

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

State of Ohio

Appellee

v.

Solomon Copeland

Appellant

Court of Appeals Nos. L-11-1103

L-11-1104

L-11-1105

L-11-1106

Trial Court Nos. CR0200801778

CR0200702751

CR0200803282

CR0200802167

DECISION AND JUDGMENT

Decided: March 15, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Ian B. English, Assistant Prosecuting Attorney, for appellee.

Lawrence A. Gold, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Solomon Copeland, appeals the May 17, 2011

judgment of the Lucas County Court of Common Pleas which, in three felony cases,

resentenced appellant in accordance with *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254. For the reasons that follow we affirm, in part, reverse, in part, and remand.

{¶ 2} Spanning from August 2007 through September 2008, three indictments and one information were filed against appellant charging him with drug possession, drug trafficking, two counts of having a weapon while under a disability, carrying a concealed weapon, and voluntary manslaughter with a firearm specification. A nolle prosequi was entered as to the murder indictment.

{¶ 3} Thereafter, appellant entered no contest pleas to possession of crack cocaine and having a weapon while under a disability. Appellant also entered a guilty plea to voluntary manslaughter with a firearm specification. Prior to sentencing, appellant filed a motion to withdraw his no contest plea in the drug possession case. The basis for the motion was the argument that appellant did not understand his plea due to his illiteracy.

{¶ 4} On September 29, 2008, appellant withdrew his motion to withdraw his plea and was sentenced to 12 months of imprisonment for drug possession. The sentence was ordered to be served consecutively to the 13-year sentence imposed for voluntary manslaughter with the gun specification and the four-year imprisonment term for having a weapon while under a disability. A nolle prosequi was entered as to the trafficking in cocaine charge and one count of having a weapon while under a disability. No direct appeal was filed.

{¶ 5} On May 26, 2009, appellant filed pro se motions to withdraw his plea in all three cases. Appellant argued that although he entered the plea agreement with the state knowingly and voluntarily, he was coerced into entering the plea because the record demonstrated that he acted in self-defense when he shot and killed the individual. Appellant further argued that his counsel was ineffective in advising him to enter the pleas. In opposition, the state argued that appellant was afforded a complete plea hearing and was advised of the potential maximum sentence and the agreed sentence.

{¶ 6} On January 12, 2011, the trial court denied appellant's motions to withdraw finding that his pleas were entered knowingly and voluntarily and that they were not coerced. The court then appointed counsel to address issues relative to the imposition of postrelease control at the time of sentencing.

{¶ 7} On April 7, 2011, appellant was resentenced to the same terms of imprisonment as the 2008 sentencing and given the proper postrelease control notifications. Appellant was also ordered to pay the costs of prosecution. The trial court indicated that appellant was apprised of the imposition of costs in accordance with R.C. 2947.23. The resentencing was journalized on May 17, 2011. This appeal followed.

{¶ 8} Appellant now raises two assignments of error for our review:

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} In appellant's first assignment of error he contends that the trial court imposed costs in each case without considering appellant's future ability to pay. Conversely, the state argues that because the sentence as to all the cases was jointly recommended by the state and appellant, he cannot now request review of "ancillary" matters. In making its argument, the state relies on R.C. 2953.08(D) which provides that "[a] sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge." Reviewing the record, we find no evidence that the plea agreement included the payment of costs so we will address the merits of appellant's argument.

{¶ 10} Although R.C. 2947.23(A)(1) mandates that, "[i]n all criminal cases * * * the judge or magistrate shall include in the sentence the costs of prosecution," the Ohio Supreme Court held that it was error for the trial court to impose those costs without orally notifying the criminal defendant. *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278, ¶ 22. In addition, the imposition of the costs of prosecution, R.C. 2947.23, is not conditioned on a defendant's ability to pay. *State v. Baughman*, 6th Dist. No. L-11-1045, 2012-Ohio-5327, ¶ 41. Likewise, a court is not required to determine the

defendant's ability to pay prior to imposing the costs of supervision while on a community control sanction. *Id.* at ¶ 42. However, the imposition of costs of assigned counsel and confinement first require a finding that the defendant has or will have the ability to pay. *Id.* at ¶ 43. Again, as stated in *Baughman*, the court is not required to conduct a hearing on a defendant's ability to pay; rather, the record must contain some evidence that the court determined the defendant's financial ability to pay. *Id.*, citing *State v. Maloy*, 6th Dist. No. L-10-1350, 2011-Ohio-6919, ¶ 13.

