

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-03-007
- vs -	:	<u>OPINION</u> 11/7/2011
KATHERINE LANG,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
Case No. CR20102244

Jessica A. Little, Brown County Court of Common Pleas, Mary McMullen, 200 East Cherry Street, Georgetown, Ohio 45121, for plaintiff-appellee

Julie Steddom, 134 North Front Street, Ripley, Ohio 45167, for defendant-appellant

PIPER, J.

{¶1} Defendant-appellant, Katherine Lang, appeals the decisions of the Brown County Court of Common Pleas, sentencing her on three counts of theft in office, and ordering restitution. We affirm the decisions of the trial court.

{¶2} Lang worked as the Utilities Clerk for the village of Ripley. As part of her job responsibilities, Lang would set up utility accounts for new customers, issue billing statements, and accept payments from customers. From January 2006 through October 27,

2009, Lang stole \$952,619.24 from the village of Ripley by adjusting utility bills and diverting money from customer accounts into cash. Lang's theft was discovered after the village of Ripley requested a "special audit" of the utilities department.

{¶3} The state charged Lang with three counts of theft in office and seven counts of tampering with records. The three counts of theft corresponded to the three methods Lang used to steal money from the village of Ripley. Lang stole \$915,845.26 by adjusting customers' utility bills downward after they had already paid their balance in full, and withdrawing the difference in cash. Lang also zeroed accounts out in the electronic billing system so that a customer's invoice would reflect a zero balance. Lang would then "whiteout" the zero balance and insert a balance-owed amount, which she would then withdraw for herself when the customer paid the bill. Lang stole \$23,162.57 through this billing scheme. Lang also diverted \$13,611.41 to herself by taking the cash from new customers who paid a deposit in order to open a new utility account.

{¶4} Lang pled guilty to three counts of theft in office, and the state dropped the remaining tampering with records charges. During her plea hearing, Lang stipulated that the proper restitution for Count One was \$915,845.26, \$23,162.57 on Count Two, and \$13,611.41 on Count Three. Lang also stipulated that the restitution for the cost of the special audit was \$121,982.80. The trial court ordered a presentence investigation report (PSI), and after reviewing it, held a sentencing hearing.

{¶5} The trial court ordered Lang to pay restitution as she had stipulated, and to serve five years on Count One, four years on Count Two, and four years on Count Three, all to be served consecutive to each other, for an aggregate sentence of 13 years. Lang now appeals that sentence and order of restitution, raising the following assignments of error.

{¶6} Assignment of Error No. 1:

{¶7} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-

APPELLANT WHEN IT ORDERED HER TO PAY RESTITUTION WITHOUT CONSIDERING HER PRESENT AND FUTURE ABILITY TO PAY THEREBY DENYING DEFENDANT-APPELLANT HER RIGHTS TO DUE PROCESS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION."

{¶8} Lang argues in her first assignment of error that the trial court erred in ordering her to pay restitution because it did not first consider whether or not she has the ability to pay.

{¶9} According to R.C. 2929.18, a trial court has the authority to impose an order of restitution based on the victim's economic loss. 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 and includes * * * any property loss * * * incurred as a result of the commission of the offense." The record must contain sufficient evidence for the trial court to ascertain the amount of restitution to a reasonable degree of certainty. *State v. Smith*, Butler App. No. CA2004-11-275, 2005-Ohio-6551, ¶21. The amount of restitution must bear a reasonable relationship to the loss suffered by the victim, and is limited to the actual loss caused by the offender's criminal conduct for which the offender was convicted. *Id.*

{¶10} During Lang's sentencing hearing, she stipulated to restitution in the amount specific to each theft charge, as well as the charge for the special audit. The trial court specifically asked Lang's counsel whether or not the amounts were the "appropriate restitution" and whether or not Lang was stipulating to those amounts. Lang's counsel replied, "yes, Your Honor." The trial court then asked Lang if the information was correct regarding her stipulation of restitution, and Lang replied "yes." Lang further agreed to the seizure of her retirement plan and deferred compensation plan so that those funds could be applied to her restitution order.

