

ORIGINAL

IN THE SUPREME COURT OF OHIO

12-0030

STATE OF OHIO,
Appellee,

vs.

TROY L. GATES,
Appellant,

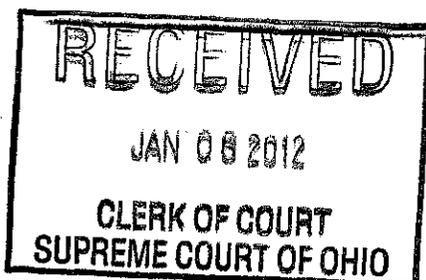
On Appeal from the
Portage County Court of Appeals,
Eleventh Appellate District

Court of Appeals
Case No.: 2011 PA 00001

NOTICE OF CERTIFIED CONFLICT, S.C.T.R. IV
BY APPELLANT, TROY L. GATES

Neil P. Agarwal, Esq.
(0065921)
Attorney for Appellant Troy L. Gates
3766 Fishcreek Rd., #289
Stow, Ohio 44224-4379
(330) 554-7700 Phone
(330) 688-2268 Fax
Neil@AgarwalLaw.com

Pamela J. Holder, Esq.
(0072427)
Attorney for Appellee State of Ohio
241 S. Chestnut St.
Ravenna, Ohio 44266
(330) 297-3850 Phone



Notice of Certified Conflict by Appellant, Troy L. Gates

Appellant, Troy L. Gates, hereby give notice, pursuant to S. Ct. R. IV, of a certified conflict to the Supreme Court of Ohio from the judgment of the Portage County Court of Appeals, Eleventh Appellate District. The December 30, 2011 Journal Entry certifying the conflict is attached and marked as Exhibit 1. The Eleventh District Court's opinion in *State v. Gates*, 11th Dist. No. 2011-P-0001, 2011-Ohio-5711, decided November 7, 2011, is attached and marked as Exhibit 2. The cases in conflict are:

***State v. Haught*, 4th Dist. No. 10-CA-34, 2011-Ohio-4767.** ("Exhibit 3"). In *Haught*, the Fourth District Court of Appeals overruled its prior rulings, and specifically held that a trial court's failure to provide defendants with R.C. 2947.23 community service notifications were ripe for review. In changing course on the ripeness question, the Court reasoned that such a notification was mandatory; was not a matter of discretion, and, as such, the trial court's imposition of costs without providing the notifications required by R.C. 2947.23(A)(1)(a) and (b) was clearly and convincingly contrary to law. *Id.* at ¶7-8.

***State v. Wagner*, 5th Dist. No. 10-CA-10, 2010-Ohio-6560,** ("Exhibit 4"). In *Wagner*, in a direct appeal case, the Court of Appeals held that the failure to advise a criminal defendant about community service is reversible error. *Id.* at ¶12-13.

***State v. Ruby*, 6th Dist. No. S-10-028, 2011-Ohio-4864,** ("Exhibit 5"). In *Ruby*, in a direct appeal case, the Court of Appeals held that failure to provide the defendant with the required R.C. 2947.23(A)(1) notification in regard to the possible imposition of community service constitutes reversible error. *Id.* at ¶41.

State v. Gabriel, 7th Dist. No. 09-MA-108, 2010-Ohio-3151. (“Exhibit 6”). In *Gabriel*, the appellate court held that even though the offender has not yet been ordered to serve community service for any failure to pay court costs, judicial economy was best served by finding that the trial court cannot order community service for the failure to pay court costs when the court did not advise in accordance with R.C. 2947.23 that community service could be ordered if the offender failed to pay court costs. *Id.* at ¶33.

State v. Adams, 8th Dist. No. 95439, 2011-Ohio-2662, (“Exhibit 7”). In *Adams*, the Court of Appeals held that the appropriate remedy where a trial court fails to provide the notice required pursuant to R.C. 2947.23(A)(1), is for the portion of the trial court's entry relative to court costs to be vacated and the case remanded to the trial court for resentencing as to the issue of court costs. *Id.* at ¶3.

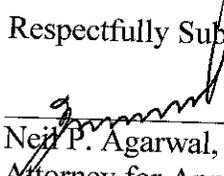
Pursuant to Art. IV, §3(B)(4) of the Ohio Constitution, the Eleventh Appellate District has certified a conflict as to the following issue:

Whether a sentencing court's failure to inform an offender, as required by R.C. 2947.23(A)(1), that community service could be imposed if the offender fails to pay the costs of prosecution or “court costs“ presents an issue ripe for review even though the record does not show that the offender has failed to pay such costs or that the trial court has ordered the offender to perform community service as a result of failure to pay.

Wherefore, Appellant respectfully requests this Court to determine that a conflict exists, and order briefing in this matter to resolve said conflict.

It should be noted that this Court has accepted a certified conflict on this identical issue in *State v. Smith*, 129 Ohio St.3d 1426, 2011-Ohio-3740, 951 N.E.2d 89 (Table), (Exhibit 8), accepted for review on August 1, 2011.

Respectfully Submitted,



Neil P. Agarwal, Esq. (0065921)
Attorney for Appellant
3766 Fishcreek Rd., #289
Stow, Ohio 44224-4379
(330) 554-7700 Phone
(330) 688-2268 Fax
Neil@AgarwalLaw.com

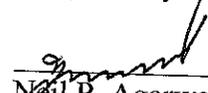
CERTIFICATE OF SERVICE

I, Neil P. Agarwal, hereby certify that a copy of the foregoing brief was sent by regular U.S.

Mail on the 5th day of January, 2012 to:

Pamela J. Holder, Esq.
Portage County Prosecutor
241 S. Chestnut St.
Ravenna, Ohio 44266
Attorney for Plaintiff-Appellee, State of Ohio

Respectfully Submitted,



Neil P. Agarwal, Esq. (0065921)
Attorney for Appellant

STATE OF OHIO)
)SS.
COUNTY OF PORTAGE)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

TROY L. GATES,

Defendant-Appellant.

JUDGMENT ENTRY

CASE NO. 2011-P-0001

FILED
COURT OF APPEALS

DEC 30 2011

LINDA K FANKHAUSER, CLERK
PORTAGE COUNTY, OHIO

This matter is before the court upon appellant's motion to certify a conflict pursuant to App.R. 25(C) and Section 3(B)(4), Article IV of the Ohio Constitution. No brief in opposition has been filed by the state of Ohio.

Appellant contends this court's holding in *State v. Gates*, 11th Dist. No. 2011-P-0001, 2011-Ohio-5711 is in conflict with several cases on the issue of whether a court's failure to inform a defendant that community service is a potential consequence of not paying court costs is ripe for review. Appellant cites the conflict cases as *State v. Haught*, 4th Dist. No. 10-CA-34, 2011-Ohio-4767; *State v. Wagner*, 5th Dist. No. 10-CA-10, 2010-Ohio-6560; *State v. Ruby*, 6th Dist. No. S-10-028, 2011-Ohio-4864; *State v. Gabriel*, 7th Dist. No. 09-MA-108, 2010-Ohio-3151; and *State v. Adams*, 8th Dist. No. 95439, 2011-Ohio-2662.

Section 3(B)(4), Article IV of the Ohio Constitution states: "Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other

court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and determination.”

Appellant pled no contest in the Portage County Municipal Court, Ravenna Division, to charges of vehicular homicide, a first-degree misdemeanor in violation of R.C. 2903.06(A)(3)(a); vehicular manslaughter, a second-degree misdemeanor in violation of R.C. 2903.06(A)(4); and a red signal lights violation, a minor misdemeanor in violation of R.C. 4511.13. He was sentenced to 180 days in jail, 90 days suspended. Appellant was additionally ordered to pay a \$1000 fine, \$500 suspended. The trial court stayed imposition of the sentence pending appeal.

On appeal in his second assignment of error, appellant contended that the trial court committed reversible error in imposing court costs against him without complying with R.C. 2947.23(A). Specifically, R.C. 2947.23(A)(1)(a) states that, at the time the sentence is imposed, the court “shall notify” the defendant that, if he fails to pay court costs or make timely payments under a payment schedule, the court “may” order the defendant to perform community service. The trial court did not indicate the possibility of community service as a means of collecting costs in the event the defendant failed to otherwise pay.

In our decision, we noted that appellate courts are split on this matter, with some courts finding the issue ripe for review. *Gates*, supra, at ¶¶45-46. However, in following our previous holding in *State v. Siler*, 11th Dist. No. 2010-A-0025, 2011-Ohio-2326, we concluded that the issue is not ripe for adjudication since appellant would not suffer actual prejudice from the court’s sentencing error

unless he fails to pay the court costs and the trial court exercises its discretion to order him to perform community service. *Gates*, supra, at ¶49. We noted this conclusion to be consistent with cases in the Third and Twelfth Districts, as well as select cases in the Fourth District, where an internal conflict on the issue existed. *Siler*, supra, at ¶49, citing *State v. Boice*, 4th Dist. No. 08CA24, 2009-Ohio-1755, at ¶11; *State v. Nutter*, 12th Dist. No. CA2008-10-0009, 2009-Ohio-2964, at ¶12; *State v. Kearse*, 3d Dist. No. 17-08-29, 2009-Ohio-4111, at ¶7-15; and *State v. Ward*, 168 Ohio App.3d 701, 2006-Ohio-4847, at ¶41.

Appellant now seeks certification of the following question:

“Whether a sentencing court’s failure to inform an offender, as required by R.C. 2947.23(A)(1), that community service could be imposed if the offender fails to pay the costs of prosecution or ‘court costs’ presents an issue ripe for review even though the record does not show that the offender has failed to pay such costs or that the trial court has ordered the offender to perform community service as a result of failure to pay.”

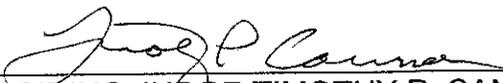
The Supreme Court of Ohio has recently certified this exact question of law, finding the Twelfth District case, *State v. Smith*, 12th Dist. No. CA2010-06-057, 2011-Ohio-1188, in conflict with the Fourth District case, *State v. Moss*, 186 Ohio App.3d 787, 2010-Ohio-1135, on the issue of ripeness. *State v. Smith*, 129 Ohio St.3d 1426, 2011-Ohio-3740.

Appellant argues five cases conflict with the holding in *Gates* in that the merits of the issue are addressed in those cases, while the merits were not addressed in *Gates* due to the ripeness doctrine. Two of these cases, *Gabriel*,

2010-Ohio-3151 and *Adams*, 2011-Ohio-2662, were cited in the *Gates* decision to be in the appellate court split. *Gates*, supra, at ¶¶45-46.

In *Adams*, appellant argued that the lower court was required to notify him, pursuant to R.C. 2947.23(A)(1), that the failure to pay court costs could potentially result in community service obligations. *Adams*, supra, at ¶1. As such, he argued the court committed plain error in not providing the notification. *Id.* at ¶3. The Eighth District addressed the issue on its merits, sustaining the assignment of error even though there was no indication that Adams had failed to pay costs or that the court had ordered community service. *Id.* at ¶21. The Eighth District remanded the case back to the lower court for resentencing as to the issue of court costs. *Id.* at ¶24. *Adams* therefore stands for the conclusion that the issue is ripe for adjudication even though the defendant had not suffered any prejudice from the purported error.

As the *Gates* decision acknowledges *Adams* stands for an opposite proposition on the issue of ripeness, there is a conflict. Appellant's motion to certify a conflict is hereby granted.


PRESIDING JUDGE TIMOTHY P. CANNON

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.

Slip Copy, 2011 WL 5333396 (Ohio App. 11 Dist.), 2011 -Ohio- 5711
 (Cite as: 2011 WL 5333396 (Ohio App. 11 Dist.))

CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio,
 Eleventh District, Portage County.
 STATE of Ohio, Plaintiff–Appellee,
 v.
 Troy L. GATES, Defendant–Appellant.

No. 2011–P–0001.
 Decided Nov. 7, 2011.

Criminal Appeal from the Municipal Court,
 Ravenna Division, Case No.2009 TRD 12709R.
 Victor V. Vigluicci, Portage County Prosecutor,
 Timothy J. Piero and Theresa M. Scahill, Assistant
 Prosecutors, Ravenna, OH, for plaintiff-appellee.

Neil P. Agarwal, Stow, OH, for defendant-appel-
 lant.

TIMOTHY P. CANNON, P.J.

*1 {¶ 1} Appellant, Troy L. Gates, appeals the decisions of the Portage County Municipal Court, Ravenna Division, in denying his motion to dismiss the indictment and in assessing costs. Appellant claims that the indictment should have been dismissed because he was arraigned improperly in violation of Crim.R. 5 and 10, and that costs should not have been assessed upon him because the court did not comply with R.C. 2947.23, which mandates that the trial court inform the defendant of potential consequences should he not pay costs. For the following reasons we affirm the judgment of the trial court.

{¶ 2} Appellant was arraigned on charges of vehicular homicide, a first-degree misdemeanor in violation of R.C. 2903.06(A)(3)(a); vehicular manslaughter, a second-degree misdemeanor in viola-

tion of R.C. 2903.06(A)(4); and a red signal lights violation, a minor misdemeanor in violation of R.C. 4511.13. An arraignment video explaining the defendant's rights is played for all defendants in the Portage County Municipal Court en masse prior to being called to plea. Appellant does not admit or deny seeing the video. During his initial appearance, appellant was informed of the nature of the charges against him and pled not guilty. The trial court inquired if appellant had an attorney, to which appellant replied that his employer was making some arrangement.

{¶ 3} Subsequent to the arraignment, appellant requested appointed counsel or a public defender. Appellant requested a continuance of the case, which was granted, and also made a demand for a jury trial which the trial court accepted. Thereafter, the public defender requested to withdraw from the case due to differences with appellant on how to proceed with his case. The motion was granted, and the court appointed new counsel to represent appellant. The court continued the case again so new counsel could become familiarized with the case.

{¶ 4} Appellant, represented by newly-appointed counsel, subsequently moved to dismiss the indictment due to an alleged improper advisement of his rights. A motion hearing was held directly before a scheduled jury trial where appellant argued that the court committed prejudicial error because he was improperly advised of his rights.

