four issues for the future of public and/or great general interest in the State of Ohio: (1) whether a person plea is knowingly, intelligently, and voluntarily waived when the trial court failed to state all circumstances of the conditional plea according to Criminal Rule 11(C)(2)(a); (2) whether the trial court erred in not researching a person eligibility to pay restitution according R.C. 2929.19(B)(6); (3) whether the trial court abused its discretion by not allowing a person who was in involved in the incident decide not to pursue charges and/or punish a person according to 2929.11 through 2929.19; (4) If a trial court erred in imposing restitution well after nineteen months after sentencing. All issues are within the arguments contained in the Memorandum of Jurisdiction.

In this case, the court of appeals decision that a person cannot decide a guilt and punishment phase of the proceedings was against the Ohio Constitution Article 1, Section 2. A person have the right to decide if they want to pursue charges in any incident especially if that person is accepting responsibility for being involved and participating in the incident by any form, way or fashion. So, does a person have the right to not pursue punishment against an accused if that person is accepting full responsibility to the incident at hand?

When accepting a plea, a person must be aware of all conditions involved when waiving their constitutional rights of a trial. When a trial court "does not" establish such procedures, this will allow trial courts to accept un-conditional pleas without properly notifying a person of the natural functions of the Trial Courts to protect the Due Process Rights of any person being accused and/or pursuing the right to innocence. Once a trial Court violated this procedures it almost becomes irreversible and violates a person right to Due Process. The mitigating circumstances in any case that involves a person has the right to speak regarding the disposition stages as of right. And not to allow a person to speak regarding such punishment phase violated Due Process of both parties. Does aperson have a right to

decide and/or speak regarding the dispositional phase of the proceedings as of right to Due Process Clause?

In sum, the Trial Court committed error when it "did not" allow a person to speak during the dispositional phase of the proceedings and by not allow a person not to pursue punishment when that person is accepting full responsibility of the incident. When a trial court does not instruct a person of their constitution rights when accepting a conditional plea violates a person's right to Due Process. For the purpose of Criminal Rule 11(C)(2)(a) promotes that such acts of procedural Due Process be taken when accepting a knowingly, intelligently, voluntarily plea. But, when that plea is in description by the words stated by the trial court, violated a person rights to be aware of all circumstances when waiving such privilege of going to trial and the punishment phase of the proceedings.

#### **STATEMENT OF THE CASE AND THE FACTS**

Richard Miller, II, was accused of driving under the influence of alcohol and /or marijuana on January 18, 2008 (Sentencing Hearing, pages 3-4). He allegedly caused a collision which killed Kathy Clos was in another vehicle and seriously injured his own passenger Steven Skaggs.

Mr. Miller was indicted on May 13, 2008, of two counts of aggravated vehicular homicide and two counts of aggravated vehicular assault (Indictment filed May 13, 2008). According to the State, Counts Two and Four were lesser included offenses on Counts One and Three (Plea Hearing, page 3).

On August 15, 2008, Mr. Miller pleaded guilty to Count I, first degree felony Aggravated Vehicular Homicide in violation of R.C. 2903.06(A)(1)(a) which carried the specification pursuant to R.C. 2903.06(B)(2)(b)(i) that Mr. Miller was driving under suspension at the time. Mr. Miller also pleaded guilty to count III, second degree felony Aggravated Vehicular Assault in violation of R.C. 2903.08 (A)(1)(a) which carried a specification pursuant to R.C.2903.08(B)(1)(a). According to the State, Mr. Miller essentially pleaded guilty as charged (plea Hearing, page 4).

On September 2, 2008, Mr. Miller was sentenced to ten years incarceration on Count I to run

consecutively to four years incarceration on Count III for a total aggregate prison term of fourteen years (sentencing Hearing, pages 13-14).

Mr. Miller was also ordered to pay restitution and fine of 1,000 (Sentencing Hearing, page13).

Mr. Miller's driver's license was suspended for life on Count One for ten years on Count III (Id.).

A timely notice of appeal was filed on October 1, 2008.

### ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**PROPOSITION OF LAW ONE: Mr. Miller was denied his right to due process of law as guaranteed by the United States and Ohio Constitution Because His guilty Pleas were not entered Knowingly, Intelligently, and Voluntarily.**

Issue Presented for Review: Whether Mr. Miler entered his plea knowingly, intelligently, and voluntarily when the trial court failed to inform him that he would not be eligible for community control sanctions at the sentencing hearing as required by Criminal Rule 11(C)(2)(a).

