

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	William B. Hoffman, P.J.
Plaintiff-Appellee	:	John W. Wise, J.
	:	Julie A. Edwards, J.
-vs-	:	
	:	Case No. 08 AP 06 0047
DWAYNE C. DANSBY	:	
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Criminal Appeal From Tuscarawas County Court Of Common Pleas Case Nos. 2007 CR 08 0290 & 2007 CR 05 0174

JUDGMENT: Affirmed In Part and Reversed and Remanded In Part

DATE OF JUDGMENT ENTRY: June 19, 2009

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

SCOTT J. MASTIN
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for Tuscarawas County
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DWAYNE C. DANSBY
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Edwards, J.

{¶1} Defendant-appellant, Dwayne C. Dansby, appeals from the trial court's imposition of court costs. Plaintiff-appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} This appeal arises from two separate cases wherein appellant was indicted by the Tuscarawas County Grand Jury for one count of domestic violence in violation of R.C. 2919.25, a fourth degree felony (Case Number 2007 CR 05 0174) and one count of menacing by stalking in violation of R.C. 2903.211, a fourth degree felony (Case Number 2007 CR 08 0290). On May 1, 2008, appellant, represented by counsel, pleaded guilty to both counts and sentencing was deferred for the completion of a pre-sentence investigation report.

{¶3} On June 4, 2008, the matter came before the court for sentencing. As memorialized in a Judgment Entry filed on June 6, 2008, appellant was sentenced to serve fourteen months on each count to run consecutively to each other and consecutively to appellant's current sentence from Coshocton County. Appellant was also ordered to pay court costs.

{¶4} Appellant was also notified in writing that in each case a certain amount could be garnished from inmate funds for court costs, those amounts being \$496.90 (Case Number 2007 CR 05 0174) and \$295.58 (Case Number 2007 CR 08 0290).

{¶5} It is from the June 6, 2008, Judgment Entry that appellant now appeals, setting forth the following assignments of error:

{¶6} "I. THE TRIAL COURT ERRED WHEN A FINE WAS IMPOSED ON APPELLANT IN THAT THE COURT FAILED TO INQUIRE INTO THE APPELLANT'S

PRESENT FINANCIAL STATUS, INCLUDING BUT NOT LIMITED TO, HIS PRESENT EARNING CAPACITY, AND FAILED TO INQUIRE INTO THE APPELLANT'S FUTURE ANTICIPATED EARNING CAPACITY.

{¶7} "II. THE TRIAL COURT FAILED TO PROVIDE A NOTIFICATION AT SENTENCING REGARDING THE FACT THAT A FAILURE TO PAY COURT COSTS MAY RESULT IN THE COURT ORDERING THE PERFORMANCE OF COMMUNITY SERVICE PURSUANT TO R.C. 2947.23(A)(1)."

I

{¶8} Appellant, in his first assignment of error, argues that the trial court erred by imposing fines in the amount of \$496.90 and \$295.58, for a total of \$792.48, "without inquiring about the appellant's present or future ability to pay the fine."

{¶9} Initially we note, that appellant was not ordered to pay a fine in either case. Rather, the trial court imposed court costs pursuant to R.C. 2947.23 in both cases. Thus, it appears that although the appellant uses the term "fines," the appellant is actually alleging, as error, the trial court's imposition of court costs without a finding of appellant's ability to pay.

{¶10} However, we find that appellant has waived his ability to assert as error the imposition of court costs because appellant failed to raise the issue at the time of sentencing. *State v. Threatt*, 108 Ohio St.3d 277, 282, 2006-Ohio-905, 843 N.E.2d 164, (An indigent defendant must move to waive payment of court costs "at the time of sentencing. * * * Otherwise, the issue is waived and costs are res judicata.") See also, *State v. Loyer*, Stark App. No. 2008CA00058, 2008-Ohio-5570.

{¶11} However, assuming, arguendo, that appellant had not waived the issue, we find, for the reasons that follow, that the trial court did not err in imposing court costs without considering appellant's present ability to pay.

{¶12} R.C. 2947.23 governs the trial court's authority to impose costs on a defendant convicted of a felony. Such section states, in relevant part, that "[i]n all criminal cases * * * the judge or magistrate shall include in the sentence the costs of prosecution and render a judgment against the defendant for such costs."

{¶13} A trial court is not only authorized to assess court costs against an indigent defendant, but it may also collect those costs from an indigent defendant. *State v. Smith*, Allen App. No. 1-07-32, 2007-Ohio-6552 at paragraph 9, citing *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393 at paragraph 14. "Ohio law does not forbid a trial court from imposing court costs on an indigent defendant convicted of a felony." *State v. Pasqualone*, 140 Ohio App.3d 650, 748 N.E.2d 1153, 1158, at footnote 4, quoting *State v. Payne* (Dec. 20, 1999), Delaware App. Nos. 99CAA05024, 99CAA05025, 99CAA05026, 99CAA05027, and 99CAA05028, 2000 WL 1405, unreported. See also, *State v. Threatt*, supra. Further, while R.C. 2949.092 allows a trial court to waive payment of court costs for indigent defendants under certain circumstances, it is not required to do so. See *State v. White*, supra.

{¶14} For these reasons, we do not find that the trial court erred by ordering the appellant to pay the costs of the action without first considering appellant's ability to pay. See also, *State v. Weyand*, Columbia App. No. 07-CO-40, 2008-Ohio-6360.

{¶15} Accordingly, appellant's first assignment of error is overruled.

II

{¶16} In the second assignment of error, appellant argues that the trial court erred by failing to notify appellant that failure to pay court costs could result in the imposition of community service. We agree.

{¶17} R.C. 2947.23, “Judgment for costs and jury fees; community service upon failure to pay,” provides as follows:

{¶18} “(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:

{¶19} “(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.

{¶20} “(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.”

{¶21} Upon a review of the transcript of the sentencing hearing, we find that while the trial court ordered appellant to pay costs, it did not notify the appellant 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).

{¶22} Appellant's second assignment of error is, therefore, sustained.

{¶23} Accordingly, the judgment of the Tuscarawas County Court of Common Pleas is affirmed in part, and reversed in part, and the matter is remanded to the trial court for re-sentencing consistent with this decision.

By: Edwards, J.

Hoffman, P.J. and

Wise, J. concur

JUDGES

JAE/k/d0130