{¶ 5} After the court denied his motion to dismiss the indictment, appellant pled no contest to the three charges. He was sentenced to 180 days in jail, 90 days suspended, and the additional 90 days suspended contingent on payment of fines and no violations of law. Appellant was ordered to pay a \$1000 fine, \$500 suspended contingent on community service obligations, plus court costs. The trial court stayed imposition of the sentence pending appeal.

Slip Copy, 2011 WL 5333396 (Ohio App. 11 Dist.), 2011 -Ohio- 5711
 (Cite as: 2011 WL 5333396 (Ohio App. 11 Dist.))

{¶ 6} Appellant sets forth two assignments of error. Appellant's first assignment of error is:

{¶ 7} "The trial court committed reversible error when it denied Defendant's motion to dismiss the indictment after he was improperly arraigned under Crim.R. 5 and 10. * * *"

*2 {¶ 8} Crim.R. 5(A) outlines the procedure to be followed by a trial court at the initial appearance of the defendant. Crim.R. 10, applicable in misdemeanor cases where the defendant is called upon to plea during the initial appearance, involves the requirements of the arraignment procedure, including the explanation of certain rights. These rules serve one purpose: "to advise the accused of his constitutional rights and to inform him of the nature of the charge against him." *Hamilton v. Brown* (1981), 1 Ohio App.3d 165.

{¶ 9} Specifically, Crim.R. 5(A) provides, in part:

{¶ 10} "(A) Procedure upon initial appearance. When a defendant first appears before a judge or magistrate, the judge or magistrate shall permit the accused or his counsel to read the complaint or a copy thereof, and shall inform the defendant:

{¶ 11} "(1) Of the nature of the charge against him;

{¶ 12} "(2) That he has a right to counsel and the right to a reasonable continuance in the proceedings to secure counsel, and, pursuant to Crim.R. 44, the right to have counsel assigned without cost to himself if he is unable to employ counsel;

{¶ 13} "(3) That he need make no statement and any statement made may be used against him;

{¶ 14} "(4) * * *

{¶ 15} "(5) Of his right, where appropriate, to jury trial and the necessity to make demand therefore in petty offense cases.

{¶ 16} " * * *

{¶ 17} "In misdemeanor cases the defendant may be called upon to plead at the initial appearance. Where the defendant enters a plea the procedure established by Crim.R. 10 and Crim.R. 11 applies."

{¶ 18} Since appellant was called upon to plead and did so at his initial appearance in court, the procedure established by Crim.R. 10 and 11 applied.

{¶ 19} Crim.R. 10, in pertinent part, provides:

{¶ 20} "(A) Arraignment procedure. Arraignment shall be conducted in open court, and shall consist of reading the indictment, information or complaint to the defendant, or stating to the defendant the substance of the charge, and calling on the defendant to plead thereto. The defendant may in open court waive the reading of the indictment, information, or complaint. The defendant shall be given a copy of the indictment, information, or complaint, or shall acknowledge receipt thereof, before being called upon to plead.

{¶ 21} " * * *

{¶ 22} "(C) Explanation of rights. When a defendant not represented by counsel is brought before a court and called upon to plead, the judge or magistrate shall cause the defendant to be informed and shall determine that the defendant understands all of the following:

{¶ 23} "(1) The defendant has a right to retain counsel even if the defendant intends to plead guilty, and has a right to a reasonable continuance in the proceedings to secure counsel.

{¶ 24} "(2) The defendant has a right to counsel, and the right to a reasonable continuance in the proceeding to secure counsel, and, pursuant to Crim.R. 44, the right to have counsel assigned without cost if the defendant is unable to employ counsel.

Slip Copy, 2011 WL 5333396 (Ohio App. 11 Dist.), 2011 -Ohio- 5711
 (Cite as: 2011 WL 5333396 (Ohio App. 11 Dist.))

*3 {¶ 25} “(3) * * *

{¶ 26} “(4) The defendant need make no statement at any point in the proceeding, but any statement made can and may be used against the defendant.”

{¶ 27} At the onset, it must be decided whether the trial court failed to properly advise appellant of his rights pursuant to the aforementioned rules. The court should make a record of the arraignment so it is clear on review what rights were advised to a defendant. *State v. Diroll*, 11th Dist. No.2006-P-0110, 2007-Ohio-6930, ¶ 37. In this matter, a review of the arraignment proceedings reveals that the court informed appellant of the nature of the charges against him. Additionally, appellant admits to receiving the court's summons, which on its face states that a copy of the indictment had been attached.

{¶ 28} However, in this municipal court, as in many others, advisement of the rights in question are not given at the arraignment hearing but instead are found on a video-recording, which is played for defendants en masse. Appellant contends it is possible he did not see this video, or, if he saw it, he might not have been paying attention. The issue regarding recorded arraignment videos has been addressed by this court before. As a general matter, en masse arraignment videos are a permissible avenue to inform a defendant of his rights and preserve judicial economy. *State v. Donkers*, 11th Dist. Nos.2003-P-0135 and 2003-P-0136, 2007-Ohio-1557, at ¶ 34. Indeed, demanding that a trial court deliver a colloquy of rights in real time to every individual defendant charged with a misdemeanor is neither realistic nor required by the rules of procedure.

{¶ 29} However, when the defendant presents a challenge, as appellant did here, regarding whether he was properly advised via a recorded arraignment video, the state bears the burden to introduce evidence sufficient to support the proposition that the defendant saw the video recording. The content of

such video shall advise the defendant of his rights. Once sufficient evidence has been introduced, the burden shifts to the defendant to rebut the contention by introducing evidence to negate the proposition.

{¶ 30} Here, the state introduced sufficient evidence indicating appellant saw the video recording, the content of which advised him of his rights. The state's evidence included the following:

{¶ 31} The state introduced the content of the arraignment DVD via transcript. This transcript was authenticated by the court reporter as a fair and accurate transcript of the arraignment DVD used by Judge Watson for use in the corresponding courtroom. In support, the court reporter also testified that no other version would have been played since she does not have access to other judge's arraignment recordings. This transcript of the DVD reveals that the viewers are advised of the following rights: the right to remain silent and that anything said could be used against the defendant later in court; the right to be represented by counsel; the right to court-appointed counsel if necessary; the right to a jury trial if the charged crime carries a possibility of jail; the right to confront and cross-examine witnesses; and the right to appeal. Finally, the recording ends with: “[i]f you have any questions about what's in your complaint or about anything that I've explained to you at this time, then you may ask any questions regarding those matters of the Court when you come forward as your name is called.”

*4 {¶ 32} The state offered testimony that the transcribed DVD is the one that is played in court. The court's bailiff testified that the videotape version has not been played in five or six years, thus the DVD version is the version that was played. The bailiff further testified that his responsibility is to put the DVD in, press play, and make sure it plays before exiting.

{¶ 33} The state offered testimony that viewers are instructed to watch the DVD and ask questions

Slip Copy, 2011 WL 5333396 (Ohio App. 11 Dist.), 2011 -Ohio- 5711
(Cite as: 2011 WL 5333396 (Ohio App. 11 Dist.))

if necessary. The bailiff testified that prior to the DVD being played, he informs the audience that they are about to watch a recording of their rights and they *must* watch the recording. The bailiff also testified that he informs the audience that if they have any questions they should approach the judge when they come before the court.

{¶ 34} The state offered evidence that the recording is played in the normal course of court operations because it is required to be done. Both the reporter and bailiff testified that the recording must be played for every audience. The reporter testified that the DVD would have been played on the date in question, October 13, 2009. The bailiff testified that, even if he was sick or on vacation, the recording would have been played by a deputy bailiff or a “floater” because it is required that the recording be played.

{¶ 35} Thus, the state presented sufficient evidence to support the proposition that appellant saw the recording, the content of which advised him of his rights.

{¶ 36} Appellant then had the opportunity to rebut this proposition by introducing evidence at the hearing. However, the record is devoid of any such evidence. There is no indication appellant was absent for viewing. There is no indication appellant saw only a portion of the recording. There is no indication he did not pay attention to the recording. There is no indication he did not understand his rights. Counsel for appellant merely argues that appellant may or may not have seen the recording; he could have only seen a portion; and if he saw it, he might not have paid attention to it. Appellant had the opportunity during the hearing to present evidence of any of these possible scenarios, but did not. Because the state presented sufficient evidence to establish the procedure and content of its arraignments and there is no evidence suggesting appellant did not view it as indicated, we determine the evidence is sufficient to establish appellant viewed the recording, the content of which explained certain constitutional rights. Appellant was thus informed

of those rights contained therein.

{¶ 37} However, the recording does not review every advisement required in Crim.R. 5 and 10, and appellant contends that even if he did see the recording, he still was not advised of his right to request a jury trial. A request for a jury trial, pursuant to Crim.R. 23, must be made within a certain time frame and in writing, or the court must inform appellant of his right to a reasonable continuance to secure counsel. Additionally, appellant was not specifically asked if he understood his rights. Appellant argues that this constitutes prejudicial error. Appellant is correct with regard to these procedural infirmities; however, the record establishes those infirmities have been cured with no prejudice to appellant. Appellant was not prejudiced in this case by the court's failure to further advise him of his rights absent from the video. The record indicates that the court appointed, then discharged, the public defender at appellant's request and appointed him new counsel; scheduled a jury trial; and granted a continuance so the new appointed counsel could become familiar with the case. Thus, it is clear from the trial court's actions that appellant both knew and exercised his rights, despite not being asked explicitly by the court if he did understand these rights. Additionally, appellant attended the hearing on his motion to dismiss the indictment. In the midst of counsel arguing what rights he was not informed of, he was obviously made aware of those rights.

*5 {¶ 38} Appellant seems to suggest a rule of prejudicial error *per se* when rights are not properly advised. In reliance, appellant cites, *inter alia*, *State v. Orr* (1985), 26 Ohio App.3d 24 to support the contention that a trial court's failure to inform an accused of his rights as required by Crim.R. 5 and 10 constitutes prejudicial error. But as the Supreme Court of Ohio noted in *State v. Davis* (1991), 62 Ohio St.3d 326, 349, “in *Orr*, [supra,] the defendant was prejudiced by signing a waiver of his right to a speedy trial, and later pleading no contest.” In this case, appellant has failed to show any manner in

Slip Copy, 2011 WL 5333396 (Ohio App. 11 Dist.), 2011 -Ohio- 5711
 (Cite as: 2011 WL 5333396 (Ohio App. 11 Dist.))

which he was prejudiced.

{¶ 39} Appellant claims the trial court erred when it did not dismiss the indictment; however, dismissing the indictment is not the proper remedy when there is no showing of prejudice due to a procedurally improper arraignment. The remedy would be a remand from this court for a new arraignment. Indeed, the state suggested this re-arraignment remedy to the trial court. However, the trial court refused to conduct a re-arraignment even though it could have easily been done and would have resolved this issue. In *State v. Donkers*, supra, this court determined that the trial court erred in failing to follow the required procedure upon the appellant's initial appearance by not fully advising her of (1) the charges against her and (2) her rights. In that case, like here, the municipal court used a mass arraignment video advisement. Unlike this case, there was nothing in that record to establish what was said to the appellant. Thus, the appropriate action was for the case to be remanded in order to remedy the improper discourse on the defendant's rights: "[These misdemeanor charges] are reversed and remanded for further proceedings starting with the initial appearance." *Donkers*, supra, at ¶ 54. Specifically, this remand was for "a new initial appearance that provides proper discourse on appellant's rights." (Emphasis added.) *Id.* at ¶ 2.

{¶ 40} In the present case, any defect as a result of deficient advisement at the arraignment was effectively cured at the trial court level. Appellant was afforded all rights at each stage of the proceedings and he suffered no prejudice. Appellant was clearly present for the hearing on his motion to dismiss and heard all of the rights afforded to him. Finally, the record clearly establishes a colloquy with appellant at the time of his plea hearing where the court gave a full recitation of the nature of the charges and the possible penalties for each charge. The court explained all of his rights to appellant, who indicated he understood and waived them. Appellant then indicated to the court that he was willing to go forward, plead no contest, and allow the

trial court to make a finding of guilty.

{¶ 41} Thus, because it is clear from the record before us that appellant was not prejudiced, and that any deficiency in the arraignment advisements was ultimately cured by the trial court, the trial court did not err in denying appellant's motion to dismiss the indictment. This assignment of error lacks merit.

*6 {¶ 42} Appellant's second assignment of error is:

{¶ 43} "The Trial Court committed reversible error in imposing court costs against Mr. Gates without complying with R.C. 2947.23(A). * * *"

{¶ 44} R.C. 2947.23(A)(1)(a) states that, at the time the sentence is imposed, the court "shall notify" the defendant that if he fails to pay court costs, or make timely payments under a payment schedule, the court "may" order the defendant to perform community service. Here, appellant had no notification of the consequences of not paying costs during his sentencing.

{¶ 45} Appellate courts are split, however, as to whether the issue is ripe for adjudication on direct appeal. Some courts conclude the issue ripe based on the principle of judicial economy. See, e.g., *State v. Gabriel*, 7th Dist. No.2009-MA-108, 2010-Ohio-3151, at ¶ 31-34. Therefore, the trial court's sentencing entry is modified to prohibit any future imposition of community service as a means of collecting costs. *Id.*

{¶ 46} Other appellate courts, relied upon by appellant, vacate the portion of the trial court's entry relative to court costs, and remand the case to the trial court for resentencing as to the issue of court costs. See, e.g., *State v. Adams*, 8th Dist. No. 95439, 2011-Ohio-2662.

{¶ 47} However, as recently noted in *State v. Siler*, 11th Dist. No.2010-A-0025, 2011-Ohio-2326, the majority of appellate courts that have reviewed this issue "held that the issue is

Slip Copy, 2011 WL 5333396 (Ohio App. 11 Dist.), 2011 -Ohio- 5711
(Cite as: 2011 WL 5333396 (Ohio App. 11 Dist.))

not ripe for adjudication until the defendant suffers actual prejudice, i.e., if the defendant fails to pay the court costs *and* if the trial court orders community service as a consequence.” *Siler*, supra, at ¶ 49, citing *State v. Boice*, 4th Dist. No. 08CA24, 2009-Ohio-1755, at ¶ 11; *State v. Nutter*, 12th Dist. No. CA2008-10-0009, 2009-Ohio-2964, at ¶ 12; *State v. Kearse*, 3d Dist. No. 17-08-29, 2009-Ohio-4111, at ¶ 7-15; and *State v. Ward*, 168 Ohio App.3d 701, 2006-Ohio-4847, at ¶ 41.

