

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 12AP-512
v.	:	(C.P.C. No. 10CR-07-4116)
	:	
Jermaine A. Huddleston,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 20, 2013

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Yeura R. Venters, Public Defender, and *Timothy E. Pierce*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Defendant-appellant, Jermaine A. Huddleston ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas denying his motions to vacate or suspend the payment of court costs. Because we conclude that the trial court did not abuse its discretion by imposing court costs as part of appellant's sentence, that appellant's claim regarding the trial court's failure to notify him that he could be required to perform community service is barred by res judicata, and that the trial court did not commit plain error by failing to notify appellant that he could be ordered to perform community service if he failed to pay court costs, we affirm.

{¶ 2} Appellant was indicted on two counts of felonious assault with specifications and one count of having a weapon under disability. Appellant ultimately

pled guilty to two counts of felonious assault without specifications. At the sentencing hearing, appellant's counsel made an oral motion for a waiver of court costs. On November 30, 2011, the trial court entered a judgment sentencing appellant to eight years of incarceration on each count of felonious assault, with the sentences to be served concurrently. The trial court did not impose a fine, but required appellant to pay court costs. Court costs were later calculated to be \$2,475.44. Appellant did not appeal this judgment.

{¶ 3} On January 20, 2012, appellant filed two motions with the trial court entitled "Motion to Vacate or Suspend Payment of Fine and/or Court Costs." In these motions, appellant asserted that he lacked the funds to pay court costs due to his incarceration and that any funds he acquired after release from incarceration would be needed for his reintegration into society. Appellant also attached an affidavit of indigency to each motion asserting that he lacked the funds to pay court costs. The trial court denied appellant's motions to vacate the court costs, finding that they were barred by res judicata and that it had considered his ability to pay court costs during the sentencing hearing and had properly imposed costs as part of his sentence.

{¶ 4} Appellant appeals from the trial court's judgment, assigning two errors for this court's review:

Assignment of error number one: the trial court abused its discretion when it ordered Appellant to pay the costs associated with this case despite him being unable to remit payment.

Assignment of error number two: the trial court erred by failing to comply with R.C. Section 2947.23(A)(1)(a) and (b) when it did not inform Appellant that if he did not pay court costs he may be ordered to perform community service hours and that if he did in fact have to perform community service he would receive hourly credit towards the outstanding balance.

{¶ 5} In his first assignment of error, appellant argues that the trial court abused its discretion by ordering him to pay court costs despite his claim of indigence. At the sentencing hearing, appellant's counsel made an oral motion to waive court costs, arguing that appellant would be unable to pay the costs due to his incarceration and that the

burden would fall on appellant's family. The trial court imposed court costs as part of its sentencing entry.

{¶ 6} Although the trial court denied appellant's motions based on the doctrine of res judicata, we conclude that the motions to vacate would fail on the merits. R.C. 2947.23 requires a court to assess costs against all convicted defendants. *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, ¶ 8. "[W]aiver of costs is permitted—but not required—if the defendant is indigent." *Id.* at ¶ 14. An order imposing costs is reviewed under an abuse-of-discretion standard. *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, ¶ 23. An abuse of discretion occurs where a trial court's decision is "unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 7} Appellant argues that the trial court abused its discretion in ordering him to pay court costs because the court never seriously considered his request for a waiver. Appellant asserts that the trial court was required to make reasonable inquiries regarding his ability to pay court costs before ruling on the waiver request. However, "it is well-established that a trial court need not consider a defendant's ability to pay court costs." *Columbus v. Kiner*, 10th Dist. No. 11AP-543, 2011-Ohio-6462, ¶ 3. Further, in the judgment entry, the trial court indicated that it considered appellant's present and future ability to pay a fine and financial sanctions before declining to impose any fine but ordering appellant to pay court costs. Appellant claims that this statement does not reflect what occurred at the sentencing hearing. "It is axiomatic that a court speaks only through its journal entries, and not through mere oral pronouncements." *In re P.S.*, 10th Dist. No. 07AP-516, 2007-Ohio-6644, ¶ 12. Therefore, we presume that the trial court did consider appellant's ability to pay before issuing its entry, even if the court's statements at the sentencing hearing did not reflect this consideration.

