

COURT OF APPEALS  
MUSKINGUM COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff - Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	
JESSICA N. EBLIN	:	Case No. CT2019-0036
	:	
Defendant - Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Muskingum County Court of Common Pleas, Case No. CR2018-0738

JUDGMENT: Affirmed

DATE OF JUDGMENT: March 25, 2020

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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*Baldwin, J.*

{¶1} Jessica Eblin entered a no contest plea to one count of obstructing justice, a violation of R.C. 2921.32 and a felony of the third degree, was found guilty, sentenced to a prison term of eighteen months and ordered to pay all costs. Her trial counsel did not object to the order to pay costs and did not request a waiver of costs at sentencing. Appellant argues she received ineffective assistance of counsel as a result of her trial counsel's failure to request a waiver of costs. The State of Ohio is appellee.

### **STATEMENT OF FACTS AND CASE**

{¶2} The facts underlying the charges filed against appellant are irrelevant to the resolution of this appeal and are therefore omitted.

{¶3} Appellant was charged with one count of acting with purpose to hinder the discovery, apprehension, prosecution, conviction or punishment of another in violation of R.C. 2921.32(A)(5) a second degree felony and one count of acting with purpose to hinder the discovery, apprehension, prosecution, conviction, or punishment of another in violation of R.C. 2921.32(A)(6) a felony of the a second degree. As part of a plea deal, appellant changed her plea to no contest to a violation of R.C. 2921.32(A)(5) and the appellee agreed to dismiss the charge of violating R.C. 2921.32(A)(6).

{¶4} Appellant was found guilty and sentencing was scheduled for a later date. Appellant then retained new counsel and her appointed counsel withdrew. Appellant's retained counsel appeared with her at the sentencing hearing.

{¶5} Appellant was sentenced to a stated prison term of 18 months to run concurrently with the sentence imposed in a related case. (*State v. Eblin*, Muskingum County Court of Common Pleas, Case No. CR2019-0012). The court also ordered that

"defendant is assessed court costs in regard to this matter." (Costs were listed as \$536.00. Docket # 48, p. 2. ) Appellant's trial counsel did not request a waiver of costs.

{¶6} Appellant filed a timely appeal and submits one assignment of error:

{¶7} "I. EBLIN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE ONE OF THE OHIO CONSTITUTION."

### ANALYSIS

{¶8} Appellant encourages this court to adopt the rationale used by the Eighth District Court of Appeals in *State v. Springer*, 8th Dist. Cuyahoga No. 104649, 2017-Ohio-8861, ¶46 where the trial court concluded counsel was ineffective for failing to ask the trial court waive court costs, the defendant previously having been found indigent. Appellant acknowledges that this court reached a contrary conclusion in *State v. Davis*, 5th Dist. Licking No. 17-CA-55, 2017-Ohio-9445, rev'd and remanded, 2020-Ohio-309 concluding that the appellant therein did not receive ineffective assistance of counsel because defendants have the opportunity to request waiver of costs at any time and failure to do so at trial is no longer res judicata. (R. C. 2947.23(C)). Our holding in *Davis* was found to be in conflict with the holding in *Springer* and the matter was certified to the Supreme Court of Ohio. That court recently decided *State vs. Davis* and concluded that both the Eighth District's and the Fifth's District's analysis of the alleged prejudicial impact of trial counsel's action was incomplete and that a complete review of the record and application of the test described in *State v. Bradley*, 42 Ohio St.3d 136, 141-142, 538 N.E.2d 373 (1989) was required. *State v. Davis*, 2020-Ohio-309 ¶1.

{¶9} We have reviewed the record in this matter and applied the analysis required by *Bradley, supra*, and we conclude that appellant has not demonstrated that she received ineffective assistance of counsel under either branch of the analysis required by that case.

{¶10} The Supreme Court of Ohio has directed that "when an indigent defendant makes an ineffective-assistance-of-counsel claim based upon counsel's failure to request a waiver of court costs, a reviewing court must apply the test in *State v. Bradley*, 42 Ohio St.3d 136, 141-142, 538 N.E.2d 373 (1989) \*\*\*\*" and that "[i]f a court analyzes the prejudice prong, then it must consider the facts and circumstances of the case objectively to determine whether the defendant established the necessary prejudice sufficient to support that claim—i.e., but for counsel's deficient performance, there exists a reasonable probability that the result of the proceeding would have been different." *State v. Davis*, 2020-Ohio-309 ¶1.

{¶11} The court in *Bradley, supra* instructed that:

When considering an allegation of ineffective assistance of counsel, a two-step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether the defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by \*142 counsel's ineffectiveness."

*Id.*, at p.141–142, (Internal citations omitted.)

{¶12} In *Davis, supra*, the Supreme Court of Ohio refined the analysis of alleged prejudicial impact by noting that "[a]n appellate court's reliance on the fact that a defendant may move for a waiver of costs at a later time under R.C. 2947.23(C) in its prejudice analysis is improper" and that "a determination of indigency alone does not rise to the level of creating a reasonable probability that the trial court would have waived costs had defense counsel moved the court to do so." *Davis, supra*, p.14-15. We must look at all the circumstances that the defendant sets forth in attempting to demonstrate prejudice and determine whether there is a reasonable probability that the trial court would have granted a motion to waive costs had one been made. *Id.*

{¶13} A waiver of court costs is within the discretion of the trial court. Revised Code Section 2947.23 requires the trial court to "include in the sentence the costs of prosecution, including any costs under section 2947.231 of the Revised Code, and render a judgment against the defendant for such costs." The trial court retains jurisdiction to "waive, suspend, or modify the payment of the costs \*\*\*, at the time of sentencing or at any time thereafter." R.C. 2947.23(C). The trial court's decision regarding whether to waive costs is, therefore, "reviewed under an abuse-of-discretion standard. *State v. Braden*, 2019-Ohio-4204 (Ohio). While no motion to waive costs nor any decision regarding waiver is reflected in the record, we find that the identification of the standard of review is needed to complete our analysis.

