

[Cite as *State v. Moore*, 2010-Ohio-6226.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2010 CA 55
v.	:	T.C. NO. 09CR913
MARKUS DIHONNE MOORE	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

OPINION

Rendered on the 17th day of December, 2010.

AMY M. SMITH, Atty. Reg. No. 0081712, 50 E. Columbia Street, Springfield, Ohio 45502
Attorney for Plaintiff-Appellee

MARCY A. VONDERWELL-HULL, Atty. Reg. No. 0078311, P. O. Box 20173, Dayton,
Ohio 45420
Attorney for Defendant-Appellant

MARKUS DIHONNE MOORE, #615010, P. O. Box 740, London, Ohio 43140
Defendant-Appellant

FROELICH, J.

{¶ 1} On April 7, 2010, Appellant Moore pled guilty to one count of misusing a credit card in violation of R.C. 2913.21(B)(2) with a specification for an elderly victim as

defined under R.C. 2913.21(D)(4), a fourth degree felony. On the same day and pursuant to a plea agreement between Moore and the State, a second count of receiving stolen property in violation of 2913.51(A) was dismissed. The trial court accepted Moore's guilty plea and found him guilty of the misuse of the credit card offense. The trial court ordered a presentence investigation report and scheduled Moore's sentencing hearing for April 27, 2010.

{¶ 2} At the sentencing hearing, the State noted that Moore has eighteen felony convictions (including the conviction forming the basis of the present appeal). Upon reciting Moore's lengthy criminal record including multiple violations of community control sanctions pursuant to his previous convictions, the trial court imposed the maximum prison sentence of eighteen months. The trial court also ordered Moore to pay restitution in the amount of \$1,630.96 plus five percent handling fee along with relevant costs.

{¶ 3} The underlying charge that Moore pled guilty to occurred on or about April 14, 2009, when he took the elderly victim's car keys from a locker at the Springfield Athletic Club. After taking the victim's keys from the locker, Moore entered the victim's car, stealing credit cards, \$350 in currency, twenty silver dollars, a gold watch, and a gift card. Moore proceeded to spend \$920.96 with a stolen credit card at local stores.

{¶ 4} Appointed counsel for Moore filed an *Anders* brief pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, stating that she "[could] find no meritorious issues for appellate review." Appointed counsel, however, has identified three possible assignments of error for the court to consider along with a request that the court conduct an independent review of the record for any possible meritorious issues for

appeal. Moore was advised of his counsel's *Anders* brief and that he could file a pro se brief assigning any errors for review by this court. Moore was further advised that absent such a filing, his appeal would be deemed submitted on its merits. No pro se brief has been received. The case is now before us for our independent review of the record. *Penson v. Ohio* (1988), 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300.

{¶ 5} Moore's counsel has identified the first possible assignment of error as "The Trial Court Erred When It Sentenced Defendant To The Maximum Prison Term And Ordered It Served Consecutive To Other Prison Terms."

{¶ 6} With regards to felony sentencing, "[t]he trial court has full discretion to impose any sentence within the authorized statutory range, and the court is not required to make any findings of fact or give its reasons for imposing maximum, consecutive, or more than the minimum sentences." *State v. Rollins*, Champaign App. No. 08CA003, 2009-Ohio-899, at ¶ 7 (citing *State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856, at paragraph 7 of the syllabus). The definite prison term for a fourth degree felony is up to eighteen months under R.C. 2929.14(A)(4). The trial court may require an offender to pay appropriate restitution for a felony offense under 2929.18(A)(1). Furthermore, a trial court may also impose a surcharge of up to five percent of the restitution amount along with ordering the offender to reimburse the State any or all of the costs of the imposed sanctions. R.C. 2929.18(A)(1), (A)(4). "Nevertheless, in exercising its discretion the trial court must consider the statutory policies that apply to every felony offense, including those set out in R.C. 2929.11 and 2929.12." *Rollins* at ¶ 7 (citing *State v. Mathis*, 109 Ohio St. 3d 54, 2006-Ohio-855, at ¶ 37).

{¶ 7} “When reviewing felony sentences, an appellate court must first determine whether the sentencing court complied with all of the applicable rules and statutes in imposing the sentence, including R.C. 2929.11 and 2929.12, in order to find out whether the sentence is contrary to law.” *Rollins* at ¶ 8 (citing *State v. Kalish*, 120 Ohio St. 3d 23, 2008-Ohio-4912, at ¶ 4). “If the sentence is not clearly and convincingly contrary to law, the trial court’s decision in imposing the term of imprisonment must be reviewed under an abuse of discretion standard.” *Rollins* at ¶ 8.

{¶ 8} “‘Abuse of discretion’ has been defined as an attitude that is unreasonable, arbitrary, or unconscionable.” *AAAA Enters., Inc. v. River Place Cmty. Corp* (1990), 50 Ohio St. 3d 157, 161. “It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary. A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue *de novo*, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result.” *Id.* Finally, “[w]hen applying the abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court.” *In re Jane Doe I* (1991), 57 Ohio St. 3d 135, 137-38.

{¶ 9} In sentencing Moore, the trial court noted that it had considered Moore’s recidivism factors and the need to incapacitate and punish him for his crime. The amount of the restitution, the five percent costs surcharge, the order to pay relevant costs, and the length of Moore’s prison sentence were all within the statutorily permissible range and,

further, we find no abuse of discretion in the trial court's decision. This "possible assignment of error" is without merit.

