[Cite as *State v. Brewer*, 2015-Ohio-693.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 26153
	:	
v.	:	Trial Court Case No. 2013-CR-3006
	:	
STEPHEN W. BREWER	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 27th day of February, 2015.

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WELBAUM, J.

{¶ 1} Defendant-appellant, Stephen W. Brewer, appeals from his conviction and sentence in the Montgomery County Court of Common Pleas after pleading no contest to five counts of nonsupport of dependents. Brewer contends that the trial court erred in: (1) using his ILC eligibility report in place of a presentence investigation report at sentencing; (2) finding him statutorily ineligible for intervention in lieu of conviction (ILC); and (3) ordering him to pay court-appointed attorney fees as a condition of community control. For the reasons outlined below, we find no merit in Brewer's arguments and the judgment of the trial court will be affirmed.

Facts and Course of Proceedings

{¶ 2} On January 24, 2014, Brewer was indicted on five counts of nonsupport of dependents in violation of R.C. 2919.21(B), all felonies of the fifth degree. Brewer initially pled not guilty to the charges and subsequently filed an application for ILC on grounds that his use of drugs and alcohol was a factor leading to his nonsupport offenses. Thereafter, an ILC eligibility report was prepared and submitted to the trial court. The report indicates that Brewer owed nearly $40,000 in restitution for unpaid child support. The child support was for a daughter he had in 1992 with his ex-wife, Sherry West, and a son he had in 2003 with another woman named Tebel Hall. Brewer has since produced two other children, ages five and three, with his current girlfriend, Nicole Golz.

{¶ 3} With respect to Brewer's daughter with West, the ILC eligibility report indicates that Brewer owed $4,267.41 in restitution for unpaid child support. In 2001, Brewer was initially ordered to pay child support in the amount of $150 per month. Then,

in 2011, he was ordered to pay $180 per month towards arrearages until paid in full. In August 2012, Brewer was found guilty of contempt for failing to comply with the child-support payments as ordered. He was sentenced to 30 days in jail, but was given the opportunity to purge his contempt by making an arrearage payment of $550. He failed to purge his contempt and served the 30 days in jail.

{¶ 4} With respect to Brewer's son with Hall, the ILC eligibility report indicates that Brewer owed $32,563.03 in restitution for unpaid child support. In 2008, Brewer was ordered to pay child support in the amount of $590.18 per month. In July 2012, Brewer was found guilty of contempt for failing to comply with the child-support payments as ordered. He was sentenced to 30 days in jail and given the opportunity to purge his contempt by making an arrearage payment of $500. Again, he failed to purge his contempt and served 30 days in jail.

{¶ 5} The ILC eligibility report indicates that Brewer has acknowledged his obligation to pay child support for both children, but claimed that he could not gain employment because he lost his driver's license. Brewer also advised that he was drinking a 12-pack of beer a day at the time of the offenses, and claims that this inhibited his ability to pay child support as well.

{¶ 6} The report further indicates that Brewer has no physical or mental disabilities and has been employed with multiple construction companies and temporary agencies between 1994 and 2006. Although he is not verifiably employed, Brewer has subcontracted work through his brother's construction company since 2009. The report concluded that Brewer was not eligible for ILC because placing him on ILC would demean the seriousness of the nonsupport offenses given that he owed nearly $40,000 in

restitution.

{¶ 7} On March 26, 2014, a brief hearing was held on the ILC eligibility report. During the hearing, the trial court indicated that it had received and reviewed the ILC eligibility report and agreed that Brewer was not eligible for ILC. Immediately following this determination, Brewer pled no contest to all five nonsupport charges and the court found him guilty as charged.

{¶ 8} At the same hearing, the trial court advised Brewer that he had the right to have a presentence investigation report prepared prior to sentencing, but that the court was willing to rely on the ILC eligibility report since it was very similar to a presentence investigation report. In response, Brewer indicated that he wanted to get the matter past him and authorized the trial court to use the ILC eligibility report and proceed directly to sentencing. Following this authorization, the trial court sentenced Brewer to community control sanctions not to exceed five years. One of the conditions of his community control was to pay $130 in court-appointed counsel fees. Another condition was to pay the restitution owed for his unpaid child support.

