[Cite as *State v. Hodge*, 2011-Ohio-633.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23964
v.	:	T.C. NO. 08CR1577
ANTHONY HODGE	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 11th day of February, 2011.

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FROELICH, J.

{¶ 1} Anthony Hodge was convicted after a bench trial in the Montgomery County Court of Common Pleas of having weapons while under disability and possession of crack cocaine in an amount equal to or greater than ten grams but less then twenty-five grams. Hodge was sentenced to three years on each count, to be served concurrently, ordered to pay

a mandatory fine of $7,500, and his driving privileges were suspended.

{¶ 2} Hodge appeals from his conviction, arguing that the trial court erred in overruling his motion to suppress evidence, that he did not validly waive his right to a jury trial, that his conviction for possession of cocaine was based on insufficient evidence, and that the court erred in imposing the mandatory fine. For the following reasons, the trial court's judgment will be affirmed in part, reversed in part, and remanded for further proceedings.

I

{¶ 3} Hodge's first assignment of error states:

{¶ 4} "THE TRIAL COURT ERRED AND/OR ABUSED ITS DISCRETION IN OVERRULING HIS MOTION TO SUPPRESS EVIDENCE THAT WAS OBTAINED FROM HIS HOME BY AN ENTRY AND SEARCH WITHOUT A WARRANT CONTRARY TO HIS CONSTITUTIONAL RIGHT AGAINST UNREASONABLE SEARCH AND SEIZURE GUARANTEED BY THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 14, ART. I, OF THE OHIO CONSTITUTION."

{¶ 5} On April 23, 2009, Hodge moved to suppress evidence seized from his apartment and any statements he had made, claiming that the officers' repeated warrantless entries into his house were unlawful. At the hearing on the motion, Hodge's counsel indicated that the portion of the motion related to Hodge's statements was related only to statements made at Hodge's home, even though Hodge had made subsequent statements to a detective at the jail.

{¶ 6} The suppression hearing was held on July 24, 2009. Montgomery County Sheriff Deputies Melanie Phelps-Powers and Matthew Snyder testified for the State, and Hodge testified on his own behalf. The State's evidence revealed the following facts:

{¶ 7} At approximately 3:00 p.m. on April 11, 2008, Deputy Phelps-Powers was on road duty in uniform and in a marked cruiser when she was dispatched to 76 Bennington Drive in Harrison Township due to a 911 hang-up call. Phelps-Powers explained that, when someone calls 911, the address "pops up" and the dispatcher "will try to call back to see what the problem is, but nobody had answered on a callback. And so they create a screen which is a dispatch for us, to go out and check and make sure that everything is okay at that residence." Phelps-Powers stated that, even if someone at the address responds to the callback that everything is fine, an officer will respond to ensure that the person's response was voluntary and that everything is, in fact, okay.

{¶ 8} When Deputy Phelps-Powers arrived at 76 Bennington, an apartment with its own entry, she noticed that the screen door was closed, but the apartment's front wooden door was ajar. The deputy knocked and said, "Sheriff's Office, Sheriff's Office. Is everything okay?" Phelps-Powers could hear that a television was on, but no one responded. She knocked several times more. Again, no one responded.

{¶ 9} Phelps-Powers opened the door and said, again, "Sheriff's Office, Sheriff's Office." She testified that the apartment was not large, and she thought she was talking loudly enough that anyone inside would have been able to hear her. When she did not get a response, she went inside to check that no one had fallen or needed assistance. The deputy stated that it "happens very frequently," including in a separate incident earlier that day, that

a resident is unable to respond and needs help.

{¶ 10} Phelps-Powers checked the living room, kitchen, bathroom, and bedroom, continuing to announce her presence. The deputy did not find anyone in the apartment, but she observed drugs "kind of everywhere" in the bedroom – pill bottles and individually packaged "little white packets" – and money on the bed. While Phelps-Powers was in the bedroom, Deputy Epstein, who had also been dispatched to the address, came in to check. Phelps-Powers told Epstein what was there, and the two left the apartment. Phelps-Powers called her sergeant and learned that a drug unit would be sent to the apartment.

