[Cite as *State v. Morgan*, 2010-Ohio-2925.]

IN THE COURT OF APPEALS OF CHAMPAIGN COUNTY, OHIO

STATE OF OHIO	**:**	
Plaintiff-Appellee	**:**	**C.A. CASE NO. 09CA21**
vs.	**:**	**T.C. CASE NO. 09CR10**
CINDY L. MORGAN	**:**	**(Criminal Appeal from Common Pleas Court)**
Defendant-Appellant	**:**	

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O P I N I O N

Rendered on the 25th day of June, 2010.

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GRADY, J.:

{¶ 1} Defendant, Cindy Morgan, appeals from her conviction and sentence for domestic violence.

{¶ 2} As a result of an altercation with her father over her alcohol abuse problem, Defendant was indicted on one count of domestic violence (with two previous domestic violence

convictions) in violation of R.C. 2919.25(A),(D)(4), a felony of the third degree, and one count of aggravated menacing in violation of R.C. 2903.21(A), a misdemeanor of the first degree. Following a jury trial, Defendant was found guilty of the domestic violence charge but not guilty of aggravated menacing.

{¶ 3} At a sentencing hearing held on May 27, 2009, the trial court sentenced Defendant to two years in prison and imposed a fine of two hundred and fifty dollars. No court costs were imposed or even mentioned at the sentencing hearing. The following day, May 28, 2009, the court filed its Journal Entry of Judgment, Conviction and Sentence wherein the court imposed court costs, including the fees of appointed counsel, and set up a payment schedule for Defendant to follow upon her release from prison.

{¶ 4} Defendant timely appealed to this court. She does not challenge her conviction, but rather challenges only the imposition of court costs.

ASSIGNMENT OF ERROR

{¶ 5} "THE TRIAL COURT ERRED WHEN IT FAILED TO ADDRESS THE IMPOSITION OF COURT COSTS IN OPEN COURT, AND THEN INCLUDED COURT COSTS IN CINDY MORGAN'S JUDGMENT ENTRY."

{¶ 6} Defendant argues that the trial court may not impose court costs upon her in its sentencing entry when it failed to impose those costs in open court at the sentencing hearing. On

the authority of the Ohio Supreme Court's recent decision in *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, we agree.

{¶ 7} We previously had held that there is no requirement that the imposition of court costs be articulated on the record at the sentencing hearing, although that practice is clearly preferable. See: *State v. Powell*, Montgomery App. No. 20857, 2006-Ohio-263; *State v. Martin*, Mont. App. No. 22744, 2009-Ohio-5303. Those decisions have been overruled by the Ohio Supreme Court's recent decision in *Joseph*, which was referred to by both parties but decided after the parties filed their briefs in this appeal.

{¶ 8} In *Joseph*, the trial court held a sentencing hearing at which it sentenced Joseph to life imprisonment with parole eligibility after twenty years. Subsequently, the court filed its judgment entry wherein it imposed court costs on Joseph. The trial court had not mentioned court costs during the sentencing hearing. The Ohio Supreme Court held that it was error not to impose those court costs at the sentencing hearing.

{¶ 9} The Supreme Court observed that, despite the fact that R.C. 2947.23(A) requires a judge to assess court costs against all convicted criminal defendants, waiver of payment of those costs is permitted, but not required, if the defendant is indigent. *Id.*, at ¶11; *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, at ¶14; *State v. Clevenger*, 114 Ohio St.3d 258, 2007-Ohio-4006,

at ¶4. A motion by an indigent criminal defendant to waive payment of court costs must be made at the time of sentencing. *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905. Otherwise, the issue is waived and a challenge to court costs are res judicata. *Id.*

{¶ 10} Although the Ohio Supreme Court in *Joseph* did not agree that the failure to orally inform a defendant at sentencing about court costs is akin to a court's failure to alert a defendant at sentencing about post release control requirements, or that it renders a defendant's entire sentence void, the Supreme Court nevertheless held that the trial court's failure to orally inform Joseph at the sentencing hearing that it was imposing court costs on him was error, because Joseph was not given an opportunity at the sentencing hearing to seek a waiver of the payment of court costs because the court did not mention costs at the sentencing hearing. *Id.*, at ¶13, 22. The Supreme Court stated:

{¶ 11} "{¶ 22} While the failure of the court to orally notify Joseph that it was imposing court costs on him does not void Joseph's sentence, it was error: Crim.R. 43(A) states that a criminal defendant must be present at every stage of his trial, including sentencing. The state urges that any error is harmless. However, Joseph was harmed here. He was denied the opportunity to claim indigency and to seek a waiver of the payment of court costs before the trial court. He should have had that chance.

{¶ 12} "{¶ 23} We therefore remand the cause to the trial court for the limited purpose of allowing Joseph to move the court for a waiver of the payment of court costs. Should Joseph file such a motion, the court should rule upon it within a reasonable time.

{¶ 13} "{¶ 24} Accordingly, we affirm the judgment of the court of appeals insofar as it held that Joseph is not entitled to a complete resentencing. We reverse the appellate court's holding that the trial court's failure to mention court costs during the sentencing hearing was not error. We remand the matter to the trial court for further proceedings consistent with this opinion."

{¶ 14} On the authority of the Ohio Supreme Court's recent decision in *State v. Joseph, supra*, Defendant Morgan's assignment of error is sustained. We reverse the sentence of the trial court. On remand, Defendant is not entitled to a de novo re-sentencing hearing. Rather, we remand the case to the trial court for the limited purpose of allowing Defendant Morgan to move the court for a waiver of the payment of court costs. If Defendant Morgan files such a motion, the trial court should rule on it within a reasonable time. Otherwise, the judgment of the trial court will be affirmed.

DONOVAN, P.J., And BROGAN, J., concur.

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