

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NOS. C-080403
		C-080404
Plaintiff-Appellee,	:	TRIAL NOS. B-0709481
		B-0709972
vs.	:	
		<i>JUDGMENT ENTRY.</i>
ALTA JACKSON,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

In case B-0709481, defendant-appellant Alta Jackson was convicted of sexual battery,² sentenced to four years in prison, and classified as a tier III sexual offender.³ In case B-0709972, he was convicted of one count of identity theft⁴ and sentenced to a concurrent prison term of thirteen months. The trial court denied his request to waive costs in both cases. Jackson has appealed both judgments, and we have consolidated the two cases for argument, review, and disposition.

In his first assignment of error, Jackson argues that the trial court abused its discretion when it declined to waive court costs. R.C. 2947.23(A)(1) provides that “[i]n *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.” Thus, the statute imposes a mandatory obligation on trial courts in all

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

² R.C. 2907.03(A)(2).

³ See R.C. 2950.01.

⁴ R.C. 2913.49(B)(2).

criminal cases to include in the sentence the costs of prosecution and to render a judgment for them.⁵

The same cannot be said for the order to pay the appointed counsel fees, which are distinct from court costs. R.C. 2941.51(D) provides that the fees “shall not be taxed as part of the costs and shall be paid by the county. However, if the person represented has, or reasonably may be expected to have, the means to meet some part of the cost of the services rendered to the person, the person shall pay the county in an amount that the person reasonably can be expected to pay.” This court has held that a trial court cannot order the payment of appointed counsel fees without making a finding that the defendant has the ability to pay those fees.⁶ The Eighth Appellate District has reached the same result, concluding that “the trial court must make an affirmative determination on the record that the defendant has, or reasonably may be expected to have, the means to pay all or some part of the legal services rendered to him”⁷

The transcript is silent on the issue of Jackson’s ability to pay the appointed counsel fee. Therefore, it was an abuse of discretion to hold Jackson responsible for that fee. Though reluctant to add yet another item to the ever-growing checklist of talismanic verbiage to be used by our sentencing courts, we are constrained to continue to hold that R.C. 2941.51(D) mandates an affirmative finding by the trial court of a defendant’s ability to pay appointed counsel fees before they can be assessed. Jackson’s first assignment of error is sustained in part.

⁵ *Middleburg Heights v. Quinones*, ___ Ohio St.3d ___, 2008-Ohio-6811, ___ N.E.2d ___, at ¶9.

⁶ *State v. Watkins* (1994), 96 Ohio App.3d 195, 198, 644 N.E.2d 1049.

⁷ *State v. Drew*, 8th Dist. No. 83563, 2004-Ohio-3609, at ¶9; see, also, *State v. Fisher*, 12th Dist. No. CA98-09-190, 2002-Ohio-2069 (“an indigent defendant may properly be required to pay his attorney fees only after the court makes an affirmative determination on the record that the defendant has, or reasonably may be expected to have, the means to pay all or some part of the cost of the legal services rendered to him”).

In his second assignment of error, Jackson makes various constitutional challenges to the residential-living sanctions imposed on him as a result of his tier III classification in case B-0709481. However, Jackson remains in prison, and the residential restrictions have not yet been applied to him. Under these circumstances, his constitutional challenges to the restrictions are not ripe for review,⁸ and his second assignment of error is overruled.

We affirm the trial court's judgments in part, reverse them in part, and remand these cases to the trial court for further proceedings consistent with this entry.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., CUNNINGHAM and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on February 25, 2009

per order of the Court _____
Presiding Judge

⁸ See *State v. Walker*, 1st Dist. No. C-060910, 2007-Ohio-6337, at ¶¶57-59, discretionary appeal not allowed, 117 Ohio St.3d 1461, 2008-Ohio-1635, 884 N.E.2d 69.