

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-10-1350

Appellee

Trial Court No. CR0201001561

v.

Delexis Maloy

**DECISION AND JUDGMENT**

Appellant

Decided: December 23, 2011

\* \* \* \* \*

Julia R. Bates, Lucas County Prosecuting Attorney, and  
Lindsay D. Navarre, Assistant Prosecuting Attorney, and  
J. Christopher Anderson, Assistant Prosecuting Attorney, for appellee.

Spiros P. Cocoves, for appellant.

\* \* \* \* \*

YARBROUGH, J.

{¶1} This is an appeal from the judgment of the Lucas County Court of Common Pleas, sentencing appellant to 73 years in prison, and ordering him to pay the "costs of

supervision, confinement, assigned counsel, and prosecution as authorized by law." For the reasons that follow, we affirm in part and reverse in part.

{¶2} On March 30, 2010, the Lucas County Grand Jury issued a 15-count indictment against appellant. The indictment was based on appellant's actions in seven separate incidents, and included charges of aggravated burglary, aggravated robbery, kidnapping, and rape. Fourteen of those counts included a firearm specification. On September 20, 2011, appellant withdrew his earlier plea of not guilty, and entered a plea of no contest to the following: Count 1, aggravated burglary in violation of R.C. 2911.11(A)(1), a felony of the first degree, with a firearm specification in violation of R.C. 2941.145; Counts 6, 9, and 13, each aggravated robbery in violation of R.C. 2911.01(A)(1), felonies of the first degree; Counts 7 and 11, each the lesser included offense of robbery in violation of R.C. 2911.02(A)(1), felonies of the second degree; Count 14, kidnapping in violation of R.C. 2905.01(A)(4) and (C), a felony of the first degree; and Count 15, rape in violation of R.C. 2907.02(A)(2) and (B), a felony of the first degree, with a firearm specification in violation of R.C. 2941.145. In exchange, the state agreed to nolle prosequi the remaining counts and firearm specifications, and to remain silent at sentencing.

{¶3} After being found guilty by the trial court of the charges to which he pleaded no contest, a sentencing hearing was held on November 15, 2010. At the hearing, the trial court sentenced appellant to nine years in prison on Count 1 with an

additional mandatory and consecutive term of three years on the firearm specification, eight years in prison on Count 6, seven years in prison each on Counts 7 and 11, nine years in prison each on Counts 9, 13, and 14, and nine years in prison on Count 15 with an additional mandatory and consecutive term of three years on the firearm specification. All of the terms were to run consecutively for an aggregate prison sentence of 73 years.

{¶4} The trial court also held that "Defendant found to have, or reasonably may be expected to have, the means to pay all or part of the applicable costs of supervision, confinement, assigned counsel, and prosecution as authorized by law. Defendant ordered to reimburse the State of Ohio and Lucas County for such costs. This order of reimbursement is a judgment enforceable pursuant to law by the parties in whose favor it is entered. Defendant further ordered to pay the cost assessed pursuant to R.C. 9.92(C), 2929.18 and 2951.021." Notably, as the court was reading the sentence, appellant disruptively began shouting obscenities and was removed from the courtroom.

{¶5} Appellant has timely appealed and now raises the following two assignments of error.

{¶6} 1. "THE TRIAL COURT ERRED TO THE PREJUDICE OF MR. MALOY WHEN IT SENTENCED HIM TO NON-MINIMUM, CONSECUTIVE SENTENCES BASED ON FACTS NOT ALLEGED IN THE INDICTMENT NOR ADMITTED BY MR. MALOY, IN VIOLATION OF HIS RIGHTS TO A TRIAL BY JURY AND DUE PROCESS OF LAW UNDER THE FIFTH, SIXTH, AND

FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND UNDER THE CORRESPONDING PROVISIONS OF THE OHIO CONSTITUTION."