{¶ 11} While Deputy Phelps-Power was waiting outside, a man who claimed to be the renter of the apartment approached her. Phelps-Powers asked for his name and to see identification; the man was identified as Hodge. The deputy asked Hodge to sit in her cruiser, because she did not want anyone to enter the apartment. Hodge told her that his neighbor had used his phone to call about a fire at her apartment. Phelps-Powers explained the situation and told him that the drug unit was on their way. Phelps-Powers did not ask Hodge any questions.

{¶ 12} At approximately 3:26 p.m., Detective Matthew Snyder, an undercover drugs and narcotics detective, responded to the scene in plain clothes and an unmarked car. Phelps-Powers advised him about what she had seen, and the detective asked her to "show me real quick." The two entered Hodge's apartment together so that Phelps-Powers could show him the money and suspected cocaine in the bedroom. The deputies were in the apartment "for about 30 seconds" and did not look in any furniture or manipulate anything while inside the apartment.

{¶ 13} Afterward, Detective Snyder introduced himself to Hodge in Phelps-Power's patrol car. Snyder told Hodge that he was not under arrest, but he was being detained and not free to go pending an investigation. Snyder informed Hodge of his *Miranda* rights using a pre-interview form. The detective reviewed the form with Hodge, Hodge indicated his understanding, and Hodge agreed to talk without an attorney.

{¶ 14} During Hodge's conversation with Snyder, Hodge consented to a search of his apartment, and he signed a written consent-to-search form. At the conclusion of the interview, Detective Snyder reviewed the pre-interview form with Hodge again; Hodge initialed beside each right and signed the form.

{¶ 15} Detective Snyer re-entered Hodge's apartment with several other officers. The officers recovered various amounts of crack cocaine, marijuana, prescription pills, a loaded .38 handgun, food stamp cards, various sums of cash, and a ledger with names and dollar amounts. During the search, Snyder went back to the cruiser several times to ask Hodge about various things they had found and to get an explanation. After the search was completed and items collected, Phelps-Powers re-entered Hodge's apartment to gather information for her report.

{¶ 16} Accordingly to Hodge's testimony at the suppression hearing, Hodge's neighbor, Belinda Wagner, had come to his apartment to use the phone due to a fire at her apartment. As Wagner dialed 911, she asked Hodge if she should call 911. Hodge told her to call the fire department. Wagner hung up the phone and asked Hodge to come to her apartment to see what was going on. Hodge left with Wagner, closing the front door behind him.

{¶ 17} As Hodge finished helping Wagner, he saw a sheriff's cruiser pull up in front of his apartment. Hodge and Wagner returned to Hodge's apartment; he told Deputy Phelps-Powers that he was the resident and Wagner told the deputy that she had used Hodge's telephone. Phelps-Powers asked Hodge for identification while another deputy took Wagner to her apartment. After Hodge provided his identification, Phelps-Powers placed him in the back of her cruiser. No one told Hodge that law enforcement officers had already entered his apartment.

{¶ 18} Hodge observed Detective Snyder arrive and speak with Phelps-Powers and another deputy. Hodge testified that the three officers knocked on his apartment door, entered, and remained for approximately twenty minutes. Afterward, Detective Snyder came to the cruiser, told Hodge what they had seen, and said that he could get a search warrant. Hodge responded, "Well, you might as well go on in there and just get everything you then seen [sic]." Hodge stated that Snyder had not informed him of his *Miranda* rights prior to this discussion.

{¶ 19} During the search, Detective Snyder came out and asked Hodge about the gun that was found. They later also talked about Hodge being on probation and the drugs in the apartment. Hodge testified that he gave consent to search his apartment after officers had already been in his apartment several times. Hodge testified that he consented "voluntarily" but, on redirect examination, stated that circumstances made him feel that he had to consent.

{¶ 20} At the conclusion of the hearing, the trial court found that the deputies had properly entered the residence in response to the 911 hang up call. With respect to the search of Hodge's residence, the court concluded that the 911 call "created a series [of]

exigent circumstances to make sure that everybody's safe and nobody's in harm's way." Having lawfully entered the apartment, Deputy Phelps-Powers discovered what appeared to be drugs in Hodge's bedroom. The court found that Hodge had knowingly and voluntarily consented to the search of his apartment, which allowed the deputies to complete a search and seize the property. As for Hodge's statements, the trial court found that Hodge had not made any incriminating statements to Deputy Phelps-Powers and that he had only stated that the 911 call was made because of a fire. The court concluded that all other statements were made after Hodge received *Miranda* warnings.

