

[Cite as *State v. Brock*, 2017-Ohio-97.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 104334

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**DESMOND D. BROCK**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
**AFFIRMED AND REMANDED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-15-597935-A

**BEFORE:** Boyle, J., Jones, P.J., and Laster Mays, J.

**RELEASED AND JOURNALIZED:** January 12, 2017

## **ATTORNEY FOR APPELLANT**

Thomas A. Rein  
820 West Superior Avenue, Suite 800  
Cleveland, Ohio 44113

## **ATTORNEYS FOR APPELLEE**

Michael C. O'Malley  
Cuyahoga County Prosecutor  
BY: Glen Ramdhan  
Andrew J. Santoli  
Assistant County Prosecutors  
Justice Center, 9th Floor  
1200 Ontario Street  
Cleveland, Ohio 44113

MARY J. BOYLE, J.:

{¶1} Defendant-appellant, Desmond Brock, pleaded guilty to amended counts of having a weapon under disability (a third-degree felony), attempted failure to comply with signal of police officer (a fourth-degree felony), and attempted obstructing justice (a fourth-degree felony). The trial court sentenced him to a total of 24 months in prison.

Brock now challenges his sentence, raising the following three assignments of error:

I. Appellant’s sentence is contrary to law because the trial court failed to comply with the purposes and principles of sentencing as set forth in R.C. 2929.11 and R.C. 2929.12.

II. The trial court erred by ordering appellant to pay costs when it did not properly comply with the statute.

III. The court costs imposed at the sentencing hearing infringes upon appellant’s rights under the Eighth and Fourteenth Amendments to the United States Constitution, R.C. 2929.18, R.C. 2919(B)(5) [sic], R.C. 2947.14, and related sections of the Ohio Constitution.

{¶2} Finding no merit to the appeal, we affirm.

#### **A. Standard of Review**

{¶3} Our review of felony sentences is governed by R.C. 2953.08. Under the plain language of R.C. 2953.08(G)(2), “an appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court’s findings under relevant statutes or that the sentence is otherwise contrary to law.” *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 23.

#### **B. Application of R.C. 2929.11 and 2929.12**

{¶4} In his first assignment of error, Brock argues that the trial court failed to comply with R.C. 2929.11 and 2929.12 when sentencing him because the trial court never specifically stated that it considered these two sentencing statutes at the sentencing hearing.

{¶5} Although the trial court has full discretion to impose any term of imprisonment within the statutory range, it must consider the sentencing purposes in R.C. 2929.11 and the relevant seriousness and recidivism factors contained in R.C. 2929.12. *State v. Boczek*, 8th Dist. Cuyahoga No. 103811, 2016-Ohio-5708, ¶ 21.

{¶6} R.C. 2929.11(A) provides that the “overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes.” R.C. 2929.11(B) requires that, in addition to achieving these goals, a sentence must be “commensurate with and not demeaning to the seriousness of the offender’s conduct and its impact upon the victim.” 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.

{¶7} Brock essentially argues that the trial court did not use “magic words” at sentencing and therefore this court must reverse his sentence as being contrary to law.

This argument, however, has no merit. We will not reverse a sentence imposed simply because a trial court did not use “magic words.” This has never been the standard even when a trial court is required to make certain findings on the record. *See, e.g., State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37 (despite the requirement to make findings on the record in support of imposition of consecutive sentences, trial court is not required to give “a talismanic incantation of the words of the statute”). And contrary to Brock’s assertion on appeal, the trial court was not required to make specific findings on the record with respect to its consideration of R.C. 2929.11 and 2929.12. *See Boczek* at ¶ 22, citing *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 31 (“Although the trial court must consider the purposes and principles of sentencing as well as the mitigating factors, the court is not required to use particular language or make specific findings on the record regarding its consideration of those factors.”).

{¶8} Brock fails to offer any argument in support of his claim that the trial court did not properly consider and apply R.C. 2929.11 and 2929.12. *See App.R. 12(A)(2)*. Nor do we find any evidence in the record to support his baseless assertion.

{¶9} Indeed, prior to imposing any sentence in this case, the trial court reviewed the PSI, heard from both the prosecutor and defense counsel, as well as the defendant, members of the defendant’s family, and members of the victim’s family. The trial court imposed six months in prison on the attempted obstruction of justice count, 12 months in prison on the attempted failure to comply with signal of a police officer, and 24 months in

prison on the having weapons while under disability count, ordering all counts to be served concurrently. In imposing the 24-month prison sentence on the having weapons while under disability offense, the trial court specifically explained that Brock's recidivism risk was high because of Brock's previous criminal offenses involving weapons. As noted by the trial court, Brock's record includes three previous felony cases involving weapons. Further, at the time that Brock committed this offense, he was out on bond for another case related to his unlawful possession of a weapon.

{¶10} Because the record demonstrates that the trial court properly considered and applied R.C. 2929.11 and 2929.12 in imposing a prison sentence, we find no merit to Brock's first assignment of error and overrule it.

{¶11} We note, however, that the trial court's journal entry contains clerical errors and does not accurately reflect the prison terms imposed at the sentencing hearing on the attempted obstruction of justice count and the attempted failure to comply with signal of a police officer count; the journal entry erroneously increased each sentence by six months.

Accordingly, we remand for the limited purpose for the trial court to enter a nunc pro tunc entry to correct the journal entry to accurately reflect the sentence as announced at the sentencing hearing. *See Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, at ¶ 30 ("a clerical mistake may be corrected by the court through a nunc pro tunc entry to reflect what actually occurred in open court").

