

[Cite as *State v. Clark*, 2017-Ohio-297.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104555

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ERIC W. CLARK

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-585350-A

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

RELEASED AND JOURNALIZED: January 26, 2017

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MARY J. BOYLE, J.:

{¶1} Defendant-appellant, Eric Clark, appeals his sentence. He raises two assignments of error for our review:

1. The trial court erred in sentencing Eric Clark absent making statutory findings.
2. The court erred in neglecting to orally notify defendant that it was assessing court costs herein; and counsel was ineffective in neglecting to file a motion to waive costs and to file an affidavit of indigency.

{¶2} Finding merit in part to his second assignment of error, we reverse Clark's sentence with respect to court costs only and remand for resentencing to allow him the opportunity to seek a waiver of those costs.

I. Procedural History and Factual Background

{¶3} In June 2014, Clark was charged by way of information with one count of possessing less than five grams of cocaine in violation of R.C. 2925.11(A), a felony of the fifth degree. He pleaded guilty as charged in the information.

{¶4} In July 2014, the trial court sentenced Clark to one and one-half years of community control sanctions, placed him in group C supervision, and notified him that if he violated the terms of his community control sanctions, he may receive more restrictive sanctions or a prison term of nine months. The trial court also suspended Clark's driver's licence for six months and ordered him to pay costs. The trial court further notified Clark that if he went to prison, he would be subject to a discretionary period of three years of postrelease control when he was released.

{¶5} In May 2015, Clark was back in court for a probation violation. He falsified a urine test because he had smoked marijuana. The trial court continued Clark's community control sanctions.

{¶6} In September 2015, Clark tested positive for cocaine, again violating his community control sanctions. The trial court continued Clark's community control sanctions for a second time.

{¶7} In March 2016, Clark tested positive for cocaine a second time while on community control sanctions. Clark admitted the violation. The court imposed a sentence of nine months in prison and court costs. It is from this judgment that Clark appeals.

II. Standard of Review

{¶8} In reviewing felony sentences under R.C. 2953.08(G)(2), this court must "review the record, including the findings underlying the sentence or modification given by the sentencing court." In doing so, if we clearly and convincingly find "[t]hat the record does not support the sentencing court's findings" under R.C. 2929.13(B) (limits on prison for certain F-4s and F-5s) or (D) (prison for F-1 and F-2 drug offenses), R.C. 2929.14(B)(2)(e) (repeat violent offender) or (C)(4) (consecutive sentences), or R.C. 2929.20(I) (judicial release), or that the sentence is otherwise contrary to law, we may "increase, reduce, or otherwise modify a sentence * * * or may vacate the sentence and remand the matter to the sentencing court for resentencing." R.C. 2953.08(G)(2).

{¶9} The Ohio Supreme Court has further explained:

We note that some sentences do not require the findings that R.C. 2953.08(G) specifically addresses. Nevertheless, it is fully consistent for appellate courts to review those sentences that are imposed solely after consideration of the factors in R.C. 2929.11 and 2929.12 under a standard that is equally deferential to the sentencing court. That is, an appellate court may vacate or modify any sentence that is not clearly and convincingly contrary to law only if the appellate court finds by clear and convincing evidence that the record does not support the sentence.

State v. Marcum, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 23.

III. R.C. 2929.12

{¶10} In his first assignment of error, Clark contends that the trial court failed to make statutory findings under R.C. 2929.12 when it sentenced him to prison in March 2016.

{¶11} Although the trial court has full discretion to impose any term of imprisonment within the statutory range, it must consider the purposes and principles of felony sentencing in R.C. 2929.11 and the seriousness and recidivism guidelines contained in R.C. 2929.12. Further, in accordance with R.C. 2953.08 and *Marcum*, an appellate court may increase, reduce, or otherwise modify a sentence or vacate the sentence and remand the matter to the sentencing court for resentencing if the record does not support the sentencing court's application of R.C. 2929.11 and 2929.12.

{¶12} R.C. 2929.12 provides a nonexhaustive list of factors the court must consider in determining the relative seriousness of the underlying crime and the likelihood that the defendant will commit another offense in the future. *State v. Wright*, 8th Dist. Cuyahoga No. 100283, 2014-Ohio-3321, ¶ 9, citing *State v. Townsend*, 8th Dist. Cuyahoga No. 99896, 2014-Ohio-924, ¶ 11. The factors include: (1) the physical,

psychological, and economic harm suffered by the victim, (2) the defendant's prior criminal record, (3) whether the defendant shows any remorse, and (4) any other relevant factors. R.C. 2929.12(B), (D), and (E).

{¶13} Although there is a mandatory duty to “consider” the relevant statutory factors under R.C. 2929.11 and 2929.12, the trial court is not required to go through each factor on the record or to make specific findings, explaining its analysis of the relevant factors prior to imposing a sentence. *State v. Williams*, 8th Dist. Cuyahoga No. 100042, 2014-Ohio-1618, ¶ 17 (“R.C. 2929.11 and 2929.12 do not require judicial fact-finding; rather, they direct trial courts to ‘consider’ the factors.”), citing *State v. May*, 8th Dist. Cuyahoga No. 99064, 2013-Ohio-2697, ¶ 15; *State v. Tate*, 8th Dist. Cuyahoga No. 97804, 2014-Ohio-5269, ¶ 58 (“The sentencing court is not required * * * to engage in any factual findings under R.C. 2929.11 or 2929.12.”). “While trial courts must carefully consider the statutes that apply to every felony case, it is not necessary for the trial court to articulate its consideration of each individual factor as long as it is evident from the record that the principles of sentencing were considered.” *Id.*, citing *State v. Roberts*, 8th Dist. Cuyahoga No. 89236, 2008-Ohio-1942, ¶ 10.

{¶14} Clark maintains that the trial court failed to consider mitigating factors when it sentenced him to prison after his third probation violation. He contends that the trial judge did not consider the fact that he was working, that he waived probable cause and admitted he tested positive for cocaine, that he had found a new girlfriend who had a positive impact on him, and that he had been going to AA meetings with his new

girlfriend. We disagree.

{¶15} In his first two probation violation hearings, as well as the third one at issue, Clark informed the trial court of the many jobs that he had been working throughout his community control sanction period. The trial court was also well aware that Clark waived probable cause and admitted he tested positive for cocaine. Clark further informed the court at the third probation violation hearing in March 2016, about his new girlfriend and attending AA meetings with her.

{¶16} The trial court, however, was also well aware that throughout the 20-month period of Clark's community control sanctions, Clark violated the terms of his community control sanctions three times — testing positive for marijuana once, and cocaine twice. The first two times, the trial court gave Clark another opportunity to continue to try to get his life together. After the third violation, the trial court sentenced him to nine months in prison — as it had warned him it may do if he violated the terms of his supervision.

{¶17} Accordingly, we find no merit to Clark's first assignment of error and overrule it.

IV. Court Costs

{¶18} Clark contends that the trial court did not properly notify him at the March 2016 sentencing hearing that he would have to pay costs. He further contends that his counsel was ineffective for failing to file a motion to waive costs due to Clark's indigency.

{¶19} R.C. 2947.23 requires an imposition of court costs on a criminal defendant

— even an indigent defendant. *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, ¶ 8. R.C. 2949.092 states that the court may not waive these costs unless the court determines, upon motion, that the offender is indigent. *See White* (noting that R.C. 2949.092 is permissive in nature). A trial court has no duty, however, to waive court costs; “it has discretion whether to do so, and R.C. 2949.092 does not provide standards for the exercise of that discretion.” *State v. Fuller*, 2d Dist. Montgomery No. 25380, 2013-Ohio-3274, ¶ 18, citing *State v. Lux*, 2d Dist. Miami No. 2010 CA 30, 2012-Ohio-112, ¶ 47.

{¶20} In the March 2016 sentencing entry, the trial court ordered Clark to pay “the costs of this prosecution.” But the trial court never mentioned costs at that sentencing hearing.

{¶21} In *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278, the Ohio Supreme Court held that a trial court may not impose court costs pursuant to former R.C. 2947.23 in its sentencing entry, when it did not impose those costs in open court at the sentencing hearing. The court explained:

While the failure of the [trial] court to orally notify Joseph that it was imposing court costs on him does not void Joseph’s sentence, it was error: 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, Joseph 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.

We therefore remand the cause to the trial court for the limited purpose of allowing Joseph to move the court for a waiver of the payment of court costs. Should Joseph file such a motion, the court should rule upon it within a reasonable time.

Id. at ¶ 22-23.

{¶22} Thus, the trial court here erred when it imposed costs without notifying Clark at the sentencing hearing that it was doing so.

{¶23} The state argues that the trial court notified Clark at the original sentencing hearing in July 2014 that it was imposing costs. The state maintains that the trial court did not need to do it again at the “resentencing” hearing. In support of this argument, the state cites *State v. Norris*, 8th Dist. Cuyahoga No. 95485, 2011-Ohio-1795. The facts in *Norris*, however, are distinguishable from the facts in the present case. In *Norris*, this court remanded the case on direct appeal for the trial court to merge two counts of felonious assault. *Id.* at ¶ 4. At the resentencing hearing, the trial court did not mention court costs and the journal entry did not impose them. This court held:

Court costs were properly imposed at Norris’s original sentencing and no issue about costs was raised in Norris’s first appeal. This court remanded the matter solely for the purpose of correcting the conviction entry regarding the allied offenses; thus, there was no issue about costs upon remand. Accordingly, the trial court had no duty to reimpose costs, either orally or in its entry, because its original judgment imposing costs was still valid upon remand.

Id. at ¶ 25.

{¶24} In the present case, the March 2016 hearing was not a resentencing hearing; it was a community control violation hearing. The Ohio Supreme Court recently explained that “[f]ollowing a community control violation, the trial court conducts a second sentencing hearing. At this second hearing, the court sentences the offender anew and must comply with the relevant sentencing statutes.” *State v. Heinz*, 146 Ohio

St.3d 374, 2016-Ohio-2814, 56 N.E.3d 965, quoting *State v. Fraley*, 105 Ohio St.3d 13, 2004-Ohio-7110, 821 N.E.2d 995. Accordingly, we find that the state's argument is without merit. In sentencing Clark anew, the trial court was required to notify Clark at the sentencing hearing that it was imposing costs pursuant to *Joseph*, 125 Ohio St.3d 76, 2010- Ohio-954, 926 N.E.2d 278, R.C. 2947.23, and Crim.R. 43.

{¶25} Clark's argument that his counsel was ineffective for failing to file a motion is moot.

{¶26} Clark's second assignment of error is sustained in part and overruled in part.

{¶27} Judgment affirmed in part, reversed in part, and remanded. We reverse the judgment with respect to the court costs that were improperly imposed. We remand for the trial court to hold a resentencing hearing, where it can properly impose court costs and where Clark may move for a waiver of the payment of costs on the basis of indigency. We affirm the trial court's judgment in all other respects.

It is ordered that appellee and appellant share the 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.

MARY J. BOYLE, JUDGE

TIM McCORMACK, P.J., and
MELODY J. STEWART, J., CONCUR