

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

State of Ohio

Court of Appeals No. S-13-025

Appellee

Trial Court No. 12 CR 1377

v.

Richard C. Seele

DECISION AND JUDGMENT

Appellant

Decided: April 4, 2014

* * * * *

Thomas L. Steirwalt, Sandusky County Prosecuting Attorney, and
Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

James J. VanEerten, for appellant.

* * * * *

JENSEN, J.

{¶ 1} Following his conviction for burglary, defendant-appellant, Richard Seele, timely appeals the sentence imposed by the Sandusky County Court of Common Pleas on July 19, 2013. For the reasons that follow, we reverse the trial court's order, in part, and affirm, in part.

I. BACKGROUND

{¶ 2} On December 19, 2012, Seele was charged with two counts of burglary and one count of theft of drugs after entering the home of his neighbor, Anthony Spieldenner, on October 23, 2012 and November 8, 2012, and stealing prescription pain medication. On April 17, 2013, he entered a plea of guilty to count one of the indictment which charged him with burglary, a violation of R.C. 2911.12 (A)(2), a second-degree felony. The two remaining counts in the indictment were dismissed. Seele understood that he faced a prison sentence of two to eight years, a fine of up to \$15,000, and restitution. The prosecutor represented to the court that the amount of restitution would be very small – some pills were taken, but he was not aware of any damage resulting from the break-in. The court referred the matter to the adult probation department for a presentence investigation report (PSI) and continued sentencing to July 19, 2013.

{¶ 3} At the sentencing hearing, Spieldenner addressed the court and spoke of his suspicions that Seele was responsible for additional neighborhood thefts and previous attempts to break into his home. Seele also spoke and implored the court to order community-based drug treatment in lieu of prison time. Ultimately, based on Seele's extensive criminal history, which included approximately 47 prior charges and prior time in prison, and based on the nature of the offense, the court imposed a sentence of six years' incarceration. It also ordered payment of court costs and court appointment fees, as well as restitution in the amount of \$3,559.20. The court briefly explained the basis for the restitution award:

[I] order that restitution be paid in the amount of \$2,508.22 to Mr. Spieldenner and that is computed by replacement of locks to his home, home surveillance system, \$400; \$1,769, as well as some reimbursement to the insurance company, State Farm, of 1,051 [sic] - - total restitution would be \$3,559.20.

{¶ 4} Seele now appeals the court's sentence and assigns the following errors for our review:

Assignment of Error No. 1: THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION UNDER THE SENTENCING GUIDELINES OF R.C. § 2929.11 AND § 2929.12 BY INCARCERATING APPELLANT FOR SIX YEARS[.]

Assignment of Error No. 2: THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT ORDERED APPELLANT TO PAY ATTORNEY FEES AND RESTITUTION WITHOUT CONSIDERING APPELLANT'S PRESENT AND FUTURE ABILITY TO PAY[.]

Assignment of Error No. 3: THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT ORDERED APPELLANT TO PAY RESTITUTION IN THE AMOUNT OF \$3,559.20 AS THE AMOUNT IS NOT REPRESENTATIVE OF THE VICTIM'S ACTUAL LOSS.

{¶ 5} For ease of analysis, we consider Seele’s three assignments of error out of order.

II. LAW AND ANALYSIS

A. Third Assignment of Error

{¶ 6} In his third assignment of error, Seele argues that the court erred and abused its discretion in ordering him to pay restitution of \$3,559.20. He argues that (1) this did not represent the victim’s actual loss, (2) there was no competent, credible evidence in support of the award, and (3) courts are not permitted to order restitution to a third party. The state concedes that it was improper for the court to award restitution to State Farm, but does not address Seele’s other arguments.

{¶ 7} Seele did not contest the restitution order in the trial court. We will consider it nonetheless because we find that the court’s order constituted plain error. *See, e.g., State v. DiJohn*, 6th Dist. Lucas No. L-98-1295, 1999 WL 299555 (May 14, 1999). Error is plain if it is obvious and ““but for the error, the outcome of the trial clearly would have been otherwise.”” *State v. Hancock*, 108 Ohio St. 3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶ 60, quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph two of the syllabus.

{¶ 8} R.C. 2929.18(A)(1) allows a trial court to order an offender to pay restitution to a victim “in an amount based on the victim’s economic loss.” The amount of restitution must bear a reasonable relationship to the loss suffered and is limited to the actual loss caused by the defendant’s criminal conduct . *DiJohn* at * 2.

“There must be competent and credible evidence in the record from which the court may ascertain the amount of restitution to a reasonable degree of certainty.” (Internal citations omitted.) *Id.* Moreover, as both parties have correctly recognized, a trial court may not award restitution to a third party. *State v. Baltzer*, 4th Dist. Washington No. 06CA76, 2007-Ohio-6719, ¶ 41; *State v. Moss*, 186 Ohio App.3d 787, 2010-Ohio-1135, 930 N.E.2d 838, ¶ 10 (4th Dist.).

{¶ 9} We agree with Seele that the trial court committed plain error in its restitution award. Of the \$3,559.20, \$1,051.00 was awarded to State Farm. This was improper. The court also ordered \$400.00 to the victim to replace his locks and \$1,769.00 for a new home security system. There exists nothing in the record to suggest that the victim’s locks required replacement or that any damage was sustained to his home security system. To the contrary, the attorney for the state indicated that he was aware of no damage. There is also nothing to which to attribute the remaining \$339.20 of the award.

{¶ 10} We find Seele’s third assignment of error well-taken.

B. Second Assignment of Error

{¶ 11} In his second assignment of error, Seele argues that the trial court erred in ordering him to pay court costs, attorney fees, and restitution without inquiring into his present and future ability to make payment. Again, this argument was not presented in the trial court, thus we may review the assignment for plain error only. *Moss* at ¶ 9.

