[Cite as *State v. Speweike*, 2011-Ohio-493.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-10-1198

Appellee — Trial Court No. CR0201001102

v.

David Speweike — **DECISION AND JUDGMENT**

Appellant — Decided: February 4, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Lindsay Navarre, Assistant Prosecuting Attorney, for appellee.

Joseph P. Walsh, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} David Speweike, appellant, appeals his conviction and sentence pursuant to a no contest plea to the offense of theft from an elderly person or disabled adult where the value of the property or services stolen was in the amount of $25,000 or more and less than $100,000, a violation of R.C. 2913.02(A)(1) and (B)(3) and a second degree felony.

The charge was the first count of a six count indictment returned by the Lucas County Grand Jury against Speweike on January 19, 2010. The other five counts were for forgery, violations of R.C. 2913.31(A)(3) and (C)(1)(c)(i) and fourth degree felonies.

{¶ 2} Under a plea agreement, Speweike pled no contest to the theft from an elderly person or disabled adult charge and agreed to pay restitution in the amount of $76,000. In exchange, the state dismissed the five forgery counts. In a final judgment journalized on July 16, 2010, the trial court sentenced Speweike to serve a five year prison term and to pay both restitution in the amount of $76,000 and costs.

{¶ 3} Speweike appeals his conviction and sentence to this court and has been provided court appointed counsel for this appeal. While his counsel has filed an appellate brief, he has also moved for leave to withdraw as appellate counsel under the procedures set forth in *Anders v. California* (1967), 386 U.S. 738 due to his inability to find meritorious grounds for an appeal. Pursuant to *Anders*, counsel provided appellant with copies of both the appellate brief and the request to withdraw as counsel. Counsel also informed appellant of his right to file his own assignments of error and appellate brief in this appeal. Appellant has not filed any additional brief or assignments of error.

{¶ 4} The appellate brief filed by counsel asserts two potential assignments of error on appeal:

{¶ 5} "Assignment of Error I: Pursuant to *Anders v. California*, 386 U.S. 738 (1967), Mr. Speweike's plea was not knowing, intelligent, and voluntary and should not have been accepted by the trial court. (T. 5/21/10: 4-14, 17-18).

{¶ 6} "Assignment of Error II: Pursuant to *Anders v. California*, U.S. 738 (1967), the restitution amount agreed to in the plea and ordered by the trial court was not supported by substantial evidence. (T. 5/21/10: 12-13, 16-17) and (T. 7/7/10: 4, 11-12)."

{¶ 7} Speweike pled no contest at a plea hearing conducted on May 21, 2010. At the hearing, the state provided a narrative statement of facts it claimed it would have proved beyond a reasonable doubt had the case proceeded to trial. The state claimed that the victim, Barbara Ripple, was elderly, age 78, and legally blind. Due to her poor eyesight, Ripple required help to pay her bills. For a period of time Speweike's mother assisted Ripple pay bills, but when she could no longer help Ripple, she recommended that Speweike help. The state claimed that the evidence would show during the period between May 16, 2008, and October 16, 2008, Speweike stole $76,000 in money from Ms. Ripple's bank accounts through various means while helping Ripple pay her bills.

No Contest Plea

{¶ 8} Under potential Assignment of Error No. I, appellant asserts that his no contest plea was not knowingly, intelligently and voluntarily made. When entering a no contest plea, a defendant must do so knowingly, intelligently, and voluntarily. *State v. Engle* (1996), 74 Ohio St.3d 525, 527. "Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution." Id.

{¶ 9} Before accepting a guilty or no contest plea, a trial court must strictly comply with the requirements of Crim.R. 11(C)(2)(c) as to waiver of constitutional

rights. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, at syllabus. This requires a trial court to:

{¶ 10} "* * * orally advise a defendant before accepting a felony plea that the plea waives (1) the right to a jury trial, (2) the right to confront one's accusers, (3) the right to compulsory process to obtain witnesses, (4) the right to require the state to prove guilt beyond a reasonable doubt, and (5) the privilege against compulsory self-incrimination. When a trial court fails to strictly comply with this duty, the defendant's plea is invalid. (Crim.R. 11(C)(2)(c), applied.)" Id.

