

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

City of Columbus,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-543
Jonathan Lee Kiner,	:	(M.C. No. 2011 CRB 2041)
Defendant-Appellant.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on December 15, 2011

Richard C. Pfeiffer, Jr., City Attorney, *Lara N. Baker*, City Prosecutor, and *Melanie R. Tobias*, for appellee.

Yeura R. Venters, Public Defender, and *David L. Strait*, for appellant.

APPEAL from the Franklin County Municipal Court.

BROWN, J.

{¶1} Jonathan Lee Kiner, defendant-appellant, appeals from a judgment of the Franklin County Municipal Court, in which the court found him guilty, pursuant to a plea of guilty, of criminal mischief, a violation of R.C. 2909.07 and third-degree misdemeanor.

{¶2} On January 27, 2011, appellant was charged with violating a protective order, in violation of R.C. 2919.27. On May 23, 2011, appellant entered a plea of guilty to criminal mischief. On the same date, the trial court issued a judgment, in which it

sentenced him to 29 days of incarceration with 29 days of jail credit, imposed court costs, and authorized time payments of the court costs. Appellant appeals the judgment of the trial court, asserting the following assignment of error:

The Franklin County Municipal Court erred by imposing a financial sanction requiring Appellant to pay court costs when there is insufficient evidence to show that the court considered Appellant's ability to pay.

{¶3} Appellant argues in his sole assignment of error that the trial court erred when it imposed a "financial sanction" in the form of court costs, but failed to demonstrate it considered his inability to pay. Appellant urges that the law requires there be some evidence that the court considered his present and future ability to pay a "financial sanction." We disagree with appellant's proposition. Appellant acknowledges the mandate of R.C. 2947.23, which requires that, in all criminal cases, the trial court must include in the sentence the costs of prosecution and render a judgment against the defendant for such costs. Appellant also acknowledges that a trial court is not required to determine a defendant's ability to pay before ordering him to pay such court costs, citing *State v. Fisher*, 12th Dist. No. CA98-09-190, 2002-Ohio-2069 (unlike the statutory provisions governing fines and court-appointed attorney fees, R.C. 2947.23 does not require a trial court to consider a defendant's ability to pay the costs of prosecution), and *State v. Scott*, 6th Dist. No. L-01-1337, 2003-Ohio-1868. We agree it is well-established that a trial court need not consider a defendant's ability to pay court costs. See, e.g., *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, ¶14; *State v. Waddell*, 4th Dist. No. 10CA27, 2011-Ohio-4629, ¶9; *State v. Lewis*, 11th Dist. No. 2010-P-0070, 2011-Ohio-3748, ¶31.

{¶4} Given these acknowledgments, appellant's current contention is difficult to discern. Appellant cites *Fisher* and *State v. Holmes*, 6th Dist. No. L-01-1459, 2002-Ohio-6185, for the proposition that there must be evidence in the record that the court considered the defendant's present and future ability to pay the "financial sanction" imposed. However, in this respect, both cases are referring to "financial sanctions" imposed pursuant to R.C. 2929.18 and the requirement of R.C. 2929.19(B) that a court consider the offender's present and future ability to pay the sanction imposed, and are not referring to court "costs" imposed pursuant to R.C. 2947.23. The court in *Fisher* specifically acknowledges court costs and financial sanctions are different, stating, "In addition to imposing the costs of prosecution pursuant to R.C. 2947.23, a trial court may also impose financial sanctions upon felony offenders. R.C. 2929.18(A)." In the present case, the trial court ordered appellant to pay the costs of prosecution and not financial sanctions under R.C. 2929.18. As admitted by appellant, there is no requirement that a trial court consider ability to pay when ordering a defendant to pay the costs of prosecution. Thus, appellant's argument is without merit.

{¶5} We also note that appellant failed to seek a waiver of the court costs. Although a trial court is required to assess costs against all criminal defendants, a waiver of the payment of such costs is permitted if the defendant is indigent. *White* at ¶14. A motion by an indigent criminal defendant to waive payment of costs must be made at the time of sentencing. *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, paragraph two of the syllabus. "If the defendant makes such a motion, then the issue is preserved for appeal and will be reviewed under an abuse-of-discretion standard. Otherwise, the issue is waived and costs are res judicata." *Id.* at ¶23. See also *State v. Clevenger*, 114 Ohio

St.3d 258, 2007-Ohio-4006, ¶5. Our review of the record demonstrates that appellant made no motion to waive costs at the sentencing hearing when the trial court imposed those costs in open court. Therefore, appellant also waived any argument as to his payment of court costs. For all the foregoing reasons, we find appellant's assignment of error without merit.

{¶6} Accordingly, appellant's assignment of error is overruled, and the judgment of the Franklin County Municipal Court is affirmed.

Judgment affirmed.

SADLER and CONNOR, JJ., concur.
