[Cite as *State v. Willis*, 2012-Ohio-6070.]

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

State of Ohio — Court of Appeals No. L-11-1274

Appellee — Trial Court No. CR0201101808

v.

Joseph Willis — **DECISION AND JUDGMENT**

Appellant — Decided: December 21, 2012

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Mark T. Herr, Assistant Prosecuting Attorney, for appellee.

Mollie B. Hojnicki, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} This is an appeal from the judgment of the Lucas County Court of Common Pleas, sentencing appellant, Joseph Willis, to 54 months in prison pursuant to his conviction for robbery and failure to comply with an order or signal of a police officer. For the reasons that follow, we affirm.

A. Facts and Procedural Background

{¶ 2} On May 21, 2011, Willis stole a vehicle from a gas station located in Toledo, Ohio. The vehicle belonged to Loreal Webb. While Willis attempted to drive away in the vehicle, Webb latched onto the vehicle in an effort to regain control of it. However, as Willis was entering an adjacent parking lot, Webb was thrown from the vehicle. Willis then fled the scene, and a police chase ensued. Willis was subsequently caught by the police in the stolen vehicle.

{¶ 3} On May 31, 2011, the Lucas County Grand Jury indicted Willis on one count of robbery in violation of R.C. 2911.02(A)(2), a felony of the second degree, and one count of failure to comply with the order or signal of a police officer in violation of R.C. 2921.331(B) and (C)(5)(a)(ii), a felony of the third degree. After reaching a plea agreement with the state, Willis entered a plea of no contest to the failure to comply count and the lesser offense of robbery under R.C. 2911.02(A)(3), a felony of the third degree.

{¶ 4} At sentencing, Willis was sentenced to 54 months in prison, the maximum prison term after the mandatory two-year reduction pursuant to H.B. 86. In support of its decision to impose the maximum sentence, the court cited Willis' extensive criminal record and the danger that Willis posed to the community. In addition to the prison term, Willis was ordered to "pay all or part of the applicable costs of supervision, confinement, assigned counsel, and prosecution."

{¶ 5} It is from this sentence that Willis timely appeals.

B. Assignments of Error

{¶ 6} Willis assigns the following errors for our review:

1. The trial court's imposition of sentence constituted an abuse of discretion.

2. The trial court's order requiring appellant to pay all applicable costs of supervision, confinement, assigned counsel and prosecution costs constituted an abuse of discretion, etc.

II. Analysis

A. The Trial Court did not Abuse its Discretion by Imposing the Maximum Sentence

{¶ 7} In his first assignment of error, Willis argues that the trial court abused its discretion by imposing the maximum prison sentence. Essentially, Willis claims that the trial court improperly weighed the factors of R.C. 2929.12.

{¶ 8} Appellate courts review assigned errors challenging the sentencing court's application of R.C. 2929.11 and 2929.12 using the method announced in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. In *Kalish*, the Supreme Court established a "two-prong" process for appellate review of felony sentences, stating:

> First, [appellate courts] must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to

law. If this first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard. *Id.* at ¶ 4.

{¶ 9} Here, Willis acknowledges that his sentence falls within the range allowed by statute. A choice of sentence from within the permissible statutory range cannot, by definition, be contrary to law. *Id.* at ¶ 15. Thus, the first prong under *Kalish* is satisfied. Under the second prong, we review the trial court's "exercise of its discretion in selecting a sentence within the permissible statutory range," using the sentencing record as the context. *Id.* at ¶ 17. This prong asks whether, in selecting a specific prison term, the court's decision was "unreasonable, arbitrary or unconscionable." *Id.* at ¶ 20.

{¶ 10} Regarding the import of R.C. 2929.12, we have stated:

> R.C. 2929.12 is a guidance statute. It sets forth the seriousness and recidivism criteria that a trial court "shall consider" in fashioning a felony sentence. * * * Subsections (B) and (C) establish the factors indicating whether the offender's conduct is more serious or less serious than conduct normally constituting the offense. Subsections (D) and (E) contain the factors bearing on whether the offender is likely or not likely to commit future crimes. While the phrase "shall consider" is used throughout R.C. 2929.12, the sentencing court is not obligated to give a detailed explanation of how it algebraically applied each seriousness and recidivism factor to the offender. Indeed, no specific recitation is required. * * * Merely stating that the court considered the statutory factors is enough. *State v.*

Brimacombe, 6th Dist. No. L-10-1179, 2011-Ohio-5032, ¶ 11. (Internal citations omitted.)

{¶ 11} Willis argues that the trial court's imposition of the maximum sentence is contrary to the purposes and principles of sentencing under R.C. 2929.11, as well as the recidivism factors set forth in R.C. 2929.12. Specifically, Willis asserts that his acknowledgement of guilt and expression of remorse precludes the trial court from imposing the maximum sentence. Willis' argument is without merit in that it seeks to replace the trial court's obligation to *consider* the mitigating factors with an obligation to *reduce a sentence* when any mitigating factors are present. A similar argument was set forth in *State v. Barnhart*, 6th Dist. No. OT-10-032, 2011-Ohio-5685, where we stated:

> [T]he premise of Barnhart's argument confuses the statutory mandate *to consider* any mitigating factor that might exist (such as an isolated statement by Cassel which appears favorable on the issue of recidivism) with a concomitant obligation automatically *to assign* that factor the same qualitative weight as another factor the court deemed unfavorable. (Emphasis sic.) *Id.* at ¶ 21.

{¶ 12} As with the statement made in *Barnhart*, "the court could reasonably assign little or no mitigating weight" to Willis' self-serving statements regarding his remorse and his acknowledgement of guilt. *Id.* In fact, "[m]erely stating that the court considered the statutory factors is enough" to pass muster under R.C. 2929.12. *Brimacombe* at ¶ 11.

{¶ 13} The judgment entry states:

> The Court has considered the record, oral statements, any victim impact statement and presentence report prepared, as well as the principles and purposes of sentencing under R.C. 2929.11, and has balanced the seriousness and recidivism factors under R.C. 2929.12.

Thus, it is clear that the court fulfilled its obligation to consider the statutory factors. Additionally, we find that the court's sentencing decision was supported by Willis' extensive criminal history and the danger he poses to the community. Therefore, we cannot say that the trial court abused its discretion by imposing the maximum sentence. Accordingly, Willis' first assignment of error is not well-taken.

B. The Trial Court's Imposition of Costs did not Constitute an Abuse of Discretion.

{¶ 14} In his second assignment of error, Willis argues that the trial court erroneously imposed the costs of supervision, confinement, court-appointed counsel, and prosecution. Willis asserts that the trial court abused its discretion when it determined that he was able to pay these costs, since that determination is contradicted by the evidence of Willis' financial status as shown by his affidavit of indigency.

{¶ 15} In this case, the costs ordered by the trial court can be broken down into the following three categories: (1) mandatory costs of prosecution imposed pursuant to R.C. 2947.23 and the mandatory one-dollar citizens' reward program cost imposed pursuant to

R.C. 9.92(C); (2) costs of confinement imposed under R.C. 2929.18(A)(5)(a)(ii); and (3) the cost of assigned counsel allowed by R.C. 2941.51(D).

{¶ 16} In addressing the mandatory costs, it is well settled that "an indigent defendant must move a trial court to waive payment of costs at the time of sentencing. If the defendant makes such a motion, then the issue is preserved for appeal. If the defendant fails to make such a motion, the issue is waived and costs are res judicata." *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, ¶ 23. Here, Willis failed to move the trial court to waive payment of the mandatory costs. Therefore, the application of res judicata bars Willis' challenge to these costs on appeal.

{¶ 17} The second category of costs imposed by the trial court is the costs of confinement. R.C. 2929.18(A)(5)(a)(ii) states that an offender may be ordered to reimburse the government for "[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." Before imposing these costs, the trial court must "consider the offender's present and future ability to pay the amount of the sanction or fine." R.C. 2929.19(B)(5). We have held that while a sentencing court is not required to hold a separate 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 present and future ability to pay such a sanction. *State v. Phillips*, 6th Dist. No. F-05-032, 2006-Ohio-4135, ¶ 18, citing *State v. Lamonds*, 6th Dist.

No. L-03-1100, 2005-Ohio-1219, ¶ 42. Further, the trial court need not explicitly state that it considered a defendant's ability to pay; instead, we look to the totality of the record to determine whether the requirement has been satisfied. *Phillips* at ¶ 18, citing *State v. Berry*, 4th Dist. No. 04CA2961, 2006-Ohio-244, ¶ 43.

{¶ 18} The costs of appointed counsel are similar to the costs of confinement, in that their imposition depends on the appellant's ability to pay. R.C. 2941.51(D). In addition, the costs imposed under R.C. 2941.51(D) are limited to "an amount that the person reasonably can be expected to pay." *Id.* "Again, no hearing on this matter is expressly required, but the court must enter a finding that the offender has the ability to pay and that determination must be supported by clear and convincing evidence of record." *State v. Jobe*, 6th Dist. No. L-07-1413, 2009-Ohio-4066, ¶ 80.

{¶ 19} Here, the trial court's judgment entry stated that it found that Willis "[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." Willis argues, however, that the record is devoid of any evidence that supports the trial court's determination of his ability to pay. We disagree.

{¶ 20} First, when asked at the plea hearing by the trial court how far he had went in school, Willis stated that he received "some college" education. This fact is confirmed by the presentence investigation report. Second, the presentence investigation report indicates that Willis has a work history. In fact, Willis held one of his jobs for over two years. Considering the entire record, we cannot say that the trial court abused its

discretion when it found that Willis has, or reasonably may be expected to have, the means to pay the costs imposed. Accordingly, Willis' second assignment of error is not well-taken.

III. Conclusion

{¶ 21} In light of the foregoing, the judgment of the Lucas County Court of Common Pleas is affirmed. Costs are hereby assessed to the appellant in accordance with 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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE