

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

State of Ohio

Court of Appeals No. E-12-005

Appellee

Trial Court No. 2008-CR-081

v.

Tyrone Lewis

**DECISION AND JUDGMENT**

Appellant

Decided: March 8, 2013

\* \* \* \* \*

Kevin J. Baxter, Erie County Prosecuting Attorney, and  
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Tyrone Lewis, pro se.

\* \* \* \* \*

**PIETRYKOWSKI, J.**

{¶ 1} Appellant, Tyrone Lewis, appeals a December 8, 2011 judgment of the Erie County Court of Common Pleas that denied his pro se motion to “Vacate Order Requiring Payment of Court Costs, Fines and/or Restitution.” Lewis filed the motion on November 22, 2011.

{¶ 2} The court filed the judgment of conviction in proceedings against appellant on April 8, 2009. In the judgment, the court convicted and sentenced appellant for theft (a violation of R.C. 2913.02(A)(1) and a fifth degree felony), forgery (a violation of R.C. 2913.31(A)(1) and a fifth degree felony), misuse of a credit card (a violation of R.C. 2913.21(B)(2) and a fifth degree felony), and identity fraud (a violation of R.C. 2913.49(B)(2) and a third degree felony). The court also ordered appellant to pay the costs of prosecution in the case.

{¶ 3} Appellant argues that the trial court erred by denying his motion to waive costs due to indigency and because the court failed to provide appellant the required statutory notice at sentencing set forth in R.C. 2947.23(A)(1). Appellant also argues that the trial court erred in failing to conduct a hearing to determine whether he was indigent.

{¶ 4} Appellant has not filed a transcript of the sentencing hearing as part of the record in this appeal. The state contends that a transcript of the sentencing hearing is necessary for this court to consider the trial court error asserted by appellant. The state also argues that appellant failed to request a waiver of court costs due to indigency at the sentencing hearing and is barred by res judicata from doing so now.

{¶ 5} The trial court conducted the sentencing hearing in this case on March 2, 2009. In its April 8, 2009 judgment, the trial court ordered appellant to pay the costs of prosecution and did not impose any obligation to pay other costs or to pay restitution.

{¶ 6} R.C. 2947.23(A)(1) requires a sentencing court to assess the costs of prosecution against all convicted defendants. *State v. White*, 103 Ohio St.3d 580,

2004-Ohio-5989, 817 N.E.2d 393, ¶ 8. However, the court retains discretion to waive costs assessed against indigent defendants. *Id.* at ¶ 14.

{¶ 7} A motion to waive costs on the basis of indigency must be made at the time of sentencing or the issue is deemed waived. *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, ¶ 23. There is no waiver, however, where the sentencing court fails to orally inform the defendant at the sentencing hearing that it is imposing costs against him. *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278, ¶ 22-23.

{¶ 8} The Ohio Supreme Court has recognized that notices required under R.C. 2947.23(A)(1) are mandatory and they are to be provided at the time the court imposes sentence. *State v. Smith*, 131 Ohio St.3d 297, 2012-Ohio-781, 964 N.E.2d 423, ¶ 10. The notifications are of mandatory community service where the defendant fails to pay costs required under R.C. 2947.23(A)(1).

{¶ 9} The version of R.C. 2947.23(A)(1) in effect at the time of sentencing provided:

(A)(1) 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. *At the time the judge or magistrate imposes sentence, the judge or magistrate shall notify the defendant of both of the following:*

(a) 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.

(b) 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.)

{¶ 10} Where a sentencing court fails to provide the mandatory notices to a defendant at sentencing as required under R.C. 2947.23(A)(1), an appellate court must vacate the sentence imposed and remand the case for resentencing in accordance with the statute. *State v. Sattler*, 6th Dist. No. E-11-085, 2013-Ohio-326, ¶ 16-17; *State v. Taylor*, 11th Dist. No. 2011-P-0090, 2012-Ohio-3890, 974 N.E.2d 175, ¶ 43; *State v. Dillard*, 1st Dist. No. C-120058, 2012-Ohio-4018, ¶ 9.

{¶ 11} It is an appellant's responsibility to provide a reviewing court with a transcript of trial court proceedings necessary to resolve assigned error on appeal. *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980); *Patrick T. v. Michelle L.*, 6th Dist. No. WD-02-015, 2002-Ohio-3574, ¶ 8-10; App.R. 9.

When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm. *Knapp* at 199.

{¶ 12} Appellant limited his motion in the trial court to seeking a waiver of imposition of costs due to indigency. His appeal is from the denial of that request. His additional argument on appeal that the trial court failed to provide mandatory notices required under R.C. 2927.23(A)(1) at sentencing was not addressed either in appellant's motion in the trial court or in the trial court judgment denying the motion. The issue is not presented in this appeal.

{¶ 13} Even if appellant had raised the R.C. 2947.23(A) notice issue in his motion in the trial court, the lack of a transcript of the sentencing hearing precludes review of appellant's claims. A transcript of the sentencing hearing is necessary to determine whether the trial court followed required procedures at sentencing, including whether the court gave mandatory R.C. 2947.23(A)(1) notices. A transcript is necessary to determine whether appellant preserved for appeal the issue of whether the trial court abused its discretion in failing to waive costs due to indigency. Due to the absence of a transcript in the record, we presume validity of the trial court proceedings at sentencing.

{¶ 14} Accordingly, we conclude that appellant's claims of trial court error are not well-taken.

{¶ 15} We conclude that justice has been afforded the party complaining and affirm the judgment of the Erie 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

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: <a href="http://www.sconet.state.oh.us/rod/newpdf/?source=6">http://www.sconet.state.oh.us/rod/newpdf/?source=6</a>.</p>
---