[Cite as *State v. Siler*, 2011-Ohio-2326.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-A-0025**
- vs -	:	
LAMAR SILER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2008 CR 501.

Judgment: Affirmed in part, reversed in part, and remanded.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

Timothy Young, Ohio Public Defender, and *Melissa M. Prendergast*, Assistant State Public Defender, 250 East Broad Street, #1400, Columbus, OH 43215-9308 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Lamar Siler appeals from a judgment of the Ashtabula County Court of Common Pleas which sentenced him to eight years of incarceration after he pled guilty to complicity to burglary. On appeal, he claims (1) his plea was not knowing, intelligent, or voluntary; (2) the trial court erred in imposing court-appointed counsel fees without determining his ability to pay, and in imposing court costs without notifying him of the potential consequences if he fails to pay; and (3) his trial counsel provided ineffective

assistance of counsel. We affirm in part, reverse in part, and remand for the limited purpose of a determination of his ability to pay court-appointed counsel fees.

{¶2} **Substantive Facts and Procedural History**

{¶3} On November 21, 2008, Mr. Siler and two friends, Lavelle Holley and Marcel Thompson, walked up to the porch of a house and pounded on the door. The resident's two young sons were home at the time, playing video games in the living room. One boy went to the door and recognized Mr. Siler and one of his friends as people from the neighborhood, although he did not know them. The boy refused to let these strangers come into the house, so Mr. Holley broke out the window in the front door with the butt of a shotgun, and held the gun on the boy, threatening to kill him with it. Mr. Siler and Mr. Thompson then ran inside, rummaging through the house. One of the boys, who had been taught to use a gun by their grandfather, a hunter, ran upstairs to retrieve a 9 mm handgun from their father's bedroom. The boy and Mr. Holley ended up in the staircase together, with the barrel of Mr. Holley's shotgun pointed at the boy, who discharged his 9 mm handgun and shot at Mr. Holley's thigh. Mr. Siler and Mr. Thompson then fled the house. Both boys developed severe anxiety issues as a result of the incident.

{¶4} The state indicted Mr. Siler for complicity to aggravated burglary, a felony of the second degree. On April 13, 2009, the trial court held a plea hearing, where Mr. Siler pled guilty to a reduced charge of complicity to burglary.

{¶5} On May 6, 2009, the court held a sentencing hearing. The court originally sentenced Mr. Siler to four years of incarceration. However, immediately after he was sentenced, while being handcuffed by a deputy, Mr. Siler turned around, looked at one of the two boys, who were present in the courtroom and sitting near Mr. Siler, and said

"I'm coming after you." When the court was alerted to the threat made to the 15-year-old boy, it questioned the boy, his father and step-mother, who were sitting with him at the time, as well as Mr. Siler and the deputy. After ascertaining that Mr. Siler did utter the threatening remark, the court modified his sentence from four years to eight years of incarceration.

{¶6} Mr. Siler now appeals, raising the following assignments of error for our review:

{¶7} "[1.] Lamar Siler was deprived of his right to due process under the Fourteenth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution when the trial court accepted an unknowing, unintelligent, and involuntary guilty plea. Plea T.p. 5-6, Sent. T.p. 12.

{¶8} "[2.] The trial court erred by imposing court-appointed counsel costs without considering Mr. Siler's present or future ability to pay and by imposing court costs without notifying Mr. Siler that his failure to pay those costs may result in the court's ordering him to perform community service. (Sent. Tr. 12, 23; Amended Judgment Entry of May 6, 2009, at p.2); Crim.R. 52(B).

{¶9} "[3.] Trial counsel's performance was constitutionally deficient, and deprived Mr. Siler of his right to the effective assistance of counsel. Sixth and Fourteenth Amendments to the United States Constitution; Section 10, Article I of the Ohio Constitution."

{¶10} **Guilty plea**

{¶11} Under the first assignment of error, Mr. Siler asserts his guilty plea was not knowing, intelligent, or voluntary because the trial court failed to advise him of the following: (1) his maximum sentence would include a mandatory three-year period of

postrelease control; (2) he would be subject to mandatory court costs in accordance with R.C. 2947.23, and (3) he would be ordered to perform community service upon a failure to pay such costs.

{¶12} "In considering whether a guilty plea was entered knowingly, intelligently and voluntarily, an appellate court examines the totality of the circumstances through a de novo review of the record to ensure that the trial court complied with constitutional and procedural safeguards." *State v. Eckler*, 4th Dist. No. 09CA878, 2009-Ohio-7064, ¶48, quoting *State v. Jodziewicz* (Apr. 16, 1999), 4th Dist. No. 98CA667, 1999 Ohio App. LEXIS 1855, citing *State v. Kelley* (1991), 57 Ohio St.3d 127, 129.