{¶ 10} The second "possible assignment of error" that Moore's counsel has identified is: "The Trial Court Erred When It Ordered the Defendant To Pay Restitution In The Amount Of \$1,630.96."

{¶ 11} "If the [trial] court imposes restitution, at sentencing, the court shall determine the amount of restitution to be made by the offender. If the court imposes restitution, the court may base the amount of the 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, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense. If the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount." *State v. Cochran*, Champaign App. No. 09CA0024, 2010-Ohio-3444, at ¶ 16 (quoting *State v. MacQuarrie*, Montgomery App. No. 22763, 2009-Ohio-2182, at ¶¶ 6-8); R.C. 2929.18(A)(1).

{¶ 12} "An order of restitution must be supported by competent, credible evidence in the record. *State v. Warner* (1990), 55 Ohio St. 3d 31, 564 N.E.2d 18. 'It is well settled that there must be a due process ascertainment that the amount of restitution bears some reasonable relationship to the loss suffered.' *State v. Williams* (1986), 34 Ohio App.3d 33, 34, 516 N.E.2d 1270. 'A sentence of restitution must be limited to the actual economic loss caused by the illegal conduct for which the defendant was convicted.' *State v. Banks* (Aug.

19, 2005), Montgomery App. No. 20711, 2005-Ohio-4488. ‘Implicit in this principle is that the amount claimed must be established to a reasonable degree of certainty before restitution can be ordered.’ *State v. Golar* (October 31, 2003), Lake App. No. 2002-L-092, 2003-Ohio-5861.” *MacQuarrie* at ¶ 7.

{¶ 13} “A trial court abuses its discretion in ordering restitution in an amount that was not determined to bear a reasonable relationship to the actual loss suffered. *State v. Williams* (1986), 34 Ohio App.3d 33, 34, 516 N.E.2d 1270.” *MacQuarrie* at ¶ 8. An appellate court reviews the trial court’s decision pertaining to restitution under an abuse of discretion standard. *Id.*

{¶ 14} The record shows that the all of the parties agreed to the \$1,630.96 restitution the court ultimately ordered Moore to pay. At no point did Moore or his counsel object to this amount, or request a hearing on it. Additionally, by pleading guilty to the offense pursuant to this agreement, Moore has waived any further objections to the amount of the restitution.

{¶ 15} Furthermore, the restitution amount bears a rational relationship to the actual economic loss suffered by the victim in this case, as prior to Moore’s guilty plea the court noted the items and cash stolen by him, along with repeating the amount of restitution agreed upon. The record provides the competent, credible evidence needed to support the trial court’s decision, and we see no abuse of discretion as to the trial court’s imposition of the \$1,630.96 restitution. This assignment of error lacks merit.

{¶ 16} The third “possible assignment of error” that Moore’s counsel has identified is: “Appellant’s Guilty Plea Was Neither Voluntarily, Knowingly, Nor Intelligently Made, In

Violation Of Ohio Crim.R. 11(C) Because He Was Denied His Right To Effective Assistance Of Counsel, In Violation Of The 6th Amendment Of The U.S. Constitution.”

{¶ 17} The *Anders* brief submitted by Moore’s counsel only states that “Mr. Moore may claim that his plea of guilty was not voluntary, knowingly or intelligently made because he was denied the effective assistance of counsel. Therefore, the same was made in violation of Ohio Criminal Rule 11 (C).” Other than this statement, no explanation is given as to how Moore’s trial counsel failed to be effective or in what manner Moore’s guilty plea was not voluntarily and intelligently made. Likewise, no explanation is offered as to how Moore’s plea was in violation of Crim.R. 11(C).

{¶ 18} We have held that “[c]ounsel’s performance will not be deemed ineffective unless and until counsel’s performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arose from counsel’s performance. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. To show that a defendant has been prejudiced by counsel’s deficient performance, the defendant must affirmatively demonstrate to a reasonable probability that were it not for counsel’s errors, the result of the proceedings would have been different. *Id.*; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. Further, the threshold inquiry should be whether a defendant was prejudiced, not whether counsel’s performance was deficient. *Strickland.*” *State v. Cordell*, Greene App. No. 2009 CA 57, 2010-Ohio-5277, at ¶ 11.

{¶ 19} Nothing in the record indicates that Moore’s trial counsel’s assistance prejudiced him in any way. At Moore’s plea hearing, the trial court asked him if his attorney had properly gone over everything with him and asked Moore if he was satisfied with his

attorney's representation. Moore repeatedly answered yes to these inquiries. Furthermore, "a defendant who pleads guilty is precluded from claiming ineffective assistance of counsel, except to the extent that the defects complained of caused the plea to be less than knowing, intelligent and voluntary." *Cordell* at ¶ 12.

{¶ 20} The trial court also followed all of the requirements of Crim.R. 11. The trial court informed Moore as to the maximum penalties that could be imposed for his offense, along with ascertaining that Moore was making his plea voluntarily and without coercion and only after being advised of all of his rights. We find nothing to suggest that Moore's trial counsel was ineffective or that Moore made his guilty plea other than voluntarily, knowingly, and intelligently. Accordingly, we find this assignment of error to be without merit.

{¶ 21} Having conducted an independent review of the record in addition to Moore's three assignments of error, we find no other potentially meritorious issues for appeal. Therefore, the judgment of the trial court is affirmed.

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DONOVAN, P.J. and FAIN, J., concur.

Copies mailed to:

Amy M. Smith
Marcy A. Vonderwell-Hull
Markus Dihonne Moore
Hon. Richard J. O'Neill