

[Cite as *State v. Johnson*, 2018-Ohio-496.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106138

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JESSTINE JOHNSON

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-17-614297-A

BEFORE: S. Gallagher, J., Keough, P.J., and Jones, J.

RELEASED AND JOURNALIZED: February 8, 2018

ATTORNEY FOR APPELLANT

P. Andrew Baker
11510 Buckeye Road
Cleveland, Ohio 44104

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor
By: Ashley B. Kilbane
Assistant Prosecuting Attorney
Justice Center - 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

SEAN C. GALLAGHER, J.:

{¶1} Jesstine Johnson appeals her being ordered to perform community control work service in lieu of paying her court costs. The state concedes the error under Loc.App.R. 16(B).

{¶2} At the sentencing hearing, the trial court imposed the mandatory court costs and required that the costs be paid within one year of the sentencing, although the deadline is not part of the final sentence and Johnson is not concerned with that fact. Johnson was notified that in lieu of paying the lump sum owed, she could either seek a payment plan from the court or perform community control work service. R.C. 2947.23(A)(1). Johnson evidently prefers the option of remitting a lump-sum payment or performing community control work service because she has never sought approval for a payment plan. In the final sentencing entry issued on July 31, 2017, Johnson was “ordered to perform CCWS in lieu of: paying costs, paying fees.” The only mention of court costs in that journal entry is limited to the imposition of community control work service in lieu of costs or fees. Court costs were assessed against Johnson on August 4, 2017, and there currently remains an outstanding balance of \$339.

{¶3} Johnson appealed, singularly concerned that the trial court’s order precluded her from paying the court costs instead of performing community control work service. According to Johnson, because it is possible for the probation department to interpret the trial court’s order as a requirement to perform community service instead of paying court costs, she should be permitted to pay the costs and fees instead of performing service. Johnson claims the final entry of conviction was in error because it should reflect the trial

court's intention of providing her the option to pay the court costs or perform community work service in lieu of costs.

{¶4} R.C. 2947.23(B) provides that if a defendant fails to pay court costs or fees, the trial court can impose community service until the judgment is paid or until the judge is satisfied that the defendant is in compliance with an approved payment plan. The statute does not preclude a defendant from remitting a payment for the outstanding balance after the trial court imposes community control work service in lieu of costs. Fortifying that conclusion, R.C. 2947.23(A)(1)(a)(ii) and 2947.23(B) provide that an offender shall receive credit upon the judgment at the specified hourly credit rate per hour of service performed, and each hour shall reduce the judgment by that amount. In other words, as an offender performs community service, there must be an ongoing deduction from the court costs to determine whether further community service is necessary. If there is no outstanding balance owed, the defendant cannot be required to perform community service.

{¶5} According to the statute, Johnson is entitled to pay her costs in a lump sum to avoid the community service imposed. Her belief that the trial court's order for her to perform community service precludes her from satisfying the debt is unfounded. Community control work service is by nature an alternative to making a lump-sum payment. Again, Johnson has not sought or argued an intention to seek approval for a payment plan.

{¶6} The state concedes that the option to make a lump-sum payment should have been included in the final entry of conviction and agrees with Johnson’s request for a nunc pro tunc entry. The state’s concession, however, presumes that the trial court possesses authority to impose community control work service as an alternative to the payment of costs in the final entry of conviction.

{¶7} Under R.C. 2947.23(B) a trial court is required to “hold a hearing to determine whether to order the offender to perform community service” for the failure to pay the balance owed or the failure to timely make payments on a court-approved plan. In this case, the trial court provided the notification contemplated in R.C. 2947.23(A)(1) at the time of sentencing.¹ No hearing was conducted to determine whether to order Johnson to perform community service because of her failure to pay the court costs. The trial court did so in the final judgment of conviction, before the clerk even assessed the court costs against Johnson.

{¶8} Although Johnson has not objected to the method in which the community control work service was imposed, her argument essentially seeks to reverse the imposition of community control work service to permit her the option of paying her

¹Effective September 28, 2012, the legislature amended the statute to clarify that the failure to provide the notification does not affect the trial court’s ability to impose community control work service, intimating that any error with respect to the notice requirement would be harmless. R.C. 2947.23(A)(1)(b); *but see State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-4347, 54 N.E.3d 80, ¶ 235, citing *State v. Smith*, 131 Ohio St.3d 297, 2012-Ohio-781, 964 N.E.2d 423 (reaffirming the mandatory notice requirement, but holding that the failure to provide the notification in a death penalty case is harmless error).

court costs in full. The state conceded that error occurred. Albeit for a different reason, we agree with the parties.

{¶9} A trial court lacks authority to impose community control work service in lieu of the payment of costs in the final entry of conviction. R.C. 2947.23(B) requires the court to have reason to believe that the defendant failed to pay court costs and to conduct a hearing before determining whether to impose community control work service. As of the final entry of conviction in this case, there was no basis to believe that Johnson failed to pay the imposed court costs. Those costs had not been assessed against Johnson, and the imposition of community control work service was concurrent with the imposition of costs. The imposition of community control work service in lieu of costs is reversed, and the matter is remanded for further proceedings.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, JUDGE

LARRY A. JONES, SR., J., CONCURS;

KATHLEEN ANN KEOUGH, P.J., CONCURS IN JUDGMENT ONLY