

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2009-08-215
 :
 - vs - : OPINION
 : 3/29/2010
 :
 CHRISTOPHER SCHUL, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2007-12-2178

Robin N. Piper III, Butler County Prosecuting Attorney, Lina N. Alkaghawi, Government Services Center, 315 High Street, 11th Fl., Hamilton, Ohio 45011, for plaintiff-appellee

Brian K. Harrison, P.O. Box 80, Monroe, Ohio 45050, for defendant-appellant

BRESSLER, P.J.

{¶1} Defendant-appellant, Christopher Alan Schul, appeals the restitution portion of his sentence imposed by the Butler County Common Pleas Court. We reverse and remand the trial court's decision as to the restitution order.

{¶2} Appellant was indicted on four fifth-degree felony counts of nonsupport of dependents. Counts Three and Four covered a period from October 1, 2003 to September 30, 2005, while Counts One and Two were for the time from October 1, 2005 to September 30, 2007. Appellant pled guilty to Counts One and Three, both pertaining

to the nonsupport of his daughter, in violation of R.C. 2919.21(A)(2). In exchange, the state agreed to merge the remaining counts. The trial court sentenced appellant to five years of community control on each count, and ordered appellant to pay \$32,024.37 in restitution to the Butler County Child Support Enforcement Agency. Appellant filed a timely appeal raising two assignments of error.

{¶3} Assignment of Error No. 1:

{¶4} "THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE WHEN IT SENTENCED APPELLANT TO PAY RESTITUTION IN AN AMOUNT THAT EXCEEDED THE VICTIM'S ECONOMIC LOSS."

{¶5} In his first assignment of error, appellant argues that the amount of restitution the trial court ordered was greater than the amount of child support which accrued because of appellant's criminal conduct.

{¶6} R.C. 2929.15(A)(1)(a) authorizes a trial court to impose sanctions on felony offenders, including financial sanctions ordered pursuant to R.C. 2929.18. One financial sanction an offender may be ordered to pay is restitution to a victim "in an amount based on the victim's economic loss." R.C. 2929.18(A)(1). "The amount of restitution ordered by the trial court must be based on the actual loss caused by the offender's criminal conduct, therefore '*[r]estitution can be ordered only for those acts that constitute the crime for which the defendant was convicted and sentenced.*'" (Emphasis sic.) *State v. Peterman*, Butler App. No. CA2009-06-149, 2010-Ohio-211, ¶6, citing *State v. Friend* (1990), 68 Ohio App.3d 241, 243; *State v. Irvin* (1987), 39 Ohio App.3d 12, 13; *State v. Williams* (1986), 34 Ohio App.3d 33, 34. See, also, *State v. Warner* (1990), 55 Ohio St.3d 31, 69-70; *State v. Hicks*, Butler App. No. CA2002-08-198, 2003-Ohio-7210, ¶44; *State v. McCants*, Butler App. No. CA2009-08-214, 2010-Ohio-854, ¶5.

{¶7} Appellant contends the trial court acted improperly when it ordered restitution for economic damages not proximately caused by the commission of the offense for which he was convicted. Appellant maintains that because he was convicted for the nonpayment of child support for his daughter over a 48-month period, from October 1, 2003 to September 30, 2007, the trial court had the authority to only order restitution for child support which accrued within that period. By ordering him to pay his entire child support arrearage, appellant argues the trial court violated R.C. 2929.18.

{¶8} The state urges us to affirm the restitution order, arguing that a trial court may order a defendant to pay restitution for the full amount of child support arrearage owed as a condition of community control. The state cites *State v. Stewart*, Franklin App. No. 04AP-761, 2005-Ohio-987, in support of this argument. We recently addressed an identical argument in *McCants* and found *Stewart* distinguishable. "In *Stewart*, the Tenth Appellate District affirmed a trial court's decision imposing payment of a father's entire child support arrearage amount as a condition of his community control, finding the condition satisfied the three criteria set forth by the Ohio Supreme Court in *State v. Jones* (1990), 49 Ohio St.3d 51, 53." *McCants* at ¶8, citing *Stewart* at ¶8-10.

{¶9} The *Stewart* court also observed, however, that: "The trial court did not order the \$11,223.72 support arrearage to be paid as 'restitution.' To the contrary, the trial court expressly stated it was *not* ordering defendant's payment of the \$11,223.72 support arrearage as restitution, but instead was ordering the payment 'as a condition of his probation.'" (Emphasis sic.) *Stewart* at ¶5.

{¶10} As in *McCants*, "[t]his case does not present a situation like *Stewart* in which the trial court ordered payment of the entire arrearage amount as a condition of community control." *McCants* at ¶12, citing *Stewart* at ¶3, 5. Instead, the trial court

ordered appellant to pay \$32,024.37 in "restitution" which the state concedes represents appellant's entire child support arrearage, not just the amount which accumulated for appellant's nonsupport of his daughter from October 1, 2003 until September 30, 2007.

{¶11} A trial court's restitution award is limited to the amount of arrearage which accrued during the time period covered by the offense. *Peterman*, 2010-Ohio-211, ¶9; *McCants* at ¶13. Thus, any restitution must be limited to that amount which accrued as a result of appellant's failure to support his daughter from October 1, 2003 to September 30, 2007.

{¶12} "[W]here a trial court orders restitution as part of the sentence in a criminal nonsupport case, the amount of restitution is limited to the support arrearage that accrued during the time frame encompassed by the specific charge or charges for which the defendant is convicted. In the alternative, if the defendant is sentenced to a term of community control, the trial court may, as a condition of community control, order the defendant to pay the entire outstanding child support arrearage." *McCants* at ¶13.

{¶13} Finally, as noted in both *Peterman* and *McCants*, we wish to emphasize that this decision does not relieve appellant of his child support obligation for the amounts that accrued outside the 48-month period; it merely limits the trial court's order of "restitution" to the amount which accrued during the commission of the offense for which he was convicted. *Peterman* at ¶9; *McCants* at ¶14. See, also, *Hubbell* at ¶12.

{¶14} Appellant's first assignment of error is sustained. The judgment is reversed and this case is remanded to the trial court with instructions to modify its sentence accordingly.

{¶15} Assignment of Error No. 2:

{¶16} "APPELLANT WAS DENIED A FAIR TRIAL WHEN TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE TO APPELLANT."

{¶17} In his second assignment of error, appellant maintains his trial counsel was ineffective for failing to obtain an accounting of the restitution owed by appellant for commission of the crime for which he pled guilty, and/or argue that the amount should have been limited to the arrearage that accrued during the commission of the crime. Based on our resolution of the first assignment of error, we find appellant's second assignment of error moot.

{¶18} Judgment reversed and remanded.

POWELL and HENDRICKSON, JJ., concur.