[Cite as *State v. Christman*, 2009-Ohio-6555.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

PREBLE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NOS. CA2009-03-007 CA2009-03-008
	:	
- vs -	:	O P I N I O N 12/14/2009
KENNETH E. CHRISTMAN,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM PREBLE COUNTY COURT OF COMMON PLEAS
Case Nos. 08CR010138 and 08CR10139

Martin P. Votel, Preble County Prosecuting Attorney, Eric E. Marit, 101 East Main Street, 1st Floor, Eaton, Ohio 45320, for plaintiff-appellee

Keith O'Korn, 440 Polaris Parkway, Suite 150, Westerville, Ohio 43082, for defendant-appellant

HENDRICKSON, J.

{¶1} This case is a consolidated appeal in which defendant-appellant, Kenneth E. Christman, challenges two sentencing decisions rendered by the Preble County Court of Common Pleas ordering him to pay restitution. For the reasons outlined below, we affirm in part, reverse in part, and remand.

{¶2} The charges in the first case stem from a January 2007 break-in at a car dealership in Eaton. The perpetrator broke into a used vehicle and removed the car

stereo. A DNA sample taken from blood in the vehicle matched appellant's DNA. Appellant was indicted on one count of vandalism in violation of R.C. 2909.05(B)(1)(a), a fifth-degree felony; and one count of theft in violation of R.C. 2913.02(A), a first-degree misdemeanor. Following a jury trial, appellant was found guilty on both counts and convicted. Appellant was sentenced to 12 months in prison and ordered to pay $1,286.34 in restitution to the car dealership, as well as costs of prosecution and costs for court-appointed counsel.

{¶3} The charges in the second case stem from two separate break-ins occurring in June 2007. In one incident, the perpetrator broke into a garage in Lewisburg owned by Gary and Ann Childers and removed a number of items. In the second incident, the perpetrator broke into a barn owned by William Van Brederode and removed an all-terrain vehicle (ATV). Appellant was indicted on one count of receiving stolen property in violation of R.C. 2913.51(A), a fifth-degree felony; another count of receiving stolen property in violation of R.C. 2913.51(A), a fourth-degree felony; and one count of breaking and entering in violation of R.C. 2911.13(A), a fifth-degree felony. Appellant pled guilty to all three counts.

{¶4} As a result of appellant's convictions in the second case, the trial court sentenced him to 12 months in prison, to be served concurrent to the 12-month sentence from the first case. The court also ordered appellant to pay costs of prosecution and costs for court-appointed counsel, as well as restitution in the following amounts: $796 to William Van Brederode; $1,302 to Gary Childers; and $1,006.35 to Progressive Insurance.

{¶5} The two cases were consolidated for purposes of appeal. In his timely appeal, appellant raises three assignments of error.

{¶6} Assignment of Error No. 1:

{¶7} "THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED BY ORDERING RESTITUTION IN THE DELINEATED AMOUNTS IN VIOLATION OF R.C. § 2929.18, OHIO COMMON LAW, AND THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION."

{¶8} Appellant disputes the trial court's restitution orders, raising three issues for our review. First, appellant argues that the trial court erred in ordering restitution in the second case for items of property which were not the subject of the indictment, conviction, or sentence.

{¶9} R.C. 2929.18(A)(1) allows a sentencing court to order restitution to the victim of the offender's crime in an amount based on the victim's economic loss. "Economic loss" is defined as "any economic detriment suffered by a victim as a direct and proximate result of the commission of an offense and includes * * * any property loss * * * incurred as a result of the commission of the offense." R.C. 2929.01(L). The amount of restitution ordered must bear a reasonable relationship to the victim's economic loss. *State v. Middleton*, Butler App. No. CA2005-11-499, 2006-Ohio-4558, ¶16. Prior to imposing a restitution order, a sentencing court must determine the amount of restitution to a reasonable degree of certainty, ensuring that the amount is supported by competent, credible evidence. *State v. Borders*, Clermont App. No. CA2004-12-101, 2005-Ohio-4339, ¶36, quoting *State v. Gears* (1999), 135 Ohio App.3d 297, 300.

