

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

State of Ohio

Appellee

Court of Appeals Nos. L-13-1056
L-13-1057
L-13-1058

v.

Trial Court Nos. CR0200902364
CR0201202162
CR0200803927

Emmanuel Andre Wright

Appellant

DECISION AND JUDGMENT

Decided: December 30, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Lawrence A. Gold, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} This is an appeal from the judgments of the Lucas County Court of Common Pleas, sentencing appellant, Emmanuel Wright, to a total of nine and one-half years in prison for violating the terms of his community control and passing bad checks. For the following reasons, we affirm, in part, and reverse, in part.

A. Facts and Procedural Background

{¶ 2} On October 7, 2008, Wright, who is a jazz musician by trade, entered three public high schools located in Toledo, Ohio, and proceeded to remove various musical instruments without the consent of the owners. Wright was thereafter indicted in case No. CR0200803927 on three counts of burglary in violation of R.C. 2911.12(A)(1) and (C), felonies of the second degree, and three counts of theft in violation of R.C. 2913.02(A)(1) and (B)(2), felonies of the fifth degree. He ultimately entered a guilty plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) to one count of burglary. The court accepted his plea, and the remaining charges were dismissed.

{¶ 3} While Wright was awaiting sentencing in CR0200803927, he was indicted in case No. CR0200902364 on one count of burglary in violation of R.C. 2911.12(A)(1) and (C), a felony of the second degree, and one count of grand theft in violation of R.C. 2913.02(A)(3) and (B)(2), a felony of the fourth degree. The charges related to an incident that occurred at a fourth school on September 8, 2008. Ultimately, the court accepted Wright's *Alford* plea and found him guilty of the lesser offense of attempted theft.

{¶ 4} A consolidated sentencing hearing was held on December 17, 2009, at which time Wright was sentenced to a three-year term of community control for his burglary conviction in case No. CR0200803927. Additionally, the court notified Wright that

“violation of community control * * * will lead to a longer or more restrictive sanction for defendant, including a prison term of 8 years.”

{¶ 5} As to case No. CR0200902364, the court imposed another three-year community control sentence, and informed Wright that violation of the terms of community control could result in the imposition of a one-year prison sentence. Additionally, the court instructed that the sentence was to be served consecutive to the sentence imposed in CR0200803927.

{¶ 6} On May 25, 2012, while on community control, Wright visited a music store in Toledo, Ohio, where he purchased “several high end musical instruments, as well as some amplifiers.” Wright paid for the equipment using two checks. However, it was later discovered that the accounts to which the checks were linked did not have sufficient funds to cover the cost of the equipment. Consequently, on July 19, 2012, Wright was indicted on one count of passing bad checks in violation of R.C. 2913.11(B) and (F), a felony of the fifth degree.

{¶ 7} At his arraignment, Wright entered a plea of not guilty. However, Wright subsequently entered a no contest plea in exchange for the state’s recommendation of a six-month prison sentence. The court accepted the plea, ordered a presentence investigation report, and scheduled a sentencing hearing for March 27, 2013.

{¶ 8} At the sentencing hearing, the court imposed the six-month recommended prison sentence. Additionally, because Wright acknowledged that his conviction for passing bad checks constituted a violation of the terms of his community control, the

court imposed the prison sentences from CR0200803927 and CR0200902364. The court ordered the prison sentences to be served consecutively, for a total prison term of nine and one-half years. Further, the court verbally ordered Wright to pay the costs of prosecution as to each case. Notably, counsel did not object with respect to the costs of prosecution.

B. Assignments of Error

{¶ 9} Wright now appeals the trial court's judgment, assigning the following errors for our review:

I. The trial court committed plain error to the prejudice of Appellant at sentencing by imposing financial sanctions without proper notification and consideration of Appellant's ability to pay.

II. The trial court abused its discretion and erred to the prejudice of Appellant by imposing maximum sentences in CR2008-3927 and CR2009-2364.

