

[Cite as *State v. Lawless*, 2004-Ohio-5344.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

ROBERT J. LAWLESS

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P. J.

Hon. John W. Wise, J.

Hon. Julie A. Edwards, J.

Case No. 03 CA 30

O P I N I O N

CHARACTER OF PROCEEDING:

Criminal Appeal from the Court of Common
Pleas, Case No. CR99-0017

JUDGMENT:

Reversed

DATE OF JUDGMENT ENTRY:

September 28, 2004

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Wise, J.

{¶1} Appellant Robert Lawless appeals the decision of the Muskingum County Court of Common Pleas that extended his period of probation an additional three years in order for appellant to pay court costs. The following facts give rise to this appeal.

{¶2} On October 30, 2000, the trial court placed appellant on community control, for two years, and ordered appellant to pay court costs within ninety days. Appellant made payments totaling \$420, over the past two years. However, there is an outstanding balance owing in the amount of \$1,308.93.

{¶3} As a result of appellant's failure to pay court costs, the state filed a motion, on October 10, 2002, alleging appellant violated the terms and conditions of his community control. On this same date, appellant filed a motion to be released from community control and a motion for an extension of time to pay court costs. On December 3, 2002, appellant filed a motion for a court-appointed attorney. The trial court granted appellant's motion and appointed counsel on December 9, 2002.

{¶4} On December 20, 2002, the trial court denied appellant's motion for release from probation and motion for extension of time to pay court costs. The trial court scheduled a hearing on the state's motion for March 14, 2003. Prior to the hearing, on March 10, 2003, appellant filed a motion asking the trial court to dismiss his court-appointed counsel. On the day of the hearing, appellant's court-appointed counsel filed a motion to withdraw. The trial court granted counsel's motion to withdraw, on March 18, 2003, and appointed new counsel to represent appellant.

{¶5} Thereafter, the court conducted the hearing on the state's motion on May 28, 2003. Following the hearing, the trial court extended appellant's community control

for three additional years in order for appellant to pay his court costs. On June 9, 2003, appellant filed a motion requesting findings of fact and conclusions of law. The trial court filed a judgment entry, on July 30, 2003, setting forth its findings of fact and conclusions of law.

{¶6} Appellant filed a notice of appeal and sets forth the following assignments of error for our consideration:

{¶7} "I. THE TRIAL COURT ERRED IN NOT TERMINATING THE COURT COST (SIC) AND PROBATION AS THE DEFENDANT IS AND HAS BEEN INDIGENT AND DID NOT VIOLATE HIS PROBATION. (SIC) WHEREBY VIOLATING APPELLANT'S CIVIL AND CONSTITUTIONAL RIGHTS UNDER 42 U.S.C. 1983.

{¶8} "II. THE JUDGE'S DECISION IS CONTRARY TO THE RECORD AND FACTS AS IS THE COURT'S DECISION WHICH IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE. (SIC) WHEREBY VIOLATING APPELLANT'S CIVIL AND CONSTITUTIONAL RIGHTS UNDER 42 U.S.C. 1983 AND O, (SIC) JUR (SIC) 3D, CRIMINAL LAW, GAGON (SIC) V. SCARPELLI, TATE V. SHORT, STATE V. CRAWFORD SUPRA. HUGGETT V. STATE, UNITED STATES V. BOSWELL, UNITED STATES V. WILSON, PEOPLE V. TIDWELL, SECTION 3.2 OF AMERICAN BAR ASSOCIATION STANDARDS RELATING TO PROBATION. TITLE 18 CFR.

{¶9} "III. THE TRIAL COURT ERRED BY KNOWINGLY PROVIDING (SIC) AN INCOMPETENT ASSISTANCE OF COUNSEL OR COUNSEL THAT WAS CONSPIRING WITH DOUG POLLOCK, HEAD OF PROBATION AND PROSECUTING ATTORNEY WHO WAS CONDUCTING A KNOWINGLY MALICIOUS PROSECUTION

AND VIOLATING DEFENDANT'S DUE PROCESS RIGHTS UNDER COLOR OF LAW KNOWINGLY IN VIOLATION OF 42 U.S.C. 1983.

{¶10} "IV. TRIAL COURT ERRED BY WILLFULLY, KNOWINGLY, AND MALICIOUSLY (SIC) ABUSED ITS DISCRETION TO THE MANIFEST WEIGHT OF THE EVIDENCE AND TESTIMONY TO EXTEND PROBATIONER'S COMMUNITY CONTROL SANCTIONS."

II

{¶11} We will begin our analysis by addressing appellant's Second Assignment of Error as we find it dispositive of this matter on appeal. Appellant maintains, in his Second Assignment of Error, the trial court's decision is contrary to the record and against the manifest weight of the evidence. Specifically, appellant argues the trial court erred when it extended his community control solely because he failed to pay court costs as he is indigent. We conclude the trial court erred when it extended his community control, not on the basis that appellant is indigent, but because it lacked subject matter jurisdiction to do so.