{¶13} "A criminal defendant's choice to enter a plea of guilty or no contest is a serious decision. The benefit to a defendant of agreeing to plead guilty is the elimination of the risk of receiving a longer sentence after trial. But, by agreeing to plead guilty, the defendant loses several constitutional rights." *State v. Clark*, 119 Ohio St.3d 239, 2008- Ohio-3748, ¶25, citing *Boykin v. Alabama* (1969), 395 U.S. 238, 243. "The exchange of certainty for some of the most fundamental protections in the criminal justice system will not be permitted unless the defendant is fully informed of the consequences of his or her plea. Thus, unless a plea is knowingly, intelligently, and voluntarily made, it is invalid." Id., citing *State v. Engle* (1996), 74 Ohio St.3d 525, 527.

{¶14} "To ensure that pleas conform to these high standards, the trial judge must engage the defendant in a colloquy before accepting his or her plea." Id. at ¶26, citing *State v. Ballard* (1981), 66 Ohio St.2d 473, paragraph one of the syllabus; Crim.R. 11 (C), (D), and (E). "It follows that, in conducting this colloquy, the trial judge must convey accurate information to the defendant so that the defendant can understand the consequences of his or her decision and enter a valid plea." Id.

{¶15} Crim.R. 11 governs what is required of the trial court before accepting a guilty plea. Crim.R. 11(C) states:

{¶16} "(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

{¶17} "(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing."

{¶18} **Advisement of Postrelease Control at Plea Colloquy**

{¶19} In *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, the Supreme Court of Ohio addressed the effect of the failure of a trial court during a plea colloquy to advise a defendant that his sentence includes a mandatory term of postrelease control. In that case, the trial court made *no* mention whatsoever of the postrelease control during the plea colloquy. The Supreme Court of Ohio distinguished a "complete" failure to advise the defendant of the postrelease control from simply misinforming the defendant regarding the length or mandatory nature of the postrelease control. The court concluded that whereas "some" compliance prompts a substantial-compliance analysis and the corresponding "prejudice" inquiry, id. at ¶23, when the trial court fails to advise a defendant that the sentence will include a mandatory term of postrelease control, the defendant may dispute the knowing, intelligent, and voluntary nature of the plea and the reviewing court must vacate the plea. Id. at ¶25.

{¶20} In other words, "[f]ailing outright to inform a defendant about mandatory postrelease control during the plea colloquy is reversible error and the reviewing court

must vacate the plea. However, when a court does not substantially comply with the requirement of notifying a defendant about mandatory postrelease control during the plea colloquy, the plea may be vacated only if the defendant shows a prejudicial effect." *State v. Griffin*, 8th Dist. No. 92728, 2010-Ohio-437, ¶14, citing *Sarkozy*. In *Griffin*, the trial court mentioned postrelease control but failed to thoroughly explain the penalties for a violation of postrelease control. The Eighth District explained that the appellant failed to demonstrate that, but for the court's omission, he would have entered a different plea. Because the appellant failed to show prejudice, the Eighth District concluded no reversible error occurred. Id. at ¶16.

{¶21} In the instant case, the court advised Mr. Siler as follows at the plea hearing:

{¶22} "THE COURT: All right. If you would go to prison, your prison term would be served without good time credit, and after you completed your prison term, you would be under Post-Release Control for a period of *up to* three years and under the supervision of the Parole Board.

{¶23} "They would set out rules for you to follow. If you violated the rules, you could be returned to prison for one-half of my sentence; however, no single return to prison could be greater than nine months.

{¶24} "So, for example, if I gave you a two-year sentence and you were under Post-Release Control, you – after you served the sentence, you continued to violate, you could go back to prison for up to one year; however, no single return to prison could be greater than nine months.

{¶25} "Do you understand that?

{¶26} "THE DEFENDANT: Yes, sir.

{¶27} "THE COURT: If you commit a new felony while you're on Post-Release Control, regardless of where it's committed within the State of Ohio, it doesn't have to be in this country, that sentencing judge for the new felony could not only sentence you for your new felony, but also for your Post-Release Control violation in this case.

{¶28} "Do you understand that?

{¶29} "THE DEFENDANT: Yes, sir." (Emphasis added.)

