

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellant,	:	
- vs -	:	CASE NO. 2001-A-0037
KAREN L. MAY,	:	
Defendant-Appellee.	:	

Criminal appeal from the Court of Common Pleas, Case No. 98 CR 276.

Judgment: Reversed and remanded.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Angela M. Scott*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047 (For Plaintiff-Appellant).

Joseph A. Humpolick, Ashtabula County Public Defender, Inc., 4817 State Road, Suite 202, Ashtabula, OH 44004 (For Defendant-Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, the state of Ohio, appeals the judgment of the Ashtabula County Court of Common Pleas. The trial court granted a motion of appellee, Karen L. May, to vacate an order requiring her to pay court costs.

{¶2} May was charged with driving under the influence in violation of R.C. 4511.19(A) and 4511.19(A)(4)(a). In July 1999, May withdrew her plea of not guilty and

entered a plea of no contest. In July 1999, May was convicted of one count of driving under the influence, in violation of R.C. 4511.19.

{¶3} On November 4, 1999, the trial court sentenced May to a two-year term of community control. The community control provisions included serving sixty days in jail, serving ninety days of intensive supervision, and paying a \$750 fine. In addition, the trial court ordered May to pay the costs of the prosecution.

{¶4} On March 1, 2001, May filed a motion to be released from probation. In a judgment entry dated April 16, 2001, the trial court noted that May had failed to pay \$1,223.50 in fines and costs. The court indicated that the motion to be released from probation would be granted if the balance was paid by April 30, 2001, and, if not, the motion would be denied. On April 26, 2001, the trial court overruled May's motion, because she had failed to pay the \$750 fine. However, the trial court vacated the order requiring May to pay court costs, because she was indigent at the time of her plea and sentencing. The trial court stated that its decision to vacate the costs was based on a recent opinion of this court. Presumably, this decision was *State v. Heil* (Mar. 30, 2001), 11th Dist. No. 2000-G-2268, 2001 Ohio App. LEXIS 1552.

{¶5} The state has timely appealed the trial court's judgment entry vacating the order to pay court costs. The state raises the following assignment of error on appeal:

{¶6} "The trial court committed reversible error when it vacated part of appellee's felony sentence."

{¶7} As noted above, the trial court presumably based its decision to vacate May's costs on this court's decision in *State v. Heil*. The Supreme Court of Ohio has vacated this court's opinion in *State v. Heil*, holding that there was not a final appealable order and the order was not proper. *State v. Heil*, 95 Ohio St.3d 531, 2002-Ohio-2841,

at ¶2. The Supreme Court of Ohio did not state its reasons for finding that there was a lack of a final appealable order in *Heil*. However, this court has held that a trial court's denial of a motion to vacate costs is not a final appealable order. *State v. Pasqualone* (2000), 140 Ohio App.3d 650, 657.

{¶8} The granting of a motion to set aside court costs is a final appealable order. This is because it is an order that vacates a previous judgment. R.C. 2505.02. Accordingly, as this matter is properly before this court, we will proceed to the merits of the appeal.

{¶9} The underlying question of this case is whether a trial court may impose court costs on an indigent defendant in a criminal case.

{¶10} The imposition of court costs is addressed by R.C. 2947.23, which states, in part:

{¶11} "In all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecutions and render a judgment against the defendant for such costs."

{¶12} R.C. 2949.14 provides for the collection of court costs and states, in part:

{¶13} "Upon conviction of a nonindigent person, for a felony, the clerk of the court of common pleas shall make and certify under his hand and seal of the court, a complete itemized bill of the costs made in such prosecution, including the sum paid to the county commissioners, certified by the county auditor, for the arrest and return of the person on the requisition of the governor, or on the request of the governor to the president of the United States, or on the return of the fugitive by a designated agent pursuant to a waiver of extradition except in cases of parole violation. Such bill of costs shall be presented by such clerk to the prosecuting attorney, who shall examine each

item therein charged and certify to it if correct and legal. Upon certification by the prosecuting attorney, the clerk shall attempt to collect the costs from the person convicted.”

{¶14} In *Pasqualone*, this court did not reach the merits of appellant’s argument regarding the trial court’s judgment denying appellant’s motion to vacate costs. Rather, this court dismissed the appeal due to the lack of a final appealable order. However, this court did note, in a footnote, that the Fifth Appellate District has held that a trial court was not prohibited from imposing court costs on an indigent defendant. *State v. Pasqualone*, 140 Ohio App.3d at 657, fn. 4, quoting *State v. Payne* (Dec. 20, 1999), 5th Dist. Nos. 99CAA05024, 99CAA05025, 99CAA05026, 99CAA05027, and 99CAA05028, 2000 WL 1405, at *3.

