[Cite as *State v. Jobe*, 2009-Ohio-4066.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-07-1413

Appellee — Trial Court No. CR-200702317

v.

Robert Jobe — **DECISION AND JUDGMENT**

Appellant — Decided: August 14, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Spiros P. Cocoves, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals his conviction for murder following a jury trial in the Lucas County Court of Common Pleas. For the reasons that follow, we affirm, in part, and reverse, in part.

{¶ 2} In the early morning hours of February 21, 2007, Toledo police Vice-Narcotics Detective Keith Dressel and two other detectives patrolled north Toledo in an unmarked sport-utility vehicle. The area was one of high drug and prostitution activity.

{¶ 3} Shortly before 2:00 a.m., the officers observed two males who appeared to be juveniles walking down the street. One of the two was on a cell phone. The officers pulled up next to the two youths and asked what they were doing. In the meantime, the youth on the cell phone began describing the officers SUV to whomever he was speaking. The officers later testified that they suspected the two were on the street to meet someone for a drug deal.

{¶ 4} When the detectives left their car and identified themselves as police, one of the men bolted and ran. Two of the detectives pursued him, leaving Detective Dressel with the other suspect. The pursuing officers later testified that while they were running they heard a rapid series of gunshots, perhaps nine. One of the detectives broke off pursuit and returned to the SUV, where he found Detective Dressel on the ground firing at the fleeing suspect. Detective Dressel told the other detective that he had been shot. Detective Dressel would die of his wound a short time later.

{¶ 5} Police captured the first suspect to run, 19-year-old Sherman Powell. Powell would later identify his companion that night as "Bobby White," the street name for appellant, 15-year-old Robert Jobe.

{¶ 6} Police went to appellant's home and while they were there appellant's mother received a call from him. One of the officers spoke to appellant, explaining to

him that a police officer had been killed and that police were searching for him. The officer advised appellant to surrender. A short time later, appellant gave himself up.

{¶ 7} When police attempted to question appellant, he requested a lawyer even before detectives began to read him his *Miranda* rights. At that point, the interview was terminated. A short time later, appellant was permitted to visit with his mother. Following this conversation, appellant agreed to waive his *Miranda* rights and be interviewed. Appellant would eventually tell police that he had shot Detective Dressel once with a .38 caliber Smith & Wesson revolver that appellant carried that night.

{¶ 8} Appellant was arrested and, following a hearing in the Lucas County Court of Common Pleas, Juvenile Division, was certified to be tried as an adult. Following certification, a Lucas County grand jury named appellant in a two count indictment, charging him with aggravated murder and murder, both counts carrying a firearm specification.

{¶ 9} Appellant was tried before a jury and found guilty of murder with a firearm specification. Following a presentence investigation, the court imposed upon appellant a sentence of 15 years to life incarceration, with an additional consecutive three-year term for the firearm specification. The court also ordered that appellant be responsible for the costs of his prosecution, confinement and appointed attorney fees.

{¶ 10} From this judgment of conviction, appellant now brings this appeal. Appellant sets forth the following four assignments of error:

{¶ 11} "Assignment of Error Number One: The Juvenile Court abused its discretion in ruling that Mr. Jobe is not amenable to treatment in the juvenile system by failing to consider all statutory factors in violation of his due process rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and the applicable portions of the Ohio Constitution.

{¶ 12} "Assignment of Error Number Two: In the alternative to Assignment of Error Number One, the juvenile court abused its discretion in finding Mr. Jobe is not amenable to treatment in the juvenile system by failing to consider all relevant evidence in violation of his due process rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and the applicable portions of the Ohio Constitution.

{¶ 13} "Assignment of Error Number Three: The trial court erred to the prejudice of Mr. Jobe by denying his motion to suppress statements made to law enforcement officers in violation of his due process rights under the Fifth, Sixth, and Fourteenth amendments to the United States Constitution and the applicable portions of the Ohio Constitution.