{¶ 9} Brewer now appeals from his conviction and sentence, raising four assignments of error for review. For ease of discussion, we will address Brewer's assignments of error out of order.

Fourth Assignment of Error

{¶ 10} Brewer's Fourth Assignment of Error is as follows:

THE TRIAL COURT ERRED BY SENTENCING APPELLANT TO [COMMUNITY CONTROL SANCTIONS] WITHOUT A PRESENTENCE

INVESTIGATION REPORT.

{¶ 11} Under his Fourth Assignment of Error, Brewer contends that it was contrary to law for the trial court to sentence him to community control sanctions without first ordering and reviewing a presentence investigation report. Specifically, Brewer claims that the trial court erred by using his ILC eligibility report in lieu of a presentence investigation report despite expressly granting the trial court authority to do so.

{¶ 12} In *State v. Amos*, 140 Ohio St.3d 238, 2014-Ohio-3160, 17 N.E.3d 528, the Supreme Court of Ohio stated that "the plain text of Crim.R. 32.2 and R.C. 2951.03(A)(1) * * * places an unavoidable duty on the trial court to obtain a presentence investigation report in every felony case in which a prison sentence is not imposed." *Id*. at ¶ 15. As a result, "[a] trial court acts contrary to law when it imposes a sentence of one or more community-control sanctions on a felony offender without first ordering and reviewing a presentence investigation report." *Id*. at ¶ 16. If a community control sentence is imposed without a presentence investigation, "the matter must be remanded for the trial court to order and review a presentence report prior to imposing a sentence of community control." *Id*. at ¶ 15.

{¶ 13} If the presentence investigation is waived by the defendant, R.C. 2951.03 would prohibit the trial court from imposing community control sanctions. (Citation omitted.) *State v. Preston*, 155 Ohio App.3d 367, 2003-Ohio-6187, 801 N.E.2d 501, ¶ 7 (10th Dist.); *Accord Disciplinary Counsel v. O'Neill*, 103 Ohio St.3d 204, 2004-Ohio-4704, 815 N.E.2d 286, ¶ 15 (to avoid the necessity of a prison term, a presentence investigation report must be requested before community control sanctions can be considered); *State v. Ferbrache*, 6th Dist. Wood No. WD-06-042, 2007-Ohio-746, ¶ 12 ("since appellant

elected to proceed directly to sentencing without a presentence investigation, community control was not an option"). "Therefore, regardless of whether there [is] a waiver, the trial court [cannot] impose community control sanctions without considering a PSI." *Preston* at ¶ 7.

{¶ 14} In this case, the record indicates that Brewer authorized the trial court to rely on the information contained in the ILC eligibility report as opposed to ordering and reviewing a presentence investigation report. Brewer gave his authorization after the trial court advised him that an ILC eligibility report is "very similar to a presentence investigation." Trans. (Mar. 26, 2014), p. 10. The trial court also advised Brewer that if it used the ILC eligibility report, the matter would immediately proceed to sentencing. Accordingly, the issue we are presented with is whether the trial court's review of the ILC eligibility report satisfied its duty under R.C. 2951.03(A)(1) and Crim.R. 32.2 to review a presentence investigation report before imposing community control.

{¶ 15} In making this determination, we must consider whether Brewer's ILC eligibility report contained the required contents of a presentence investigation report. R.C. 2951.03(A)(1) provides that if a presentence investigation is ordered by the trial court, "the officer making the report shall inquire into the circumstances of the offense and the criminal record, social history, and present condition of the defendant, all information available regarding any prior adjudications of the defendant as a delinquent child and regarding the dispositions made relative to those adjudications, and any other matters specified in Criminal Rule 32.2." We note that Crim.R. 32.2 does not provide any further requirements.

{¶ 16} Here, Brewer's ILC eligibility report contains all the information required by

R.C. 2951.03(A)(1). The report includes: (1) a summary of Brewer's instant offenses and the circumstances surrounding those offenses; (2) Brewer's criminal record, including juvenile adjudications and dispositions; (3) a summary of Brewer's social history, which includes information regarding his family, education, employment, physical health, mental health, and chemical dependency; (4) victim impact statements; and (5) sentencing considerations and recommendations. With the exception of the report's recommendation that Brewer be found ineligible for ILC, the report for all intents and purposes is the same as a presentence investigation report that is regularly prepared in Montgomery County. We also note that Brewer was not prejudiced by the court relying on the ILC eligibility report, as he expressly authorized the court to do so and was thereafter sentenced to community control sanctions as opposed to a prison term.

{¶ 17} Under the specific facts and circumstances of this case, we conclude that the trial court did not err in using the ILC eligibility report as the presentence investigation report. We reach this conclusion because Brewer's ILC eligibility report contains the same type of information that is required to be in a presentence investigation report, and using the ILC eligibility report did not prejudice Brewer. In addition, our conclusion favors judicial economy, efficiency, and reduction of costs, as preparing essentially a duplicate report simply because it is not titled "presentence investigation" is illogical and unnecessary. We emphasize that our decision is based on the specific facts and circumstances of this case and the specific ILC eligibility report prepared for Brewer. We are not holding that every ILC eligibility report may serve as a presentence investigation report. Rather, the issue needs to be determined on a case by case basis because the contents of ILC eligibility reports may differ.

{¶ 18} Brewer's Fourth Assignment of Error is overruled.

First Assignment of Error

{¶ 19} Brewer's First Assignment of Error is as follows:

STATE V. TAYLOR DOES NOT RENDER APPELLANT INELIGIBLE FOR I.L.C.

{¶ 20} Under his First Assignment of Error, Brewer generally contends that we should revisit our decision in *State v. Taylor*, 2014-Ohio-2821, 15 N.E.3d 900 (2d Dist.). In *Taylor*, we discussed the problems with the current statutory scheme governing ILC eligibility and resolved them in part by reworking the language in R.C. 2929.13(B)(2). Brewer contends that we should have instead reworked the language in R.C. 2951.041(B)(1), and claims that if we had done so in the manner he suggests, he would be statutorily eligible for ILC.

{¶ 21} "[I]n order for an offender to be statutorily eligible for ILC, the trial court must find that all ten of the criteria set forth in R.C. 2951.041(B) are met." *State v. Branch*, 2d Dist. Montgomery No. 25261, 2013-Ohio-2350, ¶ 15. *Taylor* involved the criteria enumerated under section (B)(1) of the statute, which states that an offender is ILC eligible if, among other things, the offender is "charged with a felony for which the court, upon conviction, would impose a community control sanction on the offender under division (B)(2) of section 2929.13 of the Revised Code[.]" R.C. 2951.041(B)(1).

{¶ 22} In *Taylor*, we were presented with the question of whether Taylor had been sentenced to community control under division (B)(2) or (B)(1) of R.C. 2929.13, as his ILC eligibility depended on community control being imposed under (B)(2). *Taylor* at ¶ 8. In

making this determination, we analyzed the language in R.C. 2929.13(B), which reads, in pertinent part, as follows:

> (B)(1)(a) Except as provided in division (B)(1)(b) of this section, if an offender is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence or that is a qualifying assault offense, the court shall sentence the offender to a community control sanction of at least one year's duration if all of the following apply:
>
> (i) The offender previously has not been convicted of or pleaded guilty to a felony offense.
>
> (ii) The most serious charge against the offender at the time of sentencing is a felony of the fourth or fifth degree.
>
> (iii) If the court made a request of the department of rehabilitation and correction pursuant to division (B)(1)(c) of this section, the department, within the forty-five-day period specified in that division, provided the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court.
>
> (iv) The offender previously has not been convicted of or pleaded guilty to a misdemeanor offense of violence that the offender committed within two years prior to the offense for which sentence is being imposed.
>
> (b) The court has discretion to impose a prison term upon an offender who is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence or that is a qualifying assault offense if any of the

following apply:

[List of factors omitted.]

(2) If division (B)(1) of this section does not apply, * * * in determining whether to impose a prison term as a sanction for a felony of the fourth or fifth degree, the sentencing court shall comply with the purposes and principles of sentencing under section 2929.11 of the Revised Code and with section 2929.12 of the Revised Code.

R.C. 2929.13(B)(1)-(B)(2).

