

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

WILLIAM KELLEY

Defendant-Appellant

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JUDGES:

Hon. W. Scott Gwin, P.J.

Hon. Paricia A. Delaney, J.

Hon. Earle E. Wise, Jr., J.

Case No. 2018CA00062

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Court of Common
Pleas, Case No.2008CR0643(A)

JUDGMENT:

Affirmed

DATE OF JUDGMENT:

December 31, 2018

APPEARANCES:

For Plaintiff-Appellee

JOHN D. FERRERO, Prosecuting Attorney
By: KATHLEEN O. TATARSKY
Assistant Prosecutor
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For Defendant-Appellant

WILLIAM KELLEY, Pro Se, #560-890
Marion Correctional Institution
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P. O. Box 57
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Wise, Earle, J.

{¶ 1} Defendant-Appellant William Kelley appeals the April 19, 2018 judgment of the Court of Common Pleas of Stark County Ohio denying his motion for resentencing. Plaintiff-Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶ 2} On June 6, 2008, the Stark County Grand Jury indicted appellant, on one count of murder as a proximate result of felonious assault in violation of R.C. 2903.02 and R.C. 2903.11, one count of murder as a proximate result of child endangering in violation of R.C. 2903.02 and R.C. 2919.22, one count of felonious assault in violation of R.C. 2903.11, and one count of child endangering in violation of R.C. 2919.22. Said charges arose from the death of one year old Mizia Sisson. Appellant and the child's mother, Crystal Sisson, had been living together for a short time.

{¶ 3} A jury trial commenced on December 1, 2008. The jury found appellant guilty of murder as a proximate result of child endangering and child endangering. By judgment entry filed December 23, 2008, the trial court sentenced appellant to an aggregate term of fifteen years to life in prison.

{¶ 4} Appellant appealed his convictions and sentence to this court, raising four assignments of error, each of which we overruled. *State v. Kelley*, 5th Dist. No. 2008 CA 00294, 2009-Ohio-6441. Appellant subsequently sought leave to appeal to the Supreme Court of Ohio. The Court denied leave and dismissed the appeal. *State v. Kelley*, Ohio Supreme Court No. 2010-0119.

{¶ 5} In March 2018, appellant filed a nebulous motion for resentencing. In it appellant appeared to argue he should not be required to pay court costs, and that his

trial counsel rendered ineffective assistance when he failed to file an affidavit of indigency. He further appeared to argue the trial court abused its discretion when it failed to inform him of his parole eligibility during his sentencing hearing.

{¶ 6} On April 19, 2018, the trial court denied Kelley's motion. Kelley now brings this appeal, raising four assignments of error as follow:

I

{¶ 7} "THE TRIAL COURT ERRED AS A MATTER OF LAW, AND ABUSED ITS DISCRETION, WHERE THE TRIAL COURT FAILED TO PROVIDE APPELLANT KELLEY WITH THE STATUTORY PROVISIONS REQUIRED BY LAW PURSUANT TO R. C. 2947.23(A)(1)(a) and (b), WHERE SUCH NOTIFICATION WAS MANDATORY AT THE TIME, AND THE TRIAL COURT FAILED TO GIVE FACTS FINDINGS AND CONCLUSIONS IN ITS APRIL 19, 2018 RENDERED DECISION DENYING APPELLANT'S VOID SENTENCE MOTION TO EXHAUST APPELLANT'S REMEDIES AS REQUIRED BY LAW."

II

{¶ 8} "THE TRIAL COURT ERRED AS A MATTER OF LAW, AND ABUSED ITS DISCRETION, WHERE THE TRIAL COURT FAILED TO INFORM APPELLANT KELLEY OF PAROLE ELIGIBILITY IN ITS JUDGMENT ENTRY, THAT IT PRONOUNCED AT THE SENTENCING HEARING IN 2008."