{¶ 11} The court explained that, while a no contest plea is not an admission of guilt, it is an admission of the truth of the facts alleged in the indictment. Crim.R. 11(B)(2). The court advised Speweike that by making a no contest plea he waived the right to contest those facts at trial to a jury or, if he waived the right to a jury trial, at trial to the court. The court also advised him that by pleading no contest he also gave up the right to confront and cross examine all the witnesses the state would call to testify against him, the right to use the court's subpoena power to compel witnesses to appear and testify on his behalf, and the right require the state to prove his guilt beyond a reasonable doubt at trial. Additionally, the trial court advised Speweike that had the case proceeded to trial that the state could not compel him to testify against himself. The record demonstrates that the trial court strictly complied with Crim.R. 11(C)(2)(c) by providing notice of the federal constitutional rights Speweike was waiving by pleading no contest.

{¶ 12} A trial court is also required to substantially comply with the non-constitutional requirements of Crim.R. 11(C)(2)(a) and (b) before accepting a guilty or no contest plea. *State v. Veney* at ¶ 14-17. The rule provides:

{¶ 13} "(C) Pleas of guilty and no contest in felony cases

{¶ 14} "* * *

{¶ 15} "(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

{¶ 16} "(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

{¶ 17} "(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence."

{¶ 18} Before accepting the plea, the trial court spoke with Speweike and determined that he could read and write the English language. Speweike stated he left high school in his senior year, but had secured a GED. He also stated that he was not under the influence of any alcohol or narcotic that would impair his understanding. Appellant denied that any threats were made to him to get him to change his plea to no contest and that the only promises were those made as part of the plea agreement.

{¶ 19} The court discussed the offense of theft from an elderly person or disabled adult and that the offense is a second degree felony. The court explained the maximum penalty for the offense was imprisonment for a term of eight years. The court explained that it also had discretion to impose a prison term within a range of sentences in yearly increments from two to eight years. The court advised appellant that it could also impose a fine up to $15,000, making the maximum sentence for the offense imprisonment for a term of eight years and a $15,000 fine.

{¶ 20} The trial court discussed that appellant was eligible for community control and the sanctions that could be imposed for violation of community control. The court also discussed postrelease control.

{¶ 21} The court discussed with Speweike the nature of the plea agreement including the criminal offense charged, that the state would recommend that other the other counts of the indictment, counts 2, 3, 4, 5, and 6 be dismissed in exchange for his no contest plea on the theft from the elderly or disabled adult charge. The court also discussed with appellant that under the plea agreement he agreed to pay restitution in the amount of $76,000.

{¶ 22} The plea agreement was in writing. Appellant reviewed the agreement with his attorney and executed the agreement in open court. His attorney witnessed his execution of the plea agreement. The signed plea agreement is part of the record.

{¶ 23} The record demonstrates, under the totality of the circumstances, that the trial court substantially complied with the requirements of Crim.R. 11(C)(2)(a) and (b) before accepting the no contest plea.

{¶ 24} Speweike contends in the Anders appellate brief that he was under medication for a back injury at the time of his plea and that he did not understand the proceedings. However, there is no evidence in the record supporting such a claim and appellate review in a direct appeal in a criminal case, is limited "to what transpired in the trial court as reflected by the record made of the proceedings." *State v. Ishmail* (1978), 54 Ohio St.2d 402, 405-06. A claim that requires consideration of materials outside of the record of proceedings in the trial court is not the type of claim that can be considered on direct appeal. *State v. Carter* (2000), 89 Ohio St.3d 593, 606.

{¶ 25} We conclude that the trial court committed no error in accepting Speweike's no contest plea. The record demonstrates strict compliance with Crim.R. 11(C)(2)(c) requirements as to notice of waiver of federal constitutional rights and substantial compliance with the non-constitutional requirements of Crim.R. 11(C)(2)(a) and (b). The record demonstrates that the no contest plea was knowingly, intelligently, and voluntarily made. Accordingly, we conclude that potential Assignment of Error No. I is not well-taken.

Restitution

{¶ 26} Under potential Assignment of Error No. II, appellant argues that the trial court's July 16, 2010 judgment requiring him to pay restitution in the amount of $76,000 to Barbara Ripple, the crime victim, is not supported by substantial evidence.