{¶ 23} After analyzing R.C. 2929.13(B) in *Taylor*, we found two problems with the statutory scheme and explained them as follows:

First, as written, the ILC statute excludes from eligibility those offenders seemingly best suited for ILC—i.e., defendants who committed the least egregious offenses and, therefore, would receive mandatory community control under R.C. 2929.13(B)(1)(a). Because they would be sentenced to mandatory community control under division (B)(1)(a), they would not be sentenced to community control under division (B)(2), as required for ILC eligibility. Therefore, the current scheme curiously strips ILC eligibility from a group for whom it seems most beneficial.

The second problem with the current scheme is that, as written, it provides a trial court with no guidance how to exercise its discretion on an offender under R.C. 2929.13(B)(1)(b). Because Taylor's offense involved possession of a firearm, he fit under R.C. 2929.13(B)(1)(b)(i). This means the trial court retained discretion to sentence him to prison or community

> control. But nothing in R.C. 2929.13(B)(1)(b) guides a trial court's exercise of that discretion. Such guidance is found in R.C. 2929.13(B)(2), which directs a trial court considering prison or community control for a fourth of fifth-degree felony to consider the purposes and principles of sentencing as well as the statutory seriousness and recidivism factors.
>
> On its face, however, R.C. 2929.13(B)(2) applies only if R.C. 2929.13(B)(1) does not. Here R.C. 2929.13(B)(1)(b)(i) applied to Taylor because of his firearm possession. Thus, a literal reading of R.C. 2929.13(B)(2) would leave the trial court in a dilemma. It would have discretion to impose community control or a prison term on Taylor because (B)(1)(b)(i) applied, but would have no guidance in the exercise of that discretion because (B)(2) only applies if (B)(1) does not.

Taylor, 2014-Ohio-2821, 15 N.E.3d 900 at ¶ 9-11.

{¶ 24} Having discussed the aforementioned issues with the ILC scheme, we concluded that "there is an obvious error of omission in R.C. 2929.13(B)(2)" and resolved the error by reworking that division of the statute in the following manner:

> Instead of saying "[i]f division (B)(1) of this section does not apply," a court considering community control or a prison term must consider the purposes and principles of sentencing and the statutory seriousness and recidivism factors, we believe R.C. 2929.13(B)(2) necessarily was intended to begin, "If division (B)(1)(a) of this section does not apply, * * *[.]" Referring specifically to division (B)(1)(a), rather than to division (B)(1) as a whole, avoids some absurd results while making the statute coherent and

internally consistent.

We reach this conclusion for at least two reasons. First, excluding division (B)(1)(a) from division (B)(2) makes perfect sense given the nature of the two provisions. Division (B)(1)(a) mandates community control for the least egregious F4 and F5 offenders. That being so, it would be impossible for a trial court to exercise "discretion" under division (B)(2), by considering the purposes and principles of sentencing and the seriousness and recidivism factors, to determine whether defendants falling under division (B)(1)(a) should receive community control. For those defendants, community control is automatic. A trial court has no discretion. Second, reading division (B)(2) as excluding only defendants subject to mandatory community control under division (B)(1)(a) resolves the dilemma a trial court faces with regard to a defendant like Taylor, who falls under R.C. 2929.13(B)(1)(b) by virtue of his firearm possession and, therefore, could be sentenced to community control or prison. If division (B)(2) applies where division (B)(1)(a) does not, then the trial court here could exercise its discretion under division (B)(2) to sentence Taylor to community control. This is so because, as explained above, Taylor did not fit within R.C. 2929.13(B)(1)(a).

In short, the only reasonable interpretation of R.C. 2929.13(B)(2) is that the legislature intended (B)(2) to apply whenever R.C. 2929.13(B)(1)(a) [mandatory community control] did not. * * *

(Footnote omitted.) *Taylor*, 2014-Ohio-2821, 15 N.E.3d 900 at ¶ 12-14.

