[Cite as *Cleveland Hts. v. Machlup*, 2009-Ohio-6468.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93086

CITY OF CLEVELAND HEIGHTS

PLAINTIFF-APPELLEE

vs.

PETER MACHLUP

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cleveland Heights Municipal Court
Case No. CRB 08 01990

BEFORE: Stewart, J., Kilbane, P.J., and Boyle, J.

RELEASED: December 10, 2009

JOURNALIZED:

FOR APPELLANT

Peter Machlup
1783 Cadwell Avenue
Cleveland Heights, OH 44118

ATTORNEYS FOR APPELLEE

John H. Gibbon
Director of Law

BY: Dierdra M. Howard
Assistant Director of Law
City of Cleveland Heights
40 Severance Circle
Cleveland Heights, OH 44118

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).

MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Peter Machlup, appeals from a municipal court order that, in the course of dismissing a criminal complaint by the city of Cleveland Heights alleging Machlup's failure to file city income tax returns, ordered him to pay $57 in court costs. Machlup argues that (1) the court had no jurisdiction to hear this matter because the person signing the complaint was not a licensed attorney, and (2) the court had no authority to order him to pay court costs because the court dismissed the complaint on the city's motion.

{¶ 2} The city filed a complaint that alleged that Machlup had "failed, neglected or refused to make any municipal tax return or declaration for the tax year(s) 2001-2007." The record shows that two pretrials were conducted, after which Machlup filed a motion asking the court to order the city to "perform according to the settlement agreement[.]" Machlup claimed that the city offered a settlement agreement in which it would dismiss the complaint if he were to provide the missing tax declarations and remit all unpaid taxes. He claimed that he upheld his end of the agreement by submitting tax declarations and making payment on an outstanding tax debt of $20.40, but that the city had not dismissed the complaint as agreed.

{¶ 3} One week after seeking to enforce the alleged settlement agreement, but before the court took any action on the motion, Machlup filed a motion to set aside a magistrate's "interim" order denying the city's request to dismiss the complaint. Machlup claimed that his settlement agreement with the city provided that the city would pay any court costs that might be ordered against him. But when shown the motion to enforce the settlement agreement, a magistrate supposedly stated, "I cannot accept this motion." Machlup asked the court to set aside the magistrate's refusal to accept the settlement and grant dismissal on terms agreed to by the parties.

{¶ 4} The city responded to Machlup's motions and confirmed that it agreed to dismiss the complaint on the condition that Machlup file his outstanding tax returns within 30 days of arraignment and that he pay court costs. The city claimed that when a magistrate attempted to confirm these terms, Machlup objected to having to pay court costs. With Machlup objecting, the city claimed that the magistrate refused to enforce the settlement. Because it believed that Machlup had agreed to pay court costs as part of the settlement, the city confirmed its desire to dismiss in the event that Machlup assumed responsibility for the court costs.

{¶ 5} Machlup then sought to amend his previous motion to set aside the magistrate's interim order denying the city's request to dismiss the case, offering a partial transcript of "my recording of that hearing." Based on his

transcription of that recording, he argued that the court should accept and enforce as an "oral" motion to dismiss the agreement he reached with the city that the case would be dismissed without any limitation. He then asked the court to disregard a written dismissal, prepared by the city and offered to the magistrate, which obligated him to pay court costs.

{¶ 6} The court issued an order that stated: "For good cause shown, plaintiff's motion to dismiss at defendant's costs is granted. Court costs are assessed to defendant."

I

{¶ 7} Machlup first argues that the court erred by refusing to dismiss the complaint on grounds that the person signing the complaint, a city employee, was not authorized to practice law. The court denied that motion without opinion.

{¶ 8} Crim.R. 3 states:

{¶ 9} "A complaint is a written statement of the essential facts constituting the offense charged. It shall also state the numerical designation of the applicable statute or ordinance. It shall be made upon oath before any person authorized by law to administer oaths."

