

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

State of Ohio

Court of Appeals No. WD-13-033

Appellee

Trial Court No. 2010-CR-0480

v.

John Moore

DECISION AND JUDGMENT

Appellant

Decided: June 13, 2014

* * * * *

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

J. Scott Hicks, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an accelerated appeal from the April 12, 2013 judgment of the Wood County Court of Common Pleas which terminated appellant John Moore's probation unsuccessfully. Because we find that the court did not err, we affirm.

{¶ 2} On November 4, 2010, appellant was indicted on one count of identity fraud, in violation of R.C. 2913.49(B)(1), a fifth degree felony. On February 18, 2011, appellant entered a guilty plea to the charge. On April 19, 2011, appellant was sentenced to two years of community control with various conditions. Further, appellant was ordered to pay court costs totaling \$438.28 and a \$50 supervision fee.

{¶ 3} On April 12, 2013, the court on the “Application of the Probation Officer of Wood County,” terminated appellant unsuccessfully from community control because he failed to pay court costs and fines. Appellant then commenced this appeal and raises the following assignment of error:

The trial court erred when it granted the recommendation of the Wood County probation office to terminate the defendant/appellant probation unsuccessfully, by it failing to hold a hearing to make the required findings in support of terminating probation unsuccessfully.

{¶ 4} In his sole assignment of error, appellant argues that the trial court erroneously terminated his community control without first conducting a hearing. Appellant relies heavily on a decision from this court regarding the need for a hearing prior to the revocation of probation. *State v. Majoras*, 6th Dist. Erie No. E-00-048, 2001 WL 640929 (June 8, 2001). In *Majoras*, the defendant was convicted of failure to pay child support. *Id.* at *1. As part of his suspended sentence, he was ordered to make monthly arrearage payments. *Id.* After conducting a hearing on the defendant’s failure to make the required payments, the trial court revoked his probation and imposed the

original 18 month prison sentence. *Id.* Quoting *Bearden v. Georgia*, 461 U.S. 660, 672-674, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983), this court determined that other than the fact that the defendant failed to make restitution payments, there was no evidence of his willful failure to pay. *Id.* at *2. In fact, at the hearing the defendant testified regarding his attempts to gain employment. Further, the defendant had offered to pay \$1,500 of the large sum. This court noted that the trial court was required to consider alternative measures of punishment. *Id.* at *3.

{¶ 5} Upon review, we find that *Majoras* is distinguishable from the present case. First, appellant was not ordered to pay a fine or restitution as part of his sentence; rather, as in all criminal cases he was assessed court costs under R.C. 2947.23. *See 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, 817 N.E.2d 393, ¶ 8. Because the imposition of costs is mandatory, the trial court is not required to conduct a hearing or otherwise determine the defendant's ability to pay. *State v. Riegsecker*, 6th Dist. Fulton No. F-03-022, 2004-Ohio-3808, ¶ 10. Further, appellant's failure to pay the costs did not result in his incarceration. Finally, the court's act of "unsuccessfully terminating" appellant from community control, though unnecessary, appears to be an attempt to preserve the ability of the state to pursue collection of the unpaid costs. For practical purposes, appellant was discharged from community control. Whether appellant was "finally discharged" for purposes of expungement, although neither before us nor ripe for determination, is an issue currently pending before the Ohio Supreme Court. *See State v. Aguirre*, 10th Dist.

Franklin No. 12AP-415, 2013-Ohio-768, *appeal accepted for review*, *State v. Aguirre*, 136 Ohio St.3d 1472, 2013-Ohio-3790, 993 N.E.2d 777, on proposition of law No. 1 (for purposes of expungement whether a defendant/applicant who still owes restitution has been “finally discharged” from conviction).

{¶ 6} Accordingly, we find that the trial court did not err in “unsuccessfully terminating” appellant’s community control. Appellant’s assignment of error is not well-taken.

{¶ 7} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Wood County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

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

Stephen A. Yarbrough, P.J.

JUDGE

James D. Jensen, 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>
