

[Cite as *State v. Phillips*, 2009-Ohio-5305.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23252
v.	:	T.C. NO. 2007 CR 3482/01
BRANDON PHILLIPS	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

OPINION

Rendered on the 2nd day of October, 2009.

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BRANDON PHILLIPS, #A597-162, Lebanon Correctional Institute, P. O. Box 56, Lebanon, Ohio 45036
Defendant-Appellant

FROELICH, J.

{¶ 1} The defendant, Brandon Phillips, was indicted for one count of tampering with evidence, two counts of aggravated robbery, with firearm specifications, two counts of

kidnaping, with firearm specifications, and four counts of aggravated murder, with firearm specifications; the aggravated murder charges each carried four aggravating circumstance specifications, making this a death penalty eligible case.

{¶ 2} The defendant entered pleas of not guilty at his arraignment. The defendant subsequently filed a plea of not guilty by reason of insanity and a motion to determine competency. After an examination, the court conducted a hearing and determined the defendant to be competent to proceed.

{¶ 3} The appellant filed a motion to suppress statement and a hearing was held and the court subsequently denied the motion to suppress.

{¶ 4} In January of 2009, the defendant entered into a plea and sentencing agreement whereby he withdrew his previous pleas of not guilty to all the charges and the specifications, the State withdrew the death penalty specifications, and an agreed-upon sentence was imposed.

{¶ 5} The defendant filed a timely notice of appeal and on May 11, counsel filed a brief pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 19 L.Ed.2d 493, stating that he could find no meritorious issues for appellate review. The State filed a response that there were no assignments of error to which the State could respond; however, the State requested the opportunity to respond if the court appointed new counsel to brief any issues.

{¶ 6} On May 15, 2009, this court advised the defendant that his counsel had filed a brief asserting his inability to find any meritorious claims to present for review. The appellant was granted sixty days to file a pro se brief assigning any errors for review and

notified that if a brief were not filed within that time, the appeal would be deemed submitted for decision on the merits. Nothing has been filed with the court. The case is now before us for our independent review of the record. *Penson v. Ohio* (1988), 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300.

{¶ 7} On August 21, 2007, Robert Harris and Roger Covault were shot and killed during the course of an aggravated robbery for which appellant and his co-defendant were indicted. On October 31, 2007, the appellant requested an evaluation to determine his competency to stand trial. The court ordered an examination by the Forensic Psychiatry Center for Western Ohio. The issue was presented at a hearing in December and counsel for the State and the appellant stipulated to the Center's report and the court found the defendant competent to stand trial.

{¶ 8} Various motions were filed concerning discovery, and a change of venue, as well as motions directed towards the death penalty and the procedures to be had at the trial. On February 27, 2008, the defendant, among other motions, filed a motion to suppress statements obtained in violation of the defendant's constitutional rights. The State presented numerous witnesses at the hearing and the defendant presented no evidence. Both parties were then given the opportunity to present briefs to the court.

{¶ 9} On August 6, 2008, a trial date of February 2, 2009, was set. On October 8, 2008, appellant's counsel moved to withdraw and the motion was granted and a new attorney was appointed.

{¶ 10} Apparently pursuant to negotiations, a plea hearing was set for January 9, 2009. After one of the prosecutors stated her understanding of the plea agreement, which

was confirmed by one of the defendant's attorneys, the court noted that it had filed an entry the same day overruling the defendant's previously filed motion to suppress, and the court's understanding that the defendant will be withdrawing several other motions. The defense counsel confirmed that the defendant was withdrawing all pending motions that had not been previously ruled on by the court and the defendant personally acknowledged his understanding.

{¶ 11} The record reflects the filing on January 9, of a decision and entry overruling the motion to suppress, in which the court states that it could find “no factual or legal basis to suppress evidence. . . .” Although this ruling may not comply with the technical provision of Crim.R. 12(F) requiring a court to state its essential findings on the record, even given the protean nature of Fourth, Fifth and Sixth Amendment issues, there does not appear to be any meritorious arguments concerning the court's ruling. Regardless, by pleading guilty, the appellant waived any right to claim error with respect to the trial court's denial of his motion to suppress his statements. *State v. Perez-Diaz*, Clark App. No. 06CA0130, 2008-Ohio-2722, ¶4 (internal citations omitted). A plea of guilty waives all appealable errors that may have occurred during the trial unless an error has precluded defendant from knowingly and voluntarily entering his guilty pleas. *Id.* A review of the paperwork and the transcript of the plea colloquy portrays no such defect.

{¶ 12} At the plea hearing, counsel for the defendant stated, “Mr. Phillips is indigent as has already been determined by this court. Therefore we have appointed counsel representing him. I know he did previously had retained counsel which was retained by his family. He was indigent at the time all of this occurred. His family no longer has a means

to retain counsel or otherwise. Based on the fact that he is indigent, I'd ask the court to consider waiving whatever fines or costs there may be. Because there is no likelihood of Mr. Phillips being able to pay this. He is going to be incarcerated for the rest of his life without any likelihood of parole. And I'd ask the court to consider a waiver for that reason.”

{¶ 13} In response, the prosecutor asked to approach the bench and a bench conference was held, at which the prosecutor stated, “I'm not sure you can waive costs.” And the court responded, “Now the only - 2929.02(C) allows me to waive the fine.” After that there are several remarks by the prosecutors and defense counsel which are transcribed as “indiscernible.”

{¶ 14} The court then proceeded to impose the agreed-upon imprisonment and specifically suspended any fines pursuant to R.C. 2929.02(C), but made no reference to costs. The termination entry reflects that costs were imposed.

{¶ 15} A defendant's indigence does not shield him from the payment of court costs. *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905. Court “costs must be assessed against all defendants.” *Id.* at ¶23. However, a court has discretion to waive costs assessed against an indigent defendant. *Id.*, citing *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, at ¶14; see, also, R.C. 2949.092.

{¶ 16} The defendant's appointed counsel made a timely motion that costs be waived and, especially given that the defendant was sentenced to two consecutive life sentences without eligibility for parole, there is no possibility that he has the present or future ability to pay the costs. Moreover, although it cannot be determined definitely from

an “indiscernible” record, the court appears to have incorrectly believed that it did not have the authority to waive costs.

{¶ 17} The hyper-technical resolution would be to remand the issue of waiver of costs to the trial court; this could possibly necessitate bringing the defendant back to court, and the revisiting of this tragedy on the victims’ families - not to mention the security and expense issues. Therefore, we will find that the trial court erred in not waiving the court costs and order that the termination entry be modified to reflect that costs are waived and we will affirm in all other respects.

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DONOVAN, P.J. and FAIN, J., concur.

Copies mailed to:

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Hon. Gregory F. Singer