

[Cite as *State v. Stevens*, 2011-Ohio-729.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 95011**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**TIMOTHY STEVENS**

DEFENDANT-APPELLANT

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**JUDGMENT:  
REMANDED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-531344

**BEFORE:** Keough, J., Gallagher, P.J., and Rocco, J.

**RELEASED AND JOURNALIZED:** February 17, 2011

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KATHLEEN ANN KEOUGH, J.:

{¶ 1} Defendant-appellant, Timothy Stevens, appeals from the trial court's judgment sentencing him to six years incarceration and ordering him to pay court costs. He argues that the trial court should have waived the imposition of costs because he is indigent and that it erred in imposing costs without considering his present and future ability to pay the costs. We remand for the limited purpose of allowing Stevens to move the court for waiver of the payment of court costs.

{¶ 2} Stevens pled guilty to burglary, a second degree felony, and theft, a first degree misdemeanor. At sentencing, the trial court sentenced him to six years incarceration and informed him that he was subject to five years mandatory postrelease control. Although the trial court did not mention court costs at the sentencing hearing, its journal entry ordered that Stevens pay court costs. The trial court subsequently resentenced Stevens after it was advised by the Ohio Department of Rehabilitation and Correction that he was subject to three years mandatory postrelease control, not five years as originally sentenced. Again, although the trial court did not impose court costs during the hearing, its journal entry of sentencing ordered that Stevens pay court costs.

{¶ 3} In his first assignment of error, Stevens argues that the trial court should have waived or suspended the imposition of costs because the court found him to be indigent on three occasions: at arraignment, when it approved assigned counsel fees, and when it appointed the public defender to represent him at the resentencing hearing. Stevens asserts that he earns only \$18 per month in prison, will be 52 years old when he is released from prison and, upon release, will not have held a job for nearly 30 years. Therefore, he contends that he is presently unable to pay the court costs and will be unable to do so after his release from prison and, accordingly, the trial court erred in not waiving or suspending payment of the costs. He asks that we modify the judgment entry and strike the imposition of costs.

{¶ 4} In *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, ¶14, the Ohio Supreme Court held that R.C. 2947.23 requires a trial court to assess costs

against all criminal defendants, and to do so even if the defendant is indigent.<sup>1</sup> It further held that waiver of the payment of such costs is permitted, but not required, if the defendant is indigent. *Id.*, ¶8, 14; see, also, R.C. 2949.092.

{¶ 5} A motion by an indigent criminal defendant to waive payment of costs must be made at the time of sentencing. *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, paragraph two of the syllabus. “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.*, ¶23. See, also, *State v. Clevenger*, 114 Ohio St.3d 258, 2007-Ohio-4006, 871 N.E.2d 589, ¶5.

{¶ 6} Our review of the record demonstrates that Stevens made no motion to waive costs at either the original or resentencing hearing. Nevertheless, on the authority of *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278, we remand the case so that Stevens can move the court for waiver of payment of court costs.

{¶ 7} In *Joseph*, *supra*, the Ohio Supreme Court held that the trial court erred in imposing costs in its sentencing entry when it did not impose those costs in open court at the sentencing hearing. The court noted that the defendant “was not given an opportunity at the sentencing hearing to seek a waiver of the payment of costs, because the trial court did not mention costs at the sentencing hearing.” *Id.*, ¶13. The Ohio Supreme Court did not agree with the defendant’s argument that the trial court’s failure to

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<sup>1</sup>R.C. 2947.23(A)(1) states: “In all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution and render a judgment against the defendant for such costs.”

inform him at sentencing about costs rendered his sentence void (requiring total resentencing), but held that it was reversible error. The court stated: “Crim.R. 43(A) states that a criminal defendant must be present at every stage of his trial, including sentencing. The state urges that any error is harmless. However, [the defendant] was harmed here. He was denied the opportunity to claim indigency and to seek a waiver of the payment of court costs before the trial court. He should have had that chance.” *Id.*, ¶22. The court remanded the matter for the limited purpose of allowing the defendant to move the court for a waiver of the payment of court costs. *Id.*, ¶23.

{¶ 8} We do the same here. Because the trial court did not impose costs in open court at the original sentencing hearing or at resentencing, it deprived Stevens of an opportunity to claim indigency and seek a waiver of the payment of court costs.<sup>2</sup> Therefore, we remand the matter for the limited purpose of allowing Stevens to move the court for a waiver of the payment of court costs. Should Stevens file such a motion, the trial court should rule upon it within a reasonable time. *Id.*; see, also, *State v. Morgan*, 2d Dist. No. 09CA21, 2010-Ohio-2925.

{¶ 9} Appellant’s first assignment of error is sustained in part.

## II

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<sup>2</sup>At resentencing, Stevens (not defense counsel) told the judge that he “noticed” he was charged “court costs and fines and stuff” and asked the judge to stay payment of the costs until he was released from prison. The judge denied his request. Because the trial judge did not specifically impose costs at resentencing, we conclude that under *Joseph*, Stevens was not given an opportunity to claim indigency and move for waiver of costs.

{¶ 10} In his second assignment of error, Stevens contends that the trial court erred in imposing costs without first considering his present and future ability to pay the costs. This argument is without merit.

{¶ 11} In *White*, supra, the Ohio Supreme Court specifically found that because R.C. 2947.23 requires a trial court to assess costs against all criminal defendants, “a defendant’s financial status is irrelevant to the imposition of costs.” *Id.*, ¶3. See, also, *State v. Dansby*, 5th Dist. No. 08 AP 06 0047, 2009-Ohio-2975 (Trial court did not err by ordering defendant to pay the court costs of the action without first considering defendant’s ability to pay. Defendant failed to raise the issue at sentencing and a court is authorized to assess court costs against an indigent defendant). Thus, a court may impose court costs without considering a defendant’s present or future ability to pay those costs.<sup>3</sup>

{¶ 12} Appellant’s second assignment of error is overruled.

Remanded.

It is ordered that appellant recover from appellee 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.

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<sup>3</sup> A court would presumably consider those factors, however, when considering whether *payment* of costs by an indigent defendant should be waived.

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

KATHLEEN ANN KEOUGH, JUDGE

SEAN C. GALLAGHER, P.J., and  
KENNETH A. ROCCO, J., CONCUR