

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
 :
 : Case Nos. 08-0711 and 08-1005
 :
 Plaintiff-Appellee, :
 :
 : On Appeal from the Allen
 vs. : County Court of Appeals
 :
 : Third Appellate District
 RICHARD E. JOSEPH, :
 :
 : C.A. Case No. 1-07-50
 Defendant-Appellant. :

REPLY BRIEF OF APPELLANT RICHARD E. JOSEPH

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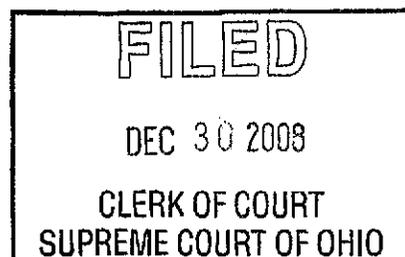


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STATEMENT OF THE CASE AND FACTS

Mr. Joseph relies upon the Statement of the Case and Facts contained in his merit brief.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW

When a trial court fails to impose court costs during a defendant's sentencing hearing, the trial court may not order the imposition of such costs in the defendant's sentencing entry.

A. Introduction

The State argues that this Court should affirm the Third District Court of Appeals' decision in Mr. Joseph's case and rule that the trial court either substantially complied with Crim.R. 43(A), or that the trial court committed a harmless error when it imposed court costs outside of Mr. Joseph's presence. But the substantial-compliance test is inappropriate in the case sub judice, as Crim.R. 43(A) involves a defendant's constitutional right to be present during a critical stage of his or her criminal proceedings. (See Argument B, *infra*). Moreover, imposing a sentence that is contrary to law is an error which is so egregious that this Court has ruled that such violations render a sentence void. (See Argument C, *infra*). As such, Mr. Joseph's complete lack of notice as to the inclusion of court costs into his sentence renders it void, and entitles him to a *de novo* resentencing hearing. Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; Sections 10 and 16, Article I of the Ohio Constitution.

B. **Because court costs are a part of a defendant's sentence, a trial court must address the imposition of such costs in open court.**

The State claims that this Court may resolve the issues presented in Mr. Joseph's case by using a substantial-compliance test in relation to Crim.R. 43(A), and holding that "compliance with Crim.R. 43(A) has occurred if a defendant is present at the sentencing hearing, even if the matter of court costs are not specifically addressed at that time, given that court costs are

mandatory in any event.” (State’s Merit Brief, p. 5). However, the substantial-compliance test may not be used when evaluating whether a trial court violated a defendant’s constitutional rights. Recently, this Court explained the difference between a trial court’s responsibility to strictly comply with Criminal Rule 11, and when substantial compliance is permitted:

If a trial court fails to literally comply with Crim.R. 11, reviewing courts must engage in a multitiered analysis to determine whether the trial judge failed to explain the defendant’s constitutional or nonconstitutional rights and, if there was a failure, to determine the significance of the failure and the appropriate remedy.

When a trial judge fails to explain the constitutional rights set forth in Crim.R. 11(C)(2)(c), the guilty or no-contest plea is invalid “under a presumption that it was entered involuntarily and unknowingly.” [State v.] Griggs, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶12; see, also, [State v.] Nero [1990], 56 Ohio St.3d [106], at 107, 564 N.E.2d 474, citing Boykin [v. Alabama (1969)], 395 U.S. [238], 242-243, 89 S.Ct. 1709, 23 L.Ed.2d 274. However, if the trial judge imperfectly explained nonconstitutional rights such as the right to be informed of the maximum possible penalty and the effect of the plea, a substantial-compliance rule applies. Id. Under this standard, a slight deviation from the text of the rule is permissible; so long as the totality of the circumstances indicates that “the defendant subjectively understands the implications of his plea and the rights he is waiving,” the plea may be upheld. Nero, 56 Ohio St.3d at 108, 564 N.E.2d 474.

State v. Clark, 119 Ohio St.3d 239, 2008-Ohio-3748, at ¶30-31. Emphasis added.

This Court has emphasized the importance of a trial court’s obligation to strictly comply with Crim.R. 11 when notifying a defendant as to which constitutional rights he or she would be waiving if he or she would decide to plead guilty:

Despite the evolution of substantial compliance as a standard for the court’s nonconstitutional notifications and determinations required by Crim.R. 11(C)(2)(a) and (b), the same is not true for the constitutional rights within Crim.R. 11(C)(2)(c). In [*State v.*] Ballard [(1981), 66 Ohio St.2d 473], we reaffirmed [*State v.*] Caudill’s [(1976), 48 Ohio St.2d 342] holding that *strict, or literal, compliance was required when constitutional rights are involved.*

66 Ohio St.2d at 479, 20 O.O.3d 397, 423 N.E.2d 115. Noting that the preferred procedure is for the trial court to use the language in Crim.R. 11(C), we also stated, “However, failure to [literally comply] will not necessarily invalidate a plea. The underlying purpose, from the defendant’s perspective, of Crim.R. 11(C) is to convey to the defendant certain information so that he can make a voluntary and intelligent decision whether to plead guilty.” Id. at 479-480.

