[Cite as *Smallwood v. State*, 2011-Ohio-3910.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

SHERMAN SMALLWOOD,	:	
Plaintiff-Appellant,	:	CASE NO. CA2011-02-021
	:	O P I N I O N
- vs -		8/8/2011
	:	
STATE OF OHIO,	:	
Defendant-Appellee.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2008-01-0170

Michael T. Gmoser, Butler County Prosecuting Attorney, Donald R. Caster, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for defendant-appellee

Sherman Smallwood, #A326-976, Chillicothe Correctional Institution, P.O. Box 5500, Chillicothe, Ohio 45601, plaintiff-appellant, pro se

HENDRICKSON, J.

{¶1} Appellant, Sherman Smallwood, appeals a decision of the Butler County Court of Common Pleas denying his motion to tax expenses to the state as costs after the Ohio Supreme Court determined his reclassification as a tier III sex offender under the Adam Walsh Act was unconstitutional.

{¶2} In December 1995, appellant was convicted of rape, felonious sexual

penetration, and gross sexual imposition. In 2006, appellant was classified as a sexually-oriented offender pursuant to Megan's Law. Then, in 2007, the General Assembly enacted Senate Bill 10, known as the Adam Walsh Act, and appellant was reclassified as a tier III sex offender.

{¶3} On January 11, 2008, appellant timely filed a pro se petition to challenge his Senate Bill 10 reclassification. A stay of the proceedings in appellant's case was ordered because of the numerous challenges to reclassification under Senate Bill 10. Based on our decision in *State v. Williams*, Warren App. No. CA2008-02-029, 2008-Ohio-6195, confirming the constitutionality of this type of reclassification, the trial court granted a motion by the state to dismiss appellant's challenge. We affirmed on appeal. *Smallwood v. State*, Butler App. No. CA2009-02-057, 2009-Ohio-3682.

{¶4} On an appeal to the Ohio Supreme Court, the case was stayed pending the outcome of *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424. In *Bodyke*, the Ohio Supreme Court found portions of Senate Bill 10 unconstitutional for violating the separation of powers doctrine. The unconstitutional portions of Senate Bill 10 were severed from the rest of the bill, and offenders who had been reclassified under Senate Bill 10 were to return to their prior classifications under Megan's Law. On August 17, 2010, the Ohio Supreme Court reversed our decision in appellant's case and ordered the trial court to carry out the judgment according to *Bodyke*. *In re Sexual Offender Reclassification Cases*, 126 Ohio St.3d 322, 2010-Ohio-3753, ¶90, 91.

{¶5} On September 2, 2010, appellant filed a "Motion to Tax Expenses of Plaintiff Smallwood as Costs." Appellant claimed he was entitled to $235 for "court costs," $23.46 for typewriter ribbons, $38.55 for copies, $60.07 for postage, and $500 in paralegal fees, for a total of $857.08. Appellant also alleged the conduct of the Butler County Prosecutor and the Ohio Attorney General constituted "frivolous and willful negligence" and that their actions

were against existing law.

{¶6} The trial court denied appellant's motion and found that the prosecutor and attorney general "merely defended the action, as per their duties under the law." The trial court held that because the portions of Senate Bill 10 had not yet been ruled unconstitutional when the attorney general initiated the reclassification, the attorney general would have violated a statutory mandate by not enforcing the reclassification.

{¶7} Appellant appeals the trial court's denial of his motion to tax his expenses as costs and raises one assignment of error:

{¶8} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT AS A MATTER OF FACT AND LAW AND/OR ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION TO TAX EXPENSES AS COSTS."

{¶9} Appellant first argues that he is entitled to costs under Civ.R. 54(D) because awarding costs to the prevailing party is the general rule in civil actions. Appellant states that "[t]he trial court denied [appellant's] motion with only a cursory examination of the facts and law" and therefore the trial court abused its discretion in not awarding him costs.

{¶10} Civ.R. 54(D) states: "Except when express provision therefore is made either in a statute or in these rules, costs shall be allowed to the prevailing party unless the court otherwise directs." Civ.R. 54(D). The Ohio Supreme Court has recognized that "the rule [Civ.R. 54(D)] is not a grant of absolute right for court costs to be allowed to the prevailing party * * *." *State ex rel. Gravill v. Fuerst* (1986), 24 Ohio St.3d 12, 13. The phrase "unless the court otherwise directs" is interpreted to grant "the court discretion to order that the prevailing party bear all or part of his or her own costs." *Vance v. Roedersheimer* (1992), 64 Ohio St.3d 552, 555. "Costs * * * may be defined as being the statutory fees to which officers, witnesses, jurors and others are entitled for their services in an action * * * and which the statutes authorize to be taxed and included in the judgment." Id., citing *State ex rel.*

Commrs. of Franklin Cty. v. Guilbert (1907), 77 Ohio St. 333, 338-339. "To be taxable as a cost under Civ.R. 54(D), an expense must be grounded in statute." *Taylor v. McCullough-Hyde Mem. Hosp.* (1996), 116 Ohio App.3d 595, 600, citing *Vance* at 555. Whether an expense is a cost is a question of law and subject to de novo review. *Smith v. Pennington*, Butler App. No. CA2010-03-071, 2010-Ohio-4570, ¶8. However, an appellate court cannot reverse a lower court's decision regarding the allocation of costs absent an abuse of discretion. Id. "Abuse of discretion requires more than simply an error in judgment; it implies unreasonable, arbitrary, or unconscionable conduct by the court." Id.

{¶11} Appellant fails to cite any statutory authority which would entitle him to recover expenses for "court costs," copies, postage, or typewriter ribbons as costs. Appellant seeks to recover "court costs" in the amount of $235, and has attached a "Cost Bill Detail Report," which includes fees for filing, computerization, and legal aid. According to this report, appellant paid a total of $125 and has an outstanding balance of $30.[1] Statutes address filing fees, computerization, and legal aid, but do not allow these expenses to be taxed as costs. R.C. 2303.20; R.C. 2303.201; *Wells v. Hoppel*, Columbiana App. No. 99-CO-59, 2001-Ohio-3171, ¶21. Furthermore, photocopying expenses and postage are not taxed as costs. *Cincinnati ex rel. Simons v. Cincinnati* (1993), 86 Ohio App.3d 258, 267. Appellant has not cited and we cannot find any statutory authority that would allow taxing expenses for typewriter ribbons as costs. Without statutory authority, the trial court did not abuse its discretion in not awarding appellant these expenses as costs under Civ.R. 54(D).

{¶12} In addition to costs, appellant claims he is entitled to recover paralegal fees. Paralegal fees are properly compensable in an award of attorney fees. *Ron Scheiderer &*

1. Appellant also referenced and attached two withdrawal slips of $40 each, for a total of $80. By adding the amount appellant should have paid of $155 and the $80 in withdrawal slips, appellant derives at $235 in "court costs."

Assoc. v. City of London (Aug. 5, 1996), Madison App. Nos. CA95-08-022, CA95-08-024, at 16, 17. However, pro se litigants are not entitled to attorney fees. *Specht v. Finnegan*, 149 Ohio App.3d 201, 2002-Ohio-4660, ¶44. An award of attorney fees is "within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion." *Taylor* at 600. Here, appellant is a pro se litigant and is therefore not entitled to attorney fees or paralegal fees as a part of attorney fees. Accordingly, the trial court did not abuse its discretion in denying appellant's request for paralegal fees.

{¶13} Appellant also argues that due to the "frivolous or willful negligence" of the prosecutor or attorney general he should be entitled to expenses under Civ.R. 11 or R.C. 2323.51. Civ.R. 11 provides: "The signature of an attorney or *pro se* party constitutes a certificate by the attorney or party that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. * * * " Civ.R. 11 continues: "For a willful violation of this rule, an attorney or *pro se* party, upon motion of a party or upon the court's own motion, may be subjected to appropriate action, including an award to the opposing party of expenses and reasonable attorney fees incurred in bringing any motion under this rule. * * *." The standard of review regarding Civ.R. 11 is an abuse of discretion standard. *Ransom v. Ransom*, Warren App. No. CA2006-03-031, 2007-Ohio-457, ¶24. "Civ.R. 11 employs a subjective bad faith standard, so it is the attorney's actual intent or belief that determines whether or not his conduct was willful." Id. at ¶25.

{¶14} Similarly, R.C. 2323.51(B)(1) provides in part: "* * * any party adversely affected by frivolous conduct may file a motion for an award of court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal. The court may assess and make an award to any party to the civil action or appeal who was adversely affected by frivolous conduct * * *."

{¶15} Conduct is frivolous if it satisfies any of the following:

{¶16} "(i) It obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the costs of litigation.

{¶17} "(ii) It is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law.

{¶18} "(iii) The conduct consists of allegations or other factual contentions that have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

{¶19} "(iv) The conduct consists of denials or factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief." R.C. 2323.51(A)(2)(a).

{¶20} Willfulness is not required under R.C. 2323.51, so the determination to be made is (1) whether the conduct is frivolous, and (2) the amount, if any, of court costs, reasonable attorney fees, and other reasonable expenses that should be awarded. See *Ceol v. Zion Industries, Inc.* (1992), 81 Ohio App.3d 286, 291. On review, the trial court's determination of the existence of frivolous conduct is entitled to substantial deference. *Ceol* at 292. "However, legal questions, such as whether a party's conduct is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, requires a de novo review." *Slye v. London Police Dept.*, Madison App. No. CA2009-12-027, 2010-Ohio-2824, ¶25. "While a review of a trial court's decision as to what constitutes frivolous conduct under R.C. 2323.51 may involve a mixed question of law and fact, even in instances where frivolous conduct is found to exist, the decision to assess or not assess a penalty lies with the sound discretion of the trial court."

Lucchesi v. Fischer, Clermont App. No. CA2008-03-023, 2008-Ohio-5935, ¶4.

{¶21} In order to determine if the conduct of the prosecutor or attorney general in this case constitutes "frivolous or willful negligence" to entitle appellant to relief under Civ.R. 11 or R.C. 2323.51, we must look at the development of the sex offender statutes. We first note that an enactment of the General Assembly is presumed constitutional. *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, paragraph one of the syllabus. In order for an enactment by the General Assembly to be declared unconstitutional, it "must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." Id. Since 1963, Ohio has had a sex offender registration statute. *State v. Cook*, 83 Ohio St.3d 404, 406, 1998-Ohio-291. The General Assembly repealed the sex offender statutes and then reenacted the sex offender statutes pursuant to Megan's Law in 1997. Id. The Ohio Supreme Court consistently upheld the constitutionality of Megan's Law, rejecting arguments that Megan's Law was impermissible due to retroactivity, being ex post facto, invading individual rights, double jeopardy, constituting a bill of attainder, violating equal protection, and vagueness. *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, ¶8, 9. See, generally, *Cook*, 83 Ohio St.3d 404; *State v. Williams*, 88 Ohio St.3d 513, 2000-Ohio-428. The Ohio Supreme Court also rejected a separation of powers argument in *State v. Thompson*, 92 Ohio St.3d 584, 2001-Ohio-1288.

{¶22} Here, there is no indication that the prosecutor or attorney general willfully violated Civ.R. 11. Appellant asserts that because "these men are professional attorneys, and it is their duty to know and following [sic] existing laws" they cannot claim they acted in good faith. However, the law required such a reclassification at the time the prosecutor and the attorney general initiated the reclassification of appellant. In addition, because the Ohio Supreme Court consistently confirmed the constitutionality of Megan's Law when Megan's Law revised the previous sex offender statutes, it was reasonable to presume that Senate Bill

10 was also constitutional. We cannot say the trial court abused its discretion in finding appellant "failed to establish any bad faith by the Butler County Prosecutor or the Ohio Attorney General" and denying appellant's claims for sanctions under Civ.R. 11.

{¶23} Regarding R.C. 2323.51, the trial court determined that the actions of the prosecutor and attorney general were not frivolous. While there is no indication that the trial court held a hearing pursuant to R.C. 2323.51(B) before denying appellant's motion based on R.C. 2323.51, a majority of courts have held that a hearing is not always necessary under the statute when denying the motion. *In re Removal of Osuna* (1996), 116 Ohio App.3d 339, 342. See, generally, *Pisani v. Pisani* (1995), 101 Ohio App.3d 83.

{¶24} Concerning the abuse of discretion analysis required under R.C. 2323.51, the attorney general was required to pursue reclassification of appellant because the General Assembly enacted legislation that required him to do so. There is no indication the action was to harass, maliciously injure another party or to cause unnecessary delay. There is no dispute that appellant was classified as a sexually-oriented offender under Megan's Law and therefore appellant's reclassification was statutorily mandated. We find no abuse of discretion in the trial court's determination that the conduct of the prosecutor and attorney general was not frivolous.

{¶25} Considering the de novo review required under R.C. 2323.51, existing statutes at the time the reclassification was initiated required the reclassification. Case law at the time gave the prosecutor and attorney general a reasonable belief that Senate Bill 10 was constitutional. Once the Ohio Supreme Court severed the unconstitutional provisions requiring reclassification in *Bodyke*, the trial court was mandated to follow *Bodyke*. There was no attempt by the prosecutor or attorney general to thwart the authority of *Bodyke* or continue to seek the reclassification of appellant under Senate Bill 10. Thus, the reclassification was supported under existing law and when the law changed, the prosecutor

and the attorney general continued to comply with existing law. Given all of the foregoing, we cannot say the trial court abused its discretion in not applying sanctions under R.C. 2323.51.

{¶26} We conclude that the trial court did not err to the prejudice of appellant as a matter of fact and law and did not abuse its discretion in denying appellant's motion to tax his expenses as costs. Appellant's sole assignment of error is overruled.

{¶27} Judgment affirmed.

POWELL, P.J., and HUTZEL, J., concur.