

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

State of Ohio

Court of Appeals No. L-12-1013

Appellee

Trial Court No. CR0201102397

v.

Michael King

DECISION AND JUDGMENT

Appellant

Decided: March 29, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellee.

Karin L. Coble, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals his conviction on two counts of aggravated robbery with a firearm specification entered on a no contest plea in the Lucas County Court of Common Pleas. Because we conclude the common pleas court, general division, obtained subject matter jurisdiction over a 17 year old by a proper mandatory bind-over from juvenile

court, we affirm appellant's conviction. However, because the trial court failed to properly consider appellant's ability to pay certain court imposed costs, we reverse a portion of appellant's sentence and remand for the vacation of improperly imposed fees.

{¶ 2} On July 25, 2011, at approximately 1:00 a.m., four young men brandishing a pistol forced their way into the home of an elderly west Toledo couple. The intruders took turns holding the couple at gunpoint while the others ransacked the home and threatened to beat the homeowner with his own shotgun to make him open a safe. The men took money and household goods, locking the couple in a bathroom before they left. The elderly man told police that near the end of the home invasion he believed the intruders intended to kill him.

{¶ 3} A witness saw the intruders leaving and provided a description of their car to police. A short time later, police stopped the vehicle in which the home invaders were traveling, the stolen goods still inside. One of the men in the car was then 17-year-old appellant, Michael King. Later in the day, police filed a juvenile complaint, alleging that appellant was a delinquent child by virtue of having committed acts constituting aggravated burglary, if committed by an adult.

{¶ 4} On August 2, 2011, the state moved to transfer the case to the common pleas court, general division, for criminal prosecution. The state asserted that transfer was mandatory because aggravated burglary with a firearm is within R.C. 2152.12(A)(1)(b), requiring transfer.

{¶ 5} In the juvenile court, appellant waived a probable cause hearing and agreed to be bound over to be tried as an adult. On September 7, 2011, the Lucas County Grand Jury indicted appellant, charging one count of aggravated burglary with a firearm specification, two counts of aggravated robbery with firearms specifications and two counts of kidnapping with firearm specifications. Appellant entered a not guilty plea and counsel was appointed.

{¶ 6} On December 16, 2011, following negotiations with the state, appellant withdrew his not guilty plea and agreed to plead no contest to two counts of aggravated robbery with a single firearm specification. After a plea colloquy, the court accepted appellant's plea and found him guilty. The remaining counts and specifications were dismissed. The court ordered a presentence investigation.

{¶ 7} On January 11, 2012, the court sentenced appellant to a seven-year term of incarceration on one count of aggravated robbery and a six-year term on the other. The court ordered the terms served consecutively after the mandatory three-year term of imprisonment for the firearm specification. The court also ordered restitution for the victims and entered a finding that appellant had, "or may reasonably 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."

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

I. The General Division of the Court of Common Pleas lacked subject matter jurisdiction over appellant. Appellant's due process rights were violated [when] the Juvenile Division failed to inform appellant of the amenability hearing and appellant did not waive the amenability hearing.

II. Appellant's plea was unknowing and involuntary due to ineffective assistance of counsel.

III. The trial court erred in imposing the term of 16 years' incarceration.

IV. The trial court erred in imposing costs.

I. Bind-over

{¶ 9} In his first assignment of error, appellant insists that his conviction is void because the common pleas court, general division, never properly obtained subject matter jurisdiction over his case.

{¶ 10} Appellant properly notes that juvenile courts have exclusive original jurisdiction over any person under age 18 alleged to be delinquent for committing acts that would constitute a criminal offense if committed by an adult. R.C. 2151.23(A)(1), 2151.011(B)(6), 2152.02(F)(1). Such a child may not be tried as an adult unless the juvenile court transfers jurisdiction of the matter to an adult court. Absent a proper bind-over proceeding in the juvenile court, the common pleas court lacks subject matter jurisdiction over the case and any conviction obtained there is void ab initio. *State v. Wilson*, 73 Ohio St.3d 40, 44, 652 N.E.2d 196 (1995).

{¶ 11} Transfer may be mandatory or discretionary. Juv.R. 30(B)(C). The transfer is mandatory if there is probable cause to believe that the child committed the act charged and the offense and the offender meet statutorily prescribed conditions. R.C. 2152.12(A).