III

{¶ 9} "TRIAL COUNSELS FAILURE TO FILE AN AFFIDAVIT OF INDIGENCY PRIOR TO SENTENCING, AND TO OBJECT TO STATUTORY PROVISIONS REQUIRED BY LAW, COUNSELS PROVIDED INEFFECTIVE ASSISTANCE OF

COUNSELS, VIOLATING MY SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATE'S CONSTITUTION, AND SECTION 10, ARTICLE 1 OF THE OHIO CONSTITUTION."

IV

{¶ 10} "THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION, WHEN THE TRIAL COURT FAILED TO CONSIDER R. C. 2947.23(C), WHERE THE TRIAL COURT HAD JURISDICTION TO CORRECT THE STATUTORY REQUIREMENTS THAT WAS IN ERROR, AND CONTRARY TO LAW, AMBIGUOUS, AND VOID IN PART."

I, II, III

{¶ 11} Preliminarily, we note this case is before this court on the accelerated calendar which is governed by App.R. 11.1. Subsection (E), determination and judgment on appeal, provides in pertinent part: "The appeal will be determined as provided by App.R. 11.1. It shall be sufficient compliance with App.R. 12(A) for the statement of the reason for the court's decision as to each error to be in brief and conclusionary form."

{¶ 12} One of the important purposes of the accelerated calendar is to enable an appellate court to render a brief and conclusory decision more quickly than in a case on the regular calendar where the briefs, facts, and legal issues are more complicated. *Crawford v. Eastland Shopping Mall Assn.*, 11 Ohio App.3d 158, 463 N.E.2d 655 (10th Dist.1983).

{¶ 13} This appeal shall be considered in accordance with the aforementioned rules.

{¶ 14} We address appellant's first three arguments together. While vague, appellant appears to argue he must be resentenced because at the time of sentencing the trial court failed to inform him that his failure to pay court costs could result in a court order to perform community service, and additionally, failed to inform him of his parole eligibility. He further argues his trial counsel rendered ineffective assistance by failing to file an affidavit of indigency. Each of these complaints are barred.

{¶ 15} Appellant could have raised these issues in his direct appeal, but failed to do so. He is therefore barred from doing so now. "A defendant who fails on direct appeal to challenge the sentence imposed on him for an offense is barred by res judicata from appealing that sentence * * *." *State v. Lindsay*, 5th Dist. Richland No. 16CA39, 2017-Ohio-595, ¶ 30.

{¶ 16} The first three assignments of error are overruled.

IV

{¶ 17} Appellant's argument in his final assignment of error is also unclear. He appears, however, to argue that the trial court erred when it failed to grant his recent motion to suspend or modify its original order as it pertained to court costs in violation of R.C 2947.23(C)

{¶ 18} Although the state argues this assignment of error is barred by the doctrine of res judicata, a trial court "retains jurisdiction to waive, suspend, or modify the payment of the costs of prosecution * * *, at the time of sentencing or any time thereafter." R.C. 2947.23(C).

{¶ 19} A trial court's denial of a criminal defendant's motion to waive court costs is reviewed under an abuse of discretion standard. *State v. Threatt*, 108 Ohio St.3d 277,

2006-Ohio-905, 843 N.E.2d 164 ¶ 23. A trial court may waive payment of court costs upon a defendant's motion if the defendant is indigent. R.C. 2949.092; *State v. Walker*, 8th Dist. Cuyahoga No. 101213, 2014-Ohio-4841, ¶ 9. This discretion to waive costs, however, includes the discretion not to waive them, as the trial court did here. *State v. Gilbert*, 8th Dist. Cuyahoga No. 104355, 2016-Ohio-8308, ¶ 6. We find therefore, the trial court did not fail to comply with R.C 2947.23(C).

{¶ 20} The final assignment of error is overruled.

{¶ 21} The judgment of the Court of Common Pleas, Stark County Ohio is affirmed.

By Wise, Earle, J.

Gwin, P.J. and

Delaney, J. concur.

EEW/db

[Cite as *State v. Kelley*, 2018-Ohio-5372.]