

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2010-06-057
 :
 - vs - : OPINION
 : 3/14/2011
 :
 TIMOTHY SMITH, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 09 CR 26229

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive,
Lebanon, Ohio 45036, for plaintiff-appellee

Keith L. O'Korn, 440 Polaris Parkway, Suite 150, Westerville, Ohio 43082, for defendant-
appellant

BRESSLER, P.J.

{¶1} Defendant-appellant, Timothy Smith, appeals his conviction and sentence in the Warren County Common Pleas Court for forgery, following his guilty plea to that charge. We affirm Smith's conviction for forgery but vacate the portion of his sentence requiring him to pay the cost bill sent to him by the clerk of the common pleas court and remand this cause for reconsideration and possible recalculation of the cost bill, as set forth in this opinion.

{¶2} In 2009, Smith was indicted by a Warren County Grand Jury for theft in violation

of R.C. 2913.02(A)(3) and forgery in violation of R.C. 2913.31(A)(3), with both charges being fifth-degree felonies. The charges stemmed from an allegation that Smith, among other things, uttered a forged check to Bush Trucking Leasing, Inc. Smith was arrested in Florida and returned to Warren County. He subsequently entered into a plea agreement with the state, in which he agreed to plead guilty to forgery in exchange for the state's agreement to dismiss the theft charge. The trial court accepted Smith's guilty plea to the forgery charge, found him guilty of that charge, and sentenced him to serve five years of community control, to pay \$4,857 in restitution to Bush Trucking, and to pay courts costs and the cost of his court-appointed counsel.

{¶13} Less than a month after his sentencing, Smith, acting pro se, moved to withdraw his guilty plea, alleging that had he been informed that as a result his plea, he would be required to pay \$4,857 in restitution, \$4,578.10 in court costs, and \$798 for his court-appointed counsel, he would not have agreed to plead guilty to the forgery charge, but would have instead insisted on a trial. The trial court denied Smith's motion to withdraw his guilty plea.

{¶14} Smith now appeals from his conviction and sentence for forgery, assigning the following as error:

{¶15} Assignment of Error No. 1:

{¶16} "THE TRIAL COURT FAILED TO COMPLY WITH CRIM.R. 11(C)(2), AND APPELLANT'S PLEA WAS NOT VOLUNTARY, KNOWING, OR INTELLIGENT UNDER THE 5TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE 1, SECTION [sic] 1, 10, AND 16 OF THE OHIO CONSTITUTION."

{¶17} Smith argues his guilty plea was invalid because he did not make the plea voluntarily, knowingly or intelligently since the trial court failed to advise him of the "maximum penalty involved" and "the effects of his plea" as required under Crim.R. 11(C)(2)(a)-(b). We

disagree.

{¶18} Crim.R. 11(C) states in pertinent part:

{¶19} "(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

{¶110} "(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

{¶111} "(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence."

{¶112} The trial court advised Smith at the plea acceptance hearing that the charge to which he was pleading guilty was punishable by a maximum prison term of 12 months and a maximum fine of \$2,500. However, Smith argues the trial court failed to advise him of "the maximum penalty involved" as required by Crim.R. 11(C)(2)(a), because the court neglected to inform him that he would be assessed the costs of prosecution or "court costs," including the \$4,218.90 in travel fees expended by the sheriff's office in returning him to Warren County from Florida. We find this argument unpersuasive.

{¶113} The Ohio Supreme Court has stated, "[A]lthough costs in criminal cases 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. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, at ¶ 20, quoting *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, at ¶15. In *State v. McDaniel*, Vinton App. No. 09CA677, 2010-Ohio-5215, ¶20-21, the Fourth District Court of Appeals, citing *Joseph* and *Threatt*, held that "[c]ourt costs are not punishment and

therefore are not part of the 'penalty' that the trial court needs to describe under Crim.R. 11(C)(2)(a)."