{¶ 27} The plea hearing proceeded on May 21, 2010. In its narrative statement of fact at the hearing, the state contended: "Mr. Speweike did steal money from Ms. Ripple's account in several different ways and this – the approximate amount of this stolen money was $76,000."

{¶ 28} The plea agreement specifically provided for restitution to be paid in the amount of $76,000. The trial court confirmed that fact with appellant at the time of his plea. Appellant executed the plea agreement in open court and the agreement is part of the record. At the plea hearing, counsel for appellant nevertheless indicated that they were working with the prosecutor to determine whether "there may be some – there may be a lesser amount, not terribly lesser amount * * *."

{¶ 29} The sentencing hearing proceeded on July 7, 2010. The victim did not attend the hearing. The chief investigator for the prosecution on the case was present. By agreement, however, the court did not conduct a hearing on the amount of restitution. The parties agreed that no hearing on the amount of restitution was necessary:

{¶ 30} "The Court: Okay. For the record, the plea agreement reflected an agreed upon restitution is $76,000; is that accurate?

{¶ 31} "Ms. Navarre [Assistant Prosecutor]: That is correct, Your Honor.

{¶ 32} "The Court: Okay. So no need for the restitution hearing because that was part of the plea agreement; is that correct?

{¶ 33} "Mr. Viren [Defense Counsel]: Yes."

{¶ 34} Appellant argues that evidence is lacking in the record to support the amount of restitution ordered. Under the R.C. 2929.18(A)(1), a court may base the amount ordered "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 provided that the amount * * * shall not exceed the amount of the economic loss suffered by the victim * * *."

{¶ 35} R.C. 2929.18(A)(1) also provides that no hearing to establish the amount of restitution is necessary unless "the offender, victim, or survivor disputes the amount."

{¶ 36} The wording of the statute clearly provides that no hearing was required as to the amount of restitution because neither the offender, the victim, nor any survivor disputed the restitution amount. *State v. Buckeye Truck and Trailer Leasing, Inc.*, 187 Ohio App.3d 309, 2010-Ohio-1699, ¶ 26. Absent a hearing, "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." R.C. 2929.18(A)(1).

{¶ 37} In *State v. Coburn*, 6th Dist. No. S-09-006, 2010-Ohio-692, we considered the required showing under R.C. 2929.18(A)(1) necessary to support the amount of restitution ordered in a sentence where the underlying conviction was based upon a plea

agreement. The plea agreement in *Coburn*, however, did not specify the amount of restitution to be ordered. *Coburn* at ¶ 15.

{¶ 38} Here, the plea agreement not only specified the restitution amount, the appellant affirmatively stated, through counsel, at sentencing that no hearing under R.C. 2929.18(A)(1) was necessary because the restitution amount was established under the plea agreement.

{¶ 39} There is authority that criminal defendants can stipulate to the amount of restitution to be ordered as a part of a sentence under R.C. 2929.18(A)(1) and that the stipulation itself provides a sufficient basis for the restitution amount under the statute. *State v. Hody*, 8th Dist. No. 94328, 2010-Ohio-6020, ¶ 25-26; *State v. Silbaugh*, 11th Dist. No. 2008-P-0059, 2009-Ohio-1489, ¶ 21; *State v. Leeper*, 5th Dist. No. 2004CAA07054, 2005-Ohio-1957, ¶ 46. Alternatively, a defendant should be barred from prevailing on error he invited in the court's determination of the restitution amount. *State v. Stewart*, 3d Dist. No. 16-08-11, 2008-Ohio-5823, ¶ 13. On these alternative grounds, we conclude that the trial court did not abuse its discretion in setting the amount of restitution to be paid to the victim as part of the appellant's sentence. Accordingly, we find appellant's potential Assignment of Error No. II is not well-taken.

{¶ 40} We have also undertaken an independent review of the entire record and find no grounds for a meritorious appeal. We conclude this appeal is wholly frivolous under *Anders v. California* and grant counsel's motion to withdraw. Substantial justice

was done the party complaining. We affirm the judgment of the Lucas County Court of Common Pleas. Appellant is ordered to pay the costs, pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE