[Cite as *State v. Paulsen*, 2010-Ohio-806.]

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

State of Ohio,	:	
Plaintiff-Appellee,	:	Case Nos. 09CA15 & 09CA16[1]
v.	:	
Charles S. Paulsen,	:	**DECISION AND JUDGMENT ENTRY**
Defendant-Appellant.	:	File-stamped date: 2-8-10

APPEARANCES:

Charles S. Paulsen, pro se, Logan, Ohio, for Appellant.

Robert L. Lilley, Logan City Law Director, Logan, OH, for Appellee.

Kline, J.:

{¶1} Charles S. Paulsen (hereinafter "Paulsen") appeals the judgment of the Hocking County Municipal Court. After finding him guilty of violating a civil protection order on two separate occasions, the trial court sentenced Paulsen to a total of one year of non-reporting probation, small fines, and various court costs. On appeal, Paulsen contends that the trial court erred by charging him double the fee for non-reporting probation. We agree. Pursuant to R.C. 2929.28(A)(3)(a)(i), a trial court may charge all or part of the costs of implementing a community control sanction. Therefore, the trial court exceeded its authority by charging Paulsen double the cost of implementing his non-

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[1] These two cases (case numbers 09CA15 and 09CA16) are interrelated and involve the exact same issues. Further, both the appellant and the appellee have filed identical briefs in both cases. Therefore, in the interest of judicial economy, we consolidate these cases.

reporting probation. Next, Paulsen contends that the trial court erred by charging him various court costs. However, we will not address the merits of this argument because of res judicata. Finally, Paulsen contends that he did not receive a fair trial. We will not address the merits of this argument, either. First, we believe that Paulsen has misinterpreted our opinion in *State v. Paulsen*, Hocking App. No. 08AP4, 2008-Ohio-6907 (hereinafter "*Paulsen I*"). And second, res judicata and the law-of-the-case doctrine bar Paulsen's arguments. Accordingly, we affirm, in part, and vacate, in part, the judgment of the trial court. Further, we remand this cause to the Hocking County Municipal Court with the instruction to vacate $168.00 in non-reporting probation fees from Paulsen's total combined sentence.

I.

{¶2} This is Paulsen's third time before this court. See *Paulsen I* (affirming, in part, and vacating, in part, the judgment of the trial court) (hereinafter "*Paulsen I*"); *Dennis v. Paulsen*, Hocking App. No. 08CA15, 2009-Ohio-2916 (finding that "the trial court abused its discretion in extending [a] protection order beyond the maximum time period allowed under R.C. 2903.214(E)(2)(a)"). Because *Paulsen I* and *Dennis* recount many of the facts of this case, we will not repeat those facts here. Instead, we will only discuss the facts pertinent to this particular appeal.

{¶3} Paulsen was accused of violating a civil protection order in two separate cases, Case No. 0701495 and Case No. 0701124. Paulsen did not have an attorney during his consolidated trial, and the Hocking County Municipal Court found him guilty in both cases. In *Paulsen I*, we affirmed Paulsen's

convictions. However, we also "remand[ed] this cause to the trial court with the instruction to vacate the confinement part of Paulsen's two sentences." *Paulsen I* at ¶1. On remand, the trial court resentenced Paulsen to one year of non-reporting probation in Case No. 0701495 and one year of non-reporting probation in Case No. 0701124, to be served concurrently. The trial court also sentenced Paulsen to pay various fines and court costs in both cases. Despite sentencing Paulsen to just one year of non-reporting probation, the trial court charged Paulsen the $168.00 fee for non-reporting probation twice – $168.00 in Case No. 0701495 *and* $168.00 in Case No. 0701124. As a result, the trial court charged Paulsen a total of $336.00 in non-reporting probation fees.

{¶4} Paulsen appeals, asserting the following three assignments of error: I. "CONCURRENT NON-REPORTING PROBATION." II. "THE COURT COSTS APPLIED TO MR. PAULSEN WERE UNRELATED TO CURRENT CASE." And, III. "THE APPEAL OVERRULING HIS PREVIOUS CONVICTION AND SENTENCING REQUIRED A NEW TRIAL BE GRANTED."