“Whether a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily.” State v. Engle, 74 Ohio St.3d 525, 527, 1996-Ohio-179, citing Kercheval v. United States (1927), 274 U.S. 220, 223, 47 S. Ct. 582, 583, 71 L.Ed. 1009, 1012. “Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and Under the Ohio Constitution.” Criminal Rule 11 helps Ohio Judges make sure they are accepting pleas that are constitutional because they are made knowingly, intelligently, voluntarily. State v. Ballard (1981), 66 Ohio St.2d 473, 423 N.E.2d 115. Criminal Rule 11(C)(2)(a) requires that a defendant be informed that he is not eligible for the imposition of community control sanctions be fore the court accepts his guilty pleas.

Mr. Miller pleaded guilty to Aggravated Vehicular Homicide in violation of R.C. 2903.06(A)(1)(a) which carried the specification pursuant to R.C. 2903.06(B)(2)(b)(i) that Mr. Miller was driving under suspension at the time of the accident. This was first degree felony that required the imposition of prison time.

Nevertheless, the trial judge failed to determine that Mr. Miller was making the plea with understanding that he would not be eligible for the imposition of community control sanctions at the sentencing hearing before accepting before his guilty pleas (Plea Hearing, pages 2-15). The judges never informed Mr. Miler that he was ineligible for community control and the judge never informed him during the colloquy that he faced mandatory prison time.

The judge told Mr. Miller regarding that first degree felony in Count 1 that “the Court has to impose a sentence to the penitentiary of at least three years and can impose a sentence of up to ten years to the Ohio State penitentiary” (Plea Hearing, Page 10 lines 5-6). While that statement could possibly be taken to mean that Mr. Miller had to be sentenced to prison, that meaning is not at all clear. What the Statement could also mean is that the minimum prison time for a first degree felony is three years, so the judge would have to sentence Mr. Miller to at least three years if he decided to send him to prison. If the judge were to sentence Mr. Miller to prison for the second degree in Count 3, the judge would have to impose a sentence of at least two years. That does not mean that Count 3 carries mandatory time, that just means the judge is only permitted the following options for sentencing on a second degree felony – 2, 3, 4, 5, 6, 7, or 8 years. Similarly, if a judge is going to sentencing a defendant to prison on a third degree felony, the judge has to sentence the defendant to at least one year.

The trial judge did not mention during the colloquy that Mr. Miller would be ineligible for community control sanctions as required by Criminal Rule 11(C)(2)(a) or that his sentence carried mandatory prison time. (Transcript of Plea Hearing, pages 2-15).

Criminal Rule 11(C)(2) states that that a trial judge “shall not accept a plea of guilty ...without first addressing the defendant personally and ... (C) (2)(a) [d]etermining that the defendant is making the plea voluntarily, with the understanding ... that the defendant is not eligible for ... the imposition of community control sanctions at the sentencing hearing.”

And this Court has stated:

We hold that when a defendant on whom a mandatory prison sentence is imposed enters a plea of guilty or no contest, before accepting the plea the court must determine the defendant's understanding that the mandatory sentence renders the defendant ineligible for alternative sentences of probation or community-control sanctions. *State v. Byrd*, 178 Ohio App.3d 646, 653, 2008-Ohio5515, ¶ 30.

In the case, the trial judge failed to determine whether Mr. Miller understood that he was not eligible for community sanctions. All the trial judge did was make the one ambiguous comment that “that Court has to impose a sentence to the penitentiary of at least three years [as to Count One which was first degree felony]” (Plea Hearing, page 10- lines 6-7). Such an ambiguous during a plea colloquy community control and mandatory prison time are not mentioned fails to comply with the requirement of Criminal Rule 11(C)(2) and (a).

While the plea form had “yes” under term is mandatory” for Count 1 (Plea Form filed September 3, 2008), and the judge confirmed during the colloquy that Mr. Miler reviewed and understood the plea from before accepting pleas (Transcript of Plea Hearing, pages 12-13), the judge never complied with the clear dictates of Criminal Rule 11(C)(2)(a) because he never determined while addressing Mr. Miller personally – that Mr. Miller understood he was not eligible for community control sanctions.

Because the requirement that judges inform defendants that they are ineligible for community control sanctions is not a Constitutional Right, the trial court was only required to “substantial comply” with the requirement. *State v. Griggs*, 103 Ohio St.3d 85, 87, 2004-Ohio-4415, ¶ 12. But in Mr. Miler's case, the trial court did not comply at all with the clear requirement of 11(C)(2)(a) because the judge did not determine that Mr. Miller understood he was ineligible for community sanctions before the judge accepted his guilty pleas. Therefore, the trial court's failure here was not just “slight deviation” from the text of the rule. *State v. Clark*, 119 Ohio St.3d 239, 244-245, 2008-Ohio-3748, ¶ 31.