III. 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, §10 of the Constitution of the State of Ohio.

IV. The trial court erred to the prejudice of Appellant by not making the required judicial findings before imposing consecutive sentences.

II. Analysis

A. Financial Sanctions Under R.C. 2947.23

{¶ 10} In his first assignment of error, Wright argues that the trial court erred in ordering him to pay the costs of prosecution without considering his ability to pay and notifying him of the consequences of failure to pay under R.C. 2947.23. In response, the state contends that the trial court was not required to consider Wright’s ability to pay prior to imposing court costs. Further, the state argues that the notification provision under R.C. 2947.23 does not apply to Wright since the court did not impose a community control sanction or other nonresidential sanction. We agree with the state on both arguments.

{¶ 11} Regarding the imposition of the costs of prosecution, R.C. 2947.23(A)(1)(a) provides: “In all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution, including any costs under section 2947.231 of the Revised Code, and render a judgment against the defendant for such costs.” This section “*requires* a sentencing court to impose the costs of prosecution against *all* convicted defendants.” (Emphasis added.) *State v. Wright*, 6th Dist. Wood No. WD-11-079, 2013-Ohio-1273, ¶ 5, citing *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 917 N.E.2d 393, ¶ 8; *see also State v. Dupuis*, 6th Dist. Lucas No. L-12-1035, 2013-Ohio-2128, ¶ 13 (“Pursuant to R.C. 2947.23, the trial court is required to impose ‘the costs of prosecution’ on all convicted defendants, including those who are determined to be indigent for purposes of obtaining appointed defense counsel at trial.”).

Because the imposition of costs pursuant to R.C. 2947.23 is mandatory, this court has held that “[t]he trial court is not required to hold a hearing or otherwise determine an offender’s ability to pay before ordering him to pay costs.” *State v. Reigsecker*, 6th Dist. Fulton No. F-03-022, 2004-Ohio-3808, ¶ 10, citing *State v. Fisher*, 12th Dist. Butler No. CA98-09-190, 2002-Ohio-2069. Thus, the trial court did not err by ordering Wright to pay the costs of prosecution without first determining his ability to pay.

{¶ 12} With respect to the trial court’s obligation to notify a criminal defendant of the consequences of failure to pay the costs of prosecution, R.C. 2947.23 provides in relevant part,

(A)(1)(a) In all criminal cases, * * * the judge or magistrate shall include in the sentence the costs of prosecution, * * * and render a judgment against the defendant for such costs. *If the judge or magistrate imposes a community control sanction or other nonresidential sanction, the judge or magistrate, when imposing the sanction, shall notify the defendant of both of the following:*

(i) If the defendant fails to pay that judgment or fails to timely make payments towards that judgment under a payment schedule approved by the court, the court may order the defendant to perform community service in an amount of not more than forty hours per month until the judgment is paid or until the court is satisfied that the defendant is in compliance with the approved payment schedule.

(ii) If the court orders the defendant to perform the community service, the defendant will receive credit upon the judgment at the specified hourly credit rate per hour of community service performed, and each hour of community service performed will reduce the judgment by that amount. (Emphasis added.)

{¶ 13} Under the express language of the statute, it is clear that the trial court was not required to notify Wright that failure to pay the costs of prosecution would result in an obligation to perform community service. Indeed, the statute only imposes such an obligation in cases in which the court imposes community control or other nonresidential sanction. Here, the court imposed a prison sentence. Thus, it was not required to provide the community service notification under R.C. 2947.23.

{¶ 14} Accordingly, Wright’s first assignment of error is not well-taken.

B. Maximum Sentences in CR0200803927 and CR0200902364

{¶ 15} In his second assignment of error, Wright argues that the trial court abused its discretion by imposing maximum sentences in CR0200803927 and CR0200902364. In particular, Wright contends that the trial court failed to comply with the sentencing mandates outlined in R.C. 2929.11 and 2929.12.

{¶ 16} An appellate court reviews challenges to 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 of Ohio 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.