{¶7} 2. "THE TRIAL COURT ERRED TO THE PREJUDICE OF MR. MALOY WHEN IT ORDERED HIM TO PAY UNSPECIFIED COSTS, INCLUDING COURT APPOINTED FEES, WITHOUT FIRST DETERMINING THE ABILITY TO PAY THOSE COSTS OR, IN THE ALTERNATIVE, TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE AN OBJECTION TO THE IMPOSITION OF THESE COSTS, ALL IN VIOLATION OF HIS RIGHT TO DUE PROCESS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE OHIO CONSTITUTION."

{¶8} As to appellant's first assignment of error, *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, paragraph seven of the syllabus, held that "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than minimum sentences." Appellant raises the familiar argument that this portion of *Foster* has been made invalid by the United States Supreme Court's decision in *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517. Therefore, appellant contends that the trial court was required to follow the pre-*Foster* sentencing requirements, and its failure to do so violated his right to due process. However,

appellant acknowledges that the Ohio Supreme Court has rejected this argument in *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, in which it held that *Oregon v. Ice* did not resurrect those statutory provisions excised by *Foster*.<sup>1</sup> Accordingly, pursuant to *Hodge*, appellant's first assignment of error is not well-taken.

{¶9} Under his second assignment of error, appellant contends that nothing in the record supports the trial court's finding that he has any present or future ability to pay any costs or fees while serving his 73-year sentence. In this case, the monetary penalty ordered by the trial court can be broken down into three categories. First are the mandatory costs of prosecution imposed pursuant to R.C. 2947.23 and the mandatory one-dollar citizens' reward program cost imposed pursuant to R.C. 9.92(C). Second are the costs of confinement imposed under R.C. 2929.18(A)(5)(a)(ii). Finally, the third category is the cost of assigned counsel allowed by R.C. 2941.51(D).

{¶10} In addressing the mandatory costs, it is well settled that "an indigent defendant must move a trial court to waive payment of costs at the time of sentencing. If the defendant makes such a motion, then the issue is preserved for appeal and will be reviewed under an abuse-of-discretion standard. Otherwise, the issue is waived and costs are res judicata." *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, ¶ 23. Here, the record is clear that no motion was made to waive payment of the mandatory costs.

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<sup>1</sup>Appellant, in his own words, "asserts this argument so that it is available for further review by other courts."

Therefore, the application of res judicata bars appellant's challenge to these costs on appeal.

{¶11} Appellant alternatively argues that trial counsel was ineffective for failing to object to the trial court's imposition of these costs. To demonstrate ineffective assistance of counsel, appellant must satisfy the two-prong test developed in *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. That is, appellant must show that counsel's performance fell below an objective standard of reasonableness, and that a reasonable probability exists that, but for counsel's error, the result of the proceedings would have been different. *Strickland* at 687-688. Here, appellant has failed to demonstrate that the result of the proceedings would have been different had the purported errors not occurred.

{¶12} R.C. 2947.23(A)(1) provides, "In all criminal cases \* \* \* the judge or magistrate shall include in the sentence the costs of prosecution \* \* \*." This requirement has been held to apply even to indigent defendants. *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, ¶ 8. Nevertheless, a trial court may, in its discretion, waive these costs. *Id.*; *State v. Phillips*, 6th Dist. No. F-05-032, 2006-Ohio-4135, ¶ 15. Similarly, R.C. 9.92(C)(1) imposes a mandatory one-dollar cost "in any case in which a person is convicted of or pleads guilty to any offense other than a traffic offense. \* \* \* [B]ut the court, in the court's discretion, may remit this one dollar additional court costs to the offender." Here, appellant argues that it is an abuse of discretion to find that he has the

ability to pay any costs of any kind. However, R.C. 2947.23(A)(1) and R.C. 9.92(C)(1) apply regardless of appellant's ability to pay. Moreover, appellant has made no demonstration that a "reasonable probability" exists that the lower court would have waived payment of the costs had appellant so moved. See *State v. King*, 6th Dist. No. WD-09-069, 2010-Ohio-3074, ¶ 11. Therefore, we cannot conclude that appellant was denied the effective assistance of counsel for failing to object to the imposition of these costs.

{¶13} The second category of costs imposed by the trial court is the costs of confinement. R.C. 2929.18(A)(5)(a)(ii) states that an offender may be ordered to reimburse the government for "[a]ll or part of the costs of confinement \* \* \* provided that the amount of reimbursement ordered under this division shall not exceed the total amount of reimbursement the offender is able to pay as determined at a hearing and shall not exceed the actual cost of the confinement." Before imposing these costs, though, the trial court "shall consider the offender's present and future ability to pay the amount of the sanction or fine." R.C. 2929.19(B)(5). We have held that while a sentencing court is not required to hold a separate hearing when determining whether to impose a financial sanction under this provision, the record must contain some evidence that the court considered the offender's present and future ability to pay such a sanction. *State v. Phillips*, supra, at ¶ 18, citing *State v. Lamonds*, 6th Dist. No. L-03-1100, 2005-Ohio-1219, ¶ 42. Further, the trial court need not explicitly state that it considered a

defendant's ability to pay; instead, we look to the totality of the record to determine whether the requirement has been satisfied. *State v. Phillips* at ¶ 18, citing *State v. Berry*, 4th Dist. No. 04CA2961, 2006-Ohio-244, ¶ 43.

{¶14} Like the costs of confinement, the imposition of costs for appointed counsel also depends on appellant's ability to pay. R.C. 2941.51(D) provides that the represented person shall pay if he or she "has, or reasonably may be expected to have, the means to meet some part of the cost of the services rendered \* \* \*." In addition, the costs imposed under R.C. 2941.51(D) are limited to "an amount that the person reasonably can be expected to pay." *Id.* "Again, no hearing on this matter is expressly required, but the court must enter a finding that the offender has the ability to pay and that determination must be supported by clear and convincing evidence of record." *State v. Jobe*, 6th Dist. No. L-07-1413, 2009-Ohio-4066, ¶ 80, citing *State v. Knight*, 6th Dist. No. S-05-007, 2006-Ohio-4807, ¶ 6-7.

{¶15} Here, the trial court affirmatively stated that it found the appellant has, or reasonably may be expected to have, the means to pay all or part of the applicable costs. Appellant, however, argues that the record is devoid of any evidence that supports the trial court's determination of his ability to pay. We agree. Although appellant is now in his early 20s, the record indicates that he only made it to his sophomore year in high school and has never been gainfully employed.<sup>2</sup> Moreover, appellant will be incarcerated

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<sup>2</sup>The record contains conflicting statements on whether appellant has earned his GED.

until he is 94 years old. From this record, we fail to find any evidence that appellant has the ability to pay the costs of his confinement. Compare *State v. Jobe*, supra, at ¶ 82 (appellant unable to pay where he only "completed the eighth grade, did not obtain a GED and has never held a job") with *State v. Bork*, 6th Dist. No. L-07-1080, 2008-Ohio-1556, ¶ 20 (appellant able to pay where he had been employed for 12 years prior to sentencing) and *State v. Phillips*, 6th Dist. No. F-05-032, 2006-Ohio-4135, ¶ 19 (appellant able to pay where record showed he "was educated, eloquent, and able to do legal research," and that he "always had opportunities" and "never had a problem getting a job"). Therefore, that portion of appellant's second assignment of error pertaining to the imposition of the costs of confinement and appointed counsel is found well-taken.

{¶16} Based on the foregoing, the judgment of the Lucas County Court of Common Pleas is affirmed in part and reversed in part. The portion of the court's sentencing order requiring appellant to pay the costs of his confinement and appointed counsel is vacated. The imposition of all other costs is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24(A).

JUDGMENT AFFIRMED, IN PART  
AND REVERSED, IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.  
See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

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JUDGE

Arlene Singer, J.

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JUDGE

Stephen A. Yarbrough, J.  
CONCUR.

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JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.