A complete failure to comply with the non-constitutional requirement of Criminal Rule 11

requires reversal of the plea. State v. Sarkozy, 117 Ohio St.3d 86, 90, 2008-Ohio-509, ¶ 22; State v. Farley (March 15, 2002), Hamilton App.No. C-0100478 (stating “[n]oncompliance with Crim.R. 11(C)(2)(a) is not substantial compliance”).

Because the trial judge completely failed to comply with Criminal Rule 11(C)(2) and (a) during the colloquy at Mr. Miller's pleas hearing, Mr. Miller's pleas should be vacated and this case should be remanded to the trial court.

But if this Court determine that the judge somehow partially complied with Criminal Rule(C)(2)(A) regarding intelligibility for community control sanctions, the test would be whether the trial judge “substantially complied” and the issue would be whether the “totality of the circumstances indicates that ‘the defendant subjectively understands the implications of his plea and the rights he is waiving.’” Clark, supra, at 244-245, ¶ 31; citing State v. Nero, 56 Ohio St.3d 106, 108.

The trial court failed to substantially comply with its duty to address Mr. Miller personally to make sure he understood that he was ineligible for community control sanctions at the sentencing hearing. The trial court did not tell Mr Miller he was ineligible for the imposition of community control sanctions or that he was facing mandatory prison time during the colloquy. The only thing the trial court did during the colloquy was make the ambiguous statement that the court had to impose a prison term of at least three years on Count 1 which was first degree felony (Transcript of Plea Hearing, page 10). from this isolated and ambiguous statement it is not clear that Mr. Miller subjectively understood the implications of his pleas and the rights he was waiving and his pleas should be vacated.

**PROPOSITION OF LAW TWO: The Trial Court Erred By Ordering Mr. Miller To Pay Restitution And A Fine In Violation of 2929.19(B)(6).**

Issue Presented for Review: Whether the Trial Court erred in ordering Mr. Miller to pay restitution and fine without first considering Mr. Miller's present and future ability to pay as require by R.C. 2929.19(B)(6)

Before ordering a defendant to pay restitution or a fine, a Trial judge must consider 'the

offender's present and future ability to pay the amount of the sanction or fine.” R.C. 2929.19(B)(6).

Mr. Miller was ordered to pay restitution and fine of 1,000 in this case (Sentencing Hearing, pages 13-14, Judgment Entry filed September 3, 2008). However, the trial judge failed to consider Mr. Miller's present and future ability to pay as required by R.C. 2929.19(B)(6).

Instead, the trial judge Mr. Miller, “I see little chance that you will ever pay any of that money” (Sentencing Hearing, pages 13-14).

Therefore, this Court should reverse Mr. Miller's order to pay “restitution” and a fine of 1,000.

**PROPOSITION OF LAW THREE: The Trial Court Abused Its Discretion In Sentencing Mr. Miller To A Consecutive Four Year Term On Count III.**

Issue Presented for Review: Whether the Trial Court abused its discretion when it sentenced Mr. Miller to a consecutive four year term on Count III because the victim in Count III was “equally culpable for the disaster” and did not want Mr. Miller to be punished.

Appellate Courts must review sentences that are not contrary to law for an abuse of discretion. State v. Kalish, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 16.

The trial judge abused his discretion in sentencing Mr. Miller for a consecutive four year term on Count III because the victim on Count III was his passenger who the judge said was “equally culpable to this disaster” and who did not want Mr. Miller punished for the injuries to himself (Transcript of Sentencing Hearing, 10, 14).

As the prosecutor pointed out, the car Mr. Miller was driving belonged to his passenger, his passenger was intoxicated and/or high, his passenger bought the drinks for Mr. Miller, his passenger did not have a drivers license either, and “but for a coin toss,” it could have been Mr. Miller's passenger who caused the accident (Transcript of Sentencing Hearing, 8-9). Furthermore, Mr. Miller passenger provided a statement to the trial court requesting that Mr. Miller not be punished for what happened to him (Transcript of Sentencing Hearing, 10).

For these reasons, the trial judge abused his discretion in imposing a consecutive four year term

on Count III, Mr. Miller respectfully asks this Court to reverse the consecutive four year sentence for Count III.