{¶ 17} Here, Wright acknowledges that his sentences fall within the statutory range. “[A] choice of sentence from within the permissible statutory range cannot, by definition, be contrary to law.” *State v. Jones*, 6th Dist. Lucas No. L-12-1267, 2013-Ohio-4745, ¶ 13, citing *State v. Sattler*, 6th Dist. Erie No. E-11-085, 2013-Ohio-326, ¶ 10. Thus, the first prong under *Kalish* is satisfied.

{¶ 18} Next, 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. *Kalish* at ¶ 17. This prong asks whether, in selecting a specific prison term, the court's decision was “unreasonable, arbitrary or unconscionable.” *Id.* at ¶ 20.

{¶ 19} R.C. 2929.11(A) provides, in relevant part: “The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes * * *.” In order to comply with the mandates of R.C. 2929.11, a trial court must impose a sentence that is “reasonably calculated to achieve the two overriding purposes of felony sentencing * * * commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim,

and consistent with sentences imposed for similar crimes committed by similar offenders.” R.C. 2929.11(B). In exercising its discretion, the trial court must consider, inter alia, the seriousness of the criminal conduct and the likelihood of recidivism. R.C. 2929.12(A). “Consideration of these factors involves an examination of the defendant’s conduct, the victims involved, the harm caused to the victims, the defendant’s record, the defendant’s level of genuine remorse, and any other mitigating factors.” *Jones, supra*, at ¶ 15, citing R.C. 2929.12(A).

{¶ 20} Here, Wright contends that the trial court “failed to fully consider the principles and purposes of sentencing under R.C. 2929.11, which endorses the court to consider the least restrictive sentence, and R.C. 2929.12 as to the seriousness of Appellant’s crimes and recidivism factors.”

{¶ 21} Contrary to Wright’s assertions, the state argues that the record supports the trial court’s sentences. The state points out that the judgment entries indicate that the court complied with R.C. 2929.11 and 2929.12. Concerning those statutes, the trial court’s judgment entries state, in relevant part:

The Court has considered the record, oral statements, any victim impact statement and community control violation 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.

In addition, the state contends that the language contained in the judgment entries is supported by the record of the sentencing hearing. At sentencing, the trial court stated:

Mr. Wright, as you well know, this is your second community control violation on your two older cases and you're here for sentencing on a new offense of passing bad checks. You have blatantly ignored the conditions of your community control and you have continued to commit further criminal offenses, and it appears – and it's obvious that you don't take community control seriously.

* * *

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

{¶ 22} Notwithstanding the court's indication that it considered R.C. 2929.11 and 2929.12 in fashioning an appropriate sentence, Wright argues that the trial court abused its discretion by imposing the maximum sentence. He contends that he has a clean criminal record, and notes that he was convicted of a non-violent offense for which he paid the full restitution owed to the victims. Further, Wright argues that the sentences imposed by the court are inconsistent with those imposed for similar crimes committed by similar offenders.

{¶ 23} In essence, Wright's arguments pertain to the trial court's allegedly improper weighing of the various statutory factors pertaining to sentencing. Regarding this type of argument, the Supreme Court of Ohio has previously stated: "A

decisionmaker need not weigh mitigating factors in a particular manner. The process of weighing mitigating factors, as well as the weight, if any, to assign a given factor is a matter for the discretion of the individual decisionmaker.” *State v. Fox*, 69 Ohio St.3d 183, 193, 631 N.E.2d 124 (1994). Thus, Wright’s argument concerning the trial court’s weighing of the applicable factors is without merit.

{¶ 24} Having reviewed the record, it is clear from the sentencing transcript and the trial court’s judgment entries that the trial court complied with R.C. 2929.11 and 2929.12. Therefore, we find that the trial court’s imposition of maximum sentences in this case was not an abuse of discretion.

{¶ 25} Accordingly, Wright’s second assignment of error is not well-taken.

C. Ineffective Assistance of Counsel

{¶ 26} In his third assignment of error, Wright argues that his trial counsel was ineffective for failing to object to the imposition of court costs at sentencing, thereby waiving the issue on appeal.

