

[Cite as *State v. Knauff*, 2009-Ohio-5535.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ADAMS COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case No. 09CA881
 :
 vs. :
 :
 KELLY K. KNAUFF, JR., : DECISION AND JUDGMENT ENTRY
 :
 Defendant-Appellant. :

APPEARANCES:

COUNSEL FOR APPELLANT: Timothy Young, Ohio Public Defender, and Claire R. Cahoon, Assistant Ohio Public Defender, 250 East Broad Street, Ste. 1400, Columbus, Ohio 43215

COUNSEL FOR APPELLEE: Aaron E. Haslam, Adams County Prosecuting Attorney, and David Kelley, Adams County Assistant Prosecuting Attorney, 112 Courthouse, 100 West Main Street, West Union, Ohio 45693

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 10-13-09

PER CURIAM.

{¶ 1} This is an appeal from an Adams County Common Pleas Court judgment of conviction and sentence. Kelly K. Knauff, Jr., defendant below and appellant herein, pled guilty to rape in violation of R.C. 2907.02(A)(1)(b). Appellant assigns the following error for review:

“THE TRIAL COURT ERRED BY IMPOSING COURT COSTS WITHOUT NOTIFYING MR. KNAUFF THAT FAILURE TO PAY COURT COSTS MAY RESULT IN THE COURT’S ORDERING HIM TO PERFORM COMMUNITY

SERVICE.”

{¶ 2} The facts are undisputed. The Adams County Grand Jury returned an indictment charging appellant with rape. Pursuant to an agreement, appellant pled guilty in exchange for the dismissal of a life-sentence specification. The trial court ultimately sentenced appellant to serve eight years imprisonment and, inter alia, to pay court costs. This appeal followed.

{¶ 3} Appellant asserts in his assignment of error that the trial court erred by imposing court costs without informing him that he could be ordered to perform community service if those costs were not satisfied. Appellees concedes that the court failed to inform him of that fact, but argues the issue is not yet “ripe” for review because appellant remains in prison and has not been ordered to perform community service. We agree with appellee.

{¶ 4} R.C. 2947.23(A)(1)(a) requires trial courts to inform defendants that if they fail to pay court costs, they may be ordered to perform community service in lieu thereof. However, as appellee notes in its brief, this Court has held that this issue is not ripe for appellate review if the defendant remains incarcerated and no order of community service has been imposed. See State v. Welch, Washington App. No. 08CA29, 2009-Ohio-2655, at ¶13; State v. Boice, Washington App. No. 08CA24, 2009-Ohio-1755, at ¶¶9-11; State v. Slonaker, Washington App. No. 08CA21, 2008-Ohio-7009, at ¶7.

{¶ 5} Because the record in the case sub judice shows that appellant is incarcerated, and thus has not suffered prejudice as a result of the trial court’s failure to

give him such warning, the issue is not yet ripe for review and we hereby overrule the assignment of error for that reason.

{¶ 6} Accordingly, the trial court's judgment is hereby affirmed.

JUDGMENT AFFIRMED.

Abele, J., Dissenting:

{¶ 7} I respectfully dissent. I concede that on a number of occasions we have applied the ripeness doctrine and have declined to review a trial court's failure to comply with R.C. 2947.23(A)(1)(a) when an appellant remains incarcerated and has not yet been ordered to perform community service (however, a different panel determined the issue ripe and reversed the sentence - See State v. Burns, Gallia App. Nos. 08CA1, 08CA2 & 08CA3, 2009-Ohio-878, at ¶12, fn. 3). I adhere to the reasoning in Burns. The problem with applying the "ripeness" doctrine is that for all practical purposes, it places this error beyond the scope of effective appellate review. If the issue is not dealt with on direct appeal, how will it be effectively reviewed in the future? An appeal from the actual order that imposes community service strikes me as a waste of judicial resources when the issue can be resolved in one appeal rather than two.

{¶ 8} Thus, until I am convinced that a more practical and straightforward means is available by which to raise this issue in the future, if and when a court imposes a community service order, I believe that we should simply consider the issue at the present time. Thus, I would sustain the assignment of error and remand the case for re-sentencing on this point.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Adams County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Kline, P.J. & McFarland, J.: Concur in Judgment & Opinion Abele, J.: Dissents with Opinion

For the Court

BY: _____

Roger L. Kline
Presiding Judge

BY: _____

Peter B. Abele, Judge

BY: _____

Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.