

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

STATE OF OHIO,	:
	:
Plaintiff-Appellee,	: Case No. 08CA21
	:
vs.	: Released: December 19, 2008
	:
MICHAEL SLONAKER,	: <u>DECISION AND JUDGMENT</u>
	: <u>ENTRY</u>
Defendant-Appellant.	:

APPEARANCES:

Timothy Young, Ohio State Public Defender, John A. Bay, Senior State Public Defender, Office of the Ohio Public Defender, Columbus, Ohio, for Appellant.

James E. Schneider, Washington County Prosecutor, Susan L. Vessels, Assistant Washington County Prosecutor, Marietta, Ohio, for Appellee.

McFarland, J.:

{¶1} Appellant appeals from the sentence imposed by the Washington County Common Pleas Court as a result of his guilty plea to trafficking in marijuana, a felony of the fifth degree, in violation of R.C. 2925.03(A)(1) & (C)(3)(a). As a result of his plea of guilt, Appellant was sentenced to serve a term of twelve months in prison, a period of post-release control, and was ordered to pay the costs of prosecution. On appeal, Appellant asserts that the trial court erred by imposing court costs without notifying him that

failure to pay court costs may result in the court ordering him to perform community service pursuant to R.C. 2947.23. The State candidly agrees with Appellant and states that the matter must be remanded for resentencing. However, because we conclude that the issue is not ripe for adjudication, we overrule Appellant's sole assignment of error and affirm the decision of the trial court.

FACTS

{¶2} On March 14, 2008, Appellant pled guilty to trafficking in marijuana, a felony of the fifth degree, in violation of R.C. 2925.03(A)(1) & (C)(3)(a). A sentencing hearing was held on April 24, 2008, and on April 28, 2008, the trial court sentenced Appellant to a prison term of twelve months, to be served consecutively with the sentence Appellant was already serving as a result of another conviction, as well as period of post release control. Additionally, Appellant was ordered to pay the costs of prosecution and his license was suspended for a period of five years. It is from this sentence that Appellant now brings his timely appeal, assigning a single error for our review.

ASSIGNMENT OF ERROR

“I. THE TRIAL COURT ERRED BY IMPOSING COURT COSTS WITHOUT NOTIFYING APPELLANT THAT FAILURE TO PAY COURT COSTS MAY RESULT IN THE COURT ORDERING HIM

TO PERFORM COMMUNITY SERVICE PURSUANT TO R.C. 2947.23.”

LEGAL ANALYSIS

{¶3} In his sole assignment of error, Appellant contends that the trial court erred by imposing court costs without notifying him that failure to pay court costs may result in the court ordering him to perform community service, as required by R.C. 2947.23(A)(1)(a). The State does not dispute Appellant’s argument and agrees that the matter must be remanded for resentencing. For the following reasons, we disagree with both Appellant and the State.

{¶4} A review of the record reveals that the trial court did in fact order Appellant to pay costs. R.C. 2947.23, Judgment for costs and jury fees; community service upon failure to pay, provides as follows:

(A)(1) In all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution and render a judgment against the defendant for such costs. At the time the judge or magistrate imposes sentence, the judge or magistrate shall notify the defendant of both of the following:

(a) If the defendant fails to pay that judgment or fails to timely make payments towards that judgment under a payment schedule approved by the court, the court may order the defendant to perform community service in an amount of not more than forty hours per month until the judgment is paid or until the court is satisfied that the defendant is in compliance with the approved payment schedule.

(b) If the court orders the defendant to perform the community service, the defendant will receive credit upon the judgment at the specified hourly credit

rate per hour of community service performed, and each hour of community service performed will reduce the judgment by that amount.

{¶5} A review of the transcript confirms that while the trial court ordered Appellant to pay costs, it did not notify him that if he failed to do so, he could be required to perform community service, as provided by R.C. 2947.23(A)(1)(a). Although the Supreme Court of Ohio has addressed sentencing errors somewhat similar to the one before us, we have found no cases directly on point which specifically deal with the failure to notify a defendant of the possibility of the imposition of community service if he or she fails to pay court costs as ordered. For instance, in *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, the Court addressed a trial court's failure to impose the nondiscretionary sanction of postrelease control, holding that "such sentence is void, and the state is entitled to a new sentencing hearing to have postrelease control imposed on the defendant unless the defendant has completed his sentence." In *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, 814 N.E.2d 837, the Court addressed a trial court's imposition of community control without giving the statutorily required notification that a prison term could be imposed in the event of a violation of community control. In *Brooks*, the Court reasoned that when such required notifications are not supplied at sentencing and when an offender appeals *after a prison term is imposed* for a violation of community

control, the matter must be remanded to the trial court for resentencing, without the option of a prison term. *Brooks* at 142.

{¶6} Here, unlike the facts in *Simpkins*, supra, the trial court did not fail to impose a nondiscretionary sanction. Rather, it did, in fact, impose the nondiscretionary payment of court costs. Instead, and much like the case in *Brooks*, supra, it simply failed to supply the statutorily required notifications with respect to the imposition of such costs. Thus, we believe that the case sub judice is more akin to the facts of *Brooks* than *Simpkins*. However, we still draw a distinction.

{¶7} As set forth above, *Brooks* dealt with a situation where a community control violation had already taken place. Thus, the issue was properly before the court and was ripe for review. Here, although we agree with Appellant that R.C. 2947.23 makes it mandatory for the judge to inform a defendant that he could be ordered to perform community service, at this time, Appellant has not suffered any prejudice from the trial court's failure to inform him that it may, in the future, require him to perform community service to fulfill his obligation to pay costs. Thus, we conclude that the issue is not ripe for adjudication. *State v. Ward*, 168 Ohio App.3d 701, 714, 2006-Ohio-4847, 861 N.E.2d 823 (declining to address identical issue because it was not properly raised, and also because the appellant had suffered no

prejudice as a result of error and matter was not ripe for adjudication). Further, should Appellant, at some point in future, fail to pay costs as ordered, the trial court, much like the *Brooks* court, would not have the option of imposing community service, as it failed to inform Appellant of this possibility at his sentencing hearing.

{¶8} Accordingly, we overrule Appellant' sole assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

Harsha, J., dissenting:

{¶9} Based largely upon concerns for judicial economy, I would address the merits of the appeal. Thus, rather than stating in dicta that Slonaker cannot be ordered to perform community service if he fails to pay the court costs, I would issue a holding to that effect.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellee recover of Appellant 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 Washington County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Abele, P.J.: Concurs in Judgment Only.

Harsha, J.: Dissents with Dissenting Opinion.

For the Court,

BY: _____
Judge Matthew W. McFarland

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.