Having found that a court must strictly comply with Crim.R. 11(C)(2)(c) when advising a defendant of all five constitutional rights listed, we answer the certified question in the affirmative.

State v. Veney, 120 Ohio St.3d 176, 2008-Ohio-5200, at ¶18, 22. Emphasis added.

Similar to the mandates in Criminal Rule 11, Criminal Rule 43(A) states, in pertinent part:

(A) Defendant’s presence.

(1) Except as provided in Rule 10 of these rules and division (A)(2) of this rule, the defendant *must be physically present at every stage of the criminal proceeding and trial, including the impaneling of the jury, the return of the verdict, and the imposition of sentence*, except as otherwise provided by these rules. In all prosecutions, the defendant’s voluntary absence after the trial has been commenced in the defendant’s presence shall not prevent continuing the trial to and including the verdict. A corporation may appear by counsel for all purposes.

Emphasis added.

A criminal defendant has a constitutional right to be present at all critical stages of his or her trial. Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; Sections 10 and 16, Article I of the Ohio Constitution; *Faretta v. California* (1975), 422 U.S. 806, 819. Sentencing is a critical stage. *Mempa v. Rhay* (1967), 389 U.S. 128. Court costs are a part of a defendant’s sentence. *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, at ¶15; *State v. Clevenger*, 114 Ohio St.3d 258, 2007-Ohio-4006. Therefore, the substantial-compliance test is

not appropriate when evaluating whether a trial court followed the constitutional guarantees that have been set forth in Criminal Rule 43(A).

Additionally, the State erroneously claims that strict compliance with Crim.R. 43(A) in the case sub judice is unnecessary because court costs are mandatory and would be included in Mr. Joseph's sentence "in any event." (State's Merit Brief, p. 5). Although court costs are mandatory, current and former R.C. 2949.092 "permit[] a trial court to waive the payment of costs imposed if the trial court finds the defendant to be indigent." *State v. Clevenger*, 2007-Ohio-4006, at ¶4. (See Richard Joseph's Merit Brief, pp. 7-10). As such, the State may not rely on the mandatory language in R.C. 2947.23 as a means of circumventing Crim.R. 43(A)'s constitutional requirement that a defendant be present when court costs are imposed. Moreover, a defendant must still be present when a mandatory term of his or her sentence is imposed. See *State v. Bishop*, 8th Dist. No. 60572, 1992 Ohio App. LEXIS 3942, at *7-8, citing *Columbus v. Rowland* (1981), 2 Ohio App.3d 144 and *State v. Huston*, 8th Dist. No. 57843, 1991 Ohio App. LEXIS 359 ("the presence of the appellant is mandated per Crim.R. 43(A) upon imposition of the mandatory fine").

However, if this Court decides to implement a substantial-compliance test for Criminal Rule 43(A), it must still reverse the court of appeals' decision as to Mr. Joseph's case, as the trial court failed to even mention court costs when sentencing Mr. Joseph. The State assumes that just because Mr. Joseph was present when a portion of his sentence was imposed, the trial court substantially complied with Criminal Rule 43(A). But Mr. Joseph was wholly absent when the trial court decided to impose court costs. As such, the trial court exhibited no compliance with Crim.R. 43(A) in relation to the imposition of court costs, much less substantial compliance. See *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, at ¶22 ("A complete failure to comply with

[Criminal Rule 11] does not implicate an analysis of prejudice,” as such a failure is evidence of *no compliance*.). Emphasis added. Indeed, while substantial compliance may be found when a trial court takes a few affirmative steps in an attempt to comply with a legal rule or standard, no compliance occurs when a trial court does nothing in relation to that legal rule or standard.

C. A trial court’s failure to impose court costs in open court renders a defendant’s sentence void, thus entitling the defendant to a de novo resentencing hearing.

The State’s next “potential resolution would be for this [C]ourt to determine that while Crim.R. 43(A) requires court costs to be imposed in a defendant’s presence in open court, failure to do so is harmless error.” (State’s Merit Brief, p. 5). However, this Court’s precedent involving a trial court’s failure to impose postrelease control in open court indicates that the failure to inform a defendant as to a mandatory term of his or her sentence is not a harmless error, but is so significant as to render the sentence void. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085; *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250; *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197. This Court has explained that “no court has the authority to substitute a different sentence for that which is required by law.” *State v. Simpkins*, 2008-Ohio-1197, at ¶20. And “in circumstances in which the judge disregards what the law clearly commands, such as when a judge fails to impose a nondiscretionary sanction required by a sentencing statute, the judge acts without authority.” *Simpkins* at ¶21, citing *State v. Beasley* (1984), 14 Ohio St.3d 74, 75. Consequently, a sentence that does not conform to a statutory mandate is void, not harmless. *Simpkins* at ¶22.

Moreover, this Court’s decision in *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905 evidences that a trial court’s failure to inform a defendant as to the imposition of court costs in open court is anything but harmless. In *Threatt*, this Court explained that court costs are

assessed at sentencing and must be included in the sentencing entry. *Threatt* at ¶23, citing R.C. 2947.23. Accordingly, an indigent defendant must request a trial court to waive payment of costs at the time of sentencing. *Id.* And “[i]f the defendant makes such a motion, then the issue is preserved for appeal and will be reviewed under an abuse-of-discretion standard. *Otherwise, the issue is waived and costs are res judicata.*” *Id.* Emphasis added.