II.

{¶5} Initially, we must note a deficiency in Paulsen's appellate brief. That is, Paulsen's appellate brief does not comply with App.R. 16(A)(7), which provides: "The appellant shall include in its brief, under the headings and in the order indicated, all of the following: * * * An argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies. The argument may be

preceded by a summary." However, Paulsen has cited no authority in support of his first and second assignments of error – not a single statute, case, or treatise.

{¶6} "'If an argument exists that can support [an] assignment of error, it is not this court's duty to root it out.'" *Thomas v. Harmon*, Lawrence App. No. 08CA17, 2009-Ohio-3299, at ¶14, quoting *State v. Carman*, Cuyahoga App. No. 90512, 2008-Ohio-4368, at ¶31. "'It is not the function of this court to construct a foundation for [an appellant's] claims; failure to comply with the rules governing practice in the appellate courts is a tactic which is ordinarily fatal.'" *Catanzarite v. Boswell*, Summit App. No. 24184, 2009-Ohio-1211, at ¶16, quoting *Kremer v. Cox* (1996), 114 Ohio App.3d 41, 60. Therefore, "[w]e may disregard any assignment of error that fails to present any citations to case law or statutes in support of its assertions." *Frye v. Holzer Clinic, Inc.*, Gallia App. No. 07CA4, 2008-Ohio-2194, at ¶12. See, also, App.R. 16(A)(7); App.R. 12(A)(2); *Albright v. Albright*, Lawrence App. No. 06CA35, 2007-Ohio-3709, at ¶16; *Tally v. Patrick*, Trumbull App. No. 2008-T-0072, 2009-Ohio-1831, at ¶21-22; *Jarvis v. Stone*, Summit App. No. 23904, 2008-Ohio-3313, at ¶23.

{¶7} We understand that Paulsen has filed these appeals pro se. Nevertheless, "like members of the bar, pro se litigants are required to comply with rules of practice and procedure." *Hardy v. Belmont Correctional Inst.*, Franklin App. No. 06AP-116, 2006-Ohio-3316, at ¶9. See, also, *State v. Hall*, Trumbull App. No. 2007-T-0022, 2008-Ohio-2128, at ¶11. However, we also understand that "an appellate court will ordinarily indulge a pro se litigant where there is some semblance of compliance with the appellate rules." *State v.*

Richard, Cuyahoga App. No. 86154, 2005-Ohio-6494, at ¶4 (internal quotation omitted). We find some semblance of compliance in Paulsen's brief, and, in the interest of justice, we will consider Paulsen's first and second assignments of error. See, e.g., *Frye* at ¶12; *Albright* at ¶16.

{¶8} The actual wording of Paulsen's first assignment of error is, by itself, incomprehensible. However, after reviewing his argument, we have interpreted Paulsen's first assignment of error in the following manner. For his convictions in two separate cases, the trial court sentenced Paulsen to a total of one year of non-reporting probation. On appeal, Paulsen essentially claims that he was "double charged" the non-reporting-probation fee. That is, Paulsen contends that the trial court erred by imposing the non-reporting probation fee twice: $168 for Case No. 0701495 and $168 for Case No. 0701124.

{¶9} "[W]e review a misdemeanor sentence for an abuse of discretion." *State v. Leeth*, Pike App. No. 05CA745, 2006-Ohio-3575, at ¶6, citing R.C. 2929.22(A). See, also, *State v. Hughley*, Cuyahoga App. Nos. 92588 & 93070, 2009-Ohio-5824, at ¶7. "An abuse of discretion implies that a court's ruling is unreasonable, arbitrary, or unconscionable; it is more than an error in judgment." *Leeth* at ¶6, citing *State ex rel. Richard v. Seidner* (1996), 76 Ohio St.3d 149, 151.

