[Cite as *State v. Heddleson*, 2010-Ohio-1107.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 08 BE 41
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
DAVID J. HEDDLESON	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of Common Pleas of Belmont County, Ohio Case No. 08 CR 134

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Atty. Christopher Berhalter
Belmont County Prosecutor
Atty. Helen Yonak
Assistant Prosecuting Attorney
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For Defendant-Appellant:

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P.O. Box 217
Brilliant, Ohio 43913

JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Joseph J. Vukovich

Dated: March 15, 2010

WAITE, J.

{¶1} Appellant, David Joseph Heddleson, appeals the judgment of the Belmont County Court of Common Pleas imposing an $800.00 fine and assessing court costs in the amount of $377.00 as a result of his conviction on one count of operating a vehicle under the influence, with a specification of one prior felony OVI conviction, a violation of R.C. 4511.19(A)(1)(a)(G)(1)(e)(i), a felony of the third degree.

{¶2} In his first assignment of error, Appellant, who is indigent, contends that the trial court failed to determine his present and future ability to pay prior to assessing the fine and court costs. In his second assignment of error, he contends that this matter should be remanded for resentencing because the trial court did not inform him that he could be ordered to perform community service in the event that he does not pay his court costs.

{¶3} Because Appellant failed to object to the imposition of the fine before the trial court, and did not file any affidavit of indigency prior to the sentencing hearing, Appellant's first assignment of error as it applies to the fine is overruled. Because the trial court was not required to determine Appellant's ability to pay court costs prior to assessing them, Appellant's first assignment of error as it applies to the court costs is overruled. Finally, because Appellant has suffered no prejudice as a result of the trial court's failure to inform him that he may be ordered to perform community service in the event that he does not pay his court costs, his second assignment of error is overruled, and the judgment of the trial court is affirmed.

{¶4} Appellant was indicted on July 2, 2008, but failed to appear for his arraignment. Consequently, a warrant was issued for his arrest. Appellant was arraigned on July 18, 2008, and the trial court appointed an attorney from the public defender's office to represent him. The trial court ordered that a financial affidavit be completed and filed with the court within thirty days. On August 4, 2008, Appellant entered a guilty plea to the sole count in the indictment.

{¶5} On November 20, 2008, Appellant was sentenced to a prison term of four years, however, the trial court stated at the hearing and in its judgment entry that it would approve entry into an IPP program after Appellant served at least fourteen months of his stated prison term, so long as he was transferred to a half-way house for further treatment upon completion of his IPP sentence. (11/21/08 J.E., p. 1.) In addition to the sentence, the court imposed an $800.00 fine, and court costs were assessed.

{¶6} Appellant did not object to the imposition of the fine or court costs at the sentencing hearing. Although the trial court did not specifically address Appellant's ability to pay the fine and court costs, it did acknowledge during the sentencing hearing that Appellant had no work history. (11/20/08 Tr., p. 12.) Contrary to the trial court's order, Appellant did not file his affidavit of indigency until December 18, 2008 with his notice of appeal.

ASSIGNMENT OF ERROR I

{¶7} "The trial court violated R.C. 2929.19(B)(6) and R.C. 2929.18(B)(1) by ordering Mr. Heddleson to pay a mandatory $1,000.00 fine and court costs without

considering Mr. Heddleson's present and future ability to pay. Fourteenth Amendment to the United States Constitution; Section 16, Article I of the Ohio Constitution, November 21, 2008 Judgment Entry of Sentence: Sentencing Hearing Tr. 9 and 11."

{¶8} "A trial court has broad discretion when imposing a financial sanction upon an offender and a reviewing court should not interfere with its decision unless the trial court abused that discretion by failing to consider the statutory sentencing factors." *State v. Weyand*, 7th Dist. No. 07-CO-40, 2008-Ohio-6360, ¶7, citing *State v. Keylor*, 7th Dist. No. 02 MO 12, 2003-Ohio-3491, ¶9. An abuse of discretion connotes more than an error of law or judgment; it implies the trial court acted unreasonably, arbitrarily, or unconscionably. *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 16 O.O.3d 169, 404 N.E.2d 144.