{¶ 12} It is an abuse of discretion for a trial court to impose a financial sanction without inquiring into the offender's present and future ability to pay. *State v. Bryant*, 4th Dist. Scioto No. 08CA3258, 2009-Ohio-5295, ¶ 7. Seele is correct that the trial court did not explicitly state in its judgment entry or during sentencing that it had considered Seele's present and future ability to pay before ordering him to pay court costs, appointment fees, and restitution. However, an explicit statement is not required. *Id.* We must look at the totality of the record to ensure that this requirement has been satisfied. *Id.* Where the record shows that the court considered a PSI from which an offender's ability to pay may be assessed, this will suffice. *Id.*

{¶ 13} During the sentencing hearing, the court indicated that it had reviewed the PSI, including Seele's employment and educational history contained in that report, in arriving at Seele's sentence. That report indicates that Seele had been employed in various capacities throughout the last 30 years, that he was working at the time the pre-sentence investigation was conducted, that he was financially stable and able to pay his bills, and was not on any form of welfare. The court also commented in connection with the restitution order, "I note that you have had a work history." Taking that information as a whole, we can surmise from the record that the court properly considered Seele's present and future ability to pay before ordering him to pay costs, fees, and restitution.

{¶ 14} We find Seele's second assignment of error not well-taken.

C. First Assignment of Error

{¶ 15} Finally, in his first assignment of error, Seele asserts that the trial court abused its discretion in sentencing him to six years' incarceration without balancing the principles and purposes of sentencing against the seriousness of the offense and the likelihood of recidivism, as required under R.C. § 2929.11 and §2929.12.

{¶ 16} As an initial matter, we recently announced in *State v. Tammerine*, 6th Dist. Lucas No. L-13-1081, 2014-Ohio-425, that under newly enacted R.C. 2953.08(G)(2), the standard of review we must apply in reviewing a felony sentence is not whether the sentencing court abused its discretion. *Tammerine* at ¶ 11. In a matter involving an issue such as the one raised in Seele's first assignment of error, we must determine whether the court's supposed failure to consider R.C. 2929.11 and 2929.12 rendered the sentence clearly and convincingly contrary to law. *Id.* at ¶ 15. In doing so, we may look to the court's analysis in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. *Tammerine* at ¶ 15-16 (“[W]hile we find that *Kalish* is no longer controlling in our review of felony sentences, it may still be utilized in the course of determining whether a sentence is clearly and convincingly contrary to law.”). That analysis requires us to examine whether the sentencing court complied with all applicable rules and statutes. *Kalish* at ¶ 26.

{¶ 17} Before Seele was sentenced, both the victim and Seele made statements and the court reviewed the PSI. That PSI revealed that at age 47, Seele had been charged

with 47 previous offenses. The court observed that Seele had served jail time in the past and had been on probation with various courts. It acknowledged that Seele may have a drug problem but noted that he had failed to address his substance abuse issues despite opportunities to do so. The court also recognized that burglary is an invasive crime which causes particular anxiety to a homeowner. It concluded that given these factors and his obligation to protect the public, a six-year sentence was warranted.

{¶ 18} In applying *Kalish* as a guide in determining whether the sentence was clearly and convincingly contrary to law, we will first look at whether the length of the prison sentence imposed was permissible. Burglary is a second-degree felony under R.C. 2911.12(D). A second-degree felony is punishable by a prison term of two, three, four, five, six, seven, or eight years. R.C. 2929.14(A)(2). Seele's sentence of 72 months falls within the permitted range.

{¶ 19} We next turn to Seele's claim that the trial court did not properly consider R.C. 2929.11 and 2929.12 in imposing his sentence. While it is true that the trial court did not expressly state in either its judgment entry or during the sentencing hearing that it had balanced the principles and purposes of sentencing against the seriousness of the offense and the likelihood of recidivism under R.C. 2929.11 and 2929.12, we must presume that the trial court gave those statutes proper consideration. *State v. Buser*, 6th Dist. Sandusky No. S-11-025, 2012-Ohio-3294, ¶ 11. See also *State v. Houston*, 6th Dist. Sandusky No. S-10-027, 2011-Ohio-4689, ¶ 11, quoting *Kalish* at ¶ 18, f.n.4 (explaining

that “where a trial court fails to put on the record its consideration of R.C. 2929.11 and 2929.12, it is presumed that the court gave proper consideration of those statutes.”).

{¶ 20} Given the court’s explanation of the reason for the sentence it imposed, the fact that the sentence fell within the range permissible under R.C. 2929.14(A)(2), and the presumption that the trial court properly balanced the principles and purposes of sentencing against the seriousness of the offense and the likelihood of recidivism under R.C. 2929.11 and 2929.12, we conclude that Seele’s sentence was not clearly and convincingly contrary to law.

{¶ 21} We find Seele’s first assignment of error not well-taken.

III. CONCLUSION

{¶ 22} We find that the prison sentence imposed by the trial court was not clearly and convincingly contrary to law. We also find that the court properly considered Seele’s present and future ability to pay court costs, appointment fees, and restitution. We, therefore, find Seele’s first and second assignments of error not well-taken. However, because the trial court erred in ordering restitution in an amount that was not based on the victim’s actual economic loss and in ordering that restitution be paid to a third party, we find Seele’s third assignment of error well-taken. We affirm, in part, and reverse, in part, the July 19, 2013 judgment of the Sandusky County Court of Common Pleas, and remand this matter to the trial court for resentencing on the amount of restitution. The costs of this appeal are assessed to Seele and the state equally pursuant to App.R. 24.

Judgment affirmed, in part,
and reversed, in part.

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

Arlene Singer, J.

JUDGE

Stephen A. Yarbrough, P.J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.