

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 23080
Plaintiff-Appellee	:	
	:	Trial Court Case No. 2005-CRB-1794
v.	:	
	:	
YOLANDA D. TWITTY	:	(Criminal Appeal from Montgomery County Court Area One)
	:	
Defendant-Appellant	:	
	:	

.....

OPINION

Rendered on the 23rd day of October, 2009.

.....

RAYMOND DUNDES, Atty. Reg. #0041515, Montgomery County Area One
Prosecutor's Office, 195 South Clayton Road, New Lebanon, Ohio 45345
Attorney for Plaintiff-Appellee

GLEN H. DEWAR, Atty. #0042077, Law Office of the Public Defender, 117 South
Main Street, Suite 400, Dayton, Ohio 45422
Attorney for Defendant-Appellant

.....

FAIN, J.

{¶ 1} Defendant-appellant Yolanda Twitty appeals from an order of the
Montgomery County Area Court District 1 allocating credit for time served in jail first
toward court costs rather than toward the payment of her assessed fines. Twitty
contends that the trial court erred because R.C. 2947.14 applies to the allocation of

credit for time served, not R.C. 2949.111(B), which pertains to the allocation of monetary payments.

{¶ 2} We conclude that this record shows that Twitty was incarcerated for non-payment of fines. She was therefore entitled to a credit of fifty dollars per day jailed toward the amount of her fine, and the trial court improperly allocated jail time toward the payment of costs first, leaving a balance owed on her fines.

{¶ 3} The order from which this appeal is taken is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

I

{¶ 4} Yolanda Twitty was arrested on July 18, 2005, for the offense of Theft, in violation of R.C. 2913.02. She was released the following day, with a summons to appear on July 21st. Twitty failed to appear on the 21st, and a warrant was issued for her arrest. Twitty was arrested on August 7, 2005. She was released by the court on the following day, and the court ordered her to appear for a pre-trial conference on August 24, 2005. Thereafter, the case was set for disposition on September 28, 2005. Again, Twitty failed to appear and another warrant for her arrest was issued.

{¶ 5} Twitty was arrested on the second warrant on November 14, 2005. She was held in jail until November 23, 2005, at which time she pled guilty to the lesser offense of Unauthorized Use of Property. She was sentenced to serve thirty days in jail, with a credit for ten days served. The balance of the jail term was suspended, on the condition that she serve a term of community control for a period of five years.

{¶ 6} Of relevance to this appeal, Twitty was also assessed court costs plus a fine of \$200, of which \$100 was suspended. A payment schedule was filed, pursuant to which Twitty was to pay \$236 in three installments with the total due by January 20, 2006. The schedule did not separate or distinguish court costs from the amount of the fine, but given that the fine totaled \$100, the remaining \$136 consisted of court costs. Twitty did not make payment.

{¶ 7} On January 4, 2006, the court filed a “Notice of Revocation Hearing and Order” due to “certain matters, which if true, constitute a violation of the terms of probation,” including Twitty’s failure to report for community control and failure to pay the fines and costs. The revocation order required Twitty to appear on February 1, 2006. Twitty failed to appear and the court issued a third arrest warrant.

{¶ 8} Twitty was arrested on July 8, 2006, and held in jail until July 19, when a revocation hearing was held. The court found that she had violated the conditions of her community control sentence, and imposed a twelve-day jail sentence, with a credit for twelve days served. The trial court also entered another payment order requiring Twitty to pay \$251 by October 27, 2006.¹ Again, the order did not separate or distinguish the amount due on the fine from the amount of court costs owed. Further, the order included an acceleration clause and notice that Twitty would be “referred to collection” if any payments were missed.

{¶ 9} Thereafter, on September 28, 2006, the trial court issued a notice of revocation of Twitty’s community control for failure to report for community control and failure to pay her fines and costs. The matter was set for hearing on November

1, 2006. Following another failure to appear, the trial court issued a fourth arrest warrant. Twitty was arrested on April 17, 2007, and held in jail. A revocation hearing was set for May 2, 2007.

{¶ 10} On April 24, 2007, Twitty filed a petition for habeas corpus relief with the Montgomery County Common Pleas Court, in which she alleged that she was serving her 32nd day in jail on an offense that carried a 30-day sentence. The Common Pleas Court granted her petition and Twitty was released the next day.

{¶ 11} The trial court then issued an administrative order terminating community control, and issued a notice to appear for a status conference regarding the payment of the fines and costs. Twitty failed to appear, and the trial court issued a fifth warrant for her arrest. She was arrested on September 19, 2007, and released the next day. On July 30, 2008, Twitty filed a motion to credit the time served and to vacate the status hearing. At that point she had served a total of 35 days in jail.

{¶ 12} The court issued a decision and order in which it determined that the fines and costs totaled \$271. The court then reduced that amount by \$250, representing the sum of \$50 per day for each of the five extra days, beyond her sentence, that Twitty spent in jail. The court also found that Twitty still owed the sum of \$21 in fines. In doing so, the trial court stated:

{¶ 13} “Given that both a fine of one hundred dollars (\$100.00) and court costs were assessed in this case the one hundred dollar fine remains unpaid pursuant to the allocation of payments mandated by R.C. 2949.111(B).

¹ Apparently this amount represented an additional \$15 in court costs.

{¶ 14} “Defendant’s attorney suggests that this court and ‘every, every, every court’ has ignored our Court of Appeals’ counsel in *State v. Swift*, 2005-Ohio-1515, ‘to segregate and/or allocate the collection of fines and court costs so that the appropriate mechanism can be utilized to collect both.’ *Swift* ¶ 26. This court has reviewed the *Swift* decision carefully and finds no consideration of the allocation set forth in R.C. 2949.111(B). Therefore, this court declines to read *Swift* to require this court to re-allocate that which is allocated under 2949.111(B).

{¶ 15} “If, as in this case, a defendant is sentenced to pay a fine and court costs, without reimbursement costs, and, a penny remains unpaid, then there is an outstanding balance owed on the fine. As a result, a criminal sentence remains under this court’s criminal jurisdiction.”

{¶ 16} Twitty appeals.

II

{¶ 17} Twitty’s sole assignment of error states as follows:

{¶ 18} “THE TRIAL COURT IMPROPERLY APPLIED APPELLANT’S EXCESS DAYS IN JAIL TO REDUCE APPELLANT’S COURT COSTS BEFORE APPLYING THE DAYS TO REDUCE APPELLANT’S FINES.”

{¶ 19} Twitty contends that the trial court “should have applied [her] excess days in jail to reduce and eliminate her fines, and use only civil means to collect her outstanding court costs.” Specifically, she argues that the trial court improperly applied the provisions of R.C. 2949.111(B), rather than the provisions of R.C. 2947.14(D), in allocating the jail time credit. The State contends that Twitty failed to

raise the issue of priority in the trial court, and that she has thus waived the matter on appeal. The State further contends that if the trial court did err in the allocation, the error does not rise to the level of plain error.

{¶ 20} We begin by noting that we disagree with the State's contention that Twitty failed to preserve this issue for appeal. In the July 30, 2008 motion to credit time served, Twitty asserted that the court must first give her credit toward the fine for the extra days served in jail. She also cited R.C. 2947.14(D) as the appropriate provision to utilize, and argued that the statute requires a court to give an offender credit toward the fine at the rate of \$50 for each day spent in jail. She noted that in cases where the trial court combines the fines and court costs into one sum and then fails to make the appropriate allocation of the jail time, it causes the offender to serve jail time for court costs. We conclude that Twitty did raise in the trial court the issue she is raising in this appeal.

{¶ 21} The issue Twitty raises deals with the question of how to allocate jail-time credit. The trial court utilized R.C. 2949.111(B) in determining the allocation of the jail-time credit. That statute provides:

{¶ 22} "Unless the court, in accordance with division (C) of this section, enters in the record of the case a different method of assigning payments, if a person who is charged with a misdemeanor is convicted of or pleads guilty to the offense, if the court orders the offender to pay any combination of court costs, state fines or costs, restitution, a conventional fine, or any reimbursement, *and if the offender makes any payment of any of them to a clerk of court*, the clerk shall assign the offender's payment in the following manner:

{¶ 23} “(1) If the court ordered the offender to pay any court costs, the offender's payment shall be assigned toward the satisfaction of those court costs until they have been entirely paid.

{¶ 24} “(2) If the court ordered the offender to pay any state fines or costs and if all of the court costs that the court ordered the offender to pay have been paid, the remainder of the offender's payment shall be assigned on a pro rata basis toward the satisfaction of the state fines or costs until they have been entirely paid.

{¶ 25} “(3) If the court ordered the offender to pay any restitution and if all of the court costs and state fines or costs that the court ordered the offender to pay have been paid, the remainder of the offender's payment shall be assigned toward the satisfaction of the restitution until it has been entirely paid.

{¶ 26} “(4) If the court ordered the offender to pay any fine and if all of the court costs, state fines or costs, and restitution that the court ordered the offender to pay have been paid, the remainder of the offender's payment shall be assigned toward the satisfaction of the fine until it has been entirely paid.

{¶ 27} “(5) If the court ordered the offender to pay any reimbursement and if all of the court costs, state fines or costs, restitution, and fines that the court ordered the offender to pay have been paid, the remainder of the offender's payment shall be assigned toward the satisfaction of the reimbursements until they have been entirely paid.” (Emphasis added.)

{¶ 28} This statute expressly addresses the order of allocation of money payments made by an offender to costs and fines, and permits a court to reduce costs before fines. The statute does not purport to govern the crediting of jail time

toward any assessed fines. The subject of jail-time credit is governed by R.C. 2947.14(D), which provides:

{¶ 29} “(A) If a fine is imposed as a sentence or a part of a sentence, the court or magistrate that imposed the fine may order that the offender be committed to the jail or workhouse until the fine is paid or secured to be paid, or the offender is otherwise legally discharged, if the court or magistrate determines at a hearing that the offender is able, at that time, to pay the fine but refuses to do so. The hearing required by this section shall be conducted at the time of sentencing.

{¶ 30} “(B) At the hearing, the offender has the right to be represented by counsel and to testify and present evidence as to the offender's ability to pay the fine. If a court or magistrate determines after considering the evidence presented by an offender, that the offender is able to pay a fine, the determination shall be supported by findings of fact set forth in a judgment entry that indicate the offender's income, assets, and debts, as presented by the offender, and the offender's ability to pay.

{¶ 31} “(C) If the court or magistrate has found the offender able to pay a fine at a hearing conducted in compliance with divisions (A) and (B) of this section, and the offender fails to pay the fine, a warrant may be issued for the arrest of the offender. Any offender held in custody pursuant to such an arrest shall be entitled to a hearing on the first regularly scheduled court day following the date of arrest in order to inform the court or magistrate of any change of circumstances that has occurred since the time of sentencing and that affects the offender's ability to pay the fine. The right to the hearing on any change of circumstances may be waived by the offender.

{¶ 32} “At the hearing to determine any change of circumstances, the offender has the right to testify and present evidence as to any portion of the offender's income, assets, or debts that has changed in such a manner as to affect the offender's ability to pay the fine. If a court or magistrate determines, after considering any evidence presented by the offender, that the offender remains able to pay the fine, that determination shall be supported by a judgment entry that includes findings of fact upon which such a determination is based.

{¶ 33} “(D) No person shall be ordered to be committed to a jail or workhouse or otherwise be held in custody in satisfaction of a fine imposed as the whole or a part of a sentence except as provided in this section. *Any person imprisoned pursuant to this section shall receive credit upon the fine at the rate of fifty dollars per day or fraction of a day.* If the unpaid fine is less than fifty dollars, the person shall be imprisoned one day.” (Emphasis added.)

{¶ 34} This court, in discussing both of the above-quoted statutes has held that “clearly it is incumbent upon a trial court to segregate and/or allocate the collection of fines and court costs, so that the appropriate mechanism can be utilized to collect both.” *State v. Swift*, Montgomery App. No 20543, 2005-Ohio-1595, ¶ 26. In this case, Twitty served five additional days in jail beyond her 30-day jail sentence, due to arrests on warrants issued after she failed to appear in court. A review of the record reveals that the duty to appear was predicated upon Twitty's failure to make the required payments toward her fine, as set forth in the court's payment schedule. Thus, it is clear that Twitty was incarcerated for five extra days due to non-payment of fines, thereby implicating the provisions of R.C. 2947.14.

{¶ 35} Permitting the reduction of fines by credit for time spent in jail makes sense. The purposes of incarceration and the imposition of a fine are both to punish the offender. Therefore, it is logical to provide for the substitution of one for the other. The imposition of court costs is to reimburse the State for its expenses, not to punish the offender. Therefore, jail time is not a proper substitute for the payment of costs. Incarceration does not reduce or ameliorate the State's expenses, but instead imposes an additional financial burden upon the State, in the form of the expenses of the additional incarceration. Furthermore, this court has clearly noted that a court cannot incarcerate an offender for non-payment of costs. *Swift* at ¶ 21.

{¶ 36} Since it is unlawful to incarcerate an individual for non-payment of costs, we conclude that the trial court has an obligation to keep a separate accounting of court costs and fine amounts and payments, and to credit jail time to the fine portion. Since Twitty served five extra days in jail, she is entitled to a credit of \$250 on her fine, which clearly exceeds the amount of her assessed fine. Therefore, we conclude that the trial court erred by finding that Twitty still owes \$21 dollars in fines. Instead, any remaining amount must be viewed solely as court costs, for which the trial court must rely upon methods of collection for civil judgments. *Swift*, supra at ¶21.

{¶ 37} The reader will surely note that the logic of our decision is that Twitty's jail-time credit for her time spent in jail beyond her sentence ought not to be credited against the payment of court costs at all, even after first crediting that time, at \$50 per day, toward unpaid fines. The State has not appealed from the order crediting that jail time against unpaid court costs, and Twitty obviously cannot be expected to

complain that this time was credited in her favor against her unpaid court costs. Therefore, we do not disturb the trial court's order crediting her excess jail time against her unpaid court costs.

{¶ 38} Twitty's sole assignment of error is sustained.

III

{¶ 39} Twitty's sole assignment of error having been sustained, the order of the trial court from which this appeal is taken is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

.....

BROGAN and FROELICH, JJ., concur.

Copies mailed to:

Raymond Dundes
Glen H. Dewar
Hon. James L. Manning