{¶12} In the recent case of *State v. McKinney*, Fairfield App. No. 02CA083, 2004-Ohio-4035, we concluded the trial court did not have jurisdiction to revoke a defendant's community control where the motion to revoke community control was filed before the expiration of the original community control sentence but the judgment entry revoking community control was filed after the expiration of the original sentence. In reaching this conclusion, we relied on the Ohio Supreme Court's decision in *Davis v. Wolfe*, 92 Ohio St.3d 549, 2001-Ohio-1281.

{¶13} In *Davis*, the Court explained:

{¶14} “R.C. 2951.09 specifies that ‘[a]t the end or termination of the period of probation, the jurisdiction of the judge or magistrate to impose sentence ceases and the defendant shall be discharged.’ Discharge is required even if the alleged probation violation occurred during the probationary period and could have resulted in a valid probation revocation and imposition of sentence if it had been timely prosecuted. *Kaine v. Marion Prison Warden* (2000), 88 Ohio St.3d 454, 455.” Id. at 551.

{¶15} The Ohio Supreme Court’s decision, in *Davis*, is consistent with previous decisions from the Court. In *State v. Yates* (1991), 58 Ohio St.3d 78, the Court determined the trial court lacked jurisdiction to impose suspended sentences where the state failed to initiate probation violation proceedings, during the original probation period, and the probationary period was not extended before the original probation period expired. Id. at 80. In the *Kaine* decision, supra, the Court held that R.C. 2951.09 terminates jurisdiction of a trial court to impose sentence, upon termination of probation, and it matters not that the alleged violation of probation occurred during the period of probation and could have resulted, if timely prosecuted, in a revocation of probation and imposition of sentence. Id. at 455.

{¶16} In the case sub judice, the trial court did not seek to impose the original sentence. Instead, the trial court extended appellant’s community control for an additional three years. Although R.C. 2951.07 permits a trial court to extend community control for a period not to exceed five years, it must do so within the original period of community control provided the period of community control has not been suspended for the reasons set forth in 2951.07. Pursuant to R.C. 2951.09, once the period of

community control terminates, the jurisdiction of the trial court to impose sentence ceases.

{¶17} The record indicates the state filed a motion alleging appellant violated the terms and conditions of his community control on October 10, 2002, prior to the expiration of his original period of community control. However, the trial court did not file its judgment entry extending appellant's community control until May 28, 2003, well after the expiration of the original period of community control.

{¶18} Accordingly, we conclude the trial court did not have jurisdiction to extend community control an additional three years as it failed to do so before the expiration of the original period of community control.

{¶19} However, this does not preclude the state from collecting court costs against a non-indigent defendant. The Seventh District Court of Appeals recently addressed this issue in *State v. Fregiato*, Belmont App. No. 04-BE-26, 2004-Ohio-4289. In *Fregiato*, defendant argued, on appeal, that the trial court lacked jurisdiction to compel payment of court costs and fines associated with his previous conviction because his probationary period had ended. The court of appeals rejected this argument and held:

{¶20} "Inherent in Petitioner's argument is that the present action is a probation proceeding. Petitioner's belief, however, is incorrect. Actions to collect unpaid court costs and fines are wholly independent and divorced from other proceedings. R.C. 2947.23 explicitly states, '[i]n all criminal cases * * * the judge or magistrate shall include in the sentence the costs of prosecution and render a judgment against the defendant for such costs.' Secondly, R.C. 2949.14 states in pertinent part, '[u]pon conviction of a

nonindigent person for a felony * * * [u]pon certification by the prosecuting attorney, the clerk shall attempt to collect the costs from the person convicted.’ Finally, if the nonindigent defendant fails to pay these costs, R.C. 2949.15 states, ‘the clerk of the court of common pleas shall * * * issue to the sheriff * * * executions against [the nonindigent defendant’s] property for fines and costs of prosecution.’ Nothing in the language of these statutes suggests that their authority is in any way contingent upon the nonindigent defendant’s probationary period after conviction. * * * Therefore, the trial court has proper subject matter jurisdiction to proceed against Petitioner for the balance of his unpaid court costs despite the fact that his probationary period has expired.” Id. at ¶ 10.

{¶21} In the case sub judice, the trial court lacked jurisdiction to extend appellant’s community control for an additional three years. Further, unlike the defendant in *Fregiato*, the appellant is indigent, thereby precluding the trial court from collecting court costs pursuant to R.C. 2949.15.

{¶22} Appellant’s Second Assignment of Error is sustained.

{¶23} We will not address the merits of appellant’s First, Third or Fourth Assignments of Error as they are moot based upon our disposition of appellant’s Second Assignment of Error.

{¶24} For the foregoing reasons, the judgment of the Court of Common Pleas, Muskingum County, Ohio, is hereby reversed.

By: Wise, J.

Gwin, P. J., and

Edwards, J., concur.

JUDGES

JWW/d 82

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

ROBERT J. LAWLESS

Defendant-Appellant

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JUDGMENT ENTRY

Case No. 03 CA 30

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Muskingum County, Ohio, is reversed.

Costs assessed to Appellee.

JUDGES