

[Cite as *State v. Brown*, 2011-Ohio-1096.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95048

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

VERNON BROWN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-447563

BEFORE: Celebrezze, P.J., Jones, J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: March 10, 2010

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FRANK D. CELEBREZZE, JR., P.J.:

{¶ 1} Appellant, Vernon Brown, appeals the imposition of court costs stemming from his murder trial. After a thorough review of the record and applicable case law, we affirm the imposition of costs.

{¶ 2} After the reversal of appellant's conviction and death sentence by the Ohio Supreme Court in *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, 873 N.E.2d 858 ("*Brown I*"), appellant was retried on charges of murder, aggravated murder, robbery, carrying a concealed weapon, and having a weapon while under disability. On February 12, 2009, a jury found appellant not guilty of aggravated murder, but guilty of the

remaining charges. A sentencing hearing was held on February 23, 2009, where the trial court sentenced appellant, including imposing court costs. According to appellant, his counsel orally moved to waive court costs, and the trial court advised that it would consider the motion. On February 25, 2009, the court's journal entry indicated that costs were imposed. It states, "[t]he public defender's officer is appointed for purposes of appeal. Pay court costs. * * * Defendant is to pay court costs."

{¶ 3} Appellant then instituted an appeal in *State v. Brown*, Cuyahoga App. No. 93007, 2010 -Ohio-2460 ("*Brown II*"), where he assigned several errors unrelated to the imposition of court costs on an indigent defendant. Appellant's assigned errors were overruled by this court, and the Ohio Supreme Court declined further review. See *State v. Brown*, 126 Ohio St.3d 1601, 2010-Ohio-4928, 935 N.E.2d 47.

{¶ 4} On March 24, 2010, appellant filed a motion to waive costs pursuant to *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278. Appellant's motion was denied on April 19, 2010, and he then instituted the present appeal, citing one assignment of error.

Law and Analysis

Res Judicata

{¶ 5} Appellant argues that he "was deprived of his property without due process of law and his rights under the Sixth Amendment where the trial court imposed costs in his absence." However, because appellant could have addressed this error in *Brown II*, the claim is now barred by res judicata.

{¶ 6} The doctrine of res judicata involves both claim preclusion, which historically has been called estoppel by judgment, and issue preclusion, which traditionally has been referred to as collateral estoppel. *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 381, 1995-Ohio-331, 653 N.E.2d 226. Under the claim preclusion branch of res judicata, “[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.” *Id.* at the syllabus. Issue preclusion, or collateral estoppel, precludes relitigation of an issue that has been “actually and necessarily litigated and determined in a prior action.” *Krahn v. Kinney* (1989), 43 Ohio St.3d 103, 107, 538 N.E.2d 1058.

{¶ 7} In *Grava*, the court stated that the doctrine of res judicata bars not only subsequent actions involving the same legal theory of recovery as the previous action, but also claims that could have been litigated in the previous action: “‘It has long been the law of Ohio that “an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were *or might have been litigated* in a first lawsuit.’”” (Emphasis sic). *Id.* at 382, quoting *Natl. Amusements, Inc. v. Springdale* (1990), 53 Ohio St.3d 60, 62, 558 N.E.2d 1178, quoting *Rogers v. Whitehall* (1986), 25 Ohio St.3d 67, 69, 494 N.E.2d 1387. Further, the court held that “[t]he doctrine of res judicata requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it.” *Id.*, quoting *Natl. Amusements* at 62.

{¶ 8} In the present case, appellant was aware at the time he instituted his appeal that the court had imposed costs. Therefore, because he could have raised the instant challenge in *Brown II*, but did not, his claims are barred by res judicata. *State v. McDowell*, Mercer App. No. 10-06-34, 2007-Ohio-5486, ¶12.

{¶ 9} Even if they were not, the Ohio Supreme Court has found that “costs are taxed against certain litigants for the purpose of lightening the burden on taxpayers financing the court system.” *Strattman v. Studt* (1969), 20 Ohio St.2d 95, 102, 253 N.E.2d 749. Therefore, “costs are not punishment, but are more akin to a civil judgment for money.” *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, ¶15.

Courts are directed by R.C. 2947.23 to assess costs against all criminal defendants, but the trial court retains discretion to determine whether those costs should be assessed to an indigent defendant. *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, ¶14. Accordingly, “an indigent defendant must move a trial court to waive payment of costs at the time of sentencing[, and] * * * then the issue is preserved for appeal and will be reviewed under an abuse-of-discretion standard.” *Threatt* at ¶23.

{¶ 10} “Ohio law does not prohibit a court from imposing a fine on an indigent defendant.” *State v. Brantley*, Cuyahoga App. No. 94508, 2010-Ohio-5760, ¶13, quoting *State v. Ramos*, Cuyahoga App. No. 92357, 2009-Ohio-3064, ¶7, citing *State v. Roark*, Cuyahoga App. No. 84992, 2005-Ohio-1980.

{¶ 11} Appellant claims the trial court imposed court costs without his presence; however, the trial court imposed costs at the sentencing hearing while appellant was

present. After the imposition of costs, appellant orally moved for costs to be waived. While appellant was found indigent regarding legal representation, in denying a motion to waive costs on appeal, this court noted, “‘simply because a person is indigent for purposes of legal representation does not mean he is indigent for purposes of paying fines or court costs.’” *State v. Shie*, Cuyahoga App. No. 88677, 2007-Ohio-3773, ¶16, quoting *Cleveland v. Tighe*, Cuyahoga App. Nos. 81767 and 81795, 2003-Ohio-1845, ¶14, fn. 4. See, also, *State v. Powell* (1992), 78 Ohio App.3d 784, 789, 605 N.E.2d 1337.

{¶ 12} Contrary to appellant’s argument, the trial court had already imposed costs and retained discretion to grant or deny appellant’s motion. Because appellant’s arguments are barred by res judicata, and appellant was indeed present when the court imposed costs, appellant’s 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.

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

FRANK D. CELEBREZZE, JR., PRESIDING JUDGE

LARRY A. JONES, J., and
SEAN C. GALLAGHER, J., CONCUR