[Cite as *State v. Bielek*, 2010-Ohio-5402.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-L-029**
- vs -	:	
MARY E. BIELEK,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 09 CR 000417.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

R. Paul LaPlante, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Mary E. Bielek, appeals from the March 4, 2010 judgment entry of the Lake County Court of Common Pleas, in which she was sentenced for grand theft and forgery and ordered to pay restitution.

{¶2} On October 9, 2009, appellant was indicted by the Lake County Grand Jury on four counts: count one, aggravated theft, a felony of the third degree, in violation of R.C. 2913.02(A)(2); count two, aggravated theft, a felony of the third degree, in

violation of R.C. 2913.02(A)(1); count three, aggravated theft, a felony of the third degree, in violation of R.C. 2913.02(A)(3); and count four, forgery, a felony of the fifth degree, in violation of R.C. 2913.31(A)(2).[1] On October 30, 2009, appellant filed a waiver of the right to be present at her arraignment, and the trial court entered a not guilty plea on her behalf.

{¶3} On January 22, 2010, appellant withdrew her former not guilty plea and entered an oral and written plea of guilty, pursuant to *North Carolina v. Alford* (1970), 400 U.S. 25, to a lesser included offense of count one, grand theft, a felony of the fourth degree, in violation of R.C. 2913.02(A)(2); and count four, forgery, a felony of the fifth degree, in violation of R.C. 2913.31(A)(2). Pursuant to its January 27, 2010 judgment entry, the trial court accepted appellant's guilty plea and entered a nolle prosequi on the remaining counts in the indictment. The trial court deferred sentencing and referred the matter to the Lake County Adult Probation Department for a presentence investigation and report as well as a victim impact statement.

{¶4} A restitution hearing and subsequent sentencing hearing occurred on February 22, 2010.

{¶5} Pursuant to its March 4, 2010 judgment entry, the trial court sentenced appellant to serve a prison term of 15 months on count one and nine months on count four, to run consecutive to each other for a total of 24 months in prison, with five days of credit for time already served. The trial court ordered appellant to pay restitution in the amount of $168,884.41. The trial court further notified appellant that post-release control is optional up to a maximum of three years. It is from that judgment that

1. The foregoing charges stem from appellant's employment and later termination as a secretary/bookkeeper with Little Mountain Plumbing, Inc.

appellant filed a timely appeal, asserting the following assignments of error for our review:

{¶6} "[1.] The trial court erred to the prejudice of the defendant-appellant in determining the amount of restitution[.]

{¶7} "[2.] The trial court erred by sentencing the defendant-appellant to a term of imprisonment[.]"

{¶8} In her first assignment of error, appellant argues that the trial court erred by ordering restitution in the amount of $168,884.41, because the testimony it relied upon was not based on competent, credible evidence.

{¶9} A court imposing a sentence upon a felony offender may order the offender to make restitution "to the victim of the offender's crime *** in an amount based on the victim's economic loss." R.C. 2929.18(A)(1).

{¶10} R.C. 2929.01(L) defines "economic loss" as "any economic detriment suffered by a victim as a direct and proximate result of the commission of an offense ***."

{¶11} However, "[b]efore imposing a financial sanction under section 2929.18 of the Revised Code[,] *** the court shall consider the offender's present and future ability to pay the amount of the sanction or fine." *State v. Magnusson*, 11th Dist. No. 2006-L-263, 2007-Ohio-6010, at ¶73. R.C. 2929.18 does not require a court to hold a hearing on the issue of a defendant's ability to pay; rather, a court is merely required to consider the offender's present and future ability to pay. *State v. Martin* (2000), 140 Ohio App.3d 326, 338; see, also, *State v. Smith*, 4th Dist. No. 06CA2893, 2007-Ohio-1884, at ¶41.

{¶12} "'Generally, the right to order restitution is limited to the actual damage or loss caused by the offense of which the defendant is convicted.'" *State v. Agnes* (Oct. 6, 2000), 11th Dist. No. 99-L-104, 2000 Ohio App. LEXIS 4653, at 23-24, quoting *State v. Williams* (1986), 34 Ohio App.3d. 33, 34. A trial court properly considers an offender's present and future ability to pay when it indicates it has done so in its judgment entry. *State v. Sanders*, 11th Dist. No. 2003-L-144, 2004-Ohio-5937, at ¶10. In reviewing a restitution order, an appellate court examines "whether there was competent, credible evidence to support the trial court's order of restitution." *State v. Morgan*, 11th Dist. No. 2005-L-135, 2006-Ohio-4166, at ¶21.

{¶13} We note that appellant failed to object to the amount of restitution imposed by the trial court. "It is well-established in Ohio that an appellate court need not consider an error which was not objected to the court below. *State v. Marbury* (1995), 104 Ohio App.3d 179, 181, ***, citing *State v. Williams* (1977), 51 Ohio St.2d 112, ***. Thus, appellant has waived all errors except plain error. *Marbury* at 181." *Agnes*, supra, at 23. (Parallel citations omitted.)

{¶14} 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.

{¶15} Here, at the beginning of the February 22, 2010 restitution hearing, appellant and appellee, the state of Ohio, stipulated to three separate amounts of

restitution, totaling $50,536.31: (1) $36,681.20 for payments made to Case Western Reserve University; (2) $12,855.11 for a Capital One account; and (3) $1,000 for a second Capital One account.

{¶16} Three witnesses testified on behalf of the state. First, Natalie Formica, the daughter of Little Mountain Plumbing owners, Peter and Louise Formica, indicated that she began working at the business after appellant, who was employed as a secretary/bookkeeper, was terminated. Part of her responsibilities included sorting through many years' worth of unauthorized purchases and transactions made by appellant. According to Ms. Formica, unauthorized fuel purchases equaled $7,271.36 and unauthorized Staples purchases totaled $2,237.05. She testified that there were two unauthorized credit card accounts which included transactions made at Micro Center, purchases of Tracfone cards, and vacations in the names of appellant and her son. Ms. Formica also said that appellant issued unauthorized transactions from the company's checking account which totaled $95,334.77. In addition, unauthorized purchases on the company's Capital One account totaled $16,364.92.

{¶17} Second, Mr. Formica testified that he started his business in 1992 and hired appellant in 1999. Her job duties included answering the telephone, talking with customers, and billing. Appellant had the authority to pay bills, make deposits, and keep the books. Mr. Formica indicated that appellant did not have the authority to write out checks to "cash" nor did she have the authority to write out checks in her own name. He specifically indicated that from 2002 to 2009, appellant was not authorized to go to banks with checks from the company's checking account made out to "cash" for a total of approximately $20,000 or with checks made out to herself for a total of approximately

$65,000. According to Mr. Formica, appellant did not have the authority to open two gas cards in her name on the company's account; did not have the authority to make personal transactions on the company's Capital One Visa; and did not have the authority to open a separate Capital One account and pay on it with company funds.

{¶18} Lastly, John Zappitelli, the accountant for Little Mountain Plumbing, testified that he reviewed the business records in May 2009 for misappropriated funds. He stated that he and his staff reviewed the company's ledgers, entries, records, and cancelled checks, as well as conducted interviews with company employees. Mr. Zappitelli determined that $85,734.77 worth of unauthorized checks were issued and/or cashed. Also, he said that there was a fuel card with $7,271.36 worth of fuel, $797.71 worth of other expenses, and a Staples account in the amount of $2,237.05. Mr. Zappitelli concluded that appellant's conduct was not appropriate in the normal course and scope of business, and the total amount of misappropriated funds amounted to $155,977.20, based on the documentation from Little Mountain Plumbing.

{¶19} After closing arguments, the trial judge reviewed the exhibits and, after a recess, indicated the following:

{¶20} "The Court has considered the evidence that was presented during the restitution component of the sentencing hearing. And as a result the Court hereby finds to a reasonable degree of certainty that the economic loss of the victims in this case that resulted as a direct and proximate cause of the commission of these crimes will be as follows:

{¶21} "With respect to the Charter One account checking account, I believe, the amount of $93,474.77. With respect to the fuel charges, $7,271.36. With respect to the

Capital One account, I believe the last four digits were 0672, the amount of $16,364.92. With respect to the Staples account $2,237.05. With respect to the monies paid to the Case Western Reserve University which were agreed to $36,681.20. And with respect to the other Capital One account last four digits being 4985, again stipulated to the amount of $12,855.11. The grand total of restitution $168,884.41 due to the victims."

{¶22} In addition, in its judgment entry of sentence, the trial court concluded:

{¶23} "The Court conducted an evidentiary hearing with regard to the issue of restitution. At the conclusion of said hearing, the Court found there was competent credible evidence from which the Court was able to discern the amount of restitution owed the victim(s) to a reasonable degree of certainty.

{¶24} "The Court, having determined that the defendant is able to pay a financial sanction of restitution or is likely in the future to be able to pay a financial sanction of restitution, hereby orders that the defendant is to make restitution to the victim(s) of the defendant's criminal act, in the amount of One Hundred Sixty-Eight Thousand, Eight Hundred Eighty-Four Dollars and Forty-One Cents ($168,884.41), the victim(s) economic loss. It is further ordered that the payment of restitution will be monitored by the Adult Parole Authority and that all payments of restitution shall be made to the Lake County Clerk of Courts on behalf of the victims. The Clerk of Courts is further ordered to disperse any restitution collected to the victim(s). This order of restitution is a Judgment in favor of the victim(s), Peter and Louise Formica and/or Little Mountain Plumbing, Inc. and against the defendant, Mary E. Bielek. Said victim(s), pursuant to this Judgment, may bring any action to collect said debt as provided for in R.C.