{¶ 48} As held in *Siler*: “We also believe the issue is not ripe for adjudication. The statute permits, but does not mandate, a trial court to order community service when a defendant fails to pay court costs.” *Siler*, supra, at ¶ 50.

{¶ 49} In this case, appellant will not suffer actual prejudice from the trial court’s sentencing error unless he fails to pay the court costs *and* the trial court exercises its discretion to order him to perform community service. Thus, this matter is not ripe for adjudication.

{¶ 50} For the foregoing reasons, the decision of the Portage County Municipal Court, Ravenna Division, is affirmed.

CYNTHIA WESTCOTT RICE, J., THOMAS R. WRIGHT, J., concur.

Ohio App. 11 Dist., 2011.
State v. Gates
Slip Copy, 2011 WL 5333396 (Ohio App. 11 Dist.),
2011 -Ohio- 5711

END OF DOCUMENT

EXHIBIT 2.p.6

Slip Copy, 2011 WL 4361528 (Ohio App. 4 Dist.), 2011 -Ohio- 4767
 (Cite as: 2011 WL 4361528 (Ohio App. 4 Dist.))

CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio,
 Fourth District, Washington County.
 STATE of Ohio, Plaintiff–Appellee,

v.

Larry D. HAUGHT, Jr., Defendant–Appellant.

No. 10CA34.
 Decided Sept. 2, 2011.

John A. Bay, Bay Law Office, L.L.C., Columbus,
 OH, for Appellant.

Roland W. Riggs, III, Marietta City Law Director,
 and Mark C. Sleeper, Marietta City Assistant Law
 Director, Marietta, OH, for Appellee.

McFARLAND, J.

*1 {¶ 1} This is an appeal from a Marietta Municipal Court entry, convicting Appellant of driving under OVI suspension in violation of R.C. 4510.14, and sentencing him to sixty days in jail, as well as fines, costs and a ten day license suspension. On appeal, Appellant contends that 1) the trial court erred by imposing court costs without notifying him that his failure to pay such costs may result in the court's ordering him to perform community service; 2) trial counsel was constitutionally ineffective for failing to object to the trial court's imposition of court costs, as the trial court did not notify him that his failure to pay court costs may result in the court's ordering him to perform community service; and 3) the trial court committed plain error and denied him due process of law when it imposed court costs without the proper notification that his failure to pay court costs may result in the court's ordering him to perform community service.

{¶ 2} We conclude that the trial court erred in failing to provide Appellant the notice regarding community service required by R.C. 2947.23. Thus, Appellant's first assignment of error is sustained. As such, we must vacate the portion of the entry that imposes court costs and remand this case for re-sentencing as to the issue of court costs.

{¶ 3} Further, in light of our disposition of Appellant's first assignment of error, the issues raised under Appellant's second and third assignments of error have been rendered moot and we decline to address them pursuant to App.R. 12(A)(1)(c).

FACTS

{¶ 4} After a jury found him guilty of driving under OVI suspension in violation of R.C. 4510.14, on October 7, 2010, Appellant was sentenced to sixty days in jail, as well as fines, costs and a ten day license suspension. Appellant's sentence was stayed pending appeal. A review of the transcript reveals that although the trial court ordered Appellant to pay costs, it did not advise him that he could be ordered to perform community service in the event he fails to pay costs, as required by R.C. 2947.23. Appellant now brings his timely appeal, assigning the following assignments of error for our review.

ASSIGNMENTS OF ERROR

I. THE TRIAL COURT ERRED BY IMPOSING COURTS COSTS WITHOUT NOTIFYING MR. HAUGHT THAT HIS FAILURE TO PAY SUCH COSTS MAY RESULT IN THE COURT'S ORDERING HIM TO PERFORM COMMUNITY SERVICE.

II. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION, FOR FAILING TO OBJECT TO THE TRIAL COURT'S IMPOSITION OF

Slip Copy, 2011 WL 4361528 (Ohio App. 4 Dist.), 2011 -Ohio- 4767
(Cite as: 2011 WL 4361528 (Ohio App. 4 Dist.))

COURT COSTS, AS THE TRIAL COURT DID NOT NOTIFY MR. HAUGHT THAT HIS FAILURE TO PAY COURT COSTS MAY RESULT IN THE COURT ORDERING HIM TO PERFORM COMMUNITY SERVICE.

THE TRIAL COURT COMMITTED PLAIN ERROR AND DENIED MR. HAUGHT DUE PROCESS OF LAW WHEN IT IMPOSED COURT COSTS WITHOUT THE PROPER NOTIFICATION THAT HIS FAILURE TO PAY COURT COSTS MAY RESULT IN THE COURT ORDERING HIM TO PERFORM COMMUNITY SERVICE.”

ASSIGNMENT OF ERROR I

*2 {¶ 5} In his first assignment of error, Appellant contends that the trial court erred by imposing costs without notifying him that the failure to pay court costs may result in the court's ordering him to perform community service. The State concedes this error by the trial court, but contends that the error is not ripe for review.

{¶ 6} R.C. 2947.23(A)(1) provides as follows:

“In 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:

(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.” (Emphasis added.)

{¶ 7} In *State v. Moss*, 186 Ohio App.3d 787, 2010-Ohio-1135, 930 N.E.2d 838, we departed from our previous line of cases holding that questions related to a trial court's failure to provide defendants with R.C. 2947.23 community service notifications were not ripe for review, and instead held that such issues were ripe for review. In changing course on the ripeness question, we reasoned that “[s]uch a notification is mandatory; it is not a matter of discretion, and, as such, we concluded that the trial court's imposition of costs without providing the notifications required by R.C. 2947.23(A)(1)(a) and (b) was clearly and convincingly contrary to law. *Moss* at ¶ 21. As in *Moss*, we conclude that the trial court's imposition of costs without providing Appellant the necessary notifications contained in R.C. 2947.23(A)(1)(a) and (b) was contrary to law.

{¶ 7} Based upon the foregoing, Appellant is entitled to be resentenced in order for the trial court to provide him with R.C. 2947.23's required notice that his failure to pay court costs may result in the trial court's ordering him to perform community service. *Moss* at ¶ 22; relying on, *State v. Burns*, Gallia App. No. 08CA1, 08CA2, 08CA3, 2009-Ohio-878; *State v. Dansby*, Tuscarawas App. No. 08AP060047, 2009-Ohio-2975 at ¶ 21-23; see also, *State v. Cardamone*, Cuyahoga App. No. 94405, 2011-Ohio-818 at ¶ 13-14.

{¶ 8} Thus, in accordance with our reasoning in *Moss*, as well as the reasoning in *Dansby* and *Cardamone*, supra, we vacate the portion of the sentencing entry that imposes court costs and remand this case to the trial court for re-sentencing as to the issue of court costs. *Moss* at ¶ 22.

Slip Copy, 2011 WL 4361528 (Ohio App. 4 Dist.), 2011 -Ohio- 4767
 (Cite as: 2011 WL 4361528 (Ohio App. 4 Dist.))

ASSIGNMENTS OF ERROR II AND III

*3 {¶ 9} In his second assignment of error, Appellant contends that he received ineffective assistance of counsel related to his counsel's failure to object to the imposition of costs when the trial court failed to provide the proper notifications regarding community service required by R.C. 2947.23(A)(1)(a) and (b). Appellant further contends that the trial court committed plain error when it imposed costs without providing these notifications.

{¶ 10} In *State v. Burns*, this Court was presented with an ineffective assistance of counsel argument based upon facts essentially the same as the facts sub judice. *State v. Burns*, Gallia App. No. 08CA2-3, 2009-Ohio-878. In *Burns*, after deciding that the trial court had indeed erred in failing to provide the notifications required by R.C. 2947.23(A)(1)(a) and (b), we determined that the ineffective assistance of counsel argument raised by the appellant was moot and thus declined to address it in accordance with App.R. 12(A)(1)(c). *Burns* at ¶ 13. Based upon the same reasoning as set forth in *Burns*, we conclude that the issues raised under Appellant's second and third assignments of error have been rendered moot. As a result, we decline to address them.

{¶ 11} Accordingly, having sustained Appellant's first assignment of error, the trial court's imposition of costs is vacated and the matter is remanded to the trial court for a limited re-sentencing consistent with this opinion, with respect to the issue of costs.

SENTENCE VACATED IN PART AND THE CAUSE REMANDED.

KLINE, J. dissenting.

{¶ 12} I respectfully dissent because I conclude that assignment of error one is not ripe for review. I acknowledge that R.C. 2947.23 makes it mandatory for the trial court to inform a defendant that he could be ordered to perform community service. At this time, however, the defendant has not suffered

any prejudice from the trial court's failure to inform him that it may, in the future, require him to perform community service to fulfill his obligation to pay costs. Thus, I would hold that assignment of error one is not ripe for review.

{¶ 13} Accordingly, I would adhere to our recent decisions in *State v. Knauff*, Adams App. No. 09CA881, 2009-Ohio-5535, at ¶ 4-5, *State v. Welch*, Washington App. No. 08CA29, 2009-Ohio-2655, at ¶ 14 (McFarland, J.), *State v. Bryant*, Scioto App. No. 08CA3258, 2009-Ohio-5295, at ¶ 11, and *State v. Slonaker*, Washington App. No. 08CA21, 2008-Ohio-7009, at ¶ 7 (McFarland, J.). See, also, *State v. Moss*, 186 Ohio App.3d 787, 2010-Ohio-1135, at ¶ 34 (Kline, J., dissenting); *State v. Kearsse*, Shelby App. No. 17-08-29, 2009-Ohio-4111, at ¶ 12-15 (noting the disagreement within the Fourth District and applying the ripeness doctrine).

JUDGMENT ENTRY

It is ordered that the SENTENCE BE VACATED IN PART AND THE CAUSE REMANDED and that the Appellant recover of Appellee costs herein taxed.

*4 The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Marietta Municipal Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Su-

Slip Copy, 2011 WL 4361528 (Ohio App. 4 Dist.), 2011 -Ohio- 4767
(Cite as: 2011 WL 4361528 (Ohio App. 4 Dist.))

preme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Exceptions.

HARSHA, P.J.: Concurs in Judgment and Opinion.

KLINE, J.: Dissents with Dissenting Opinion.

Ohio App. 4 Dist., 2011.

State v. Haught

Slip Copy, 2011 WL 4361528 (Ohio App. 4 Dist.),

2011 -Ohio- 4767

END OF DOCUMENT



Slip Copy, 2010 WL 5551308 (Ohio App. 5 Dist.), 2010 -Ohio- 6560
(Cite as: 2010 WL 5551308 (Ohio App. 5 Dist.))

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

Court of Appeals of Ohio,
Fifth District, Perry County.
STATE of Ohio, Plaintiff-Appellee
v.
John H. WAGNER, Defendant-Appellant.

No. 10-CA-10.
Decided Dec. 29, 2010.

Perry County Court of Common Pleas, Case No. 09-CR-72.

Joseph A. Flautt, Prosecuting Attorney, for Plaintiff-Appellee.

Claire R. Cahoon, Assistant State public Defender, Columbus, OH, for Defendant-Appellant.

HOFFMAN, P.J.

*1 ¶ 1} Defendant-appellant John H. Wagner appeals his conviction and sentence entered by the Perry County Court of Common Pleas. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

¶ 2} On October 22, 2009, Appellant was indicted by the Perry County Grand Jury on four counts of trafficking in cocaine, violations of R.C. 2925.03(A)(1) and (C)(4)(a), felonies of the fifth degree. Following a jury trial, Appellant was found guilty of all counts.

¶ 3} The trial court sentenced Appellant to eight months incarceration, and suspended his driver's license for five years. The court waived

Appellant's fines due to his indigency. The trial court did not inform Appellant of court costs during the sentencing hearing, but did include costs in the sentencing entry.

¶ 4} Appellant now appeals, assigning as error:

¶ 5} "1. THE TRIAL COURT ERRED BY IMPOSING COURT COSTS IN ITS JUDGMENT ENTRY, WITHOUT NOTIFYING MR. WAGNER OF THE COSTS AT HIS SENTENCING HEARING OR THAT FAILURE TO PAY COURT COSTS MAY RESULT IN THE COURT'S ORDERING HIM TO PERFORM COMMUNITY SERVICE. STATE V. JOSEPH, 125 Ohio St.3d 76, 926 N.E.2d 278, 2010-OHIO-954."

¶ 6} The Ohio Supreme Court addressed this issue in *State v. Joseph*, 125 Ohio St.3d 76, 926 N.E.2d 278, 2010-Ohio-954, and held a trial court commits error by imposing court costs in its sentencing entry when it did not impose those costs in open court at the sentencing hearing. The court further held the error did not void defendant's entire sentence, but mandated a remand for the limited purpose of allowing defendant to move the trial court for a waiver of the payment of court costs.

¶ 7} Appellant further maintains the trial court erred in failing to notify him failure to pay court costs could result in community service.

¶ 8} R.C. 2947.23 states,

¶ 9} "(A)(1) In 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:

Slip Copy, 2010 WL 5551308 (Ohio App. 5 Dist.), 2010 -Ohio- 6560
(Cite as: 2010 WL 5551308 (Ohio App. 5 Dist.))

{¶ 10} “(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.

{¶ 11} “(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.”

*2 {¶ 12} This Court has previously held in *State v. Dansby*, 2009-Ohio-2975, failure to advise a criminal defendant about community service is reversible error.

{¶ 13} Pursuant to *Joseph*, supra, and *Dansby*, supra, this matter is remanded to the trial court for the limited purpose of allowing Appellant to move the trial court for a waiver of the payment of court costs, and if denied, to inform Appellant of the consequences of failing to pay court costs.

{¶ 14} The February 16, 2010 Judgment Entry of the Perry County Court of Common Pleas is vacated, in part, and the matter remanded to the trial court for further proceedings in accordance with this Opinion and the law.