{¶30} The trial court correctly explained the postrelease control to Mr. Siler, except for the erroneous statement that he would be subjected to "up to" three years of postrelease control when in fact the three-year postrelease control was mandatory in his case.[1] Pursuant to *Sarkozy*, this error is subject to the substantial-compliance analysis. Therefore, Mr. Siler must demonstrate prejudice. However, Mr. Siler does not allege that he would not have pled guilty but for the trial court's erroneous advisement that he would be under postrelease control for a period "up to" three years, as opposed to a period of three years. Therefore, the trial court's misstatement regarding the length of the postrelease control does not alter the knowing, intelligent, and voluntary nature of Mr. Siler's plea.

{¶31} **Advisement of Court Costs at Plea Colloquy**

{¶32} Mr. Siler also maintains that that pursuant to Crim.R. 11(C)(2)(a), the trial court must determine he understood the "maximum penalty" involved, yet the court in this case made no mention during the plea colloquy of the fact that court costs would be imposed.

1. In both the plea agreement and the judgment entry, the postrelease control term was stated correctly as for a period of three years.

{¶33} R.C. 2947.23 governs the imposition of court costs on a criminal defendant. It states, in part:

{¶34} "(A)(1) In all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution, including any costs under section 2947.231 [2947.23.1] of the Revised Code, and render a judgment against the defendant for such costs. At the time the judge or magistrate imposes sentence, the judge or magistrate shall notify the defendant of both of the following:

{¶35} "(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.

{¶36} "(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."

{¶37} Mr. Siler cites *Sarkozy* and analogizes the imposition of court costs to mandatory postrelease control. He argues the trial court's failure to mention court costs and the consequence of nonpayment at the plea colloquy renders his plea invalid pursuant to *Sarkozy*. Mr. Siler's claim is without merit.

{¶38} In a recent case, *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, the Supreme Court of Ohio contrasted postrelease control and court costs imposed under R.C. 2947.23. The court reiterated the long-standing principle that court costs are "distinct from criminal punishment," id. at ¶20. "[A]lthough costs in criminal cases are

assessed at sentencing and are included in the sentencing entry, costs are not punishment, but are more akin to a civil judgment for money." Id., quoting *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, ¶ 5. The duty to pay court costs is a "civil obligation arising from an implied contract." Id. quoting *Strattman v. Studt* (1969), 20 Ohio St.2d 95, paragraph six of the syllabus. "That court costs are a civil obligation is true in both criminal and civil cases." Id. Distinguishing the payment of court costs from postrelease control, the court noted in *Joseph* that "[t]he civil nature of the imposition of court costs does not create the taint on the criminal sentence that the failure to inform a defendant of postrelease control does."[2]

{¶39} In *State v. McDaniel*, 4th Dist. No. 09CA677, 2010-Ohio-5215, the appellant similarly claimed his guilty plea was invalid because the trial court failed to inform him that he would be obligated to pay courts costs. The Fourth District applied *Joseph* and concluded that court costs are not punishment and therefore not part of the "penalty" that the trial court needs to describe under Crim.R. 11(C)(2)(a). It therefore held the appellant did not show the trial court failed to substantially comply with the requirements of Crim.R. 11(C)(2)(a) in not mentioning the court costs. Id. at ¶21.

{¶40} We agree with the Fourth District and similarly conclude that Mr. Siler fails to establish that the trial court did not substantially comply with the requirements of Crim.R. 11(C)(2)(a) during the plea colloquy in not mentioning his obligations to pay the court costs.

{¶41} The first assignment of error is overruled.

2. We note that although in *Joseph* the court reviewed a former version of R.C. 2947.23, which did not include the trial court's discretion to order the defendant to perform community service no more than 40 hours per month, the principle that court costs are civil in nature still stands.

{¶42} Under the second assignment of error, Mr. Siler claims the trial court erred in (1) failing to notify him at sentencing that his failure to pay court costs could potentially result in the court's ordering him to perform community service, and (2) ordering him to pay court-appointed counsel fees without first determining his ability to pay.

{¶43} **Failure to Notify of Potential Consequences of Nonpayment of Court Costs at Sentencing**

{¶44} Mr. Siler argues the trial court violated R.C. 2947.23 by failing to inform him that a failure to pay the court costs could result in an order requiring him to perform community service for up to 40 hours per month at a specified hourly credit rate. R.C. 2947.23(A)(1). He maintains that, because of the omission, the trial court should be prohibited from ordering him to satisfy his court costs debt through community service, should he fail to pay such costs.

{¶45} R.C. 2947.23 states that in all criminal cases, the judge shall include in the sentence the costs of prosecution and render a judgment against the defendant for such costs. It also states that at the time the court imposes the sentence, the judge "shall" notify the defendant that if the defendant fails to pay that judgment, or fails to timely make payments towards that judgment under a payment schedule, the court "may" order the defendant to perform community service, in an amount of not more than 40 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. R.C. 2947.23(A)(1)(a).