{¶9} R.C. 2925.11 directs a trial court to impose all mandatory fines specified for a particular crime, unless the court determines that the defendant is indigent. R.C. 2929.18(B)(1) states, in pertinent part:

{¶10} "If an offender alleges in an affidavit filed with the court prior to sentencing that the offender is indigent and unable to pay the mandatory fine and if the court determines the offender is an indigent person and is unable to pay the mandatory fine described in this division, the court shall not impose the mandatory fine upon the offender."

{¶11} Before imposing a financial sanction under R.C. 2929.18, the court must consider the offender's present and future ability to pay the amount of the

sanction or fine. See R.C. 2929.19(B)(6). As to the trial court's duty, "there are no express factors that must be taken into consideration or findings regarding the offender's ability to pay that must be made on the record." *State v. Martin* (2000), 140 Ohio App.3d 326, 338, 747 N.E.2d 318.

{¶12} Ohio law does not prohibit a court from imposing a fine on an indigent defendant. *State v. Ramos*, 8th Dist. No. 92357, 2009-Ohio-3064. Nor does the filing of an affidavit of indigency by a defendant automatically entitle a defendant to a waiver of a mandatory fine. *State v. Gipson* (1998), 80 Ohio St.3d 626, 687 N.E.2d 750. Therefore, imposition of the mandatory fine is required unless (1) the offender's affidavit is filed prior to sentencing, and (2) the trial court finds that the offender is an indigent person and is unable to pay the mandatory fines. Id. at 634; R.C. 2929.18(B)(1).

{¶13} In the case sub judice, Appellant did not object to his fine, therefore, he has waived that issue on appeal. *Keylor* at ¶12. Assuming that Appellant had not waived the issue, it is apparent that he did not file his affidavit of indigency until well after the sentencing hearing. The Ohio Supreme Court has held that a fine is mandatory if the defendant does not file such an affidavit prior to sentencing. *Gipson*, supra. Further, a determination that a criminal defendant is indigent for the purposes of receiving counsel does not prohibit the trial court from imposing a fine. *Weyand* at ¶16 ("the ability to pay a fine over a period of time is not equivalent to the ability to pay legal counsel a retainer at the onset of criminal proceedings.")

{¶14} Turning to the issue of court costs, pursuant to R.C. 2947.23, a trial court must assess court costs in every case, even those in which the defendant has been deemed indigent for purposes of appointment of counsel. *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, at ¶8. A trial court is not required to determine an offender's ability to pay before ordering him to pay court costs. *State v. Brunson*, 7th Dist. No. 03-BE-26, 2004-Ohio-6211, ¶16, citing *State v. Roux*, 154 Ohio App.3d 296, 2003-Ohio-4876, 797 N.E.2d 112, ¶16; affirmed, 105 Ohio St.3d 126, 2005-Ohio-783, 823 N.E.2d 443.

{¶15} We have repeatedly held that R.C. 2947.23 makes no distinction between indigent defendants and defendants who have the ability to pay court costs, *Weyand* at ¶17, *Brunson* at ¶16, *Roux* at ¶8, and that the issue of ability to pay court costs only arises when the clerk acts to collect the costs. *Weyand* at ¶17, *Brunson* at ¶16, *Roux* at ¶16.

{¶16} For the foregoing reasons, Appellant's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

{¶17} "The trial court erred by imposing court costs without notifying Mr. Heddleson that failure to pay court costs may result in the court's ordering him to perform community service. (Sent. Tr. 8-12; November 20, 2008 Judgment Entry of Sentence)."

{¶18} R.C. 2947.23(A)(1)(a) requires that the trial court inform a defendant that he could be ordered to perform community service in the event he does not pay

court costs. If Appellant fails to pay the requisite court costs, R.C. 2947.23(B) requires the trial court to hold a hearing on the matter, and provides that the court may, in its discretion, order community service.