{¶10} As stated, the indictment in the second case contained two charges for receiving stolen property. The fifth-degree felony charge, stemming from the Childers

robbery, listed the following items of property: battery electric charger, electric polisher, red "come-along," Ralley lawnmower, orange flashlight, and orange cordless screwdriver. The bill of particulars reflected these same items as listed in the indictment. Of these items, everything was recovered except for the battery charger and the come-along. At the February 18, 2009 restitution hearing, Gary Childers testified about the following additional items that he discovered were missing from the garage after the break-in: a STIHL weed eater, a second battery charger, an air compressor, and a number of chains. The trial court's $1,302 restitution award to Childers included these additional items.

{¶11} The indictment for the fourth-degree receiving stolen property charge, stemming from the Van Brederode robbery, listed only the 2000 Polaris Magnum ATV. The bill of particulars was consistent with the indictment, solely identifying the ATV as the subject of the charge. The ATV was recovered, although it had sustained some damage. At the February 18, 2009 restitution hearing, Van Brederode testified that he discovered the following additional items were missing from his barn after the break-in: a motorcycle jack, a trimmer, a blower, a five-gallon gas can, a small gas can, and seven gallons of gas. The trial court's $796 restitution award to Van Brederode included these additional items. Van Brederode also sought reimbursement for materials for a barn door repair, a metal security chain, and mileage to retrieve and repair the ATV. The restitution award reflected these items as well, plus Van Brederode's $100 insurance deductible.

{¶12} It is well established that, in fashioning a restitution order, a trial court is restricted to awarding restitution only for those acts which constitute the crime for which the defendant has been convicted and sentenced. *State v. Coldiron*, Clermont App. No.

CA2008-06-062, 2009-Ohio-2105, ¶21; *State v. Miller*, Butler App. No. CA2007-11-295, 2008-Ohio-5661, ¶11; *State v. Smith*, Butler App. No. CA2004-11-275, 2005-Ohio-6551, ¶25. After reviewing the record, it is apparent that the trial court's restitution awards to both Childers and Van Brederode encompassed items that exceeded this limitation.

{¶13} As stated, the trial court's $1,302 restitution award to Childers included reimbursement for the STIHL weed eater, second battery charger, air compressor, and chains. These items of property were not the subject of appellant's conviction for fifth-degree receiving stolen property. They were not listed in the indictment or bill of particulars, and were only incorporated into the offense at the restitution hearing. See, e.g., *Middleton*, 2006-Ohio-4558 at ¶18. On remand, the trial court is instructed to modify the restitution order to omit these unauthorized items.

{¶14} Similarly, the trial court's $796 restitution award to Van Brederode included reimbursement for the motorcycle jack, trimmer, blower, five-gallon gas can, small gas can, and seven gallons of gas. These items of property were not the subject of appellant's conviction for fourth-degree receiving stolen property. The indictment and bill of particulars did not include these items, which were not incorporated into the offense until the restitution hearing. See id. On remand, the trial court is instructed to modify the restitution order to omit these unauthorized items as well.

{¶15} Appellant concedes that Van Brederode was entitled to receive restitution for the barn door repair, metal security chain, and mileage to retrieve and repair the ATV. Indeed, the economic loss represented by these items was proximately caused by the criminal conduct for which appellant was convicted, that is, receiving the stolen ATV. R.C. 2929.01(L). See, also, *State v. Foster*, Butler App. No. CA2005-09-415, 2006-Ohio-4830, ¶9. Consequently, the trial court properly included these items in Van

Brederode's restitution award. Employing the same reasoning, we find that the trial court properly included Van Brederode's $100 insurance deductible in the restitution award as well.

{¶16} Having determined that the trial court erred in ordering restitution for items of property which were not the subject of appellant's indictments or convictions in the second case, we turn to the next issue raised by appellant under his first assignment of error. Appellant contends that the record does not contain competent, credible evidence to support the restitution figures for the damage to the ATV and for the come-along. Appellant insists that there was no evidence that he caused any damage to the ATV while it was in his possession, therefore the restitution amount for the ATV repair ordered payable to Progressive Insurance was erroneous. Appellant also rejects Childers' valuation for the come-along.