{¶14} We agree with the Fourth District that court costs are not punishment, and thus are not part of the "maximum penalty involved" for purposes of Crim.R. 11(C)(2)(a). Therefore, the trial court did not need to inform Smith that he would be required to pay court costs in order to inform him of the "maximum penalty involved," as required by Crim.R. 11(C)(2)(a).

{¶15} Smith also argues the trial court failed to advise him of the "effect" of his guilty plea, as required by Crim.R. 11(C)(2)(b), because the court failed to inform him that he would be assessed court costs and that the court would order execution of those costs at his sentencing. We find this argument unpersuasive.

{¶16} Crim.R. 11(B), captioned "Effect of guilty or no contest pleas," states in relevant part:

{¶17} "With reference to the offense or offenses to which the plea is entered:

{¶18} "(1) The plea of guilty is a complete admission of the defendant's guilt."

{¶19} Crim.R. 11(C)(2)(b) provides that a trial court shall not accept a defendant's guilty plea "without first addressing the defendant personally," and among other things, inform the defendant of and determine that he or she understands the "effect" of the guilty plea. It follows that in order to inform the defendant of and determine that the defendant understands the effect of his guilty plea, the trial court must advise the defendant that "[t]he plea of guilty is a complete admission of the defendant's guilt." Crim.R. 11(B)(1).

{¶20} In this case, the trial court did not specifically inform Smith that his guilty plea was a complete admission of his guilt. However, Smith has not assigned this issue as error, nor would he have been entitled to a reversal of his conviction if he had. In *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, syllabus, the court held:

{¶21} "A defendant who has entered a guilty plea without asserting actual innocence is presumed to understand that he has completely admitted his guilt. In such circumstances, a court's failure to inform the defendant of the effect of his guilty plea as required by Crim.R. 11 is presumed not to be prejudicial."

{¶22} Here, Smith never asserted his actual innocence at the plea acceptance hearing, nor, for that matter, in his post-sentence motion to withdraw his guilty plea. Therefore, the trial court's failure to inform Smith that his guilty plea is a complete admission of his guilt is presumed not to be prejudicial. *Griggs* at syllabus. Furthermore, Smith has not cited, and we have not found, any specific authority in support of his contention that in order to comply with the requirements of Crim.R. 11(C)(2)(b), a trial court must inform a defendant that he will have to pay court costs as a result of his guilty plea and that the court could order execution of those costs at his sentencing.

{¶23} Therefore, Smith's first assignment of error is overruled.

{¶24} Assignment of Error No. 2:

{¶25} "APPELLANT'S SENTENCE WAS CLEARLY AND CONVINCINGLY CONTRARY TO LAW AND CONSTITUTED AN ABUSE OF DISCRETION."

{¶26} Smith argues the trial court erred when it failed to inform him at sentencing that community service could be imposed on him if he fails to pay the court costs he has been ordered to pay. In response, the state acknowledges that the trial court failed to inform Smith that community service could be imposed on him if he fails to pay the court costs he has been ordered to pay. However, the state argues this issue is not ripe for review under this court's decisions in *State v. Nutter*, Brown App. No. CA2008-10-009, 2009-Ohio-2964, ¶9-12; and *State v. Christman*, Preble App. Nos. CA2009-03-007 and CA2009-03-008, 2009-Ohio-6555, ¶35-36. We agree with the state.

{¶27} "For a cause to be justiciable, there must exist a real controversy presenting

issues which are ripe for judicial resolution and which will have a direct and immediate impact on the parties.' *State v. Stambaugh* (1987), 34 Ohio St.3d 34, 38 (Douglas, J., concurring in part and dissenting in part), citing *Burger Brewing Co. v. Liquor Control Comm.* (1973), 34 Ohio St.2d 93, 97-98. A claim is not ripe if the claim rests upon 'future events that may not occur as anticipated, or may not occur at all.' *Texas v. United States* (1998), 532 U.S. 296, 300, 118 S.Ct. 1257." *State v. McCarty*, Butler App. No. CA2006-04-093, 2007-Ohio-2290, ¶15.

