

[Cite as *State v. Hurt*, 2009-Ohio-5811.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case No. 07CA3176
 :
 vs. :
 :
 JOHN D. HURT, : DECISION AND JUDGMENT ENTRY
 :
 Defendant-Appellant. :

APPEARANCES:

COUNSEL FOR APPELLANT: Timothy Young, Ohio Public Defender, and Robert L. Lane, Assistant State Public Defender, 250 East Broad Street, Ste. 1400, Columbus, Ohio 43215

COUNSEL FOR APPELLEE: Mark E. Kuhn, Scioto County Prosecuting Attorney, 602 Seventh Street, Room 310, Portsmouth, Ohio 45662

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 10-29-09

PER CURIAM.

{¶ 1} This is an appeal from a Scioto County Common Pleas Court judgment of conviction and sentence. A jury found John D. Hurt, defendant below and appellant herein, guilty of voluntary manslaughter in violation of R.C. 2903.03. This Court affirmed his conviction and sentence. See State v. Hurt, Scioto App. No. 07CA3176, 2009-Ohio-239.¹ However, on June 18, 2009, we granted an App.R. 26(B) application

¹ That appeal was prosecuted pursuant to Anders v. California (1967), 386 U.S.

to reopen appeal so that appellant could raise a new assignment of error:

“THE TRIAL COURT ERRED BY IMPOSING COURT COSTS AT THE SENTENCING HEARING AND IN ITS JUDGMENT ENTRY OF SENTENCING, WITHOUT NOTIFYING MR. HURT THAT FAILURE TO PAY COURT COSTS MAY RESULT IN THE COURT’S ORDERING HIM TO PERFORM COMMUNITY SERVICE.”

{¶ 2} R.C. 2947.23(A)(1)(a) requires trial courts to inform defendants that if they fail to pay court costs, they may be ordered to perform community service. Appellee concedes that although this warning was not given to appellant, the issue is not ripe for appellate review. We agree.

{¶ 3} This Court has held on several occasions that this issue is not ripe for appellate review if a defendant remains incarcerated and no order of community service has been imposed. See State v. Welch, Washington App. No. 08CA29, 2009-Ohio-2655, at ¶13; State v. Boice, Washington App. No. 08CA24, 2009-Ohio-1755, at ¶¶9-11; State v. Slonaker, Washington App. No. 08CA21, 2008-Ohio-7009, at ¶7. Here, we find nothing in the record to indicate that appellant has been released from prison, failed to pay courts costs and ordered to perform community service. Thus, appellant has suffered no prejudice as a result of the lack of the required warning.

{¶ 4} Therefore, we find the issue is not yet ripe for review and overrule the assignment of error for that reason. The trial court’s judgment is hereby affirmed.

JUDGMENT AFFIRMED.

738, 87 S.Ct. 1396, 18 L.Ed.2d 493. Appellate counsel represented that he could find no “meritorious claims” and we granted leave to withdraw.

Abele, J., Dissenting:

{¶ 5} I respectfully dissent. I concede that on a number of occasions we have applied the ripeness doctrine and have declined to review a trial court's failure to comply with R.C. 2947.23(A)(1)(a) when an appellant remains incarcerated and has not yet been ordered to perform community service (however, a different panel determined the issue ripe and reversed the sentence - See State v. Burns, Gallia App. Nos. 08CA1, 08CA2 & 08CA3, 2009-Ohio-878, at ¶12, fn. 3). I adhere to the reasoning in Burns. The problem with applying the "ripeness" doctrine is that for all practical purposes, it places this error beyond the scope of effective appellate review. If the issue is not dealt with on direct appeal, how will it be effectively reviewed in the future? An appeal from the actual order that imposes community service strikes me as a waste of judicial resources when the issue can be resolved in one appeal rather than two.

{¶ 6} Thus, until I am convinced that a more practical and straightforward means is available by which to raise this issue in the future, if and when a court imposes a community service order, I believe that we should simply consider the issue at the present time. Thus, I would sustain the assignment of error and remand the case for re-sentencing on this point.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Kline, P.J. & McFarland, J.: Concur in Judgment & Opinion
Abele, J.: Dissents with Opinion

For the Court

BY: _____

Roger L. Kline
Presiding Judge

BY: _____

Peter B. Abele, Judge

BY: _____

Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.