{¶ 14} "Assignment of Error Number Four: The trial court erred to the prejudice of Mr. Jobe when it ordered him to pay unspecified costs, including court appointed fees, without first determining the ability to pay those costs."

I. Amenability

{¶ 15} In his first two assignments of error, appellant asserts that the trial court abused its discretion when finding him not amenable to rehabilitation in the juvenile

system. Such an abuse occurred when (1) the court failed to consider all of the statutory factors in reaching its amenability decision, and (2) the court did not consider certain evidence brought forth in the amenability hearing. We shall discuss these assignments of error together.

{¶ 16} Juv.R. 30 provides that when a court considers the transfer of a case for criminal prosecution, the court shall first hold a preliminary hearing to determine whether there is probable cause to believe that the child committed the act alleged and that the act constitutes a criminal offense if committed by an adult. Juv.R. 30(A). If the court makes such a determination it must transfer the case if that is statutorily required. Juv.R. 30(B).

{¶ 17} "In any proceeding in which transfer of a case for criminal prosecution is permitted, but not required, by statute, and in which probable cause is found at the preliminary hearing, the court shall continue the proceeding for full investigation. The investigation shall include a mental examination of the child by a public or private agency or by a person qualified to make the examination. When the investigation is completed, an amenability hearing shall be held to determine whether to transfer jurisdiction. The criteria for transfer shall be as provided by statute." Juv.R. 30(C).

{¶ 18} The criteria for a non-mandatory transfer are articulated in R.C. 2151.12(B). The child must be age 14 or older when the act was committed. There must be probable cause to believe that the child committed the act. Additionally, the court must find that "[t]he child is not amenable to care or rehabilitation within the juvenile system, and the safety of the community may require that the child be subject to adult sanctions."

{¶ 19} The statute directs the court to consider the factors enumerated in R.C. 2152.12(D) and (E) and to weigh the factors favoring transfer against those opposed. Those factors favoring transfer are:

{¶ 20} "(1) The victim of the act charged suffered physical or psychological harm, or serious economic harm, as a result of the alleged act.

{¶ 21} "(2) The physical or psychological harm suffered by the victim due to the alleged act of the child was exacerbated because of the physical or psychological vulnerability or the age of the victim.

{¶ 22} "(3) The child's relationship with the victim facilitated the act charged.

{¶ 23} "(4) The child allegedly committed the act charged for hire or as a part of a gang or other organized criminal activity.

{¶ 24} "(5) The child had a firearm on or about the child's person or under the child's control at the time of the act charged, the act charged is not [carrying a concealed weapon], and the child, during the commission of the act charged, allegedly used or displayed the firearm, brandished the firearm, or indicated that the child possessed a firearm.

{¶ 25} "(6) At the time of the act charged, the child was awaiting adjudication or disposition as a delinquent child, was under a community control sanction, or was on parole for a prior delinquent child adjudication or conviction.

{¶ 26} "(7) The results of any previous juvenile sanctions and programs indicate that rehabilitation of the child will not occur in the juvenile system.

{¶ 27} "(8) The child is emotionally, physically, or psychologically mature enough for the transfer.

{¶ 28} "(9) There is not sufficient time to rehabilitate the child within the juvenile system." R.C. 2152.12(D).

{¶ 29} The factors favoring amenability are stated in R.C. 2152.12(E):

{¶ 30} "(1) The victim induced or facilitated the act charged.

{¶ 31} "(2) The child acted under provocation in allegedly committing the act charged.

{¶ 32} "(3) The child was not the principal actor in the act charged, or, at the time of the act charged, the child was under the negative influence or coercion of another person.

{¶ 33} "(4) The child did not cause physical harm to any person or property, or have reasonable cause to believe that harm of that nature would occur, in allegedly committing the act charged.

{¶ 34} "(5) The child previously has not been adjudicated a delinquent child.

{¶ 35} "(6) The child is not emotionally, physically, or psychologically mature enough for the transfer.

{¶ 36} "(7) The child has a mental illness or is a mentally retarded person.