{¶ 21} In addressing Hodge's motion to suppress, the trial court assumed the role of the trier of fact. *State v. Morgan*, Montgomery App. No. 18985, 2002-Ohio-268, citing *State v. Curry* (1994), 95 Ohio App.3d 93, 96. As the trier of fact, the court determined the credibility of the witnesses and weighed the evidence presented at the hearing. Id. In reviewing the trial court's ruling, an appellate court must accept the findings of fact made by the trial court if they are supported by competent, credible evidence. Id. However, "the reviewing court must independently determine, as a matter of law, whether the facts meet the appropriate legal standard." Id.

{¶ 22} Hodge claims that a 911 hang-up call, without more, is insufficient to qualify as an "exigent circumstance" to justify a warrantless entry into an apartment. He argues that Deputy Phelps-Powers needed more than the mere possibility that someone was in need of aid to permit her entry into his apartment; rather, there must have been a "'real and immediate' necessity" to enter. Hodge states: "Without some corroborating information of a dangerous situation, the hang-up is insufficient to create an exigent circumstance that

excuses the obligation to obtain a search warrant." He further asserts that, because the deputy's entry was unlawful, all the evidence against him should have been suppressed as fruit of the poisonous tree.

{¶ 23} The Fourth Amendment to the United States Constitution prohibits warrantless searches and seizures, rendering them per se unreasonable unless an exception applies. *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576; *State v. Cosby*, 177 Ohio App.3d 670, 2008-Ohio-3862, ¶16. Exigent circumstances are a well-established exception to the Fourth Amendment's warrant requirement. *State v. Andrews*, 177 Ohio App.3d 593, 2008-Ohio-3993, ¶23; *State v. Berry*, 167 Ohio App.3d 206, 2006-Ohio-3035, ¶12.

{¶ 24} "Generally, the exigent-circumstances exception to the Fourth Amendment's warrant requirement can apply when the delay associated with obtaining a warrant would result in endangering police officers or other individuals, or would result in concealment or destruction of evidence." *State v. Johnson*, Montgomery App. No. 23616, 2010-Ohio-1790, ¶14. Accordingly, the exigent or emergency circumstances exception justifies an officer's warrantless entry into a building when such entry "is necessary to protect or preserve life, to prevent physical harm to persons or property, or to prevent the concealment or destruction of evidence, or when someone inside poses a danger to the police officer's safety." *State v. Sharpe*, 174 Ohio App.3d 498, 2008-Ohio-267, ¶48, citations omitted. "The key issue is whether the officers 'had reasonable grounds to believe that some kind of emergency existed ***. The officer must be able to point to specific and articulable facts, which, taken with rational inferences from those facts, reasonably warrant intrusion into protected areas.' "

State v. Prater, Clark App. No. 06-CA-89, 2008-Ohio-6730, ¶21, quoting *State v. White*, 175 Ohio App.3d 302, 2008-Ohio-657, ¶17. The police "bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." *Welsh v. Wisconsin* (1984), 466 U.S. 740, 750, 104 S.Ct. 2091, 80 L.Ed.2d 732.

{¶ 25} In our view, the 911 hang-up call created a reasonable belief that an emergency existed, requiring investigation by law enforcement officers. *State v. May*, Highland App. No. 06CA10, 2007-Ohio-1428, ¶12. As stated by the Third District in *State v. Myers*, Marion App. Nos. 9-02-65, 9-02-66, 2003-Ohio-2936:

{¶ 26} "[W]e find these types of calls [i.e., 911 hang-up calls] to inherently be emergencies. In fact, the emergency of these situations only ceases once the emergency responder is able to ascertain whether someone is in need of aid. Once the responder discovers that no emergency exists, there is no need to further investigate. However, at times, this discovery can only be made by gaining entrance to the location from which the call was placed. The mere absence of sounds is not always a sufficient basis to determine whether someone in the home needs immediate aid, especially when other information exists that would lead one to reasonably believe that someone is inside the home. The person in need of aid could be unconscious or otherwise debilitated. In addition, there may be sounds of distress within the home but which are inaudible to those on the outside of the home." Id. at ¶12.

