

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

State of Ohio

Court of Appeals No. L-13-1245

Appellee

Trial Court No. CR0201301970

v.

Dustin Lynch

DECISION AND JUDGMENT

Appellant

Decided: March 31, 2015

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Emil G. Gravelle, III, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Dustin Lynch, appeals the October 18, 2013 judgment of the Lucas County Court of Common Pleas which, following his no contest plea to aggravated murder, sentenced him to life imprisonment and imposed various monetary sanctions. For the reasons set forth herein, we affirm, in part, and reverse, in part.

{¶ 2} On June 19, 2013, appellant was indicted on two counts of aggravated murder in connection with the death of his cellmate at the Toledo Correctional Institution, and one count of felonious assault connected with an assault on a fellow inmate.

{¶ 3} On October 4, 2013, appellant entered a no contest plea to one count of aggravated murder. A nolle prosequi was entered as to the remaining two counts. Appellant's sentencing hearing was held on October 16, 2013. Relevant to this appeal, in sentencing appellant, the court stated:

Also, there will be the maximum fine of \$25,000. As I learned in the research and information given to me at some point in time you had indicated that you might be able to profit from some of your experiences in life by writing a book of some sort. The \$25,000 maximum fine will come out of any future profits or attempt to profit from any type of behavior of a criminal nature and/or any other appropriate way to attach the maximum fine to your sentence.

Appellant was also ordered to pay "any restitution," court appointed counsel fees, and any other fees permitted pursuant to R.C. 2929.18(A)(4).

{¶ 4} The court's October 18, 2013 judgment entry provides:

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 cost assessed pursuant to R.C. 9.92(C), 2929.18 and 2951.021. Notification pursuant to R.C. 2947.23 given.

{¶ 5} Appellant timely appealed and raises the following three assignments of error:

1. The trial court erred to the prejudice of Mr. Lynch when it ordered him to pay the maximum fine of \$25,000 by improperly determining Mr. Lynch's ability to pay such fine as required by R.C. 2929.02(C).

2. The trial court erred to the prejudice of Mr. Lynch when it ordered the elimination of some costs and imposition of new costs and fees in its sentencing judgment entry and improperly determined Mr. Lynch's present and future ability to pay such costs and fees as required by R.C. 2929.19(B)(5).

3. The trial court erred to the prejudice of Mr. Lynch when it ordered him to pay an unspecified amount of restitution where there is no evidence in the record to support restitution.

{¶ 6} At the outset we note that pursuant to R.C. 2953.08, an appellate court has the authority to review sentencing decisions of trial court. An appellate court may vacate

or modify a sentence only upon clear and convincing evidence that the record does not support the sentence or that the sentence is contrary to law. R.C. 2953.08(G)(2).

{¶ 7} In appellant's first assignment of error he contends that the trial court erred when it imposed a maximum \$25,000 fine by improperly finding that he had the ability to pay. Pursuant to R.C. 2929.02(C):

The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to the offender or to the dependents of the offender, or will prevent the offender from making reparation for the victim's wrongful death.

In the present case the court, based on the presentence investigation report which contained a copy of a Cleveland newspaper article where appellant mentioned that he might write a book, found that this showed a potential future ability to pay. However, also before the court were facts including that appellant has been incarcerated since the age of 16, he has never held a job, and may never be released from prison. He did receive his GED.

{¶ 8} We note that, by statute, a convicted felon may not profit from the publication of a book which related in any way to the commission of the offense. R.C. 2969.021. Accordingly, we find that the trial court erred when it imposed a \$25,000 fine

without properly determining his current or future ability to pay. Appellant's first assignment of error is well-taken.

{¶ 9} In appellant's second assignment of error, he contends that the trial court erroneously imposed various costs and fees outside of his presence, in contravention of Crim.R. 43(A), imposed costs and fees without first determining appellant's ability to pay, and imposed costs pursuant to R.C. 2951.021, which are not permitted in an aggravated murder conviction.

