[Cite as *State v. Mordas,* 2010-Ohio-196.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2009-P-0028**
- vs -	:	
MICHAEL E. MORDAS,	:	
Defendant-Appellee.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2008 CR 0317.

Judgment: Reversed and remanded.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellant).

Craig M. Stephens, 206-A South Meridian Street, P.O. Box 229, Ravenna, OH 44266, and *Lisa J. Hirt*, P.O. Box 219, Kent, OH 44240 (For Defendant-Appellee).

TIMOTHY P. CANNON, J.

{¶1} Appellant, the state of Ohio, appeals the sentence imposed by the Portage County Court of Common Pleas upon appellee, Michael E. Mordas. Mordas pled guilty to felonious assault, in violation of R.C. 2903.11(A)(1), a felony of the second degree.

{¶2} This charge stemmed from an incident on St. Patrick's Day, 2008, wherein Mordas repeatedly struck Joseph Harris with a 22-ounce beer mug. Mr. Harris suffered a broken nose and a fractured cheekbone and eye socket.

{¶3} The trial court accepted Mordas' plea and nolled pending charges in a separate case. The trial court held a sentencing hearing, and Mordas was sentenced to one year in jail and placed "on the general control of the Portage County Adult Probation Department in the Intensive Supervision Program for a period of twenty-four months and twenty-four additional months under the General Division of Adult Probation." In the sentencing entry, the trial court further ordered Mordas to undergo a substance abuse evaluation, pay restitution to the victim in the amount of $35,000 within 60 months if the victim provided proof of loss, complete 200 hours of community work service within two years, and have no contact with the victim.

{¶4} Appellant filed a timely notice of appeal and alleges the following assignment of error for our review:

{¶5} "As the trial court did not adhere to the requirements in R.C. 2929.13(D)(1), (2)(a) and (b) and 2929.18(B)(1), Mordas' sentence fails the first prong of the *Kalish* analysis and the resulting sentence is contrary to law."

{¶6} Under this assignment of error, appellant asserts two arguments for our review. First, appellant maintains the trial court failed to overcome the presumption of prison for Mordas' second-degree felony, resulting in a sentence contrary to law. Appellant argues that Mordas' sentence is contrary to law since the trial court failed to state that it had considered the purposes and principles of felony sentencing in R.C. 2929.11 and the seriousness and recidivism factors in R.C. 2929.12. Second, appellant maintains the trial court failed to determine a specific amount of restitution.

{¶7} After the *State v. Foster* decision, "[t]rial 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, at paragraph seven of the syllabus.

{¶8} The Supreme Court of Ohio, in a plurality opinion, has recently held that felony sentences are to be reviewed under a two-step process. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶26. The Court held:

{¶9} "First, [appellate courts] must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard." Id.

{¶10} Mordas pled guilty to one count of felonious assault, in violation of R.C. 2903.11(A)(1), a second-degree felony. Mordas' conviction is governed by R.C. 2929.13(D)(1), which provides in part: "for a felony of the *** second degree *** it is presumed that a prison term is necessary in order to comply with the purposes and principles of sentencing under section 2929.11 of the Revised Code." The statutory range for a second-degree felony is two to eight years. R.C. 2929.14(A)(2).

{¶11} Pursuant to R.C. 2929.13(D)(2), a trial court "may impose a community control sanction or a combination of community control sanctions instead of a prison term on an offender for a felony of the *** second degree *** if [the trial court] makes both of the following findings:

{¶12} "(a) A community control sanction or a combination of community control sanctions would adequately punish the offender and protect the public from future

crime, because the applicable factors under section 2929.12 of the Revised Code indicating a lesser likelihood of recidivism outweigh the applicable factors under that section indicating a greater likelihood of recidivism.

{¶13} "(b) A community control sanction or a combination of community control sanctions would not demean the seriousness of the offense, because one or more factors under section 2929.12 of the Revised Code that indicate that the offender's conduct was less serious than conduct normally constituting the offense are applicable, and they outweigh the applicable facts under that section that indicate the offender's conduct was more serious than conduct normally constituting the offense."

{¶14} In *State v. Lewis*, 11th Dist. No. 2006-L-224, 2007-Ohio-3014, at ¶24, this court stated:

{¶15} "Although a trial court is required to consider the seriousness and recidivism factors, the court does not '"need to make specific findings on the record in order to evince the requisite consideration of all applicable seriousness and recidivism factors."' *** Thus, post-*Foster*, R.C. 2929.12 serves as a general judicial guide for every sentencing and remains valid after *Foster*. ***. '"Although there is no mandate for judicial fact-finding in the general guidance statutes, there is no violation if the trial court makes findings with respect to R.C. 2929.12."' ***." (Internal citations omitted.)