HOFFMAN, P.J., FARMER and DELANEY, JJ.,
concur.

Ohio App. 5 Dist., 2010.
State v. Wagner
Slip Copy, 2010 WL 5551308 (Ohio App. 5 Dist.),
2010 -Ohio- 6560

END OF DOCUMENT

Slip Copy, 2011 WL 4424295 (Ohio App. 6 Dist.), 2011 -Ohio- 4864
(Cite as: 2011 WL 4424295 (Ohio App. 6 Dist.))

CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio,
Sixth District, Sandusky County.
STATE of Ohio, Appellee

v.

Ronald D. RUBY, Appellant.

No. S-10-028.
Decided Sept. 23, 2011.

Thomas L. Stierwalt, Sandusky County Prosecuting
Attorney, and Norman P. Solze, Assistant Prosecut-
ing Attorney, for appellee.

Andrew R. Schuman, for appellant.

HANDWORK, J.

*1 {¶ 1} Defendant-appellant, Ronald Ruby, appeals his conviction and sentence on multiple offenses arising from a home invasion at the residence of an elderly couple, James and Mary Kohler. Appellant raises numerous assignments of error in which he challenges the propriety of his sentences and the effectiveness of his trial counsel. For the reasons that follow, we affirm the judgment of the Sandusky County Court of Common Pleas in part, and reverse in part, and remand the cause for the limited purposes set forth below.

I. FACTS

{¶ 2} During the night of July 2, 2009, appellant and co-defendants, Jimmy Houston and Paul Biddwell, broke into the Gibsonburg home of 74-year-old James Kohler and 76-year-old Mary Kohler, beat them severely, and stole 35 firearms and money from the residence. The burglary was planned in advance by Houston, who had visited the Kohler residence on several occasions to sell

Mr. Kohler "a couple of junk rifles." According to appellant, the burglary was planned to take place while the Kohlers were out of town. On the evening of the burglary, Houston dropped off Bidwell and appellant at the end of the Kohlers' driveway. When the two walked to the house, they observed Mr. Kohler asleep on the couch in the living room. They kicked in the front door, beat Mr. Kohler in the head, grabbed him by his disabled right arm, threw him headfirst into a brick fireplace hearth, continued to beat him on the face as he lay on the floor, resulting in a broken eye socket and loss of consciousness, and then tied him up. They then proceeded upstairs to Mrs. Kohler's bedroom, where she was sleeping, beat her in the face, threatened her with rape, bound her hands and feet, and pushed her down a flight of stairs.

{¶ 3} On July 30, 2009, the Sandusky County Grand Jury returned a 43-count indictment against appellant, charging him with two counts of attempted murder in violation of R.C. 2903.02(A) and 2923.02, felonies of the first degree (Counts 1 and 2), two counts of felonious assault in violation of R.C. 2903.11(A)(1), felonies of the second degree (Counts 3 and 4), two counts of kidnapping in violation of R.C. 2905.01(A)(2), felonies of the first degree (Counts 5 and 6), two counts of aggravated robbery in violation of R.C. 2911.01(A)(3), felonies of the first degree (Counts 7 and 8), one count of aggravated burglary in violation of R.C. 2911.11(A)(1), a felony of the first degree, with a firearm specification (Count 9), 33 counts of grand theft in violation of R.C. 2913.02(A)(1) and (B)(4), felonies of the third degree (Counts 10-42), and one count of tampering with evidence in violation of R.C. 2921.12(A)(1), a felony of the third degree (Count 43).

{¶ 4} On September 23, 2009, appellant withdrew his initial pleas of not guilty to all counts and entered guilty pleas to Counts 1 and 2 (attempted murder of James Kohler and Mary Kohler, respectively), Count 5 (kidnapping of James Kohler),

Slip Copy, 2011 WL 4424295 (Ohio App. 6 Dist.), 2011 -Ohio- 4864
(Cite as: 2011 WL 4424295 (Ohio App. 6 Dist.))

Count 9 (aggravated burglary with a firearm specification), and Count 10 (grand theft of a firearm). In exchange, the state agreed to dismiss the remaining charges at sentencing.

*2 ¶ 5} A sentencing hearing was held on May 11, 2010. During the hearing, appellant's counsel stated, "It would be our position that the Kidnapping, the Aggravated Burglary charges would merge, that those have a single animus, that they did not occur separately." The trial court did not explicitly rule on the issue of allied offenses, but did impose a separate sentence for each offense. Specifically, the court sentenced appellant to a ten-year term of incarceration for each attempted murder, to be served consecutively, ten years for kidnapping and aggravated burglary, to be served concurrently to each other and to the sentences for attempted murder, and a mandatory one-year term for the firearm specification to be served consecutively to the sentences for attempted murder. The court also imposed a one-year sentence for the grand theft. The court did not specifically state that the one-year sentence imposed for grand theft would run consecutive to the murder counts, but did state that the aggregate sentence was 22 years.

¶ 6} On May 12, 2010, the trial court filed its judgment entry, which also failed to specify that the one-year prison term for grand theft would be served consecutively, but provided that "Defendant is further sentenced to a one year term in prison on count Ten, for an aggregate sentence of TWENTY-TWO (22) years prison ." Appellant now appeals that judgment, asserting the following assignments of error:

¶ 7} "1. The sentence was contrary to law and constitutes an abuse of discretion.

¶ 8} "2. The trial court erred in imposing consecutive sentences without making statutory findings required by R.C. 2929.14(E)(4) and 2929.41(A).

¶ 9} "3. The trial court erred by not advising

the defendant of the consequences of failing to pay costs of prosecution, pursuant to R.C. 2947.23.

¶ 10} "4. The trial court failed to include in the sentencing entry the name and section reference for the firearm specification, as required by R.C. 2929.19(B)(3).

¶ 11} "5. Trial counsel was ineffective in violation of the United States and Ohio Constitutions for failing to make the arguments and objections set forth in the preceding assignments of error, and for permitting the defendant to enter a plea that was not knowing, intelligent and voluntary.

¶ 12} "6. The trial court failed to determine whether the offenses were allied offenses of similar import and the result of a single act."

II. PROPORTIONALITY, CONSISTENCY, AND LEGALITY OF SENTENCE

¶ 13} In his first assignment of error, appellant asserts that his 22-year sentence is contrary to law and constitutes an abuse of the trial court's discretion. Appellant delineates four separate arguments in support of his position.

A. Conservation of Resources

¶ 14} Appellant first argues that the trial court violated the conservation-of-resources principle embodied in R.C. 2929.13(A), which provides that a "sentence shall not impose an unnecessary burden on state or local government resources." Appellant points out that "a 22-year sentence * * * places him at nearly 60 years old at [the] time of his anticipated release" and posits that most individuals cease committing serious crimes as they approach the age of 60. Thus, appellant reasons, "Because any danger [he] might pose [to society] would be abated when he reaches his fifties, the trial court violated the principle set forth in R.C. 2929.13(A) by imposing a 22-year prison term."

*3 ¶ 15} R.C. 2929.13(A) does not establish a rule of felony sentencing under which no offender may be imprisoned past a certain age. The statute

Slip Copy, 2011 WL 4424295 (Ohio App. 6 Dist.), 2011 -Ohio- 4864
 (Cite as: 2011 WL 4424295 (Ohio App. 6 Dist.))

precludes a sentence from imposing an “unnecessary burden” on government resources, but contains no presumption that imprisoning an offender beyond the age of 50 or 60 imposes such a burden. By its plain language, R.C. 2929.13(A) “suggests that the costs, both economic and societal, should not outweigh the benefit that the people of the state derive from an offender’s incarceration.” *State v. Ward*, 6th Dist. No. OT-10-005, 2010-Ohio-5164, ¶ 9, quoting *State v. Vlahopoulos*, 154 Ohio App.3d 450, 2003-Ohio-5070, ¶ 5, abrogated on other grounds by *State ex rel. Carnail v. McCormick*, 126 Ohio St.3d 124, 2010-Ohio-2671. See, also, *State v. Carlisle*, 8th Dist. No. 93266, 2010-Ohio-3407, ¶ 33.

{¶ 16} Moreover, although resource burdens may be a relevant sentencing criterion, a sentencing court is not required to elevate resource conservation above the principles and purposes of felony sentencing under R.C. 2929.11 or the seriousness and recidivism factors in R.C. 2929.12. *Carlisle* at ¶ 33. See, also, *State v. Bianca*, 5th Dist. No. 10-COA-041, 2011-Ohio-3321, ¶ 16; *State v. Weber*, 5th Dist. No. 10-COA-003, 2010-Ohio-4058, ¶ 24-25; *State v. Kase*, 187 Ohio App.3d 590, 2010-Ohio-2688, ¶ 20; *State v. Hyland*, 12th Dist. No. CA2005-05-103, 2006-Ohio-339, ¶ 34-35; *State v. Foster*, 11th Dist. No.2004-P-0104, 2005-Ohio-5281, ¶ 66.

{¶ 17} In *State v. Ferenbaugh*, 5th Dist. No. 03COA038, 2004-Ohio-977, ¶ 8, the Fifth Appellate District held:

{¶ 18} “The record sub judice is devoid of any evidence to support the claim of an ‘unnecessary burden on state or local government resources.’ In fact, the record indicates [that] appellant’s past probation violations have placed a burden on local government resources. * * * Having failed twice on local supervision resulting in probation violation hearings, resentencing and jail time, we find that the least impact on local and state government resources in this case would be imprisonment.”

{¶ 19} In *State v. Konstantinov*, 5th Dist. No. CAA 09 0075, 2010-Ohio-3098, ¶ 24, the court concluded, “Despite appellant’s age [of 65], based on his long pattern of criminal activity the court did not err in rejecting his argument * * * that [an aggregate six year term of] incarceration placed an unnecessary burden on state resources.” Similarly, in *State v. Burrows*, 5th Dist. No. 07CAA080039, 2008-Ohio-2861, ¶ 26, the court held that an eight-year sentence imposed on a 48-year-old offender did not create an unnecessary burden on state resources, where the record revealed that appellant had “committed numerous theft offenses” and “had numerous previous criminal convictions.”

{¶ 20} Even if we accepted the general proposition that most offenders will stop committing serious crimes by the time they reach their fifties or sixties, the record in this case does not disclose that appellant is one of them. To the contrary, appellant has a long pattern of criminal activity that spans from the time he was a juvenile, including previous convictions for assault, attempted aggravated burglary, theft, forgery, carrying concealed weapons, multiple counts of receiving stolen property, and various drug-related offenses, as well as several probation violations. In fact, appellant was on probation when he committed the present offenses. In addition, the crimes in this case were carried out with grievous violence against two elderly victims, which prompted the trial court’s finding that “[t]his crime is about as heinous as they come.” Based on the present record, we cannot conclude that appellant’s sentence is contrary to R.C. 2929.13(A).

B. Proportionality and Consistency

*4 {¶ 21} Appellant’s second contention is that his sentence is neither proportional nor consistent under R.C. 2929.11(B) and constitutes an abuse of discretion. Appellant argues that the trial court “failed to engage in a proportionality or consistency analysis, making no reference to such an analysis in its sentencing entry and merely imposing the same approximate sentences on all three defendants, even though Ruby asserted that he played no role in the

Slip Copy, 2011 WL 4424295 (Ohio App. 6 Dist.), 2011 -Ohio- 4864
(Cite as: 2011 WL 4424295 (Ohio App. 6 Dist.))

beatings." Appellant reasons that he should have received a shorter sentence than his co-defendants because he denied any participation in the beatings and Houston planned the invasion.

{¶ 22} When reviewing a felony sentence, this court has repeatedly followed the two-step analysis adopted by a plurality of the Ohio Supreme Court in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. See, e.g., *State v. Loyd*, 6th Dist. Nos. E-10-055, E-10-056, 2011-Ohio-2964, ¶ 35; *State v. Mendoza*, 6th Dist. No. WD-008, 2011-Ohio-1971, ¶ 22; *State v. Donald*, 6th Dist. No. S-09-027, 2010-Ohio-2790, ¶ 6; and *State v. Turner*, 6th Dist. No. L-09-1195, 2010-Ohio-2630, ¶ 50. Under that approach, an appellate court must first "examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard." *Kalish* at ¶ 26.

{¶ 23} We have also recognized that sentencing consistency is not derived from a numerical comparison of prison terms between co-defendants or by reference to prison terms imposed in other cases where defendants were sentenced for the same offense. "Consistent sentencing occurs when a trial court properly considers the statutory sentencing factors and guidelines found in R.C. 2929.11 and 2929.12 in every case." *State v. Elkins*, 6th Dist. No. S-08-014, 2009-Ohio-2602, ¶ 17. See, also, *State v. O'Neil*, 11th Dist. No.2010-P-0041, 2011-Ohio-2202, ¶ 31.

{¶ 24} With regard to the first prong of the *Kalish* test, appellant's only argument at this point is that the trial court failed to consider the sentencing guidelines and factors in R.C. 2929.11 and 2929.12. This argument, however, is belied by the record. At sentencing, the court explicitly recognized its obligations "to protect the public from future crimes," "to impose an appropriate punish-

ment," "to consider factors which indicate that you would likely commit future crimes," and "to be consistent with my sentences and * * * to take into consideration the relevant seriousness and recidivism factors under [R.C.] 2929.12(B) through (E)." This is more than sufficient to indicate the trial court's compliance with those statutes. *State v. O'Neil*, supra, 2011-Ohio-2202, ¶ 26. Moreover, even "where the trial court does not put on the record its consideration of R.C. 2929.11 and 2929.12, it is presumed that the trial court gave proper consideration to those statutes." *Kalish* at ¶ 18, fn. 4. The presumption remains in the absence of an affirmative showing to the contrary. *State v. James*, 7th Dist. No. 07 CO 47, 2009-Ohio-4392, ¶ 50.