{¶ 12} A discretionary transfer requires probable cause to believe that the child committed an act that would be a felony if committed by an adult, but also a determination that the 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. R.C. 2152.12(B). Prior to discretionary transfer, the juvenile court must order an investigation of the child's education, social history, family situation and other factors, including a mental examination. R.C. 2152.12(C).

{¶ 13} Juv.R. 30(C) directs that, following the investigation, the court must conduct an amenability hearing to determine whether transfer is appropriate. R.C. 2151.12(D) and (E) contain a non-exclusive list of factors to be considered in favor of and against transfer. The court must make a part of the record the specific applicable factors that were weighed. R.C. 2152.12(B)(3). Ultimately, the decision of whether to bind over a child to be tried as an adult rests within the sound discretion of the juvenile court. *State v. Carmichael*, 35 Ohio St.2d 1, 298 N.E.2d 568 (1973), paragraph two of the syllabus.

{¶ 14} Appellant maintains that the bind-over proceeding in the juvenile court was flawed, denying the common pleas court subject matter jurisdiction. Since the common

pleas court had no subject matter jurisdiction, appellant insists, his conviction is void and should be vacated.

{¶ 15} Appellant argues that the complaint against him in juvenile court charged that he committed acts that would have constituted aggravated burglary if committed by an adult. The charging paragraph concluded: “Further, said juvenile had a deadly weapon or dangerous ordnance on or about his/her [sic] person or under his/her [sic] control.”

{¶ 16} R.C. 2152.12(A) mandates a bind-over to an adult court if the child was 16 or 17 at the time of committing a category two offense and was either previously adjudicated delinquent for a category one or two offense and was committed to the Department of Youth Services, R.C. 2152.10(A)(2)(a), or:

The child is alleged to have had a firearm on or about the child’s person or under the child’s control while committing the act charged and to have displayed the firearm, brandished the firearm, indicated possession of the firearm, or used the firearm to facilitate the commission of the act charged. R.C. 2152.10(A)(2)(b).

{¶ 17} Aggravated burglary is a category two offense. R.C. 2152.02(CC)(1). Appellant was 17 years old at the time of the alleged offense. He had not been previously adjudicated delinquent in the manner defined in R.C. 2151.10(A)(2)(a).

{¶ 18} At issue is whether appellant was alleged to have a firearm. Appellant maintains that the complaint against him contained no such allegation.

{¶ 19} According to appellant, having a “deadly weapon” or “dangerous ordnance” as alleged in his complaint does not equate to an allegation of having “firearm” as is required by R.C. 2152.10(A)(2)(b) for a mandatory bind-over. A “firearm,” as defined in R.C. 2152.02(M) and 2923.11(B)(1), “means any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant. ‘Firearm’ includes an unloaded firearm, and any firearm that is inoperable but that can readily be rendered operable.”

{¶ 20} A “deadly weapon” is “any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon.” R.C. 2923.11(A). “Dangerous ordnance” includes some types of firearms, R.C. 2923.11(K), but expressly excludes others, including pistols, rifles, or shotguns suitable for sporting purposes. R.C. 2923.11(L).

{¶ 21} Since neither a “deadly weapon” nor “dangerous ordnance,” as alleged, is synonymous with the “firearm” necessary for a mandatory bind-over, appellant argues, his proceeding was discretionary. Because a discretionary bind-over requires an amenability hearing which appellant did not receive, appellant maintains the bind-over was defective and the common pleas court never acquired subject matter jurisdiction.

{¶ 22} The state disagrees. Allegations are not limited to the complaint, the state insists. The word “alleged,” as used in R.C. 2152.10(A)(2)(b), encompasses all the allegations made at any time prior to bind-over, including the state’s statement of the evidence at the mandatory bind-over hearing, the state suggests. In that statement, the

state points out, it was clearly alleged that appellant carried a firearm in the commission of his offense. As a result, the mandatory bind-over proceeding was proper and subject matter jurisdiction vested in the common pleas court.

{¶ 23} Although we favor the state’s broader view of that which constitutes an allegation, we need not reach that issue. Although the main body of the complaint against appellant tracks the language of the aggravated burglary statute, including an allegation of the use of a “deadly weapon” or “dangerous ordnance,” the complaint also contains a paragraph alleging specific behavior: “To wit: Mike King did enter the residence * * * at *gunpoint*, threaten the elderly occupants, and take items from the residence such as jewelry, *firearms*, and televisions.” (Emphasis added.)

{¶ 24} A gun and a firearm are synonymous. Merriam-Webster Thesaurus, <http://www.merriam-webster.com/thesaurus/gun> (accessed Mar. 18, 2013).

Consequently, an allegation that appellant entered the victims’ home at gunpoint is an allegation that he entered the home carrying a firearm. Moreover, it was expressly alleged that, at some point during the intrusion, appellant acquired other firearms belonging to the victims. Either of these allegations is sufficient to satisfy the allegation of the use of a firearm element in R.C. 2152.10(A)(2)(b). Since the bind-over was mandatory, there was no requirement for an amenability hearing and no deficiency in the proceedings to impede the assumption of subject matter jurisdiction by the common pleas court. Accordingly, appellant’s first assignment of error is not well-taken.

II. Ineffective Assistance of Counsel

{¶ 25} In his second assignment of error, appellant contends that the plea he entered was not knowingly or intelligently given because he was denied effective assistance of counsel.

{¶ 26} When a defendant pleads guilty or no contest, he waives his right to assert an ineffective assistance of counsel claim on appeal except to the extent the defects complained of caused the plea to be less than knowing, intelligent, and voluntary. *State v. Barnett*, 73 Ohio App.3d 244, 248-249, 596 N.E.2d 1101(2d Dist.1991). Ineffective assistance of counsel, in any circumstance, may only be a ground for reversal if the defendant demonstrates both that counsel's performance was deficient and that this deficiency resulted in prejudice to the defendant to the extent that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Accord State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). To prevail on this assignment of error, appellant must demonstrate that his trial counsel's performance was deficient and that but for this deficiency he would not have pled no contest. *State v. Xie*, 62 Ohio St.3d 521, 524, 584 N.E.2d 715 (1991).

{¶ 27} At issue is a discussion between appellant and trial counsel at the sentencing hearing. Appellant voiced to the probation department interviewer and apparently trial counsel that he wished to withdraw his plea before sentencing.

{¶ 28} At the sentencing hearing, trial counsel informed the court of these discussions, indicating that appellant was unhappy with his plea bargain and believed he could get a better deal if he withdrew his plea. Trial counsel stated that she had strongly advised against the course, told appellant that unhappiness with his deal did not constitute legal grounds for withdrawing a plea and advised him that further negotiations with the prosecutor were unlikely in the event that he withdrew his plea. During the hearing, the prosecution verified counsel's assessment that there would be no further negotiations. The trial court advised appellant that if he went to trial on the indictment, "you would be looking at five counts of felony one, that's 50 years, plus gun specifications if consecutive and max; do you understand that?" Appellant responded that he understood and advised the court that he did not wish to withdraw his plea.

{¶ 29} Appellant, citing Crim.R. 32.1 and *Xie*, contends that trial counsel's statement that appellant could not withdraw his plea merely because he was unhappy with his plea bargain was incorrect. Quoting *Xie*, at 527, appellant maintains that presentencing motions to withdraw a plea should be "freely and liberally granted." Appellant theorizes that, using this criterion, his motion would likely have been granted. The misinformation provided by trial counsel negated the knowing and intelligent nature of his decision not to move to withdraw his plea, he maintains.

{¶ 30} We rather suspect the information that swayed appellant's mind to forego his motion was the prosecution's statement that there would be no further negotiations coupled with the reminder from the court that he faced in excess of 50 years

imprisonment if things went badly at trial. More importantly, we disagree with appellant's assertion that trial counsel misinformed him.

{¶ 31} If anything, *Xie* stands for the proposition that a defendant does not have an absolute right to withdraw his plea prior to sentencing. There must be a "reasonable and legitimate basis for the withdrawal of the plea." *Id.* at paragraph one of the syllabus. Moreover, the ultimate decision rests within the discretion of the court. *Id.* at paragraph two of the syllabus.

