

[Cite as *State v. Miller*, 2010-Ohio-4760.]

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	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 1st day of October, 2010.

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GRADY, J.:

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

{¶ 2} 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.

{¶ 3} 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).

{¶ 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).

{¶ 5} 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

{¶ 6} "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."

{¶ 7} 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).

{¶ 8} 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.*

{¶ 9} Crim.R. 11(C) (2) (a) provides:

{¶ 10} "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:

{¶ 11} "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."

{¶ 12} 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.

{¶ 13} 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:

{¶ 14} "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.

{¶ 15} "Do you understand those potential and real penalties?"

{¶ 16} "THE DEFENDANT: Yes, sir."

{¶ 17} "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.

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

{¶ 19} "THE DEFENDANT: Yes, sir."

{¶ 20} "*" * *

{¶ 21} "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?

{¶ 22} "THE DEFENDANT: Yes, sir.

{¶ 23} "THE COURT: Did you understand that form?

{¶ 24} "THE DEFENDANT: Yes, sir.

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

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

{¶ 27} 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"

{¶ 28} 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*.

{¶ 29} Defendant's first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

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

{¶ 31} 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).

{¶ 32} 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.

{¶ 33} 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.

{¶ 34} 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.

{¶ 35} The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

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

{¶ 37} 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.

{¶ 38} 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.*

{¶ 39} 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).

{¶ 40} 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:

{¶ 41} "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)

{¶ 42} The record before us is sufficient to demonstrate that the trial court considered Defendant's present and future ability to pay financial sanctions.

{¶ 43} Defendant's third assignment of error is overruled.

FOURTH ASSIGNMENT OF ERROR

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

{¶ 45} 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.

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

{¶ 47} "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.

{¶ 48} “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.*

{¶ 49} “‘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.”

{¶ 50} 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*.

{¶ 51} 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.

{¶ 52} 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.

{¶ 53} 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.

{¶ 54} Defendant's fourth assignment of error is overruled.

FIFTH ASSIGNMENT OF ERROR

{¶ 55} "THE TRIAL COURT ERRED BY ORDERING MR. MILLER TO PAY APPOINTED COUNSEL COSTS."

{¶ 56} 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*.

{¶ 57} 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:

{¶ 58} "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.

{¶ 59} "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.

{¶ 60} "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.'

{¶ 61} "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."

{¶ 62} 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

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

{¶ 64} 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

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

{¶ 66} 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.

{¶ 67} 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

{¶ 68} 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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