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

This case presents a critical issue in respect to Appellant's right to be informed in open court, at the time of sentencing, that he is obligated to pay court costs, and a failure of a court to do so is reversible error.

The constitutional questions presented here are: whether Appellant has a constitutional right to be informed in open court, at the time of sentencing, that he is obligated to pay court costs; whether the trial court abuses its discretion, and commits reversible error when it fails to inform a defendant of an obligation to pay court costs; and if Appellant is entitled to resentencing when he is not informed in open court, at the time of sentencing, that he is obligated to pay court costs?

In the instant case, the trial court abused its discretion when it failed to inform Appellant that he was obligated to pay court costs, at the time that it rendered a judgment and sentence against Appellant; denying Appellant the opportunity to see a waiver of said court costs, and thereby denying him due process in the matter.

As such, to ensure that justice is rendered in this matter, this Honorable Court must accept jurisdiction of this case and review this issue on its merit.

STATEMENT OF THE CASE AND FACTS

Appellant was charged by way of indictment in the Cuyahoga County Court of Common Pleas with one count of Felonious Assault (Case No. 530921); one count of Kidnapping (Case No. 530921); two counts of Possession of Drugs (Case Nos. 500587, 500881); and one count of Theft (Case No. 532408).

Appellant proceeded to trial on the Felonious Assault and Kidnapping charges, where he was found guilty on both counts. Thereafter, Appellant pled guilty to the remaining charges of Possession of Drugs and Theft.

On April 12, 2010, Appellant filed a timely Notice of Appeal in the Cuyahoga County Court of Appeals, Eighth Appellate District. On April 2, 2013, Appellant filed a Motion to Vacate Court Costs, and/or Motion For Resentencing, arguing the issue that the Court abused its discretion in failing to inform him, at the time of sentencing, that he was obligated to pay court costs.

The court failed to rule on the matter, and issue the required Finding of Facts and Conclusion s of Law. Whereupon, on April 25, 2013, Appellant filed a motion, moving the court to issue the required Finding of Facts and Conclusions of Law, to enable Appellant the opportunity to perfect an appeal of right. The court, as well, failed to rule upon this motion.

Subsequently, on May 31, 2013, Appellant filed a timely Notice of Appeal before the Cuyahoga County Court of Appeals, Eighth Appellate District, along with a Motion for Appointment of counsel,

and a motion for Preparation of Complete Transcript. The court denied Appellant's request for appointment of counsel; granted the Notice of Appeal, and the motion for Preparation of Complete Transcript - of which Appellant only received a partial copy.

On August 13, 2013, Appellant submitted a timely brief in respect to his stated claim. The court of appeals affirmed the judgment of the court of common pleas, in an opinion and journal entry entered in case no. 99952, on March 6, 2014. It is from this opinion that Appellant now appeals.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW NO.1

APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS, AND PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT WHEN THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION TO VACATE COURT COSTS, AND/OR MOTION FOR RESENTENCING.

On March 12, 2010, while present in court, with defense counsel Scott Ramsey, Appellant was sentenced to an aggregate term of seven (7) years imprisonment, for convictions of Felonious Assault, Kidnapping, Possession of Drugs and Theft. During sentencing on the convictions, although the court properly informed Appellant that post release control was part of the sentence, it failed to inform Appellant that he would be required to pay court cost. In so doing, the court abused its discretion, to Appellant's

prejudice; denying him due process, as Appellant was denied the opportunity to seek a waiver of the court cost.

Pursuant to Criminal Rule 43(A), "A criminal defendant must be present at every stage of his trial." This includes sentencing. Further, in *State v. Joseph*, 125 Ohio St.3d, 76, This Honorable Court held that the trial court committed reversible error when it imposed court costs in its sentencing entry after failing to impose said costs in open court, during the sentencing hearing. The court stated that the defendant "was not given an opportunity at the sentencing hearing to seek a waiver of the payment of costs because the trial court did not mention costs at the sentencing hearing." *Id.*, 13, 926 N.E.2d, 278. In its ruling, this Honorable Court held that the defendant was prejudiced because he was denied the opportunity to claim indigency and seek a waiver of the payment of court costs before the trial court; and due process requires that the defendant be given such an opportunity. *Id.*, at 22.

The trial court's failure to impose court costs, in open court, deprived Appellant of the opportunity to claim indigency and seek a waiver of the payment of court costs. Although the trial court is required to assess costs against an indigent defendant, the defendant has the right, and should be given the opportunity in open court, to make a motion to waive said costs at the time of sentencing. It is a denial of due process to deny a defendant such an opportunity, as Appellant was so denied in the instant case.

The court of appeals held that Appellant's claim is barred from review by the doctrine of *res judicata*. However, the authority in *State v. Clevenger*, 114 Ohio St.3d 258, does not apply in the instant case, nor does *res judicata*. Further, pursuant to O.R.C.

