

[Cite as *State v. Walters*, 2009-Ohio-6762.]
STATE OF OHIO, COLUMBIANA COUNTY

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STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)

PLAINTIFF-APPELLEE,)

VS.)

VS.) CASE NO. 08-CO-34

ROBERT L. WALTERS,

ROBERT L. WALTERS.) OPINION

DEFENDANT-APPELLANT.)

CHARACTER OF PROCEEDINGS: Criminal Appeal from Court of Common
Pleas of Columbiana County, Ohio
Case No. 2007CR331

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JUDGMENT: Affirmed

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JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

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Hon. Mary DeGenaro

Dated: December 16, 2009

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DONOFRIO, J.

{¶1} Defendant-appellant Robert L. Walters appeals from the sentence imposed by the Columbiana County Court of Common Pleas as a result of his conviction for violating a protective order in violation of R.C. 2919.27(A)(1), a fifth-degree felony. The violation arose from an incident in July 2007, in which Walters' ex-wife alleged that he threatened her outside of a friend's home. On July 17, 2008, following a two-day trial, the jury returned a guilty verdict against Walters.

{¶2} The sentencing hearing was held on September 15, 2008. During sentencing, the trial court took into consideration Walters' past criminal record and pendency of trial for a similar offense. (Sentencing Tr. 9). The court sentenced Walters to twelve months in prison and up to a three-year period of optional post-release control. (Sentencing Tr. 9). Additionally, the court directed Walters on his responsibility for court costs using the language, "you are in charge of paying the costs in this case." (Sentencing Tr. 10). The judgment entry, which was filed on September 16, 2008, states, "costs taxed to the Defendant, which shall include the cost of the jury in this matter, the collection of which is stayed until the Defendant is released." (Judgment Entry, p. 2). This appeal followed.

{¶3} Walter's sole assignment of error states:

{¶4} "THE TRIAL COURT ERRED BY IMPOSING COURT COSTS WITHOUT NOTIFYING MR. WALTERS THAT FAILURE TO PAY COURT COSTS MAY RESULT IN THE COURT'S ORDERING HIM TO PERFORM COMMUNITY SERVICE."

{¶5} A trial court may order an indigent defendant to pay court costs as part of his sentence. *State v. Roux*, 154 Ohio App.3d 296, 2003-Ohio-4876, 797 N.E.2d 112. In criminal cases, court costs and the imposition of community service upon default are governed by R.C. 2947.23, which provides as follows:

{¶6} "(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:

{¶7} “(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.

{¶8} “(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.)

{¶9} In his single assignment of error, Walters contends that the trial court erred by imposing court costs without notifying him that a failure to pay court costs may result in the court ordering him to perform community service. Walters argues that because of this error, the court should vacate the court costs against him. A review of the transcript and judgment entry confirms that the trial court ordered Walters to pay costs. However, it did not notify him that failure to do so could result in the imposition of community service, as provided by R.C. 2947.23(A)(1)(a).

{¶10} Walters relies heavily on *State v. Clevenger*, 114 Ohio St.3d 258, 2007-Ohio-4006, 871 N.E.2d 589, in which the Ohio Supreme Court acknowledged that the trial court must notify the defendant, at the time of sentencing, that a failure to pay judgment costs may result in the imposition of community service. In *Clevenger*, the trial court chose to suspend properly imposed court costs because of the defendant’s financial status. The Court held that the trial court had no authority to suspend the payment of court costs previously imposed on a criminal defendant.

{¶11} Here, unlike the facts in *Clevenger*, *supra*, the trial court did not suspend Walters’ court costs. Instead, the trial court directly imposed (but stayed collection of) court costs. However, it did so in a manner inconsistent with R.C. 2947.23(A)(1)(a).

{¶12} In *State v. Boice*, 4th Dist. No. 08CA24, 2009-Ohio-1755, the Fourth District faced the identical argument raised here. In *Boice*, the trial court imposed court costs on a defendant who pled guilty to aggravated burglary. Id. at ¶1. The defendant asserted the trial court erred when it imposed court costs without notifying him that failure to pay court costs could result in the imposition of community service. Id. The defendant raised this issue for the first time on appeal, even before he failed to make his first payment of court costs. Id. The court concluded that although they “agree with Appellant that R.C. 2947.23 makes it mandatory for the Judge to inform a defendant that he could be ordered to perform community service, at [the time the appeal was brought], Appellant 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.” Id. at ¶11. The court held the issue is not ripe for adjudication. *Boice* at ¶11. See, also, *State v. Slonaker*, 4th Dist. No. 08CA21, 2008-Ohio-7009, at ¶7 (concluding an identical appeal was not ripe for adjudication), *State v. Ward*, 168 Ohio App.3d 701, 714, 2006-Ohio-4847, 861 N.E.2d 823 (declining to address an identical issue because it was not properly raised, and because the appellant had suffered no prejudice because of error and, therefore, the matter was not ripe for adjudication).

{¶13} Here, similar to *Boice*, Walters raises this issue on appeal and has yet to default on his payment of court costs or fines. Like *Boice*, Walters has not yet suffered any prejudice because of the error and, therefore, the issue is not ripe for adjudication. Further, as the court in *Boice* and *Slonaker* set forth, should Walters, at some point in the future, fail to pay costs as ordered, the trial court should not have the option of imposing community service because it did not inform the appellant of this possibility at his sentencing hearing. See *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, 814 N.E.2d 837 (addressing an issue, ripe for adjudication, and remanding the case to the trial court because the required notifications were not supplied at sentencing). In *Brooks*, during sentencing, the trial court did not notify the defendant that a prison term might be imposed if he violated the terms of his

community control sanction, as required by R.C. 2929.19. Id. at ¶1. The appeal was brought after Brooks pled guilty to violating the terms of his community control and was sentenced to eight months in prison. Id. at ¶1. Here, in contrast, Walters has yet to default on his payments and, therefore, has not been ordered to perform community service, thus making this issue not ripe for adjudication.

{¶14} Accordingly, Walters' sole assignment of error is without merit.

{¶15} The judgment of the trial court is hereby affirmed.

Waite, J., concurs.

DeGenaro, J., concurs.