[Cite as *State v. Sheffield*, 2004-Ohio-3099.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 20029

vs. : T.C. CASE NO. 02CR67/2

OCT SHEFFIELD : (Criminal Appeal from Common Pleas Court)

Defendant-Appellant :

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O P I N I O N

Rendered on the 10th day of June, 2004.

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GRADY, J.

{¶1} Defendant, Oct Sheffield, appeals from his conviction and sentence for possession of crack cocaine.

{¶2} Defendant was indicted on two counts of possession of crack cocaine in violation of R.C. 2925.11(A). The first count involved an amount equal to or exceeding twenty-five grams but less than one hundred grams.

The second count involved less than one gram. Following a jury trial Defendant was found guilty of both charges. The trial court sentenced Defendant to concurrent prison terms of four years on the first count and six months on the second count. The court also imposed a mandatory ten thousand dollar fine.

{¶3} On September 9, 2003, we granted Defendant leave to file a delayed appeal.

FIRST ASSIGNMENT OF ERROR

{¶4} "DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN, BEFORE SENTENCING, HE FAILED TO PREPARE AND FILE AN AFFIDAVIT FROM MR. SHEFFIELD INDICATING THAT HE WAS INDIGENT AND UNABLE TO PAY A FINE."

{¶5} In order to demonstrate ineffective assistance of trial counsel, Defendant must demonstrate that counsel's performance was deficient and fell below an objective standard of reasonable representation, and that Defendant was prejudiced by counsel's performance; that is there is a reasonable probability that but for counsel's unprofessional errors, the result of Defendant's trial or proceeding would have been different. *Strickland v. Washington* (1984), 466 U.S. 668; *State v. Bradley* (1989), 42 Ohio St.3d 136.

{¶6} Defendant argues that he was deprived of the effective assistance of counsel when, before he was sentenced, his trial counsel failed to file an affidavit of indigency alleging that Defendant was unable to

pay the mandatory fine in R.C. 2929.18 applicable to his felony drug offense. According to Defendant, as a result of his counsel's deficient performance, he was deprived of the opportunity to avoid the ten thousand dollar fine the trial court imposed upon him.

{¶7} R.C. 2929.18(B)(1) establishes a procedure for avoiding imposition of mandatory fines applicable to certain felony drug offenses. That section provides:

{¶8} "If an offender alleges in an affidavit filed with the court prior to sentencing that the offender is indigent and unable to pay the mandatory fine and if the court determines the offender is an indigent person and is unable to pay the mandatory fine described in this division, the court shall not impose the mandatory fine upon the offender."

{¶9} At the sentencing hearing after the trial court imposed the mandatory ten thousand dollar fine for this felony drug offense, the following exchange occurred between defense counsel and the trial court:

{¶10} "COUNSEL: Your Honor, I'm just wondering and it's – on the ten thousand dollar fine, was there a finding by the Probation Department that Mr. uh ... Sheffield had any funds, uh...

{¶11} "THE COURT: This is a – with a mandatory sentence, there has to be an Affidavit filed with the Court prior to sentencing that I agr – I believe, and there's no such Affidavit that I'm aware of having been filed." (Sentence Tr. at p. 5).

{¶12} Defense counsel pursued this matter no further. Defendant

now argues that his counsel's deficient performance in failing to file an affidavit of indigency before sentencing resulted in a ten thousand dollar fine being imposed upon him that could have been avoided but for counsel's deficient performance.

{¶13} The failure to file an affidavit of indigency prior to sentencing may constitute ineffective assistance of counsel if the record shows a reasonable probability that the trial court would have found Defendant indigent and relieved him of the obligation to pay the fine had the affidavit been filed. *State v. Cochran* (June 5, 1998), Clark App. No. 97CA50; *State v. Stearns* (Oct. 9, 1997), Cuyahoga App. No. 71851; *State v. Gilmer* (April 26, 2002), Ottawa App. No. OT-01-015, 2002-Ohio-2045; *State v. McDowell* (Sept. 30, 2003), Portage App. No. 2001-P-0149, 2003-Ohio-5352; *State v. Powell* (1992), 78 Ohio App.3d 784, 787; *State v. Williams* (1995), 105 Ohio App.3d 471, 482.

{¶14} Information regarding Defendant's financial status is typically outside the record on merit appeal. Then, the more appropriate vehicle for pursuing that issue is post-conviction relief proceedings filed pursuant to R.C. 2953.21. *Cochran, supra*. In this case there is insufficient evidence in the record before us to demonstrate a reasonable probability that the trial court would have found Defendant indigent and unable to pay the fine had defense counsel filed an affidavit of indigency prior to sentencing.

{¶15} Defendant told the trial court at sentencing that he is thirty-six years old, has no criminal record, and has been able to keep himself

employed. At the time of his arrest Defendant had three hundred forty seven dollars in cash on his person. Defendant was able to post a five thousand dollar secured bond in order to obtain his release from jail pending trial. Furthermore, Defendant retained his own counsel for trial.

{¶16} The only affidavit of indigency which appears in the docket and journal entries in this case was filed by Defendant over eight months after he was sentenced and sent to prison. That is not, of course, an accurate reflection of Defendant's financial condition at the time of sentencing.

{¶17} On these facts and circumstances, we cannot conclude that a reasonable probability exists that the trial court would have found Defendant indigent had his trial counsel filed an affidavit of indigency prior to sentencing. Ineffective assistance of counsel has not been demonstrated.

{¶18} The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶19} "THE TRIAL COURT ERRED IN NOT GRANTING MR. SHEFFIELD SUFFICIENT CREDIT FOR TIME SERVED IN JAIL."

{¶20} Defendant was arrested on March 22, 2002, and was released on bond the same date. He remained free until October 29, 2002, when he was found guilty by the jury and convicted of possession of crack cocaine. Defendant remained incarcerated from that date through his sentencing on November 11, 2002, until he was eventually released for transport to state

custody on November 19, 2002, a total of twenty-one days. He is entitled to credit for those twenty-one days against the sentence the court imposed. The issue presented is whether the court was required to award him that credit.

{¶21} Defendant represents that he has since been advised by the Ohio Department of Rehabilitation and Correction that he will receive but seven days of jail time credit. Defendant argues that the trial court erred when it failed to specify the correct number of days to which he is entitled, which would have avoided the Department's mistake. Indeed, the trial court failed to specify any number of days to which Defendant is entitled to a credit.

{¶22} The Department of Rehabilitation and Correction is required by law to award an offender the correct number of days of jail time credit to which the offender is entitled against a sentence he is serving. R.C. 2967.191. The sentencing court is not required to calculate or specify those days or, in view of the statute's application, order that a credit be given. *State v. Reichelderfer* (April 30, 1999), Montgomery App. No. 17445; *State v. Marcum* (May 30, 2002), Richland App. No. 01CA63-2. However, as we noted in *Reichelderfer,* it is the preferred practice to at least specify the days in order to avoid mistakes of this kind.

{¶23} For the foregoing reasons, we cannot find that the trial court failed to discharge the duties imposed on it by law when the court failed to award jail-time credit of any kind. Defendant's only recourse, in law, is a

petition for a writ of mandamus to require the Department to award him the correct number of days.

{¶24} The trial court's failure in this case and the confusion from which it arose appears to have resulted from the fact that a visiting judge presided. The assistant prosecuting attorney might have aided the court by reporting the correct number of days to specify in the termination entry, which is the practice in Montgomery County, but instead stood mute while the court grappled with the problem. We encourage the Montgomery County Prosecutor to act to correct the Department of Rehabilitation and Corrections records in order to avoid a mandamus action.

{¶25} The second assignment of error is overruled. The judgment of the trial court will be affirmed.

{¶26} BROGAN, J. and YOUNG, J., concur.

Copies mailed to:

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Hon. Neal B. Bronson