

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Court of Appeals No. WD-09-069

Appellee

Trial Court No. 2007CR0243

v.

Bryan King

DECISION AND JUDGMENT

Appellant

Decided: June 30, 2010

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
David E. Romaker, Jr., Assistant Prosecuting Attorney, for appellee.

Lawrence A. Gold, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This accelerated case is before the court on appeal from a judgment of the Wood County Common Pleas Court.

{¶ 2} On April 23, 2008, appellant, Bryan King, pled guilty to one count of obstructing justice, in violation of R.C. 2921.32(A)(2), a felony of the fifth degree. His sentencing hearing was held on May 29, 2009. It is undisputed that at this hearing the

trial court failed to inform appellant that he may be subject to postrelease control for a period of three years. The court then sentenced appellant to serve 11 months in the Ohio Department of Rehabilitation and Correction. The court further ordered appellant to pay the costs of prosecution. The trial judge, however, did not inform King of the fact that a failure to pay court costs may result in an order requiring appellant to perform community service "until the judgment is paid or until the court is satisfied that the defendant is in compliance with the approved schedule." See R.C. 2947.23(A)(1)(a).

{¶ 3} Appellant appeals his sentence and sets forth the following assignments of error:

{¶ 4} "Appellant's sentence is void due to the trial court's failure to inform appellant of post release control requirements at sentencing hearing.

{¶ 5} "Appellant received ineffective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10, of the constitution of Ohio.

{¶ 6} "The trial court erred in failing to inform appellant that failure to pay court costs could result in imposition of community service."

{¶ 7} As to appellant's first assignment of error, R.C. 2929.19(B)(3)(d) requires a trial judge who sentences an offender to a prison term to, at the sentencing hearing, "notify the offender that the offender may be supervised under section 2957.28 of the Revised Code after the offender leaves prison if the offender is being sentenced to a felony of the third, fourth or fifth degree * * *." A review of the transcript of the

sentencing hearing in this cause reveals that the trial court did fail to comply with R.C. 2929.19(B)(3)(d). The remedy for such a failure is to vacate the sentence and remand the matter for resentencing¹. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, ¶ 27. Accordingly, appellant's first assignment of error is found well-taken.

{¶ 8} In his second assignment of error, appellant contends that he was deprived of effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and Section 10, Article I, Ohio Constitution. In Ohio, a properly licensed attorney is presumed competent. *State v. Lott* (1990), 51 Ohio St.3d 160, 174. The United States Supreme Court devised a two prong test to determine ineffective assistance of counsel. Therefore, in order to demonstrate ineffective assistance of counsel, an accused must satisfy both prongs of the standard set by the United States Supreme Court. See *Strickland v. Washington* (1984), 466 U.S. 668, 687. First, the defendant must show that his trial counsel's performance was so deficient that the attorney was not functioning as the counsel guaranteed by the Sixth Amendment of the United States Constitution. *Id.* Second, he must establish that counsel's "deficient performance prejudiced the defense." *Id.* In other words, King "must show counsel's performance fell below an objective standard of reasonable representation and but for counsel's error, the result of the proceedings would have been different." *State v.*

¹If appellant has already served his prison term, he cannot be subject to resentencing; therefore, "in order that its record may be complete" the trial court should note on the record of appellant's sentence "that because he has completed his sentence, [King] will not be subject to resentencing pursuant to our decision." *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, ¶ 18.

Edwards, 6th Dist. No. L-08-1408, 2010-Ohio-2582, ¶ 22, citing *Strickland*, 466 U.S. at 686.

{¶ 9} In support of this assignment appellant contends that, pursuant to *State v. Threatt*, 108 Ohio St.3d, 2006-Ohio-905, paragraph two of the syllabus, his trial counsel was required to file a motion to waive court costs at the time of sentencing. Because he did not file said motion, King concludes that counsel was ineffective.

{¶ 10} In the present case, appellant was found indigent and was appointed counsel. R.C. 2947.23(A)(1) states: "In all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution and render a judgment against the defendant for such costs." Nevertheless, in its discretion a trial court may waive court costs if it first determines that the defendant is indigent. See R.C. 2949.092; *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, fn. 1. The court may, however, only grant a waiver of court costs if the defendant makes a motion at the time of sentencing. *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, paragraph two of the syllabus. If the defendant fails to make a motion to waive court costs at the time of sentencing, the issue is waived and the matter of costs are res judicata. Id.

{¶ 11} In *State v. Blade*, 8th Dist. Nos. 88703, 88704 and 88705, 2007-Ohio-5323, ¶ 13, the Eighth Appellate District determined that trial counsel was ineffective in failing to file the motion to waive court costs at the time of sentencing if "[t]he court's prior waiver of court costs showed a reasonable probability that it would have again waived

costs had counsel made a timely motion." See, also, *State v. Masterson*, 8th Dist. No. 90505, 2008-Ohio-4704, ¶ 19. We find this cause to be distinguishable from *Blade* in that there was never a showing of a "reasonable probability" that the lower court would have waived court costs. Based upon the foregoing, we can only conclude that trial counsel's failure to object to the imposition of court costs did not prejudice his client's defense and, therefore, did not constitute ineffective assistance of counsel. *Id.* Appellant's second assignment of error is found not well-taken.

{¶ 12} In his third assignment of error, appellant complains that the trial court erred by not informing him, either at his plea hearing or sentencing hearing, of the fact that his failure to pay court costs would result in the imposition of community service in lieu of payment of said costs. See R.C. 2947.23(A)(1)(a). Appellee concedes error and requests that this cause be remanded to the trial court for resentencing. We agree. Appellant's third assignment of error is found well-taken.²

{¶ 13} The judgment of the Wood County Court of Common Pleas as to sentencing only is reversed and this cause is remanded to the trial court for further proceedings consistent with this judgment. Appellee, the state of Ohio, is ordered to pay the costs of this appeal pursuant to App.R. 24(A).

JUDGMENT REVERSED IN PART.

²Nonetheless, if appellant has served his sentence, he is not subject to resentencing. See n. 1. Therefore, the trial court cannot impose community service in lieu of payment of court costs if King has completed his sentence.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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