

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

State of Ohio

Court of Appeals No. WD-12-064

Appellee

Trial Court No. 2011 CR 139

v.

Michael Turner

**DECISION AND JUDGMENT**

Appellant

Decided: November 15, 2013

\* \* \* \* \*

Paul Dobson, Wood County Prosecuting Attorney, and  
Gwen Howe-Gebbers and Jacqueline M. Kirian, Assistant Prosecuting Attorneys,  
for appellee.

Lawrence A. Gold, for appellant.

\* \* \* \* \*

**YARBROUGH, J.**

**I. Introduction**

{¶ 1} This is an *Anders* appeal. Appellant, Michael Turner, appeals the judgment of the Wood County Court of Common Pleas, revoking his community control sanctions and sentencing him to a prison term of one year following his admission to violating the terms of his community control.

## **A. Facts and Procedural Background**

{¶ 2} On March 17, 2011, Turner was indicted on one count of possession of cocaine in violation of R.C. 2925.11(A) and (C)(4), a felony of the fifth degree. Turner initially entered a plea of not guilty. However, on May 3, 2011, Turner withdrew his not guilty plea and entered a plea of guilty to the sole charge in the indictment. The court accepted Turner's guilty plea and, on July 8, 2011, sentenced him to three years of community control. The court also reserved a prison sentence of one year in the event Turner violated the terms of his community control. Further, Turner was ordered to pay court costs, a \$50 supervision fee, and a \$500 fine.

{¶ 3} While on community control, Turner tested positive for cocaine use on two separate occasions. In addition to his impermissible drug use, Turner violated the terms of his community control by leaving the state of Ohio without permission and failing to notify his probation officer that he was charged with various traffic offenses. Consequently, the trial court held a community control violation hearing, at which Turner stipulated to violating the terms of his community control. The court accepted Turner's stipulation and found him to be in violation of the terms of his community control. The trial court held a disposition hearing on November 2, 2012, at which the court sentenced him to the one-year prison term it previously reserved as part of his original sentence. Turner's timely appeal followed.

{¶ 4} Based upon his belief that no prejudicial error occurred below, Turner's appointed counsel has filed a motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

{¶ 5} *Anders, supra*, and *State v. Duncan*, 57 Ohio App.2d 93, 385 N.E.2d 323 (8th Dist.1978), set forth the procedure to be followed by appointed counsel who desires to withdraw for want of a meritorious, appealable issue. In *Anders*, the United States Supreme Court held that if counsel, after a conscientious examination of the case, determines it to be wholly frivolous, he should so advise the court and request permission to withdraw. *Anders* at 744. This request, however, must be accompanied by a brief identifying anything in the record that could arguably support the appeal. *Id.*

{¶ 6} Counsel must also furnish his client with a copy of the brief and request to withdraw and allow the client sufficient time to raise any matters that he chooses. *Id.* Once these requirements have been satisfied, the appellate court must then conduct a full examination of the proceedings held below to determine if the appeal is indeed frivolous. If the appellate court determines that the appeal is frivolous, it may grant counsel's request to withdraw and dismiss the appeal without violating constitutional requirements, or it may proceed to a decision on the merits if state law so requires. *Id.*

{¶ 7} In this case, Turner's counsel has satisfied the requirements set forth in *Anders*. Accordingly, this court shall proceed with an examination of the potential assignments of error set forth by Turner's counsel and the entire record below to determine if this appeal lacks merit and is, therefore, wholly frivolous.

## **B. Assignments of Error**

{¶ 8} In his *Anders* brief, Turner’s counsel assigns the following possible errors:

I. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO THE PREJUDICE OF APPELLANT AT SENTENCING BY IMPOSING FINANCIAL SANCTIONS WITHOUT CONSIDERATION OF APPELLANT’S ABILITY TO PAY.

II. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §10 OF THE CONSTITUTION OF THE STATE OF OHIO.

{¶ 9} Turner has not filed a pro se brief.

## **II. Analysis**

### **A. Imposition of Financial Sanctions**

{¶ 10} In his first potential assignment of error, Turner argues that the trial court erred in ordering him to pay court costs and a \$500 fine without first inquiring into his ability to pay such expenses. Further, he contends that the trial court erred in imposing court costs without explaining to him what would happen if he failed to pay.

{¶ 11} As to Turner’s contention that the trial court should have first determined that he was able to pay for the court costs and the fine, we must disagree. Former R.C. 2947.23(A)(1) mandates that “[i]n all criminal cases, including violations of ordinances,

the judge or magistrate shall include in the sentence the costs of prosecution, \* \* \* and render a judgment against the defendant for such costs.”<sup>1</sup> The Supreme Court of Ohio has previously held that a trial court may assess court costs against an indigent defendant convicted of a felony. *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, at paragraph one of the syllabus. Because the imposition of costs pursuant to R.C. 2947.23 is mandatory, this court has held that “[t]he trial court is not required to hold a hearing or otherwise determine an offender’s ability to pay before ordering him to pay costs.” *State v. Reigsecker*, 6th Dist. Fulton No. F-03-022, 2004-Ohio-3808, ¶ 10, citing *State v. Fisher*, 12th Dist. Butler No. CA98-09-190, 2002-Ohio-2069. Accordingly, the trial court did not err by ordering Turner to pay court costs without first determining his ability to pay.

{¶ 12} In addition to court costs imposed pursuant to R.C. 2947.23, the trial court also ordered Turner to pay a \$500 fine pursuant to R.C. 2929.18(A)(3)(e). Regarding the fine, R.C. 2929.18(E) states that the trial court “may hold a hearing if necessary to determine whether the offender is able to pay the sanction or is likely in the future to be able to pay it.” While such a hearing is not mandatory, the court must, at a minimum, “consider the offender’s present and future ability to pay the amount of the sanction or fine.” R.C. 2929.19(B)(5).

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<sup>1</sup> Since Turner was sentenced, R.C. 2947.23 has been revised several times. However, we will apply the version of the statute in effect on July 8, 2011, the date that the trial court originally imposed Turner’s sentence.

{¶ 13} Here, the court did not comment on Turner’s ability to pay the fine at the sentencing hearing. It did, however, state in its judgment entry that it had considered, among other things, Turner’s presentence investigation report (“PSI”). The PSI indicated that, although appellant was unemployed at the time of the offense, he receives social security benefits in the amount of \$900 per month. Additionally, the PSI reveals that Turner’s monthly expenses amount to \$398.75, leaving a surplus of roughly \$500 per month. Based on the income information contained in the PSI, we hold that the court sufficiently considered Turner’s ability to pay the \$500 fine.

{¶ 14} Next, we consider Turner’s contention that the trial court failed to properly notify him of the consequences of failing to pay court costs. Regarding such notification, former R.C. 2947.23(A)(1) provides:

{¶ 15} 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 credit rate per hour of community service performed, and each hour of community service performed will reduce the judgment by that amount.

{¶ 16} Here, the state concedes that “the trial court did not comply with the former version of R.C. 2947.23(A)(1).” Having independently reviewed the record, we agree with both Turner and the state that the trial court failed to provide the proper notification under R.C. 2947.23.

{¶ 17} Accordingly, we find Turner’s first potential assignment of error well-taken. Generally, under *Anders*, we would appoint new appellate counsel for appellant to brief and argue this issue. However, the record demonstrates that the trial court failed to comply with R.C. 2947.23. Consequently, we may take immediate action. *State v. Embry*, 6th Dist. Lucas No. L-03-1114, 2006-Ohio-729, ¶ 16.

{¶ 18} In remedying the trial court’s failure to provide proper notification under R.C. 2947.23, we have previously held that the proper action is to “reverse the trial court’s sentence solely as it relates to the imposition of court costs, and to remand the cause for the limited purpose of allowing the trial [court] to give proper notification \* \* \* with a concomitant opportunity for the defendant to object.” *State v. Griffin*, 6th Dist. Lucas No. L-11-1283, 2013-Ohio-411, ¶ 51.

### **B. Ineffective Assistance of Counsel**

{¶ 19} In his second potential assignment of error, Turner asserts that he received ineffective assistance of counsel.

{¶ 20} To support a claim for ineffective assistance of counsel, appellant must satisfy the two-prong test developed in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That is, appellant must show counsel’s performance fell below an objective standard of reasonableness, and a reasonable probability exists that but for counsel’s error, the result of the proceedings would have been different. *Id.* at 687–688, 694. In *Strickland*, the United States Supreme Court opined,

[A] court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel’s performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. *Id.* at 697.

{¶ 21} Here, Turner argues that his trial counsel was ineffective for failing to object to the imposition of financial sanctions at sentencing. However, Turner has failed to demonstrate that the result of the proceedings would have been different had defense counsel objected.

{¶ 22} Concerning the imposition of financial sanctions, it is well settled that “an indigent defendant must move a trial court to waive payment of costs at the time of sentencing.” *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, ¶ 23. Upon a defendant’s motion, the trial court possesses the discretion to waive such costs. *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, ¶ 8; *State v. Phillips*, 6th Dist.

Fulton No. F-05-032, 2006-Ohio-4135, ¶ 15. No such motion was made in this case. However, Turner has made no demonstration that a “reasonable probability” exists that the lower court would have waived payment of the costs had defense counsel moved for a waiver. Therefore, we cannot conclude that he was denied effective assistance of counsel. *See State v. Maloy*, 6th Dist. Lucas No. L-10-1350, 2011-Ohio-6919, ¶ 12.

{¶ 23} Accordingly, Turner’s second potential assignment of error is not well-taken.

### III. Conclusion

{¶ 24} We hereby grant appellate counsel’s motion to withdraw, and instruct the trial court to appoint new counsel to represent Turner at resentencing as it pertains to the imposition of court costs. The judgment of the Wood County Court of Common Pleas is reversed, and this matter is remanded to the trial court solely for resentencing consistent with the requirements of R.C. 2947.23. Costs are assessed to appellee pursuant to App.R. 24. The clerk is ordered to serve all parties with notice of this decision.

Judgment reversed.

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

Thomas J. Osowik, 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>.