{¶46} Here, the record reflects that at the sentencing hearing, the trial court simply ordered Mr. Siler to "[p]ay the court costs." In its judgment entry, the court stated

"[c]osts herein are assessed against the Defendant." There was no notification on the consequence of a failure to pay the court costs.

{¶47} Our research of the case law indicates the courts that have reviewed this issue have consistently concluded that, because of the mandatory nature of the notification, the trial court cannot order community service for a failure to pay court costs when the court failed to advise in accordance with R.C. 2947.23(A)(1)(a). The courts are split, however, on whether the issue is ripe for adjudication on direct appeal**.**

{¶48} A minority of the courts concluded it is, based on the principle of judicial economy. These courts believed judicial economy would be best served if the issue was actually decided on direct appeal. These courts believed that, instead of stating in dicta that community service cannot be ordered, the court reviewing the claim should just make that holding outright. Therefore, these courts modified the trial court's sentencing entry and prohibited any future imposition of community service as a means of collecting court costs. See, e.g., *State v. Gabriel*, 7th Dist. No. 09MA108, 2010-Ohio-3151.

{¶49} The majority of the courts that have reviewed this issue, however, held that the issue is not ripe for adjudication until the defendant suffers actual prejudice, i.e., if the defendant fails to pay the court costs *and* if the trial court orders community service as a consequence. See, e.g., *State v. Boice*, 4th Dist. No. 08CA24, 2009-Ohio-1755, ¶11; *State v. Nutter*, 12th Dist. No. CA2008-10-0009, 2009-Ohio-2964, ¶12; *State v. Kearse*, 3d Dist. No. 17-08-29, 2009-Ohio-4111, ¶7-15; *State v. Ward*, 168 Ohio App.3d 701, 2006-Ohio-4847, ¶41.

{¶50} We also believe the issue is not ripe for adjudication. The statute permits, but does not mandate, a trial court to order community service when a defendant fails to

pay court costs. Mr. Siler will not suffer actual prejudice from the trial court's error in sentencing unless he fails to pay the court costs and unless the trial court exercises its discretion to order him to perform community service, both of which are conjectural and hypothetical at this point. Therefore, we hold the matter is not ripe for adjudication.[3]

{¶51} **Determination of Ability to Pay Counsel Fees**

{¶52} Mr. Siler also claims the trial court erred when it imposed court-appointed counsel fees without first considering his present or future ability to pay. The state concedes this issue.

{¶53} In its judgment entry, the trial court stated: "Defendant is ordered to pay any and all prosecution costs, *court appointed counsel costs*, and any fees permitted pursuant to O.R.C. Section 2929.18(A)(4)." (Emphasis added.) The court made no mention of payment of court-appointed counsel fees this at the sentencing hearing.

{¶54} R.C. 2941.51 allows a trial court to order a criminal defendant to pay the appointed counsel fees. However, the statute does not address whether the court must determine the defendant's ability to pay before imposing such costs. The courts, in answering this question, have looked to R.C. 2929.18 and R.C. 2919.19(B)(6).

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3. **In *State v. Wagner*, 5th Dist. 10-CA-10, No. 2011-Ohio-2, the court took a third approach. In that case, the trial court *failed to mention court costs* at the sentencing hearing but included it in the sentencing entry. The Fifth District remanded the case to the trial court for the limited purpose of allowing the defendant to move for a waiver of the court costs, and, if denied, to inform the defendant of the potential requirement of community service. The Fifth District cited *Joseph*, supra, to support its disposition. In *Joseph*, the Supreme Court of Ohio reviewed a prior version of R.C. 2947.23, which does not provide for community service in the event of non-payment of court costs. After determining a trial court may waive the court costs if the defendant is indigent, the court held that when the trial court failed to notify a defendant of court costs at the sentencing hearing and to provide the defendant an opportunity at the hearing to seek a waiver of costs, the case should be remanded for the limited purpose of allowing the defendant to request a waiver of the payment. See, also, *State v. Jones*, 8th Dist. No. 94408, 2011-Ohio-453 (the trial court failed to impose court costs at the sentencing hearing; the Eighth District applied *Joseph* and remanded the case for proper notification and an opportunity for the defendant to seek a waiver). This line of case law is to be distinguished from the instant case, where the court *did* impose court costs in open court (without a request of waiver from the defendant) but failed to notify the consequences of a failure of payment.**

{¶55} R.C. 2929.18 allows a trial court to impose financial sanctions, restitutions, and reimbursements on a defendant. However, R.C. 2929.19(B)(6) requires that, before imposing a financial sanction under R.C. 2929.18, the trial court "shall consider the offender's present and future ability to pay ***."

