

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

State of Ohio

Court of Appeals No. L-11-1080

Appellee

Trial Court No. CR0201002685

v.

Stephen Turner

DECISION AND JUDGMENT

Appellant

Decided: December 14, 2012

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Michael D. Bahner, Assistant Prosecuting Attorney, for appellee.

Megan Mattimoe, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This appeal is from the April 11, 2011 judgment of the Lucas County Court of Common Pleas, which sentenced appellant, Stephen Turner, after he was convicted by a jury of violating R.C. 2911.01(A)(1) and 2941.145, aggravated robbery with a firearm specification. Upon consideration of the assignments of error, we affirm the decision of the lower court. Appellant asserts the following assignments of error on appeal:

I. THE TRIAL COURT ERRED WHEN IT FAILED TO CONSIDER APPELLANT'S PRESENT AND FUTURE ABILITY TO PAY THE COSTS OF SUPERVISION, CONFINEMENT, AND APPOINTED COUNSEL'S FEES AS SET FORTH IN ITS APRIL JUDGMENT ENTRY. THESE ERRORS VIOLATED APPELLANT'S RIGHT TO DUE PROCESS AS GUARANTEED UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO STATE CONSTITUTION.

II. THE TRIAL COURT ERRED WHEN IT FAILED TO MAKE AN EXPLICIT FINDING, ON THE RECORD, REGARDING APPELLANT'S PRESENT AND FUTURE ABILITY TO PAY APPOINTED COUNSEL'S FEES AND IMPROPERLY ORDERED APPELLANT, WHO IS INDIGENT, TO PAY THOSE FEES. THESE ERRORS VIOLATED APPELLANT'S RIGHT TO DUE PROCESS AS GUARANTEED UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO STATE CONSTITUTION.

III. TRIAL COUNSEL DID NOT EFFECTIVELY ASSIST APPELLANT IN HIS DEFENSE BY FAILING TO RAISE THE ISSUE

OF APPELLANT’S [SIC] FINANCIAL CONDITION WHEN THE TRIAL COURT ORDERED APPELLANT TO PAY BOTH THE COSTS OF PROSECUTION AND APPOINTED COUNSEL’S FEES. THIS VIOLATED APPELLANT’S RIGHT TO DUE PROCESS AND RIGHT TO COUNSEL AS GUARANTEED UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 10 AND 16, ARTICLE I, OF THE OHIO STATE CONSTITUTION.

{¶ 2} When appellant was sentenced, the trial court ordered that he pay the costs of prosecution, supervision, and confinement and his appointed counsel’s fees. The trial court made a finding that appellant has 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’s appointed counsel sought the minimum sentence emphasizing that appellant appeared to have a learning disability, had children to support, was addicted to drugs, and he had a prior conviction. We begin by addressing appellant’s third assignment of error where appellant argues that his appointed counsel rendered ineffective assistance by failing to file a motion for waiver of the payment of costs.

{¶ 3} In all criminal cases, the court must include costs of prosecution in the sentence. R.C. 2947.23(A)(1)(a) and *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, ¶ 8. Furthermore, costs must be included in the sentencing entry.

R.C. 2947.23(A). There is no requirement for the court to hold a hearing or determine that an offender has the ability to pay such costs. *White* at ¶ 6 and *State v. Rohda*, 6th Dist. No. F-06-007, 2006-Ohio-6291, ¶ 13. Furthermore, the court must orally notify the defendant of the imposition of costs. *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278, ¶ 22. However, a court does have the discretion to waive the payment of costs for indigent defendants despite the mandatory language of R.C. 2947.23(A). *Id.* at ¶ 11 and *White* at paragraph one of the syllabus.

{¶ 4} A defendant must move to have the payment of costs waived in order to preserve the issue for appellate review. *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, paragraph two of the syllabus. Appellant failed to file such a motion in this case. Therefore, the issue becomes whether appellant's appointed counsel rendered ineffective assistance by failing to file this motion.

{¶ 5} Appellant bears the burden of proving that his counsel was ineffective since an attorney is presumed competent. *Strickland v. Washington*, 466 U.S. 668, 687-689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and *State v. Lott*, 51 Ohio St.3d 160, 174, 555 N.E.2d 293 (1990). To meet this burden of proof, appellant must show that: (1) there was a substantial violation of the attorney's duty to his client, and (2) the defense was prejudiced by the attorney's actions or breach of duty. *Strickland* at 687-689 and *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). Prejudice is shown where there is a reasonable probability that a different result would have occurred in the case if the attorney had not erred. *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989),

paragraph three of the syllabus, and *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, 781 N.E.2d 88, ¶ 108.