{¶ 27} In his reply brief, Hodge cites *United States v. Cohen* (C.A.6, 2007), 481 F.3d 896, arguing that a 911 hang-up call "is no more an objective fact of immediate need for aid than an investigatory stop is justified by an anonymous tip, with no assessment of

reliability." In *Cohen*, officers responding to an early morning 911 hang-up call from a home in a cul-de-sac stopped a vehicle that was turning from the cul-de-sac onto an adjacent road. The cul-de-sac contained five or six houses and ran off of Wooded Glen Road, which was a dead-end street. In addressing whether the silent 911 call provided a reasonable suspicion for the stop of the vehicle, the Sixth Circuit concluded that the 911 hang-up call "provided even less information to police than the anonymous tip at issue in [*Florida v.] J.L. [*(2000), 529 U.S. 266, 270, 120 S.Ct. 1375, 146 L.Ed.2d 254]." The appellate court noted:

{¶ 28} "Citizens call 911 for many different reasons. A citizen may call 911 in order to report an emergency, be it criminal activity, a fire, or a medical emergency, but someone may also call 911 because he or she misdialed another number, accidentally activated a speed dial feature, or wished to pull a prank on the authorities. Thus, without any information from the caller, the silent 911 hang-up call was the equivalent of an anonymous 911 report that there might be an emergency, which might or might not include criminal activity, at or near the address from which the call was made. In that sense, the silent 911 hang-up call could be said to have suggested the possibility of, among other things, a limited 'assertion of illegality,' but, absent any observed suspicious activity or other corroboration that criminal activity was afoot, Officer Pender had no way of determining whether the silent 911 hang-up call was reliable in even that limited possible assertion." *Cohen*, 481 F.3d at 900.

{¶ 29} We do not necessarily disagree with this general language, but *Cohen* is factually and legally distinguishable from the circumstances before us. The question before is us is not whether a 911 hang-up call inherently implies that criminal activity is afoot so as

to justify the stop of a vehicle near the source of the 911 call. Rather, our focus is whether such a call created a reasonable basis to believe that an emergency existed, in the circumstances of this case.

{¶ 30} The Montgomery County Sheriff's dispatcher received a hang-up emergency telephone call from 76 Bennington, which suggested that an emergency existed at the residence, and there was no response to a callback. Deputy Phelps-Powers was dispatched to the residence to investigate whether an emergency actually existed and the nature of any such emergency. Upon arrival, Phelps-Powers noticed that the front door was open and she heard that a television set was on, both of which suggested that someone was in the apartment. However, no one responded, even though the deputy repeatedly knocked on the door and loudly announced her presence. At the time Deputy Phelps-Powers entered Hodge's apartment, she continued to have reasonable grounds to believe that some kind of emergency existed inside the residence, causing the caller to be incapacitated and/or unable to respond to her. The deputy was entitled to enter the apartment to further investigate the 911 hang-up call and to ascertain the nature of the emergency or lack thereof. The deputy's entry into the apartment was justified under the exigent circumstances exception to the warrant requirement.

{¶ 31} It is very possible that, under certain circumstances, a police officer may be able to determine that no actual emergency exists without a warrantless entry into the caller's residence. Those circumstances did not exist in this case.

{¶ 32} Hodge has not argued that the seizure of items from his apartment was unlawful, if the deputy's initial entry into his apartment was proper. Nor does Hodge

challenge the trial court's decision regarding his statements. Accordingly, we will not address those issues.

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

II

{¶ 34} Hodge's second assignment of error states:

{¶ 35} "THE WAIVER OF RIGHT TO JURY WAS INVALID SINCE IT DID NOT OCCUR IN OPEN COURT, VIOLATING DEFENDANT'S SIXTH AMENDMENT AND OHIO CONSTITUTION RIGHT TO A JURY TRIAL."