{¶17} Regarding the come-along, the trial court attributed a value of $500 to the item, adopting Childers' estimation. Childers testified that the same come-along would have cost approximately $1,700 new, but he decreased the value because he purchased the item used. He arrived at the $500 figure based upon his experience as a GM mechanic, a position he retired from in the year 2000. Childers stated that he used come-alongs all the time while working at GM, so he had a good idea of their cost. We hold that this constitutes competent, credible evidence supporting the restitution award for the come-along. *Borders*, 2005-Ohio-4339 at ¶36.

{¶18} We agree that the trial court's restitution award to Progressive Insurance was improper, but for reasons distinct from those advanced by appellant. In *State v. Baker*, Butler App. No. CA2007-06-152, 2008-Ohio-4426, this court recognized that the current version of R.C. 2929.18(A)(1) does not authorize restitution to third parties other

than those enumerated in the statute. *Baker* at ¶53-56. The permissible third parties include adult probation departments, clerks of court, and other agencies designated by the court. R.C. 2929.18(A)(1). See, also, *State v. Bartholomew*, 119 Ohio St.3d 359, 2008-Ohio-4080, ¶14. A state reparations fund, for example, is a permissible agency designated by the trial court that may receive restitution. Id. at ¶17. A private insurance company is not. We therefore find that the trial court erred in ordering appellant to pay restitution directly to Progressive Insurance.

{¶19} Appellant's third and final argument under his second assignment of error asserts that there is no evidence that the trial court made any determination regarding his present and future ability to pay prior to ordering restitution in both cases, in derogation of the court's statutory duties.

{¶20} Prior to imposing any financial sanction, including restitution, a trial court must "consider the offender's present and future ability to pay the amount of the sanction or fine" in accordance with R.C. 2929.19(B)(6). This determination does not require the trial court to consider any express factors or make any specific findings regarding the offender's ability to pay. *State v. Martin*, 140 Ohio App.3d 326, 338, 2000-Ohio-1942. Rather, the record must contain some evidence which establishes that the trial court complied with its duty to make the statutory determination regarding the offender's ability to pay. See, e.g., *State v. Adkins* (2001), 144 Ohio App.3d 633, 647.

{¶21} A review of the record reveals that the trial court did not expressly state, either at the restitution hearing or in its judgment entries of sentence, that it considered appellant's ability to pay prior to ordering restitution in both cases. This omission, however, is not determinative.

{¶22} This court has previously held that a trial court complies with R.C.

2929.19(B)(6) where it considers the offender's Presentence Investigation Report (PSI), a document which often details an offender's financial and personal information, in determining the offender's ability to pay financial sanctions. *State v. Patterson*, Warren App. No. CA2005-08-088, 2006-Ohio-2133, ¶21; *State v. Dandridge*, Butler App. No. CA2003-12-330, 2005-Ohio-1077, ¶6; *State v. Back*, Butler App. No. CA2003-01-011, 2003-Ohio-5985, ¶21. We have also noted that consideration of a PSI is not the only avenue for a trial court to assess the offender's ability to pay. *State v. Simms*, Clermont App. No. CA2009-02-005, 2009-Ohio-5440, ¶9. The court may hear evidence at trial pertaining to the offender's education and employment history. See, e.g., *State v. Sillett,* Butler App. No. CA2000-10-205, 2002-Ohio-2596, ¶34. Another method is for the trial court to inquire into these subjects at the sentencing hearing. See, e.g., *State v. Culver*, 160 Ohio App.3d 172, 2005-Ohio-1359, ¶59. Alternatively, the court may elect to hold a separate hearing to determine the offender's ability to pay, though such a hearing is not required. See, e.g., *Martin*, 140 Ohio App.3d at 338.