{¶ 37} "(8) There is sufficient time to rehabilitate the child within the juvenile system and the level of security available in the juvenile system provides a reasonable assurance of public safety."

{¶ 38} R.C. 2152.12(B)(3) requires that the record "indicate the specific factors that were applicable and that the court weighed."

{¶ 39} In a non-mandatory certification, the decision to bind over a juvenile to be tried as an adult rests within the sound discretion of the juvenile court and will not be reversed absent an abuse of that discretion. *State v. Wilson* (May 19, 2000), 6th Dist. No. L-99-1124; *State v. Carmichael* (1973), 35 Ohio St.2d 1, paragraph two of the syllabus. An abuse of discretion is more than an error of judgment or a mistake of law, the term connotes that the court's attitude is arbitrary, unreasonable or unconscionable. *State v. Adams* (1970), 62 Ohio St.2d 151, 157.

{¶ 40} Testimony at the amenability hearing portrayed appellant as a study in contradiction. His teachers in juvenile detention described him as courteous, respectful and anxious to please. To some extent, his probation officers agreed, but suggested that such good behavior lasted only so long as appellant was in their presence. Other witnesses told of a youth who, after the eighth grade, simply refused ever again to attend school, who became a drug user and, in his fourteenth year, a drug dealer.

{¶ 41} According to testimony at the amenability hearing, a year before Detective Dressel's shooting appellant was charged with being unruly after having been arrested in a drug house. Appellant was directed to a diversion program which he failed to complete. In June and again in August 2006, appellant was arrested and adjudicated delinquent for drug possession.

{¶ 42} In September 2006, appellant assaulted two bike patrol officers who attempted to stop him after he left a drug house. This resulted in a delinquency adjudication for obstruction and resisting arrest. After this adjudication, appellant was diverted to "Drug Court" on appellant's promise that he would stop using drugs. After positive screens for marijuana, cocaine and amphetamines, however, appellant's probation officer had him fitted for an alcohol detecting ankle monitor. The day after the monitor was attached, appellant's mother called the probation officer, reporting that appellant intended to cut the monitor off. The probation officer spoke to appellant on the telephone, eventually eliciting a promise not to remove the monitor. Minutes after this conversation, appellant's mother again called the probation officer to advise him that appellant had removed the monitor from his ankle and left the house.

{¶ 43} Following a search, the probation officer found appellant at a friend's house. When the probation officer asked appellant to accompany him, appellant went to collect his coat, but instead left by a side door. Appellant disappeared for nearly two months.

{¶ 44} On December 29, 2006, police responded to a complaint of a young man shooting a pistol into the air outside a carryout store. When police arrived they found appellant, intoxicated, attempting to hide a .22 caliber revolver in the store. When police attempted to arrest appellant, he resisted to the point that it required four officers to subdue him. Appellant was charged with carrying a concealed weapon and several misdemeanors. Appellant was again adjudicated delinquent and placed on level II

probation. He was also fitted with an ankle monitor which he wore until February 9, 2007. Less than two weeks later, just after his fifteenth birthday, appellant and a companion were trying to sell drugs on a north Toledo street when he shot Detective Dressel at point blank range.

{¶ 45} Pursuant to R.C. 2152.12(C), the juvenile court accepted reports and heard testimony from two clinical psychologists and a psychiatrist who conducted mental examinations and evaluations on appellant. Each agreed that appellant was not mentally ill and that he is of average intelligence. Where the experts differed was in their assessment of appellant's amenability to rehabilitation within the juvenile system.

{¶ 46} Psychiatrist Dr. Thomas Sherman of the Court Diagnostic and Treatment Center testified that he found appellant immature and unsophisticated, but without signals that appellant was a psychopathic offender who is unlikely to change. Dr. Sherman opined that appellant was amenable to rehabilitation in the juvenile system.

{¶ 47} Psychologist Dr. Wayne Graves agreed, noting that he believed that appellant had a significant, but largely unaddressed, drug problem. Dr. Graves testified that he concurred with Dr. Sherman that appellant had a conduct disorder which could be addressed in the juvenile system. Moreover, Dr. Graves concluded that appellant was not mature enough to be transferred to the adult system.