**PROPOSITION OF LAW FOUR: The Trial Court erred in ordering Mr. Miller to pay \$11, 730.20 In Restitution Nineteen Months After The Sentencing Hearing.**

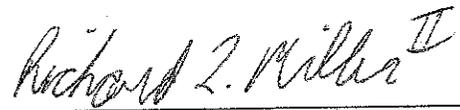
Issue Presented for Review: Whether the Trial Court abused its discretion when it order Appellant to pay restitution nineteen months after the original sentencing.

This Proposition of law cannot be properly presented due to Appellate Counsel failure to provide Appellant with Supplemental Brief filed in this matter.

**CONCLUSION**

Mr. Miller's pleas should be vacated because the trial judge failed to comply with Criminal Rule 11(C)(2)(a). In the alternative, this Court should reverse the consecutive sentence portion due to the reasons argued in this Merit Brief.

Respectfully submitted,

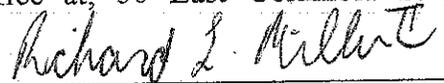


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Defendant-Appellant, pro se

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Memorandum of Jurisdiction was forwarded by regular U.S. Mail to Clark County Prosecuting Attorney Office at, 50 East Columbia Street, Springfield, Ohio 45501 on this 15<sup>th</sup> day of March, 2011.



Richard Miller, II  
Defendant-Appellant, pro se

STATE OF OHIO

Plaintiff-Appellee,

Case No. \_\_\_\_\_

On Appeal from the Clark County  
Court of Appeals Second Appellate  
District

vs.

RICHARD MILLER, II

C.A. Case No. 2008 CA 90

Defendant-Appellant.

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**APPENDIX TO**

**MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT RICHARD MILLER, II**

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IN THE SUPREME COURT OF OHIO

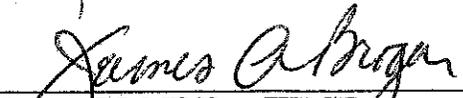
IN THE COURT OF APPEALS OF CLARK COUNTY, OHIO

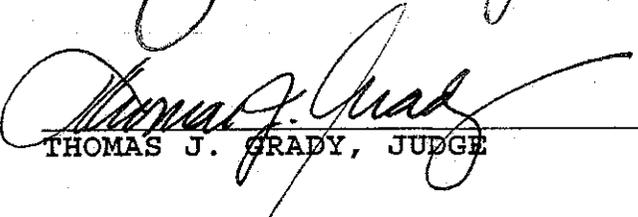
STATE OF OHIO :  
Plaintiff-Appellee : C.A. CASE NO. 08CA0090  
vs. : T.C. CASE NO. 08CR0390  
RICHARD MILLER, II : FINAL ENTRY  
Defendant-Appellant :

.....

Pursuant to the opinion of this court rendered on the  
1st day of October, 2010, the judgment of the trial  
court is Reversed, in part, and the matter is Remanded to the  
trial court for further proceedings consistent with the opinion.  
The trial court's judgment is otherwise affirmed. Costs are to  
be paid as follows: 50% by Appellant, 50% by Appellee.

  
MARY E. DONOVAN, PRESIDING JUDGE

  
JAMES A. BROGAN, JUDGE

  
THOMAS J. GRADY, JUDGE

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IN THE COURT OF APPEALS OF CLARK COUNTY, OHIO

STATE OF OHIO

Plaintiff-Appellee

vs.

RICHARD MILLER, II

Defendant-Appellant

:

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C.A. CASE NO. 08CA0090

T.C. CASE NO. 08CR0390

(Criminal Appeal from  
Common Pleas Court)

O P I N I O N

Rendered on the 1st day of October, 2010.

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GRADY, J.:

Defendant, Richard Miller, II, appeals from his conviction  
and sentence for aggravated vehicular homicide and aggravated  
vehicular assault.

On January 18, 2008, Defendant was operating his motor  
vehicle while under the influence of alcohol and/or marijuana.  
At the intersection of Villa and Derr Roads in Springfield,  
Defendant caused a traffic accident which resulted in the death

of another driver, Kathy Clos, and serious physical harm to Defendant's passenger, Steven Skaggs. At the time of the accident, Defendant's driving privileges had been suspended. Defendant subsequently entered pleas of guilty to one count of aggravated vehicular homicide, R.C. 2903.06(A)(1)(a), a felony of the first degree, and one count of aggravated vehicular assault, R.C. 2903.08(A)(1)(a), a felony of the second degree, each with a specification that at the time of the offense Defendant was driving under suspension.

On September 2, 2008, the trial court sentenced Defendant to consecutive prison terms of ten years on the aggravated vehicular homicide and four years on the aggravated vehicular assault, for a total sentence of fourteen years. The court suspended Defendant's driver's license for life on the aggravated vehicular homicide charge, and for ten years on the aggravated vehicular assault charge. The court also fined Defendant one thousand dollars and ordered him to pay restitution, in an unspecified amount, court costs, appointed counsel costs, and any fees permitted by R.C. 2929.18(A)(4).