*5 {¶ 25} Addressing the second step of the *Kalish* test, we find nothing unreasonable, arbitrary, or unconscionable in the trial court's application of the relevant considerations in R.C. 2929.11 and 2929.12. Before imposing sentence, the trial court "considered the statements of the victims, the Presentence Investigation, the official version of the facts and defendant's version." In regard to the beatings, the trial court explained, "Each of the three [defendants] have a slightly different take on what happened, so we * * * can't really identify the person who did the beating, but certainly can place all three defendants at the scene." The court then noted that appellant's "criminal history [is] quite lengthy, * * * about 16 years * * * of criminal history," and that appellant has "not been successfully rehabilitated." The court found that "[t]his crime is about as heinous as they come," considered that the Kohlers suffered "serious physical and psychological harm," which was "exacerbated due to their ages," and explained that it could not identify "any factors which would appear to make the offense less serious for sentencing purposes."

{¶ 26} Moreover, even if we were inclined to test consistency and proportionality by comparing the sentences in this case, we could not conclude that the trial court abused its discretion in failing to impose a shorter aggregate sentence on appellant

Slip Copy, 2011 WL 4424295 (Ohio App. 6 Dist.), 2011 -Ohio- 4864
(Cite as: 2011 WL 4424295 (Ohio App. 6 Dist.))

than it imposed on his co-defendants. With respect to the beatings, appellant stood in no better sentencing position than his co-defendants. It appears from the record at sentencing that each defendant denied a role in the beatings and blamed one or more of the others. According to the presentence investigation, appellant claimed that Biddwell beat the Kohlers, Biddwell claimed that appellant and Houston beat the Kohlers, and Houston did not give a statement to police. Thus, there was good reason for the trial court's refusal to distinguish culpability on this basis. With regard to planning the invasion, while Houston may have been the architect of the project, the record does not reveal the actual length of Houston's sentence, the extent of his prior criminal history, or whether he too was on probation at the time of this offense. See *State v. Smith*, 8th Dist. No. 95243, 2011-Ohio-3051, ¶ 68-70.

C. Consecutive Sentence for Grand Theft

{¶ 27} Appellant further contends that his sentence should be reduced by one year because the trial court failed to specify in its sentencing entry whether the one-year term for grand theft would be served consecutively or concurrently to the prison terms for attempted murder. Appellant argues that any ambiguity as to whether a sentence is to be served concurrently or consecutively must be resolved in the defendant's favor. Appellant also suggests that the sentencing entry is inconsistent with the statements made by the trial court at the sentencing hearing in regard to the sentence for grand theft.

*6 {¶ 28} The problem with appellant's argument, however, is that there is no ambiguity or inconsistency in this case. Although the trial court did not specifically state at sentencing or in its entry that the term for grand theft was to run "consecutive" to the terms for attempted murder, it made eminently clear at both times that the one-year term for grand theft brought the aggregate prison term up from 21 to 22 years.

D. The Firearm Specification

{¶ 29} Finally, appellant argues that the total

prison term should be reduced by one year because the trial court improperly ran the mandatory one-year prison sentence for the firearm specification consecutive to the aggregate 20-year term imposed on the murder counts. According to appellant, the firearm specification can only be run consecutive to the sentence on the base offense of aggravated burglary, which was run concurrent with the sentences for attempted murder.

{¶ 30} This precise issue was addressed by the court in *State v. Spears*, 8th Dist. No. 94089, 2010-Ohio-2229. In that case, the defendant Myron Spears pled guilty to one count of felonious assault with a three-year firearm specification, one count of kidnapping, and one count of aggravated burglary. The trial court sentenced Spears to seven years for felonious assault and eight years on the kidnapping and aggravated burglary charges, and ordered those sentences to run concurrently. Rejecting Spears' argument that his total sentence should be ten years, rather than eleven years, the Eighth District Court of Appeals held:

{¶ 31} "However, R.C. 2929.14(E)(1)(a) requires that the mandatory three-year prison sentence for the firearm specification be served 'consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.' Thus, the three-year firearm specification must be served before both the seven-year sentence on the felonious assault count and the concurrent eight-year sentences on the kidnapping and aggravated burglary counts begin. When the three years is added to the eight years, the sentence adds up to a total of eleven years, not ten, even though the eight-year sentences were ordered to run concurrently with the felonious assault conviction." *Id.* at ¶ 9.

{¶ 32} Accordingly, appellant's first assignment of error is not well-taken.

III. STATUTORY FINDINGS FOR CONSECUTIVE SENTENCES

{¶ 33} In his second assignment of error, ap-

Slip Copy, 2011 WL 4424295 (Ohio App. 6 Dist.), 2011 -Ohio- 4864
(Cite as: 2011 WL 4424295 (Ohio App. 6 Dist.))

pellant asserts that the trial court erred by imposing consecutive sentences without making the statutory findings required by R.C. 2929.14(E)(4) and 2929.41(A), which were severed from the sentencing code by the Supreme Court of Ohio in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. Appellant argues that *Foster* has been "undone" by the United States Supreme Court's decision in *Oregon v. Ice* (2009), 555 U.S. 160, and that "[a]ny decision in this case should be stayed until the Supreme Court of Ohio issues a decision in *Hodge* regarding the effect of *Ice* on the *Foster* case." At the time appellant's brief in this case was filed, however, the Supreme Court of Ohio had already issued its decision in *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, certiorari denied, *Hodge v. Ohio* (2011), 131 S.Ct. 3063. The court held in *Hodge* that *Ice* did not revive the former consecutive-sentencing provisions of R.C. 2929.14(E)(4) and 2929.41(A) that were excised in *Foster*, and that trial courts are not required to engage in fact-finding before imposing consecutive sentences unless the General Assembly enacts new legislation to that effect. *Id.* at paragraphs two and three of the syllabus.

*7 {¶ 34} Relying on several pre-*Hodge* appellate decisions, appellant also suggests that "the Ohio General Assembly, through 2008 House Bill 130, had amended and reenacted R.C. 2929.14(E)(4) with an effective date of April 7, 2009 and that any sentences subsequent to that date, like Ruby's, must be in compliance with these once excised statutes based on their re-enactment." In *Hodge*, however, the Ohio Supreme Court noted that the post-*Foster* amendments to R.C. 2929.14 did not constitute an affirmative reenactment of R.C. 2929.14(E)(4). *Id.* at ¶ 27, fn. 7. In fact, the decisions upon which appellant relies is typified by *State v. Jordan*, 11th Dist. No. 2009-T-0110, 2010-Ohio-5183, which held that "a sentencing judge, pronouncing a sentence after April 7, 2009, must again, as before *Foster's* release, make certain findings of fact before imposing consecutive sentences on a defendant." *Id.* at ¶ 14. That holding

was reversed by the Ohio Supreme Court in *State v. Jordan*, 128 Ohio St.3d 268, 2011-Ohio-737, upon the authority of *Hodge*. Moreover, this court recently affirmed the principle that only an affirmative reenactment of the excised sentencing provisions will cause their revival, explaining that the mere act of reprinting those sections as part of amendments to other provisions does not constitute such a reenactment. *State v. Millhoan*, 6th Dist. Nos. L-10-1328, L-10-1329, 2011-Ohio-4741, quoting *State v. Hohvart*, 7th Dist. No. 10 MA 31, 2011-Ohio-3372, ¶ 11.

{¶ 35} Accordingly, appellant's second assignment of error is not well-taken.

IV. NOTIFICATION IN REGARD TO COSTS OF PROSECUTION

{¶ 36} In his third assignment of error, appellant contends that the trial court erred by not adhering to the mandates of R.C. 2947.23(A)(1)(a) and (b). We agree.

{¶ 37} R.C. 2947.23(A)(1) provides:

{¶ 38} "In all criminal cases, * * * 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:

{¶ 39} "(a) If the defendant fails to pay that judgment or fails to make timely payments toward 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.

{¶ 40} "(b) If the court orders the defendant to perform the community service, the defendant will receive credit upon the judgment at the specified

Slip Copy, 2011 WL 4424295 (Ohio App. 6 Dist.), 2011 -Ohio- 4864
 (Cite as: 2011 WL 4424295 (Ohio App. 6 Dist.))

hourly credit rate per hour of community service performed, and each hour of community service performed will reduce the judgment by that amount.”

{¶ 41} In *State v. King*, 6th Dist. No. WD-09-069, 2010-Ohio-3074, ¶ 12, this court held that the failure to provide the defendant with the required R.C. 2947.23(A)(1) notification in regard to the possible imposition of community service constitutes reversible error. See, also, *State v. Cardamone*, 8th Dist. No. 94405, 2011-Ohio-818, ¶ 13-15.

*8 {¶ 42} In this case, the trial court ordered that appellant pay the costs of prosecution, but did not give the required notification under R.C. 2947.23(A)(1)(a) and (b). The state argues that appellant is barred from raising the issue on appeal, because he did not file a motion to waive the payment of court costs at the time of sentencing. But the defendant's counsel in *King* also failed to file a motion to waive the payment of costs at sentencing, and we still sustained the assigned error in regard to lack of proper notification of potential community service under R.C. 2947.23(A)(1).

{¶ 43} Accordingly, appellant's third assignment of error is well-taken.

V. SECTION REFERENCE OF FIREARM SPECIFICATION

{¶ 44} In his fourth assignment of error, appellant asserts that the trial court failed to include in its sentencing entry the name and section reference of the firearm specification as required under R.C. 2929.19(B)(3)(b). We agree, in part.

{¶ 45} R.C. 2929.19(B)(3)(b) provides:

{¶ 46} “In addition to any other information, [the sentencing court shall] include in the sentencing entry the name and section reference to the offense or offenses, the sentence or sentences imposed and whether the sentence or sentences contain mandatory prison terms, if sentences are im-

posed for multiple counts whether the sentences are to be served concurrently or consecutively, and the name and section reference of any specification or specifications for which sentence is imposed and the sentence or sentences imposed for the specification or specifications.”

{¶ 47} The sentencing entry in this case clearly includes the name of the firearm specification. It imposes a “ONE (1) year mandatory sentence for the firearm specification” and provides that “[t]he mandatory one-year firearm specification term shall run consecutive to counts One and Two.” It does not, however, include any section reference for that specification.

{¶ 48} Relying on *State v. Ford*, 128 Ohio St.3d 398, 2011-Ohio-765, the state argues that “the firearm specification is not a separate offense that must be named in the sentencing entry.” In *Ford*, the Ohio Supreme Court held that a firearm specification and its predicate offense are not allied offenses of similar import, “because a firearm specification is a penalty enhancement, not a criminal offense.” *Id.* at paragraph one of the syllabus. But the nature of a firearm specification as a penalty enhancement, rather than a criminal offense, is irrelevant for purposes of R.C. 2929.19(B)(3)(b), which expressly provides that the sentencing entry shall include section references for both the specification and its predicate offense. Thus, the failure of the trial court to include a section reference for the firearm specification in its judgment entry constitutes error.

{¶ 49} Accordingly, appellant's fourth assignment of error is well-taken in part.

VI. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

*9 {¶ 50} Appellant asserts in his fifth assignment of error that his trial counsel was ineffective “for failing to make the arguments and objections set forth in the preceding assignments of error, and for permitting [him] to enter a plea that was not knowing, intelligent and voluntary.” As to the latter

Slip Copy, 2011 WL 4424295 (Ohio App. 6 Dist.), 2011 -Ohio- 4864
(Cite as: 2011 WL 4424295 (Ohio App. 6 Dist.))

contention, appellant alleges that his trial counsel failed to advise him of the aggregate possible penalty for the charged offenses and claims that if he had been so informed, he "would likely have not entered pleas to the charges and the outcome of the proceedings would have been different."

{¶ 51} The parties agree on the applicable test for determining claims of ineffective assistance of counsel. "Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance." *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus. Prejudice exists where "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Pryor*, 5th Dist. No.2007-CA-00166, 2008-Ohio-1249, ¶ 75.

{¶ 52} As to appellant's contention that his trial counsel failed to rectify the preceding errors, none of those assigned errors has been sustained on grounds that would affect the validity of appellant's pleas or the length of his sentence. In regard to appellant's allegation that he would have pled differently had his trial counsel informed him of the aggregate possible penalty, that allegation is not supported by the record. Appellant was well-aware of the maximum penalty he could receive for all offenses. At his plea hearing, the trial court informed appellant that he could receive a sentence of up to five years on the grant theft and up to ten years on each of the other four counts. The trial court then advised appellant that "your plea will result in a conviction to all crimes charged" and that "the sentence on each count could be imposed either consecutive or concurrent."

{¶ 53} Accordingly, appellant's fifth assignment of error is not well-taken.

VII. ALLIED OFFENSES

{¶ 54} In his final assignment of error, appel-

lant maintains that "the trial court should have conducted an allied offense analysis, found that the offenses were a single course of conduct, and merged all counts for sentencing." According to appellant, "[t]he break-in, beatings and theft offenses were, effectively, one transaction" and "the attempted murder involved the defendants being physically in control of the victims, indicating that the kidnapping was part and parcel of the attempted murder charges."

{¶ 55} R.C. 2941.25 provides:

{¶ 56} "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

*10 {¶ 57} "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶ 58} The Supreme Court of Ohio recently redefined the test for determining whether multiple offenses should be merged as allied offenses of similar import under R.C. 2941.25. In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, ¶ 44, the court overruled its prior decision in *State v. Race* (1999), 85 Ohio St.3d 632, "to the extent that it calls for a comparison of statutory elements solely in the abstract under R.C. 2941.25." Pursuant to *Johnson*, the conduct of the accused must be considered in determining whether two offenses should be merged as allied offenses of similar import under R.C. 2941.25. *Id.*, at the syllabus. The determinative inquiry is two-fold: (1) "whether it is possible to commit one offense *and* commit the other with the same conduct," and (2) "whether the offenses were committed by the same conduct, i.e., 'a

Slip Copy, 2011 WL 4424295 (Ohio App. 6 Dist.), 2011 -Ohio- 4864
(Cite as: 2011 WL 4424295 (Ohio App. 6 Dist.))

single act, committed with a single state of mind.’ “ (Emphasis sic.) *Id.* at ¶ 48–49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008–Ohio–4569, at ¶ 50 (Lanzinger, J., dissenting). “If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.” *Id.* at ¶ 50. “Conversely, if the court determines that the commission of one offense will *never* result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge.” (Emphasis sic.) *Id.* at 51.

{¶ 59} We can summarily conclude at the outset that the counts of aggravated burglary and grand theft should have been merged. At oral argument in this case, the state conceded, and we agree, that those offenses should be merged as allied offenses of similar import under the present facts. The theft of firearms and money was the purpose and grand incidence of the burglary, and only those items were taken from the residence. See *State v. Bridgeman*, 2d Dist. No.2010 CA 16, 2011–Ohio–2680, ¶ 54 (holding that the offenses of aggravated burglary and grand theft were committed with a single state of mind where the defendant forcibly entered a bank to commit grand theft, threatened the employees with a firearm, and left with money from the bank).

{¶ 60} Aside from aggravated burglary and grand theft, we find that all of the offenses in this case were committed with a separate animus. The two counts of attempted murder involve two different victims, and each attempted murder was “necessarily committed with a separate animus.” 1973 Legislative Service Commission comments to R.C. 2941.25, 1972 Am.Sub.H.B. No. 511. See, also, *State v. Harvey*, 3d Dist. No. 5–10–05, 2010–Ohio–5408, ¶ 24 (“Clearly, a defendant can be convicted for more than one offense if each offense involves a different victim, even though the offenses charged are identical * * * ”); *State v. Young*, 2d Dist. No. 23642, 2011–Ohio–747, ¶ 39

(“separate convictions and sentences are permitted when a defendant’s conduct results in multiple victims”); *State v. Poole*, 8th Dist. No. 94759, 2011–Ohio–716, ¶ 14, quoting *State v. Poole*, 8th Dist. No. 80150, 2002–Ohio–5065, ¶ 33 (“felonious assault [like attempted murder] is a crime defined in terms of conduct toward another and * * * where there are two victims, there is a dissimilar import for each person and the two charges of felonious assault are not allied offenses of similar import’ ”).

*11 {¶ 61} The attempted murders and the two allied theft offenses were not committed with the same animus. The facts of this case indicate that the animus for the beatings was to cause the death of the Kohlers. This animus was separate from the animus to commit the burglary and theft. See *State v. Rios*, 8th Dist. No. 95364, 2011–Ohio–3053, ¶ 65. The beatings, moreover, were entirely unnecessary for the successful commission of the theft offenses. See *State v. Howard*, 1st Dist. No. C–100240, 2011–Ohio–2862, ¶ 55. Contrary to appellant’s assertion, there is no indication in the record that the purpose of the beatings was to establish physical control over the Kohlers while the burglary and theft were in progress and, in any event, it was hardly necessary under the circumstances for appellant and his co-defendants to beat two frail and elderly victims to the brink of death in order to control them while those offenses were being committed. Indeed, Mrs. Kohler aptly stated at sentencing, “The person who planned this robbery knew that my husband was physically handicapped and I was a small person. Who would beat another human being under these circumstances?”

{¶ 62} The record also reveals that the kidnapping of Mr. Kohler was committed with a separate animus, distinct from the animus that drove the attempted murders and from the animus that directed the theft offenses. Mr. Kohler was 74 years of age, suffering from a stroke-related disability, and already beaten far beyond what was necessary to control his person or insure his compliance when he

Slip Copy, 2011 WL 4424295 (Ohio App. 6 Dist.), 2011 -Ohio- 4864
(Cite as: 2011 WL 4424295 (Ohio App. 6 Dist.))

was tied up. Indeed, it appears from the record that Mr. Kohler was laying on the floor unconscious with a broken eye socket at the time he was restrained. Under these circumstances, we find that the kidnapping took on a significance of its own, demonstrating a separate animus sufficient to sustain separate convictions and sentences for these offenses. Cf. *State v. Edwards*, 6th Dist. No. L-08-1408, 2010-Ohio-2582, ¶ 17.

{¶ 63} Accordingly, appellant's sixth assignment of error is well-taken to the extent that the trial court failed to merge the counts of aggravated burglary and grand theft.

{¶ 64} The judgment of the Sandusky County Court of Common Pleas is affirmed in part, and reversed in part. The sentences imposed for aggravated burglary and grand theft are vacated. The portion of the sentence relative to costs of prosecution is vacated. The cause is remanded for a new sentencing hearing on those matters, and for further proceedings consistent with this decision. Costs of this appeal are assessed equally to the parties pursuant to App.R. 24(A)(4).

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.

PETER M. HANDWORK, J., ARLENE SINGER,
J., THOMAS J. OSOWIK, P.J., Concur.

Ohio App. 6 Dist., 2011.

State v. Ruby

Slip Copy, 2011 WL 4424295 (Ohio App. 6 Dist.),
2011 -Ohio- 4864

END OF DOCUMENT

Slip Copy, 2010 WL 2676886 (Ohio App. 7 Dist.), 2010 -Ohio- 3151
 (Cite as: 2010 WL 2676886 (Ohio App. 7 Dist.))

CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio,
 Seventh District, Mahoning County.
 STATE of Ohio, Plaintiff-Appellee,
 v.
 Michael GABRIEL, Sr., Defendant-Appellant.

No. 09 MA 108.
 Decided June 30, 2010.

Criminal Appeal from Common Pleas Court, Case
 No. 08CR1509.

Paul Gains, Prosecuting Attorney, Ralph Rivera,
 Assistant Prosecuting Attorney, Youngstown, OH,
 for plaintiff-appellee.

Timothy Young, Ohio Public Defender, Melissa
 Prendergast, Assistant State Public Defender,
 Columbus, OH, for defendant-appellant.

VUKOVICH, P.J.

*1 {¶ 1} Defendant-appellant Michael Gabriel,
 Sr., appeals the sentence entered in the Mahoning
 County Common Pleas Court after a jury found him
 guilty of obstructing official business. Three issues
 are raised in this appeal. The first two deal with the
 trial court's imposition of a fine and court costs. His
 first argument is that the trial court violated the sen-
 tencing statutes when it failed to consider his
 present and future ability to pay fines and costs be-
 fore it imposed such financial sanctions. His second
 argument is that the trial court violated R.C.
 2947.23 when it failed to inform him that his failure
 to pay court costs could result in the court ordering
 him to perform community service. The third and
 final argument is that trial counsel was ineffective.
 For the reasons that follow, the judgment of the tri-
 al court regarding appellant's conviction is af-

firmed, and his sentence is affirmed in part and
 modified in part.

STATEMENT OF CASE ^{FN1}

^{FN1}. Neither of the state's briefs provide a
 statement of the case; it agreed with Gabri-
 el's statement of the case. See App.R.
 16(B). Thus, the statement of the case is
 derived from the case file and Gabriel's
 statement of the case.

{¶ 2} On January 15, 2009, Gabriel was in-
 dicted for obstructing official business, a violation
 of R.C. 2921.31(A) and (B), a fifth degree felony.
 The incident that led to this indictment occurred
 while Gabriel's son, Michael Gabriel, Jr., was being
 arrested at Gabriel's house. Testimony at trial re-
 vealed two different versions of events that trans-
 pired during the arrest.

{¶ 3} According to the two officers, Officer
 Craig and Sergeant Vance, they went to Gabriel's
 house to execute the felony arrest warrants on Gab-
 riel, Jr. They knocked on the door and asked Gab-
 riel if his son was there and if they could talk to him.
 The officers testified that Gabriel was cooperative;
 Gabriel informed them that Gabriel, Jr. was there,
 and Gabriel brought Gabriel, Jr. outside. However,
 at the point that Sergeant Vance began arresting the
 son, Gabriel's cooperative attitude ceased. Gabriel's
 attitude became "heightened" and he approached
 Sergeant Vance from behind and questioned the of-
 ficers about what was going on. (Tr. 229). Although
 Gabriel did not touch Sergeant Vance when he ap-
 proached him, Officer Craig indicated that Gabriel
 "bolted" toward Sergeant Vance. (Tr. 280). Officer
 Craig explained that by the term "bolted" he meant
 not a full sprint, but a "quick charge, quick walk."
 (Tr. 280). Officer Craig then allegedly told Gabriel
 to calm down and back up, but Gabriel did not
 comply. The officer then told him again to back up
 and gave him a push. Gabriel again did not comply,
 but instead took a "bladed stance" with his fist

Slip Copy, 2010 WL 2676886 (Ohio App. 7 Dist.), 2010 -Ohio- 3151
(Cite as: 2010 WL 2676886 (Ohio App. 7 Dist.))

clenched at his side and told Officer Craig that he assaulted Gabriel. The officer once again pushed Gabriel and Gabriel responded by pushing back. Officer Craig then told Gabriel that he was under arrest for obstructing official business. The officer then tried to handcuff Gabriel, but Gabriel took a position that hindered the officer's attempts. It was not until Officer Craig took Gabriel to the ground that he was able to handcuff Gabriel and arrest him.

*2 ¶ 4} Gabriel's testimony differed in some respects from that of the officers. Gabriel contends that he was cooperative throughout the entire process. He contends that while he did ask what was going on when his son was being arrested, he did not approach Sergeant Vance. Furthermore, he contends that he complied with Officer Craig's commands to back up. According to Gabriel, the officer shoved him after he had backed up, told him he was under arrest and then threw him to the ground to handcuff him. Gabriel testified that he is a veteran on disability and he could not "charge" Sergeant Vance or fight back when Officer Craig was pushing him.

¶ 5} Gabriel was tried before a jury and found guilty. 05/21/09 J.E. The trial court sentenced him to two years community control and three years of post release control. As a condition of community control, he was ordered to serve thirty days in jail. He was then fined \$2,500 with \$2,000 suspended and ordered to pay costs.

¶ 6} Gabriel timely appeals. Counsel filed an appellate brief solely addressing the sentence imposed. Gabriel filed a *pro se* brief arguing that trial counsel's performance was ineffective. The state responded to each brief.

FIRST ASSIGNMENT OF ERROR

¶ 7} "THE TRIAL COURT PLAINLY ERRED WHEN IT IMPOSED A \$2,500.00 FINE AND COURT COSTS AS PART OF MR. GABRIEL'S SENTENCE WITHOUT CONSIDERING HIS PRESENT AND FUTURE ABILITY TO PAY, AS REQUIRED BY R.C. 2929.19(B)(6).

SENT. T. 8; MAY 28, 2009 JUDGMENT ENTRY OF SENTENCING; CRIM.R. 52."

¶ 8} Under this assignment of error, Gabriel argues that although he did not object at sentencing to the court's imposition of a fine and court costs, the trial court committed plain error when it did so without first considering his present and future ability to pay the fine and court costs.

¶ 9} Our analysis begins with the imposition of the fine. Usually a reviewing court reviews a trial court's decision to impose a fine under an abuse of discretion standard of review. *State v. Keylor*, 7th Dist. No. 02MO12, 2003-Ohio-3491, ¶ 9. However, since Gabriel did not object to the fine at sentencing, we review the trial court's imposition of the fine for plain error. As we have previously explained:

¶ 10} "Where the offender does not object at the sentencing hearing to the amount of the fine and does not request an opportunity to demonstrate to the court that he does not have the resources to pay the fine, he waives any objection to the fine on appeal." *Id.* at ¶ 12.

¶ 11} R.C. 2929.18 and R.C. 2929.19 govern the imposition of financial sanctions. Under R.C. 2929.18(A)(3)(e) an offender convicted of a fifth degree felony can be fined up to \$2,500. However, R.C. 2929.19(B)(6) states that before imposing a fine under R.C. 2929.18, "the court shall consider the offender's present and future ability to pay the amount of the sanction or fine."

¶ 12} A trial court does not need to explicitly state in its judgment entry that it considered the defendant's ability to pay because the determination of whether that requirement can be satisfied can be gleaned from a review of the entire record. *State v. Williams*, 4th Dist. No. 08CA3, 2009-Ohio-657, ¶ 20 (indicating that it is more preferable for a court to state it considered a defendant's ability to pay in the judgment entry). We have previously indicated, as have other appellate courts, that when a pre-

Slip Copy, 2010 WL 2676886 (Ohio App. 7 Dist.), 2010 -Ohio- 3151
 (Cite as: 2010 WL 2676886 (Ohio App. 7 Dist.))

sentence investigation report (PSI) contains financial information and the court states that it considered the PSI, that statement is sufficient to comply with R.C. 2929.19(B)(6). *State v. Weyand*, 7th Dist. No. 07CO4, 2008-Ohio-6360, ¶ 13-14. See, also, *State v. Rickett*, 4th Dist. No. 07CA846, 2008-Ohio-1637, ¶ 6; *State v. Bemmes*, 1st Dist. No. C-010522, 2002-Ohio-1905. Likewise, statements by the trial court, defense counsel and the offender at sentencing may also demonstrate compliance with R.C. 2929.19(B)(6). *Weyand*, supra, at ¶ 13-14; *Rickett*, supra, at ¶ 7; *Bemmes*, supra.

*3 {¶ 13} In the case at hand, there is evidence in the record that the trial court considered the present and future ability to pay the fine before imposing it. At sentencing, defense counsel informed the court that Gabriel is a 63-year-old disabled man who receives a disability pension. 05/27/09 Tr. 5. The PSI, which was discussed at sentencing, confirms that information and indicates that Gabriel is unemployed. The report further notes that Gabriel asserts he has no financial assets and his financial obligations are a truck payment, a YMCA membership, utilities and insurance.

{¶ 14} The sentencing judgment entry clearly indicates that it considered the PSI when imposing the fine. It also provides another indication that the trial court considered Gabriel's present and future ability to pay the fine when after imposing the fine it stated:

{¶ 15} "Note: Defendant is the owner of real estate and currently receives a V.A. disability income." 05/28/09 J.E.

{¶ 16} Likewise, the following statement by the trial court at sentencing also indicates that it considered R.C. 2929.19(B)(6) when it imposed the fine and suspended a portion of it because of Gabriel's financial inability to pay the full fine:

{¶ 17} "There will be a fine of \$2,500. For good cause, \$2,000 will be suspended. The balance is to be paid within 90 days." 05/27/09 Tr. 8.

{¶ 18} Thus, the record verifies that the trial court considered Gabriel's present and future ability to pay the fine before imposing it.