{¶23} The trial court's judgment entries of sentence denote that the court "considered the record, oral statements, any victim impact statement and pre-sentence report prepared, as well as the principles and purposes of sentencing under §2929.12." The court had access to a number of documents in the record to aid in determining whether appellant had the ability to pay restitution. This included the trial court's entry finding appellant indigent and appointing counsel, the issuance of which indicates that the court indeed considered appellant's financial circumstances. The record also contains appellant's affidavit of indigency and his motion to modify bond, documents which detailed his family, financial, and employment information. The affidavit conveyed that appellant earned no income, received food stamps, and lived with his parents. The

motion stated that appellant's elderly parents were in poor health, and that appellant was the primary caregiver for his father and the sole person capable of cleaning the home. The motion noted that appellant's parents had limited financial resources, their only income being social security. Without detailing specifics, the motion further stated that appellant had a criminal past.

{¶24} The transcript of the jury trial in the first case also contains testimony relevant to appellant's ability to pay, including appellant's age, education, employment history, physical ailments, and prior convictions. At the time of trial, appellant was 45 years old and had a tenth-grade education. He was not regularly employed as a result of having cancerous tumors throughout his body, but he expressed his intention to seek social security benefits. Appellant testified that he did a little side work on vehicles for money. His prior convictions included aggravated drug trafficking, breaking and entering, and possession of drug paraphernalia.

{¶25} Armed with this information, the trial court employed the following language in awarding financial sanctions in both judgment entries of sentence:

{¶26} "The Court finds that the Defendant is able-bodied and has the ability to work upon his release from prison. Accordingly, Defendant is ordered to pay all costs of prosecution, court appointed counsel costs, restitution, and any supervision fees permitted pursuant to Ohio Revised Code §2929.18(A)(4), all for which execution is granted. Upon his release from prison, the Defendant shall pay the unpaid financial sanctions mentioned above pursuant to a schedule to be established by the Defendant and the Clerk of Courts."

{¶27} Considering the information at the trial court's disposal, along with the court's determination that appellant was able to work upon his release, we conclude that

the trial court adequately considered appellant's present and future ability to pay before ordering restitution. Although an express statement to this effect would have been helpful for purposes of appellate review, the evidence in the record is sufficient to confirm that the trial court made this determination in accordance with R.C. 2929.19(B)(6). See *Simms*, 2009-Ohio-5440 at ¶11-12.

{¶28} Appellant's first assignment of error is sustained in part and overruled in part.

{¶29} Assignment of Error No. 2:

{¶30} "THE TRIAL COURT'S COURT COSTS ORDER IN BOTH CASES VIOLATED R.C. § 2947.23 AND R.C. § 2947.51."

{¶31} Appellant raises two issues for our review in challenging the trial court's order that he pay court costs. First, appellant contends that the trial court failed to make the mandatory disclosure that community service could be substituted for the payment of court costs under R.C. 2947.23. Appellant insists that the judgment entries of sentence should be modified to include this notification.

{¶32} R.C. 2947.23(A)(1) provides that "[i]n all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution, including any costs under section 2947.231 of the Revised Code, and render a judgment against the defendant for such costs. At the time the judge or magistrate imposes sentence, the judge or magistrate shall notify the defendant of both of the following:

{¶33} "(a) If the defendant fails to pay that judgment or fails to timely make payments towards that judgment under a payment schedule approved by the court, the court may order the defendant to perform community service in an amount of not more

than forty hours per month until the judgment is paid or until the court is satisfied that the defendant is in compliance with the approved payment schedule.

{¶34} "(b) If the court orders the defendant to perform the community service, the defendant will receive credit upon the judgment at the specified hourly credit rate per hour of community service performed, and each hour of community service performed will reduce the judgment by that amount."

{¶35} This court recently addressed an argument nearly identical to the one posited by appellant in the case of *State v. Nutter*, Brown App. No. CA2008-10-009, 2009-Ohio-2964. In *Nutter*, as in the present matter, the sentencing court failed to notify the defendant that he may be ordered to perform community service if he failed to pay court costs. The defendant argued that this omission required reversal in order to permit the lower court to resentence him in compliance with R.C. 2947.23(A)(1)(a). We rejected this argument, finding it unripe in view of the fact that the defendant had not yet failed to pay court costs. Id. at ¶12.