Defendant timely appealed to this court from his conviction and sentence. On January 28, 2010, Defendant asked this court to stay the appeal and remand the matter to the trial court to determine the amount of restitution he must pay. On March 8, 2010, we filed an Order wherein we pointed out that a sentencing entry that orders the payment of restitution but fails to determine the amount of that restitution is not a final,

appealable order. We ordered Defendant to show cause within thirty days as to why this appeal should not be dismissed for lack of a final, appealable order. However, we indicated that if the trial court revised its judgment of conviction within that time, with the amount of restitution determined, we would construe Defendant's notice of appeal as premature and this appeal could proceed. App.R. 4(C).

On April 23, 2010, the trial court issued a Revised Judgment Entry of Conviction wherein the court specified that the amount of restitution to be paid by Defendant is \$11,730.27. On May 14, 2010, we deemed our show cause order satisfied, and held that the notice of appeal would be premature to the April 23, 2010 Revised Judgment Entry of Conviction.

#### FIRST ASSIGNMENT OF ERROR

"MR. MILLER WAS DENIED HIS RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE UNITED STATES AND OHIO CONSTITUTIONS BECAUSE HIS GUILTY PLEAS WERE NOT ENTERED KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY."

Defendant argues that his guilty pleas were not entered knowingly, intelligently and voluntarily because the trial court failed to inform him that he was not eligible for community control sanctions. Community control sanctions may be imposed, depending on the felony offense concerned, if in imposing a sentence the court is not required to impose a prison term or mandatory prison term. R.C. 2929.15(A)(1).

To be constitutionally valid, a guilty or no contest plea

must be made knowingly, intelligently and voluntarily. *State v. Engle*, 74 Ohio St.3d 525, 1996-Ohio-179. Compliance with Crim.R. 11(C) in accepting guilty or no contest pleas portrays those qualities. *State v. Ballard* (1981), 66 Ohio St.2d 473; *State v. Gossard*, Montgomery App. No. 19494, 2003-Ohio-3770. With respect to the non-constitutional requirements in Crim.R. 11(C)(2), substantial compliance by the trial court is sufficient. *State v. Stewart* (1977), 51 Ohio St.2d 86; *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200. Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving. *Veney*, at ¶15. A defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently and voluntarily made must show a prejudicial effect, which requires the defendant to show that the plea would otherwise not have been entered. *Id.*

Crim.R. 11(C)(2)(a) provides:

"In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

"Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing."

In *State v. Byrd*, 178 Ohio App.3d 646, 2008-Ohio-5515, we held that when a defendant on whom a mandatory prison sentence is imposed enters a plea of guilty or no contest, the court must, before accepting the plea, determine the defendant's understanding that the mandatory sentence renders the defendant ineligible for probation or community control sanctions. *Id.* at ¶30.

Defendant pled guilty to aggravated vehicular homicide in violation of R.C. 2903.06(A)(1)(a), with a specification that Defendant was driving under suspension at the time of the offense. That offense is a felony of the first degree that requires a mandatory prison term. R.C. 2903.06(B)(2)(b)(i). In accepting Defendant's guilty pleas, the trial court engaged in the following colloquy with Defendant:

"THE COURT: Now, if you plead guilty, the Court is going to have certain penalties, which can and will be imposed. As to Count One, the charge of aggravated vehicular homicide, the Court has to impose a sentence to the penitentiary of at least three years and can impose a sentence of up to ten years to the Ohio State Penitentiary. There would be a maximum fine of \$20,000. There is a mandatory lifetime license suspension as a result of a conviction for this offense.

"Do you understand those potential and real penalties?"

"THE DEFENDANT: Yes, sir.

"THE COURT: Count three permits the Court to impose a sentence of up to eight years in the Ohio State Penitentiary and

a fine of up to \$15,000. For that offense the Court could impose a license suspension of up to ten years.

"Do you understand the penalties in Count Three that are available to this Court?

"THE DEFENDANT: Yes, sir."

\* \* \*

"THE COURT: There is a form that you reviewed with your attorney. It's called a plea of guilty form and it has actually quite a bit of what I just said here. Did you review that form with your attorney?

"THE DEFENDANT: Yes, sir.

"THE COURT: Did you understand that form?

"THE DEFENDANT: Yes, sir.

"THE COURT: And did you indeed sign that form here in the courtroom?