{¶ 19} Besides arguing that the court failed to consider his ability to pay, Gabriel also appears to be contending that he cannot afford to pay the fine. In the brief, he emphasizes that he was found indigent and counsel was appointed for him. However, that fact does not prohibit the court from imposing a fine. We have previously explained:

{¶ 20} "[A] determination that a criminal defendant is indigent for purposes of receiving appointed counsel does not prohibit the trial court from imposing a financial sanction pursuant to R.C. 2929.18. This is because the ability to pay a fine over a period of time is not equivalent to the ability to pay legal counsel a retainer fee at the onset of criminal proceedings." *Weyand*, 7th Dist. No. 07CO40, 2008-Ohio-6360, at ¶ 16. (Internal citations omitted).

{¶ 21} Consequently, considering all of the above, the trial court did not abuse its discretion in imposing the fine, let alone commit plain error.

{¶ 22} Having concluded that the trial court did not err in imposing the fine, we now turn to the trial court's imposition of court costs. Gabriel argues that the trial court erred when it imposed court costs without first considering R.C. 2929.19(B)(6). This court has previously addressed this exact argument and found it to be without merit. *Id.* at ¶ 17. We explained that R.C. 2929.19(B)(6) is not applicable and there is no requirement to consider the present and future ability to pay before ordering costs. *Id.*

*4 {¶ 23} Based on the foregoing, Gabriel's first assignment of error is without merit.

SECOND ASSIGNMENT OF ERROR

{¶ 24} "THE TRIAL COURT PLAINLY ERRED WHEN IT IMPOSED COURT COSTS AS A PART OF MR. GABRIEL'S SENTENCE

Slip Copy, 2010 WL 2676886 (Ohio App. 7 Dist.), 2010 -Ohio- 3151
 (Cite as: 2010 WL 2676886 (Ohio App. 7 Dist.))

WITHOUT NOTIFYING HIM THAT HIS FAILURE TO PAY COURT COSTS MAY RESULT IN THE COURT'S ORDERING HIM TO PERFORM COMMUNITY SERVICE. MAY 28, 2009 JUDGMENT ENTRY OF SENTENCING; CRIM.R. 52.”

{¶ 25} Under this assignment of error Gabriel argues that the trial court erred by imposing court costs without first notifying him that under R.C. 2947.23 his failure to pay court costs could result in the court ordering him to perform community service. The state counters this argument by contending that the issue is not ripe for review.

{¶ 26} R.C. 2947.23 provides, in pertinent part:

{¶ 27} “(A)(1) 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:

{¶ 28} “(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.

{¶ 29} “(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.” (Emphasis added.)

{¶ 30} It is undisputed that the trial court did not notify Gabriel that his failure to pay courts costs could result in an order to perform community service. Furthermore, nothing in the record indic-

ates that Gabriel paid court costs or that the trial court is attempting to order Gabriel to perform community service because of that failure.

{¶ 31} A few appellate courts have held that while R.C. 2947.23 makes it mandatory for the trial court to inform a defendant that he/she could be ordered to perform community service, until the defendant suffers prejudice from the trial court's failure, the issue is not ripe for appeal. *State v. Boice*, 4th Dist. No. 08CA24, 2009-Ohio-1755, ¶ 11 ^{FN2}; *State v. Nutter*, 12th Dist. No. CA2008-10-0009, 2009-Ohio-2964, ¶ 12; *State v. Kearsse*, 3d Dist. No. 17-08-29, 2009-Ohio-4111, ¶ 7-15. Prejudice would occur if the defendant fails to pay the court costs and if the trial court orders community service for that failure. *Boice*, supra.

FN2. It is acknowledged that the Fourth Appellate District has also held that the issue is ripe for review. *State v. Burns*, 4th Dist. Nos. 08CA1, 08CA2 and 08CA3, 2009-Ohio-878, ¶ 12 and fn.3, departing from its 2006 decision in *State v. Ward*, 168 Ohio App.3d 701, 2006-Ohio-4847, ¶ 41, holding that the issue was not ripe for review. Following the *Burns* decision, the Fourth Appellate District has issued at least three decisions, including the *Boice* decision, that reinstated the *Ward* holding (that the issue is not ripe for review). See *State v. Moore*, 4th Dist. No. 09CA2, 2009-Ohio-5732, ¶ 7; *State v. Welch*, 4th Dist. No. 08CA29, 2009-Ohio-2655, ¶ 13-14. Thus, it appears the Fourth District has implicitly overruled its decision in *Burns*.

However, Judge Harsha of the Fourth District has consistently dissented from the holding that the issue is not ripe for review. *State v. Moore*, 4th Dist. No. 09CA2, 2009-Ohio-5732, ¶ 8 (Harsha, J., dissenting); *State v. Welch*, 4th Dist. No. 08CA29, 2009-Ohio-2655, ¶ 16 (Harsha, J., dissenting); *State v. Boice*,

Slip Copy, 2010 WL 2676886 (Ohio App. 7 Dist.), 2010 -Ohio- 3151
 (Cite as: 2010 WL 2676886 (Ohio App. 7 Dist.))

4th Dist. No. 08CA24, 2009-Ohio-1755 (Harsha, J., dissenting); *State v. Slonaker*, 4th Dist. No. 08CA21, 2008-Ohio-7009, ¶ 9 (Harsha, J., dissenting). He contends that judicial economy would be served if the issue was actually decided and, as such, instead of stating in dicta that community service cannot be ordered, he would just make that holding outright. *Slonaker*, supra.

{¶ 32} In 2009 and early 2010, we followed those holdings in *State v. Walters*, 7th Dist. No. 08CO34, 2009-Ohio-6762, ¶ 12 and *State v. Heddleson*, 7th Dist. No. 08BE41, 2010-Ohio-1107, ¶ 17-21.^{FN3} However, in *Heddleson*, there was a dissent that indicated that the issue is ripe for review and that the appellate court should outright hold that the trial court is foreclosed from ordering community service if the offender fails to pay court costs. *Heddleson*, supra, ¶ 23-24. (Vukovich, J.; dissenting).

FN3. Recently in *State v. Castle*, 7th Dist. No. 08MA195, 2010-Ohio---, ¶ 13, when the state conceded that the trial court could not impose community service if the offender did not pay the court costs, we did not hold that the issue was not ripe for review. Rather, considering the concession, we held that the trial court could not impose community service if the offender did not pay the court costs.

*5 {¶ 33} Reconsidering our prior majority positions in *Heddleson* and *Walters*, we find that the dissent's position in *Heddleson* is more logical. Even though the offender has not yet been ordered to serve community service for any failure to pay court costs, judicial economy is best served by finding that the trial court cannot order community service for the failure to pay court costs when the court did not advise in accordance with R.C. 2947.23 that community service could be ordered if the offender failed to pay court costs. Consequently, we overrule our prior decisions in

Heddleson and *Walters* to the extent that they hold that the issue is not ripe for review.

{¶ 34} Accordingly as the issue is ripe for review, we hold that the trial court's failure to comply with R.C. 2947.23 at sentencing prohibits the court from ordering Gabriel to perform community service if he fails to pay his court cost. Accordingly, the trial court's sentencing entry is modified to prohibit imposition of community service as a means of collecting court costs. This assignment of error is sustained in part.

PRO SE ASSIGNMENT OF ERROR

{¶ 35} "WAS DEFENSE ATTORNEY MICHAEL SAKMAR COMPETENT IN PRESENTING THE BEST POSSIBLE DEFENSE FOR DEFENDANT MICHAEL M. GABRIEL, SR. AS REQUIRED BY THE OHIO RULES OF PROFESSIONAL CONDUCT?"

{¶ 36} Gabriel's *pro se* argument solely concentrates on the closing argument presented by defense counsel. He cites many statements made by counsel during closing argument that he claims bolsters the state's case rather than raising doubt about the state's position. Gabriel also asserts that counsel did not acknowledge his disability in the closing argument, but rather made it appear that he could move better than he can. He claims that the statements made by counsel in closing argument amounted to ineffective assistance of trial counsel.

{¶ 37} When reviewing the portions of the transcript that he cites and when reading the closing argument as a whole, it appears that Gabriel is attacking counsel's trial strategy. It is clear from reading the entire closing argument (and even the witnesses' testimony) that counsel's position was that Gabriel did nothing to interfere with the arrest, and thus, the state could not prove the element of doing an act to purposely prevent, obstruct, or delay performance of official act, i.e. purposely doing an act to prevent his son's arrest. The statements Gabriel is focusing on in attempt to show ineffective assistance of counsel are taken somewhat out of con-

Slip Copy, 2010 WL 2676886 (Ohio App. 7 Dist.), 2010 -Ohio- 3151
 (Cite as: 2010 WL 2676886 (Ohio App. 7 Dist.))

text. Gabriel's counsel was not bolstering the officer's testimony, however, he was also not bolstering his own client's testimony. Counsel was arguing that the truth was somewhere in the middle. The following excerpt of the closing argument best illustrates counsel's argument that the truth of the events was in the middle of the two testified versions of the events and that the defense was that Gabriel did no act to prevent his son's arrest.

*6 {¶ 38} “ * * * So Mr. Gabriel never really even got to the point where he could obstruct, interfere with the arrest. He got close enough that Officer Craig-his red lights are flashing there, the hair on the back of his neck is standing up. He even said something to the effect he was startled by Mr. Gabriel's move. And, you know, maybe Mr. Gabriel wasn't moving fast, maybe he made a sudden move, something caught Officer Craig's eye. * * *

{¶ 39} “ * * * Which I guess coming back to Mr. Gabriel might well have done something to trigger Officer Craig's protective training instructs. That doesn't mean Mr. Gabriel was interfering in the arrest of his son. And I've heard a lot of testimony here. All four people got to give the story. And when you look at the testimony, and you will be given the instructions by the judge, you need to go back then to the statute, which Mr. Gabriel is charged with violating, the obstructing official business statute. And you have got to look at the testimony in the light of did Mr. Gabriel with the purpose to prevent, obstruct or delay performance of official acts, did he purposely do something to hamper that and create a risk of physical harm to the officers?

{¶ 41} “He was cooperative, he was cooperative, he was cooperative, and then allegedly he was less cooperative. But you've heard testimony from all four people there. To find Mr. Gabriel guilty, you have to-you have to be able to see that-let me find my one card here. There's eight bullet points, a little sheet that the prosecutor brought out and early

on in the trial, you could see the first three bullet points are, you know, yes. The defendant is the defendant. He is the proper person identified; this happened in Mahoning County, state of Ohio; and the defendant has no privilege to interrupt in the arrest of his son. Those are the first three bullet points that the state is attempting to make. And we agree with those three.

{¶ 42} “But I guess the last five, purposely-with the purpose to prevent, obstruct or delay, the arrest of his son. He did an act, a specific act, hampering or impeding these officers in the performance of their duty, creating a risk of physical harm to the officers. Again, kind of listened [sic] to the prosecution's theory, it seems like their story is, yeah, he was cooperative, he was cooperative, he was cooperative and all of the sudden he snapped and tried to break up the arrest. I find that one is hard to believe. As he was cooperative, he was cooperative, he was cooperative and all of a sudden Officer Craig, with no reason whatsoever, without provocation, jumped on the defendant and tackled him. Both of those stories seem just fanciful and unrealistic. The father identifies his son, brings him out to the police. Then, all of a sudden-you now, I guess, Mr. Gabriel can get around. He's not confined to a wheelchair, he's not crippled. But he's not 25 years old. He one time practiced marital arts. He's familiar with a two-hand bladed fighting stance. He also testified at this point of his life, he can no longer assume a two-hand bladed fighting stance due to the fact that his hips are crippled with arthritis, and that that evening he did not take a two-hand bladed fighting stance to confront Sergeant Vance to try to interrupt in the arrest of his son who he just literally brought out to the police.

*7 {¶ 43} “Again, I've brought out three possible ways that this-that we could have got from point A to point B. I think the first two stories are a little fanciful. The third option where Officer Craig legitimately intervened to protect his fellow officer, I think that can happen.

{¶ 44} “And at the same time, Mr. Gabriel was

Slip Copy, 2010 WL 2676886 (Ohio App. 7 Dist.), 2010 -Ohio- 3151
 (Cite as: 2010 WL 2676886 (Ohio App. 7 Dist.))

not attempting to obstruct, delay, hamper, [or] interfere in the arrest of his son. I think if you look at the facts, look at the testimony, look at the bullet points, look at the law, the jury instruction which you will be provided by the judge I think you could only find one outcome in this matter and that would be that the defendant, Michael Gabriel, Sr. is not guilty of the offense of obstructing official business.” (Tr. 386, 388-392).

{¶ 45} In order to show that the statements made in closing argument and the defense asserted amount to ineffective assistance of counsel, Gabriel has to show the two prong test articulated in *Strickland v. Washington* (1984), 466 U.S. 668. Under *Strickland*, a reviewing court will not deem counsel's performance ineffective unless a defendant can show his lawyer's performance fell below an objective standard of reasonable representation and that the defendant was prejudiced by counsel's deficient performance. *Id.* at 687; *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph one of syllabus. If this court finds that either prong fails, there is no need to analyze the remaining prong because in order for ineffective assistance of counsel to be shown, both prongs must be established by appellant. *State v. Herring*, 7th Dist. No. 06JE8, 2007-Ohio-3174, ¶ 43.

{¶ 46} Concerning whether counsel's choice of defense amounts to ineffective assistance of counsel, we have explained that an appellate court will not second guess trial strategy:

{¶ 47} “When considering an ineffective assistance of counsel claim, the reviewing court should not consider what, in hindsight, may have been a more appropriate course of defense. See *State v. Phillips* (1995), 74 Ohio St.3d 72, 85 (a reviewing court must assess the reasonableness of defense counsel's decisions at the time they are made). Rather, the reviewing court “must be highly deferential.” *Strickland*, 466 U.S. at 689.

{¶ 48} “Appellate courts, ‘must indulge a strong presumption that counsel's conduct falls

within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action “might be considered sound trial strategy.” ‘ *Id.*; see, also, *State v. Hamblin* (1988), 37 Ohio St.3d 153, certiorari denied (1988), 488 U.S. 975.” *State v. McGee*, 7th Dist. No. 07MA137, 2009-Ohio-6397, ¶ 14-15.

