

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

State of Ohio

Court of Appeals No. L-09-1016

Appellee

Trial Court No. CR0200803208

v.

Joseph R. Dorsey, Jr.

DECISION AND JUDGMENT

Appellant

Decided: March 12, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Lindsay D. Navarre, Assistant Prosecuting Attorney, for appellee.

Spiros P. Cocoves, for appellant.

* * * * *

HANDWORK, J.

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

{¶ 2} In September 2008, the Lucas County Grand Jury indicted appellant, Joseph Dorsey, on: (1) six counts of receiving stolen property in violation of R.C.

2913.51, all are denoted as felonies of the fourth degree; and (2) one count of knowingly receiving, retaining, or disposing of a motor vehicle identification plate, placard or sticker while knowing or having reasonable cause to believe that the property was obtained through the commission of a theft offense in violation of R.C. 2913.51 and 2913.71(C), a felony of the fifth degree. Appellant initially entered not guilty pleas to all counts in the indictment.

{¶ 3} On November 5, 2008, the trial court held a hearing at which appellant withdrew his former pleas of not guilty and entered no contest pleas to: (1) two counts of receiving stolen property, both being offenses of the fourth degree; and (2) two counts of receiving stolen property, both being offenses of the fifth degree. In exchange, appellee, the state of Ohio, agreed to dismiss all of the remaining counts in the indictment. The trial court found appellant guilty, then scheduled a sentencing hearing for November 24, 2008. Prior to that date, however, appellant filed pro se motions for arrest of judgment and to withdraw his guilty plea.

{¶ 4} On December 18, 2008, the court below held a hearing on both motions. Appellant was represented by counsel at this hearing, but also chose to speak on his own behalf. He claimed that after performing his own research, he learned that by pleading no contest, he "depart[ed] from a lot of" his rights. He further asserted that there was a "lot of stuff" missing in his case. Appellant also insinuated that the detective who arrested him was biased toward appellant and, therefore, "had a lot to do with the filing of these

charges." Finally, he maintained that the current charges against him were filed due to his "priors," presumably his prior criminal record.

{¶ 5} At a hearing held on December 29, 2008, the trial judge denied appellant's motion to withdraw his pleas of no contest. He then held a sentencing hearing. On January 7, 2009, the common pleas court sentenced appellant to 17 months on each conviction for receiving stolen property and 11 months on each conviction for receiving stolen property. The court ordered that these sentences were to be served consecutively. In addition, the judge held:

{¶ 6} "Defendant found to have, or reasonably may be expected to have, the means to pay all or part of the applicable costs of supervision, confinement, assigned counsel, and prosecution as authorized by law. Defendant ordered to reimburse the State of Ohio and Lucas County for such costs. This order of reimbursement is a judgment enforceable pursuant to law by the parties in whose favor it is entered. Defendant further ordered to pay the costs assessed pursuant to R.C. 9.92(C), 2929.18, and 2951.021."

{¶ 7} Appellant appeals his conviction and sets forth the following assignments of error:

{¶ 8} "The trial court erred to the prejudice of Mr. Dorsey by denying his motion to withdraw his no contest pleas in violation of Crim.R. 32.1 and in violation of his due process rights under the Fifth, Sixth, and Fourteenth Amendments to the United State Constitution and the applicable portions of the Ohio Constitution.

{¶ 9} "The trial court erred to the prejudice of Mr. Dorsey when it ordered him to pay unspecified costs, including court appointed [attorney] fees, without first determining the ability to pay those costs."

{¶ 10} In his first assignment of error, appellant contends that the trial court erred in denying his motion to withdraw his no contest plea.

{¶ 11} Crim.R. 32.1 allows an offender to file a motion to withdraw a guilty prior to sentencing. The general rule is that a presentence motion to withdraw a guilty plea is treated with liberality. *State v. Xie* (1992), 62 Ohio St.3d 521, 526, quoting *Barker v. United States* (C.A.10, 1978), 579 F.2d 1219, 1223. Nevertheless, because an offender has no right to withdraw his or her guilty plea, the final decision is "'still within the sound discretion of the trial court.'" *Id.* As a result, a trial court must conduct a hearing to determine whether there is a "reasonable and legitimate basis for the withdrawal of the plea." *Id.* at 527. In order for this court to find that the trial court abused its discretion, we must conclude that the court's ruling was unreasonable, arbitrary, or unconscionable. *Id.*

{¶ 12} It is well-established that in reviewing a trial court's decision regarding a motion to withdraw a plea, we are required to weigh a number of nonexhaustive factors. *State v. Eversole*, 6th Dist. Nos. E-05-073, E-05-076, E-05-074, E-05-075, 2006-Ohio-3988, ¶ 13. These factors include: (1) whether the prosecution would be prejudiced if the plea was vacated; (2) whether the offender was represented by highly competent counsel; (3) the extent of the Crim.R. 11 hearing; (4) whether there was a full hearing on

the motion to withdraw the offender's guilty plea; (5) "whether the trial court gave full and fair consideration to the motion; (6) whether the motion was made within a reasonable time; (7) whether the motion set forth specific reasons for the withdrawal"; (8) "whether the accused understood the nature of the charges and possible penalties"; and (9) "whether the accused was perhaps not guilty or had a complete defense to the crime." *State v. Fish* (1995), 104 Ohio App.3d 236, 240.