{¶11} Stipulations or agreements by an accused in the course of a criminal trial are binding and enforceable. *State v. Folk* (1991), 74 Ohio App.3d 468, 471. A defendant is thus bound to all matters of fact contained in her stipulations. *Id.* Lang's stipulation that restitution would be made in the amount specific to each charge and the special audit precludes her from now arguing that these amounts were not proper. In an attempt to challenge the trial court's restitution order in the face of her clear and uncontroverted stipulation, Lang argues on appeal that the trial court did not abide by statutory requirements when ordering restitution.

{¶12} R.C. 2929.19(B)(5) requires a trial court to "consider the offender's present and future ability to pay the amount of the sanction" before imposing restitution pursuant to R.C. 2929.18. "[T]here are no express factors that must be taken into consideration or findings regarding the offender's ability to pay that must be made on the record." *State v. Martin*, 140 Ohio App.3d 326, 338, 2000-Ohio-1942. However, there must be some evidence in the record to show that the trial court acted in accordance with the legislative mandate that the trial court consider the offender's ability to pay. *State v. Adkins* (2001), 144 Ohio App.3d 633, 647.

{¶13} This court has consistently held that compliance with R.C. 2929.19(B)(5) can be shown through the trial court's use of a Presentence Investigation, which often provides financial and personal information in order to aid the court in making its sentencing determination. *State v. Patterson*, Warren App. No. CA2005-08-088, 2006-Ohio-2133, ¶21; *State v. Dandridge*, Butler App. No. CA2003-12-330, 2005-Ohio-1077, ¶6; *State v. Back*, Butler App. No. CA2003-01-011, 2003-Ohio-5985, ¶21.

{¶14} The trial court ordered a PSI after it accepted Lang's guilty plea, and explained to Lang that a PSI "basically tells me a little bit about you: Your criminal history; social history; employment history * * * it'll give me a good idea of who you are. It's also going to

allow my Probation Department to get sufficient information, for me, to determine what the appropriate restitution is * * *." During sentencing, the trial court stated that it had "received and reviewed" the PSI, and the record is clear that the PSI provided a basis for the trial court to consider whether or not Lang has the ability to pay.

{¶15} The PSI detailed Lang's education, social status, current health, employment history, as well as Lang's version of the events leading up to and after the theft offenses. From Lang's education, social status, health, and employment history, the trial court was able to consider Lang's future earning potential, and whether or not she will be able to pay the restitution order once she is released from prison. From Lang's version of the events, the trial court was able to consider that a very large percentage of the money has not been accounted for. As part of the PSI, Lang gave a limited accounting of what she used the embezzled funds for, but did not otherwise account for hundreds of thousands of dollars and gave no explanation regarding the whereabouts of the remaining money.

{¶16} The record contains ample evidence that the trial court acted in accordance with the legislative mandate set forth in R.C. 2929.19(B)(5) that it consider Lang's ability to pay before ordering restitution. Lang's PSI provided the necessary financial and personal information in order to aid the court in making its sentencing determination, and the trial court specifically stated that one of the reasons for ordering the PSI was to "determine what the appropriate restitution is." While the trial court did not make any express findings regarding Lang's ability to pay, none are required.

{¶17} After reviewing the record, notwithstanding Lang's stipulation to the restitution amounts, the trial court complied with R.C. 2929.19(B)(5) through the use of the PSI it ordered. Therefore, the trial court's order of restitution did not violate any constitutional protection or result in a due process violation. Lang's first assignment of error is overruled.

{¶18} Assignment of Error No. 2:

{¶19} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT IMPOSED A SENTENCE THAT WAS INCONSISTENT WITH AND DISPROPORTIONATE TO SENTENCES THAT HAD BEEN IMPOSED FOR SIMILAR CRIMES COMMITTED BY SIMILAR OFFENDERS, THEREBY DENYING DEFENDANT-APPELLANT HER RIGHTS TO EQUAL PROTECTION IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION."

{¶20} Lang argues in her second assignment of error that her 13-year sentence is disproportionate to a sentence handed down by the same trial court to a different village clerk who also committed theft in office.

{¶21} The Ohio Supreme Court set forth a two-part test for appellate courts to use when reviewing an appellant's sentence. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶4. First, an appellate court is to review the sentence to "determine whether the sentence is clearly and convincingly contrary to law." *Id.* Should the sentence satisfy the first prong, "the trial court's decision shall be reviewed under an abuse-of-discretion standard." *Id.* An abuse of discretion "connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶181.

