

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

State of Ohio

Court of Appeals No. WD-11-079

Appellee

Trial Court No. 2011CR0323

v.

Theodore Wright, Jr.

DECISION AND JUDGMENT

Appellant

Decided: March 29, 2013

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney,
David E. Romaker, Jr. and Aaron T. Lindsey, Assistant
Prosecuting Attorneys, for appellee.

Lawrence A. Gold, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Theodore Wright appeals his sentence in the Wood County Court of Common Pleas on a conviction of theft, a violation of R.C. 2913.02(A)(1) and a fifth degree felony. Wright pled guilty to the offense on August 2, 2011. In a December 13,

2011 judgment, the trial court sentenced Wright to serve six months in prison for the offense. The court also ordered Wright to pay the outstanding costs of prosecution.

{¶ 2} Wright appeals the December 13, 2011 judgment to this court. He asserts two assignments of error on appeal:

1. The trial court abused its discretion and erred to the prejudice of appellant at sentencing by imposing financial sanctions without consideration of appellant's ability to pay.

2. Appellant received ineffective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Constitution of the State of Ohio.

{¶ 3} Both assignments of error concern the trial court's imposition of the obligation to pay costs of prosecution as part of appellant's sentence. Under Assignment of Error No. 1, appellant argues that the trial court erred in imposing an obligation to pay the costs of prosecution without inquiring at sentencing whether appellant had or in the future would have the ability to pay those costs.

{¶ 4} At the sentencing hearing the trial court advised appellant that it was imposing an obligation to pay costs as part of his sentence. Appellant did not seek a waiver of costs at the hearing on the basis of indigency.

{¶ 5} Appellant's contention that a sentencing court must sua sponte consider a defendant's ability to pay costs before imposing an obligation to pay the costs of

prosecution as part of a sentence is without merit. R.C. 2947.23(A)(1) requires a sentencing court to impose the costs of prosecution against all convicted defendants. *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 917 N.E.2d 393, ¶ 8. Sentencing courts retain discretion to waive those costs where they are assessed against indigent defendants. *Id.* at ¶ 14. However, to secure a waiver of the costs of prosecution on the basis of indigency, a convicted defendant must make a motion for waiver of those costs at the time of sentencing. *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, ¶ 23.

{¶ 6} We find Assignment of Error No. 1 not well-taken.

{¶ 7} Under Assignment of Error No. 2, appellant argues ineffective assistance of counsel due to counsel's failure to seek a waiver of the costs of prosecution on the basis of indigency at sentencing. Appellant acknowledges under this assignment of error that, under *Threatt*, the issue of whether a trial court erred in failing to waive costs due to the defendant's indigency is not preserved for appeal unless the defendant moved for a waiver of costs at the sentencing hearing. *Id.* Under such circumstances the issue of costs is barred on appeal by res judicata. *Id.*

{¶ 8} Appellant argues that trial counsel was deficient at sentencing because he failed to make a motion to waive costs due to indigency at the hearing. Appellant claims prejudice because due to counsel's failure he is now barred by res judicata from seeking a waiver of costs due to his indigency.

{¶ 9} To prevail on a claim of ineffective assistance of counsel, a defendant must prove two elements: “First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.”

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Proof of prejudice requires a showing “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”

Id. at 694; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus. A defendant must establish both prongs of the standard to demonstrate ineffective assistance of counsel. *Strickland* at 687.

{¶ 10} This court has considered claims of ineffective assistance of counsel arising from the failure of trial counsel to move at sentencing for the court to waive imposition of costs of prosecution on the defendant on the basis of indigency. Such claims require a showing that there is a reasonable probability that the trial court would have waived costs had trial counsel sought a waiver at sentencing. *State v. Turner*, 6th Dist. No. L-11-1080, 2012-Ohio-5985, ¶ 6; *State v. Maloy*, 6th Dist. No. L-10-1350, 2011-Ohio-6919, ¶ 12; *State v. King*, 6th Dist. No. WD-09-069, 2010-Ohio-3074, ¶ 11.

{¶ 11} The state argues that there was no reasonable probability that the trial court would have waived costs. The state argues that the trial court understood that appellant was indigent and that any motion to waive costs would have been futile.

{¶ 12} Our review of the record discloses that the court had appointed counsel to represent appellant because he was indigent. At sentencing, the court discussed with appellant the fact that he was unemployed. The trial court stated it had reviewed the presentence investigative report. The report stated appellant was unemployed and that appellant stated during the PSI interview that he had worked for a former employer for four years in the 1990s. The court delayed imposition of sentence because appellant was scheduled for back surgery with a period of rehabilitation to follow.

{¶ 13} We conclude that appellant has failed to demonstrate prejudice from counsel's error with respect to costs. Appellant has not demonstrated that there was a reasonable probability that the trial court would have waived costs had trial counsel sought a waiver at sentencing.

{¶ 14} We find Assignment of Error No. 2 not well-taken.

{¶ 15} We find that justice has been afforded the party complaining and affirm the judgment of the Wood County Court of Common Pleas. We order appellant to pay the 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.

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

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