

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

State of Ohio

Court of Appeals No. WD-12-038

Appellee

Trial Court No. 2011CR0619

v.

Christopher J. Rosino

DECISION AND JUDGMENT

Appellant

Decided: August 2, 2013

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney,
Aaron T. Lindsey and David E. Romaker, Jr. Assistant
Prosecuting Attorneys, for appellee.

William F. Hayes, for appellant.

* * * * *

JENSEN, J.

A. Introduction

{¶ 1} This is an appeal from the judgment of the Wood County Court of Common Pleas. Defendant-appellant, Christopher Rosino, argues that the trial court erred when it

failed to notify him at the sentencing hearing that if he did not pay the mandated court costs then additional community service could be imposed. Appellee, the state of Ohio, agrees that the case should be remanded for the limited purpose of allowing the trial court to give proper notification pursuant to R.C. 2947.23(A)(1). We agree.

B. Facts and Procedural History

{¶ 2} This case stems from an incident that occurred on October 27, 2011, when appellant and three other individuals stole merchandise from Best Buy in Perrysburg, Ohio. Appellant was arrested in the vicinity of the store after hiding some of the stolen merchandise under a tree. Appellant was charged with tampering with evidence, in violation of R.C. 2921.12(A)(1), a felony of the fifth degree, and theft, in violation of R.C. 2913.02(A)(1)(B)(2), a felony of the fifth degree.

{¶ 3} On April 13, 2012, appellant and the Wood County Prosecutor entered into a plea agreement whereby appellant pled guilty to the theft offense in exchange for the prosecutor dismissing the tampering with evidence charge. The trial court accepted the plea agreement and set the matter for sentencing.

{¶ 4} On June 25, 2012, the trial court sentenced appellant to complete a rehabilitation program at the Northwest Community Corrections Center. In addition, the trial court ordered appellant to complete 150 hours of community service work and to pay court costs. During the hearing, the trial court did not mention what consequences, if any, would result if appellant failed to pay those costs.

{¶ 5} In its final judgment entry, journalized on June 27, 2012, the trial court addressed the issue of costs in greater detail. It said,

Defendant is ordered to pay the costs of prosecution with judgment and execution awarded. The Defendant is notified that failure to pay court costs may result in the imposition of additional community service in lieu of payment of said costs. The specified hourly credit rate per hour will be that minimum wage established as contemplated by R.C. 4111.02 as then in effect. Bond is released. (Emphasis added.)

{¶ 6} On July 20, 2012, appellant filed a timely notice of appeal with this court. Appellant raises one assignment of error for our review:

THE TRIAL COURT ERRED TO THE PREJUDICE OF
DEFENDANT/APPELLANT “MR. ROSINO” BY IMPOSING COURT
COSTS WITHOUT NOTIFYING MR. ROSINO AT THE TIME OF
SENTENCING, THAT FAILURE TO PAY COURT COSTS MAY
RESULT IN THE COURT’S ORDERING HIM TO PERFORM
COMMUNITY SERVICE.

C. Analysis

{¶ 7} The Ohio Supreme Court established the standard of review for felony sentences in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124; *see also State v. Barnhart*, 6th Dist. Ottawa No. OT-10-032, 2011-Ohio-5685, ¶ 14, fn. 1. (Applying *Kalish*’s two-prong test.) Appellate courts apply a two-step approach when

reviewing a felony sentence. *Kalish* at ¶ 4. First, a court must “examine the sentencing court’s compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law.” *Id.* at ¶ 4. If the trial court’s sentence is contrary to law, “the appellate court’s review is at an end. The sentence cannot stand.” *Id.* at ¶ 15. If, however, the first prong is satisfied, then the trial court’s decision shall be reviewed under an abuse of discretion standard. *Id.* at ¶ 4.

{¶ 8} Here, the parties agree that the trial court did not strictly adhere to the procedure set forth in R.C. 2947.23(A)(1) when it sentenced appellant in open court. The statute required that the costs of prosecution be included in all criminal sentences. It also required that the defendant be notified in open court 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.¹

{¶ 9} The Supreme Court of Ohio has held that “[a] sentencing court’s failure to inform an offender, as required by R.C. 2947.23(A)(1)(a), that community service could be imposed if the offender fails to pay the costs of prosecution or court costs, presents an issue ripe for review.” *State v. Smith*, 131 Ohio St.3d 297, 2012-Ohio-781, 964 N.E.2d 423, syllabus. Moreover, this court has held that, under such circumstances,

[t]he appropriate remedy for such failure 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 pursuant to R.C. 2947.23(A) with a concomitant opportunity for the defendant to object. *State v. Griffin*, 6th Dist. Lucas No. L-11-1283, 2013-Ohio-411, ¶ 51.

{¶ 10} We have reviewed the transcript from the sentencing hearing. We agree that the trial court did not properly inform appellant that his failure to pay costs could result in extra community service hours being imposed upon him. Therefore, we remand

¹ The quoted version of R.C. 2947.23(A)(1)(a) and (b) was in effect at the time appellant was sentenced on June 25, 2012. Effective September 28, 2012, the statute was amended by Am.Sub.S.B. No. 337, 2012 Ohio Laws 131. The amendment did not change the above-quoted language, but it was renumbered as R.C. 2947.23(A)(1)(a)(i) and (ii). The amendment also added subsection (A)(1)(b), which provides that the trial court’s failure to give the statutory notifications “does not negate or limit the authority of the court to order the defendant to perform community service if the defendant fails to pay the judgment * * * or [fails] to timely make payments toward that judgment under an approved payment plan.”

the case back to the trial court for the limited purpose of resentencing appellant and providing him with proper notification pursuant to R.C. 2947.23(A)(1).

{¶ 11} Appellant’s sole assignment of error is well-taken.

D. Conclusion

{¶ 12} For the foregoing reasons, we affirm appellant’s conviction and reverse that portion of the June 25, 2012 judgment of the Wood County Court of Common Pleas as it relates to the imposition of costs. We remand the case for the limited purpose of allowing the trial court to give proper notification pursuant to R.C. 2947.23(A)(1) with the accompanying opportunity for appellant to object. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

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.

JUDGE

Stephen A. Yarbrough, J.

JUDGE

James D. Jensen, J.
CONCUR.

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>.