{¶16} In *State v. Greitzer*, 11th Dist. No. 2006-P-0090, 2007-Ohio-6721, at ¶28, this court acknowledged its adoption of the pronouncement of the Supreme Court of Ohio in *State v. Adams* (1988), 37 Ohio St.3d 295. The Supreme Court of Ohio in *Adams* held: "[a] silent record raises the presumption that a trial court considered the factors contained in R.C. 2929.12." *Adams*, supra, at paragraph three of the syllabus.

This court recognized that Ohio Appellate Districts have adopted the holding in *Adams*, prior to and after the Supreme Court of Ohio's decision in *State v. Foster*, supra. *Greitzer*, supra, at ¶29.

{¶17} We further recognize that the *Kalish* Court affirmed the sentence of the trial court as not being contrary to law, since the trial court expressly stated that it had considered the R.C. 2929.11 and R.C. 2929.12 factors, postrelease control was applied properly, and the sentence was within the statutory range. *Kalish*, 2008-Ohio-4912, at ¶18. Although the opinion noted that the trial court considered R.C. 2929.11 and R.C. 2929.12, the plurality added the following footnote:

{¶18} "Of course, where the trial court does not put on the record its consideration of R.C. 2929.11 and 2929.12, it is presumed that the trial court gave proper consideration to those statutes." *Kalish*, supra, at ¶18, fn. 4, citing *Adams*, 37 Ohio St.3d 295, at paragraph three of the syllabus.

{¶19} At the sentencing hearing in this case, the trial court stated specifically: "This is a felony of the second degree. There is a presumption of prison. And to overcome that presumption, there are several factors that must be stated on the record." The court heard from Mordas, who expressed his remorse and took full responsibility for his actions. The trial court also noted that it had received "more letters on [Mordas], positive letters, than any other Defendant I have ever had; from superintendants to fellow teachers, students and also neighbors and family members. Sir, you must have been a brilliant teacher for as many students to send in letters saying how wonderful and what a great impact you have made on their life." The trial court further noted a letter from Dr. Dhungat of the Cleveland Clinic, which was part of

the record, stating that Mordas had been overmedicated with a thyroid prescription, which impacted his personality on the night of the incident. The trial court also took into consideration the letter of the victim. The trial court stated that it had considered the "totality of the evidence" when sentencing Mordas and found him "amendable to community control sanctions." In sentencing Mordas to community control, the trial court recognized that Mordas' sentence would not "minimize what [he] had done that evening, and [he] would be strongly punished." This appears to be a direct reference to the statutory findings.

{¶20} After reviewing the entire transcript of the sentencing hearing, we believe the trial court did, in fact, find the factors set forth in R.C. 2929.13(D)(1), (2)(a) and (b). On the record, the trial court acknowledged there is a presumption of a prison term for a second-degree felony. Of course, the best practice would have been for the trial court to explicitly state, on the record, that it has made the statutory findings set forth in R.C. 2929.13(D)(1), (2)(a) and (b), to comply with *State v. Mathis*, 109 Ohio St.3d 54.

{¶21} As part of appellant's argument that the trial court failed to make the required findings to overcome the presumption of a prison term, appellant contends that it was improper for the trial court to consider the April 9, 2009 letter from Dr. Dhungat regarding Mordas' thyroid medication. A review of the record reveals that appellant received the April 9, 2009 letter approximately one week prior to the sentencing hearing and, further, appellant failed to object to the letter at the hearing. Additionally, the trial court commented that it is "aware of how overmedicating with thyroid prescriptions can alter a person's personality." Once again, appellant did not object to this consideration by the trial court at the sentencing hearing. Since appellant failed to object to this

purported error at the sentencing hearing, which would have allowed the trial court to clarify its consideration or remedy any error, appellant has waived these issues for appeal for all but plain error. *State v. Fields*, 12th Dist. Nos. CA2005-03-067 & CA2005-03-068, 2005-Ohio-6270, at ¶20. (Citation omitted.)

{¶22} Crim.R. 52(B) provides: "[p]lain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." This court will recognize plain error, "'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.'" *State v. Landrum* (1990), 53 Ohio St.3d 107, 111, quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus.

{¶23} In sentencing Mordas, the trial court not only considered the letter from Dr. Dhungat, but stated that it had also considered "evidence presented by counsel, oral statements, any victim impact statement, the pre sentence report and/or the Defendant's statement." As such, this argument by appellant is not well-taken.

{¶24} We turn now to the sentence itself.

{¶25} "If a sentencing court determines that a community control sanction, or combination of community control sanctions, is appropriate, the court is vested with broad discretion to decide which sanctions may be imposed. R.C. 2929.13(A) and 2929.15. R.C. 2929.16 and 2929.17 provide seventeen different nonprison sanctions that can be used to impair an offender's freedom, and R.C. 2929.18 provides four types of financial sanctions.

