

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93625

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ARTHUR WILLIAMS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-519218

BEFORE: Blackmon, J., McMonagle, P.J., and Sweeney, J.

RELEASED: July 22, 2010

JOURNALIZED:

ATTORNEYS FOR APPELLANT

Robert L. Tobik
Chief Public Defender

David M. King
Cullen Sweeney
Nathaniel McDonald
John T. Martin
Assistant Public Defenders
310 Lakeside Avenue
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

Donna Blough Thomas
Assistant Prosecuting Attorney
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Arthur Williams appeals the trial court's decision ordering him to pay restitution and assigns the following error for our review:

“I. The trial court erred in ordering the appellant to pay restitution without first conducting a hearing pursuant to R.C. 2929.18(A)(1) in violation of United States Constitutional Amendments V and XIV, and the Ohio Constitution Article 1, Section 10.”

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court's decision. The apposite facts follow.

{¶ 3} On December 26, 2008, a Cuyahoga County Grand Jury indicted Williams on four counts of criminal nonsupport for failing to pay court-ordered child support for two children. Williams pleaded not guilty at his arraignment and several pretrials followed.

{¶ 4} On May 12, 2009, Williams pleaded no contest to the charges, the trial court found him guilty, ordered a presentence investigation report, and scheduled sentencing for June 15, 2009.

{¶ 5} At the sentencing hearing, the state indicated that the two children were emancipated, that there was an arrearage in the amount of \$26,687.64, and as part of the plea, Williams had agreed to pay restitution in the amount of \$326.42 per month. Williams's attorney requested that his client be placed on community control sanctions and given the opportunity to pay restitution.

{¶ 6} The trial court sentenced Williams to five years of community control, and ordered restitution of \$26,687.64 to be paid in monthly installments of \$326.42.

Restitution

{¶ 7} In his sole assigned error, Williams argues the trial court erred in ordering restitution without conducting a hearing, thus violating R.C. 2929.18(A)(1).

{¶ 8} Preliminarily, we note that Williams did not object at his sentencing hearing to the order of restitution or the amount ordered, thus he waived all but plain error. *State v. Jarrett*, Cuyahoga App. No. 90404, 2008-Ohio-4868, citing *State v. Marbury* (1995), 104 Ohio App.3d 179, 181, 661 N.E.2d 271.

{¶ 9} Crim.R. 52(B) provides that: “plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” We invoke plain error if we find that the circumstances in the instant case are exceptional and that reversal of the restitution order is necessary to prevent a manifest miscarriage of justice. *State v. Landrum* (1990), 53 Ohio St.3d 107, 112, 559 N.E.2d 710. For the reasons that follow, we do not find plain error.

{¶ 10} R.C. 2929.18(A) provides in relevant part that a court may sentence the offender to a financial sanction, including:

“(1) Restitution by the offender to the victim of the offender’s crime or any survivor of the victim, in an amount based on the victim’s economic loss. If the court imposes restitution, the court shall order that the restitution be made to the victim in open court * * *. If the court imposes restitution, at sentencing, the court shall determine the amount of restitution to be made by the offender. If the court imposes restitution, the court may base the amount of restitution it orders on an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information * * *. If the court decides to impose

restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount. * * *

{¶ 11} In the instant case, despite his present assertions, the record indicates that Williams agreed to pay the ordered restitution as part of his plea. At sentencing, the state's prosecuting attorney stated:

“* * * As a condition of supervision, we ask that the defendant be ordered to comply with the juvenile [court] order to pay \$326.42 per month. The children are emancipated on this case, so that is the payment on the arrears. As part of the plea, the defendant, I believe, has agreed to pay restitution as of 5/31/09 arrearage due and owing in the amount of \$26,687.64, and that is for both children and does not include past care.” Tr. 11.

{¶ 12} The record also indicates that neither Williams nor his attorney refuted the state's assertions that he had agreed to pay the restitution as part of his plea. On the contrary, Williams's attorney requested that the trial court impose community control sanctions so that Williams would have the ability to continue to work and pay the restitution. More importantly, Williams expressed a willingness to pay the restitution, stating:

“* * * I'm willing to pay. Because before I refused to pay because they might not be mine. Now I have a different mind. I'm trying to keep my freedom. I have a house for the first time in my life. Everything is in my name. I raise my grandkids. I just want to prove some way in the future the paternity of the kids, but now I'm willing to pay.” Tr. 13.

{¶ 13} In addition, the record indicates that the trial court had ordered a presentence investigation report. The information regarding the juvenile

court child support order, the amount of the arrears, and the monthly payment was included in the report. The amount of restitution represented the amount owed under Williams's juvenile court child support order. This comports with R.C. 2929.18(A)(1), which permits the trial court to base the restitution on an amount recommended by the presentence investigation report.

{¶ 14} Further, regarding Williams's claim that the trial court ordered restitution without conducting a hearing, R.C. 2929.18(A)(1) specifically states, "[i]f the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount." As previously noted, at no time did Williams or his counsel object to restitution or dispute the amount. As such, the trial court was not required to hold a separate hearing on restitution.

{¶ 15} Nonetheless, at oral argument, appellate counsel argued for the first time that, pursuant to R.C. 2929.19(B)(6), the trial court was required to hold a hearing to determine whether Williams was financially able to pay the restitution.

{¶ 16} R.C. 2929.19(B)(6) provides as follows:

"Before imposing a financial sanction under section 2929.18 of the Revised Code or a fine under section 2929.32 of the Revised Code, the court shall consider the offender's present and future ability to pay the amount of the sanction or fine."

{¶ 17} Given that the instant matter involves restitution and not a fine we turn our attention to R.C. 2929.18(E), which provides as follows:

“A court that imposes a financial sanction upon an offender may hold a hearing if necessary to determine whether the offender is able to pay the sanction or is likely in the future to be able to pay it.”

{¶ 18} As previously noted, Williams did not object at his sentencing hearing to the order of restitution or the amount ordered. Williams also agreed to pay the restitution as part of his plea. In addition, in open court, Williams expressed a willingness to pay the restitution ordered.

{¶ 19} Further, although R.C. 2929.18(E) does not require the trial court to hold a hearing to determine the offender’s ability to pay, there is nothing in the record to suggest that the trial court did not consider Williams’s present or future ability to pay the amount ordered. Williams indicated that he had a house in his name and his defense counsel requested that the trial court impose community control sanctions instead of a prison sentence to allow Williams the opportunity to continue to work. As such, we find appellate counsel’s reliance on R.C. 2929.19(B)(6) and the implications of R.C. 2929.18(E) inapplicable.

{¶ 20} Based upon the forgoing, we conclude that the trial court’s restitution order did not violate Williams’s substantial rights. Consequently, we find no plain error. Accordingly, we overrule the sole assigned error.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

PATRICIA ANN BLACKMON, JUDGE

CHRISTINE T. McMONAGLE, P.J., and
JAMES J. SWEENEY, J., CONCUR