{¶19} We addressed an argument identical to the one now raised by Appellant last year in *State v. Walters*, 7th Dist. No. 08-CO-34, 2009-Ohio-6762. In that case, we held that Walters, who asserted on direct appeal that his case should be remanded for resentencing, had not suffered any prejudice as a result of the trial court's error. Therefore, the issue was not ripe for adjudication. Id., ¶13. We further observed that, "should Walters, at some point in the future, fail to pay costs as ordered, the trial court should not have the option of imposing community service because it did not inform the appellant of this possibility at his sentencing hearing." Id., citing *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, 814 N.E.2d 837 (sentence for community control violation vacated where trial court did not inform defendant of potential prison sentence).

{¶20} We note that the rule announced in *Walters* represents the majority view in our sister districts. *State v. Kearse*, 3d Dist. No. 17-08-29, 2009-Ohio-4111; *State v. Nutter*, 12th Dist. No. CA2008-10-009, 2009-Ohio-2964; *State v. Hurt*, 4th Dist. No. 07CA3176, 2009-Ohio-5811; *State v. Slonaker*, 4th Dist. No. 08 CA 21, 2008-Ohio-7009; *State v. Welch*, 4th Dist. No. 08CA29, 2009-Ohio-2655; *State v. Barkley*, 10th Dist. No. 09AP-223, 2009-Ohio-5549; but see *State v. Burns*, 4th Dist. Nos. 08CA1, 08CA2, 08CA3, 2009-Ohio-878 (remanding case for resentencing).

{¶21} Hence, Appellant has raised an issue here that is not ripe for adjudication. However, in the future should Appellant fail to pay his costs because of his continued indigency, it would appear that the trial court may be foreclosed from ordering community service based on this failure.

{¶22} Accordingly, Appellant's second assignment of error is also overruled and the judgment of the trial court is affirmed in its entirety.

Donofrio, J., concurs.

Vukovich, P.J., concurs in part and dissents in part; see concurring in part and dissenting in part opinion.

VUKOVICH, P.J., concurring in part; dissenting in part:

{¶23} While I agree with my colleagues' disposition of the first assignment of error, I do not agree that the second assignment of error is not ripe for review. Admittedly, the majority's holding in this case and this court's recent decision in *State v. Walters*, 7th Dist. No. 08CO34, 2009-Ohio-6762 (Judges Donofrio, Waite and DeGenaro), follow the majority view from our sister districts that the issue is not ripe for review. However, as Judge Harsha explained in his dissents to the Fourth Appellate District's holdings that the issue is not ripe for review, judicial economy is not served by failing to address the issue. *State v. Moore*, 4th Dist. No. 09CA2, 2009-Ohio-5732, ¶8 (Harsha, J., dissenting); *State v. Welch*, 4th Dist. No. 08CA29, 2009-Ohio-2655, ¶16 (Harsha, J., dissenting); *State v. Boice*, 4th Dist. No. 08CA24, 2009-Ohio-1755 (Harsha, J., dissenting); *State v. Slonaker*, 4th Dist. No. 08CA21, 2008-Ohio-7009, ¶9 (Harsha, J., dissenting). I agree with Judge Harsha's logic. Accordingly, as to the second assignment of error, the merits should be addressed and I would hold that since the trial court did not inform appellant at sentencing that he could be sentenced to perform community service if he fails to pay the court costs, he cannot later be ordered to perform community service if he in fact subsequently fails to pay court costs. *Slonaker*, 4th Dist. No. 08CA21, 2008-ohio-7009, ¶9 (Harsha, J., dissenting stating that "rather than stating in dicta that Slonaker cannot be ordered to perform community service if he fails to pay the court costs, I would issue a holding to that effect").

{¶24} I note that my colleagues in the majority similarly stated in dicta that "it would appear the trial court may be foreclosed from ordering community service based on this failure." (Majority Opin. ¶21). I see no logical or valid purpose to hint that a trial court cannot do something in the future instead of telling them now that they cannot do so. At the very least, this latter approach would spare taxpayers unnecessary expense and trial courts would avoid unnecessary use of the court's valuable time. Moreover, trial courts in this district would be advised in a timely

manner what language is necessary if they wish to impose community service in lieu of an indigent's nonpayment of court costs.

{¶25} Thus, for those reasons, I concur in the first assignment of error and dissent to the second assignment of error.