

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2002-05-114
 :
 - vs - : D E C I S I O N
 : 1/13/2003
 :
 PAMELA G. BUSH, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM COMMON PLEAS COURT

Robin N. Piper, Butler County Prosecuting Attorney, Government Services Center, 315 High Street, 11th Fl., Hamilton, Ohio 45011, for plaintiff-appellee

Dwight David Myfelt, 114 East Eighth Street, Cincinnati, Ohio 45202, for defendant-appellant

Per Curiam.

{¶1} This cause came on to be considered upon a notice of appeal, the transcript of the docket and journal entries, the transcript of proceedings and original papers from the Butler County Court of Common Pleas, and upon a brief filed by appellant's counsel, oral argument having been waived.

{¶2} Counsel for defendant-appellant, Pamela G. Bush, has filed a brief with this court pursuant to Anders v. California

(1967), 386 U.S. 738, 87 S.Ct. 1396, which (1) indicates that a careful review of the record from the proceedings below fails to disclose any errors by the trial court prejudicial to the rights of appellant upon which an assignment of error may be predicated; (2) lists three potential errors "that might arguably support the appeal," Anders at 744, 87 S.Ct. at 1400; (3) requests that this court review the record independently to determine whether the proceedings are free from prejudicial error and without infringement of appellant's constitutional rights; (4) requests permission to withdraw as counsel for appellant on the basis that the appeal is wholly frivolous; and (5) certifies that a copy of both the brief and motion to withdraw have been served upon appellant.

{¶3} Having allowed appellant sufficient time to respond, and no response having been received, we have accordingly examined the record and found one error prejudicial to appellant's rights in the proceedings in the trial court. The trial court's sentencing order required appellant to pay court-appointed counsel fees. In State v. Cooper, Butler App. No. CA2001-03-063, 2002-Ohio-617, this court held that under R.C. 2941.51(D), a trial court may require an indigent defendant to pay court-appointed counsel costs only after the court has made "an affirmative determination on the record" that the accused has, or reasonably may be expected to have, the means to pay all or some part of the costs of legal services rendered on his or her behalf. *Id.* at ¶71. There is no such affirmative determination in the record before us.

{¶4} Under such circumstances, Anders would seemingly dictate that we appoint new counsel to brief and argue this issue. How-

ever, we find that the total absence in the record of any determination in compliance with R.C. 2941.51(D) constitutes plain error which we may take immediate action to remedy. See Penson v. Ohio (1998), 488 U.S. 75, 109 S.Ct. 346.

{¶5} In all other respects, our examination of the record discloses no other errors prejudicial to appellant's rights in the proceedings in the trial court.¹

{¶6} Therefore, it is the order of this court that the motion of counsel for appellant requesting to withdraw as counsel is granted, and that portion of appellant's sentence ordering him to pay attorney fees is hereby reversed and the matter remanded for a determination pursuant to R.C. 2941.51(D) regarding appellant's ability to pay court-appointed attorney fees. See Cooper at ¶72, 73.

WALSH, P.J., YOUNG and POWELL, JJ., concur.

1. {¶a} Appellant was convicted of a fourth-degree felony and faced a possible prison term of six to 18 months. R.C. 2929.14(A)(4). Upon advising appellant that she could be subject to post-release control after completing her sentence, the trial court then erroneously told appellant she could face an additional one year in prison for violating post-release control. R.C. 2967.28(F)(3) limits the prison sanction for each violation of post-release control to nine months with the maximum cumulative term for all such violations not to exceed one-half of the stated prison term imposed upon the offender.

{¶b} The trial court sentenced appellant to a prison term of 16 months. Thus, the maximum additional prison time appellant faced for any violations of post-release control was eight months, not one year. We conclude that such error was not prejudicial, however, as appellant in all likelihood would not have changed her plea had she known any potential additional prison time for violating post-release control was actually less than the amount stated by the court.

This opinion or 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/documents/>. Final versions of decisions are also available on the Twelfth District's web site at: <http://www.twelfth.courts.state.oh.us/search.asp>

[Cite as *State v. Bush*, 2003-Ohio-81.]