[Cite as *State v. Dickinson*, 2004-Ohio-6373.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 03 CO 52
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
DONALD M. DICKINSON	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas of Columbiana County, Ohio Case No. 02 CR 20
JUDGMENT:	Affirmed.
APPEARANCES:	
For Plaintiff-Appellee:	Atty. Robert Herron Columbiana County Prosecutor Atty. Timothy J. McNicol Assistant Prosecuting Attorney 105 South Market Street Lisbon, Ohio 44432
For Defendant-Appellant:	Atty. David H. Bodiker Ohio Public Defender Atty. Charles B. Clovis Assistant State Public Defender Office of the Ohio Public Defender 8 East Long Street, 11th Floor Columbus, Ohio 43215-2998

JUDGES:
Hon. Cheryl L. Waite
Hon. Gene Donofrio

Hon. Joseph J. Vukovich

Dated: November 26, 2004

WAITE, P.J.

{¶1} Appellant Donald M. Dickinson appeals the ruling of the Columbiana County Court of Common Pleas which sentenced him to five years in prison on one count of sexual battery. The sentence resulted from a Crim.R. 11 plea agreement. Appellant argues that he was denied effective assistance of counsel based on counsel's failure to argue in favor of probation or community control sanctions. Appellant also alleges that the trial court erred by requiring him to pay court costs even though he is indigent. We cannot find any prejudice in counsel's failure to request probation or community control sanctions, and counsel's error does not constitute reversible error unless we also find that Appellant was prejudiced by the alleged error. In addition, we have previously held that a court may impose court costs on any criminal defendant, even an indigent defendant, under R.C. §2947.23(A)(1). We find no merit in either of Appellant's assignments of errors, and the judgment of the trial court is affirmed.

{¶2} On January 28, 2002, Appellant pleaded guilty to one count of sexual battery, a third degree felony in violation of R.C. §2907.03(A)(5). Appellant admitted that during the summer months of 2001 and continuing until the month of November 2001, he engaged in sexual conduct with his grandson, who at the time was sixteen years old. Appellant's plea agreement stated that the State of Ohio would recommend a five-year prison sentence while Appellant's counsel would request probation or community control.

{¶3} On March 29, 2002, Appellant appeared for sentencing. The prosecutor recommended the maximum prison sentence, but Appellant's counsel made no recommendation as to what type of sentence was appropriate.

{¶4} On April 2, 2002, the court imposed a definite term of incarceration of five years and designated Appellant a sexually oriented offender. In addition, Appellant was ordered to pay court costs.

{¶5} On September 19, 2003, Appellant filed a motion for leave to file this delayed appeal, asserting that neither the trial court nor his counsel advised him of his right to appeal his sentence. We sustained the motion. Appellant presents two assignments of error in this appeal.

{¶6} Appellant's first assignment of error asserts:

{¶7} "Mr. Dickinson was denied the effective assistance of counsel at sentencing when defense counsel misrepresented Mr. Dickinson's plea agreement and failed to advocate on Mr. Dickinson's behalf. (March 29, 2002 Sentencing Hearing Transcript)."

{¶8} Appellant argues that his counsel was ineffective because he failed to fulfill one of the terms of the plea agreement, namely, that counsel would request probation or community control sanctions at the sentencing hearing. Appellant contends that the prosecutor's request for the maximum sentence, coupled with counsel's silence, was not an accurate representation of Appellant's plea agreement. Appellant argues that his counsel effectively misled the court into believing that the parties had agreed to recommend a maximum sentence.

{¶9} The law concerning ineffective assistance of counsel is not in dispute. The criminal defendant has the burden of proving ineffective assistance. *State v. Lott* (1990), 51 Ohio St.3d 160, 175, 555 N.E.2d 293; see also *State v. High* (2001), 143 Ohio App.3d 232, 757 N.E.2d 1176. To meet this burden of proof, the defendant must show, "first, that counsel's performance was deficient and, second, that the deficient performance prejudiced his defense so as to deprive the defendant of a fair trial." *Lott*, 51 Ohio St.3d at 174, 555 N.E.2d 293, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶10} In order to establish that counsel's representation is deficient, Appellant must demonstrate that his, "performance fell below an objective standard of reasonable representation." *State v. Keith* (1997), 79 Ohio St.3d 514, 534, 684 N.E.2d 47

{¶11} In Ohio, a properly licensed attorney is presumed competent. *Lott*, 51 Ohio St.3d at 175, 555 N.E.2d 293. Moreover, strategic or tactical decisions will not form a basis for a claim of ineffective assistance of counsel. *State v. Clayton* (1980), 62 Ohio St.2d 45, 48-49, 16 O.O.3d 35, 402 N.E.2d 1189.

{¶12} Effectiveness is, "not defined in terms of the best available practice, but rather should be viewed in terms of the choices made by counsel. We must assess the reasonableness of the attorney's decisions at the time they are made, not at the time of our assessment." *State v. Wilkins* (1980), 64 Ohio St.2d 382, 390, 18 O.O.3d 528, 415 N.E.2d 303.

{¶13} Furthermore, even if counsel's performance at the sentencing hearing was deficient, the conviction cannot be reversed absent a determination that Appellant

was prejudiced. *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, 538 N.E.2d 373. "The defendant must thus show that there is reasonable probability that but for the serious error, the result of the trial would have been different." *State v. Baker*, 7th Dist. No. 03 CO 24, 2003-Ohio-7008, ¶13; *Keith*, supra, 79 Ohio St.3d at 534, 684 N.E.2d 47.

{¶14} There is some basis to support Appellant's argument that a criminal defendant may raise an ineffective assistance of counsel claim based on counsel's failure to follow or enforce the terms of a plea agreement. In *State v. Aponte* (2001), 145 Ohio App.3d 607, 763 N.E.2d 1205, for example, the defendant contended that his appellate counsel was ineffective in failing to assert that the plea agreement remained unfulfilled and was, in fact, unenforceable, due to the illusory nature of some of the provisions. Id. at 613. The Tenth District Court of Appeals reversed the conviction due to the unfulfilled and unfulfillable promises in the plea agreement. Id. at 614-615.

{¶15} In the present case, Appellant entered into a plea agreement wherein it was agreed that the State of Ohio would recommend a five-year prison sentence while Appellant's counsel would request probation or community control. Following the State's request for the maximum sentence, the court asked defense counsel whether the prosecutor, "properly stated the contents of the Felony Plea Agreement." (Tr., p. 5.) Defense counsel responded that the plea agreement was properly stated. The court later asked defense counsel if there was anything he wanted to say on his client's behalf. Defense counsel responded that he had nothing else to say. (Tr., p. 8.) By saying nothing, defense counsel breached the terms of the plea agreement.

{¶16} Although counsel does appear to have erred in failing to request probation or community control sanctions, Appellant must also prove that he was prejudiced by counsel's error. The record does not reveal any prejudice. First, the trial court assumed that counsel would make a request for probation and community control sanctions, and the court denied that request both at the sentencing hearing and in the sentencing judgment entry. (Tr., p. 14; 4/2/02 J.E., p. 2.) Second, the trial court found that Appellant had committed the worst form of the offense, that Appellant had committed multiple sexual offenses, and that Appellant had a high risk of reoffending. The court found that anything less than the maximum sentence would demean the seriousness of the offense. The court also stated that, "[i]f the law gave me more options, you would have to suffer the consequence because for what you have done even the maximum term here, in my judgment, is insufficient." (Tr., p. 14.) Based on the specific findings and opinions of the court, there is no indication that the outcome of the sentencing hearing would have been any different if counsel had specifically requested probation or community control sanctions. Without a reasonable probability that the outcome of the sentencing hearing would have been different but for counsel's error, Appellant has failed to show that he was prejudiced by the error, and has failed to establish ineffective assistance of counsel. For all these reasons, Appellant's first assignment of error is overruled.

{¶17} Appellant's second assignment of error asserts:

{¶18} "The trial court erred when it imposed costs on Mr. Dickinson. (April 2, 2002 Sentencing Entry)."

{¶19} Appellant argues that the trial court erred by imposing costs on an indigent defendant. Appellant contends that the language of Revised Code §2949.14 implicitly establishes that court costs and prosecution costs may be certified and collected only from nonindigent defendants.

{¶20} The Ohio Revised Code §2949.14 governs the procedure for collecting court costs in criminal cases: "Upon conviction of a *nonindigent* person for a felony, the clerk of the court of common pleas shall make and certify under his hand and seal of the court, a complete itemized bill of the costs made in such prosecution * * *. Such bill of costs shall be presented by such clerk to the prosecuting attorney, who shall examine each item therein charged and certify to it if correct and legal. Upon certification by the prosecuting attorney, the clerk shall attempt to collect the costs from the person convicted." (Emphasis added.)

{¶21} However, Revised Code §2947.23(A)(1) provides: "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." (Emphasis added.) This statute gives no indication that it applies only to "nonindigent" defendants, unlike R.C. §2949.14.

{¶22} We have recently ruled that a trial court is required to impose costs on all criminal defendants, whether or not they are indigent. See *State v. Roux* (2003), 154 Ohio App.3d 296, 797 N.E.2d 112. *Roux* held that a distinction exists between ordering a defendant to pay costs and actually collecting those costs. Id. at 299. R.C. §2947.23 merely provides that the court include costs as part of a defendant's sentence and render a judgment for those costs. In later attempting to collect the

court-imposed costs, the clerk of court is limited by R.C. §2949.14 and can collect those costs only from nonindigent defendants. Based on our holding in *Roux*, a trial court may order an indigent defendant to pay court costs as part of his sentence, even though those costs may never be collected. Id. Accordingly, Appellant's second assignment of error is without merit and is overruled.

{¶23} We do note that the Ohio Supreme Court has accepted the *Roux* case for review because it is in conflict with *State v. Clark*, 4th Dist. No. 02-CA-62, 2002-Ohio-6684. Until the Ohio Supreme Court rules on this issue, the current holding of this Court is that the imposition of court costs is proper whether or not the defendant is indigent.

{¶24} Given the facts in the record, Appellant has failed to show that he was prejudiced by his counsel's error of failing to request probation or community control sanctions, and that the trial court properly imposed court costs on Appellant. Appellant's two assignments of error are overruled and the judgment of Columbiana County Court of Common Pleas is hereby affirmed in full.

Donofrio, J., concurs.

Vukovich, J., concurs.