[Cite as *State v. Simms*, 2009-Ohio-5440.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

STATE OF OHIO, :

Plaintiff-Appellee, : CASE NO. CA2009-02-005

: O P I N I O N

- vs - 10/13/2009

:

JEFFREY A. SIMMS, :

Defendant-Appellant. :

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2008CR00797

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, 123 North Third Street, Batavia, Ohio 45103, for plaintiff-appellee

R. Daniel Hannon, Clermont County Public Defender, Robert F. Benintendi, 10 South Third Street, Batavia, Ohio 45103, for defendant-appellant

RINGLAND, J.

{¶1} Defendant-appellant, Jeffrey Allen Simms, appeals his sentence, including the order of restitution, for his aggravated vehicular homicide conviction in the Clermont County Court of Common Pleas. We affirm the trial court's decision.

{¶2} On the morning of September 2, 2008, appellant and his 16-year-old passenger, Ashley Mocahbee, were driving along Wilson Dunham Road in Clermont County.

Appellant was exceeding the posted speed limit of 55 m.p.h. when he lost control of the vehicle and crashed into a tree. Mocahbee was ejected from the vehicle's backseat, and later died from the injuries she sustained in the collision.

{¶3} Appellant was indicted for aggravated vehicular homicide, a violation of R.C. 2903.06(A)(2)(a). He pled guilty to that charge, and the trial court sentenced him to five years. The trial court also ordered appellant to pay $86,864.72 in restitution to the family of the victim. Because appellant was on community control at the time of the accident, he was sentenced to an additional 18 months, running consecutively, for violating a term of his community control. Appellant filed a timely appeal raising three assignments of error.

{¶4} Assignment of Error No. 1:

{¶5} "THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING RESTITUTION DUE TO ITS FAILURE TO ADEQUATELY ASSESS APPELLANT'S PRESENT AND FUTURE ABILITY TO PAY."

{¶6} In his first assignment of error, appellant argues there is no evidence in the record to show the trial court considered whether appellant had the present and future ability to pay the $86,864.72 the court ordered in restitution.[1] We do not agree.

{¶7} R.C. 2929.18(A) authorizes trial courts to impose financial sanctions on felony offenders. This includes ordering the offender to pay restitution to the victim, or the victim's survivor, "in an amount based on the victim’s economic loss." R.C. 2929.18(A)(1). However, before a trial court may impose a financial sanction, the court must consider the offender's present and future ability to pay the financial sanction.[2] R.C. 2929.19(B)(6).

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1. We note that appellant does not contest the amount of the restitution order, only his ability to pay.

2. The state argues that by failing to object to restitution at trial, appellant has waived the issue on appeal. As we recently stated, "'[w]e are not persuaded [by this argument because] R.C. 2929.19(B)(6) imposes a legislative mandate with which trial courts must comply.'" *State v. Moore*, Butler App. No. CA2006-09-242, 2007-Ohio-3472, ¶8, quoting *State v. Slater,* Scioto App. No. 01 CA2806, 2002-Ohio-5343, ¶10. Thus, "'[w]hile criminal defendants may waive their own rights, they cannot waive a mandatory duty imposed on trial courts.'" Id.

{¶8} "[T]here are no express factors that must be taken into consideration or findings regarding the offender's ability to pay that must be made on the record." *State v. Martin,* 140 Ohio App.3d 326, 338, 2000-Ohio-1942. However, there must be some evidence in the record to show that the trial court acted in accordance with the legislative mandate. See *State v. Adkins* (2001), 144 Ohio App.3d 633, 647.

{¶9} We have consistently held that compliance with R.C. 2929.19(B)(6) can be shown through the trial court's use of a Presentence Investigation Report (PSI), which often provides financial and personal information, in order to aid the court in making its determination. *State v. Patterson*, Warren App. No. CA2005-08-088, 2006-Ohio-2133, ¶21; *State v. Dandridge*, Butler App. No. CA2003-12-330, 2005-Ohio-1077, ¶6; *State v. Back*, Butler, CA2003-01-011, 2003-Ohio-5985, ¶21. We note, however, that reference to a PSI is not the only means by which a trial court may comply with R.C. 2929.19(B)(6). See, e.g., *Martin* at 327 (hearings are not required, but may be held); *State v. Culver,* 160 Ohio App.3d 172, 2005-Ohio-1359, ¶59 (inquiries made at the sentencing hearing regarding present employment, employment history, the ability to maintain employment, and assets); *State v. Sillett*, Butler App. No. CA2000-10-205, 2002-Ohio-2596 (evidence regarding past employment and earning ability heard during trial).

{¶10} Appellant argues that there was not enough information in the PSI to allow the trial court to make any meaningful analysis under R.C. 2929.19(B)(6). In particular, appellant maintains the PSI did not contain any information regarding his assets or debts; or his future ability to pay in light of his employment history, his several incarcerations, and his education level. Appellant contends that the trial court should have made more inquiries, during the sentencing hearing, regarding appellant's ability to pay restitution.

{¶11} Although helpful for appellate review purposes, there is no mention of appellant's present or future ability to pay the financial sanction in the transcript of the

sentencing hearing. Instead, the trial court stated in its final judgment entry that it considered the record, oral statements, victim impact statement, and presentence report, as well as appellant's present and future ability to pay any financial sanctions which may be imposed. While the PSI did not list any of appellant's assets, it did contain information regarding his age, education level, family/marital status, physical and mental health, his alcohol and drug use, and his previous employment. The PSI also contained information regarding an existing restitution order, from another case, and noted that appellant had financial difficulties.

{¶12} In addition to the PSI, relevant evidence regarding appellant's ability to pay restitution was elicited by the trial court. During the plea colloquy appellant stated he was 26 years old, he had worked for two employers, and he had his GED. Appellant also informed the trial court of his incarceration in 2005 and 2006. Furthermore, at the sentencing hearing, the trial court noted that as of September 20, 2008 appellant was unemployed and had served more than five years of his adult life in prison. In addition, we recognize that the trial court placed a lifetime suspension on appellant's driver's license and driving privileges in the state of Ohio which may also have an impact on his future earning ability. Moreover, we observe that upon his release from prison, appellant will be approximately 33 years old. Finally, there is nothing in the record which would indicate that appellant would be unable to obtain some type of employment upon his release from confinement.

{¶13} We find that the information before the trial court, in the form of statements made by appellant and the trial court, and the court's reference to the PSI in the sentencing hearing and journal entry, indicates that the court complied with R.C. 2929.19(B)(6) before ordering restitution. Therefore, appellant's first assignment of error is overruled.

{¶14} Because appellant's second and third assignments of error relate to sentencing issues, and are subject to the same standard of review, we have elected to address them together.

{¶15} Assignment of Error No. 2:

{¶16} "THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING APPELLANT TO THE MAXIMUM TERM OF IMPRISONMENT OF FIVE (5) YEARS ON COUNT ONE, AGGRAVATED VEHICULAR HOMICIDE."

{¶17} Assignment of Error No. 3:

{¶18} "THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO CONSECUTIVE PRISON TERMS AS THE RECORD DOES NOT SUPPORT SUCH A SENTENCE."

{¶19} In his second assignment of error, appellant maintains that the five-year sentence imposed by the court is excessive and does not achieve the overriding purposes of felony sentencing. In his third assignment of error, appellant argues that the imposition of consecutive sentences is not supported by the record and is contrary to law.[3] We find no merit to appellant's arguments.

{¶20} "Trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856, ¶100. "In applying *Foster* * * * appellate courts must apply a two-step approach. First, they must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is

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3. Separate from the analysis under *Kalish*, the state argues that there was a forfeiture of this claimed error in that appellant failed to object to the trial court's decision to make appellant's sentences consecutive. See *State v. Lewis*, Warren App. No. Nos. CA2009-02-012, CA2009-02-016, 2009-Ohio-4684, ¶7, citing *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶1. As such, we may only notice "'plain errors or defects affecting substantial rights.'" *Payne* at ¶15, quoting Crim.R. 52(B). Upon careful review of the record, we do not find that there was an obvious deviation from a legal rule that affected appellant's substantial rights, or otherwise influenced the outcome of the proceedings. See *State v. Barnes,* 94 Ohio St.3d 21, 27, 2002-Ohio-68. Therefore, pursuant to *Payne*, no plain error is evident. We note, however, that *Payne* was decided prior to *Kalish*. Thus, we believe it is necessary to analyze appellant's claimed error under *Kalish* as it is the most recent guidance the Supreme Court has offered to review sentencing issues.

clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard." *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶4.

{¶21} A sentence is not clearly and convincingly contrary to law, where the trial court "consider[s] the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12, * * * properly applie[s] postrelease control, and * * * sentence[s] [appellant] * * * within the permissible range." Id. at ¶18. In addition, so long as the trial court gives "careful and substantial deliberation to the relevant statutory considerations" the court's sentencing decision is not an abuse of discretion. Id. at ¶20.

{¶22} Applying this analysis to the second assignment of error, we find that the trial court's sentence is not clearly and convincingly contrary to law. The trial court expressly stated in its judgment entry that it "considered * * * the principles and purposes of sentencing under Ohio Revised Code Section 2929.11, and has balanced the seriousness and recidivism factors under Ohio Revised Code Section 2929.12." The trial court also properly applied a mandatory three-year postrelease control, and sentenced appellant to five years, which is within the permissible range for the offense.

{¶23} We also find that the trial court did not abuse its discretion in ordering appellant to serve the maximum sentence of five years for aggravated vehicular homicide. It is clear from the record that the trial court "gave careful and substantial deliberation to the relevant statutory considerations." The trial court considered the fact that appellant was driving under a suspended license, had a criminal history, and had violated the terms of community control on more than one occasion. The trial court also took into account the seriousness of the crime including the trauma to the family and the young age of the victim. Finally, the trial court considered appellant's remorse for Mocahbee's death; but balanced that against the fact that appellant had not followed rules in the past, and the seriousness of appellant's

conduct. Thus we find nothing in the record to indicate the trial court's decision to sentence appellant to five years was unreasonable, arbitrary, or unconscionable.

{¶24} Applying the *Kalish* analysis to the third assignment of error, we find that the trial court's sentence is not clearly and convincingly contrary to law. As noted above, the trial court stated it complied with R.C. 2929.11 and 2929.12. In addition, the trial court sentenced appellant to 18 months, which is in the statutory range for the felony appellant was convicted of, which resulted in the imposition of community control that appellant violated. R.C. 2929.15(B); R.C. 2929.14(A)(4).

{¶25} Additionally, we find that the trial court's decision to require the community control violation sentence to run consecutive to the aggravated vehicular homicide sentence was not an abuse of discretion. One of the specified conditions on appellant's community control was that he have no contact with the parents of the victim. Not only did appellant violate community control by staying in their home, but he allowed Mocahbee in the vehicle in order to transport Mocahbee to her mother. The trial court stated that appellant had been on community control for a relatively short period of time and his record while under community control was "not very good." The trial court also noted that the "no contact" with the victim's parents was a relatively simple rule that appellant completely failed to comply with. We can simply not find anything in the record which makes the trial court's decision to run the community control violation sentence consecutively, rather than concurrently, unreasonable, arbitrary, or unconscionable. Therefore, appellant's second and third assignments of error are overruled.

{¶26} Judgment affirmed.

YOUNG, P.J., and HENDRICKSON, J., concur.