

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

JUSTIN M. BURRIS

Defendant-Appellant

: JUDGES:

:
: Hon. Julie A. Edwards, P.J.
: Hon. John W. Wise, J.
: Hon. Patricia A. Delaney, J.

: Case No. 09-COA-038

:
:
:
:
: O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Ashland County Court of
Common Pleas, Case No. 00-CRI-07969

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

March 8, 2010

APPEARANCES:

For Defendant-Appellant:

JUSTIN M. BURRIS (#398-683)
Ohio State Penitentiary
878 Coitsville-Hubbard Road
Youngstown, OH 44505

For Plaintiff-Appellee:

RAMONA FRANCESCONI ROGERS
ASHLAND COUNTY PROSECUTOR

PAUL T. LANGE
307 Orange St.
Ashland, OH 44805

Delaney, J.

{¶1} Defendant-Appellant Justin M. Burris appeals the October 20, 2009 judgment entry of the Ashland County Court of Common Pleas denying Appellant's motion to vacate court costs. Plaintiff-Appellee is the State of Ohio.

STATEMENT OF THE CASE¹

{¶2} On December 5, 2000, the trial court journalized Appellant's waiver of constitutional rights and plea of guilty to the charges of one count of felonious assault, in violation of R.C. 2903.11(A)(1), and one count of escape, in violation of R.C. 2921.34(A)(1). In the entry, the trial court stated, "Court costs, restitution and other financial sanctions including fines, day fines, and reimbursement for the cost of any sanctions may also be imposed."

{¶3} The trial court sentenced Appellant on January 8, 2001. In addition to his prison sentence, the trial court stated in its sentencing entry filed January 17, 2001:

{¶4} "Costs are taxed to the Defendant and in addition to these costs, the Defendant is taxed a sum of \$11 pursuant to Section 2949.091 of the Ohio Revised Code. In addition, the \$30 previously posted with the Clerk of Courts is to be paid over to the Treasurer of the State of Ohio, pursuant to Section 2743.70 of the Ohio Revised Code."

{¶5} Appellant did not file a direct appeal of the January 17, 2001 sentencing entry. There is no record showing that Appellant raised the issue of court costs at the time of sentencing.

¹ A discussion of the underlying facts is unnecessary for the disposition of this appeal.

{¶6} Appellant filed a “Motion for Modification of Sentence to Lesser-Included Offense of Aggravated Assault for Judicial Release Pursuant to Ohio Revised Code 2951.02 and 2929.20” on July 21, 2006. Appellant attached an Affidavit of Indigency. The trial court denied the motion on July 26, 2006.

{¶7} On September 16, 2009, Appellant filed a “Motion to Vacate Payment of Court Costs Pursuant to O.R.C. 2929.51(C).” In his motion, Appellant argued that he was indigent and unable to pay the court costs assessed against him. The trial court denied the motion on October 20, 2009.

{¶8} It is from this decision Appellant now appeals.

{¶9} Appellant raises one Assignment of Error:

{¶10} “DEFENDANT-APPELLANT WAS DENIED DUE PROCESS WHEN THE TRIAL COURT DENIED HIS MOTION TO VACATE COURT COSTS WITHOUT CONSIDERING THE ABILITY TO PAY FUTURE COSTS.”

{¶11} This matter comes to us on the accelerated calendar. App.R. 11.1 states in pertinent part: “The appeal will be determined as provided by App. R. 11.1. It shall be sufficient compliance with App. R. 12(A) for the statement of the reason for the court's decision as to each error to be in brief and conclusionary form. The decision may be by judgment entry in which case it will not be published in any form.”

{¶12} Appellant raises two arguments as to why the trial court erred in denying his motion to vacate court costs. First, Appellant argues that the trial court impermissibly ordered Appellant to pay an unspecified amount of restitution. Appellant does not specify in the record where the trial court ordered Appellant to pay restitution.

The trial court referenced the possibility that the trial court could impose restitution in its December 5, 2000 judgment entry journalizing Appellant's guilty plea. The trial court's January 17, 2001 sentencing entry is silent as to restitution, as is the remainder of the record. We find Appellant's argument regarding restitution has no merit. We further find Appellant failed to make this argument before the trial court in his motion to vacate court costs and is impermissibly raising the matter for the first time on appeal.

{¶13} Appellant contends in his second argument that he is indigent and the trial court made no determination of Appellant's future ability to pay court costs or fees. Upon the well-reasoned authority of *State v. Dansby*, Tuscarawas App. No. 08 AP 06 0047, 2009-Ohio-2975, we find Appellant's argument to be not well taken.

{¶14} In *Dansby*, the appellant raised the same argument as in the present case that the trial court failed to take into consideration the appellant's future ability to pay court costs. We found that at the time of sentencing, the appellant failed to move to waive payment of court costs. *Dansby*, ¶10. Pursuant to *State v. Threatt*, an appellant has waived his ability to assert as error the imposition of court costs if the appellant fails 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.

{¶15} In the present case, we find that Appellant has failed to established in the record that he raised the issue of court costs at the time of sentencing. As such, we rely

upon *Dansby* to hold that Appellant has waived his ability to assert as error the imposition of court costs.

{¶16} Assuming arguendo that Appellant had not waived the issue of court costs, we further found in *Dansby* that:

{¶17} “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.”

{¶18} Accordingly, we find the trial court did not err by ordering Appellant to pay the costs of the action without first considering Appellant’s ability to pay.

{¶19} Appellant’s Assignment of Error is overruled.

{¶20} The judgment of the Ashland County Court of Common Pleas is affirmed.

By: Delaney, J.

Edwards, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. JOHN W. WISE

PAD:kgb

IN THE COURT OF APPEALS FOR ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

| | | |
|---------------------|---|---------------------|
| STATE OF OHIO | : | |
| | : | |
| | : | |
| Plaintiff-Appellee | : | |
| | : | |
| -vs- | : | JUDGMENT ENTRY |
| | : | |
| JUSTIN M. BURRIS | : | |
| | : | |
| | : | Case No. 09-COA-038 |
| Defendant-Appellant | : | |

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Ashland County Court of Common Pleas is affirmed. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. JOHN W. WISE