

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

State of Ohio

Court of Appeals No. L-10-1147

Appellee

Trial Court No. CR2010-1371

v.

Joshua David Faulkner

DECISION AND JUDGMENT

Appellant

Decided: June 3, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
J. Christopher Anderson, Assistant Prosecuting Attorney,
for appellee.

Patricia Horner, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This appeal is taken from a judgment issued by the Lucas County Court of Common Pleas, following appellant's no contest plea to burglary with a firearm specification. Because we conclude that the trial court substantially complied with

Crim.R. 11 and appellant's no contest plea was knowingly, intelligently, and voluntarily made, we affirm.

{¶ 2} Appellant, Joshua Faulkner, was indicted on and initially pled not guilty to one count of aggravated burglary, a violation of R.C. 2911.11(A)(2), with a firearm specification, in violation of R.C. 2941.145, and one count of having a weapon under disability, a violation of R.C. 2923.13(A)(1). A motion to suppress was filed, but later withdrawn. Pursuant to a plea agreement, appellant entered a no contest plea and was found guilty of the lesser included offense of burglary, R.C. 2911.12(A)(2), and the attached firearm specification. The second count, having a weapon under disability, was dismissed.

{¶ 3} After reviewing a presentence investigation report, the court sentenced appellant to four years incarceration as to the burglary conviction, and an additional mandatory one year as to the firearm specification, to be served consecutively and prior to the burglary sentence. Appellant was also given notice of three to five years postrelease control that could be imposed upon his release from prison. Appellant was also found to be "ineligible for shock incarceration under R.C. 5120.031 or intensive program prison under R.C. 5120.032." The court credited appellant with 62 days of jail time, plus any days spent while he awaited transportation to the Ohio Department of Rehabilitation and Corrections.

{¶ 4} Appellant now appeals from that judgment, arguing the following three assignments of error:

{¶ 5} "I. Defendant's plea was not made voluntarily, knowingly, or intelligently.

{¶ 6} "II. The trial court committed reversible error in ordering defendant to pay his court appointed attorney fees.

{¶ 7} "III. Vagueness of the phrase 'costs of case' requires strict construction against the state."

I.

{¶ 8} We will address appellant's assignments of error out of order. In his second assignment of error, appellant claims that the court erred in ordering him to pay court-appointed attorney fees. We disagree.

{¶ 9} R.C. 2947.23 provides that in "all criminal cases * * * the judge or magistrate shall" impose the costs of prosecution as part of a defendant's sentence. Court-appointed counsel fees, however, are not included in the costs of prosecution. *State v. Holmes*, 6th Dist. No. L-01-1459, 2002-Ohio-6185, ¶ 20. In addition, R.C. 2929.18 includes the financial sanctions a court may impose on a defendant after a felony conviction. The costs of or fees paid to court-appointed counsel are not among them. In criminal cases, costs "are assessed at sentencing and are included in the sentencing entry; costs are not punishment, but are more akin to a civil judgment for money." *State v. McDaniel*, 4th Dist. No. 09CA677, 2010-Ohio-5215, ¶ 21, quoting *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, ¶ 20, and *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, ¶ 15.

{¶ 10} Nevertheless, reimbursement for appointed counsel fees may be imposed only pursuant to R.C. 2941.51(D), which provides, in pertinent part, that such fees "approved by the court under this section shall not be taxed as part of the costs and shall be paid by the county. However, if the person represented has, or reasonably may be expected to have, the means to meet some part of the cost of the services rendered to the person, the person shall pay the county an amount that the person reasonably can be expected to pay." Thus, before an indigent defendant may be required to pay his attorney fees pursuant to R.C. 2941.51(D), the court must make an affirmative determination on the record that the defendant has the ability to pay. See *State v. Knight*, 6th Dist. No. S-05-007, 2006-Ohio-4807; *State v. Phillips*, 6th Dist. No. F-05-032, 2006-Ohio-4135, ¶ 20; *State v. Fisher*, 12th Dist. No. CA98-09-190, 2002-Ohio-2069. Additionally, the finding that a criminal defendant has the ability to pay court-appointed counsel's costs must be supported by clear and convincing evidence. R.C. 2953.08(G)(2)(b).

{¶ 11} In this case, the court found, on the record, appellant is "to have or reasonably be expected to have the means to pay all applicable costs of supervision, confinement, *assigned counsel*, and prosecution as authorized by law and * * * [is] ordered to reimburse the State of Ohio and Lucas County for such costs." (Emphasis added.) During the plea hearing, at the court's inquiry, appellant responded that he was 26 years old and had a GED with a vocational degree in small engine repair. Consequently, from this information, the court could infer that appellant would have the ability to find gainful employment to pay costs and attorney fees, after his release.

