

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

State of Ohio

Court of Appeals No. L-14-1141

Appellee

Trial Court No. CR0201401136

v.

Damien Flowers

DECISION AND JUDGMENT

Appellant

Decided: March 13, 2015

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Lawrence A. Gold, for appellant.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶ 1} This is an appeal from the judgment of the Lucas County Court of Common Pleas, convicting appellant, Damien Flowers, of one count of robbery in violation of R.C. 2911.02(A)(3), a felony of the third degree. Appellant contests the trial court's imposition of financial sanctions as part of his sentence. We affirm.

A. Facts and Procedural Background

{¶ 2} Appellant was initially indicted on one count of aggravated robbery, with a firearm specification, in violation of R.C. 2911.01(A)(1) and 2941.145, a felony of the first degree. The charge stemmed from an incident wherein appellant robbed a pizza delivery person at gunpoint.

{¶ 3} Ultimately, appellant entered a plea of guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), to the lesser included offense of robbery in violation of R.C. 2911.02(A)(3), a felony of the third degree. The trial court accepted the plea and ordered a presentence investigation report.

{¶ 4} At the sentencing hearing on May 29, 2014, the trial court ordered appellant to serve 30 months in prison. In addition, the trial court found that appellant, upon his release, would have the ability to pay the costs of prosecution and fees. The trial court also ordered appellant to pay \$173 in restitution. Appellant did not object to the imposition of the financial sanctions.

{¶ 5} In the subsequent judgment entry, the trial court stated, in pertinent part,

Defendant found to have, or reasonably may be expected to have, the means to pay all or part of the applicable costs of supervision, confinement, assigned counsel, and prosecution as authorized by law. Defendant ordered to reimburse the State of Ohio and Lucas County for such costs **and to pay restitution in the amount of \$173.00 to Vito's Pizza**. This order of reimbursement and restitution is a judgment enforceable pursuant to law by

the parties in whose favor it is entered. Defendant further ordered to pay the cost assessed pursuant to R.C. 9.92(C), 2929.18 and 2951.021. Notification pursuant to R.C. 2947.23 given.

B. Assignments of Error

{¶ 6} Appellant has timely appealed the judgment of conviction, and now asserts two assignments of error for our review:

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

II. 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.

II. Analysis

A. Imposition of Financial Sanctions

{¶ 7} In his first assignment of error, appellant argues that the trial court committed plain error when it imposed financial sanctions against him. In this case, the financial sanctions can be divided into two categories: (1) mandatory sanctions including the costs of prosecution imposed pursuant to R.C. 2947.23 and the mandatory one-dollar citizens' reward program cost imposed pursuant to R.C. 9.92(C); and (2) discretionary sanctions including the award of restitution under R.C. 2929.18(A)(1), the costs of

confinement imposed under R.C. 2929.18(A)(5)(a)(ii), and the cost of assigned counsel under R.C. 2941.51(D).¹

1. Mandatory Financial Sanctions Under R.C. 2947.23 and 9.92(C)

{¶ 8} First, relative to the mandatory costs imposed pursuant to R.C. 2947.23 and 9.92(C), it is well settled that “an indigent defendant must move a trial court to waive payment of costs at the time of sentencing. If the defendant makes such a motion, then the issue is preserved for appeal.” *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, ¶ 23. If the defendant fails to make such a motion, the issue is waived and costs are res judicata. *Id.* Here, the record is clear that appellant did not make a motion to waive payment of the mandatory costs. Therefore, the application of res judicata bars appellant’s challenge to these costs on appeal.

2. Discretionary Financial Sanctions Under R.C. 2929.18(A)(1), 2929.18(A)(5)(a)(ii), and 2941.51(D)

{¶ 9} The second category of financial sanctions imposed by the trial court are the award of restitution and the discretionary costs for confinement and appointed counsel.

{¶ 10} R.C. 2929.18(A)(1) authorizes the trial court to award restitution to the victim in an amount based on the victim’s economic loss. Likewise, R.C. 2929.18(A)(5)(a)(ii) states that an offender may be ordered to reimburse the government for “[a]ll or part of the costs of confinement * * * provided that the amount of

¹ As the state notes, the imposition of costs for supervision, as provided for in R.C. 2951.021, is not applicable because appellant has not been placed on community control.

reimbursement ordered under this division shall not exceed the total amount of reimbursement the offender is able to pay as determined at a hearing and shall not exceed the actual cost of the confinement.”