§2949.092, and Article 1, Section 15, of the Ohio Constitution, this Honorable Court has authority to vacate the court costs that were not imposed during sentencing in this matter.

As such, this Honorable Court should accept jurisdiction of this case; review this issue on its merits; find that the trial court abused its discretion and denied Appellant due process when it failed to impose court costs in open court and give Appellant the opportunity to move to waive costs; and remand this matter back to the trial court for the purpose of permitting Appellant the chance to ask for waiver of the court costs.

CONCLUSION

For all of the above stated reasons, Appellant prays this Honorable Court accept jurisdiction of this matter; review this issue on its merit, and issue an order remanding this case back to the trial court to allow Appellant the right to move the trial court for a waiver of the payment of court costs and/or resentencing.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum In Support of Jurisdiction was placed in the prison's mailing system on this 6th day of April, 2014, to be sent via regular U.S. mail, postage prepaid, to: Office of Cuyahoga County Prosecutor, 1200 Ontario Street, 8th Floor, Cleveland, Ohio 44113.

Eddie Dudley

Eddie Dudley
APPELLANT, PRO SE

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 99952

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

EDDIE DUDLEY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-500587, CR-500881, CR-530921, and CR-532408

BEFORE: Stewart, J., Blackmon, P.J., and McCormack, J.

RELEASED AND JOURNALIZED: March 6, 2014

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FILED AND JOURNALIZED
PER APP.R. 22(C)

MAR 06 2014

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By WJH Deputy

MELODY J. STEWART, J.:

{¶1} In March 2010, the court sentenced defendant-appellant Eddie Dudley in four separate cases: in three of those cases Dudley pleaded guilty; in the fourth case a jury found him guilty after a trial. In March 2012, Dudley filed an identical motion in all four cases asking the court to vacate his sentences because he was not informed in court at the time of sentencing that he was obligated to pay court costs. The court denied those motions, and Dudley did not appeal. In April 2013, Dudley refiled the same motion to vacate in all four cases. The court denied those motions, and Dudley appeals, arguing that the trial court erred by doing so. We find no error for several reasons.

{¶2} First, the motions to vacate the sentences were barred by principles of res judicata because the cost issues contained in those motions could have been, but were not, raised on direct appeal from the jury trial and the three guilty pleas. See *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, ¶ 23 (“[A]n indigent defendant must move a trial court to waive payment of costs at the time of sentencing. If the defendant makes such a motion, then the issue is preserved for appeal and will be reviewed under an abuse-of-discretion standard. Otherwise, the issue is waived and costs are res judicata.”).

{¶3} Second, even if not res judicata because they were not raised on direct appeal, the cost issues are nonetheless untimely in a way that deprived

the court of jurisdiction to hear them. A motion to vacate or correct a sentence filed after a direct appeal is treated as a petition for postconviction relief under R.C. 2953.21. See *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431, ¶ 12; *State v. Ali*, 8th Dist. Cuyahoga No. 99062, 2013-Ohio-2696, ¶ 7. Although Dudley only appealed from one of his four convictions (*State v. Dudley*, 8th Dist. Cuyahoga No. 94972, 2011-Ohio-726), the time for filing an appeal in the other three cases had long since expired, so we consider the motions to vacate the sentences in the three cases that were not appealed to be postconviction petitions. That being the case, the motions to vacate sentence had to be filed within 180 days after the expiration of the time for filing an appeal or, in the case where an appeal was filed, within 180 days after the date on which the trial transcript was filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication. See R.C. 2953.21(A)(2). In none of the four cases being appealed from did Dudley file his motion to vacate sentence in a timely manner, so the court lacked jurisdiction to consider those motions. *State v. Johns*, 8th Dist. Cuyahoga No. 93226, 2010-Ohio-162, ¶ 8.

{¶4} Finally, even if we could view the motions to vacate sentence as being timely filed and not res judicata because the issues in those motions were not raised on direct appeal, they were nonetheless res judicata for a different reason: Dudley did not appeal when the court denied his first set of motions in

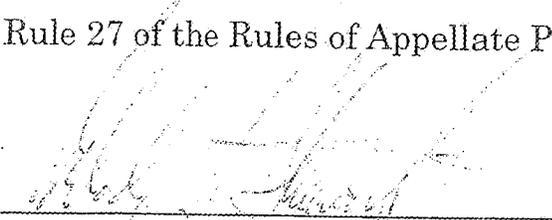
March 2012. Instead, Dudley waited just over one year and then refiled the same motions. It was only after the court denied those motions a second time in May 2013 that Dudley appealed. So apart from all of the other defects with his motions, Dudley's failure to file an appeal in March 2012, like his failure to raise the issue on direct appeal, rendered the cost issues res judicata. *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, ¶ 59, citing *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus.

{¶5} Judgment affirmed.

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

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas 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.



MELODY J. STEWART, JUDGE

PATRICIA ANN BLACKMON, P.J., and
TIM McCORMACK, J., CONCUR