

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 107187
v.	:	
	:	
ERIC COPELAND,	:	
	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: March 21, 2019

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-17-620146-A

Appearances:

Ruth R. Fischbein-Cohen, *for appellant.*

Michael C. O'Malley, Prosecuting Attorney, and Brian
Lynch, Assistant Prosecuting Attorney, *for appellee.*

SEAN C. GALLAGHER, P.J.:

{¶ 1} Appellant Eric Copeland appeals his conviction and sentence. Upon review, we affirm.

{¶ 2} On August 22, 2017, appellant was charged under a three-count indictment. Pursuant to a plea agreement, appellant entered a plea of guilty to

Count 2, as amended, felonious assault, a felony of the second degree, with a one-year firearm specification, and a plea of guilty to Count 3, having weapons while under disability, a felony of the third degree. The remaining count was nolle. There was also an agreed prison term of four years on Count 2.

{¶ 3} During the plea hearing, appellant admitted that on or about June 19, 2017, he did knowingly acquire, have, carry, or use a firearm and that he had previously been convicted of a felony offense of violence. He further admitted that on the same date he “did knowingly cause or attempt to cause physical harm to [the victim] by means of a deadly weapon or dangerous ordnance, specifically a firearm” and that he “had a firearm on or about [his] person or under [his] control while committing the offense[.]”

{¶ 4} The trial court sentenced appellant to a prison term of four years on Count 2, consisting of one year on the firearm specification to be served prior to and consecutive with three years on the base charge, and 36 months on Count 3. The counts were run concurrent to each other, resulting in an aggregate prison term of four years. The trial court imposed three years of postrelease control and ordered appellant to pay costs.

{¶ 5} On appeal, appellant raises two assignments of error for our review. Under his first assignment of error, appellant claims the offenses should have merged as allied offenses of similar import.¹

¹ We find the matter is not precluded from review under R.C. 2953.08(D)(1), which precludes review of a jointly recommended sentence that is authorized by law and imposed by the trial court. Although there was an agreed term of four years on Count 2

{¶ 6} We review the issue for plain error, which requires appellant to demonstrate that there is a reasonable probability that the convictions are for allied offenses of similar import committed with the same conduct and without a separate animus. *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 3. Appellant has not met this burden.

{¶ 7} The offenses of having a weapon while under disability in violation of R.C. 2923.13(A)(2) and felonious assault in violation of R.C. 2903.11(A)(2) are not subject to merger because the decision to possess the weapon prior to actually using it involves a separate and distinct animus. *See State v. Evans*, 8th Dist. Cuyahoga No. 100151, 2014-Ohio-3584, ¶ 15-16; *see also State v. Smith*, 8th Dist. Cuyahoga No. 102495, 2016-Ohio-103, ¶ 20. As this court has recognized, “[the] animus of having a weapon under disability is making a conscious choice to possess a weapon[,]” and the fact that the defendant then uses the weapon to commit another crime does not absolve the defendant of the criminal liability that arises solely from his decision to illegally possess the weapon. *Evans* at ¶ 15, quoting *State v. Cowan*, 8th Dist. Cuyahoga No. 97877, 2012-Ohio-5723, ¶ 39. Here, appellant committed the offense of having a weapon while under disability the moment he was in possession of the firearm because he had previously been convicted of a felony offense of violence. This offense was committed with separate conduct and a

and it was suggested that the prison term imposed on Count 3 would be run concurrent to Count 2, defense counsel stated that “we didn’t really discuss that part.” Therefore, we shall address the allied offense issue.

separate animus from the felonious assault that was committed against the victim. Thus, no plain error occurred. Appellant's first assignment of error is overruled.

{¶ 8} Under his second assignment of error, appellant claims he received ineffective assistance of counsel because his trial counsel did not pursue a waiver of court costs and neglected to file an affidavit of indigence.

{¶ 9} In order to substantiate a claim of ineffective assistance of counsel, the appellant must show "(1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that but for counsel's errors, the proceeding's result would have been different." *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, ¶ 200, citing *Strickland v. Washington*, 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus. The defendant has the burden of proving his counsel rendered ineffective assistance. *Perez* at ¶ 223.