{¶ 8} Finally, we note that appellant offered minimal evidence in support of his claim of indigence. In his oral motion at the sentencing hearing, appellant's counsel asserted that appellant would not be able to pay court costs because he had been incarcerated 509 days leading up to the sentencing hearing and that appellant's family would bear the burden of the court costs. In his motions to vacate or suspend payment of court costs, appellant attached an affidavit attesting that he lacked the necessary funds to pay court costs due to his incarceration and a memorandum asserting that any money he

earned upon release from incarceration would be needed for reintegration into society. Appellant provided no details regarding bank accounts, other assets or the lack thereof. In light of the record before us, we cannot conclude that the trial court acted in an unreasonable, arbitrary or unconscionable manner in ordering appellant to pay court costs. Therefore, appellant's motions to vacate were properly denied. Because this is the same result that the trial court reached, albeit for a different reason, we overrule appellant's first assignment of error.

{¶ 9} In his second assignment of error, appellant argues that the trial court erred by failing to comply with the statutory requirement of notifying him that he could be ordered to perform community service if he failed to pay court costs and that he would receive hourly credit for community service performed toward the balance of any court costs owed.

{¶ 10} At the time of appellant's sentencing hearing, R.C. 2947.23(A)(1) provided as follows:

(A)(1) In 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. At the time the judge or magistrate imposes sentence, the judge or magistrate shall notify the defendant of both of the following:

(a) If the defendant fails to pay that judgment or fails to timely make payments towards that judgment under a payment schedule approved by the court, the court may order the defendant to perform community service in an amount of not more than forty hours per month until the judgment is paid or until the court is satisfied that the defendant is in compliance with the approved payment schedule.

(b) If the court orders the defendant to perform the community service, the defendant will receive credit upon the judgment at the specified hourly rate per hour of community service performed, and each hour of community service performed will reduce the judgment by that amount.

{¶ 11} Appellant asserts that the trial court erred by failing to give the required notices regarding community service. Although appellant is correct that the trial court did

not give the required notices at the sentencing hearing or in its judgment entry, we conclude that this assignment of error fails for two reasons.

{¶ 12} First, *res judicata* bars appellant's second assignment of error. "Pursuant to the doctrine of *res judicata*, a final judgment of conviction precludes a defendant from raising and litigating in any proceeding, except a direct appeal from that judgment, any defense or claimed lack of due process that the defendant raised or could have raised on direct appeal from his conviction." *State v. Slager*, 10th Dist. No. 11AP-794, 2012-Ohio-3584, ¶ 11, citing *State v. Szefcyk*, 77 Ohio St.3d 93 (1996), syllabus. *See also State v. Jama*, 10th Dist. No. 11AP-210, 2012-Ohio-2466, ¶ 44 ("In Ohio, *res judicata* bars consideration of issues that could have been raised on direct appeal."). The asserted error relates to the sentencing hearing and judgment entry. As explained above, appellant did not file a direct appeal of the judgment entry within 30 days. A claim that the trial court failed to give the required statutory notices is an issue that appellant could have raised in a direct appeal. Because he failed to do so, this claim is now barred by *res judicata*. *See Slager* at ¶ 11. *Compare State v. Debruce*, 9th Dist. No. 25574, 2012-Ohio-454, ¶ 32-39 (sustaining appellant's claim that the trial court erred by failing to give statutory notices required under R.C. 2947.23(A)(1) when raised in a direct appeal from judgment of conviction).

{¶ 13} Second, even if the claim was not barred by *res judicata*, appellant waived this claim by failing to raise it in the trial court. Appellant did not raise the issue of failure to give the statutory notices at the sentencing hearing or in his motions to vacate or suspend payment of court costs. "It is well-settled law that issues not raised in the trial court may not be raised for the first time on appeal because such issues are deemed waived." *State v. Barrett*, 10th Dist. No. 11AP-375, 2011-Ohio-4986, ¶ 13. Under Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." To find plain error, we must find that there was an error, that the error was plain, constituting an obvious defect in the trial proceedings, and that the error affected the appellant's substantial rights. *State v. Carter*, 10th Dist. No. 03AP-778, 2005-Ohio-291, ¶ 9. Moreover, we take notice of plain error only in exceptional circumstances to prevent a manifest miscarriage of justice. *State v. Sneed*,

63 Ohio St.3d 3, 10 (1992). Appellant has not asserted plain error, and we do not find plain error in this case.

{¶ 14} Accordingly, we overrule appellant's second assignment of error.

{¶ 15} For the foregoing reasons, we overrule both of appellant's assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT, P.J., and CONNOR, J., concur.
