

[Cite as *State v. Navarro*, 2019-Ohio-989.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 107204

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOSEAN D. NAVARRO

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-17-621437-B

BEFORE: E.A. Gallagher, J., S. Gallagher, P.J., and Headen, J.

RELEASED AND JOURNALIZED: March 21, 2019

ATTORNEYS FOR APPELLANT

Francis R. Krajenke
815 Superior Avenue, Suite 1225
Cleveland, Ohio 44114

Richard T. Herman
Richard T. Herman & Associates
815 Superior Avenue, Suite 1910
Cleveland, Ohio 44114

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor
BY: Patrick J. Lavelle
Assistant Prosecuting Attorney
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

EILEEN A. GALLAGHER, J.:

{¶1} Defendant-appellant Josean D. Navarro pleaded guilty to one amended count of drug trafficking, a first-degree felony in violation of R.C. 2925.03(A)(2). The trial court sentenced Navarro to five years in prison and imposed a mandatory \$10,000 fine. On appeal, Navarro raises two assignments of error, each related to the fine. He complains that the trial court imposed the fine without considering either his motion to waive the requirement that he pay the fine or the affidavit he claims was attached to the motion,¹ and that as a result the court denied him due process. For the reasons that follow, we affirm.

¹ We note that contrary to his assertion, there is no affidavit of indigency attached to his motion in the record and the record does not contain any affidavit that satisfies R.C. 2929.18(B)(1). *See State v. Goines*, 8th Dist. Cuyahoga No. 105436, 2017-Ohio-8172, ¶ 30 (“App.R. 9 places the responsibility for filing the record with the appellant and, in the absence of documents demonstrating the error complained of, we must presume regularity in the

{¶2} In his first assignment of error, Navarro argues that the trial court violated R.C. 2929.18 because it imposed a mandatory fine as part of his sentence, without considering his purported affidavit of indigency. Navarro claims that the court based its decision to impose the fine on mere speculation that he will be able to pay the fine in the future and that as a father of four children, doing so will be nearly impossible. As such, he asserts that the court abused its discretion in imposing the fine.

{¶3} For a first-degree felony violation of R.C. 2925.03, pursuant to R.C. 2929.18(B)(1), a trial court is generally required to impose a fine of at least \$10,000 and not more than \$20,000.

R.C. 2929.18(B)(1) qualifies the nature of this “mandatory” fine, by further providing that “the court shall not impose” the fine so long as two prerequisites are met: (1) the defendant files an affidavit alleging that he or she is “indigent and unable to pay the mandatory fine” prior to sentencing and (2) the court “determines” the defendant “is an indigent person and unable to pay the mandatory fine.”

{¶4} Courts have found these prerequisites to be jurisdictional requirements that must be met before a trial court is vested with the authority to waive a defendant’s obligation to pay an otherwise mandatory fine. *See, e.g., State v. Gray*, 8th Dist. Cuyahoga No. 104140, 2016-Ohio-8320, ¶ 10 (citing cases). If a defendant fails to file the requisite affidavit, R.C. 2929.18(B)(1) mandates that the trial court impose the fine. *State v. Moore*, 135 Ohio St.3d 151, 2012-Ohio-5479, 985 N.E.2d 432, ¶ 13. However, if a defendant files the affidavit and if the court determines that the defendant is indigent and unable to pay, R.C. 2929.18(B)(1)

prevents the court from imposing the fine. *Moore* at ¶ 13. As such, “the trial court has no discretion in deciding whether to impose the fine.” *Id.*

{¶5} In this case, we find that neither prerequisite was met. Navarro did not file an affidavit alleging he was indigent and unable to pay the fine. *See* R.C. 2929.18(B)(1). Although he filed a motion prior to sentencing that sought waiver of “any and all mandatory fines based upon the fact that he is indigent and without funds to pay the mandatory drug law fine,” a motion that purported to include as attached, “the standard Affidavit of Indigency,” Navarro did not actually attach an affidavit to this motion. At the sentencing hearing, Navarro’s counsel addressed the court and stated “[f]irst of all, * * * is my co-counsel, and I believe that he has an affidavit of indigency in terms of the fine.” Nevertheless, the record does not contain any such affidavit that satisfies R.C. 2929.18(B)(1).

{¶6} Moreover, the trial court did not determine that Navarro was indigent and unable to pay the fine. *See* R.C. 2929.18(B)(1). To the contrary, based on factors including the presentence investigation report and counsel’s indication that Navarro had been trained and employed as a welder, the court determined that Navarro would be able to pay the fine:

[D]rug trafficking is ordinarily an activity undertaken for profit, and when you were arrested, you were in possession of at least a thousand dollars, tending to suggest that you do have the ability to pay the fine now or certainly in the future once you become an earner again, employed, as your wife mentioned that you have always been.

Tr. 70.

{¶7} Accordingly, because Navarro did not submit an affidavit alleging indigence and an inability to pay the fine prior to sentencing and because the trial court did not determine same, R.C. 2929.18(B)(1) required the court to impose a minimum fine of \$10,000. We overrule the first assignment of error.

{¶8} In his second assignment of error, Navarro argues that the court violated his right to due process because it did not hold a hearing on his motion to waive the mandatory fine. He provides no basis for us to conclude as much.

{¶9} R.C. 2929.18(E) provides that “[a] court that imposes a financial sanction upon an offender may hold a hearing if necessary to determine whether the offender is able to pay the sanction or is likely in the future to be able to pay it.” *See also State v. Lumpkin*, 8th Dist. Cuyahoga No. 102591, 2015-Ohio-3887, ¶ 12 (R.C. 2929.18 does not mandate a hearing; it only requires that the trial court “consider” a defendant’s ability to pay).

{¶10} Here, as previously noted, the trial court considered that Navarro was previously trained and employed as a welder. It considered that he was 31 years old at the time of sentencing and that he would be able to return to work after serving his five-year sentence. This was sufficient to satisfy the requirements under the statute. We overrule Navarro’s second assignment of error.

{¶11} Judgment affirmed.

It is ordered that appellee recover from 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 Cuyahoga County Court of Common Pleas to carry this judgment into execution.

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

EILEEN A. GALLAGHER, JUDGE

SEAN C. GALLAGHER, P.J., and
RAYMOND C. HEADEN, J., CONCUR