{¶ 10} R.C. 2947.23 requires trial courts to assess costs against all convicted defendants regardless of whether they are indigent or nonindigent. *State v. Braden*, Slip Opinion No. 2018-Ohio-5079, ¶ 14. Waiver of costs is permitted, though not required, if a defendant is indigent. *Id.* at ¶ 15, citing *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, ¶ 14. Under R.C. 2947.23(C), as amended March 22, 2013, a trial court retains jurisdiction to waive, suspend, or modify the payment of court costs at any time. *State v. Beasley*, 153 Ohio St.3d 497, 2018-Ohio-

493, 108 N.E.3d 1028, ¶ 265. Because appellant could pursue a waiver of the payment of court costs after sentencing, he was not prejudiced by counsel's performance.

{¶ 11} Furthermore, this court has held that “a claim of ineffective assistance of counsel in connection with the imposition of costs will be rejected on appeal where the defendant makes ‘no demonstration that a “reasonable probability” exists that the lower court would have waived payment of the costs’ if such motion had been filed.” *State v. Vanderhorst*, 8th Dist. Cuyahoga No. 97242, 2012-Ohio-2762, ¶ 78, quoting *State v. Maloy*, 6th Dist. Lucas No. L-10-1350, 2011-Ohio-6919, ¶ 12, citing *State v. King*, 6th Dist. Wood No. WD-09-069, 2010-Ohio-3074, ¶ 11. In this case, when imposing costs, the trial court indicated that appellant could be required to do court community work service. The record also reflects that after trial counsel informed the court that appellant was indigent for the purposes of appointing appellate counsel, the trial court observed that trial counsel was retained and that appellant “has a business and the ability to make a living,” but indicated it would “consider an affidavit if you want to suggest that he is indigent at this point.” Later docket entries reveal that an affidavit of indigency was filed and the trial court found appellant to be indigent for purposes of appointing appellate counsel.

{¶ 12} Under similar circumstances where the trial court has been informed that a defendant may be indigent for purposes of appointing appellate counsel, but imposed costs anyway, this court has determined that the defendant's indigency status was not a factor the trial court found relevant to imposing the court costs and,

therefore, counsel's failure to file an affidavit of indigency for purposes of waiving court costs did not result in prejudice. *State v. Graves*, 8th Dist. Cuyahoga No. 103984, 2016-Ohio-7303, ¶ 11-12; *State v. Bonton*, 8th Dist. Cuyahoga No. 102918, 2016-Ohio-700, ¶ 18-20.

{¶ 13} Finally, we recognize that the Supreme Court of Ohio in *State v. Davis*, 152 Ohio St.3d 1441, 2018-Ohio-1600, 96 N.E.3d 297, certified a conflict between the Fifth District's decision in *State v. Davis*, 5th Dist. Licking No. 17CA55, 2017 Ohio App. LEXIS 5642 (Dec. 20, 2017), and the Eighth District's decision in *State v. Springer*, 8th Dist. Cuyahoga No. 104649, 2017-Ohio-8861, on the following issue: "Is trial counsel's failure to file a motion to waive court costs at sentencing ineffective assistance of counsel when defendant has previously been found indigent?" In *Davis*, the Fifth District has answered the question in the negative, while in *Springer*, the Eighth District answered the question in the affirmative.² Here, the defendant was not previously found indigent and had retained counsel in the trial court proceedings.

{¶ 14} Accordingly, we cannot conclude appellant was denied effective assistance of counsel. Appellant's second assignment of error is overruled.

² In *Springer* at ¶ 45, the Eighth District found that although trial courts retain jurisdiction to waive court costs at any time under R.C. 2947.23(C), a trial court's prior finding that a defendant was indigent demonstrates a reasonable probability that the trial court would have waived costs had counsel made a timely motion. *Id.*, citing *State v. Gibson*, 8th Dist. Cuyahoga No. 104363, 2017-Ohio-102, ¶ 16. The Fifth District concluded otherwise in *Davis* at ¶ 14, wherein the court found that trial counsel's failure to request a waiver of court costs at sentencing is not ineffective assistance of counsel when the defendant has previously been found indigent because the defendant is not foreclosed from filing a request at a later time and is not prejudiced.

{¶ 15} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending is terminated. Case remanded to the trial court for execution of sentence.

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

SEAN C. GALLAGHER, PRESIDING JUDGE

**ANITA LASTER MAYS, J., and
EILEEN A. GALLAGHER, J., CONCUR**