{¶ 49} During trial the complaint Gabriel brought against Officer Craig for his actions in arresting Gabriel was discussed. The police department investigated the complaint and Officer Craig was cleared of the matter. It was further explained that in his ten years as a police officer, Officer Craig has never had a previous complaint filed against him. Given those facts, and the differences in the versions of events, defense counsel's claim that the truth was in the middle of the two versions was a believable strategic stance to take. It was a position that possibly could be believed by the jury. Likewise, such position would promote the defense that even if Gabriel did move slightly toward Sergeant Vance, he did not do an act to hinder his son's arrest. The jury could believe that if he did walk toward the officer asking what was going on, he did not move in such a way to hinder the arrest. Moreover, as is shown in the above excerpt, counsel did acknowledge that Gabriel is disabled. Gabriel may have wished for counsel to state that Gabriel had to walk with two canes and thus, could not have moved toward the officer in a manner that could be deemed hindering the arrest. However, testimony at trial indicated that he was not using canes that day and that the officers did observe him to be moving slower. Thus, counsel's statement in closing that Gabriel was not in a wheelchair and that he could move around was accurate. (Tr. 379). Considering the strong presumption of reasonable professional assistance, we cannot find that the trial counsel's performance was deficient. Consequently, this assignment of error lacks merit.

CONCLUSION

*8 {¶ 50} For the above stated reasons, the first

Slip Copy, 2010 WL 2676886 (Ohio App. 7 Dist.), 2010 -Ohio- 3151
(Cite as: 2010 WL 2676886 (Ohio App. 7 Dist.))

assignment of error and the *pro se* assignment are overruled. The second assignment of error is overruled in part and sustained in part. As to the trial court's imposition of a fine and court costs it is overruled. However, as to the trial court's failure to instruct at sentencing that if Gabriel fails to pay court costs he could be ordered to perform community service is sustained. Accordingly, the conviction and the trial court's imposition of a fine and court costs are hereby affirmed. However, the sentence entry is modified to indicate that the trial court is prohibited from imposing community control as a means of collecting court costs.

WAITE and DeGENARO, JJ., concur.

Ohio App. 7 Dist., 2010.
State v. Gabriel
Slip Copy, 2010 WL 2676886 (Ohio App. 7 Dist.),
2010 -Ohio- 3151

END OF DOCUMENT

Slip Copy, 2011 WL 2175986 (Ohio App. 8 Dist.), 2011 -Ohio- 2662
(Cite as: 2011 WL 2175986 (Ohio App. 8 Dist.))

CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio,
Eighth District, Cuyahoga County.
STATE of Ohio, Plaintiff–Appellee
v.
Lowell ADAMS, Defendant–Appellant.

No. 95439.
Decided June 2, 2011.

Criminal Appeal from the Cuyahoga County Court
of Common Pleas, Case No. CR–529961.
Terrence K. Scott, Assistant State Public Defender,
Columbus, OH, for appellant.

William D. Mason, Cuyahoga County Prosecutor
by Mary McGrath, Assistant County Prosecutor,
Cleveland, OH, for appellee.

Before: E. GALLAGHER, J., SWEENEY, P.J., and
KEOUGH, J.

EILEEN A. GALLAGHER, J.

*1 {¶ 1} Lowell Adams (“Appellant”), appeals his convictions from the Cuyahoga County Court of Common Pleas. Appellant argues that the trial court erred by not informing him that his failure to pay court costs may result in court ordered community service, that his trial counsel provided ineffective assistance for failing to object to this omission, and that his guilty plea was not knowing, voluntary and intelligent because the court inadequately informed him of his right to compulsory process. For the following reasons we affirm, in part, and reverse, in part.

{¶ 2} Appellant was indicted on October 20, 2009. Appellant's five count indictment included

charges of kidnapping (Count 1), rape (Count 2), felonious assault (Count 3), domestic violence (Count 4), and endangering children (Count 5). Appellant initially pled not guilty to the indictment. On May 26, 2010, pursuant to a plea agreement between the State and appellant, the State moved to amend count 2 (rape) to gross sexual imposition pursuant to R.C. 2907.05(A)(4) and count 3 (felonious assault) to child endangering pursuant to R.C. 2919.22(B)(2). Under the plea agreement, appellant would plead guilty to the two amended counts and all other remaining counts would be dismissed. Appellant entered a guilty plea pursuant to this agreement and was sentenced on June 28, 2010 to consecutive terms of five years on Count 2 and two years on Count 3. Appellant was advised of a mandatory five year period of postrelease control. Finally, the trial court ordered appellant to pay court costs. Appellant subsequently appealed raising the three assignments of error contained in the appendix of this opinion.

{¶ 3} In his first assignment of error, appellant argues that the trial court committed plain error when it failed to notify him that his failure to pay court costs could result in his being ordered to perform community service. R.C. 2947.23(A)(1) requires that at the time the trial court imposes sentence, the court “shall” notify the defendant that if he fails to pay, or make timely payments against, the judgment of court costs rendered against him, the court “may order the defendant to perform community service * * *.” The trial court did not provide this required notification to appellant. We recently held in *State v. Cardamone*, Cuyahoga App. No. 94405, 2011–Ohio–818, that the appropriate remedy where a trial court fails to provide the notice required pursuant to R.C. 2947.23(A)(1), is for the portion of the trial court's entry relative to court costs to be vacated and the case remanded to the trial court for resentencing as to the issue of court costs. Thus, appellant's first assignment of error is sustained.

Slip Copy, 2011 WL 2175986 (Ohio App. 8 Dist.), 2011 -Ohio- 2662
(Cite as: 2011 WL 2175986 (Ohio App. 8 Dist.))

{¶ 4} In his second assignment of error, appellant argues that his trial counsel provided ineffective assistance by failing to object when the trial court imposed costs without notifying him that the failure to pay such costs could result in the court ordering him to perform community service. In light of our ruling on appellant's first assignment of error, we find that appellant's second assignment of error is moot and is hereby disregarded pursuant to App.R. 12(A)(1)(c). *State v. Burns*, Gallia App. Nos. 08CA1, 08CA2, 08CA3, 2009-Ohio-878, at ¶ 13.

*2 {¶ 5} Appellant argues in his third assignment of error that his guilty plea must be vacated due to the fact that it was not knowing, voluntary, and intelligent because the trial court failed to correctly explain his right to compulsory process and failed to apprise him of the maximum sentence he faced.

{¶ 6} The standard for reviewing whether the trial court accepted a plea in compliance with Crim.R. 11(C) is a de novo standard of review. *State v. Cardwell*, 8th Dist. No. 92796, 2009-Ohio-6827, ¶ 26, citing *State v. Stewart* (1977), 51 Ohio St.2d 86, 364 N.E.2d 1163. "It requires an appellate court to review the totality of the circumstances and determine whether the plea hearing was in compliance with Crim.R. 11(C)." *Id.*

{¶ 7} Crim.R. 11(C) sets forth a trial court's duties in accepting guilty pleas and states as follows:

{¶ 8} "(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:

{¶ 9} "(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.

{¶ 10} "(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.

{¶ 11} "(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."

{¶ 12} The trial court must strictly comply with its duties of notifying the defendant of his constitutional rights and must strictly comply with those provisions of Crim.R. 11(C) that relate to the waiver of constitutional rights. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, syllabus; *State v. Ballard* (1981), 66 Ohio St.2d 473, 423 N.E.2d 115, at paragraph one of the syllabus. "Strict compliance" does not require an exact recitation of the precise language of the rule but instead focuses on whether the trial court explained or referred to that defendant in a manner reasonably intelligible to that defendant. *Ballard*, at paragraph two of the syllabus.

{¶ 13} With regard to notification of the constitutional right of compulsory process, we have previously stated that, "[a]lthough a trial court need not specifically tell a defendant that he has the right to 'compulsory process,' it must nonetheless 'inform a defendant that it has the power to force, compel, subpoena, or otherwise cause a witness to appear and testify on the defendant's behalf.'" *State v. Cummings*, Cuyahoga App. No. 83759, 2004-Ohio-4470, quoting *State v. Wilson*, Cuyahoga App. No. 82770, 2004-Ohio-499, at ¶ 16, appeal not allowed, 102 Ohio St.3d 1484,

Slip Copy, 2011 WL 2175986 (Ohio App. 8 Dist.), 2011 -Ohio- 2662
(Cite as: 2011 WL 2175986 (Ohio App. 8 Dist.))

2004-Ohio-3069, 810 N.E.2d 968.

*3 {¶ 14} Prior to accepting appellant's guilty plea in this case, the trial court informed appellant, "Sir, if you had a trial, counsel would be with you. He'd have a right to ask questions and challenge the case against you. *You have a right to call witnesses. You could subpoena them for trial. * * **" (Emphasis added.) (Tr. 27.)

{¶ 15} We have previously held that the use of the word "subpoena" adequately informs the defendant of his right to compulsory process. *State v. Parks*, Cuyahoga App. No. 86312, 2006-Ohio-1352, appeal not allowed by 110 Ohio St.3d 1443, 2006-Ohio-3862, 852 N.E.2d 190; *State v. Senich*, Cuyahoga App. No. 82581, 2003-Ohio-5082; *State v. Gurley* (June 5, 1997), Cuyahoga App. No. 70586. In *State v. Moulton*, Cuyahoga App. No. 93726, 2010-Ohio-4484, we held that the trial court's statement that the defendant had a right to "subpoena and call witnesses" clearly informed her at the time of her plea of her right to compulsory process. *Id.* at ¶ 12.

{¶ 16} In the present case, we find the trial court's statements that, "[y]ou have a right to call witnesses. You could subpoena them for trial" adequately informed appellant at the time of his plea of his right to compulsory process. We find that the trial court strictly complied with the requirements of Crim.R. 11(C) in accepting appellant's waiver of his right to compulsory process.

{¶ 17} Finally, appellant argues that the trial court failed to inform him of maximum potential penalty for his offenses because it failed to inform him that in the event that he fails to pay court costs, he may be ordered to perform community service.

{¶ 18} The trial court's duty to inform the defendant of the maximum potential penalty for each offense is a nonconstitutional requirement of Crim.R. 11(C)(2)(a). *State v. Scott*, Cuyahoga App. Nos. 84381, 84382, 84383, 84384, 84389, 2005-Ohio-3690, citing *State v. Griggs*, 103 Ohio

St.3d 85, 87, 2004-Ohio-4415, 814 N.E.2d 51.

{¶ 19} With respect to the nonconstitutional requirements of Crim.R. 11, as set forth in Crim.R. 11(C)(2)(a) and (b), reviewing courts shall consider whether there was substantial compliance with the rule. *Veney*, at ¶ 14-17. Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving. *Id.*, citing *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474.

{¶ 20} Furthermore, a defendant must show prejudice before a plea will be vacated for a trial court's error involving Crim.R. 11(C) procedure when nonconstitutional aspects of the colloquy are at issue. *Veney*. The test for prejudice is whether the plea would have otherwise been made. *Id.*; see, also, *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462.

{¶ 21} Though appellant presents this argument only in passing and provides no legal support for his position, we note that the Ohio Supreme Court has stated that, "[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, 79, 2010-Ohio-954, 926 N.E.2d 278, 281, quoting *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, ¶ 15.

*4 {¶ 22} 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)." The Twelfth District Court of Appeals reached the same conclusion in *State v. Smith*, Warren App. No. CA2010-06-057, 2011-Ohio-1188.

{¶ 23} We agree with the reasoning of the

Slip Copy, 2011 WL 2175986 (Ohio App. 8 Dist.), 2011 -Ohio- 2662
(Cite as: 2011 WL 2175986 (Ohio App. 8 Dist.))

Fourth and Twelfth Districts and hold 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 appellant that his failure to pay court costs could potentially subject him to community service in order to inform him of the "maximum penalty involved," as required by Crim.R. 11(C)(2)(a). Appellant's third assignment of error is overruled.

{¶ 24} The judgment of the trial court is affirmed in part and reversed and remanded in part. On remand, a hearing shall be held for only the proper notification of the penalty for a failure to pay court costs.

It is ordered that appellant recover of appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, P.J., and KATHLEEN A. KEOUGH, J., concur.

Appendix

Assignment of Error No. 1:

"The trial court committed plain error by imposing court costs without notifying Mr. Adams that his failure to pay such costs may result in the court's ordering him to perform community service."

Assignment of Error No. 2:

"Trial counsel provided ineffective assistance, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution, for failing to object to the trial court's imposition of court costs,

as the trial court did not notify Mr. Adams that his failure to pay court costs may result in the court's ordering him to perform community service."

Assignment of Error No. 3:

"Lowell Adams was deprived of his right to due process under the Fourteenth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution when the trial court accepted an unknowing, unintelligent, and involuntary guilty plea."

Ohio App. 8 Dist., 2011.

State v. Adams

Slip Copy, 2011 WL 2175986 (Ohio App. 8 Dist.),
 2011 -Ohio- 2662

END OF DOCUMENT



951 N.E.2d 89 (Table)
 129 Ohio St.3d 1426, 951 N.E.2d 89 (Table), 2011 -Ohio- 3740
 (Cite as: 129 Ohio St.3d 1426)

Page 1

(The decision of the Court is referenced in the North Eastern Reporter in a table captioned "Supreme Court of Ohio Motion Tables".)

Supreme Court of Ohio
 State
 v.
 Smith

NO. 2011-0811
 August 01, 2011

MOTION AND PROCEDURAL RULINGS

Warren App. No. CA2010-06-057, 2011-Ohio-1188. On review of order certifying a conflict. The court determines that a conflict exists. The parties are to brief the following issue, as modified from the issue certified in the court of appeals' entry filed April 18, 2011:

"[W]hether a sentencing court's failure to inform an offender, as required by R.C. 2947.23(A)(1), that community service could be imposed if the offender fails to pay the costs of prosecution or "court costs" presents an issue ripe for review even though the record does not show that the offender has failed to pay such costs or that the trial court has ordered the offender to perform community service as a result of failure to pay."

McGee Brown, J., dissents.

The conflict case is *State v. Moss*, 186 Ohio App.3d 787, 2010-Ohio-1135.

Ohio 2011.
 State v. Smith
 129 Ohio St.3d 1426, 951 N.E.2d 89 (Table), 2011 -Ohio- 3740

END OF DOCUMENT

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

EXHIBIT 8