{¶28} In *State v. Nutter*, 2009-Ohio-2964 at ¶9-12, this court stated:

{¶29} "[A]ppellant's assignments of error [concern the trial court's alleged failure to notify him that he may be ordered to perform community service if he fails to pay the court costs that were imposed as part of his sentence. R.C. 2947.23(A)(1) provides that '[i]n all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution, including any costs under section 2947.231 of the Revised Code, and render a judgment against the defendant for such costs. At the time the judge or magistrate imposes sentence, the judge or magistrate shall notify the defendant of both of the following:

{¶30} "'(a) If the defendant fails to pay that judgment or fails to timely make payments towards that judgment under a payment schedule approved by the court, the court may order the defendant to perform community service in an amount of not more than forty hours per month until the judgment is paid or until the court is satisfied that the defendant is in compliance with the approved payment schedule.

{¶31} "'(b) If the court orders the defendant to perform the community service, the defendant will receive credit upon the judgment at the specified hourly credit rate per hour of community service performed, and each hour of community service performed will reduce the judgment by that amount.'

{¶32} "It is undisputed in this case that the trial court imposed court costs as part of appellant's sentence, but failed to notify appellant that he may be ordered to perform community service if he fails to pay such costs. Appellant contends that such failure requires reversal to enable the trial court to resentence appellant in compliance with R.C. 2947.23(A)(1)(a). There is no indication in the record, however, that appellant has failed to pay such costs, or that the trial court has ordered appellant to perform community service as a sanction for such failure. Moreover, should appellant fail 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. Such events have not occurred, and might not occur. As a result, we find appellant's arguments as to this issue are not ripe for review at this time. *State v. Boice*, Washington App. No. 08CA24, 2009-Ohio-1755, ¶11; *State v. Slonaker*, Washington App. No. 08CA21, 2008-Ohio-7009, ¶7. See, also, *State v. McCarty*, 2007-Ohio-2290 at ¶15, 16." (Emphasis sic.) This court followed *Nutter* in *Christman*, 2009-Ohio-6555 at ¶35-36.

{¶33} Smith argues *Nutter* and *Christman* are distinguishable because the defendants in those cases received long prison sentences and will not be released for some time, but in this case, he was not imprisoned for his offenses but soon may be. We find this argument unpersuasive. The principle set forth in *Nutter* and *Christman* holds true for this case: the record does not demonstrate that Smith has failed to pay the court costs or the cost for his court-appointed counsel, or that the trial court has ordered him to perform community service. If Smith fails to pay those costs in the future, then under R.C. 2947.23(B), the trial court will be required to hold a hearing regarding his failure to pay and may, in its discretion, order him to perform community service. However, because these events have yet to happen and may not ever happen, Smith's claim regarding community service is not yet ripe for review. See *Nutter* and *Christman*. See, also, *State v. Barkley*, 185 Ohio App.3d 686,

2009-Ohio-5549, ¶12 (as long as defendant remains incarcerated *and* the trial court does not impose an order of community service, defendant's claim is not ripe for review). But, see, *State v. Moss*, 186 Ohio App.3d 787, 2010-Ohio-1135, ¶16-22 (refusing to apply ripeness doctrine because issue may evade review).

{¶34} Smith also argues the trial court "violated R.C. [section] 2949.14 by usurping the clerk of court's discretion in the collection of court costs from an indigent defendant by ordering the execution of the costs of prosecution," and that "[i]n effect, the court ordered the clerk of courts to collect the costs from an indigent defendant, which it did not have the power to do." We find this argument unpersuasive.

{¶35} It has long been held that a clerk of courts' duties are considered administrative and political, as opposed to judicial, in nature, and contrary to what Smith contends, the clerk of courts is vested with no judicial discretion in any respect. See *State ex rel. McKean v. Graves* (1914), 91 Ohio St. 23, 24.

{¶36} In *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, paragraphs one and two of the syllabus, the court held that a "trial court may assess court costs against an indigent defendant convicted of a felony as part of the sentence," and that a "clerk of courts may attempt the collection of court costs assessed against an indigent defendant." In *Threatt* at ¶16, the Ohio Supreme Court held that "the state may use any collection method that is available for collection of a civil judgment for money" in collecting court costs from a convicted defendant. Therefore, the trial court clearly had the authority to order execution of court costs in this case and the clerk of courts clearly has the authority to collect those costs as the trial court has directed it to do.