{¶15} In *State v. Young*, the Fourth Appellate District held that court costs could not be imposed on an indigent person convicted of a felony. *State v. Young* (July 14, 2000), 4th Dist. No. 00CA02, 2000 Ohio App. LEXIS 3316.

{¶16} However, several cases have held that indigent defendants are required to pay costs. *State v. Morrison*, 10th Dist. No. 02AP-651, 2003-Ohio-1517; *State v. Flanagan*, 12th Dist. No. CA2002-05-120, 2003-Ohio-1444; *State v. Payne*, supra; and *State ex rel. Pless v. McMonagle* (2000), 139 Ohio App.3d 503. These cases cite the language in R.C. 2947.23, that in all cases, the court shall order the defendant to pay costs. *Id.*

{¶17} The Seventh Appellate District recently addressed the relation of R.C. 2947.23 and R.C. 2949.14. *State v. Roux*, 154 Ohio App.3d 296, 2003-Ohio-4876. Therein, the court held:

{¶18} “A distinction exists between ordering a defendant to pay costs and actually engaging in the collection of those costs. R.C. 2947.23 merely provides that the court include costs as part of a defendant’s sentence and render judgment for those costs. This section makes no distinction between indigent and non-indigent defendants. In later attempting to collect the court imposed costs, the clerk must then follow R.C. 2949.14. Therefore, we hold that a trial court may order an indigent defendant to pay court costs as part of his sentence.” *Id.* at ¶16.

{¶19} Similarly, this court has recently adopted the following language from the Fifth Appellate District:

{¶20} “R.C. 2949.14 does not govern the court’s ability to order costs. The statute is directed at the ability of the clerk of courts to collect the costs from the person convicted. While R.C. 2949.14 provides a collection mechanism only for non-indigent defendants, nothing in R.C. 2947.23 prohibits the court from assessing costs to an indigent defendant as part of the sentence. In the event the indigent defendant at some point ceases to be indigent, the clerk could then collect costs pursuant to the procedure outlined in R.C. 2949.14. Ohio law does not prohibit a judge from including court costs as part of the sentence of an indigent defendant.” *State v. McDowell*, 11th Dist. No. 2001-P-0149, 2003-Ohio-5352, at ¶57, quoting *State v. White*, 5th Dist. No. 02CA23, 2003-Ohio-2289, at ¶9.

{¶21} We agree with these recent holdings.

{¶22} Finally, a review of the purpose of court costs, set forth by the Supreme Court of Ohio and cited to by this court, is appropriate. “In both criminal and civil cases, costs are taxed against certain litigants for the purpose of lightening the burden on taxpayers financing the court system. As we view it, statutory provisions for the

payment of court costs were not enacted to serve as a punitive, retributive, or rehabilitative, purpose, as are fines.” *State v. Pasqualone*, 140 Ohio App.3d at 657, fn. 4, quoting *Strattman v. Studt* (1969), 20 Ohio St.2d 95, 102.

{¶23} R.C. 2947.23, expressly states that the trial court “shall” include court costs as part of a defendant’s sentence. In addition, R.C. 2949.14 does not prohibit the imposition of court costs on an indigent defendant. Thus, the trial court erred by granting May’s motion to vacate the order requiring her to pay court costs.

{¶24} The state also argues that the *State v. Heil* holding should not have been applied retroactively and that the trial court erred by modifying May’s sentence. Having held that trial court erred by vacating May’s court costs, these two arguments are moot.

{¶25} The state’s assignment of error has merit.

{¶26} The judgment of the trial court is reversed, and this matter is remanded to the trial court, in order for the trial court to reinstate the order assessing court costs.

DIANE V. GRENDELL, J., concurs.

WILLIAM M. O’NEILL, J., dissents with dissenting opinion.

WILLIAM M. O’NEILL, J., dissenting.

{¶27} I must respectfully dissent. I do not believe indigent defendants convicted of a felony should be assessed court costs.

{¶28} R.C. 2949.14, states, in part, “[u]pon conviction of a *nonindigent* person for a felony, the clerk of the court of common pleas shall make and certify under his

hand and seal of the court, a complete itemized bill of the costs made in such prosecution ***.” (Emphasis added.)

{¶29} By comparison, R.C. 2947.23 stated, in part, “[i]n all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution and render a judgment against the defendant for such costs.”

{¶30} There is a conflict between R.C. 2947.23 and 2949.14, as the first statute requires that all convicted defendants be assessed costs, while the second statute requires the clerk to assess costs only on convicted, *nonindigent* felons. Special provisions of statutes prevail over general provisions.¹ R.C. 2949.14 is a special provision, as it sets forth the specific procedure to collect court costs from nonindigent, convicted felons. R.C. 2947.23 is a general provision, as it merely states that the trial court shall include court costs in all sentences. Thus, R.C. 2949.14, as a special provision, prevails over R.C. 2947.23.

