[Cite as *State v. Bryant*, 2009-Ohio-5295.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 08CA3258
vs.	:	
SHARIA BRYANT,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: Timothy Young, Ohio Public Defender, and Claire R. Cahoon, Ohio Assistant Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215

COUNSEL FOR APPELLEE: Mark E. Kuhn, Scioto County Prosecuting Attorney, and Danielle M. Parker, Scioto County Assistant Prosecuting Attorney, 602 Seventh Street, Room 310, Portsmouth, Ohio 45662

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 9-25-09

PER CURIAM.

{¶ 1} This is an appeal from a Scioto County Common Pleas Court judgment of conviction and sentence. Sharia Bryant, defendant below and appellant herein, pled guilty to two counts of forgery in violation of R.C. 2913.31(A)(1)/(A)(2)/(C)(1)(b), and theft by deception in violation of R.C. 2913.02(A)(3)/2913.71(B).

{¶ 2} Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT COMMITTED PLAIN ERROR BY ORDERING MS. BRYANT TO PAY $5,530 IN RESTITUTION WITHOUT CONSIDERING HER PRESENT AND FUTURE ABILITY TO PAY, AS REQUIRED BY R.C. 2919.19(B)(6)."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY IMPOSING COURT COSTS WITHOUT NOTIFYING MS. BRYANT THAT FAILURE TO PAY COURT COSTS MAY RESULT IN THE COURT'S ORDERING HER TO PERFORM COMMUNITY SERVICE."

{¶ 3} In December 2007, one of appellant's brothers had to be bailed out of jail by their father, James Bryant. Appellant asked her father to also compensate her in kind, but he refused. Outraged over this display of sibling financial favoritism, appellant stole six of her father's checks, forged his name and deposited them into her bank account. The stolen checks were later discovered, but it is unclear whether Mr. Bryant bailed appellant out of jail like he did for her brother.

{¶ 4} On February 5, 2008, the Scioto County Grand Jury returned an indictment charging appellant with six counts of forgery, six counts of receiving stolen property and one count of theft by deception. She initially pled not guilty, but later agreed to plead guilty to two counts of forgery and the count of theft by deception.

{¶ 5} At the March 28, 2008 hearing, the trial court explained to appellant her various constitutional rights and accepted her plea. The court found appellant guilty of the offenses. At the sentencing hearing, the trial court sentenced appellant to serve twelve months on each of the two forgery counts to be served consecutively, and twelve

months for the theft by deception count to be served concurrently with the other two sentences. The court also ordered appellant to pay court costs and $5,530 in restitution. We granted leave to file a delayed appeal and the matter is now properly before us for review.

I

{¶ 6} Appellant asserts in her first assignment of error that the trial court erred by ordering her to pay restitution without first considering her ability to pay restitution. We disagree.

{¶ 7} R.C. 2929.18(A)(1) allows a court to order an offender to make restitution to the victim of the offender's crime based on the amount of the victim's economic loss. Before ordering an offender to pay restitution, R.C. 2929.19(B)(6) requires a court to consider the offender's present and future ability to pay the amount of the sanction or fine. When, however, a trial court imposes a financial sanction without any inquiry into the offender's present and future means to pay, the failure to make the requisite inquiry constitutes an abuse of discretion. See State v. Henderson, Vinton App. No. 07CA659, 2008-Ohio-2063, at ¶ 5; State v. Bemmes, (April 5, 2002) Hamilton App. No. C-010522. Obviously, the better practice is for a trial court to explain on the record that it considered an offender's financial circumstances. However, we have consistently held that a trial court need not explicitly state in its judgment that it considered a defendant's ability to pay a financial sanction. Rather, courts look to the totality of the record to see if this requirement has been satisfied. See State v. Rickett, Adams App. No. 07CA846, 2008-Ohio- 1637, ¶6; State v. Smith, Ross App. No. 06CA2893, 2007-Ohio-1884, at ¶42; State v. Ray, Scioto App. No. 04CA2965, 2006-Ohio-853, at ¶26. Thus, a court

complies with Ohio law if the record shows that the court considered a PSI that provides all pertinent financial information regarding an offender's ability to pay restitution. Rickett, supra at ¶6; Smith, supra at ¶ 42.

{¶ 8} In the case sub judice, although the trial court did not explicitly state in its judgment that it considered appellant's present and future ability to pay restitution, the court did state that they had considered the record and the PSI. The PSI reveals that appellant previously served in the United States Air Force and attended Shawnee State University at the time of this offense. Appellant also told the investigator who prepared the PSI that she was waiting to "get into the physical therapy program" at the University and almost had a "nurses aid certificate." This indicates that appellant has the capacity to be a productive citizen in the future. Thus, we believe the trial court satisfied its burden to determine if appellant had a future ability to pay restitution.

{¶ 9} Accordingly, we hereby overrule appellant's first assignment of error.

II

{¶ 10} Appellant argues in her second assignment of error that the trial court erred by imposing court costs without informing her that she could be ordered to perform community service if those costs were not paid. Appellee concedes that the court failed to inform her of that fact, but argues that the issue is not ripe for review because she remains in prison and has not yet been ordered to perform community service.

{¶ 11} It is true that R.C. 2947.23(A)(1)(a) requires trial courts to inform defendants that, if they fail to pay court costs, they may be ordered to perform

community service in lieu thereof. But, as the appellee correctly notes in its brief, we have held on several occasions that the issue is not ripe for appellate review if the defendant remains incarcerated and no order of community service has been imposed. See State v. Welch, Washington App. No. 08CA29, 2009-Ohio-2655, at ¶13; State v. Boice, Washington App. No. 08CA24, 2009-Ohio-1755, at ¶¶9-11; State v. Slonaker, Washington App. No. 08CA21, 2008-Ohio-7009, at ¶7. Because the record shows appellant is still incarcerated, and thus has not suffered any prejudice as a result of the trial court's failure to give her such warning, we find that the issue is not yet ripe for review and overrule the assignment of error for that reason.

{¶ 12} Having reviewed all of the errors assigned and argued in the briefs, and finding merit in none of them, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

Abele, J., Dissenting as to appellant's second assignment of error:

{¶ 13} I respectfully dissent. I concede that on a number of occasions we have applied the ripeness doctrine and have declined to review a trial court's failure to comply with R.C. 2947.23(A)(1)(a) when an appellant remains incarcerated and has not yet been ordered to perform community service (however, a different panel determined the issue ripe and reversed the sentence - See State v. Burns, Gallia App. Nos. 08CA1,

08CA2 & 08CA3, 2009-Ohio-878, at ¶12, fn. 3). I adhere to the reasoning in Burns. The problem with applying the "ripeness" doctrine is that for all practical purposes, it places this error beyond the scope of effective appellate review. If the issue is not dealt with on direct appeal, how will it be effectively reviewed in the future? An appeal from the actual order that imposes community service strikes me as a waste of judicial resources when the issue can be resolved in one appeal rather than two.

{¶ 14} Thus, until I am convinced that a more practical and straightforward means is available by which to raise this issue in the future, if and when a court imposes a community service order, I believe that we should simply consider the issue at the present time. Thus, I would sustain the assignment of error and remand the case for re-sentencing on this point.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and appellee shall recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Kline, P.J. & McFarland, J.: Concur in Judgment & Opinion
Abele, J.: Concurs in Judgment & Opinion as to Assignment of Error I; Dissents with Opinion as to Assignment of Error II

For the Court

BY: _____
Roger L. Kline
Presiding Judge

BY: _____
Peter B. Abele, Judge

BY: _____
Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.