{¶36} Similarly, appellant has not yet failed to pay court costs in the present matter. Should appellant fail to do so, the trial court will be required to hold a hearing in accordance with R.C. 2947.23(B) and, in its discretion, may order community service in lieu of payment. *Nutter* at ¶12. On the basis of *Nutter*, since these events have not yet transpired, we find that appellant's arguments regarding this issue are not yet ripe for review.

{¶37} Next, appellant urges this court to find that the trial court erred in including the appointed counsel fees in the calculation of costs. According to appellant, the trial court was without authority to assess the costs for his appointed counsel to him without determining whether he could reasonably be expected to pay any of the costs.

{¶38} A trial court's authority to assess court-appointed counsel costs is governed by R.C. 2941.51. The statute permits a trial court to order an accused to pay court-appointed counsel costs "if the person has, or reasonably may be expected to have, the means to meet some part of the cost of the services rendered to the person." R.C. 2941.51(D). In previous decisions, this court has interpreted the statute to impose a duty on the trial court to make an "affirmative determination on the record" that the accused has the ability to pay or may reasonably be expected to have the ability to pay court-appointed counsel costs. *State v. Cooper*, 147 Ohio App.3d 116, 2002-Ohio-617, ¶71; *State v. Rivera-Carrillo*, Butler App. No. CA2001-03-054, 2002-Ohio-1013, at 39.

{¶39} Similar to the trial court's determination regarding the defendant's ability to pay restitution as discussed under appellant's first assignment of error, we have held that a trial court complies with its duty to make an "affirmative determination on the record" under R.C. 2941.51(D) when the record indicates that the court has considered a PSI containing the defendant's financial and employment information. *State v. Lane*, Butler App. No. CA2002-003-069, 2003-Ohio-1246, ¶23; *State v. Dunaway*, Butler App. No. CA2001-12-280, 2003-Ohio-1062, ¶40. A hearing is not necessary to determine a defendant's ability to pay counsel costs where evidence of his ability to pay is otherwise contained in the record. *State v. Bailey*, Butler App. No. CA2002-03-057, 2003-Ohio-5280, ¶27.

{¶40} Appellant's case is not akin to those that must be reversed due to the absence of information from which the court could make the requisite costs determination under the statute. *State v. Young*, Warren App. No. CA2005-03-023, 2005-Ohio-5766, ¶10. As stated, the record contained documents and testimony which described appellant's age, family circumstances, physical health, finances, education,

prior convictions, and employment history. In the judgment entries of sentence, immediately prior to assessing the appointed counsel costs to appellant, the court found that appellant was able-bodied and capable of working once released from prison. This finding indicates that the trial court considered appellant's ability to pay, and was tantamount to an affirmative determination on the issue. See *Bailey* at ¶28. Accordingly, the requirements of R.C. 2941.51(D) have been satisfied.

{¶41} Appellant's second assignment of error is overruled.

{¶42} Assignment of Error No. 3:

{¶43} "TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 10, 16 OF THE OHIO CONSTITUTION?"

{¶44} Appellant maintains that he suffered ineffective assistance of counsel due to trial counsel's failure to tender appropriate objections to any of the alleged errors regarding the restitution orders and court costs. However, appellant's third assignment of error has been rendered moot by our disposition of his first and second assignments of error. Consequently, we need not address it. See App.R. 12(A)(1)(c).

{¶45} In sum, we reverse the trial court's restitution awards to Gary Childers and William Van Brederode insofar as they include the specified items of property for which appellant was not indicted or convicted. In addition, we reverse the portion of the trial court decision awarding $1,006.35 in restitution directly to Progressive Insurance. The remainder of the trial court's decisions in both cases is affirmed.

{¶46} Judgment affirmed in part, reversed in part, and remanded to the trial court for further proceedings according to law and consistent with this opinion.

BRESSLER, P.J., and POWELL, J., concur.