{¶10} Here, we believe that Paulsen's argument has merit. R.C. 2929.28(A)(3)(a)(i) provides: "In addition to imposing court costs pursuant to section 2947.23 of the Revised Code, the court imposing a sentence upon an offender for a misdemeanor, including a minor misdemeanor, may sentence the

offender to any financial sanction or combination of financial sanctions authorized under this section. If the court in its discretion imposes one or more financial sanctions, the financial sanctions that may be imposed pursuant to this section include, but are not limited to, the following: * * * Reimbursement by the offender of any or all of the costs of sanctions incurred by the government, including * * * [a]ll or part of the costs of implementing any community control sanction, including a supervision fee under section 2951.021 of the Revised Code[.]"

{¶11} The trial court sentenced Paulsen to one year of non-reporting probation in Case No. 0701495 and one year of non-reporting probation in Case No. 0701124. However, the "Conditions of Probation" forms in both Case No. 0701495 and Case No. 0701124 list the same start-and-end dates. Thus, from the record, it is clear that Paulsen received concurrent sentences for a total of one year of non-reporting probation. And according to Appendix D of the Local Rules of the Hocking County Municipal Court, the fee for non-reporting probation is $168.00 for one year ($14.00 per month). Therefore, by charging Paulsen a total of $336.00 in non-reporting probation fees, the trial court exceeded its authority under R.C. 2929.28(A)(3)(a)(i). In Hocking County, one year of non-reporting probation costs $168.00, not $336.00. As a result, the trial court abused its discretion by sentencing Paulsen to pay more than "[a]ll or part of the costs of implementing" his probation.

{¶12} Accordingly, we sustain Paulsen's first assignment of error and instruct the trial court to vacate $168.00 in non-reporting probation fees from Paulsen's

total combined sentence. The trial court may vacate $168.00 in non-reporting probation fees in either Case No. 0701495 or Case No. 0701124.

III.

{¶13} In his second assignment of error, Paulsen contends that the trial court charged him with court costs unrelated to the present case. However, we will not address the merits of Paulsen's second assignment of error because of res judicata.

{¶14} "Theories of res judicata are used to prevent relitigation of issues already decided by a court or matters that should have been brought as part of a previous action." *Lasko v. G.M.C.*, Trumbull App. No. 2002-T-0143, 2003-Ohio-4103, at ¶16. "This doctrine has been held to apply to appellate proceedings in both criminal and civil cases." *In re Kangas*, Ashtabula App. No. 2006-A-0084, 2007-Ohio-1921, at ¶71, citing *State v. Beckwith* (Mar. 2, 2001), Cuyahoga App. No. 75927. Here, the trial court assessed the relevant costs against Paulsen on March 20 and 21, 2008.[2] Also on March 21, 2008, Paulsen filed his notice of appeal in *Paulsen I*. Therefore, Paulsen should have raised the issue of costs in his first appeal. The doctrine of res judicata bars Paulsen from raising this issue now. See, e.g., *State v. Crotts*, Cuyahoga App. No. 90898, 2009-Ohio-138, at ¶22 ("Since [appellant] could have raised, but did not raise, this issue in his prior appeal, the doctrine of res judicata bars him from raising this issue in this appeal."); *State v. Langley*, Sandusky App. No. S-05-034, 2006-Ohio-3391, at ¶10-11 ("It is evident that appellant's issue of court costs could have been raised

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[2] Paulsen contends that the trial court assessed these costs on March 20, 2009. However, from the record, it is clear that the trial court assessed these costs on March 20 and 21, 2008. The trial court did not charge Paulsen any costs between March 2008 and April 2009.

in either of his previous appeals. He indicates no valid reason why he was prevented from doing so. Consequently, the doctrine of res judicata bars the assertion of such a claim now."); *State v. Stone* (Jun. 23, 1993), Washington App. No. 92 CA 21 ("Since appellant could have raised, but did not raise, this issue in his prior appeal, the doctrine of *res judicata* bars him from raising this issue in this second appeal.").

{¶15} Accordingly, we overrule Paulsen's second assignment of error.

IV.