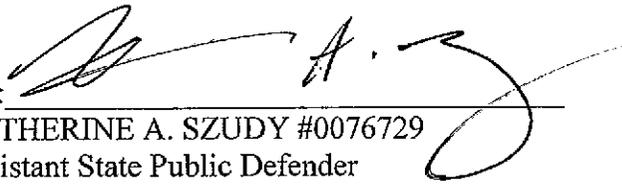
As this Court has stated, a defendant must object to the imposition of court costs during his or her sentencing hearing. The failure to so do has dire procedural implications for that defendant during his or her appeal. And contrary to the State’s suggestion, the trial court’s decision to impose court costs in Mr. Joseph’s absence is not harmless, as a “critical stage of the trial was involved,” and Mr. Joseph’s opportunity to object was “thwarted by his absence.” *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, at ¶139, 145, respectively. See, also, *Mempa v. Rhay*, 389 U.S. 128 (the time of sentencing is a critical stage in a criminal case).

CONCLUSION

For the reasons stated in his Merit Brief and in this Reply Brief, Mr. Joseph asks this Court to reverse the court of appeals’ judgment affirming the imposition of court costs, and to remand his case for a de novo resentencing hearing.

Respectfully submitted,

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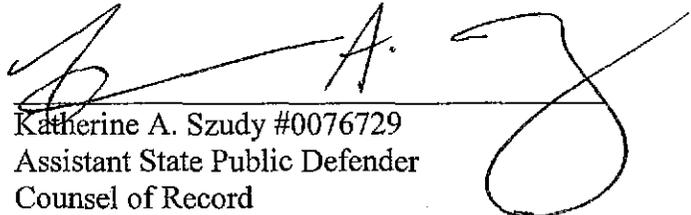
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Reply Brief of Appellant Richard E. Joseph** has been sent by regular U.S. mail, postage prepaid, to Assistant Allen County Prosecuting Attorney Jana E. Emerick, Court of Appeals Building, 204 N. Main Street, Suite 302, Lima, Ohio 45802-1243, on this 30th day of December, 2008.


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APPENDIX TO

REPLY BRIEF OF APPELLANT RICHARD E. JOSEPH

LEXSTAT OHIO CRIM. R. 11

OHIO RULES OF COURT SERVICE

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*** RULES CURRENT THROUGH NOVEMBER 15, 2008 ***

*** ANNOTATIONS CURRENT THROUGH DECEMBER 31, 2007 ***

Ohio Rules Of Criminal Procedure

Ohio Crim. R. 11 (2008)

Review Court Orders which may amend this Rule.

Rule 11. Pleas, Rights Upon Plea

(A) Pleas.

A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no contest. A plea of not guilty by reason of insanity shall be made in writing by either the defendant or the defendant's attorney. All other pleas may be made orally. The pleas of not

guilty and not guilty by reason of insanity may be joined. If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

(B) Effect of guilty or no contest pleas.

With reference to the offense or offenses to which the plea is entered:

(1) The plea of guilty is a complete admission of the defendant's guilt.

(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.

(3) When a plea of guilty or no contest is accepted pursuant to this rule, the court, except as provided in divisions (C)(3) and (4) of this rule, shall proceed with sentencing under *Crim. R. 32*.

(C) Pleas of guilty and no contest in felony cases.

(1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to *Crim. R. 44* by appointed counsel, waives this right.

(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:

(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.

(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.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

(3) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting a plea of guilty or no contest the court shall so advise the defendant and determine that the defendant understands the consequences of the plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications that are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to

have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

(4) With respect to all other cases the court need not take testimony upon a plea of guilty or no contest.

(D) Misdemeanor cases involving serious offenses.

In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing the defendant of the effect of the pleas of guilty, no contest, and not guilty and determining that the defendant is making the plea voluntarily. Where the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to *Crim. R. 44* by appointed counsel, waives this right.

(E) Misdemeanor cases involving petty offenses.

In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first informing the defendant of the effect of the pleas of guilty, no contest, and not guilty.

The counsel provisions of *Crim. R. 44(B)* and (C) apply to division (E) of this rule.

(F) Negotiated plea in felony cases.

When, in felony cases, a negotiated plea of guilty or no contest to one or more offenses charged or to one or more other or lesser offenses is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court.

(G) Refusal of court to accept plea.

Ohio Crim. R. 11

If the court refuses to accept a plea of guilty or no contest, the court shall enter a plea of not guilty on behalf of the defendant. In such cases neither plea shall be admissible in evidence nor be the subject of comment by the prosecuting attorney or court.

(H) Defense of insanity.

The defense of not guilty by reason of insanity must be pleaded at the time of arraignment, except that the court for good cause shown shall permit such a plea to be entered at any time before trial.

HISTORY: Amended, eff 7-1-76; 7-1-80; 7-1-98.