{¶ 25} We noted in *Taylor* that our analysis did "not resolve the problem that, on its face, the ILC statute, R.C. 2951.041(B)(1), precludes from eligibility the least egregious offenders who would receive mandatory community control under R.C. 2929.13(B)(1)(a) and, therefore, would not be sentenced under R.C. 2929.13(B)(2)." *Taylor* at fn. 4. However, because Taylor did not fit within the scope of R.C. 2929.13(B)(1)(a), we decided to "leave that problem for another day." *Id.*

{¶ 26} Brewer contends the present case raises the problem that *Taylor* did not resolve since he meets all the requirements for mandatory community control under R.C. 2929.13(B)(1)(a). He claims that the problem could be resolved if we were to rework the language in R.C. 2951.041(B)(1). Specifically, Brewer proposes that R.C. 2951.041(B)(1) should be read to state that an offender is ILC eligible if the offender is "charged with a felony for which the court, upon conviction, would impose a community control sanction on the offender *under division [(B)] of section 2929.13 of the Revised Code*" as opposed to "under division (B)(2)." Under Brewer's suggested reading of R.C. 2951.041(B)(1), the least egregious offenders who are sentenced to mandatory community control under (B)(1)(a) would no longer be precluded from ILC eligibility.

{¶ 27} Brewer claims that if his suggested reading of R.C. 2951.041(B)(1) is adopted and applied by this court, he would be statutorily eligible for ILC. However, Brewer fails to account for the fact that there are nine other factors that he must satisfy under R.C. 2951.041(B) in order to be eligible for ILC. One of those factors states that:

> The offender's drug usage, alcohol usage, mental illness, or intellectual disability, or the fact that the offender was a victim of a violation of section 2905.32 of the Revised Code, whichever is applicable, was a factor leading

> to the criminal offense with which the offender is charged, intervention in lieu of conviction would not demean the seriousness of the offense, and intervention would substantially reduce the likelihood of any future criminal activity.

R.C. 2951.041(B)(6).

{¶ 28} In this case, the ILC eligibility report submitted to the trial court stated that Brewer was not eligible for ILC because it would demean the seriousness of his offenses given that he owed nearly $40,000 in restitution. The trial court indicated on the record that it reviewed the ILC eligibility report and agreed that Brewer was ineligible for ILC. As discussed more fully under Brewer's Second Assignment of Error, we do not find error in the trial court's eligibility determination. Therefore, since Brewer is ILC ineligible for reasons other than failing to satisfy R.C. 2951.041(B)(1), we need not address his proposed reading of that statute, as it would not change the fact that he is ineligible under R.C. 2951.041(B)(6).

{¶ 29} Brewer's First Assignment of Error is overruled.

Second Assignment of Error

{¶ 30} Brewer's Second Assignment of Error is as follows:

> THE TRIAL COURT ERRED BY FINDING APPELLANT INELIGIBLE FOR I.L.C. DUE TO THE AMOUNT OF RESTITUTION OWING.

{¶ 31} Under his Second Assignment of Error, Brewer contends that the trial court's decision finding him ineligible for ILC based on the amount of restitution owing is contrary to law and violates his rights to equal protection and due process of the law.

Brewer also challenges the trial court's ILC eligibility determination on grounds that the trial court failed to consider his present and future ability to pay restitution before finding him ineligible.

{¶ 32} " 'Eligibility determinations are matters of law subject to de novo review.' " *State v. Smith*, 2d Dist. Montgomery No. 24812, 2012-Ohio-3395, ¶ 7, quoting *State v. Baker*, 2d Dist. Montgomery No. 24510, 2012-Ohio-729, ¶ 8. A "[d]e novo review requires the reviewing court to determine the legal issues without any deference to the trial court's determination." *Bank of Am., N.A. v. Thompson*, 2d Dist. Montgomery No. 26316, 2015-Ohio-456, ¶ 8, citing *Mattice v. Ohio Dept. of Job & Family Servs*., 2d Dist. Montgomery No. 25718, 2013-Ohio-3941, ¶ 7.

{¶ 33} The ILC eligibility report in this case concluded that Brewer was ineligible for ILC because ILC would demean the seriousness of the offense given that Brewer owes nearly $40,000 in restitution. We have previously found no error in ILC eligibility determinations in which a trial court relies on the amount of restitution owing as set forth in the ILC eligibility report. *See, e.g., State v. Brown*, 2d Dist. Montgomery No. 24813, 2012-Ohio-3177, ¶ 8 (finding no error in trial court's determination that ILC would demean the seriousness of nonsupport offense due to appellant owing $18,756 in child support); *State v. Smith*, 2d Dist. Montgomery No. 24812, 2012-Ohio-3395, ¶ 10 (finding nor error in trial court's determination that ILC would demean the seriousness of appellant's nonsupport offense due to appellant owing $11,768.25 in child support).