{¶ 13} In the instant cause, appellant timely filed his motion to withdraw his no contest pleas eight days after the trial court accepted the same. Dorsey was represented by the same counsel who represented him at the Crim.R. 11 hearing in which he entered his no contest pleas. A review of the transcript of that hearing reveals that it was a full plea hearing. Moreover, it appears from a colloquy between the judge and appellant during the Crim.R. 11 hearing, that Dorsey fully understood the nature of the charges against him and the possible sentences that would be imposed if he was found guilty.

{¶ 14} Appellant's counsel was a highly capable attorney who had conferred with his client on the issues that Dorsey wanted to raise and discussed the viability of those arguments during the hearing on appellant's motion to withdraw his no contest plea. These included "suppression issues," appellant's right to a preliminary hearing, and the indictments. Counsel then indicated that appellant wished to speak on his own behalf, and the trial judge granted that wish.

{¶ 15} Appellant claimed that the charges filed against him in this case were not premised solely on the elements of the alleged offenses, but were filed because he had

"priors." Appellant stated that he gained this information from docket sheets, which were apparently obtained from the Toledo Municipal Court. He also claimed that the docket sheets showed "a lot of faulty mistakes made in the criminal procedure." Appellant further argued that the offenses named in the indictments in this case did not match the offenses charged against him in the Toledo Municipal Court. Appellant never explained how these alleged mistakes impacted on a voluntary, intelligent, and knowing no contest plea.

{¶ 16} Because the trial judge had not seen an affidavit and a motion recently filed by appellant, he took the case under advisement until such time that he could review these documents. Thus, appellant's motion to withdraw received full and fair consideration by the lower court. Finally, there is nothing in the record of this cause demonstrating that the state would be prejudiced if appellant was permitted to withdraw his guilty plea. Based upon a complete review of all of the factors set forth in Crim.R. 32.1, we cannot say that the trial court's attitude in denying appellant's motion to withdraw his no contest plea was arbitrary, unreasonable, or unconscionable. Therefore, appellant's first assignment of error is found not well-taken.

{¶ 17} In his second assignment of error, appellant contends that the trial court erred in ordering him to pay "costs of supervision, confinement, assigned counsel, and prosecution" without determining appellant's present and future ability to pay these costs and fees. An order imposing payment of these costs by a criminal defendant are governed by different statutes.

{¶ 18} R.C. 2947.23(A)(1) provides that costs of prosecution, i.e., court costs, must be assessed against all criminal defendants at the time that a court imposes sentence. See *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, ¶ 23. Unless the defendant moves a trial court to waive the payment of costs at that particular point in time, "the issue is waived and the costs are res judicata." *State v. Phillips*, 6th Dist. No. F-05-032, 2006-Ohio-4135, ¶ 14, citing *State v. Threatt*, supra, ¶ 23. Appellant never moved the trial court for waiver of payment of his court costs and that issue is, therefore, barred by the doctrine of res judicata.

{¶ 19} We turn now to the trial court's order requiring appellant to pay appointed counsel fees. R.C. 2941.51(D) authorizes a court to assess appointed counsel fees against an offender if that "person has, or reasonably can be expected to have, the means to meet some part of the cost of the services tendered to the person." Nevertheless, there must be clear and convincing evidence in the record demonstrating that the offender has the future ability to pay those fees. *State v. Mason*, 6th Dist. No. L-06-1404, 2008-Ohio-5034, ¶ 90. In addition, this court requires that in ordering the payment of these fees by the offender, a trial court must make a finding upon that record that the defendant has the ability to pay. *State v. John*, 6th Dist. No. L-03-1261, 2005-Ohio-1218, ¶ 38.

{¶ 20} In the case before us, the trial court explicitly found that appellant had or could reasonably have the means to pay all or part of the applicable costs ordered by that court. We conclude that this satisfies the requirement that an "ability to pay" finding must be entered on the record. Nonetheless, there must still be some evidence in the

record of this cause that demonstrates that appellant had the ability to pay. *Id.* at ¶ 21. Here, in our review of the entire record, including the Presentence Investigation Report, we failed to find any evidence that appellant has the ability to pay court appointed attorney fees. Therefore, that portion of appellant's second assignment of error addressing the trial court's judgment ordering Dorsey to pay court appointed counsel's fees is found well-taken.

{¶ 21} R.C. 2929.18(A)(5)(a)(ii) authorizes a court to order a criminal defendant to pay all or part of the costs of his confinement. Again, however, "the record must contain some evidence that the court considered the offender's ability to pay such a sanction." *State v. White*, 6th Dist. No. L-07-1196, 2009-Ohio-4587, ¶ 23. Again, there is no evidence in the record demonstrating appellant's ability to pay. Consequently, that part of appellant's second assignment of error addressing the validity of the imposition of costs of confinement is also found well-taken.

{¶ 22} Finally, appellant was not placed on community control or probation. Therefore, R.C. 2951.021, which governs "the cost of supervision," is inapplicable to appellant's costs. *State v. Mason*, *supra*, ¶ 84, fn. 1. Thus, that part of appellant's second assignment of error that claims that he could not be assessed the costs of supervision is found well-taken.

{¶ 23} The judgment of the Lucas County Court of Common Pleas is affirmed, in part, and reversed, in part. Specifically, the trial court's judgment denying appellant's motion to withdraw his guilty plea is affirmed. Those sections of the court's judgment

imposing the costs of supervision and the costs of confinement on appellant and ordering appellant to pay court appointed attorney fees are hereby vacated. The imposition of all other costs is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24(A).

JUDGMENT AFFIRMED, IN PART,
AND REVERSED, IN PART.

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

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.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:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.