{¶ 11} In the present case, the court's three sentencing judgment entries contain the following language regarding costs:

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. Notification pursuant to R.C. 2947.23 given.

{¶ 12} In addition, at the April 7, 2011 resentencing hearing, for each case the trial court stated: "Defendant is ordered to pay restitution costs and court appointed counsel fees and any fees permitted pursuant to 2929.18(A)(4)."

{¶ 13} The above-quoted language is similar to the language in *Baughman*.

However, appellant further argues that he will be 71 years old upon release from his 18-year incarceration and that, at the time of sentencing, he was indigent and received court-appointed counsel. Conversely, in *Baughman* this court noted that the record contained evidence that the appellant had funds available and that he provided no support for the argument that he would be unemployable following his incarceration. *Id.* at ¶ 45.

{¶ 14} Upon review of the record in this matter, we find that appellant's age, indigency, and lack of a high school diploma suggest limited employment opportunities following his release from prison. Accordingly, we find that the trial court erred when it imposed the costs of appointed counsel and confinement without first determining appellant's ability to pay. Appellant's first assignment of error is well-taken, in part.

{¶ 15} In appellant's second assignment of error, he contends that he was denied the effective assistance of counsel. Appellant's argument is two-fold. First, appellant argues that counsel was ineffective by failing to request a competency evaluation. Next, in conjunction with appellant's first assignment of error, appellant argues that counsel was ineffective by failing to move for the waiver of payment of court costs.

{¶ 16} To prevail on a claim of ineffective assistance of counsel, a defendant must prove two elements: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense."

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Proof of prejudice requires a showing “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”

Id. at 694; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus. Further, debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel. *State v. Phillips*, 74 Ohio St.3d 72, 85, 656 N.E.2d 643 (1995).

{¶ 17} Appellant first argues that the issue of appellant’s competency should have been raised by counsel. In support appellant states that “inferences” can be drawn from the record to indicate his “limited understanding of the purpose of his re-sentencing hearing.” Conversely, the state asserts that because the record is devoid of any evidence of appellant’s incompetence, there was no valid reason to raise the issue.

{¶ 18} Reviewing the proceedings leading up to and on the date of appellant’s resentencing, we cannot say that issues regarding appellant’s competency were apparent. At the April 7, 2011 hearing, the court questioned appellant about his pending motions to withdraw his pleas and he agreed that he wished to withdraw the motions and proceed with resentencing.

{¶ 19} When asked whether he was satisfied with his newly-appointed counsel, appellant responded negatively. The court questioned him and he indicated that he did not receive the evidence he desired from the case. The court then explained that appellant was being resentenced and that the factual evidence was not in dispute.

Appellant then stated that he was satisfied with counsel. After further questioning and appellant's statement that "Mr. Dech didn't explain nothing," the court asked appellant whether he was satisfied with counsel, if new counsel needed to be appointed, or if he had any questions. Appellant stated that he did not have any questions.

{¶ 20} Upon review we note that although there was some initial confusion regarding the scope of resentencing, appellant participated in the proceedings and appeared legally competent.

{¶ 21} Appellant next contends that trial counsel was ineffective when he failed to move the court to waive costs. In general, we agree with appellant 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. Houston*, 6th Dist. No. S-10-027, 2011-Ohio-4689, ¶ 27, quoting *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, ¶ 23.

{¶ 22} As to the costs which first require a determination of the ability to pay, as is apparent from our disposition of appellant's first assignment of error, we do not believe that the court's failure to make the necessary finding was waived on appeal. *See, generally, State v. Turner*, 6th Dist. No. L-11-1080, 2012-Ohio-5985.

{¶ 23} Regarding the balance of the costs imposed, appellant has made no demonstration that a "reasonable probability" exists that the lower court would have waived the costs upon appellant's motion. *See State v. King*, 6th Dist. No. WD-09-069,

2010-Ohio-3074, ¶ 11. Accordingly, we cannot conclude that trial counsel’s failure to object to costs constituted ineffective assistance of counsel.

{¶ 24} Based on the foregoing, we find that appellant was provided effective assistance of counsel. Appellant’s second assignment of error is not well-taken.

{¶ 25} On consideration whereof, we find that substantial justice was not done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed, in part, and reversed, in part. The matter is remanded to the trial court for determination of appellant’s ability to pay the costs of assigned counsel and confinement. Pursuant to App.R. 24, appellee is ordered to pay the costs of this appeal.

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

Thomas J. Osowik, J. _____

JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.

JUDGE

<p>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.</p>