2929.18(D), and/or may accept payment pursuant to a payment schedule that will be determined and monitored by the Adult Parole Authority."

{¶25} We note that a trial court's restitution order will not be disturbed by a reviewing court as being against the manifest weight of the evidence if some competent, credible evidence supports the order. *State v. Warner* (1990), 55 Ohio St.3d 31, 51-53. The weight to be given to evidence and the credibility of the witnesses are issues primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶26} After considering the foregoing, we determine that there is competent, credible evidence in the record to support the trial court's restitution order.

{¶27} Appellant's first assignment of error is without merit.

{¶28} In her second assignment of error, appellant alleges that the trial court erred by sentencing her to a term of imprisonment where its findings under R.C. 2929.12 were not supported by the record and where it failed to give careful and substantial deliberation to the relevant statutory considerations.

{¶29} 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, paragraph seven of the syllabus.

{¶30} The Supreme Court of Ohio, in a plurality opinion, has 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:

{¶31} "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.

{¶32} 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, post-release control was applied properly, and the sentence was within the statutory range. *Kalish* at ¶18.

{¶33} In the case at bar, appellant does not assert that her sentence was contrary to law. Rather, she alleges that the trial court failed to give careful and substantial deliberation to the relevant statutory considerations.

{¶34} An abuse of discretion is the trial court's "'failure to exercise sound, reasonable, and legal decision-making.'" *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶35} "It is important to note that there is no mandate for judicial factfinding in the general guidance statutes. The court is merely to 'consider' the statutory factors." *Foster*, supra, at ¶42. Thus, the trial court was not required to make any findings regarding sentencing appellant to more than the minimum sentence. Id. at ¶100.

{¶36} The record reflects the trial court considered R.C. 2929.11 and R.C. 2929.12. In its March 4, 2010 judgment entry, the trial court specifically indicated the following:

{¶37} "The Court has considered the record, oral statements, any victim impact statement, pre-sentence report and/or drug and alcohol evaluation submitted by the Lake County Adult Probation Department of the Court of Common Pleas, as well as the principles and purposes of sentencing in R.C. 2929.11, and has balanced the seriousness and recidivism factors under R.C. 2929.12.

{¶38} "In considering the foregoing, and for the reasons stated on the record, this Court finds that a prison sentence is consistent with the purposes and principles of sentencing set forth in R.C. 2929.11 and that Defendant is not amenable to an available community control sanction."

{¶39} The trial court made a similar pronouncement at the sentencing hearing, in which it stated the following:

{¶40} "The Court has considered the overriding purposes and principles of felony sentencing as set forth in Revised Code Section 2929.11, those being to punish this Defendant, as well as to protect the public from future crimes committed by this Defendant as well as by others.

{¶41} "In determining the most effective way to comply with those purposes and principles, the Court has considered all relevant factors, including but not limited to those set forth in 2929.12 of the code that relate to the seriousness of the Defendant's conduct, as well as the likelihood that she will commit crimes in the future. The Court has also considered the factors in 2929.13 of the code, these being a felony of the fourth degree and a felony of the fifth degree.

{¶42} "The Court has also considered the complete record before me, that includes the presentence investigation and report, and the recommendations of the

Lake County Adult Probation Department. The Court has also considered the victim impact statements. The Court has also received and considered separate letters from the Defendant, as well as the Defendant's husband, and the Court has considered as well all of the statements that have been made here in open Court throughout this day."

{¶43} In addition, the trial court considered and found that the preference for community control was overcome by the fact that these offenses were facilitated by appellant's position of trust within the company. The trial court acknowledged appellant's lack of a prior criminal history, but recognized the fact that the victim suffered serious economic as well as psychological harm as a result of her conduct. The trial court also found that appellant's crimes were committed over a long period of time, she used devious and deceptive tactics to cover up some of the transactions, and she showed no genuine remorse.

{¶44} Thus, the court considered the record as well as the principles and purposes of sentencing under R.C. 2929.11 and balanced the seriousness and recidivism factors under R.C. 2929.12 before imposing sentence. Thus, the trial court sentenced appellant after considering the appropriate statutory factors.

{¶45} Also, appellant pled guilty by way of *North Carolina v. Alford*, supra. Both appellant's prison terms of 15 months for the felony of the fourth degree and nine months for the felony of the fifth degree were within the statutory range for her crimes. R.C. 2929.14(A)(4) and (5). Therefore, the trial court did not abuse its discretion in imposing appellant's sentence.

{¶46} Appellant's second assignment of error is without merit.

{¶47} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.