### ESSENTIAL DUTIES

{¶14} We first review the record to determine whether trial counsel failed in his essential duties to appellant by failing to request a waiver of court costs under R.C. 2947.23. *Bradley, supra*. Appellant does not address this part of the *Bradley* analysis in

her brief, and instead argues that a prior finding that a defendant was indigent demonstrates a reasonable probability that the trial court would have waived costs had counsel made the request, thus focusing on the second step of the analysis. Appellee likewise focuses on the second step of the *Bradley* analysis. We find it imperative to consider the first step to render a complete analysis as "both deficient performance and prejudice are required to justify reversal based on ineffective assistance of counsel." *State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-4347, 54 N.E.3d 80, ¶ 259 (internal citations omitted).

{¶15} We are guided by the United States Supreme Court ruling in *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984) describing the deference to be used in such an analysis:

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See *Michel v. Louisiana*, supra, 350 U.S., at 101, 76 S.Ct., at 164. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

{¶16} The adoption of R.C. 2947.23(C) now permits trial counsel flexibility regarding a request for waiving costs. Prior to its adoption, a failure to request of waiver of costs at sentencing resulted in a final judgment and a prohibition of any further consideration of that issue. *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, ¶ 23. Res judicata no longer bars appellant from requesting a waiver at any time after sentencing. "Trial counsel may have decided as a matter of strategy not to seek a waiver or modification of court costs until some later time" and "[s]trategic timing may now play a role in trial counsel's decision." *State v. Farnese*, 4th Dist. Washington No. 15CA11, 2015-Ohio-3533, ¶ 16; *State v. Purifoy*, 2nd Dist. Montgomery No. 28042, 2019-Ohio-2942, ¶ 28. We find that the timing of a motion, seeking waiver of payment, is a matter of trial strategy. *State v. Southam*, 6th Dist. Fulton No. F-18-004, 2018-Ohio-5288, ¶ 67, quoting *State v. Pultz*, 6th Dist. Wood No. WD-14-083, 2016-Ohio-329, ¶ 61. And a debatable trial strategy does not equal ineffective assistance of counsel. *Southam, supra* at ¶ 68, quoting *State v. Phillips*, 74 Ohio St.3d 72, 85, 656 N.E.2d 643 (1995). *State v. Moore*, 6th Dist. Erie No. E-19-009, 2019-Ohio-4609, ¶ 14. *Accord State v. Boyd*, 5th Dist. Richland No. 12CA23, 2013-Ohio-1333, ¶ 26. ("Trial strategy and even debatable trial tactics do not establish ineffective assistance of counsel," quoting *State v. Conway*, 109 Ohio St.3d 412, 2006–Ohio–2815, ¶ 101) and *State v. McCall*, 5th Dist. Coshocton No. 2017CA0002, 2017-Ohio-7860, ¶ 43 ("Tactical or strategic trial decisions, including timing of a motion, do not generally constitute ineffective assistance").

{¶17} We hold that trial counsel does not violate an essential duty to appellant by not filing a motion to waive costs at the sentencing hearing and that, therefore, she did not receive ineffective assistance of counsel in this case.

{¶18} Even if we had concluded that trial counsel's failure to file a motion to waive costs was a violation of his duty to appellant, our analysis of the second branch of the *Bradley* analysis would lead us to the same conclusion because the record lacks evidence of a reasonable probability of a different outcome.

### REASONABLE PROBABILITY

{¶19} Appellant relies on the trial court's findings that she was indigent for appointment of trial and appellant counsel to support her argument that there was a reasonable probability that the trial court would have waived costs. That argument has been rejected in *State v. Davis, supra* and is not an accurate description of the record.

{¶20} The trial court did find appellant indigent and appoint counsel initially, but she retained counsel and discharged her appointed counsel prior to sentencing. (Notice of Substitution and Withdrawal of Counsel, March 8, 2019, Docket #31). Appellant's reliance on *Springer, supra*, even if it remained valid precedent, would be undermined by the fact that she retained counsel for her defense prior to sentencing. However, the holding of *Davis, supra* has made it clear that "[A] determination of indigency alone does not rise to the level of creating a reasonable probability that the trial court would have waived costs had defense counsel moved the court to do so" and, instead we must determine " whether the facts and circumstances presented by the defendant establish that there is a reasonable probability that the trial court would have granted the request to waive costs had one been made. *Id.* at ¶ 15-16.

{¶21} Appellant has not presented any further facts or circumstances to support a finding that there was a reasonable probability that trial court would have granted the request to waive costs. We have reviewed the record before us and found nothing that



would support the conclusion that there was a reasonable probability that the outcome would have changed had a motion been filed. We considered, as part of this analysis, whether the trial court's denial of such a motion would have been an abuse of discretion and find nothing within the facts and circumstances of this case that would lead us to find that a failure to grant the motion would constitute an abuse. For those reasons, we are compelled to conclude that appellant has failed to demonstrate a reasonable probability that the outcome would have changed and that, therefore, the appellant did not suffer prejudice as a result of counsel not filing a motion to wave costs. *State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-4347, 54 N.E.3d 80, ¶ 233.

{¶22} Appellant's assignment of error is overruled and the decision of the Muskingum County Court of Common Pleas is affirmed.

By: Baldwin, J.

Hoffman, P.J. and

Delaney, J. concur.