"THE DEFENDANT: Yes, sir." (T. 10, 12-13) (Emphasis supplied.)

In accepting Defendant's guilty pleas and discussing with him the possible penalties he faced, the trial court did not expressly tell Defendant that he faced "mandatory prison time" or that he was "ineligible for community control." Nevertheless, with respect to the aggravated vehicular homicide charge, the court advised Defendant in plain, simple language that "the Court has to impose a sentence to the penitentiary . . ." The court's use of the phrase "has to" carries a clear implication of something that is mandatory. The court's advisement forecloses

the possibility that any sentence other than a term of imprisonment of three up to ten years would be imposed, eliminating community control as an option available to the court. In describing to Defendant the penalty for aggravated vehicular homicide, the court's use of mandatory language, "has to impose a sentence to the penitentiary," contrasts with the permissive language the court used when describing the penalty for aggravated vehicular assault, "permits the Court to impose a sentence of up to eight years . . . ."

Furthermore, the plea agreement that Defendant told the court he had reviewed, understood, and signed, clearly specifies that the sentence for aggravated vehicular homicide includes a mandatory prison term. On the totality of these facts and circumstances, we find that the trial court substantially complied with Crim.R. 11(C)(2)(a). In any event, Defendant has failed to demonstrate any prejudicial effect because he does not allege that if he would have known that he was ineligible for community control sanctions, he would not have entered his guilty plea. *Veney; Stewart.*

Defendant's first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN ORDERING MR. MILLER TO PAY RESTITUTION IN VIOLATION OF R.C. 2929.18(A)(1)."

R.C. 2929.18(A)(1) provides that if the court imposes restitution at sentencing, the court shall determine the amount of restitution to be made by the offender. At the sentencing

hearing the trial court ordered Defendant to pay restitution but failed to determine the amount of restitution to be paid. That constitutes plain error requiring remand. *State v. Collins*, Montgomery App. No. 21182, 2006-Ohio-3036. On remand, the trial court, on April 23, 2010, ordered Defendant to pay restitution in the amount of \$11,730.20, by a judgment entry journalized on that date. (Dkt. 28).

The judgment entry of April 23, 2010 cured the lack of a final order concerning restitution to be paid. In a supplemental brief and for his Sixth Assignment of Error, Defendant argues that the trial court erred, nevertheless, because he was not physically before the court for pronouncement of the amount of restitution the court ordered in the judgment entry.

R.C. 2929.18(A)(1) provides: "If the court imposes restitution, the court shall order the restitution to be made in open court . . ." Further, per R.C. 2929.18(A)(1), restitution is an element of a sentence imposed, and "the defendant must be physically present at every stage of the criminal proceeding and trial, including . . . the imposition of sentence." Crim.R. 43(A)(1). When a sentence that was pronounced in open court is subsequently modified, and a judgment entry reflects the modification, the modification must have been made in the defendant's presence. *State v. Mullens*, Summit App. No. 23395, 2007-Ohio-2893.

The State does not dispute Defendant's contention that he was not physically before the court when the amount of

restitution was imposed. The State instead argues that Defendant was not prejudiced on that account because the amount of restitution ordered, \$11,730.20, was the amount of restitution that had been recommended in the presentence investigation report, which the court and the parties reviewed prior to the sentence that was imposed on September 2, 2008. We do not agree. Until an amount of restitution was imposed by the court, Defendant had no right to the hearing to which he is entitled by R.C. 2929.18(A)(1), should he dispute the amount ordered. Further, a defendant's physical presence is always required, absent an express waiver.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED BY ORDERING MR. MILLER TO PAY RESTITUTION AND A FINE IN VIOLATION OF 2929.19(B)(6)."

Defendant argues that the trial court erred in ordering him to pay restitution and a one thousand dollar fine without first considering his present and future ability to pay.

R.C. 2929.18(A) authorizes the trial court to impose financial sanctions upon an offender, including restitution and a fine. Before imposing any financial sanctions, the trial court has a mandatory duty to "consider the offender's present and future ability to pay the amount of the sanction." R.C. 2929.19(B)(6). There is, however, no requirement that the court hold a hearing on the matter, nor is the court obligated to make any express findings on the record regarding defendant's ability

to pay a financial sanction, although that, in our opinion, is clearly the better practice. *State v. Ayers*, Greene App.No. 04CA0034, 2005-Ohio-44. All that is required is that the trial court consider Defendant's ability to pay. *Id.*

Information contained in a presentence investigation report relating to defendant's age, health, education, and employment history, coupled with a statement by the trial court that it considered the presentence report, has been found sufficient to demonstrate that the trial court considered defendant's ability to pay a financial sanction. *Ayers* (citations omitted). A finding that Defendant is indigent for purposes of appointed counsel does not shield a defendant from paying court costs, which are required by law, or a financial sanction. *Ayers* (citations omitted).

At the September 2, 2008 sentencing hearing the trial court expressly stated that it had reviewed the presentence investigation report in this case. That report includes information relating to Defendant's age, health, education and employment history. Furthermore, the court stated at the sentencing hearing:

"I'm going to order restitution in both counts. Although I see little chance that you will ever pay any of that money. And, likewise, because of that, the Court will only impose a fine of \$1,000 as to Count One and the court costs." (T. 13-14)

The record before us is sufficient to demonstrate that the trial court considered Defendant's present and future ability to

pay financial sanctions.

Defendant's third assignment of error is overruled.

FOURTH ASSIGNMENT OF ERROR

"THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING MR. MILLER TO A CONSECUTIVE FOUR YEAR TERM ON COUNT III."

Defendant argues that the trial court abused its discretion by sentencing him to a four year prison term for aggravated vehicular assault, consecutive to the sentence imposed for aggravated vehicular homicide, when the victim of that vehicular assault offense, a passenger in the vehicle Defendant was driving, was equally culpable for this disaster because he provided drinks to Defendant and a car for Defendant to drive, and he did not want Defendant punished for the injuries he sustained.

In *State v. Jeffrey Barker*, Montgomery App. No. 22779, 2009-Ohio-3511, at ¶36-38, we wrote:

"The trial court has full discretion to impose any sentence within the authorized statutory range, and the court is not required to make any findings or give its reasons for imposing maximum, consecutive, or more than minimum sentences. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, at paragraph 7 of the syllabus. Nevertheless, in exercising its discretion the trial court must consider the statutory policies that apply to every felony offense, including those set out in R.C. 2929.11 and 2929.12. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, at ¶ 37.

"When reviewing felony sentences, an appellate court must first determine whether the sentencing court complied with all applicable rules and statutes in imposing the sentence, including R.C. 2929.11 and 2929.12, in order to find whether the sentence is contrary to law. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. If the sentence is not clearly and convincingly contrary to law, the trial court's decision in imposing the term of imprisonment must be reviewed under an abuse of discretion standard. *Id.*

"The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the trial court's attitude is unreasonable, arbitrary, or unconscionable.' *State v. Adams* (1980), 62 Ohio St.2d 151, 157[, 16 O.O.3d 169], 404 N.E.2d 144."

Defendant does not argue that his sentence is contrary to law. An examination of this entire record reveals that the court considered the presentence investigation report, the principles and purposes of felony sentencing, R.C. 2929.11, the seriousness and recidivism factors, R.C. 2929.12, and the statements made by all parties at sentencing. The court also informed Defendant about post release control requirements. The trial court complied with all applicable rules and statutes in imposing its sentence. Furthermore, the prison terms the court imposed on each count are clearly within the authorized range of available punishments for felonies of the first and second degree. R.C. 2929.14(A) (1), (2). Defendant's sentence is not clearly and convincingly contrary to law. *Kalish*.

In imposing a consecutive four year prison term on the aggravated vehicular assault, the trial court did take into account that the victim of that offense was a passenger in the vehicle Defendant was driving, who provided Defendant with a vehicle to drive and the drinks Defendant consumed, and who, like Defendant, was intoxicated and did not have a valid driver's license, and therefore was "equally culpable for this disaster." The court considered that but for the fact he was too intoxicated, it could have been the passenger who caused this accident. The court also considered that the passenger did not want Defendant punished for the injuries he sustained. But the victim's wishes, while relevant, is only one factor to consider.

The overriding purposes of felony sentencing are (1) to protect the public from future crime by the offender and (2) to punish the offender. R.C. 2929.11. Although the victim's conduct may have contributed to this accident, Defendant nevertheless chose to drive while under the influence of alcohol.

\* The trial court noted a number of aggravating factors. Defendant was driving under suspension, speeding, fleeing from police, ran a red light, and was at the time under the influence of alcohol. The victim of the offense suffered serious physical harm. R.C. 2929.12(B)(2). Defendant has an extensive prior criminal history. R.C. 2929.12(D)(2). Defendant has not responded favorably to sanctions previously imposed. R.C. 2929.12(D)(3). This record supports the trial court's mid-range four year consecutive sentence for aggravated vehicular assault.

No abuse of discretion on the part of the trial court has been demonstrated.

Defendant's fourth assignment of error is overruled.

