

[Cite as *State v. Luna*, 2009-Ohio-2712.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91271

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RAMON LUNA

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-501245

BEFORE: Gallagher, P.J., Rocco, J., and Kilbane, J.

RELEASED: June 11, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

SEAN C. GALLAGHER, P.J.:

{¶ 1} Appellant, Ramon Luna (“Luna”), appeals his sentence from the Cuyahoga County Court of Common Pleas. For the reasons outlined below, we overrule the three assigned errors and affirm the sentence imposed.

{¶ 2} In September 2007, Luna was charged with two counts of trafficking marijuana in violation of R.C. 2925.03(A)(1) and (A)(2) in an amount equal to or exceeding twenty thousand grams, which are felonies of the second degree. Luna was also charged with possession of drugs under R.C. 2925.11(A) and possession of criminal tools under R.C. 2923.24(A). The charges included forfeiture specifications related to money, personal property, and a tractor-trailer truck.

{¶ 3} On February 19, 2008, Luna pled guilty to the two counts of trafficking marijuana as amended to reflect an amount by weight between five thousand and twenty thousand grams, which are felonies of the third degree. As part of the plea agreement, Luna agreed to forfeit all property named in the indictment, and he agreed to an aggregate sentence of six years in prison. Luna further agreed to testify against a codefendant.

{¶ 4} On April 7, 2008, Luna was sentenced to six years in prison.

{¶ 5} Luna appeals, advancing three assignments of error for our review.

{¶ 6} Assignment of Error No. 1: “The trial court erred by imposing a sentence that exceeded the minimum and concurrent terms of imprisonment on

the basis of a facially unconstitutional statutory sentencing scheme and that was procedurally and substantively unreasonable in violation of the U.S. Constitution Amendment V.”

{¶ 7} We will not address Luna’s first assignment of error because Luna’s sentence was an agreed sentence. In *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, 829 N.E.2d 690, the Ohio Supreme Court held that pursuant to R.C. 2953.08(D), a sentence is not subject to review when the sentence is authorized by law, jointly recommended by the parties, and imposed by the sentencing judge. The court reasoned that “the General Assembly intended a jointly agreed-upon sentence to be protected from review precisely because the parties agreed that the sentence is appropriate.” *Id.* at 10. “Authorized by law” under R.C. 2953.08(D) means that the sentence falls within the statutorily set range of available sentences, so long as the prison term imposed does not exceed the maximum term prescribed by the statute for the offense. *State v. Jackson*, Cuyahoga App. No. 86506, 2006-Ohio-3165.

{¶ 8} Here, Luna agreed to a six-year sentence and the trial court sentenced him accordingly. He was sentenced to five years on one count and one year on another count. The sentence was ordered to run consecutive, for a total of six years. The sentence imposed for each offense fell within the statutory range for felonies of the third degree. Thus, his sentence was authorized by law. Accordingly, Luna’s first assignment of error is overruled.

{¶ 9} Assignment of Error No. 2: “The court erred in sentencing Mr. Luna to pay court costs without addressing the issue of court costs at the sentencing hearing and by not considering the accused’s ability to pay a monetary sanction.”

{¶ 10} Luna argues that the trial court failed to order court costs at the sentencing hearing and, thus, could not order him to pay court costs, citing Crim.R. 43(A), which requires a defendant’s presence at sentencing. He also contends he was prejudiced by the trial court’s failure to mention court costs at the sentencing hearing because he was not able to challenge the imposition or his ability to pay.

