[Cite as *State v. Clevenger,* 2006-Ohio-128.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2004-T-0130**
- vs -	:	
DANIEL CLEVENGER,	:	
Defendant-Appellee.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 99 CR 451.

Judgment: Reversed and remanded.

Dennis Watkins, Trumbull County Prosecutor, and *Diane Barber,* Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellant).

Michael A. Partlow, Morganstern, MacAdams & DeVito Co., L.P.A., 623 West St Clair Avenue, Cleveland, OH 44113-1204 (For Defendant-Appellee).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, State of Ohio, appeals the decision of the Trumbull County Court of Common Pleas to grant appellee, Daniel Clevenger's, motion to suspend payment of costs. For the following reasons, we reverse the decision of the trial court and remand for the issuance of a new judgment.

{¶2} On August 25, 1999, Clevenger pled guilty to an amended indictment charging him with one count of breaking and entering, a felony of the fifth degree in

violation of R.C. 2911.13(A) and (B). On October 13, 1999, Clevenger was sentenced to five years of community control sanctions. Among the specific conditions imposed by the court, Clevenger was ordered to pay court costs. Clevenger subsequently violated the terms of his community control. On August 2, 2000, Clevenger was sentenced to six months in prison and ordered "to pay the cost of prosecution."

{¶3} On September 22, 2004, Clevenger filed a Motion to Suspend Payments of Costs. In this motion, Clevenger acknowledged that he has not paid court costs assessed in the amount of $351.26. Clevenger explained that he was seeking social security benefits for a mental disability but was ineligible for cash benefits because of the unpaid court costs. Clevenger attached an affidavit of indigency and alleged that his only current source of income was food stamps. The state opposed Clevenger's motion, relying on *State ex rel. Biros v. Logan*, 11th Dist No. 2003-T-0016, 2003-Ohio-5425, for the proposition that it is within the trial court's discretion to impose costs on an indigent defendant and that the decision to impose costs may only be contested on direct appeal from the sentencing judgment. Id. at ¶8-9.

{¶4} On October 25, 2004, the trial court granted Clevenger's motion, "based upon the indigency affidavit and the other circumstances presented in the Defendant's Motion to Suspend Costs." The state timely sought and was granted leave to appeal this decision pursuant to App.R. 5(C). The state raised the following assignment of error:

{¶5} "The trial court erred in granting an order to suspend payment of court costs."

{¶6} "In all criminal cases *** the judge *** shall include in the sentence the costs of prosecution and render a judgment against the defendant for such costs." R.C. 2947.23(A)(1); *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, at ¶8, ("R.C. 2947.23 does not prohibit a court from assessing costs against an indigent defendant; rather it *requires* a court to assess costs against all convicted defendants."). (Emphasis sic.). "The courts of common pleas do not have inherent power to suspend execution of a sentence in a criminal case and may order such suspension only as authorized by statute." *State v. Smith* (1989), 42 Ohio St.3d 60, paragraph one of the syllabus; cf. *White* at ¶8, fn.1, ("R.C. 2949.092 outlines those circumstances in which a court may waive costs for indigents.).

{¶7} It is well-established that a trial court's jurisdiction to modify a criminal judgment of sentence terminates upon execution of that sentence. *State v Frazier*, 11th Dist Nos. 2001-L-052 and 2002-L-003, 2002-Ohio-7132, at ¶5, ("once a sentence is executed, 'a trial court no longer has the power to modify the sentence except as provided by the General Assembly'.") (citation omitted); *State v Clark*, 8th Dist No. 82519, 2003-Ohio-3969, at ¶20, ("once the trial court has ordered into execution a valid sentence, it may no longer either amend or modify that sentence except under very limited circumstances."). (Citations omitted).

{¶8} However, there is nothing in the record before this court to show that any part of Clevenger's sentence remains pending, save the judgment to pay costs. Pursuant to R.C. 2947.23, this is certainly part of his sentence for the felony he committed; just as certainly, it is not, itself, a criminal judgment. Rather, "[t]he duty to pay court costs is a civil obligation arising from an implied contract." *Strattman v. Studt*

(1969), 20 Ohio St.2d 95, paragraph six of the syllabus. This is true of judgments for court costs arising from criminal, as well as civil, cases. Id., at 103. Such judgments "may be collected only by the methods provided for the collection of civil judgments." Id.

{¶9} We further note that the collection of this civil judgment from an indigent debtor is permissive with the clerk of courts. *White* at ¶14-15. That being so, we see no conceptual or legal difficulty with the civil creditor - i.e., the court of common pleas - issuing a directive regarding how the clerk, its agent for collection of the debt, should carry out this permissive matter. That is all Clevenger requested of the trial court: that the payment of this civil debt be suspended. He did not request that the debt be abolished or modified. Therefore, he did not seek an improper suspension or modification of his criminal sentence, which the trial court was powerless to grant. Rather, he merely requested that the trial court specify the manner in which the clerk should carry out the permissive duty of collecting the subject civil debt.

{¶10} We believe this conclusion comports with our prior decision in *State v. McDowell*, 11th Dist. No. 2001-P-0149, 2003-Ohio-5352, at ¶57, wherein we concluded that the clerk could collect court costs assessed against an indigent defendant at such time as the defendant's financial status improved. We also believe it complies with the decision of the Supreme Court in *White* at ¶15, fn. 3 ("[m]any decisions have stated that *a court* may look at a defendant's current financial status to collect on a past order for costs.") (Emphasis added). This indicates that the courts retain jurisdiction to review when to collect on past orders for costs. So long as the implied contract to pay the civil judgment for court costs continues to exist, mere decisions regarding ways and means of payment do not attack the criminal sentence giving rise to that judgment.

{¶11} In its judgment entry granting Clevenger's Motion to Suspend Payment of Costs, the trial court ordered that the costs be suspended - not the payment of costs. This was incorrect, as it might be construed as affecting Clevenger's criminal sentence. The trial court should have granted the relief requested - suspension of payment of costs.

{¶12} This court notes that the relief sought by Clevenger would, more appropriately, have been sought though the filing of a properly drafted Civ.R. 60(B)(4) motion, pursuant to Crim.R. 57(B), or, perhaps, by filing a complaint under Civ.R. 3(A) to set aside the judgment. Cf. *State v. Good*, 10th Dist Nos. 03AP549 and 03AP550, 2004-Ohio-1736, at ¶5, 6.

{¶13} Should the civil judgment for court costs against Clevenger ever become dormant, it could be revived pursuant to R.C. 2325.15. Proceedings to revive a judgment are not new actions, but merely motions in the original action. *State v. Jones* (Oct. 16, 2000), 12th Dist Case No. CA2000-02-015, 2000 Ohio App. LEXIS 4802, at 8. These civil judgments are, therefore, commonly and appropriately revived under the original criminal case numbers. Cf., *State v. Graewe* (Aug. 3, 2000), 8th Dist No. 77545, 2000 Ohio App. LEXIS 3511. "What's good for the goose is good for the gander." Crim.R. 57(B) directs the courts to look to the civil rules if no criminal rule is applicable; Civ.R. 60(B) motions are commonly entertained in criminal proceedings, pursuant to Crim.R. 57(B). See, e.g., *State v. Lehrfeld*, 1st Dist No. C-030390, 2004-Ohio-2277, at ¶5-7; *State v. Garcia* (Aug. 24, 1995), 10th Dist. No. 94APA11-1646, 1995 Ohio App. LEXIS 3511, at 3-4. Civ.R. 60(B)(4) provides that a court may relieve a

party of a final judgment if "*** it is no longer equitable that the judgment should have prospective application ***."

{¶14} To the extent that the appealed judgment ordered the suspension of costs, the state's sole assignment of error has merit. In other respects, the assignment of error is without merit. Accordingly, it is the order of this Court that the judgment of the trial court is reversed, and the case is hereby remanded so that the trial court can vacate that judgment and issue a new judgment indicating that the payment of costs is suspended.

WILLIAM M. O'NEILL, J., concurs in judgment only,

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

{¶15} The majority opinion correctly holds that the trial court exceeded its authority, more specifically, its jurisdiction to modify a sentence, by ordering Clevenger's unpaid court costs to be suspended. However, the majority proceeds to commit the same error by ordering the "suspension of payment of costs." For the following reasons, I must respectfully dissent.

{¶16} Initially, the majority incorrectly states that Clevenger "did not request that the debt be abolished or modified." In fact, Clevenger requested of the court below that he "be declared indigent and the assessment of court costs and the obligation to pay

such court costs *** be suspended." A fair reading of Clevenger's motion reveals that Clevenger is seeking three things: 1) a declaration of indigency, 2) the suspension of the assessment of costs, and 3) the suspension of the obligation to pay costs.

{¶17} Clevenger was not declared indigent when sentenced on October 15, 1999. Nor does Clevenger allege that he was indigent or otherwise unable to pay costs when the court ordered him to pay $351.26 in court costs. The argument for Clevenger's post-sentence suspension of "the assessment of court costs" and "the obligation to pay such court costs" is premised on his current, alleged indigency. It is well-settled by this court and others that issues of indigency and the payment of costs are res judicata if not raised on direct appeal. See *State v. Pasqualone* (11th Dist. 2000), 140 Ohio App.3d 650, 657-658 (and the cases cited therein).

{¶18} The majority's opinion makes a distinction between the "assessment" of costs and the "collection" of costs. The majority notes that the original assessment of costs as part of Clevenger's sentence cannot be suspended, as that "might be construed as affecting Clevenger's sentence." The majority has no "conceptual or legal difficulty" with the trial court suspending collection of costs, i.e. "the manner in which the clerk should carry out the permissive duty of collecting the subject civil debt."