{¶22} "A sentence is not clearly and convincingly contrary to law, where the trial court considers the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12, properly applies postrelease control, and sentences appellant within the permissible range." *State v. Elliott*, Clermont App. No. CA2009-03-020, 2009-Ohio-5926, ¶10, citing *Kalish* at ¶18.

{¶23} Lang was charged with and pled guilty to three counts of theft in office in violation of R.C. 2921.41(A)(2). Because the theft amount exceeded \$7,500, each offense

was a felony of the third degree. According to R.C. 2929.14, the maximum sentence for a third-degree felony is five years. After considering the purposes, principles, and factors pertinent to sentencing, the trial court sentenced Lang to five years on Count One, and four years each on Count Two and Three. The sentences were not clearly and convincingly contrary to law, as the sentences were within the permissible range.

{¶24} Regarding the second prong, Lang essentially argues that the trial court abused its discretion by sentencing her to 13 years in prison. Lang argues that the trial court was obligated to sentence her in a consistent manner with sentences imposed for similar crimes committed by similar offenders. According to R.C. 2929.11, "(A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources. * * * (B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders."

{¶25} A consistent sentence is not derived from a case-by-case comparison, but from the trial court's proper application of the statutory sentencing guidelines. *State v. Hall*, Franklin App. No. 09AP-302, 2009-Ohio-5712, ¶10. In other words, a defendant claiming inconsistent sentencing must demonstrate that the trial court failed to properly consider the statutory sentencing factors and guidelines found in R.C. 2929.11 and 2929.12. *Id.*

{¶26} To support her claim that her sentence is disproportion, Lang cites *State v. Shannon*, 191 Ohio App.3d 8, 2010-Ohio-6079, in which this court affirmed Shannon's

convictions for theft in office, tampering with records, and identity fraud. Shannon served as treasurer clerk and utilities clerk for the village of Sardinia from 2002 through 2007. From 2006 to 2008, Shannon issued herself three extra pay checks, failed to deduct health-insurance premiums from her pay check, kept money paid by new customers as deposits for utilities, and used false information in order to receive free utility services at her home. After a jury found Shannon guilty, the Brown County Court of Common Pleas sentenced Shannon to three years in prison and ordered her to pay \$9,675.11 in restitution. We affirmed the convictions and sentence.

{¶27} Lang argues that her sentence is disproportionate because the same trial court that sentenced her to 13 years, handed down a much shorter sentence to Shannon. However, the facts specific to Shannon are distinguishable from those in the case at bar. Shannon was guilty of embezzling less than ten thousand dollars from the village, whereas Lang stole almost a million dollars from the village of Ripley.

{¶28} Moreover, the trial court heard and was free to consider several issues that demonstrated the severity and long-lasting impact of Lang's crimes. The trial court heard a statement from the village of Ripley that as a result of Lang's actions, the village feels it has lost the trust and confidence of its citizens. The village is also unable to financially support important programs and cannot fund needed improvements because of the missing money. The trial court also heard a statement on behalf of village employees that they now face constant speculation and accusations of impropriety from utility customers and citizens. Employees also face innuendo by those who wonder if other employees knew that their accounts and payments were involved in Lang's schemes, and question how far-reaching the theft was. The trial court was also free to consider that Lang implemented three different schemes for embezzling the funds, and did so over a three-and-one-half-year time period. The trial court could have also considered the fact that Lang refuses to account for a very

large portion of the money she stole, and has not returned any of the money to the village.

{¶29} Regardless of the differences between Shannon's and Lang's cases, and as stated above, a consistent sentence is not derived from a case-by-case comparison, but from the trial court's proper application of the statutory sentencing guidelines. *Hall*, 2009-Ohio-5712 at ¶10. Lang has failed to show that the trial court failed to properly consider the statutory sentencing factors and guidelines found in R.C. 2929.11 and 2929.12, or that her sentence was an abuse of discretion for any reason.

{¶30} Our review of the record demonstrates the trial court based its sentencing decision on the statutory factors and imposed a sentence within the statutory range for the offenses according to R.C. 2929.14 and in accordance with *Kalish*. Therefore, the trial court's sentence did not violate Lang's equal protection rights under either the federal or Ohio constitutions. Lang's second assignment of error is overruled.

{¶31} Judgment affirmed.

HENDRICKSON, P.J., and RINGLAND, J., concur.