

[Cite as *State v. Bacote*, 2015-Ohio-5268.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 102991 and 102992

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

TIMOTHY BACOTE

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-11-553750-B and CR-11-552420-B

BEFORE: McCormack, J., Celebrezze, A.J., and Boyle, J.

RELEASED AND JOURNALIZED: December 17, 2015

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TIM McCORMACK, J.:

{¶1} Plaintiff-appellant, state of Ohio, appeals from the trial court's judgment vacating defendant-appellee, Timothy Bacote's court costs. For the following reasons, we affirm the trial court's decision.

{¶2} On October 21, 2011, Bacote pleaded guilty to one count of drug trafficking in violation of R.C. 2925.03(A)(1) in Cuyahoga C.P. No. CR-11-552420-B and one count of drug possession in violation of R.C. 2925.11(A) in Cuyahoga C.P. No. CR-11-553750-B. The court sentenced Bacote to one year community control sanctions on each offense, to be served concurrently. In lieu of costs, the court ordered Bacote to perform community control work sanctions. The court advised Bacote that any violation would result in a prison term of 12 months in Case No. CR-11-552420, to run consecutively to a prison term of 18 months in Case No. CR-11-553750.

{¶3} In November 2012, Bacote's community control sanctions were extended until October 31, 2013, at the request of the probation department. In May 2013, the court found Bacote in violation of his community control sanctions and sentenced him to 18 months in prison.¹ The court waived court costs associated with the violation hearing.

¹ In May 2013, Bacote pleaded guilty to aggravated robbery and felonious assault in Cuyahoga C.P. Nos. CR-12-570149 and CR-12-569333. He was sentenced to 11 years in each case, to be served concurrently to each other and consecutively to the sentence in CR-11-553750. In both cases, the trial court found Bacote indigent and waived court costs.

{¶4} On April 7, 2015, while incarcerated, Bacote filed a motion to pay the court costs originally imposed in CR-11-552420 and CR-11-553750 in \$10 monthly installments. The motion was unopposed. The court denied Bacote’s motion to pay monthly installments but determined instead to vacate and waive all costs and fees.

{¶5} The state now appeals the trial court’s order vacating and waiving Bacote’s court costs. The state contends that the trial court erred when it vacated and waived Bacote’s costs, arguing it was without jurisdiction to modify a criminal sentence because the amendments to R.C. 2947.23 do not apply to sentences imposed prior to March 22, 2013.

{¶6} This court recently addressed the exact issue of whether a defendant who was originally sentenced before the effective date of R.C. 2947.23(C) and who did not seek a waiver of court costs at the time of the original sentencing can subsequently use the revised statute as a means of invoking the court’s jurisdiction to seek a waiver of those costs. *See State v. Hunter*, 8th Dist. Cuyahoga No. 102245, 2015-Ohio-4180. Effective March 22, 2013, R.C. 2947.23(C) provides that the trial court has jurisdiction “to waive, suspend, or modify the payment of the costs of prosecution * * * at the time of sentencing or at any time thereafter.” In *Hunter*, we held that the specific language of the statute stating that a court has jurisdiction to waive costs at “any time” after sentencing is prospective in application and is not a retroactive application that would bar defendants who failed to seek a waiver of court costs at the time of sentencing.² *Hunter*

² In *Hunter*, we distinguished the court’s prior decision in *State v. Walker*, 8th Dist.

at ¶ 1; *State v. Price*, 8th Dist. Cuyahoga No. 102987, 2015-Ohio-4592. In interpreting R.C. 2947.23(C), we determined that the plain wording of the statute demonstrates there is not to be a time limit on when a defendant may seek a modification or waiver of court costs:

[R]etroactivity is premised on the idea that a law reaches back in time to upset settled legal expectations. By its own terms, R.C. 2947.23(C) states that a court retains jurisdiction to waive, suspend, or modify court costs “at the time of sentencing or at any time thereafter.” No settled legal expectations are affected by the amended statute — it expressly states, consistent with prior precedent, that the court may waive court costs at the time of sentencing, but the statute goes on to expand the time frame in which a court may waive, suspend, or modify costs to “any time thereafter.”

Id. at ¶ 14.

{¶7} Here, Bacote affirmatively filed a motion in 2015 to pay the court costs associated with his 2011 cases in monthly installments. Rather than acceding to the requested payment plan, the trial court, in the alternative, vacated and waived all court costs. In light of R.C. 2947.23(C) and this court’s decision in *Hunter*, we find the trial court had the jurisdiction and discretion to vacate and waive Bacote’s court costs.

Cuyahoga No. 101213, 2014-Ohio-4841, that determined the defendant’s failure to raise the issue of court costs at his first appeal was res judicata. We found our discussion in *Walker* concerning the application of R.C. 2947.23(C) was an alternative holding and therefore not an authoritative statement of the law. *Hunter* at ¶ 14.

{¶8} The state's sole assignment of error is overruled.

{¶9} Judgment affirmed.

It is ordered that appellee recover of 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. 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.

TIM McCORMACK, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
MARY J. BOYLE, J., CONCUR