{¶19} There are several problems with the majority's decision to suspend the collection of costs against Clevenger, or, as the majority states it, "to suspend payment of costs." The first is that Clevenger did not ask that efforts to collect costs be suspended. He asked that "the assessment of court costs" and "the obligation to pay such court costs *** be suspended." This writer discerns no meaningful difference between suspending the assessment of court costs and the obligation to pay them.

{¶20} The second is that no effort is currently being made to collect the $312.26 owed for court costs. Judgment for the execution of costs was entered, pursuant to R.C. 2949.15, on August 2, 2000, when the Trumbull County Sheriff was ordered to levy upon "the goods and chattels, *** lands and tenements of DANIEL L. CLEVENGER" in satisfaction for these costs. At the time Clevenger filed his motion to suspend costs, he was a resident of Mercer County, Pennsylvania. There is no indication that the Trumbull County Sheriff has attempted to transfer the writ of execution from Trumbull County to Mercer County.

{¶21} Third, Clevenger did not ask that the collection of costs against him be suspended because such relief will not benefit him. As Clevenger explained in his motion, the outstanding court costs must be removed before he is eligible for "cash benefits" under Pennsylvania welfare law. Under the applicable Pennsylvania law, cash "[a]ssistance may not be granted to any person who has been sentenced for a felony *** and who has not otherwise satisfied the penalty imposed on that person by law. *** As used in this clause, 'satisfied the penalty' means *** ***paid all fines, costs and restitution***." 62 P.S. § 432(9) (emphasis added). Merely suspending collection of the costs does not "satisfy the penalty" as along as the underlying debt remains, and the majority acknowledges that suspension or modification of this debt would be "improper."

{¶22} Finally, the trial court is without jurisdiction even to suspend the collection of costs once executed. "The courts of common pleas do not have inherent power to suspend execution of a sentence in a criminal case and may order such suspension only as authorized by statute." *State v. Smith* (1989), 42 Ohio St.3d 60, paragraph one of the syllabus. In the present case, the judgment for costs has been executed. There

is no statute authorizing the trial court to order the "suspension of payment of costs" against Clevenger.

{¶23} The majority avoids this difficulty by arguing that Clevenger's obligation to pay costs "is certainly part of his sentence for the felony he committed" but, "just as certainly, it is not *** a criminal judgment." Instead, the majority describes Clevenger's obligation to pay costs as "a civil obligation arising from an implied contract." Citing *Strattman v. Studt* (1969), 20 Ohio St.2d 95, paragraph six of the syllabus. Clevenger's obligation to pay costs certainly did not arise from any implied contract but was imposed by a criminal statute ***requiring all criminal defendants to pay costs regardless of their indigent status.*** R.C. 2947.23; *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, paragraph one of the syllabus.

{¶24} The cases relied upon by the majority do not support the proposition that "the courts retain jurisdiction to review when to collect on past orders for costs." In *White*, the Ohio Supreme Court addressed "two questions ***: first, whether a court may assess costs against an indigent defendant; and, second, whether those costs may be collected." 2004-Ohio-5989, at ¶1. The Supreme Court answered both questions in the affirmative. Id. at paragraphs one and two of the syllabus. While discussing, in dicta, the possible methods for collecting costs, the Supreme Court noted that when costs are assessed against an indigent defendant, the clerk of courts may attempt collection at a time when the defendant is no longer indigent. Id. at ¶15. The Supreme Court then cited to this court's decision in *State v. McDowell*, 11th Dist. No. 2001-P-0149, 2003-Ohio-5352, for the proposition that "a court may look at a defendant's current financial status to collect on a past order for costs." Id. at ¶15 n. 3.

{¶25} In *McDowell*, as in this case, appellant had been assessed court costs pursuant to R.C. 2947.43 and failed to pay them. Appellant was not declared indigent at the time of sentencing. Thereafter, appellant's canoe was seized by writ of execution ordered by the trial court pursuant to R.C. 2949.15. On appeal, appellant challenged the seizure of his canoe, on the grounds that he was currently indigent and that the trial court failed to hold a forfeiture hearing before ordering the writ of execution. This court rejected these arguments, holding "it is evident that the trial court was not required to hold a hearing prior to the seizure and forfeiture of appellant's canoe, regardless of his possible indigent status." Id. at ¶61.

{¶26} Nothing in *White* or *McDowell* supports the action taken by the majority in ordering "the suspension of payment of costs" where judgment for costs has already been executed pursuant to R.C. 2949.15.

{¶27} Clevenger may properly remove the impediment that his unpaid court costs pose to his eligibility for cash benefits by making arrangements with the Trumbull County Clerk of Courts to pay these costs. Pennsylvania law allows recipients to receive cash benefits when they have made arrangements for satisfying the debt and remain "in compliance with an approved payment plan." 62 P.S. § 432(9). Ordering the suspension of payment of costs will not aid Clevenger and sets a dubious precedent. Accordingly, the decision of the lower court should be reversed and remanded with instructions to vacate the judgment granting Clevenger relief, as the lower court is without any jurisdiction to grant Clevenger relief.

{¶28} For the foregoing reasons, I dissent.