{¶ 36} In his second assignment of error, Hodge initially claimed that he did not validly waive his right to a jury trial, because the record does not reflect that he waived that right in open court. In response, the State has supplemented the record with an electronic recording of Hodge's jury waiver; a transcription of the hearing was separately filed and also attached to Hodge's reply brief. Hodge acknowledges in his reply brief that he was in court with his counsel when the jury waiver was discussed and signed. Hodge raises in his reply brief that his jury waiver was nevertheless invalid, because the indictment was subsequently amended and the waiver failed to address the amended indictment.[1]

{¶ 37} Shortly after Hodge waived his right to a jury trial, the State orally moved to

[1] "Reply briefs are merely intended to be an opportunity to reply to the brief of the appellee." *Griffin* at ¶13. Consequently, an appellant is not permitted to raise new arguments in his or her reply brief. E.g., *Ameritech Publishing, Inc. v. Griffin*, Clark App. No. 2009 CA 18, 2009-Ohio-5602, ¶13; *Hoskins v. Simones* (2007), 173 Ohio App.3d 186, 194. See, also, App.R. 16(C). However, Hodge has sought leave to raise this additional argument as well as additional arguments regarding his fourth assignment of error, and we have granted that motion.

amend the indictment to add the words "either" and "or" on the charge for having weapons while under disability. Hodge did not object, and his counsel noted that the change was "purely grammatical." The State's amendment did not make any substantive change to the charge against him. Hodge's waiver of his right to a jury trial remained valid.

{¶ 38} The second assignment of error is overruled.

III

{¶ 39} Hodge's third assignment of error states:

{¶ 40} "DEFENDANT WAS DENIED DUE PROCESS OF LAW BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE TRIAL COURT FINDING THE DEFENDANT GUILTY OF POSSESSION OF 10.23 GRAMS OF CRACK COCAINE, A FELONY OF THE SECOND DEGREE, WHEN EVIDENCE OF WEIGHING OF SAMPLES WAS THAT THEY 'CONTAINED CRACK COCAINE.'"

{¶ 41} In his third assignment of error, Hodge claims that his conviction for possession of crack cocaine was based on insufficient evidence. Hodge argues that the State presented testimony that the seized substances "contained" crack cocaine, not that the weight of the crack cocaine itself was more than ten grams. Hodges also notes that his expert, who weighed the drug samples closer to trial, testified that the crack cocaine samples weighed 9.91 grams.

{¶ 42} "A sufficiency of the evidence argument disputes whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law." *State v. Wilson*, Montgomery App. No. 22581, 2009-Ohio-525, ¶10, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386,

1997-Ohio-52. When reviewing whether the State has presented sufficient evidence to support a conviction, the relevant inquiry is whether any rational finder of fact, after viewing the evidence in a light most favorable to the State, could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Dennis*, 79 Ohio St.3d 421, 430, 1997-Ohio-372, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d. 560. A guilty verdict will not be disturbed on appeal unless "reasonable minds could not reach the conclusion reached by the trier-of-fact." Id.

{¶ 43} The State presented the testimony of Jennifer Watson, a forensic chemist for the Miami Valley Regional Crime Laboratory who analyzed the substances that were collected from Hodge's apartment on April 11, 2008. The substances were submitted to the lab as three samples: State's Exhibit 4 was a rock of suspected crack cocaine that was collected from Hodge's bed; Exhibit 5 consisted of a pill tin with two small pieces of suspected crack cocaine that were collected from the top dresser drawer; and Exhibit 6 was several pieces of suspected crack cocaine that were collected from a night stand.

{¶ 44} Watson analyzed the samples of the suspected crack cocaine on June 25, 2008. First, she weighed the samples (without the packaging). Second, she performed a preliminary cobalt thiocyanate test, which turns blue when applied to suspected cocaine or crack cocaine. After getting a blue test result, Watson performed a confirmatory gas chromatograph mass spectrometer (GCMS) test on all of the samples. Because Exhibits 4 and 6 weighed more than one gram, she also performed a confirmatory infrared spectra photometer (IR) test on those exhibits to confirm the base form of the cocaine or crack cocaine. Watson concluded that the "substances contained crack cocaine." Exhibit 4 had a

net weight of 2.7 grams, the off-white chunky substance in Exhibit 5 (a portion did not appear to be crack cocaine) had a net weight of .34 grams, and Exhibit 6 had a net weight of 7.19 grams, for a total weight of 10.23 grams.

{¶ 45} Watson testified that crack cocaine is made using baking soda, water, and cocaine. The three substances are mixed together, heated for a short period of time, and then allowed to dry. Watson stated that, over time, the water in the mixture will evaporate, and the weight of the crack cocaine will decrease. Watson was aware that the samples recovered from Hodge's apartment were reweighed in December 2009 and that they weighed less at that time; Watson testified that she was not surprised by the results and that the decrease was due to water evaporation.

{¶ 46} Hodge subsequently presented the evidence of Larry Dehus, who tested the samples in December 2009. Exhibit 4 was 2.58 grams, the chunky portion of Exhibit 5 was .31 grams, and Exhibit 6 was 7.02 grams; the second piece of Exhibit 5 was determined to be wax. Dehus did not dispute that the samples contained crack cocaine, but found that the combined weight of the crack cocaine was 9.91 grams. Dehus was not surprised by the decrease in weight compared to Watson's measurements, and he testified that he has never seen the weight of crack cocaine increase over time.

{¶ 47} Viewing the State's evidence in the light most favorable to it, there was sufficient evidence to convict Hodge of possession of crack cocaine in an amount equal to or greater than ten grams but less than twenty-five grams. Watson testified that the net weight of the crack cocaine was greater than ten grams when she weighed it in June 2008, and that the moisture in the crack cocaine evaporates, which can cause the weight to decrease over

time. Based on Watson's testimony, the trial court, as the trier of fact, reasonably concluded that the crack cocaine from Hodge's apartment weighed more than ten grams at the time of the offense.[2] See *State v. Moore*, Montgomery App. No. 21863, 2007-Ohio-2961, ¶8. The trial court "was not required to disregard the weight of moisture in the crack cocaine when determining its weight." Id., citing R.C. 2925.01(GG) (defining crack cocaine as "a compound, mixture, preparation or substance that is or contains any amount of cocaine that is analytically identified as the base form of cocaine ***").

{¶ 48} The third assignment of error is overruled.

IV

{¶ 49} Hodge's fourth assignment of error states:

{¶ 50} "THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO A FINE OF $7,500.00, WHEN HE HAD SIGNED AN INDIGENCY AFFIDAVIT AND THE COURT MADE NO INQUIRY AS TO ABILITY TO PAY."

{¶ 51} In his fourth assignment of error, Hodge asserts that the imposition of a mandatory fine of $7,500 was contrary to law, because the court did not consider its prior finding of indigency or Hodge's present ability to pay before imposing the fine. In his reply brief, Hodge further claims that the State waived the argument that Hodge was required to file an affidavit of indigency before sentencing in order to avoid the mandatory fine and that his trial counsel's failure to file an affidavit of indigency before sentencing constituted

[2] Hodge did not argue that his conviction was against the manifest weight of the evidence. Even if such an argument had been raised, we would not find that the trial court's verdict was against the manifest weight of the evidence, considering that Watson testified that samples weighed 10.23 grams and Hodge's expert agreed with Watson that the weight of crack cocaine may decrease over time due to water evaporation.

ineffective assistance of counsel.

{¶ 52} Hodge was convicted of possession of crack cocaine in violation of R.C. 2925.11(A), (C)(4)(d), a second-degree felony. R.C. 2929.18(B)(1) governs the imposition of fines for first, second, and third degree drug felonies, stating:

{¶ 53} "[T]he sentencing court shall impose upon the offender a mandatory fine of at least one-half of, but not more than, the maximum statutory fine amount authorized for the level of the offense pursuant to division (A)(3) of this section. 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.

{¶ 54} The maximum statutory fine for a second degree felony is $15,000. R.C. 2929.18(A)(3)(b). Absent an affidavit of indigency, the trial court was required to impose a mandatory fine upon Hodge of at least $7,500. In order for Hodge to avoid the mandatory fine, Hodge was required to allege in an affidavit filed with the court prior to sentencing that he was indigent and unable to pay the mandatory fine, and the court must have determined that Hodge was, in fact, indigent. R.C. 2929.18(B)(1); *State v. Allen*, Montgomery App. No. 23738, 2010-Ohio-3336, ¶48.