{¶37} Smith also argues the trial court abused its discretion when it found that he has the future ability to pay the costs of prosecution and the cost of his court-appointed attorney. We disagree.

{¶38} A trial court is *not* required to consider a criminal defendant's ability to pay the cost of prosecution before imposing them on the defendant following his conviction, since the trial court is obligated to impose such costs under R.C. 2947.23(A)(1). See *State v. Clevenger*, 114 Ohio St.3d 258, 2007-Ohio-4006, ¶3. However, a trial court *is* required to consider a criminal defendant's ability to pay the cost of his court-appointed counsel. See, e.g., *State v. Layne*, Clermont App. No. CA2009-07-043, ¶57, citing *State v. Shannon*, Preble App. No. CA2003-02-005, 2004-Ohio-1866, ¶4 (ordering defendant to pay court-appointed counsel fees without determining defendant's ability to pay as required under R.C. 2941.51[D] constitutes plain error). R.C. 2941.51(D) provides that where a person who has received court-appointed counsel "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."

{¶39} At sentencing, the trial court stated in relevant part:

{¶40} "You're to pay the cost of prosecution, the cost of your court-appointed counsel. You're young enough and healthy enough to be able to work and in the future, you should be able to earn enough to pay this back. So, I find that you have a future ability to do so, even though you currently do not have the ability to do so."

{¶41} The trial court stated in its sentencing entry that it considered the presentence investigation report prepared on Smith, which indicated that Smith is a high school graduate and has been employed as a truck driver. This information provides sufficient evidence to support the trial court's finding that Smith has a future ability to pay the cost of his court-appointed counsel.

{¶42} In his reply brief, Smith "takes issue with his appellate counsel not being permitted to review the *** PSI *** that the trial court relied on in assessing" the court costs and cost of Smith's court-appointed counsel. However, as this court explained in denying

Smith's motion to review the PSI, R.C. 2951.03(D)(1) addresses disclosure of a presentence investigation report and no provision of that section permits disclosure of a PSI to counsel after the defendant has been sentenced.

{¶43} Smith also contends that because his appellate counsel was not permitted to review the PSI, this court should not rely on it in analyzing his claims, since doing so would violate his due process rights. However, Smith had ample opportunity at the trial proceedings to put on evidence and make arguments as to why he would not have the ability to pay court costs or the cost of his court-appointed counsel in the future, but failed to present any such evidence or argument.

{¶44} In light of the foregoing, Smith's second assignment of error is overruled.

{¶45} Assignment of Error No. 3:

{¶46} "THE COST BILL INCLUDES ITEMS THAT ARE NOT AUTHORIZED BY THE OHIO REVISED CODE."

{¶47} Smith argues the cost bill sent to him by the clerk of the common pleas court that he is obligated to pay as part of his sentence improperly includes a \$74 charge for the issuance and service of two subpoenas that were not served until *after* the plea acceptance hearing, thereby rendering them unnecessary and any charge for them unreasonable. We disagree.

{¶48} R.C. 2947.23(A)(1) provides that in all criminal cases, the sentencing court must include in the defendant's sentence the "costs of prosecution" and "render a judgment against the defendant for such costs." The expenses that may be taxed as the cost of prosecution or court costs in a criminal case are those that are "directly related to the court proceedings" and "identified by a specific statutory authorization." *State v. Christy*, Wyandot App. No. 16-04-04, 2004-Ohio-6963, ¶22. See, also, *State v. Perz*, 173 Ohio App.3d 99, 106, 2007-Ohio-3962, ¶36.