{¶ 34} Furthermore, while Brewer focuses on the dollar amount, it could just as easily be said that the report's conclusion is commenting on the fact that Brewer has consistently failed to pay child support for multiple children over an extended period of

time in order to reach such a high level of arrearages. This is further enhanced by the fact that Brewer's failure to pay child support continued even after he was held in contempt twice and served jail sentences for failing to pay. Therefore, regardless of the trial court's considerations or lack thereof, we conclude that the court ultimately reached the correct conclusion, as the contents of the ILC eligibility report indicate that ILC would indeed demean the seriousness of Brewer's nonsupport offenses.

{¶ 35} As for his constitutional argument, Brewer claims that denying ILC based on the amount of restitution owed discriminates against the poor in violation of equal protection and due process of the law. As noted above, the dollar amount of the restitution owing is not the specific reason why ILC would demean the seriousness of Brewer's nonsupport offenses. Regardless, Brewer has failed to raise his constitutional argument at the trial court level. In *State v. Thompson*, 2d Dist. Montgomery No. 20359, 2004-Ohio-5802, we stated that:

> The Supreme Court of Ohio has held that "[f]ailure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue and a deviation from this state's orderly procedure, and therefore need not be heard for the first time on appeal." [*State v. Awan*, 22 Ohio St.3d 120, 489 N.E.2d 277 (1986), syllabus]. "The general rule is that 'an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court.' Likewise, '[c]onstitutional rights may be lost as finally as

> any others by a failure to assert them at the proper time.' Accordingly, the question of the constitutionality of a statute must generally be raised at the first opportunity and, in a criminal prosecution, this means in the trial court." *Id*. at 122, 489 N.E.2d 277, internal citations omitted.

Thompson at ¶ 12.

{¶ 36} Since Brewer failed to raise his constitutional argument before the trial court, the issue was waived and cannot be raised for the first time on appeal. We recognize that even where waiver is clear, this court reserves the right to consider constitutional challenges to the application of statutes in specific cases of plain error or where the rights and interests involved may warrant it. *In re M.D*., 38 Ohio St.3d 149, 527 N.E.2d 286 (1988), syllabus. However, in this case, there was no plain error committed and consideration of the constitutional challenge advanced by Brewer is not warranted by the rights and interests of the parties involved in this case. *See State v. Jordan*, 2d Dist. Greene No. 2004 CA 115, 2005-Ohio-4202, ¶ 17.

{¶ 37} Next, Brewer challenges the trial court's ILC eligibility determination on grounds that the trial court failed to consider his present and future ability to pay restitution before finding him ineligible. This argument is misplaced because the trial court's duty to consider a defendant's present and future ability to pay restitution arises at sentencing, *see* R.C. 2929.19(B)(5), and here Brewer is not alleging error at sentencing. Rather, Brewer is alleging error occurred with respect to the trial court's ILC eligibility determination under R.C. 2951.041. Under that statute, there is no requirement that a trial court must consider a defendant's present and future ability to pay restitution before making its ILC eligibility determination.

{¶ 38} Even if Brewer had appropriately alleged error in the context of sentencing, the trial court stated on the record prior to sentencing that it had reviewed Brewer's ILC eligibility report, which we found appropriately served as a presentence investigation report. That report contains information relative to Brewer's age, education, and employment history, which is sufficient to demonstrate that the trial court considered his ability to pay the restitution prior to sentencing. *See State v. Whitfield*, 2d Dist. Montgomery No. 22432, 2009-Ohio-293, ¶ 154; *State v. Lenton*, 2d Dist. Clark No. 06CA0091, 2007-Ohio-5180, ¶ 15; *State v. Felder*, 2d Dist. Montgomery No. 21076, 2006-Ohio-2330, ¶ 65; *State v. Parker*, 2d Dist. Champaign No. 03CA17, 2004-Ohio-1313, ¶ 42-45.

{¶ 39} Because none of the arguments raised by Brewer have any merit, his Second Assignment of Error is overruled.

Third Assignment of Error

{¶ 40} Brewer's Third Assignment of Error is as follows:

THE TRIAL COURT ERRED BY ORDERING APPELLANT TO PAY $130 FOR ATTORNEY FEES.