{¶ 32} Appellant's trial counsel predicted that if appellant moved to withdraw his plea on the basis that he did not like his plea deal, the court would deny it and the prosecution would take the deal off the table and go to trial. In our view, this was a highly probable result. Accordingly, we find that appellant has failed to show that trial counsel was deficient in the performance of her duties. Appellant's second assignment of error is not well-taken.

III. Consecutive Sentences

{¶ 33} In his third assignment of error, appellant maintains the trial court abused its discretion when it sentenced him to 16 years imprisonment.

A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge. R.C. 2953.04(D)(1).

{¶ 34} The sentence imposed upon appellant was at the joint recommendation of appellant and the state. Moreover, even if we were to review the sentence, it is not contrary to law and appears to be in conformity with the purposes and principles of sentencing in Ohio. Accordingly, appellant's third assignment of error is not well-taken.

IV. Imposition of Costs

{¶ 35} In his remaining assignment of error, appellant asserts that the trial court erred in imposing the costs of prosecution, confinement and appointed counsel upon appellant.

{¶ 36} R.C. 2947.23 requires that, in all criminal cases, the court must include in the sentence the cost of prosecution. The court is to notify the defendant of the imposition of such costs at the sentencing hearing and explain that, if the defendant fails to pay, community service may be imposed instead and the judgment reduced at a specified hourly rate. R.C. 2947.23(A)(1)(a)(i)(ii).

{¶ 37} In the present matter the court advised appellant that he would be held responsible for the cost of prosecution, but failed to inform him of the alternative community service plan. Appellant maintains that the court should have determined whether appellant had the ability to pay prosecution costs and should have given the community service notification. Absent notification and the finding, appellant asserts, the imposition of prosecution costs should be vacated.

{¶ 38} Appellee responds that no finding with respect to ability to pay is required. The imposition of prosecution costs is statutorily mandated. The court may waive the

imposition of costs on a defendant's motion, but no such motion was interposed here.

Moreover, the court notified appellant at the sentencing hearing that the prosecution costs would be imposed.

{¶ 39} The state is correct with respect to possible waiver of the costs. The burden is on the defendant to initiate a request for such a waiver. *State v. Maloy*, 6th Dist. No. L-10-1350, 2011-Ohio-6919, ¶ 10. If appellant had not been notified of the imposition of prosecution costs, this would have been error, and the matter remanded for resentencing on that item. *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278, ¶ 24. In this matter, appellant was notified.

{¶ 40} As to the omission of the explanation of community service alternatives, R.C. 2947.23(A)(1)(b) states that failure to advise a defendant, "does not negate or limit the authority of the court to order the defendant to perform community service if the defendant fails to pay the judgment described in that division or to timely make payments toward that judgment under an approved payment plan." As a result, this branch of appellant's fourth assignment of error is without merit.

{¶ 41} In the second prong of this assignment of error, appellant complains that the trial court's decision to order him to pay the costs of his confinement and appointed counsel was erroneous.

R.C. 2929.18(A)(5)(a)(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*, [6th Dist. No. F-05-032, 2006-Ohio- 4135], ¶ 18, citing *State v. Lamonds*, 6th Dist. No. L-03-1100, 2005-Ohio-1219, ¶ 42.

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.

State v. Jobe, 6th Dist. No. L-07-1413, 2009-Ohio-4066, ¶ 79-80.

{¶ 42} In this matter, as in *Jobe*, the trial court did not conduct a hearing on appellant's ability to pay either of these assessments, but did enter a finding that appellant had, or would have, the ability to pay. Also as in *Jobe*, the state has not directed our attention to any point in the record in which appellant's ability to pay was considered. Neither is there anything in the presentence investigation report discussing any factor concerning appellant's ability to pay, save a notation that he had completed the tenth grade.

{¶ 43} Absent a record indicating that the court considered appellant's ability to pay costs of confinement or appointed counsel fees, the imposition of these costs fails. Accordingly, to the extent that appellant's fourth assignment of error asserts error in imposing cost of confinement and appointed counsel fees, it is well-taken.

{¶ 44} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed, in part, and reversed, in part. This matter is remanded to said court for a modification of sentence with respect to the imposition of costs of confinement and appointed counsel fees. It is ordered that appellee pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed, in part,
and reversed, 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, P.J.

Thomas J. Osowik, J.
CONCUR.

JUDGE

JUDGE

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<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.