{¶26} "One community control sanction is a jail sentence. R.C. 2929.16(A)(2) authorizes a felony offender who is eligible for a community control sanction to be

incarcerated for a jail term of up to six months. A jail sentence may be followed by other community control sanctions. R.C. 2929.15(A)(1)." *State v. Jordan*, 4th Dist. No. 03CA2878, 2004-Ohio-2111, at ¶12-13. (Internal citation omitted.)

{¶27} As previously indicated, the trial court sentenced Mordas to a one-year jail term. The duration of Mordas' jail term, however, is improper, as it is beyond the statutory limits of R.C. 2929.16(A)(2). Consequently, Mordas' sentence is contrary to law. We must, therefore, vacate his sentence and remand this matter for a new sentencing hearing.

{¶28} With regard to the restitution element of Mordas' sentence, the trial court ordered the payment of "restitution through adult probation in an amount up to $35,000.00 within sixty months if the victims provide proof of loss within thirty days of this entry."

{¶29} Appellant maintains the trial court failed to adhere to the requirements of R.C. 2929.18(A)(1), in that it failed to "determine a specific amount of restitution to be made by the offender."

{¶30} Pursuant to R.C. 2929.18, a trial court may impose financial sanctions as part of a defendant's felony sentence. Specifically, R.C. 2929.18(A)(1) allows a trial court to order a defendant to pay restitution to the victim "of the offender's crime *** 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, *to the adult probation department that serves the county on behalf of the victim*, to the clerk of courts, or to another agency designated by the court." (Emphasis added.)

{¶31} The trial court's order as to restitution in the case sub judice is consistent with the order in *State v. Humr*, 11th Dist. No. 2008-P-0088, 2009-Ohio-5632, at ¶23. In *Humr*, the trial court ordered restitution "in an amount up to $400.00 within seven years." Id. In *Humr*, this court previously held that, pursuant to R.C. 2929.18(A)(1), the trial court must set forth a "specific amount for restitution." Id. While *State v. Humr* indicated the statute requires the trial court to determine "a specific amount" of restitution, the statute simply states: "*** the court shall determine the amount of restitution to be made by the offender ***." R.C. 2929.18(A)(1).

{¶32} We recognize there are times when the precise amount of restitution will not be available or known with specificity at the time of sentencing. The statute addresses this concern by allowing the trial court to enter an order for an amount that is an "estimate." Therefore, in order to clarify *Humr*, a restitution order would comply with the statute if it orders a specific amount of restitution that is known at the time of the sentencing hearing and, in addition, an amount that consists of an estimate of future expenses, or an amount that represents unrecovered costs after resolution of collateral source benefits, if those amounts could be ascertained to a "reasonable degree of certainty." *State v. Noe*, 6th Dist. Nos. L-06-1393 and L-09-1193, 2009-Ohio-6978, at ¶162. (Citations omitted.)

{¶33} It does not promote judicial economy to delay a sentencing hearing simply because a victim is still in treatment or because some collateral source reimbursement is unresolved.

{¶34} At the sentencing hearing in the instant case, the trial court stated the victim was to provide verification of loss and further required the victim's advocate to

"*inform the victim that he must provide his medical bill and lost wages*." While the sum of restitution was not ascertained by the trial court prior to the hearing, it would have been appropriate to order the amount known at the time of the sentencing hearing, plus an additional amount based on an estimate of those expenses that could be based on a "reasonable degree of certainty." *State v. Noe*, 2009-Ohio-6978, at ¶162. (Citation omitted.) Under the statute, both the victim and the defendant are protected by the ability to object and have a hearing to ensure that the amount of restitution ordered "'bears a reasonable relationship to the loss suffered.'" (Citation omitted.) *State v. Marbury* (1995), 104 Ohio App.3d 179, 181. See also R.C. 2929.18(A)(1).

{¶35} While appellant alleges the trial court erred in transferring its authority to the adult probation department, we find no such evidence in the record. The trial court did not order the adult probation department to ascertain the amount of restitution, as advocated by appellant. The sentencing entry simply orders payment of restitution to the adult probation department, which is wholly consistent with R.C. 2929.18(A)(1). Based on the preceding analysis, this portion of appellant's argument is without merit.

{¶36} Appellant's assignment of error has merit to the extent indicated. Based on the foregoing, the judgment of the Portage County Court of Common Pleas is hereby reversed, and this matter is remanded for proceedings consistent with this opinion.

MARY JANE TRAPP, P.J., concurs,

DIANE V. GRENDELL, J., concurs in judgment only.