{¶ 27} To support a claim for ineffective assistance of counsel, Wright must satisfy the two-prong test developed in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That is, Wright must show counsel’s performance fell below an objective standard of reasonableness, and a reasonable probability exists that, but for counsel’s error, the result of the proceedings would have been different. *Id.* at 687-688, 694.

{¶ 28} As noted above, the trial court properly ordered Wright to pay the costs of prosecution despite his alleged indigency. However, Wright argues that the result would have been different if trial counsel had moved for a waiver of such sanctions. Indeed, sentencing courts retain discretion to waive the costs of prosecution where they are assessed against indigent defendants. *White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 917 N.E.2d 393 at ¶ 14. 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. The record does not show that counsel objected to the imposition of costs or made a motion for waiver at the time of sentencing. Thus, the first prong under *Strickland* is satisfied. *See State v. Turner*, 6th Dist. Lucas No. L-11-1080, 2012-Ohio-5985, ¶ 6 (concluding that appointed counsel’s failure to move for a waiver of court costs was a “substantial violation of the duty he owed appellant”).

{¶ 29} As to the second prong under *Strickland*, we find that Wright has failed to demonstrate that the result of the proceedings would have been different had counsel moved for a waiver of the costs of prosecution. Notably, Wright has presented no evidence that the trial court would have waived the costs of prosecution. Without such evidence, we must find that the error of counsel was not prejudicial in this case. *Id.*, citing *State v. King*, 6th Dist. Wood No. WD-09-069, 2010-Ohio-3074, ¶ 11; *State v. Maloy*, 6th Dist. Lucas No. L-10-1350, 2011-Ohio-6919, ¶ 12.

{¶ 30} Accordingly, Wright’s third assignment of error is not well-taken.

D. Consecutive Sentences

{¶ 31} In his fourth assignment of error, Wright argues that the trial court erred by imposing consecutive sentences “without making judicial findings under R.C. 2929.14(C)(4).”

{¶ 32} R.C. 2929.14(C) provides, in relevant part:

(4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender’s conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

{¶ 33} Under R.C. 2929.14(C)(4), the trial court must state its findings in support of consecutive sentences on the record at the sentencing hearing. *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, 793 N.E.2d 473, paragraph one of the syllabus. However, it is not required to recite any “magic” or “talismanic” words when imposing consecutive sentences provided it is “clear from the record that the trial court engaged in

the appropriate analysis.” *State v. Murrin*, 8th Dist. Cuyahoga No. 83714, 2004-Ohio-3962, ¶ 12.

{¶ 34} Here, Wright argues that “the court’s recitation at [the] sentencing hearing was insufficient for purposes of the sentencing statute and * * * it is not clear from the record that the trial court correctly engaged in the requirements of R.C. 2929.14(C)(4) before imposing consecutive sentences.” Upon due consideration, we agree with Wright that the trial court failed to comply with R.C. 2929.14(C)(4) before imposing consecutive sentences.

{¶ 35} Notably, the sentencing hearing transcript is silent as to whether the sentences were to be served consecutively or concurrently. Additionally, the court failed to provide any justification for imposing consecutive sentences in its judgment entries. While the entries clearly order the sentences to be served consecutively, they do not demonstrate that the court determined that consecutive sentences were necessary to protect the public from future crime or to punish Wright, nor do they indicate that the court found that such sentences were justified in light of Wright’s conduct or the danger he poses to the public. In light of the complete absence of any such findings, we conclude that the trial court failed to comply with the mandates of R.C. 2929.14(C)(4).

{¶ 36} Accordingly, Wright’s fourth assignment of error is well-taken.

III. Conclusion

{¶ 37} For the foregoing reasons, the judgments of the Lucas County Court of Common Pleas are affirmed, in part, and reversed, in part, and this case is remanded for

resentencing in accordance with R.C. 2929.14(C)(4). Appellant and appellee are each ordered to pay one-half of the costs of this appeal pursuant to App.R. 24.

Judgments 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.

JUDGE

Stephen A. Yarbrough, 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>