{¶ 6} In the case before us, the sentencing hearing immediately followed appellant's jury conviction. The judge orally informed appellant that costs would be imposed on him. Because appellant had appointed counsel at trial, his indigency at the time of sentencing is apparent. His counsel should have filed a motion for waiver of the court costs or at least made an oral motion during the hearing. We find his failure to do so was a substantial violation of the duty he owed appellant. However, we do not find that the filing of the motion would have altered the outcome in this case. First, the court noted that appellant was indigent shortly after imposing costs. The facts that appellant argues would prove that he will be indigent in the future were all offered at trial in an effort to mitigate his sentence. Therefore, even if appellant's attorney had properly filed a motion, it appears from the record that the court was aware of appellant's indigency and abilities to earn money in the future, and yet the court imposed costs. Without further evidence the trial court would have exercised its discretion to waive payment of the costs, we must find that the error of counsel was irrelevant in this case. *State v. King*, 6th Dist. No. WD-09-069, 2010-Ohio-3074, ¶ 11, and *State v. Maloy*, 6th Dist. No. L-10-1350, 2011-Ohio-6919, ¶ 12. Compare *State v. Blade*, 8th Dist. Nos. 88703, 88704 and 88705, 2007-Ohio-5323, ¶ 13 (prejudice shown by evidence of a reasonable probability that the court would have waived the costs because the court had done so in a separate pending criminal action). Therefore, appellant's third assignment of error is not well-taken.

{¶ 7} Appellant argues in his first assignment of error that the trial court erred by imposing additional costs of confinement, fines, and the cost of his appointed counsel. In his second assignment of error, appellant argues that the trial court erred by not making an explicit finding that he had the present and future ability to pay his appointed counsel's fees.

{¶ 8} In addition to mandatory court costs, the court may impose other costs as a financial sanction for felony offenses. R.C. 2929.18(A). These costs include the cost of confinement, R.C. 2929.18(A)(5)(a)(ii). Furthermore, “[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)(5). There is no requirement that a court must hold a hearing, but it must include in its judgment that it considered appellant’s ability to pay the sanction. *Maloy*, at ¶ 13; *State v. Brinkman*, 6th Dist. No. WD-05-058, 2006-Ohio-3868, ¶ 16-17; *State v. Lamonds*, 6th Dist. No. L-03-1100, 2005-Ohio-1219, ¶ 42.

{¶ 9} The court may also impose a financial sanction to reimburse the county for the fees for appointed counsel, R.C. 2941.51(D). This section provides that representation fees may not be assessed as part of the state’s costs of the prosecution, but “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.” The court

must make an affirmative determination on the record in the form of a journal entry that the defendant has, or reasonably may be expected to have, the means to pay all or some part of the cost of the legal services rendered to him. The court must then enter a separate civil judgment for the attorney fees or any part thereof that the court finds the defendant has the ability to repay. *State v. Dorsey*, 6th Dist. No. L-09-1016, 2010-Ohio-936, ¶ 19-20, and *State v. Knight*, 6th Dist. No. S-05-007, 2006-Ohio-4807, ¶ 6.

Furthermore, this finding must be supported by clear and convincing evidence.

R.C. 2953.08(G)(2)(b) and *State v. Dahms*, 6th Dist. No. S-11-028, 2012-Ohio-3181, ¶ 29.

{¶ 10} The trial court in this case did make a finding orally and in the sentencing judgment that appellant has or reasonably may be expected to have the means to pay all applicable costs of supervision, confinement, assigned counsel, and prosecution as authorized by law. Appellant argues that this finding is contrary to the evidence in the record.

{¶ 11} Appellant's attorney also argued prior to imposition of his sentence that appellant is an extremely slow learner, has some mental health issues, and has drug and alcohol abuse issues. However, there is nothing in the record to support any finding regarding appellant's mental incapacity or mental health. Despite these alleged issues, appellant has been able to successfully support his family by running an illegal drug trafficking operation until his arrest. The presentence investigation report states that

appellant stated he is ready and willing to address his drug addiction for the sake of his children. Furthermore, there was no evidence that appellant had any physical disabilities that would prevent him from working once he left prison. The presentencing investigation report indicates that appellant is a healthy, young man who is capable of working after his release from prison.

{¶ 12} Therefore, we find appellant's first and second assignments of error not well-taken.

{¶ 13} Having found that the trial court did not commit error prejudicial to appellant, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

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

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