{¶16} In his third assignment of error, Paulsen contends that he "was not given a second fair hearing or trial." Brief for Appellant at 2. Apparently, Paulsen believes that he was entitled to a new trial because of our decision in *Paulsen I*. However, in *Paulsen I*, this court did not instruct the trial court to grant Paulsen a new trial. On the contrary, we affirmed Paulsen's convictions. See *Paulsen I* at ¶15-29. Thus, Paulsen's arguments are misplaced.

{¶17} Further, res judicata and the law-of-the-case doctrine bar Paulsen's argument that he "was not given a fair trial with counsel[.]" Brief for Appellant at 3. Paulsen should have raised this argument in his first appeal. See, generally, *Paulsen I* at ¶6 (noting that the trial court "denied [Paulsen's] request for court appointed counsel"). "[T]he doctrine of law of the case precludes a litigant from attempting to rely on arguments at a retrial which were fully pursued, or available to be pursued, in a first appeal. New arguments are subject to issue preclusion, and are barred." *Hubbard ex rel. Creed v. Sauline*, 74 Ohio St.3d 402, 404-405, 1996-Ohio-174, citing *Beifuss v. Westerville Bd. of Edn.* (1988), 37 Ohio St.3d

187, 191. More specifically, "it has been found that where a 'court affirm[s] the convictions in the First Appeal, the propriety of those convictions [becomes] the law of the case, and subsequent arguments seeking to overturn them [become] barred. Thus, in the Second Appeal, only arguments relating to the resentencing [are] proper.'" *State v. Ortega*, Lorain App. No. 08CA009316, 2008-Ohio-6053, at ¶7, quoting *State v. Harrison*, Cuyahoga App. No. 88957, 2008-Ohio-921, at ¶9. See, also, *State v. Fischer*, 181 Ohio App.3d 758, 2009-Ohio-1491, at ¶8. Therefore, we will not consider Paulsen's fair-trial arguments.

{¶18} Accordingly, we overrule Paulsen's third assignment of error.

V.

{¶19} In conclusion, we sustain Paulsen's first assignment of error and overrule his second and third assignments of error. Accordingly, we affirm, in part, and vacate, in part, the judgment of the trial court. Further, we remand this case to the Hocking County Municipal Court with the instruction to vacate $168.00 in non-reporting probation fees from Paulsen's total combined sentence. The trial court may vacate $168.00 in non-reporting probation fees in either Case No. 0701495 or Case No. 0701124.

JUDGMENT AFFIRMED IN PART,
VACATED IN PART, AND
CAUSE REMANDED.

Harsha, J., dissenting:

{¶20} I dissent because the appellant has the burden to establish that the trial court violated the statute, but the record does not support that contention. There is nothing in this record that identifies "the actual cost of the sanction". Thus, how can we determine that imposing two $168 fees exceeds an unknown cost? The principal opinion looks to Appendix D of the trial court's local rules to conclude that $168 is the actual cost involved based upon the fee schedule adopted by the rule. But the fee schedule in Appendix D does not indicate that the actual cost involved to the county is $168.00. It simply states the fee for monitoring one year of non-reporting probation is $168. And the introductory paragraph says probationers "are required to pay a portion of the costs of their probation". What portion of the actual cost does $168 represent? We simply don't know based on this record. It could be the actual cost of monitoring this probation exceeds $336. It also might be substantially less. But we have no evidence of the actual cost, and we should not speculate. Because the appellant has the burden to show prejudicial error within the record, and has not done so here, I dissent.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED, IN PART, VACATED, IN PART, and this CAUSE BE REMANDED to the trial court with the instruction to vacate $168.00 in non-reporting probation fees from Paulsen's total combined sentence. The trial court may vacate $168.00 in non-reporting probation fees in either Case No. 0701495 or Case No. 0701124. Appellant and Appellee shall equally pay 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 Hocking County Municipal Court to carry this judgment into execution.

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

Abele, J.: Concurs in Judgment Only.
Harsha, J.: Dissents with Dissenting Opinion.

For the Court

BY: ______________________________
Roger L. Kline, 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.