{¶ 48} Psychologist Dr. David Connell disagreed with his colleagues, finding that appellant exhibited a maturity in street sense beyond his years. Moreover, according to Dr. Connell, appellant exhibited psychopathic tendencies which made rehabilitation unlikely.

{¶ 49} The experts also disagreed over the significance of appellant breaking into tears when speaking to his mother following his confession. Drs. Sherman and Graves found the incident to be indicia of remorse, while Dr. Connell characterized it as appellant's reaction to the realization of the trouble he was in.

{¶ 50} After the hearing, the court issued its judgment, transferring the case for adult prosecution. The court stated that it found the R.C. 2152.12(D) factors outweighed the R.C. 2152.12(E) factors:

{¶ 51} "In making this finding the Court finds that [R.C.] 2152.12(D)(1) applies, i.e., Officer Dressel died as the result of a gunshot wound. (4) applies as is evidenced by the fact that the alleged incident took place at about 2:00 am on a street where [appellant] was allegedly engaged in drug selling activity which the Court finds is loosely organized criminal activity. (5) applies because a firearm was used by [appellant.] (6) applies because [appellant] at the time of the incident was on Juvenile Probation. (7) applies because [appellant] has willingly disobeyed the Court's orders and the terms of his probation. (8) applies notwithstanding the expert opinion of two mental health professionals (a third said that he was mature enough for transfer.) The Court finds, regarding (8), that [appellant's] ability to cope when on the streets selling drugs, on the run from probation supervision for at least eight weeks, and when in detention, constitutes a level of maturity that permits the Court to order his transfer. (9) applies and the Court finds that, in light of the totality of the circumstances in the case and [appellant's] willful refusal to correct his attitude, values, beliefs and behavior when

placed on probation and offered the services to do so, demonstrates that 5½ years is not enough time to rehabilitate [appellant.]

{¶ 52} "The Court further finds that community safety from this [appellant] may require that he be subject to adult sanctions.

{¶ 53} "The Court further finds, based on the findings relative to [R.C.] 2152.12(D), that none of the factors in [R.C.] 2152.12(E) apply."

{¶ 54} Appellant insists that, because the trial court summarily rejected the R.C. 2152.12(E) factors, the court did not properly consider them or improperly refused to find any of them applicable solely because of its R.C. 2152.12(D) findings. Appellant contends that the court could have found that his conduct was victim induced, pursuant to (E)(1), because there was a dispute as to whether the officers identified themselves as police. The court could have found that appellant was not the principal actor, pursuant to (E)(3), because appellant's older companion on the night of the shooting may have been a negative influence. Section (E)(6) should be considered in mitigation because two of the three mental health professionals who testified concluded that he was not psychologically mature enough for transfer.

{¶ 55} Moreover, appellant maintains, a court binding over a juvenile to be tried as an adult should be required to state with specificity its findings as to the existence of any mitigating factors in the same manner as is required by R.C. 2929.04 in capital cases. Applying that measure, appellant concludes, the juvenile court's judgment was deficient. Alternatively, appellant asserts in his second assignment of error, the court's failure to

employ the standard he proposes renders certification unreliable, violating his rights to due process of law.

{¶ 56} Had the legislature intended to make the analysis required for a juvenile bindover the same as that for imposition of the death penalty, as R.C. 2929.04 demonstrates, it is capable of doing so. It did not.

{¶ 57} The only requirement that the legislature did impose with respect to the juvenile court articulating its analysis is contained in the last sentence of R.C. 2152.12(B)(3) which states that, "[t]he record shall indicate the specific factors that were applicable and that the court weighed." Indeed, we have held that a bindover court need not even include such weighing in its judgment entry. It is sufficient that such consideration appears anywhere in the record. *State v. Luna*, 6th Dist. No. L-05-1245, 2006-Ohio-5907, ¶ 21.