{¶ 11} In a similar case, *State v. Clifford*, Paulding App. No. 11-04-06, 2005-Ohio- 958, Clifford argued that the judgment entry of sentencing included an order for court costs that was not imposed at the sentencing hearing, which he asserted violated Crim.R. 43(A). Clifford also argued that the trial court erred in imposing court costs against him because he is indigent. The court explained that the trial court is required to assess the cost of prosecution against a convicted criminal defendant pursuant to R.C. 2947.23(A)(1). The court also noted that there was no requirement that the imposition of court costs be made on the record at the sentencing hearing. The court concluded that because “the imposition of court costs is mandatory, and not at the discretion of the trial court, the Crim.R. 43(A) protection that a defendant be present at the imposition of sentence was not violated.” *Id.*

{¶ 12} The court further concluded that the trial court did not err in assessing court costs against Clifford, despite his indigent status at the time of trial, because the Ohio Supreme Court had recently held that “R.C. 2947.23 does not prohibit a court from assessing costs against an indigent defendant; rather it requires a court to assess costs against all convicted defendants.” *Id.*, quoting *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, at ¶8, 817 N.E.2d 393.

{¶ 13} In *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, the Ohio Supreme Court stated that a trial judge has discretion to waive costs assessed against an indigent defendant; however, an indigent defendant must move a trial court to waive payment of costs at the time of sentencing. *Id.* If the defendant makes such a motion, then the issue is preserved for appeal and will be reviewed under an abuse-of-discretion standard. Otherwise, the issue is waived and costs are res judicata. *Id.*

{¶ 14} In *State v. Clevenger*, 114 Ohio St.3d 258, 2007-Ohio-4006, 871 N.E.2d 589, the Ohio Supreme Court again explained that the common pleas courts do not have the power to suspend the execution of a sentence unless authorized by statute. Limited statutory authority exists for waiver of payment, as opposed to the suspension, of costs. R.C. 2949.092 permits a trial court to waive the payment of costs imposed if the trial court finds the defendant to be indigent. A motion by an indigent criminal defendant to waive payment of costs must be made at the time of sentencing. If the defendant makes such a motion,

then the issue is preserved for appeal and will be reviewed under an abuse-of-discretion standard. Otherwise, the issue is waived and costs are res judicata.

{¶ 15} Although the trial court did not address court costs during the sentencing hearing, nothing in the transcript indicates Luna was prevented from raising the issue of his ability to pay costs. He did not present an affidavit of indigency at the time of sentencing. The trial judge was therefore required to impose the costs in this case. Accordingly, Luna's second assignment of error is overruled.

{¶ 16} Assignment of Error No. III: "Defendant Ramon Luna was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution and Article I, Section 10 of the Ohio Constitution."

{¶ 17} In this assigned error, Luna argues that his trial counsel was ineffective for failing to raise a continuing challenge to the *Foster* decision regarding minimum and concurrent sentences. He also argues that the failure to challenge the court costs at sentencing prejudiced Luna.

{¶ 18} A claim of ineffective assistance of counsel requires proof that counsel's "performance has fallen below an objective standard of reasonable representation and, in addition, prejudice arises from that performance. * * *

The establishment of prejudice requires proof that there exists a reasonable

probability that were it not for counsel's errors, the result of the trial would have been different." (Internal quotation and citations omitted.) *State v. Carter*, Cuyahoga App. No. 91019, 2008-Ohio-6955.

{¶ 19} In this instance, Luna's trial counsel effectively saved Luna a possible six additional years of incarceration by negotiating the plea. The original charges carried a mandatory term of imprisonment of eight years. Because the *Foster* challenges have been rejected by this court, it cannot be said that trial counsel's performance fell below an objective standard of reasonableness.

{¶ 20} Further, we cannot second-guess the decision of Luna's counsel not to file an affidavit of indigency regarding the court costs at the time of sentencing. Even if Luna had filed an affidavit of indigency, there is no guarantee that the trial court would have waived the costs, especially in light of the fact that Luna had retained counsel and had legitimate employment in the oil industry for many years. Thus, Luna cannot show how he was prejudiced. Costs must be assessed against all defendants. R.C. 2947.23.

{¶ 21} For these reasons, Luna's third assigned error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, PRESIDING JUDGE

KENNETH A. ROCCO, J., and
MARY EILEEN KILBANE, J., CONCUR