

[Cite as *State v. Pence*, 2010-Ohio-5901.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23837
v.	:	T.C. NO. 08 CR 358
	:	
DOUGLAS L. PENCE	:	(Criminal appeal from Common Pleas Court)
	:	
Defendant-Appellant	:	

OPINION

Rendered on the 3rd day of December, 2010.

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McFARLAND, J. (by assignment)

{¶ 1} Appellant, Douglas Pence, appeals from a judgment of the Montgomery County Court of Common Pleas finding him guilty of one count of felony nonsupport of dependents in violation of R.C. 2919.21(B) and sentencing him to a term of community

control, based upon the court's determination that Appellant was statutorily ineligible for intervention in lieu of conviction. On appeal, Appellant contends that 1) the denial of his motion for intervention in lieu of conviction is contrary to law; and 2) the denial of intervention in lieu of conviction is contrary to a full and complete application of the statutes relating to sentencing.

{¶ 2} In our view, the trial court abused its discretion in determining Appellant was statutorily ineligible for intervention in lieu of conviction pursuant to R.C. 2951.041(B)(7), and Appellant's first assignment of error is sustained. Accordingly, Appellant's plea is vacated, his conviction and sentence are reversed, and this matter is remanded for proceedings consistent with this opinion. Further, in light of our disposition of Appellant's first assignment of error, Appellant's second assignment of error has been rendered moot.

FACTS

{¶ 3} On April 9, 2008, Appellant was indicted on three counts of failure to provide support for his child, for the periods of March 1, 2003, through February 28, 2005, and March 1, 2005, through February 28, 2007 and March 1, 2007, through December 7, 2007. On April 24, 2008, a plea of not guilty was entered on behalf of Appellant. A review of the record indicates that an entry and order granting Appellant diversion was filed on June 23, 2008.

{¶ 4} Subsequently, On December 16, 2009, Appellant filed a motion for intervention in lieu of conviction (hereinafter "ILC"). Thereafter, the court held that Appellant was statutorily ineligible for ILC based upon the fact that the victim of the offense

was Appellant's child, who was under the age of 13. The court noted that "Mr. Pence is otherwise eligible for ILC, and if it was not for that impediment, the Court would, in fact, grant ILC to Mr. Pence."

{¶ 5} Following the denial of his motion for ILC, Appellant pleaded no contest to count one of the indictment in exchange for the State's agreement to nolle the second and third counts, with the understanding that Appellant would pay restitution on all three counts, totaling \$6,842.54. The trial court found Appellant guilty and sentenced him to a term of community control. It is from this judgment that Appellant presently appeals.

ASSIGNMENTS OF ERROR

{¶ 6} "I. THE DENIAL OF APPELLANT'S MOTION FOR ILC IS CONTRARY TO LAW.

{¶ 7} "II. THE DENIAL OF ILC IS CONTRARY TO A FULL AND COMPLETE APPLICATION OF THE STATUTES RELATING TO SENTENCING."

ASSIGNMENT OF ERROR I

{¶ 8} In his first assignment of error, Appellant contends that the denial of his motion for ILC is contrary to law. In making this argument, Appellant contends that the trial court erred when it found that he was statutorily ineligible for ILC. Specifically, Appellant argues that the trial court was wrong in finding that the dependent child named in the support order was the victim of the offense, claiming instead that the recipient of the support, the child's mother, was the victim. Based upon the prior reasoning of this Court in *State v. Sorrell*, 187 Ohio App.3d 286, 2010-Ohio-1618, we agree with Appellant.

{¶ 9} In determining whether an offender is statutorily eligible for ILC, the trial court's inquiry is governed by R.C. 2951.041(B)(7), which states:

{¶ 10} “The alleged victim of the offense was not sixty-five years of age or older, permanently and totally disabled, *under thirteen years of age*, or a peace officer engaged in the officer's official duties at the time of the alleged offense.” (Emphasis added.)

{¶ 11} R.C. 2930.01(H) defines a “victim” as the following:

{¶ 12} “(1) A person who is identified as the victim of a crime or specified delinquent act in a police report or in a complaint, indictment, or information that charges the commission of a crime and that provides the basis for the criminal prosecution or delinquency proceeding and subsequent proceedings to which this chapter makes reference.”

