

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WILLIAMS COUNTY

State of Ohio

Court of Appeals No. WM-10-011

Appellee

Trial Court No. 07 CR 063

v.

Nathan Dalton

DECISION AND JUDGMENT

Appellant

Decided: January 28, 2011

* * * * *

Nathan H. Dalton, pro se.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Nathan H. Dalton, appeals a June 1, 2010 judgment of the Williams County Court of Common Pleas. In the judgment, the trial court denied appellant's motion of May 27, 2010, for the court to vacate a July 2, 2007 sentencing judgment to the extent the judgment imposed a duty to pay costs. Appellant seeks a

waiver of costs because of indigency. Because we conclude that appellant's request is barred by res judicata, we affirm.

{¶ 2} Appellant appears pro se and appeals the denial of a May 27, 2010 "motion to vacate court costs due to indigency forthwith." Appellant argues in his appellate brief that it was established in the original court proceedings in 2007 that he was indigent. In a May 31, 2007 judgment, the trial court found appellant to be indigent and appointed an attorney to represent him in the criminal case. The trial court also waived a court-appointed attorney application fee. Appellant claims that the trial court erred in denying his motion to vacate or set aside that portion of his sentence requiring him to pay costs due to his indigency.

{¶ 3} Appellant asserts two assignments of error on appeal:

{¶ 4} "Assignment of Error No. 1: garnishing all of Appellant's personal account for court costs except for \$15.00 every month when appellant was found to be indigent and attorney fees and court costs were waived.

{¶ 5} "Assignment of Error No. 2: Garnishment of appellant's personal account without ever holding a hearing."

{¶ 6} In the July 2, 2007 judgment, appellant was convicted of operating a vehicle under the influence of alcohol or drug of abuse in violation of R.C. 4511.19(A)(1)(a) a third degree felony with a specification under R.C. 4511.19(G)(1)(e)

and sentenced.¹ The sentence included an order that appellant "pay any restitution, all costs of prosecution, any court-appointed counsel costs, and any supervision fees permitted, pursuant to Ohio Revised Code §2929.18(A)(4)." At the sentencing hearing, conducted on June 26, 2007, the trial court directly advised appellant, in open court, that his sentence would impose a duty to pay costs. Appellant did not move the court to waive costs at sentencing.

{¶ 7} In *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, the Ohio Supreme Court held that R.C. 2947.23 requires a court to assess costs against all convicted defendants, including indigent defendants. *White* at ¶ 8. The court also recognized that a court may waive payment of costs by indigent defendants. *White* at ¶ 8, 14; *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, ¶ 1.

{¶ 8} Under the Ohio Supreme Court's decision in *State v. Threatt*, any request by an indigent defendant to waive payment of costs must be made by motion at sentencing. In the absence of a motion for waiver at that time, the issue is waived and a subsequent challenge to the obligation to pay costs is barred by res judicata:

{¶ 9} "Costs are assessed at sentencing and must be included in the sentencing entry. R.C. 2947.23. Therefore, an indigent defendant must move a trial court to waive payment of costs at the time of sentencing. If the defendant makes such a motion, then the issue is preserved for appeal and will be reviewed under an abuse-of-discretion

¹The specification provided that at the time of the offense, appellant, within 20 years of committing the offense, previously had been convicted of or pleaded guilty to five or more equivalent offenses.

standard. Otherwise, the issue is waived and costs are res judicata." *Threatt* at ¶ 23; see *State v. King*, 6th Dist. No. WD-09-069, 2010-Ohio-3074, ¶ 10.

{¶ 10} Under *Threatt*, appellant's motion to vacate sentence as to costs is clearly barred by res judicata as appellant made no motion to waive costs at sentencing.

{¶ 11} Furthermore, this is not the first time appellant has filed a motion to vacate the order to pay court costs under the July 2, 2007 judgment. Previously, on June 18, 2009, appellant filed a motion to "vacate or set aside court costs." The trial court denied the motion in a judgment filed on June 18, 2009. Appellant appealed the judgment to this court. We dismissed the appeal due to appellant's failure to file assignments of error and a brief in a decision and judgment issued on May 12, 2008. *State v. Dalton* (May 12, 2008), 6th Dist. No. WM-08-003. The Ohio Supreme Court denied further appeal in a September 25, 2008 judgment.

{¶ 12} Even were the issue not barred by failure to seek a waiver of costs at sentencing, it would be barred by the adverse judgment in his earlier appeal of the June 18, 2009 motion to vacate or set aside court costs. "A final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of the rights, questions and facts in issue as to the parties and their privies, and is a complete bar to any subsequent action upon the same cause of action between the parties or those in privity with them." *State ex rel. Brook Park Entertainment, Inc. v. Cuyahoga Cty. Bd. of Elections* (1991), 60 Ohio St.3d. 44, 46 (quoting *Whitehead v. Gen. Tel. Co.* (1969), 20 Ohio St.2d 108, at paragraph one of the syllabus.)

{¶ 13} We find appellant's Assignment of Error No. 1 is not well-taken.

{¶ 14} Under Assignment of Error No. 2, appellant argues that the procedures used to garnish his inmate account to pay court costs violated his right to due process of law under both the United States Constitution and the Constitution of the State of Ohio. However, the assignment of error raises issues beyond the scope of this appeal. This appeal concerns claimed trial court error in its denial of appellant's "motion to vacate court costs due to indigency forthwith." Appellant made no argument in the trial court that improper attachment or garnishment procedures were employed against him. He also sought no relief based upon any claim such procedures were used against him. Accordingly, we find Assignment of Error No. 2 is not well-taken.

{¶ 15} We conclude that substantial justice was done the party complaining and affirm the judgment of the Williams County Court of Common Pleas. Appellant is ordered to pay the court costs of this appeal, pursuant to App.R. 24.

JUDGMENT AFFIRMED.

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.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.