

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

MELVIN COLBURN

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.

Hon. John W. Wise, J.

Hon. Craig R. Baldwin, J.

Case No. 22 COA 038

O P I N I O N

CHARACTER OF PROCEEDING:

Criminal Appeal from the Court of Common
Pleas, Case No. 22 CRI 121

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

August 21, 2023

APPEARANCES:

For Plaintiff-Appellee

CHRISTOPHER R. TUNNELL
PROSECUTING ATTORNEY
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For Defendant-Appellant

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Wise, J.

{¶1} Appellant Melvin Colburn appeals his sentence entered in the Ashland County Court of Common Pleas. Appellee is State of Ohio. The relevant facts leading to this appeal are as follows.

STATEMENT OF THE FACTS AND CASE

{¶2} On May 12, 2022, Appellant was indicted on one count Aggravated Possession of Drugs, in violation of R.C. §2925.11(A) and R.C. §2925.11(C)(1)(a) for his possession of methamphetamine.

{¶3} On September 23, 2022, Appellant entered a plea of guilty to the sole count of the indictment.

{¶4} On October 17, 2022, the trial court sentenced Appellant to nine months and to pay court costs.

ASSIGNMENTS OF ERROR

{¶5} Appellant filed a timely notice of appeal. He herein raises the following two Assignments of Error:

{¶6} “I. THE TRIAL COURT’S FAILURE TO WAIVE APPELLANT’S COURT COSTS WAS AN ABUSE OF DISCRETION.

{¶7} II. THE FAILURE OF APPELLANT’S TRIAL COUNSEL TO SEEK A WAIVER OF COURT COSTS CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF APPELLANT’S RIGHT TO COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.”

I.

{¶8} In Appellant's First Assignment of Error, Appellant argues the trial court abused its discretion in ordering him to pay court costs. We disagree.

{¶9} A decision to impose court costs is within a trial court's sound discretion. *State v. Braden*, 158 Ohio St.3d 462, 2019-Ohio-4204, 145 N.E.3d 235, ¶30. The abuse of discretion standard is more than an error of law or judgment; it implies the court ruled arbitrarily, unreasonably, or unconscionably. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

{¶10} R.C. §2947.23, in pertinent part, states:

(A)(1)(a) 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.

* * *

(C) The court retains jurisdiction to waive, suspend, or modify the payment of prosecution, including any costs under section 2947.231 of the Revised Code, at the time of sentencing or at any time thereafter.

{¶11} “[A] trial court is not required to consider the defendant's ability to pay in assessing a motion to waive, suspend, or modify court costs under R.C. 2947.23(C), though it is permitted to do so.” *State v. Taylor*, 161 Ohio St.3d 319, 2020-Ohio-3514, 163 N.E.3d 486, ¶16.

{¶12} Appellant argues costs should not have been imposed because he is unemployed, receiving government food assistance, has a limited ability to work, and

limited income potential because of his tenth-grade education and lack of any professional license. However, Appellant represented to the trial court he believes he has a job for when he gets out of prison. He has not presented any support that he is unable to work after release from incarceration. As such, and because a trial court is not required to consider Appellant's ability to pay, we find the trial court did not abuse its discretion in imposing court costs.

{¶13} Accordingly, Appellant's first Assignment of Error is overruled.

II.

{¶14} In Appellant's second Assignment of Error, Appellant argues he was deprived of effective assistance of counsel as his trial counsel failed to ask for the trial court to waive court costs. We disagree.

{¶15} Our standard is set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Ohio adopted this standard in the case of *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. These cases require a two-pronged analysis in reviewing a claim for ineffective assistance of counsel. *Id.* First, we must determine whether counsel's assistance was ineffective; whether counsel's performance fell below an objective standard of reasonable representation and was violative of any of his essential duties to the client. *Id.* If we find ineffective assistance of counsel, we must then determine whether the defense was actually prejudiced by counsel's ineffectiveness such that the reliability of the outcome of the trial is suspect. *Id.* This requires a showing there is a reasonable probability that, but for counsel's unprofessional error, the outcome of the trial would have been different. *Id.*

{¶16} Trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie*, 81 Ohio St.3d 673, 675, 693 N.E.2d 267 (1998). Even debatable trial tactics and strategies do not constitute ineffective assistance of counsel. *State v. Clayton*, 62 Ohio St.2d 45, 402 N.E.2d 1189 (1980)

{¶17} This Court previously held:

The adoption of R.C. 2947.23(C) now permits trial counsel flexibility regarding a request for waiving costs. Prior to its adoption, a failure to request waiver of costs at sentencing resulted in a final judgment and a prohibition of any further consideration of that issue. *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, ¶23. Res judicata no longer bars appellant from requesting a waiver at any time after sentencing. “Trial counsel may have decided as a matter of strategy not to seek a waiver or modification of court costs until some later time” and “[s]trategic timing may now play a role in trial counsel’s decision.” *State v. Farnese*, 4th Dist. Washington No. 15CA11, 2015-Ohio-3533, ¶16; *State v. Purifoy*, 2nd Dist. Montgomery No. 28042, 2019-Ohio-2942, ¶28. We find that the timing of a motion, seeking waiver of payment, is a matter of trial strategy. *State v. Southam*, 6th Dist. Fulton No. F-18-004, 2018-Ohio-5288, ¶67, quoting *State v. Pultz*, 6th Dist. Wood No. WD-14-083, 2016-Ohio-329, ¶61. And a debatable trial strategy does not equal ineffective assistance of counsel. *Southam*, *supra* at ¶68, quoting *State v. Phillips*, 74 Ohio St.3d 72 85, 656 N.E.2d 643 (1995). *State v. Moore*, 6th Dist. Erie No. E-19-009, 2019-Ohio-

4609, ¶14. *Accord State v. Boyd*, 5th Dist. Richland No. 12CA23, 2013-Ohio-1333, ¶26. (“Trial strategy and even debatable trial tactics do not establish ineffective assistance of counsel,” quoting *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶101) and *State v. McCall*, 5th Dist. Coshocton No. 2017CA0002, 2017-Ohio-7860, ¶43 (“Tactical or strategic trial decisions, including timing of a motion, do not generally constitute ineffective assistance”).

State v. Eblin, 5th Dist. Muskingum No. CT2019-0036, 2020-Ohio-1216, ¶16. *Accord State v. Dooley*, 5th Dist. Muskingum No. CT 2019-0054, 2020-Ohio-3947, ¶29.

{¶18} Accordingly, we find trial counsel’s performance did not fall below an objective standard of reasonable representation.

{¶19} Appellant’s second Assignment of Error is overruled.

{¶20} For the foregoing reasons, the judgment of the Court of Common Pleas of Ashland County, Ohio, is hereby affirmed.

By: Wise, J.
Gwin, P. J. and
Baldwin, J., concur.

JWW/br 0816