

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2011-T-0092
ALAN M. FRANCIS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 2005 CR 867.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Alan M. Francis, pro se, P.I.D. A562-142, Mansfield Correctional Institution, P.O. Box 788, Mansfield, OH 44901-0788 (Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Alan M. Francis, appeals the judgment of the Trumbull County Court of Common Pleas denying his motion to vacate court costs, which he filed after his conviction of aggravated murder and multiple counts of aggravated robbery. At issue is whether appellant's motion is barred by res judicata. For the reasons that follow, we affirm.

{¶2} On December 6, 2005, appellant was indicted for two counts of aggravated murder, with death penalty specifications and three-year firearm specifications; one count of aggravated burglary, with a firearm specification; four counts of aggravated robbery, each with a firearm specification; one count of robbery; and one count of having a weapon while under disability.

{¶3} On November 23, 2005, appellant entered a gas station in Niles, Ohio. He put a gun to the female clerk's side, and said, "This is a stick up. Give me the money." Terrified for her life, the clerk opened the cash drawer. Appellant grabbed the cash; told her if she moved, he would "shoot to kill;" and walked out the door. The clerk recognized appellant later that day when he brazenly returned to the gas station. The clerk called the police and provided appellant's description. He was arrested later that day at a residence in nearby Weathersfield Township. While appellant was being booked, Niles Police found on him an emergency identification card of an elderly, disabled resident, who had been beaten, stabbed, and shot to death in his own home with his own gun two days earlier. Appellant stole the murder victim's gun and identification. Appellant made incriminating statements to police regarding his involvement in the murder.

{¶4} Appellant pled not guilty. He filed a motion to suppress his statements to the police. Following multiple hearings, the trial court denied that motion. Appellant then entered a plea bargain with the state. On January 22, 2009, appellant pled no contest to the indictment, including the firearm specifications, in exchange for the dismissal of the death specifications. During the colloquy prior to appellant's entry of his no contest

plea, the trial court asked him, “Do you understand that court costs * * * may be imposed?” Appellant answered, “Yes.”

{¶5} On the same date, the trial court found appellant guilty of the charges, and sentenced him to 30 years to life for the aggravated murder conviction. This sentence was ordered to be served concurrently with appellant's sentence to 37 years in prison for three unrelated aggravated robberies and the disability charge, and a separate three-year term of imprisonment for the merged firearm specifications. The effective sentence imposed on appellant was 40 years to life. The state concedes the court did not orally advise appellant at his sentencing that the court would impose court costs. However, the court's February 3, 2009 entry on sentence expressly ordered appellant to pay court costs “in the amount of \$_____.”

{¶6} Appellant filed a direct appeal challenging his conviction. Specifically, he challenged the trial court's ruling on his motion to suppress and also argued he was denied the effective assistance of counsel. Appellant did not allege error in connection with the court's imposition of court costs. On June 11, 2010, this court unanimously affirmed appellant's conviction in *State v. Francis*, 11th Dist. No. 2009-T-0015, 2010-Ohio-2686, discretionary appeal not allowed at 2011-Ohio-1618, 2011 Ohio LEXIS 885.

{¶7} Appellant subsequently filed a motion to reopen his direct appeal pursuant to App.R. 26(B). He argued his appellate counsel was ineffective. He asserted several additional proposed assignments of error, but he did not raise an issue regarding court costs. This court denied his motion to reopen on November 23, 2010.

{¶8} On June 9, 2011, *two and one-half years after appellant was sentenced*, he filed a motion to vacate the assessment of court costs against him in his 2009

sentencing entry. This was the first time appellant raised this issue. He argued that the trial court did not inform him at his sentencing regarding court costs and that the court did not consider his ability to pay them. On July 12, 2011, the trial court denied appellant's motion. He did not appeal this ruling.

{¶9} Then, on July 25, 2011, appellant filed a second motion to vacate court costs. Appellant presented the same argument in this motion that he made in his June 9, 2011 motion. The trial court again denied the motion. Appellant now appeals the trial court's judgment denying his second motion to vacate court costs, asserting two assignments of error. Because the assigned errors are related, we shall consider them together. They allege:

{¶10} "The Trial Court erred in imposing cost [sic] against an Indigent Defendant.

{¶11} "The Trial Court erred when it failed to hold a hearing prior to sentencing Appellant to determine his present and future ability to pay a stated obligation."

{¶12} Appellant argues the trial court erred because it imposed court costs against him despite his alleged indigent status and further because the court failed to hold a hearing before sentencing to determine whether he was able to pay court costs.

{¶13} On similar facts, this court in *State v. Pasqualone*, 140 Ohio App.3d 650 (11th Dist.2000), noted that the defendant could have raised costs issues in his direct appeal, but that he failed to do so. *Id.* at 658. As a result, this court stated that the doctrine of res judicata barred the defendant from raising these issues in his appeal from the trial court's denial of his post-conviction motion to vacate costs. *Id.*

{¶14} Subsequent to this court’s decision in *Pasqualone*, the Supreme Court of Ohio addressed the issue of court costs in *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905. In that case the Supreme Court held: “[A]n indigent defendant must move a trial court to waive payment of costs at the time of sentencing. 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.

{¶15} Applying the foregoing authority to the instant case, appellant could have raised the trial court’s imposition of court costs and the court’s failure to hold a hearing to determine his ability to pay costs in his direct appeal. Having failed to do so, he is now barred by res judicata from raising either argument.

{¶16} For the reasons stated in this opinion, appellant’s assignments of error are overruled. It is the judgment and order of this court that the judgment of the Trumbull County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.