{¶31} Even if R.C. 2949.14 is not classified as a special provision, it still prevails over R.C. 2947.23. When statutes are irreconcilable, the statute later enacted prevails.² R.C. 2949.14 was enacted subsequent to R.C. 2947.23.

{¶32} Moreover, R.C. 2949.19 sets forth the procedure for clerks to recover the costs associated with the conviction of an indigent felon. This statute is further evidence of the intent of the legislature not to assess court costs for indigent persons convicted of a felony.

{¶33} The above analysis has been applied by the Fourth Appellate District.³ In *State v. Young*, the court held that court costs could not be imposed on indigent

1. *State v. Rush* (1998), 83 Ohio St.3d 53, 58; R.C. 1.51.

2. *State v. Rush*, 83 Ohio St.3d at 58; R.C. 1.52.

3. *State v. Young* (July 14, 2000), 4th Dist. No. 00CA02, 2000 Ohio App. LEXIS 3316.

defendants convicted of a felony.⁴ In *State v. Clark*, the Fourth District reaffirmed its position on this issue, again holding that a trial court may not assess costs against indigent defendants.⁵

{¶34} As noted by the majority, in *State v. Pasqualone*, this court did note that the Fifth Appellate District has held that a trial court was not prohibited from imposing court costs on an indigent defendant.⁶ However, subsequent to this court's decision in *Pasqualone*, this court issued its decision in *State v. Heil*, wherein this court held that court costs could not be imposed on indigent defendants convicted of a felony. This court adopted the legislative analysis of *State v. Young*.⁷ In addition, this court held "the legislature intended to relieve indigent felony defendants from the burden of court costs, just as they are relieved from having to pay for an attorney, pay for expert witnesses, pay for filing fees, or pay for transcripts."⁸ The Supreme Court of Ohio vacated this court's opinion in *State v. Heil*, due to the lack of a final appealable order.⁹

{¶35} While there are numerous appellate cases that have held that indigent defendants are required to pay costs, many of these cases do not address the implications of R.C. 2949.14.¹⁰ Both this court and the Seventh Appellate District have recently held that R.C. 2947.23 and R.C. 2949.14 are not in conflict and that R.C. 2949.14 does not prohibit a trial court from imposing court costs on an indigent

4. *Id.*

5. *State v. Clark*, 4th Dist. No. 02CA12, [2002-Ohio-6684](#).

6. *State v. Pasqualone*, 140 Ohio App.3d 650, 657, fn. 4, quoting *State v. Payne* (Dec. 20, 1999), 5th Dist. Nos. 99CAA05024, 99CAA05025, 99CAA05026, 99CAA05027, and 99CAA05028, 2000 WL 1405, at *3.

7. *State v. Heil* (Mar. 30, 2001), 11th Dist. No. 2000-G-2268, 2001 Ohio App. LEXIS 1552.

8. *Id.* at *6.

9. *State v. Heil*, 95 Ohio St.3d 531, [2002-Ohio-2841](#), at ¶2.

10. See *State v. Morrison*, 10th Dist. No. 02AP-651, [2003-Ohio-1517](#); *State v. Flanagan*, 12th Dist. No. CA2002-05-120, [2003-Ohio-1444](#); *State v. Payne*, *supra*; and *State ex rel. Pless v. McMonagle* (2000), 139 Ohio App.3d 503.

defendant convicted of a felony.¹¹ *State v. Roux* and *State v. McDowell* cite the decision from the Fifth Appellate District in *State v. White*.¹² The Fifth Appellate District's opinion in *State v. White* has been appealed to the Supreme Court of Ohio, which has certified a conflict on the issue of whether a trial court may assess court costs on an indigent defendant convicted of a felony.¹³

{¶36} I acknowledge that I concurred in the *State v. McDowell* Opinion. However, after further examination of the issue, I believe it is fundamentally wrong to impose court costs on indigent persons.

{¶37} I would follow this court's holding in *State v. Heil*, that a trial court cannot assess court costs on indigent persons convicted of a felony. This holding is consistent with R.C. 2949.14, R.C. 2949.19, and case law from the Fourth Appellate District.

{¶38} Accordingly, I would affirm the judgment of the trial court.

11. *State v. McDowell*, 11th Dist. No. 2001-P-0149, [2003-Ohio-5352](#); *State v. Roux*, 154 Ohio App.3d 296, [2003-Ohio-4876](#).

12. *State v. White*, 5th Dist. No. 02CA23, [2003-Ohio-2289](#).

13. *State v. White*, 100 Ohio St.3d 1406, [2003-Ohio-4948](#).