[Cite as *State v. Williams*, 2014-Ohio-2693.]

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

State of Ohio — Court of Appeals No. S-12-039

Appellee — Trial Court No. 12 CR 653

v.

Carl D. Williams — **DECISION AND JUDGMENT**

Appellant — Decided: June 20, 2014

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney, and Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Karin L. Coble, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Carl D. Williams, appeals the July 30, 2012 judgment of the Sandusky County Court of Common Pleas which, following appellant's guilty plea to one count of attempted burglary, sentenced him to three years of imprisonment.

{¶ 2} A brief recitation of the facts is as follows. On June 7, 2012, appellant was indicted on one count of burglary, in violation of R.C. 2911.12(A)(2), a second degree felony. He entered a not guilty plea. Thereafter, on July 30, 2012, he withdrew his not guilty plea and entered a plea of guilty to the lesser included offense of attempted burglary. Appellant was then sentenced to the maximum penalty of three years of imprisonment. This appeal followed.

{¶ 3} Appellant raises four assignments of error for our review:

> Assignment of Error One: The trial court erred by failing to consider community control.
>
> Assignment of Error Two: The trial court abused its discretion in sentencing appellant to the maximum term of incarceration for the offense.
>
> Assignment of Error Three: The trial court erred in imposing the costs of prosecution without orally notifying appellant these costs would be imposed, and erred in failing to give the statutorily-required notifications of R.C. 2947.23.
>
> Assignment of Error Four: The trial court erred in imposing the costs of court-appointed counsel pursuant to R.C. 2941.51(D) without ascertaining appellant's ability to pay.

{¶ 4} Appellant's first and second assignments of error concern the length of the sentence imposed by the trial court and will be jointly addressed. Appellant first

contends that the trial court erred in sentencing him without ordering a presentence investigation report ("PSI") be prepared and considering a community control sanction.

{¶ 5} Crim.R. 32.2 provides: "In felony cases the court shall, and in misdemeanor cases the court may, order a presentence investigation and report before imposing community control sanctions or granting probation." Further, R.C. 2929.19 requires that the court consider the PSI, "if one was prepared," and R.C. 2951.03 prevents the imposition of community control until a written PSI has been reviewed by the court.

{¶ 6} At the hearing, the trial court questioned appellant about his prior criminal history. Appellant admitted to serving a two and one-half year prison sentence in Mississippi and being released in September 2011. At that point, the trial court determined that it would not require the preparation of a PSI. Thus, the court did not consider appellant eligible for community control. We find no error in the court's finding.

{¶ 7} Appellant next contends that the court's imposition of a maximum prison term was an abuse of discretion. Specifically, appellant argues that the court failed to consider the principles and purposes of felony sentencing under R.C. 2929.11 and 2929.12.

{¶ 8} A sentencing court is not required to use any specific language to demonstrate that it considered the applicable seriousness and recidivism factors under R.C. 2929.12. *State v. Arnett*, 88 Ohio St.3d 208, 215, 724 N.E.2d 793 (2000); *State v. Warren*, 6th Dist. Lucas No. L-07-1057, 2008-Ohio-970, ¶ 9; *State v. Braxton*, 10th Dist.

Franklin No. 04AP-725, 2005-Ohio-2198, ¶ 27. The Ohio Supreme Court has recognized that where a trial court fails to put on the record its consideration of R.C. 2929.11 and 2929.12, it is presumed that the court gave proper consideration of those statutes. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 18, fn. 4.

{¶ 9} In the present case, prior to imposing sentence, the court questioned appellant about his work history and failure to maintain employment in Ohio. He was also questioned about his failure to obtain his GED. Finally, the court accepted the state's recommendation to sentence appellant to a maximum term which was based on the nature of the crime and appellant's criminal history. We find that the court did not err in sentencing appellant.

{¶ 10} Based on the foregoing, we find that appellant's first and second assignments of error are not well-taken.

{¶ 11} Appellant's third assignment of error challenges the trial court's imposition of the costs of prosecution without prior oral notification as required under R.C. 2947.23(A). During the sentencing, the court stated: "I would not impose a fine but would order that costs be paid including the costs of this court-appointed attorney."

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

> (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.

{¶ 13} While the imposition of costs is mandatory, this court has held that the trial court's failure to inform a defendant at the sentencing hearing of the possible imposition of community service constitutes reversible error. *State v. Ruby*, 6th Dist. Sandusky No. S-10-028, 2011-Ohio-4864, ¶ 36-42. Accordingly, appellant's third assignment of error is well-taken.

{¶ 14} Appellant's fourth and final assignment of error contends that the trial court erroneously ordered appellant to pay his court-appointed attorney fees without first determining his ability to pay. The relevant statute, R.C. 2941.51(D), provides, in part:

> The fees and expenses approved by the court under this section 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.

{¶ 15} While the court did, in the judgment entry, explicitly find that appellant has or may reasonably have the ability to pay attorney fees, such a finding must be supported by clear and convincing evidence. *See State v. Knight*, 6th Dist. Sandusky No. S-05-007, 2006-Ohio-4807, ¶ 7. At the sentencing hearing, there was discussion about the fact that when appellant first moved from Mississippi he was employed. The employment terminated because he failed to renew his state identification card. Accordingly, we find that the court did not err when it ordered appellant to pay the court-appointed attorney fees. Appellant's fourth assignment of error is not well-taken.

{¶ 16} On consideration whereof, we find that the judgment of the Sandusky County Court of Common Pleas is affirmed, in part, and reversed, in part. The portion of the judgment relative to the costs of prosecution is vacated and the matter is remanded for a sentencing hearing limited to that issue. Costs of this appeal are assessed equally to the parties 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, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE