IN THE SUPREME COURT OF OHIO

Anthony LOYER,

Appellant,

08-2287

vs.

On Appeal from the Stark
County Court of Appeals,
Fifth Appellate District

State of Ohio,

Appellee.

Court of Appeals No. 2008CA00058
Case No. 2002CR0480

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT ANTHONY LOYER

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INIVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This cause presents an issue of critical importance to the administration of justice and to the due process rights of criminal defendants in Ohio.

The issues presented represent constitutional issues related to criminal defendant's right to have due process and a fair trial, such as does a trial court abuse its discretion when it denies a defendant's motion to vacate the sentence where the trial court has failed to comply with statutory sentencing requirements? It follows that if it does, then does such a failure render the attempted sentence a nullity or void?

STATEMENT OF THE CASE AND FACTS

May 29, 2002, the Stark County Grand Jury indicted appellant, Anthony Loyer, on one count of aggravated murder with prior calculation and design and a firearm specification in violation of **R.C. 2903.01**. Said charges arose from the shooting death of appellant's father, Steven Loyer.

On October 17, 2002, appellant filed a motion to suppress his statements made to police officers. A hearing was held prior to trial on October 22, 2002. The trial court suppressed any statements made after appellant invoked his right to counsel; all other statements were admissible.

After trial, the jury found appellant guilty as charged. By judgment entry filed November 1, 2001, the trial court sentenced appellant to life in prison with parole eligibility after twenty years, and three years on the firearm specification, to be served consecutively.

On February 26, 2008, appellant filed a motion to vacate judgment and set aside sentence. The trial court denied this motion on February 28, 2008. Subsequent appeal was to taken to the court of appeals which affirmed the trial court's decision on October 27, 2008. This timely appeal follows.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. I: THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED PLAIN AND PREJUDICIAL ERROR BY DENYING DEFENDANT-APPELLANT'S MOTION TO VACATE THE SENTENCE BECAUSE ANY ATTEMPT BY A COURT TO DISREGARD STATUTORY REQUIREMENTS WHEN IMPOSING A SENTENCE RENDERS THE ATTEMPTED SENTENCE A NULLITY OR VOID.

The applicable sentencing statute in this case, **R.C. 2947.23** , mandates that in all criminal cases, including violations of ordinances, the judge or magistrate ***shall*** include in the sentence the costs of prosecution 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:***

> (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.
>
> (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.

In the instant case, the Court not only failed to notify appellant at the time of sentencing that he was being ordered to pay court costs, but the court also failed to notify appellant that he could make a payment plan to satisfy the judgment, perform community service to satisfy the judgment, or what the

consequences of failing to satisfy the judgment were.

Furthermore, by the Court's failure to advise appellant that he would be ordered to pay court costs, appellant had no opportunity to seek waiver of those costs due to indigence. In ***State v. Threatt*** (2006), 108 Ohio St.3d 277, 843 N.E.2d 164, the Ohio Supreme Court held "... that a judge has discretion to waive costs assessed against an indigent defendant.[***State v. White***, 103 Ohio St.3d 580, 817 N.E.2d 393.] *Id.* at ¶ 14. Costs are assessed at sentencing and must be included in the sentencing entry. R.C. 2947.23. Therefore, an indigent defendant must move a trial court to waive payment of costs at the time of sentencing."

Any attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void. Because a trial court has a statutory duty to provide notice of court costs at the sentencing hearing, any sentence imposed without such notification is contrary to law. As a general rule, if an appellate court determines that a sentence is clearly and convincingly contrary to law, it may remand for resentencing. Furthermore, where a sentence is void because it does not contain a statutorily mandated term, the proper remedy is, likewise, to resentence the defendant. See ***State v. Beasley*** (1984), 14 Ohio St.3d 74, 14 OBR 511, 471 N.E.2d 774; ***State v. Jordan*** (2004), 104 Ohio St.3d 21, 817 N.E.2d 864, 2004; ***Hernandez v. Kelly*** (2006), 108 Ohio St.3d 395, 844 N.E.2d 301; and ***State v. Bezak*** (2007), 114 Ohio St.3d 94, 868 N.E.2d 961.

In its opinion, the court of appeals raised the issue of *res judicata* as a means of disposing of Appellant's claim stating that he could have raised the issue of court costs before the trial court and in his direct appeal in 2002. But reliance on this doctrine is misplaced. *Res judicata* cannot serve as a bar to protect a void judgment where a sentence is void because it does not contain a statutorily mandated term, the proper remedy is, likewise, to re-sentence the defendant. See ***State v. Beasley*** (1984), 14 Ohio St.3d 74, 14 OBR 511, 471 N.E.2d 774; ***State v. Jordan*** (2004), 104 Ohio St.3d 21, 817 N.E.2d 864,

2004; ***Hernandez v. Kelly*** (2006), 108 Ohio St.3d 395, 844 N.E.2d 301; and ***State v. Bezak*** (2007), 114 Ohio St.3d 94, 868 N.E.2d 961.

CONCLUSION

This Court should vacate appellant's judgment and set aside sentence in this case because it is illegal and void under **State v. Jordan, Hernandez v. Kelly, State v. Bezak,** and ***State v. Beasley*** because appellant was not notified of court costs at the time of sentencing. Therefore, appellant's sentence is void. A judgment can be void not only for lack of jurisdiction, but also where the court acts in a manner contrary to due process. ***Rondy v. Rondy*** (1983), 13 Ohio App.3d 19, 22, 13 OBR 20, 468 N.E.2d 81; ***Bank One Columbus, NA v. W. Ohio Services, Inc.*** (Oct. 12, 1989), 10th Dist. No. 89AP-394, 1989 WL 119964.

A void judgment is a nullity. It may be collaterally attacked at any time, and the party attacking the judgment need not meet the requirements of Civ.R. 60(B). ***Van DeRyt v. Van DeRyt*** (1966), 6 Ohio St.2d 31, 36, 35 O.O.2d 42, 215 N.E.2d 698; ***Sampson v. Hooper Holmes, Inc.*** (1993), 91 Ohio App.3d 538, 540, 632 N.E.2d 1338; ***Fourth & Plum Apts. v. Tuzzolino*** (June 23, 2000), 1st Dist. No. C-990568, 2000 WL 799379.

WHEREFORE, appellant prays that the trial court's decision be reversed and that the judgment in his case be vacated and this cause remanded for a new sentencing hearing in accordance with R.C. 2947.23.

Respectfully submitted,

Anthony Loyer

Anthony Loyer, *pro se*

Certificate of Service

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to counsel for appellee Stark County Prosecutor at 3P.O. Box 20049, Canton, OH 44701-0049 on this 24 day of November, 2008.

Anthony Loyer

Anthony Loyer

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

NANCY S. REINBOLD
CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO
08 OCT 27 PM 2:58

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. W. Scott Gwin, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2008CA00058
ANTHONY LOYER	:	
	:	
	:	
Defendant-Appellant	:	OPINION

CHARACTER OF PROCEEDING: Appeal from the Stark County Court of Common Pleas Court Case No. 2002-CR-0480

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

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A TRUE COPY TESTE:
NANCY S. REINBOLD, CLERK
By T.T. Dickinson Deputy
Date 10/28/08

Delaney, J.

{¶1} Appellant Anthony Loyer appeals the decision of the Stark County Common Pleas Court to deny his motion to vacate judgment and set aside sentence.

{¶2} On May 29, 2002, the Stark County Grand Jury indicted appellant on one count of aggravated murder with prior calculation and design and a firearm specification in violation of R.C. 2903.01. The charges arose from the shooting death of appellant's father, Steven Loyer.

{¶3} Appellant pleaded not guilty and the case proceeded to trial. The jury found appellant guilty as charged. By judgment entry filed November 1, 2002, the trial court sentenced appellant to life in prison with parole eligibility after twenty years, and three years on the firearm specification, to be served consecutively. The trial court included in its sentencing entry the following language:

{¶4} "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant pay the costs of this prosecution for which execution is hereby awarded."

{¶5} Appellant appealed his sentence and conviction. In *State v. Loyer*, 5th App. No. 2002CA00397, 2003-Ohio-4041, this Court affirmed appellant's sentence and conviction.

{¶6} On February 26, 2008, appellant filed a motion to vacate judgment and set aside sentence. The trial court denied this motion on February 28, 2008.

{¶7} Appellant appeals this decision and raises one Assignment of Error:

{¶8} "I. THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED PLAIN AND PREJUDICIAL ERROR BY DENYING APPELLANT'S MOTION TO VACATE THE SENTENCE BECAUSE ANY ATTEMPT BY A COURT TO DISREGARD

STATUTORY REQUIREMENTS WHEN IMPOSING A SENTENCE RENDERS THE ATTEMPTED SENTENCE A NULLITY OR VOID.

I.

{¶9} Appellant contends his sentence is void because the trial court failed, pursuant to R.C. 2947.23, to inform him that he was to pay court costs, that he could make a payment plan to satisfy the judgment or could perform community service to satisfy the judgment and what the consequences of failing to satisfy the judgment were.

{¶10} In this matter, the trial court imposed court costs against appellant. We note that R.C. 2947.23 states that "[i]n all criminal cases, * * * the judge * * * shall include in the sentence the costs of prosecution and render a judgment against the defendant for such costs." "Ohio law does not forbid a trial court from imposing court costs on an indigent defendant convicted of a felony." *State v. Pasqualone*, 140 Ohio App.3d 650, 657, 748 N.E.2d 1153, 1158, quoting, *State v. Payne* (Dec. 20, 1999), 5th App. Nos. 99CAA05024, 99CAA05025, 99CAA05026, 99CAA05027, and 99CAA05028, unreported. See also, *State v. Threatt*, 108 Ohio St. 3d 277, 843 N.e.2d 164, 2006-Ohio-905.

{¶11} Ohio courts have recognized that challenges of costs imposed at sentencing should be raised on direct appeal otherwise the issue is barred by the doctrine of *res judicata*. *State v. Pasqualone, supra; State v. Hudnall* (Dec. 19, 1997), 3rd App. No. 9-97-65, unreported; *State v. Rivers* (Aug. 25, 1999), 9th App. No. 19033, unreported; *State v. Costa* (Sept. 3, 1999), 2nd App. No. 99CA0014, unreported. Further, appellant could have made a motion to waive payment of costs at sentencing.

If an appellant fails raise the issue before the trial court, the issue is waived and the costs are *res judicata*. *State v. Threatt,* supra.

{¶12} Appellant could have raised the issue of court costs before the trial court and in his direct appeal to this court in 2002. He failed to do so. The doctrine of *res judicata* bars appellant from raising this issue now.

{¶13} Appellant's assignment of error is overruled.

{¶14} The judgment of the Stark County Court of Common Pleas is affirmed.

By: Delaney, J.

Hoffman, P.J. and

Gwin, J. concur.

HON. PATRICIA A. DELANEY

HON. WILLIAM B. HOFFMAN

HON. W. SCOTT GWIN

PAD:kgb

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

NANCY S. REINBOLD
CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO
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STATE OF OHIO Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
ANTHONY LOYER Defendant-Appellant	:	Case No. 2008CA00058

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas is affirmed. Costs assessed to appellant.

Patricia A. Delaney
HON. PATRICIA A. DELANEY

William B. Hoffman
HON. WILLIAM B. HOFFMAN

W. Scott Gwin
HON. W. SCOTT GWIN