{¶ 13} In *Sorrell*, when presented with the same argument as currently advanced by Appellant, this Court acknowledged that while the indictment identified the minor children, “the basis for the criminal prosecution is the failure to comply with the court order, which designates the children's mother, Robyn Sorrell, as the payee.” *Sorrell* at ¶13. We further noted in *Sorrell* that “[e]lsewhere in the Revised Code, a ‘victim’ is defined as ‘a person who suffers personal injury or death as a result of * * * [c]riminally injurious conduct.’ R.C. 2743.51(L)(1). Black's Law Dictionary defines a ‘victim’ as a ‘person who is the object of a crime or tort.’ (5th Ed.1979) 1405.” *Id.* at ¶14.

{¶ 14} In *Sorrell*, based on facts similar to the facts sub judice, we ultimately held that “the ‘victim’ in a nonsupport case is not the dependent child who is the object of the support order. Rather, the ‘victim’ is the custodial parent to whom the support payments are to be made.” As a result, we held that “the trial court abused its discretion when it held that

Sorrell was statutorily ineligible for ILC pursuant to R.C. 2951.041(B)(7), since the victim of Sorrell's failure to pay child support was Robyn Sorrell, the custodial parent.” *Sorrell* at ¶19. In reaching this decision, we reasoned as follows:

{¶ 15} “While the object of a support order is clearly the welfare of the dependent child, the child's claim to any arrearage owed by the offender is secondary to that of the custodial parent or state agency tasked with the responsibility of collecting and distributing the payments made pursuant to the support order fashioned by the court. ‘[I]n the absence of evidence to the contrary, the court will presume that the child was clothed, fed, and generally accorded the necessities of life, the payment for which the weekly support was intended.’ *Connin v. Bailey* (1984), 15 Ohio St.3d 34, 37. Simply put, the court presumes that the custodial parent will provide for the daily needs of the dependent child regardless of whether the offender pays the support ordered by the court.

{¶ 16} “In Ohio, the noncustodial parent is required to pay his support directly to the Ohio Child Support Payment Center, who then distributes the payment to the custodial parent. If the offender fails to pay according to the support order, the victim is the payee of the unpaid support check, i.e., the custodial parent to whom the court-ordered support payments are to be made.” *Sorrell* at ¶16-17.

{¶ 17} Based upon the foregoing and adhering to the established precedent of this Court, we conclude that the trial court erred and abused its discretion in finding Appellant was statutorily ineligible for ILC based upon its determination that the victim of the felony nonsupport was the dependent who was under age 13, rather than the child support payee, or the child’s mother. We note for the record, however, that in reaching its decision, the trial

court expressed the following reservations:

{¶ 18} “I would note that we are here on an ILC evaluation. Termination [sic] is made or has been made that Mr. Pence is not statutorily eligible for ILC. That determination is made based upon the fact that the victims of this offense are under the age of 13, with the victims being Mr. Pence’s minor children who are under the age of 13.

{¶ 19} “In this nonsupport case, I would note that Mr. Pence is otherwise eligible for ILC; and if it was not for that impediment, the Court would, in fact, grant ILC to Mr. Pence.

{¶ 20} “And also to acknowledge, that at least in my mind, there is an argument – strong or otherwise – that it is the – that the victim of this offense is the payee, the mother of the children, as opposed to the children.”

{¶ 21} We further note that the trial court’s entry was dated January 13, 2010, and that our decision in *Sorrell* was not released until April 9, 2010.

{¶ 22} Additionally, although the State respectfully requests that we reconsider our prior reasoning as set forth in *Sorrell*, we decline to do so. Accordingly, Appellant’s first assignment of error is sustained.

ASSIGNMENT OF ERROR II

{¶ 23} In his second assignment of error, Appellant contends that the denial of ILC is contrary to a full and complete application of the statutes relating to sentencing. In light of our holding in regard to Appellant’s first assignment of error, his second assignment of error is rendered moot.

{¶ 24} Appellant’s first assignment of error having been sustained, his plea is vacated, his conviction and sentence are reversed, and this matter is remanded for

proceedings consistent with this opinion.

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BROGAN, J. and GRADY, J., concur.

(Hon. Matthew W. McFarland, Fourth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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