

[Cite as *State v. Kenney*, 2011-Ohio-1232.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94657

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

PAUL KENNEY, A.K.A. KENNY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED; REMANDED FOR IMPOSITION
OF COURT COSTS

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-506263 and CR-520789

BEFORE: Cooney, J., Sweeney, P.J., and Rocco, J.

RELEASED AND JOURNALIZED: March 17, 2011
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COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Paul A. Kenny (“Kenny”), appeals his sentence for robbery. Finding merit to the appeal, we affirm his conviction but remand to allow him to move for waiver of court costs.

{¶ 2} In April 2009, Kenny was convicted of one count of robbery pursuant to R.C. 2911.01(A)(2) and one count of robbery pursuant to R.C. 2911.02(A)(3). He was sentenced to three years’ incarceration.

{¶ 3} In August 2009, Kenny’s initial appeal was dismissed by this court for failure to file a timely notice of appeal. In March 2010, Kenny filed a pro se motion for leave to file a delayed appeal, which was granted by this court. Kenny was appointed counsel.

{¶ 4} In his sole assignment of error on appeal, Kenny argues that the trial court erred by imposing court costs in the sentencing entry, despite having failed to impose them in Kenny’s presence during the sentencing hearing, in violation of Crim.R. 43 and R.C. 2947.23. The State concedes this issue.

{¶ 5} Crim.R. 43(A) states that a criminal defendant must be present at every stage of his trial, including sentencing. R.C. 2947.23(A) provides: “[i]n 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.”

{¶ 6} This issue was recently addressed by the Ohio Supreme Court in *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278. The court held that a trial court may not impose court costs in its sentencing entry when it did not impose those costs on the defendant in open court. The court held that this error does not void a defendant’s entire sentence, but mandates that the case be remanded for the limited purpose of allowing the defendant to request a waiver of payment of court costs.

{¶ 7} As was the case in *Joseph*, Kenny was denied the opportunity to claim indigency and to seek a waiver of the payment of court costs. Kenny is entitled to this opportunity, although not a complete resentencing. He is entitled to be notified of the imposition of court costs as required by R.C. 2947.23.

{¶ 8} Accordingly, we affirm his conviction and remand this matter to the trial court for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share equally their 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 resentencing.

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

COLLEEN CONWAY COONEY, JUDGE

JAMES J. SWEENEY, P.J., and
KENNETH A. ROCCO, J., CONCUR