{¶ 55} R.C. 2929.19(B)(6) requires the trial court to consider defendant's present and future ability to pay before imposing any financial sanction under R.C. 2929.18. *State v. Ward*, 187 Ohio App3d. 384, 2010-Ohio-1794, ¶27. "A hearing on a defendant's ability to pay is not mandated, though the trial court may hold a hearing if necessary to determine the

issue. R.C. 2929.18(E). Neither is the court obligated to make any express findings on the record regarding a defendant's ability to pay a financial sanction, although in our opinion that is clearly the better practice. *State v. Ayers* (January 7, 2005), Greene App. No. 2004CA0034, 2005-Ohio-44. All that is required is that the trial court 'consider' a defendant's ability to pay. Id. A finding that a defendant is indigent for purposes of appointed counsel does not shield the defendant from paying court costs or a financial sanction. Id." *State v. Felder*, Montgomery App. No. 21076, 2006-Ohio-2330, ¶64.

{¶ 56} The trial court imposed a mandatory fine of $7,500 at the sentencing hearing, and the following exchange occurred between the trial court and Hodge's counsel:

{¶ 57} "MR. NORWICKI [sic]: And if I could, Your Honor, with respect to the mandatory fine, my client is indigent and we'll be submitting an affidavit of indigency. We just ask that any fine be waived due to that.

{¶ 58} "THE COURT: I'm trying to remember what kind of money he had on him at that time. Let me just see. He had some cash as I recall.

{¶ 59} "MR. NORWICKI: He's telling me it was only $266 that they collected there are the –

{¶ 60} "THE COURT: They were talking about –

{¶ 61} "MR. NORWICKI: It's somewhere between six to $700, Your Honor, that they collected from the house and 250 from his person.

{¶ 62} "THE COURT: Quite a pretty valuable stash of drugs though too. Well, I'll take a look at your thing. But right now, based on the business he was running and the amount of cash that was available to him and the – he had a whole ledge[r] of people that

owed him money as well. So he has outstanding debts I suppose, if that's all legal. And based on that, I'm going to impose the fine."

{¶ 63} Hodge's counsel did not file an affidavit of indigency.

{¶ 64} As an initial matter, Hodge argues that "there is no indication that the State argued that the trial court was required to impose the fine since Mr. Hodge's counsel did not filed [sic] the affidavit of indigency with the Court." Contrary to Hodge's argument, the State is not required to argue that a mandatory fine be imposed. R.C. 2929.18(B)(1) required the court to impose a mandatory fine, absent evidence from Hodge establishing his indigency. The State did not waive the imposition of the mandatory fine.

{¶ 65} Moreover, the record reflects that the trial court "considered" Hodge's ability to pay the mandatory fine, as required by R.C. 2929.19(B)(6), although it did not have a current affidavit of indigency before it. The court reviewed the amount of drugs and money that were seized from his house and considered the "business," albeit illegal, that Hodge was running. Based on that information, the court concluded that Hodge had or would have sufficient funds to pay the fine. Although Hodge had appointed counsel due to indigency, the court was not required to waive the mandatory fine based solely on that fact. The trial court's imposition of the mandatory fine was not contrary to R.C. 2929.19(B)(6).

{¶ 66} In order to establish ineffective assistance of counsel, an appellant must demonstrate both that trial counsel's conduct fell below an objective standard of reasonableness and that the errors were serious enough to create a reasonable probability that, but for the errors, the result of the trial or proceeding would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State*

v. Bradley (1989), 42 Ohio St.3d 136. "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." (Internal citations omitted.) *State v. Sheffield*, Montgomery App. No. 20029, 2004-Ohio-3099, ¶13.

{¶ 67} In *Sheffield*, we commented that, "[t]ypically, information regarding Defendant's financial status is outside the record in a direct appeal." Id. at ¶15. Consequently, the more appropriate vehicle for pursuing this issue is, often times, post-conviction relief proceedings filed pursuant to R.C. 2953.21. *State v. Hicks*, Montgomery App. No. 23757, 2010-Ohio-5521, ¶16; *State v. Dixon*, Montgomery App. No. 23671, 2010-Ohio-4919, ¶16.

{¶ 68} The record reflects that, at the time of his arrest in April 2008, Hodge was in possession of at least $850 and more than ten grams of crack cocaine. Hodge had appointed counsel due to a finding of indigency at the time of counsel's appointment on January 14, 2009; he was on community control on another charge, and he was subsequently released on his personal recognizance. As stated above, a determination that a defendant is indigent for purposes of employing counsel is separate and distinct from a determination of indigency for purposes of paying a mandatory fine. See *Felder*, supra.