Moreover, appellant entered no objection to the finding that he was ordered to pay the cost of his appointed attorney or any other costs. Therefore, since the trial court made the required finding pursuant to R.C. 2941.51(D), and that finding is supported by evidence in the record, we conclude that the order to pay the cost of his appointed attorney fees was proper.

{¶ 12} Accordingly, appellant's second assignment of error is not well-taken.

II.

{¶ 13} We will now address appellant's first and third assignments of error together. In his first assignment of error, appellant contends that his no contest plea was not voluntarily, knowingly, or intelligently made because the written plea agreement did not specify that the trial court could order him to pay his court-appointed counsel's fees. In his third assignment of error, appellant argues that the phrase "costs of case"¹ in the plea agreement is vague, must be construed against the state, and should not include court-appointed attorney fees.

{¶ 14} Crim.R. 11(C)(2) requires, prior to accepting a plea of guilty or no contest, the court to personally address the defendant, determine that the plea is voluntary and that the defendant understands the charges and potential penalties. The court must also advise the defendant of the rights he is waiving by entering such a plea. Crim.R. 11(C)(2)(a)

¹In his assignment of error, appellant refers to the phrase "costs of case," which is not the language used in the plea agreement. In his argument, however, appellant includes the correct language which is "other financial costs."

and (c). Additionally, the court must inform the defendant of and determine that the defendant understands the effect of the guilty or no contest plea. Crim.R. 11(C)(2)(b).

{¶ 15} When considering if a plea was entered knowingly, intelligently and voluntarily, an appellate court's examination of the totality of the circumstances requires a "de novo review of the record to ensure that the trial court complied with constitutional and procedural safeguards." *State v. Kelly* (1991), 57 Ohio St.3d 127, 129. Strict compliance with Crim.R. 11 is required with respect to a defendant's waiver of constitutional rights. *State v. Gibson*, 8th Dist. No. 93878, 2010-Ohio-3509, ¶ 13, citing *Boykin v. Alabama* (1969), 395 U.S. 238, 243.

{¶ 16} When the rights involved are not constitutional, however, substantial compliance with the rule is sufficient. *State v. Nero* (1990), 56 Ohio St.3d 106, 108. "Substantial compliance means that, under the totality of the circumstances, appellant subjectively understood the implications of his plea and the rights he waived." *State v. Vinson*, 10th Dist. No. 08AP-903, 2009-Ohio-3240, ¶ 6.

{¶ 17} The rights to be informed of the maximum possible penalty and the effect of the plea are nonconstitutional rights that are reviewed for substantial compliance. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, ¶ 31. As we noted previously, however, costs of prosecution and payment of court-appointed attorney fees are not considered penalties or sanctions. *Joseph*, supra, at ¶ 20, and *Threatt*, supra, at ¶ 15. "Consequently, since court costs are not punishment, they are not part of the 'penalty' that the trial court needs to describe under Crim.R. 11(C)(2)(a)." *McDaniel*, supra, at ¶ 21.

See, also, *State v. Smith*, 12th Dist. No. CA2010-06-057, 2011-Ohio-1188. Therefore, like court costs, the order to pay court-appointed attorney fees is reviewed under the totality of the circumstances test to determine whether appellant was subjectively aware of the effect and implications of the plea, as prescribed by Crim.R.11(C)(2)(b).

{¶ 18} In this case, contrary to appellant's contention, the order to pay costs of his court-appointed counsel is not punishment or sanction, and the strict compliance requirement of Crim.R. 11(C)(2)(a) does not apply. Consequently, only substantial compliance by the trial court is required. The plea agreement signed by appellant refers to "other financial costs," which we do not find to be "vague." Rather, it is an all-inclusive, descriptive term, which, under its plain meaning, is meant to include any other fees that court might impose, including the cost of prosecution, court costs, and court-appointed attorney fees. During the plea hearing, the court asked appellant if he "had a chance to review this plea form?" Appellant responded that he had. The court then asked, "Do you have any questions about what's set forth in this document?" Appellant responded in the negative.

{¶ 19} Further, as noted previously, the court specifically found during sentencing that appellant would have the means to pay the costs of "assigned counsel." Since appellant indicated he understood the written plea agreement, and the court clearly included court-appointed attorney fees as "other financial costs" during the sentencing hearing, without objection, we conclude that, under the totality of the circumstances appellant was subjectively aware of the effect and implications of his plea. Therefore,

since the trial court substantially complied with Crim.R. 11, we conclude that appellant's plea was knowingly, intelligently, and voluntarily made.

{¶ 20} Accordingly, appellant's first and third assignments of error are not well-taken.

{¶ 21} The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

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.

Arlene Singer, J.

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

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