{¶49} R.C. 2303.20(D) allows the clerk of a common pleas court to charge "[t]wo dollars for each name for issuing subpoena[.]" R.C. 311.17 allows a sheriff to charge certain enumerated fees that the common pleas court or its clerk must include in the bill of costs against "the judgment debtor or those legally liable therefor for the judgment[.]" including "a fee of two dollars per mile for the first mile, and one dollar per mile for each additional mile, going and returning, actual mileage to be charged on each additional name[.]" R.C. 311.17(B)(1).

{¶50} The record indicates that on April 15, 2010, the state requested subpoenas for Officer K. Bryant and Detective Cope of the Mason Police Department, as well as Sue Cornette and Bob Agricola. Officer Bryant and Detective Cope were personally served one day *before* the trial court accepted Smith's guilty plea, while Cornette and Agricola were served one day *after* the trial court accepted Smith's guilty plea. The cost bill sent to Smith contains a \$76 charge from the sheriff that, apparently, is a fee for serving witness subpoenas. Smith asserts that \$74 of this amount stemmed from the sheriff's personal service of the subpoenas on Cornette and Agricola and argues that \$74 should be deducted from the cost bill because the subpoenas for these witnesses became "pointless" following the plea acceptance hearing. We find this argument unpersuasive.

{¶51} The clerk of the common pleas court, acting on the sheriff's behalf, was permitted to charge Smith \$2 apiece for issuing subpoenas to Cornette and Agricola, or \$4, altogether. See R.C. 2303.20(D) and R.C. 311.17(A). Moreover, the record shows that the clerk charged Smith only \$35 altogether for issuing subpoenas to Cornette and Agricola on April 20, 2010. Assuming that the \$76 amount set forth in the cost bill does include a \$35 charge for the sheriff's personal service of the subpoenas on Cornette and Agricola one day after the trial court accepted Smith guilty plea, we believe that this charge still qualifies as one "directly related" to the costs of Smith's prosecution. If the subpoenas had not been

served on Cornette or Agricola until much later, then a question might arise as to whether the costs of the subpoenas could be considered "directly related" to the costs of Smith's prosecution and thus properly assessed against him. However, in this case, the subpoenas for Cornette and Agricola were filed four days *before* the plea acceptance hearing, and therefore, any charge for those fees was properly assessed against Smith.

{¶52} Smith also argues the clerk was not permitted to bill him for the travel expenses accrued by the Warren County Sheriff's Office, because under R.C. 311.17, the bill could be assessed only against "the judgment debtor or those legally liable therefor for the judgment," and Smith argues, without citation to authority, that he does not fall under those categories. We find this argument unpersuasive.

{¶53} The Ohio Supreme Court held in *Joseph*, 2010-Ohio-954 at ¶20, that a criminal defendant, by implied contract, becomes liable for payment of court costs if such costs are a part of the trial court's judgment and that a judgment for court costs in a criminal case is a civil obligation that may be collected by any means provided for the collection of civil judgments. Here, the trial court ordered Smith to pay the costs of prosecution. Consequently, Smith is a "judgment debtor" or a person who is "legally liable therefor for the judgment," for purposes of R.C. 311.17, and therefore is liable to pay any court costs properly assessed against him.

{¶54} Smith also argues the cost bill improperly included a charge for both air fare and the sheriff's mileage costs for returning him to Warren County from Florida. In response, the state argues the clerk of courts was permitted under R.C. 311.17(B)(1) to collect, on the sheriff's behalf, "the mileage for going and returning in regards to summons, writs, orders, and notices[,]" and since the statute "does not exclude air fare from travel expenses[,]" "the clerk was authorized to collect both mileage and air fare" concerning Smith's extradition from Florida. We disagree with the state's argument.

{¶55} The clerk of the common pleas court was permitted to assess as court costs those expenses that were "directly related to the court proceedings" and "identified by a specific statutory authorization." *Perz*, 2007-Ohio-3962 at ¶36. Under R.C. 311.17(B)(1), the clerk was authorized to collect fees for the sheriff's mileage with respect to returning Smith from Florida to Warren County. However, it appears that the cost bill sent to Smith may have inadvertently provided the sheriff's office with a double recovery against Smith.