{¶ 10} Crim.R. 43(A) requires that the defendant be physically present during all stages of the proceedings, including sentencing. This court has held that any costs imposed in the sentencing judgment entry must have also been announced during the sentencing hearing. *State v. Williams*, 6th Dist. Lucas No. L-11-1084, 2013-Ohio-726, ¶ 49, quoting *State v. Robinson*, 6th Dist. Lucas No. L-10-1369, 2012-Ohio-6068, ¶ 79.

{¶ 11} The state concedes that the trial court did not advise appellant of his responsibility for the costs of prosecution, R.C. 2947.23, or the \$1.00 citizens' reward program fee (R.C. 9.92) as set forth in the judgment entry. The state also agrees that because appellant was not placed on community control the \$50.00 supervision fee, R.C. 2951.021, could not have been imposed. The state argues, however, that it was not imposed by the court. This assertion is reflected in the trial court's January 23, 2014 nunc pro tunc judgment entry where it specifically removed the post-release control language.

{¶ 12} Next, appellant argues that the trial court erroneously imposed the costs of confinement pursuant to R.C. 2929.18(A)(5)(a), which provides:

(A) Except as otherwise provided in this division and in addition to imposing court costs pursuant to section 2947.23 of the Revised Code, the court imposing a sentence upon an offender for a felony may sentence the offender to any financial sanction or combination of financial sanctions authorized under this section or, in the circumstances specified in section 2929.32 of the Revised Code, may impose upon the offender a fine in accordance with that section. Financial sanctions that may be imposed pursuant to this section include, but are not limited to, the following:

* * *

(5)(a) Reimbursement by the offender of any or all of the costs of sanctions incurred by the government, including the following:

* * *

(ii) All or part of the costs of confinement under a sanction imposed pursuant to section 2929.14, 2929.142, or 2929.16 of the Revised Code, provided that the amount of reimbursement ordered under this division shall not exceed the total amount of reimbursement the offender is able to pay as determined at a hearing and shall not exceed the actual cost of the confinement; * * *.

{¶ 13} The Ohio Supreme Court has held that R.C. 2947.23 requires a court to assess costs against all convicted defendants, including indigent defendants. *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, ¶ 8. Such costs include the costs of confinement and court-appointed counsel. The court also recognized that a court may waive payment of costs by indigent defendants. *Id.*; *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, ¶ 1.

{¶ 14} Under the Ohio Supreme Court’s decision in *Threatt* any request by an indigent defendant to waive payment of costs must be made by motion at sentencing. *Id.* at ¶ 23. In the absence of a motion for waiver at that time, the issue is waived and a subsequent challenge to the obligation to pay costs is barred by res judicata. *Id.*

{¶ 15} Under *Threatt*, appellant’s arguments as to the imposition of costs are clearly barred by res judicata as appellant made no motion to waive costs at sentencing. We further note that the “discrepancy” between the language used at sentencing appellant being ordered to pay “court appointed counsel fees” and in the sentencing judgment entry “assigned counsel” costs is merely semantical.

{¶ 16} Based on the foregoing, we find that the court erroneously failed to orally inform appellant of his responsibility to pay the costs of prosecution and the \$1.00 citizens’ reward program fee. Accordingly, we find that appellant’s second assignment of error is well-taken, in part.

{¶ 17} Appellant’s third assignment of error states that the court erred when it imposed restitution without determining the amount to be paid. At the sentencing

hearing, appellant was ordered to pay “any restitution;” however, the October 18, 2013 judgment entry is devoid of any reference to restitution. Accordingly, assuming the court intended to order restitution, because no monetary amount was established and it was not set forth in the judgment entry, we find that it was not properly ordered and may not be enforced. *See* R.C. 2929.18(A)(1). Appellant’s third assignment of error is well-taken.

{¶ 18} On consideration whereof, we find that appellant was prejudiced and prevented from having a fair proceeding and the judgment of the Lucas County Court of Common Pleas is reversed, in part. The portion of the court’s sentencing judgment entry requiring appellant to pay the costs of prosecution and the \$1.00 citizens’ reward program fee and the \$25,000 fine is vacated and the matter is remanded to the trial court for further proceedings. Pursuant to App.R. 24, appellee is ordered to pay the costs of this appeal.

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.

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

James D. Jensen, 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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