FIFTH ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED BY ORDERING MR. MILLER TO PAY APPOINTED COUNSEL COSTS."

Defendant argues that the trial court erred by ordering him to pay appointed counsel costs in its September 5, 2008 Judgment Entry of Conviction and Sentence when the court did not impose those costs at the September 2, 2008 sentencing hearing, and the court further failed to consider whether Defendant had the ability to pay those costs. R.C. 2941.51(D). The State concedes in its appellate brief that the trial court erred in imposing appointed counsel costs in its Judgment Entry of Conviction and Sentence without having first pronounced those costs in open court at the sentencing hearing, in violation of Defendant's Crim.R. 43 right to be present at sentencing. Accordingly the court's order that Defendant pay appointed counsel costs must be reversed and remanded for resentencing. The State claims, however, that the court did consider Defendant's present and future ability to pay because it reviewed the presentence investigation report which contained information relating to Defendant's age, health, education, and work history. Ayers.

We have previously considered this issue and held that the trial court lacks statutory authority to impose the payment of costs of appointed counsel in a criminal prosecution as part of

the financial sanctions authorized by R.C. 2929.18. Rather, that sanction must be prosecuted in a civil action. In *State v. Hill*, Clark App. No. 04CA0047, 2005-Ohio-3877, at ¶3-6, we stated:

"The General Assembly, acting pursuant to the legislative authority conferred on it by Section 1, Article II of the Ohio Constitution, has assumed the responsibility of defining what acts or omissions are crimes or offenses against the state, and of prescribing suitable penalties in case of guilt. *State v. Hogan* (1900), 63 Ohio St. 202, 58 N.E. 572. As a corollary to that proposition, no penalty may be imposed upon conviction of a criminal offense which the General Assembly has not by statute prescribed for that purpose.

"R.C. 2929.18 prescribes the financial sanctions a court may impose on conviction for a felony. The costs of or fees paid to court-appointed counsel are not among them.

"The State relies on R.C. 2941.51(D). That section confers a right of action on a county for any claim it has for reimbursement of court-appointed counsel fees and expenses, 'if the person has, or may reasonably be expected to have, the means to meet some part of the cost of the services rendered to the person.'

"The right of action R.C. 2941.51(D) confers must be prosecuted in a civil action. *State v. Crenshaw* (2001), 145 Ohio App.3d 86, 761 N.E.2d 1121. That fact is underscored by the further provision of R.C. 2941.51(D) which states that '[t]he fees and expenses (for court-appointed counsel) approved by the

court ... shall not be taxed as part of the costs,' as the court here did."

Defendant's fifth assignment of error is sustained. That portion of the trial court's sentence ordering Defendant to pay appointed counsel costs is reversed and vacated.

#### SIXTH ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN ORDERING MR. MILLER TO PAY \$11,730.20 IN RESTITUTION NINETEEN MONTHS AFTER THE SENTENCING HEARING."

Defendant argues that the trial court erred when it ordered the amount of restitution specified in its Revised Judgment Entry of Conviction. Our determination of the second assignment of error requires a reversal of the amount of restitution the court ordered. That determination renders this assignment of error moot, and we therefore decline to determine the error assigned. App.R. 12(C)(3).

#### SEVENTH ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN ORDERING MR. MILLER TO PAY 'ANY FEES PERMITTED PURSUANT TO REVISED CODE SECTION 2929.18(A)(4).'"

Defendant argues that the trial court erred in ordering him to pay "any fees permitted pursuant to R.C. 2929.18(A)(4)" in its judgment entry without first having pronounced that financial sanction in open court at the sentencing hearing in violation of Defendant's Crim.R. 43 right to be present at sentencing. The State concedes this error in its appellate brief, and that the court's order to pay any fees permitted pursuant to R.C.

2929.18(A) (4) must be reversed and remanded for resentencing. We agree.

Defendant' seventh assignment of error is sustained. That portion of the trial court's sentence ordering Defendant to pay any fees permitted pursuant to R.C. 2929.18(A) (4) is reversed and remanded to the trial court for resentencing.

#### Conclusion

Having sustained the second, fifth, and seventh assignments of error, the trial court's sentence will be reversed, in part. Specifically, we will vacate the requirement that Defendant pay the costs of his court appointed counsel, and will reverse the trial court's order of restitution and its order that Defendant pay any fees permitted pursuant to R.C. 2929.18(A) (4), and remand this matter to the trial court for resentencing on those latter two issues. The trial court's judgment is otherwise affirmed.

DONOVAN, P.J., And BROGAN, J., concur.

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