{¶ 58} In this matter, in its judgment entry, the court found that seven of the nine factors favoring transfer were applicable and that none of the mitigating factors were applicable. Even if there was evidence in the hearing by which the court could have found that the crime was victim induced, or that appellant was not the principal actor or that appellant was not psychologically mature enough for transfer, it is clear from the record and the judgment entry that the court considered the evidence on the R.C. 2152.12(D) and R.C. 2152.12(E) factors, and found in favor of certification of appellant to adult court. This is all that the statutes require.

{¶ 59} As to any purported due process violation, appellant has directed us to nothing in the record that would suggest that he was not afforded the full panoply of rights the law affords an alleged juvenile offender. Accordingly, appellant's first and second assignments of error are not well-taken.

II. Suppression

{¶ 60} Following his surrender, police transported appellant to police headquarters where he was placed in an interrogation room equipped for videotaping. As recordings made that day clearly show, appellant requested an attorney even before detectives began to read him his rights as mandated by *Miranda v. Arizona* (1966), 384 U.S. 436. In conformity with *Miranda*, at 474, once appellant invoked his right to counsel, police ceased questioning. Appellant was removed to a holding cell.

{¶ 61} A short time later, appellant's mother arrived and was permitted to speak with appellant privately. Following this conversation, appellant asked to again speak with detectives. With his mother in the room, detectives again advised appellant of his *Miranda* rights. Appellant acknowledged that he understood his rights and executed a written waiver. Appellant eventually admitted to detectives that he had shot Detective Dressel.

{¶ 62} After indictment, appellant moved to suppress his statements during police questioning. Appellant insisted that, after he had unambiguously requested an attorney, police persuaded his mother that things would go easier on him if he made a statement. Appellant argued that police co-opted appellant's mother as their agent to deliver

promises of leniency to induce appellant to reconsider a waiver of the rights he had already invoked. According to appellant, this tactic negated the voluntary nature of his waiver and the evidence obtained should be suppressed.

{¶ 63} Additionally, appellant maintained, when he requested an attorney, police had an obligation to get one for him. He noted that the public defender's office was nearby and staffed with attorneys when he made his request. With no more than a telephone call, police could have summoned an attorney and had counsel present to advise him prior to his waiver. With such counsel he would likely not have confessed.

{¶ 64} The trial court held an extensive hearing on appellant's motion, eventually finding it not well-taken. In his third assignment of error, appellant asserts that this decision was erroneous.

{¶ 65} When considering a motion to suppress, the trial court assumes the role of the trier of fact and is, therefore, in the best position to resolve factual questions and evaluate the credibility of a witness. *State v. Mills* (1992), 62 Ohio St.3d 357, 366. Consequently, in its review, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594. Accepting the facts as found by the trial court as true, the appellate court must then independently determine as a matter of law, without deferring to the trial court's conclusions, whether the facts meet the applicable legal standard. *State v. Klein* (1991), 73 Ohio App.3d 486, 488.

{¶ 66} Once a statement made during a custodial interrogation is challenged by way of a motion to suppress, it is the state's burden to show by a preponderance of the evidence that the statement was voluntary. *State v. Koger*, 6th Dist. No. L-05-1265, 2007-Ohio-2398, ¶ 25, citing *State v. Arrington* (1984), 14 Ohio App.3d 111, 114. In this matter, the videotape of appellant's first interview clearly shows that he invoked his right to counsel from the beginning. The same tape shows appellant some time later being re-read his *Miranda* rights and agreeing in writing to waive them. The focus, then, is on that which occurred in the intervening time.

{¶ 67} Once a suspect invokes his or her right to counsel, police must cease interrogation and may make no further attempts at questioning. The suspect "* * * is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police," *Edwards v. Arizona* (1981), 451 U.S. 477, 484-485, and there are indices that the suspect subsequently voluntarily waived his or her rights. *Oregon v. Bradshaw* (1983), 462 U.S. 1039, 1045, see, also, *State v. Knuckles* (1992), 65 Ohio St.3d 494, paragraph one of the syllabus. A waiver obtained by intimidation, coercion or deceit by police is not voluntary. *Moran v. Burbine* (1986), 475 U.S. 412, 421.

{¶ 68} Nevertheless, the prohibition against further questioning after invocation of the right to counsel goes to government action only. There is no prohibition that would prevent friends and family from attempting to persuade a suspect to talk to police. See

Arizona v. Mauro (1987), 481 U.S. 520, 527-528; *State v. Van Hook* (1988), 39 Ohio St.3d 256, 260.

{¶ 69} Appellant crafts a scenario wherein police, thwarted by appellant's invocation of his right to counsel, sent for appellant's mother and enlisted her in an effort to get appellant to talk. In this circumstance, appellant insists, his mother became an agent of police for the purpose of persuading him to rescind his request for counsel and to submit to further interrogation. Appellant argues that police effected this plan by promising appellant's mother that they would "go easy" on him if he talked.

{¶ 70} As the trial court noted, the only evidence supporting appellant's version of these events is the suppression hearing testimony of his mother. Every police officer who testified denied making any promises. There is nothing on the videotape of appellant's interview to suggest that there were any promises made. Indeed, after his confession and alone in the interrogation room, appellant's mother approached him and asked if telling the truth didn't feel better. In our view, on this evidence, the trial court properly found that appellant's mother was not an agent of the state and appellant's decision to resume the interview without counsel was voluntary.

{¶ 71} Appellant alternatively claimed that police deliberately delayed obtaining a public defender for him. Had such counsel arrived in a timely manner, appellant insists, counsel would have advised against further submission to questioning.

{¶ 72} Here, as in the trial court, appellant fails to provide any authority that would suggest that police have any duty to obtain counsel for a defendant within a

specific time frame. Absent such a requirement, we cannot say that the trial court erred in rejecting this argument and denying appellant's suppression motion. Accordingly, appellant's third assignment of error is not well-taken.

III. Costs

{¶ 73} The trial court found that appellant had, "* * * or reasonably may be expected to have, the means to pay all or part of the applicable costs of supervision, confinement, assigned counsel, and prosecution, as authorized by law. [Appellant] ordered to reimburse the State of Ohio and Lucas County for such costs. * * * [Appellant] further ordered to pay the cost assessed pursuant to R.C. 9.92(C), 2929.18 and 2851.021."

{¶ 74} In his fourth assignment of error, appellant asserts that the imposition of these costs, without a hearing or evidence of his ability to pay appearing elsewhere in the record, is erroneous. Appellant concedes that R.C. 2947.23 permits the imposition of costs of prosecution without consideration of the ability to pay, but, citing this court's *State v. Phillips*, 6th Dist. No. F-05-032, 2006-Ohio-4135, notes that a court may, in its discretion, waive such costs for an indigent defendant. Nevertheless, appellant insists, the remainder of the costs imposed require evidence based findings and no such evidence appears of record here. Appellant maintains that he is a 15 year-old without any money; who will be incarcerated for a minimum of 18 years, during which he will have no money; who will be without money when he is eventually released. On this evidence, appellant suggests, the court should not have assessed any costs.

{¶ 75} R.C. 2947.23 not only permits a court to assess costs against an indigent defendant, "* * * it *requires* a court to assess costs against all convicted defendants." *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, ¶ 8 (Emphasis in original.) This encompasses the cost of prosecution and jury fees. R.C. 2947.23(A).

{¶ 76} A sentencing court may waive these costs for an indigent defendant, but, to preserve the issue, a motion for a waiver 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; *State v. Phillips*, supra, ¶ 14. In this matter, there is nothing in the record to suggest that appellant moved to waive the R.C. 2947.23 costs at the sentencing hearing. As a result, there was no impropriety in the court's imposition of prosecution costs and jury fees.

{¶ 77} R.C. 9.92 requires that specific courts impose a one dollar additional court cost to fund the citizen's reward fund. The fee is mandatory; however, the court "* * * in the court's discretion, may remit this one dollar additional court costs to the offender." R.C. 9.92(C)(1). The statute provides for no means test. Since the decision to remit is discretionary, a court's failure to remit will not be disturbed on appeal absent an abuse of discretion. An abuse of discretion is more than a mistake of law or a factual error, the term connotes that the court's attitude is arbitrary, unreasonable or unconscionable. *State v. Adams*, supra. We cannot find an abuse of discretion for failure to remit when, as here, there was no request for remission from appellant before the trial court.

{¶ 78} R.C. 2951.021 permits a sentencing court that places a felony offender under a community control sanction to require the offender to pay a maximum of $50

monthly supervision fee as a condition of parole. No means test is stated. Imposition is in the discretion of the court. Appellant fails to articulate how imposition of this fee constitutes an abuse of discretion.

{¶ 79} R.C. 2929.18(A)(5)(ii) provides that a sentencing court may impose as a financial sanction, "[a]ll or part of the costs of confinement * * * provided that the amount of reimbursement ordered under this division shall not exceed the total amount of reimbursement the offender is able to pay as determined at a hearing and shall not exceed the actual cost of the confinement * * *." However, "[b]efore imposing a financial sanction under [R.C. 2929.18], the court shall consider the offender's present and future ability to pay the amount of the sanction or fine." R.C. 2929.19(B)(6). We have held that while a sentencing court is not required to hold a hearing when determining whether to impose a financial sanction under this provision, the record must contain some evidence that the court considered the offender's ability to pay such a sanction. *State v. Phillips*, supra, ¶ 18, citing *State v. Lamonds*, 6th Dist. No. L-03-1100, 2005-Ohio-1219, ¶ 42.

{¶ 80} The recovery of appointed counsel fees is governed by R.C. 2941.51(D) which provides that such fees, "* * * shall not be taxed as part of the costs and shall be paid by the county. However, if the person represented has, or reasonably may be expected to have, the means to meet some part of the cost of the services rendered to the person, the person shall pay the county an amount that the person reasonably can be expected to pay." Again, no hearing on this matter is expressly required, but the court

must enter a finding that that the offender has the ability to pay and that determination must be supported by clear and convincing evidence of record. *State v. Knight*, 6th Dist. No. S-05-007, 2006-Ohio-4807, ¶ 6-7.

{¶ 81} Although the trial court entered the requisite findings in this matter, no hearing was held on appellant's ability to pay and the state essentially concedes that, except for an affidavit of indigency, there was no evidence presented after the bind-over[1] of appellant's ability to pay. The state suggests that such evidence might be found in the non-disclosable portions of the presentence investigation report prepared for sentencing.

{¶ 82} We have carefully examined the presentence investigation report and find the only information contained therein, material to this issue, are the facts that appellant completed the eighth grade, did not obtain a GED and has never held a job. We fail to see how any of this information would weigh in favor of appellant's ability to pay for either his cost of confinement or his appointed counsel.

{¶ 83} Absent evidence in the record supporting the trial court's finding that appellant had, or could reasonably in the future be expected to have, the ability to pay the cost of his confinement or his appointed attorney fees, appellant's fourth assignment is found well-taken to the extent that these fees were imposed.

{¶ 84} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed, in part, and reversed, in part. The portion of the court's

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[1]There was testimony in the bind-over hearing that appellant had told one of the examining mental health professionals that he had a $20,000 cache of money derived from drug dealing concealed at his mother's house. There is no corroboration of this statement anywhere in the record and it does not appear that the report was ever before the adult court.

sentencing order requiring appellant to pay the cost of his confinement and appointed attorney fees is vacated. This matter is remanded to the trial court for further proceeding consistent with this decision. It is ordered that appellant and appellee share equally the court costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED, IN PART,
AND AFFIRMED, IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Richard W. Knepper, J. _____
CONCUR.
JUDGE

Judge Richard W. Knepper, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.