{¶ 11} Before imposing these sanctions, the trial court “shall consider the offender’s present and future ability to pay the amount of the sanction or fine.” R.C. 2929.19(B)(5). We have held that while a sentencing court is not required to hold a separate hearing when determining whether to impose a financial sanction under these provisions, the record must contain some evidence that the court considered the offender’s present and future ability to pay such a sanction. *State v. Phillips*, 6th Dist. Fulton No. F-05-032, 2006-Ohio-4135, ¶ 18, citing *State v. Lamonds*, 6th Dist. Lucas No. L-03-1100, 2005-Ohio-1219, ¶ 42. Further, the trial court need not explicitly state that it considered a defendant’s ability to pay; instead, we look to the totality of the record to determine whether the requirement has been satisfied. *Id.* at ¶ 18, citing *State v. Berry*, 4th Dist. Scioto No. 04CA2961, 2006-Ohio-244, ¶ 43.

{¶ 12} Similar to the financial sanctions under R.C. 2929.18, the imposition of costs for appointed counsel also depends on appellant’s ability to pay. R.C. 2941.51(D) provides that the represented person shall pay if he or she “has, or reasonably may be expected to have, the means to meet some part of the cost of the services rendered * * *.” In addition, the costs imposed under R.C. 2941.51(D) are limited to “an amount that the person reasonably can be expected to pay.” *Id.* “Again, no hearing on this matter is expressly required, but the court must enter a finding that the offender has the ability to

pay and that determination must be supported by clear and convincing evidence of record.” *State v. Jobe*, 6th Dist. No. L-07-1413, 2009-Ohio-4066, ¶ 80, citing *State v. Knight*, 6th Dist. No. S-05-007, 2006-Ohio-4807, ¶ 6-7.

{¶ 13} Here, the trial court affirmatively stated that it found appellant has, or reasonably may be expected to have, the means to pay all or part of the applicable costs. Appellant argues that the trial court erred in its determination given the length of his sentence, and the likely additional time that will be imposed in federal court for violation of his parole. We disagree, and find that the trial court’s determination is supported by clear and convincing evidence of record. At the time of sentencing, appellant was only 32 years old. Further, he has completed his GED, and has been employed up until this arrest. Therefore, we hold that the trial court did not err when it ordered appellant to pay restitution, and imposed the costs of confinement and appointed counsel. *Compare State v. Maloy*, 6th Dist. Lucas No. L-10-1350, 2011-Ohio-6919, ¶ 15 (appellant unable to pay where he only made it to his sophomore year in high school, has never been gainfully employed, and will be incarcerated until he is 94 years old) and *Jobe* at ¶ 82 (appellant unable to pay where he only “completed the eighth grade, did not obtain a GED and has never held a job”) with *State v. Willis*, 6th Dist. Lucas No. L-11-1274, 2012-Ohio-6070, ¶ 20 (appellant able to pay where he had some college education and a work history) and *State v. Donaldson*, 6th Dist. Lucas No. L-11-1264, 2012-Ohio-6064, ¶ 31 (appellant able to pay where he had 10th grade education, has held jobs in the past, and is only 41 years old).

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

B. Ineffective Assistance of Counsel

{¶ 15} Alternatively, appellant argues in his second assignment of error that his trial counsel was ineffective for failing to object to the imposition of financial sanctions. In order to demonstrate ineffective assistance of counsel, appellant 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, appellant 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.

{¶ 16} Here, we find that appellant has failed to satisfy the elements for ineffective assistance of counsel. Relative to the imposition of the mandatory costs, we note that those costs have been held to apply even to indigent defendants. *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, ¶ 8. Nevertheless, a trial court, in its discretion, may waive the mandatory costs. *See id.*; R.C. 9.92(C)(1). However, appellant has made no demonstration that a reasonable probability exists that the trial court would have waived payment of the costs had appellant so moved. Therefore, we cannot conclude that appellant was denied the effective assistance of counsel for failing to object to the imposition of these costs. *See Maloy* at ¶ 12.

{¶ 17} Further, we do not find that trial counsel was ineffective relative to the imposition of the discretionary costs. The trial court determined that appellant was found

to have, or reasonably may be expected to have, the means to pay those costs, and the court's determination was supported by the evidence in the record. Appellant has not shown that a reasonable probability exists that the court would not have imposed those costs had counsel objected. Therefore, we hold that appellant was not denied the effective assistance of counsel.

{¶ 18} Accordingly, appellant's second assignment of error is not well-taken.

III. Conclusion

{¶ 19} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered 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, J.

JUDGE

Stephen A. Yarbrough, P.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>
