



IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
SANDUSKY COUNTY

State of Ohio

Court of Appeals No. S-18-036

Appellee

Trial Court No. 18CR566

v.

Billy Jones

**DECISION AND JUDGMENT**

Appellant

Decided: June 28, 2019

\* \* \* \* \*

Timothy Braun, Sandusky County Prosecuting Attorney, and  
Mark E. Mulligan, Assistant Prosecuting Attorney, for appellee.

Karin L. Coble, for appellant.

\* \* \* \* \*

**PIETRYKOWSKI, J.**

{¶ 1} Appellant, Billy Jones, appeals from the August 3, 2018 judgment of the Sandusky County Court of Common Pleas convicting him following the acceptance of his guilty plea to Count 3 of the indictment, trafficking in cocaine in the vicinity of a school, a violation of R.C. 2925.03(C)(4)(d), a second-degree felony. Appellant was

immediately sentenced to a five-year mandatory term of imprisonment, a \$2,500 fine, and unspecified court costs. The trial court journalized a nunc pro tunc sentencing judgment on October 22, 2018 adding the following paragraph: “By agreement of the parties the defendant shall pay restitution to the Sandusky County Drug Task Force in the amount of \$1,750.” For the reasons which follow, we affirm in part and reverse in part.

{¶ 2} Appellant was indicted in a multi-count indictment for selling cocaine from a residence located on Stilwell Avenue, Fremont, Ohio, after execution of a search warrant. As part of a plea agreement, appellant entered a guilty plea to Count 3 and the remaining counts were dismissed. At the sentencing hearing, appellant acknowledged to the court that he had agreed to pay \$1,750 in restitution to the Sandusky County Task Force as part of his plea agreement and the parties executed the agreement at the hearing. The trial court never imposed restitution as part of the sentence at the time of the sentencing hearing, but included an order of restitution in its nunc pro tunc sentencing judgment.<sup>1</sup>

{¶ 3} On appeal, appellant asserts the following assignments of error:

Assignment of Error One: Restitution should be vacated, as the trial court did not impose restitution at the sentencing hearing and only imposed it in the judgment entry.

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<sup>1</sup> Appellant does not assign as error the entry of a nunc pro tunc order and, therefore, we do not address that issue.

Assignment of Error Two: The fine of \$2,500 is excessive and an abuse of discretion when appellant was twice found indigent during proceedings and he has no ability to pay.

Assignment of Error Three: The trial court's order to pay unspecified "costs" must be reversed for failure to find Jones had the ability to pay.

Assignment of Error Four: Trial counsel rendered ineffective assistance of counsel by failing to file an affidavit of indigency for purposes of fines and object to the fines and cost imposed.

{¶ 4} In his first assignment of error, appellant argues that although he agreed to pay restitution and verbally acknowledged the agreement at the plea hearing, the court erred in failing to actually impose restitution at the hearing. Therefore, appellant argues the order of restitution violates Crim.R. 43(A) and appellant's constitutional due process rights.

{¶ 5} Assuming *arguendo* that R.C. 2953.08(D)(1) does not bar the review of the jointly-recommended sentence, we find appellant was not prejudiced by the court's failure to impose the restitution order at the time of the sentencing hearing.

{¶ 6} Under both the federal and Ohio Constitutions and Crim.R. 43(A), the defendant has the right to be present at the time of sentencing. Due Process Clause of the Fifth and Fourteenth Amendments; Article I, Section 10 of the Ohio Constitution; *State v. Ogletree*, 2d Dist. Montgomery No. 9768, 1987 WL 15731, \*2 (Aug. 14, 1987) (Crim.R.

43(A) embodies the expanded scope of the due process clause).<sup>2</sup> However, that right ““is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.”” *State v. Wilks*, 154 Ohio St.3d 359, 2018-Ohio-1562, 114 N.E.3d 1092, ¶ 215, quoting *Snyder v. Massachusetts*, 291 U.S. 97, 107-108, 54 S.Ct. 330, 78 L.Ed. 674 (1934). *See also State v. Armas*, 12th Dist. Clermont No. CA2004-01-007, 2005-Ohio-2793, ¶ 25 (applying the same standard and holding that a violation of Crim.R. 43(A) is not a structural error and is subject to the harmless error analysis if no prejudice is shown). Therefore, a defendant must establish that imposing a sentence in the judgment entry but not at the sentencing hearing resulted in an unfair hearing or impeded the defendant’s ability to fully defend against the charges.

{¶ 7} Prejudice has been shown where costs were added to a sentencing judgment because the defendant did not have the opportunity to move to waive costs. *State v. Taylor*, 2017-Ohio-9270, 102 N.E.3d 1101, ¶ 4-6 (8th Dist.); *State v. Jones*, 6th Dist. Lucas No. L-17-1010, 2018-Ohio-882, ¶ 6; *State v. Williams*, 2013-Ohio-726, 987 N.E.2d 322, ¶ 48-49 (6th Dist.). Prejudice has also been shown where there is a discrepancy between the sentencing judgment and the sentence pronounced at the sentencing hearing which results in an unclear sentence. *State v. Smith*, 10th Dist. Franklin No. 17AP-573, 2018-Ohio-3875, ¶ 7-8; *State v. Reinthaler*, 7th Dist. Mahoning No. 16 MA 0170, 2018-Ohio-2483, ¶ 8-9; *State v. Lett*, 7th Dist. Mahoning No.

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<sup>2</sup> Appellant does not assert a violation of any statute which requires the defendant be present at the time sentence is imposed and, therefore, we do not address that issue.