{¶56} Furthermore, R.C. 2929.18(E) states: "A court that imposes a financial sanction upon an offender *may* hold a hearing if necessary to determine whether the offender is able to pay the sanction or is likely in the future to be able to pay it." (Emphasis added.)

{¶57} Therefore, although the trial court is not required to hold a hearing to determine a defendant's ability to pay, "there must be some evidence in the record that the court considered the offender's present and future ability to pay the sanction imposed." *State v. Holmes*, 6th Dist. No. L-01-1459, 2002-Ohio-6185, ¶21. See, also, *State v. Johnson*, 6th Dist. No. L-04-1221, 2006-Ohio-1406, ¶56; *State v. Fisher*, 12th Dist. No. CA98-09-190, 2002-Ohio-2069.

{¶58} In this case, the court made no inquiry of Mr. Siler's present or future ability to pay the attorney fees; nor did it make a determination on the record. No presentence investigation report was completed. Absent such an inquiry or evidence regarding Mr. Siler's ability to pay, the imposition of court-appointed counsel fee was an error. Therefore, we reverse this portion of the judgment and remand for the limited purpose of a determination of Mr. Siler's ability to pay.

{¶59} The second assignment of error is overruled in part and sustained in part.

{¶60} **Ineffective Assistance of Counsel**

{¶61} Under the third assignment of error, Mr. Siler claims his trial counsel provided ineffective assistance of counsel because she (1) failed to move to withdraw

his guilty plea "when it became apparent that the trial court was going to resentence him" due to the alleged threat made at one of the victims; and (2) failed to object to the trial court's imposition of court costs.

{¶62} A properly licensed attorney is presumed to have rendered competent assistance. *State v. Smith* (1985), 17 Ohio St.3d 98, 100. In the context of a guilty plea, the standard of review for ineffective assistance of counsel is whether: (1) counsel's performance was deficient, and (2) the defendant was prejudiced by the deficient performance in that there is a reasonable probability that, but for counsel's error, the defendant would not have pled guilty. *State v. Madeline* (Mar. 22, 2002), 11th Dist. No. 2000-T-0156, *9. However, "[t]he mere fact that, if not for the alleged ineffective assistance of counsel, the defendant would not have entered a guilty plea is *not* sufficient to establish the requisite connection between the guilty plea and the ineffective assistance." Id. at *10, citing *State v. Sopjack* (Dec. 15, 1995), 11th Dist. No. 93-G-1826, 1995 Ohio App. LEXIS 5572, citing *State v. Haynes* (Mar. 3, 1995), 11th Dist. No. 93-T-4911, 1995 Ohio App. LEXIS 780. "Rather, ineffective assistance of trial counsel is found to have affected the validity of a guilty plea when it precluded a defendant from entering his plea knowingly and voluntarily." *Madeline* at *10, citing *Sopjack*. See, also, *State v. Dansby*, 5th Dist. Nos. 2009AP120065 and 2009AP120066, 2010-Ohio-4538, ¶19.

{¶63} Here, Mr. Siler does not claim his counsel's performance precluded him from entering a knowing and voluntary plea. Rather, he argues his counsel should have utilized the court's decision to modify his sentence to his benefit, by moving to withdraw his plea at that time.

{¶64} As we have determined from our review of the record, Mr. Siler's plea was knowing, voluntary, and intelligent. There was nothing in the record to suggest that had his counsel moved to withdraw the plea after the trial court learned of his threat and decided to modify his sentence, the court would have allowed the motion. Consequently, his counsel cannot be faulted for the failure to perform a futile act.

{¶65} Mr. Siler also claims his counsel should have objected to the trial court's imposition of court costs when it failed to mention the potential consequence of a failure to pay. In an ineffective assistance of counsel claim, an appellant must demonstrate prejudice by showing that but for counsel's deficient performance, there exists a reasonable probability that the outcome would have been different. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus.

{¶66} Mr. Siler's ineffective assistance claim regarding the imposition of court costs is meritless. Had counsel raised objections at the sentencing hearing to the lack of proper notification of potential consequences of nonpayment, the trial court most likely would have remedied the inadvertent omission. The outcome would *not* have been different. Thus, we do not see how his counsel's failure to object prejudiced him.

{¶67} The third assignment of error is without merit.

{¶68} The judgment of the Ashtabula County Court of Common Pleas is affirmed in part, reversed in part, and remanded for the limited purpose of a determination of Mr. Siler's ability to pay the appointed counsel fees.

THOMAS R. WRIGHT, J., concurs,

DIANE V. GRENDELL, J., concurs in judgment only.