{¶ 10} There is no requirement that a complaint can be sworn only by a person who is authorized to practice law. In fact, a complaint need not be signed by a person who observed the commission of the offense — it is

"sufficient if such person has reasonable grounds to believe that the accused has committed the crime." *Sopko v. Maxwell* (1965), 3 Ohio St.2d 123, 124; *State v. Wilson* (1995), 102 Ohio App.3d 1.

{¶ 11} The complaint filed in this case contained a written statement of the essential facts constituting the offense of failing to file a tax return, it stated the numerical designation of the ordinance that was violated, and it was made upon oath before a notary public. In all respects it conformed with Crim.R. 3.

{¶ 12} Machlup also maintains that the complainant engaged in the unauthorized practice of law by deciding to bring the charges and promising to dismiss the action. This argument is without merit because the complainant acted as a representative of the city and not as legal counsel for the city. At all events, the city law director or his assistant represented the city during the proceedings. It may be that the city employee suggested the terms on which the city would agree to settle the matter, but that authority to state terms agreeable to the city is not the same thing as practicing law. The record gives no basis for concluding that the complainant engaged in any form of unauthorized practice of law.

II

{¶ 13} Machlup next argues that the court could not assess costs against him in the absence of any statute that specifically authorized such costs and that costs can only be assessed to convicted defendants during sentencing.

{¶ 14} R.C. 2947.23 states that in criminal cases terminated by a conviction and entry of sentence, "the judge or magistrate shall include in the sentence the costs of prosecution and render a judgment against the defendant for such costs."

{¶ 15} While a conviction is usually a prerequisite for the imposition of court costs, the parties in a criminal prosecution that is settled and dismissed can otherwise agree that a defendant be responsible for the payment of court costs. See *Cuyahoga Falls v. Coup-Peterson* (1997), 124 Ohio App.3d 716, 717; *Clark v. Marc Glassman, Inc.*, Cuyahoga App. No. 86190, 2006-Ohio-1335, at ¶17.

{¶ 16} In its reply to Machlup's motion to enforce the terms of the "oral" settlement agreement, the city claimed that it always conditioned its agreement to settle the case on Machlup's agreement to pay court costs. For his part, Machlup repeatedly denied agreeing to pay court costs as part of a settlement. But apart from representations made by the parties in their written submissions to the court, there is nothing in the record to substantiate either of their claims.

{¶ 17} A trial court "speaks through its journal entries." *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, at ¶47. The only journal entry issued by the court (apart from notices of hearings) was the court's order dismissing the case at Machlup's costs. This entry gave no indication that there had been an agreement to settle the case, nor did it contain any explanation of why costs were being imposed against a criminal defendant when the case had not resulted in a judgment of conviction. The record shows that the court scheduled a "special hearing" shortly before it dismissed the case, but the record gives no indication that the hearing went forward, much less that the court heard evidence on the parties' respective positions. In fact, the record does not even contain a motion by the city to dismiss the case.

{¶ 18} We recognize that the parties have each offered anecdotal evidence to support their respective positions, but none of that evidence is properly in the record on appeal because the court failed to conduct an evidentiary hearing on the matter. Moreover, although the absence of a record normally requires us to presume the regularity of the proceedings below, *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, no presumption of regularity can attach when the parties so contentiously disputed the payment of costs, and there is nothing in the record to show that the court took any action to resolve that dispute.

{¶ 19} Being limited solely to the court's judgment entry of dismissal, we are constrained to find that the court erred by imposing those court costs. Without a prerequisite conviction as required by R.C. 2947.23, the court could only impose costs upon agreement of the parties. The court failed to note that the parties had agreed to Machlup's payment of court costs, and no such agreement is shown in the limited record on appeal. We therefore sustain Machlup's second assignment of error and reverse and remand with instructions for the court to vacate the court costs assessed against him.

{¶ 20} This cause is reversed and remanded for proceedings consistent with this opinion.

It is ordered that appellant recover of appellee his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cleveland Heights Municipal Court to carry this judgment into execution.

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

MELODY J. STEWART, JUDGE

MARY EILEEN KILBANE, P.J., and
MARY J. BOYLE, J., CONCUR