### **C. Notice Required Prior to Imposing Court Costs**

{¶12} In his second assignment of error, Brock argues that the trial court erred

when it ordered him to pay court costs without providing notice of the consequences if he failed to pay such costs as required under R.C. 2947.23(A), i.e., that the court may order the defendant to perform community service if defendant fails to pay costs. Relying on this court's decision in *State v. Huber*, 8th Dist. Cuyahoga No. 98206, 2012-Ohio-6139, Brock argues that notification under R.C. 2947.23(A)(1) is mandatory and requires a remand for a limited resentencing hearing.<sup>1</sup>

{¶13} Brock's argument, however, relies on the former version of the statute that was in place at the time that this court decided *Huber*. Since the defendant in *Huber* was sentenced, R.C. 2947.23 has undergone three revisions. The statute was first revised by 2012 Am.Sub.S.B. 337 ("S.B. 337"), effective September 28, 2012, then later revised by 2012 Am.Sub.H.B. 247 ("H.B. 247"), effective March 22, 2013, and lastly revised by 2014 Am.Sub.S.B. 143 ("S.B. 143"), effective September 19, 2014. Brock was sentenced in March 2016, and therefore the current statute applies. This statute no longer requires such notification when a trial court imposes a prison term. *State v. Brown*, 12th Dist. Butler No. CA2013-03-043, 2014-Ohio-1317, fn. 3, quoting R.C. 2947.23(A)(1)(a) ("The current statute \* \* \* provides that notification of possible court-ordered community service need only be given '[i]f the judge or magistrate imposes a community control sanction or other nonresidential sanction.'").

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<sup>1</sup> The state counters Brock's assignment of error in the argument section of its brief and emphasizes that the statute has been amended but then later in its brief concedes that the trial court committed error as it relates to this argument. Although we find the state's position perplexing, we find no basis to reverse the trial court's actions based on the amended version of the statute.

{¶14} Moreover, the current version of the statute also provides that the trial court's failure to provide the notification of the consequences of failure to pay court costs set forth in R.C. 2947.23(A)(1) "does not negate or limit the authority of the court to order the defendant to perform community service if the defendant fails to pay the judgment \* \* \* or to timely make payments toward that judgment under an approved payment plan." R.C. 2947.23(A)(1)(b). Consequently, Ohio courts have declined to remand cases for notification even when a trial court imposes community control sanctions, recognizing that the failure to provide such notice is no longer grounds for reversal. *See State v. Leonard*, 1st Dist. Hamilton No. C-130474, 2014-Ohio-3828, ¶ 38, citing *Brown* at ¶ 31; *State v. Huntsman*, 7th Dist. Monroe No. 13MO6, 2014-Ohio-440, ¶ 14.

{¶15} The second assignment of error is overruled.

#### **D. Ability to Pay Court Costs**

{¶16} In his final assignment of error, Brock argues that the trial court should not have imposed court costs because he was indigent. Brock further contends that the trial court failed to comply with its duty under R.C. 2929.19(B)(5) and 2947.14 to consider his ability to pay and that had it done so, it would not have ordered him to pay court costs. These arguments have no merit.

{¶17} R.C. 2947.23(A)(1) governs the imposition of court costs and provides in relevant part: "In all criminal cases \* \* \* the judge \* \* \* shall include in the sentence the costs of prosecution \* \* \* and render a judgment against the defendant for such costs."



Thus, a sentencing court must include in the sentence the costs of prosecution and render a judgment against the defendant for costs, even if the defendant is indigent. *State v. Brown*, 8th Dist. Cuyahoga No. 103247, 2016-Ohio-1546, ¶ 12, citing *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, ¶ 8; *see also State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164.

{¶18} However, in its discretion, a trial court may waive court costs if the defendant is indigent. *Brown* at ¶ 13, citing *State v. Walker*, 8th Dist. Cuyahoga No. 101213, 2014-Ohio-4841, ¶ 9; *see also* R.C. 2947.23(C) (a trial court now retains jurisdiction to waive, suspend, or modify payment of the costs “at the time of sentencing or at any time thereafter”). The discretion to waive court costs includes the discretion not to waive them. *Id.*

{¶19} At the conclusion of the sentencing hearing, defense counsel asked the trial court to waive court costs because Brock was indigent. The trial court nonetheless imposed court costs but told Brock that he would have the opportunity to pay the court costs by doing community service work in prison. We find no grounds to reverse the trial court’s decision imposing court costs. The trial court properly exercised its discretion and ordered Brock to pay court costs. *See State v. Miniffee*, 8th Dist. Cuyahoga No. 99202, 2013-Ohio-3146, ¶ 36 (“although the trial court found appellant to be indigent, it acted within its discretion under R.C. 2947.23(A)(1) in imposing court costs regardless of appellant’s financial status”).

{¶20} Brock’s reliance on R.C. 2929.19(B)(5) and 2947.14, which relate to the

imposition of financial sanctions or a fine and satisfaction of fine, is misplaced. The trial court did not order Brock to pay any fine; it merely imposed court costs. And “[c]ourt costs are not financial sanctions.” *State v. Lux*, 2d Dist. Miami No. 2010 CA 30, 2012-Ohio-112, ¶ 45.

{¶21} The final assignment of error is overruled.

{¶22} Judgment affirmed. Case is remanded for the trial court to issue a nunc pro tunc entry to correct the clerical errors in the sentencing entry. Specifically, the trial court shall issue a nunc pro tunc entry to accurately reflect that it imposed six months in prison on the attempted obstruction of justice count and 12 months in prison on the attempted failure to comply with signal of a police officer count.

It is ordered that appellee recover from appellant 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. The defendant’s conviction having been affirmed, any bail pending appeal is terminated. 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.

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MARY J. BOYLE, JUDGE

LARRY A. JONES, SR., P.J., and

ANITA LASTER MAYS, J., CONCUR