{¶ 41} Under his Third Assignment of Error, Brewer contends that it was error for the trial court to order him to pay $130 in court-appointed attorney fees as a condition of community control. Specifically, he claims that R.C. 2941.51(D) requires the fees to be pursued through a separate civil action.

{¶ 42} R.C. 2941.51(D) allows "a county to seek reimbursement of court-appointed counsel fees if a defendant has the means to pay for some or all of the

costs of services provided to him, but we have held that the right of action it confers 'must be prosecuted in a civil action.' " *State v. Breneman*, 2d Dist. Champaign No. 2013 CA 15, 2014-Ohio-1102, ¶ 5, quoting *State v. Miller*, 2d Dist. Clark No. 08CA0090, 2010-Ohio-4760, ¶ 61. (Other citations omitted.) Therefore, requiring a defendant to pay his court-appointed attorney fees as part of his sentence is not condoned under R.C. 2941.51. *State v. Crenshaw*, 145 Ohio App.3d 86, 90, 761 N.E.2d 1121 (8th Dist.2001). *Accord State v. Louden,* 2d Dist. Champaign Nos. 2013 CA 30, 2013 CA 31, 2014-Ohio-3059, ¶ 5, 28-29 (finding the trial court erred in ordering appellant to pay court-appointed attorney fees as part of his sentence after his community control sanctions were revoked, as attorney fees "must be pursued in a separate civil action").

{¶ 43} Nevertheless, pursuant to R.C. 2929.15(A)(1), the trial court has broad discretion to impose community control sanctions, as it may "impose residential, nonresidential, and financial sanctions, *as well any other conditions the court deems appropriate*." (Emphasis added.) *State v. Rogers*, 2d Dist. Montgomery No. 24848, 2012-Ohio-4753, ¶ 21, citing *State v. Talty*, 103 Ohio St.3d 177, 2004-Ohio-4888, 814 N.E.2d 1201, ¶ 10. "[T]he tests for reasonableness of a [community control] sanction are those announced in [*State v. Jones*, 49 Ohio St.3d 51, 550 N.E.2d 469 (1990)] regarding reasonableness of a condition of probation." *State v. Lacey*, 2d Dist. Montgomery No. 23261, 2009-Ohio-6267, ¶ 12, citing *Talty*.

{¶ 44} The Supreme Court held in *Jones* that a trial court may impose conditions upon a defendant's probation that relate to the interests of doing justice, rehabilitating the offender, and insuring his good behavior. *Jones* at 52, citing former R.C. 2951.02(C). In making this determination, "courts should consider whether the condition (1) is

reasonably related to rehabilitating the offender, (2) has some relationship to the crime of which the offender was convicted, and (3) relates to conduct which is criminal or reasonably related to future criminality and serves the statutory ends of probation." (Citations omitted.) *Id.* at 53.

{¶ 45} In following *Jones*, it has been held that "[a] convicted defendant's repayment of attorney fees for court-appointed counsel fits within this three-part test" and that a "trial court can impose and enforce repayment of attorney fees as a valid special condition of probation." *State v. McLean*, 87 Ohio App.3d 392, 396-397, 622 N.E.2d 402 (1st Dist.1993). *Accord State v. Barnes*, 9th Dist. Lorain No. 06CA009034, 2007-Ohio-2460, ¶ 8; *State v. Drew*, 8th Dist. Cuyahoga No. 83563, 2004-Ohio-3609, ¶ 9; *State v. Trembly*, 137 Ohio App.3d 134, 144, 738 N.E.2d 93 (8th Dist.2000).

{¶ 46} Given that Brewer was ordered to pay court-appointed attorney fees as a condition of community control, which is governed by R.C. 2929.15(A), and said condition meets the three-part test for reasonableness under *Jones*, it is unnecessary for the fees to be recouped through a separate civil action as provided under R.C. 2941.51(D). Rather, the attorney fees were properly ordered to be paid as a condition of community control under R.C. 2929.15(A).

{¶ 47} Brewer's Third Assignment of Error is overruled.

Conclusion

{¶ 48} Having overruled all four assignments of error raised by Brewer, the judgment of the trial court is affirmed.

. . . . . .

FROELICH, P.J. and HALL, J., concur.

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