15 MA 0128, 2016-Ohio-4811, ¶ 39-41; *State v. Jordan*, 10th Dist. Franklin No. 05AP-1330, 2006-Ohio-5208, ¶ 47-48; *State v. Culver*, 160 Ohio App.3d 172, 2005-Ohio-1359, ¶ 70-71. *Compare State v. Baker*, 6th Dist. Lucas No. L-03-1026, 2004-Ohio-5894, ¶ 27-28 (modification of a sentence after the hearing was not prejudicial because the defendant's sentence was reduced based upon the defendant's motion for reconsideration); *State v. Moore*, 8th Dist. Cuyahoga No. 86224, 2006-Ohio-816, ¶ 13-17 (video sentencing violates the due process right to physically present at sentencing as a whole). *See also State v. Woods*, 8th Dist. Cuyahoga No. 106476, 2018-Ohio-4856, ¶ 13 (finding R.C. 2938.11(F), which requires a defendant be present at the time of sentencing, was a directory guideline and not a mandatory procedure in bench trials and that failing to impose a firearm specification in open court did not violate Crim.R. 43).

{¶ 8} However, in the case before us, we find appellant has failed to demonstrate any objection that could have been made or how he was prejudiced by the court's failure to impose restitution in open court when the payment of restitution was part of a plea agreement. The parties discussed the provision in open court and appellant acknowledged that he had agreed to pay restitution.

{¶ 9} Therefore, we find appellant's first assignment of error not well-taken.

{¶ 10} In his second assignment of error, appellant argues the imposition of a \$2,500 fine was excessive and an abuse of discretion because appellant was found to be indigent during the proceedings. R.C. 2953.08(D)(1) does not bar our review of this assignment of error because the parties only agreed that a fine up to \$15,000 could be

awarded, which indicates that no joint plea agreement was made regarding the fine. *State v. Perry*, 2018-Ohio-1760, 111 N.E.3d 746, ¶ 12 (8th Dist.).

{¶ 11} Because appellant was convicted of a second-degree felony, he was subject to a discretionary fine up to a maximum of \$15,000. R.C. 2929.18(A)(3)(b).

Furthermore, because his conviction was for a violation of R.C. 2925.03, the trial court was required to impose a mandatory minimum fine of at least one-half the maximum discretionary fine (\$7,500). R.C. 2929.18(B)(1). The trial court may waive the mandatory minimum fine if the offender files an affidavit attesting he is indigent and unable to pay the fine and the court finds the offender is indigent and unable to pay the fine. R.C. 2929.18(B)(1).

{¶ 12} In the case before us, appellant did not file an affidavit of indigency. Therefore, the trial court lacked authority to waive appellant's obligation to pay the mandatory minimum fine. *State v. Moore*, 135 Ohio St.3d 151, 2012-Ohio-5479, 985 N.E.2d 432, ¶ 13-14; *State v. Gore*, 6th Dist. Lucas No. L-05-1242, 2006-Ohio-5622, ¶ 9; *State v. Navarro*, 8th Dist. Cuyahoga No. 107204, 2019-Ohio-989, ¶ 4.

{¶ 13} Because the trial court did not impose the mandatory minimum fine required by law, and waiver was not permitted because appellant did not file the required affidavit, we must find the sentence is void as to the mandatory fine imposed and the case must be remanded for resentencing and imposition of the mandatory fine. Ohio Constitution, Article IV, Section 2(B)(2); R.C. 2953.08(G)(2); *Moore* at ¶ 1; *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 10. Therefore, because

this case must be remanded for resentencing as to the imposition of the mandatory fine, appellant's second assignment of error is rendered moot.

{¶ 14} In his third assignment of error, appellant argues the trial court erred by imposing unspecified "court costs" without considering appellant's ability to pay such costs.

{¶ 15} The court did not indicate what "court costs" encompassed and did not cite its statutory authority to impose such costs. However, R.C. 2929.28 defines "court costs" as costs imposed pursuant to R.C. 2947.23, i.e., costs of prosecution. R.C. 2947.23 mandates that the trial court impose the costs of prosecution against all convicted defendants regardless of their ability to pay such costs. *Middleburg Hts. v. Quinones*, 120 Ohio St.3d 534, 2008-Ohio-6811, 900 N.E.2d 1005; *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, ¶ 7-8. The court retains jurisdiction to waive the costs of prosecution, R.C. 2947.23(C), if the defendant objects and presents evidence of indigency. *State v. Taylor*, 2018-Ohio-2858, 117 N.E.3d 887, ¶ 9 (2d Dist.); *State v. Johnson*, 6th Dist. Lucas No. L-16-1165, 2017-Ohio-8206, ¶ 22. Therefore, appellant's third assignment of error is found not well-taken.

{¶ 16} In his fourth assignment of error, appellant argues appointed trial counsel rendered ineffective assistance of counsel by failing to file an affidavit of indigency for purposes of waiving the fine imposed pursuant to R.C. 2929.18(B)(1). Since we have vacated the sentencing judgment with regard to imposition of this fine, appellant's fourth assignment of error is also rendered moot.

{¶ 17} Having found that the trial court did commit error prejudicial to appellant and that substantial justice has not been done, the judgment of the Sandusky County Court of Common Pleas is affirmed in part and reversed in part. This case is remanded to the trial court for resentencing on the issue of imposition of a fine pursuant to R.C. 2929.18(B)(1). In all other respects the judgment is affirmed. Appellant and appellee are ordered to equally share the costs of this appeal pursuant to App.R. 24.

Judgment affirmed in part  
and reversed in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.  
*See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

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JUDGE

Arlene Singer, J.

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JUDGE

Christine E. Mayle, P.J.  
CONCUR.

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JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <a href="http://www.supremecourt.ohio.gov/ROD/docs/">http://www.supremecourt.ohio.gov/ROD/docs/</a>.</p>
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