{¶56} The portion of the cost bill related to the sheriff's expense in executing the arrest warrant against Smith and returning him to Warren County from Florida was \$4,218.90. This amount appears to have been taken from a notation regarding certain fees that appears on Smith's arrest warrant. The \$4,218.90 amount included \$2,089 for mileage; \$1,047.41 for overtime, presumably, for the deputy or deputies involved; \$46.85 for food; \$933.50 fee for air fare; \$82.14 for a rental car; and \$20 for service of the arrest warrant, see R.C. 311.17(A)(5).

{¶57} Since Smith was charged \$2,089 for mileage *and* \$933.50 for air fare, it appears that the sheriff may have been permitted to recover twice against Smith for the same expense of returning him to Warren County from Florida, i.e., \$2,089 for mileage fees and \$933.50 for air fare. The state has not disputed that this, in fact, is what happened, but instead argues that since R.C. 311.17(B)(1) does not exclude air fare from travel expenses, it was proper for the clerk of the common pleas court to include both the sheriff's mileage fees and air fare in the cost bill. We find this argument unpersuasive.

{¶58} While it was reasonable for the clerk of the common pleas court to include in the cost bill sent to Smith the sheriff's mileage costs in going to and from the airports in both Warren County and Florida, the clerk should not have charged Smith for both the sheriff's mileage *and* the cost of air fare, since allowing the sheriff's office to recover for both expenses appears to provide them with a double recovery for the same expense. Any

expense that constitutes a double recovery would not constitute an expense "directly related to the court proceedings" and "identified by a specific statutory authorization," *Perz*, 2007-Ohio-3962 at ¶36, and therefore would not constitute court costs that can be assessed against a defendant like Smith. Therefore, we will remand this case to the trial court so that it can re-examine and, if appropriate, amend the cost bill sent to Smith, in order to prevent any double recovery from being assessed against him.

{¶59} Smith's third assignment of error is sustained to the extent indicated.

{¶60} Assignment of Error No. 4:

{¶61} "TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AMENDMENT TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION."

{¶62} Smith argues his trial counsel provided him with ineffective assistance of counsel by failing to (1) move for a waiver of court costs, (2) advise him that he may be liable for court costs and that failure to pay them could lead to imprisonment or imposition of community service, and (3) object to the trial court's order of execution regarding the court costs and the trial court's finding that he has the future ability to pay such costs. We disagree with these arguments.

{¶63} In order to prevail on a claim of ineffective assistance of counsel, a criminal defendant must show that his counsel's performance fell below an objective standard of reasonableness *and* that there is a reasonable probability that but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 104 S.Ct. 2052.

{¶64} As to his counsel's failure to ask the trial court to waive court costs, Smith has failed to show that there is a reasonable probability that the trial court would have waived those costs even if his counsel had asked the court to do so, since the trial court found that

while Smith was currently unable to pay the court costs and the cost of his court-appointed counsel, he was young and healthy enough to work and thus would be able to pay those costs in the future. See *State v. Hayden*, Cuyahoga App. No. 90474, 2008-Ohio-6279, ¶18-19.

{¶65} As to his counsel's failure to advise him at the plea hearing that he may be liable for court costs and that a failure to pay such costs could lead to his imprisonment upon revocation of his probation or the imposition of a community service obligation, Smith again has not shown the reasonable probability of a different result even if his counsel had advised him of these matters, since he has never made a claim of actual innocence in this case.

{¶66} Finally, as to his counsel's failure to object to the trial court's order of execution regarding the court costs and the trial court's finding that he has the future ability to pay such costs, Smith again has failed to show how an objection from his counsel on these matters would have led to a different outcome, since the trial court was permitted to order execution of the court costs and the trial court did not abuse its discretion in finding that Smith had the future ability to pay the costs imposed on him.

{¶67} Accordingly, Smith's fourth assignment of error is overruled.

{¶68} The trial court's judgment is reversed, and this cause is remanded to the trial court for further proceedings consistent with this opinion.

POWELL and RINGLAND, JJ., concur.

[Cite as *State v. Smith*, 2011-Ohio-1188.]