{¶ 69} The presentence investigation report indicated that Hodge was 53 years old, had ten years of schooling, had several past felony convictions (including probation revocations and imprisonment), and lived alone. Hodge claimed to have no children, although the Support Enforcement Agency reported that he needed to establish paternity and

support for a child. Hodge had reported being born legally blind and being unable to hold steady employment, but he acknowledged having had several temporary services jobs over the years. For the past ten years, Hodge has received social security disability benefits of $693 per month, plus an additional $200 per month in food stamp benefits.

{¶ 70} Hodge did not provide any additional details of his financial situation at the sentencing hearing on March 18, 2010. However, his counsel informed the court that he (Hodge) was indigent and that counsel planned to file an affidavit of indigency. As stated above, Hodge was sentenced to three years in prison.

{¶ 71} On this record, we find that a reasonable probability exists that the trial court would have found Hodge indigent and unable to pay the mandatory fine for his felony drug offense had defense counsel filed an affidavit of indigency prior to sentencing. See *Ward* at ¶35 (based on defendant's and her counsel's numerous assertions at the sentencing hearing regarding defendant's employment prospects, financial assets, health, and financial obligations, there was a reasonable probability that the trial court would have found defendant indigent if her trial counsel had filed an affidavit of indigency prior to sentencing).

{¶ 72} The fourth assignment of error is overruled in part and sustained in part.

V

{¶ 73} Having sustained in part Hodge's fourth assignment of error, the portion of the trial court's judgment imposing a mandatory fine will be reversed, and this matter will be remanded to the trial court for a hearing pursuant to R.C. 2929.18(E) in order to determine whether Hodge is indigent for the purpose of avoiding the mandatory fine imposed by

statute. In all other respects, the trial court's judgment will be affirmed.

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DONOVAN, J., concurs.

GRADY, P.J., dissenting:

{¶ 74} Deputy Phelps-Powers received no response when she knocked on the door of Defendant's apartment and called out, "Sheriff's Office, Sheriff's Office." Had a person inside the apartment been injured and in need of immediate aid, the Deputy could not have rendered that aid without entering the apartment. However, that fact does not demonstrate that an occupant was in need of aid, based on nothing more than the previous aborted 911 call.

{¶ 75} The fact that a need to provide emergency aid exists does not remove an officer's conduct in entering a private residence from the coverage of the Fourth Amendment. Rather, the existence of an exigent circumstance of that kind excuses the search warrant requirement, because the delay in securing a warrant would itself endanger persons in need of aid. Katz, Ohio Arrest, Search and Seizure (2008 Ed.), §9:1. Therefore, to justify entering without a warrant in that circumstance, the State must demonstrate two propositions.

{¶ 76} First, the exigencies of the situation must be so compelling that the warrantless search is objectively reasonable. *Mincey v. Arizona* (1978), 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290. To satisfy that standard, officers must have been confronted by an "emergency threatening life or limb." *Id*., 437 U.S., at 393.

{¶ 77} Second, the emergency aid exception does not depend on the officer's

subjective intent, but "whether there was ‘an objectively reasonable basis for believing’ that medical assistance was needed, or persons were in danger." *Michigan v. Fisher* (2009), ___ U.S. ___, 130 S.Ct. 546, 549, 175 L.Ed.2d 410, quoting from *Brigham City v. Stuart* (2006), 547 U.S. 398, 126 S.Ct. 1943, 164 L.Ed.2d 650.

{¶ 78} The objective reasonableness test in *Fisher and Brigham City* replicates the "probable cause" standard. Probable cause exists when a reasonably prudent person would believe that the person to be arrested has committed a crime or that the place to be searched contains evidence of a crime. *State v. Timson* (1974), 38 Oho St.2d 122; *State v. George* (1989), 45 Ohio St.3d 325. Mere suspicion is insufficient for probable cause. Katz, §2:2. By rejecting the officer’s subjective intent, to which we are instructed by *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, to give deference, *Fisher* implicitly also rejects application of the reasonable and articulable suspicion standard in *Terry* to warrantless entries to provide emergency aid.

{¶ 79} An aborted 911 call of this kind that produces no response on a "call back," absent some other positive indication that an occupant of the premises may actually be in need of immediate aid, is insufficient as a matter of law to justify entry into the premises from which the call came. The objective reasonableness test is not satisfied by the subjective belief on which Deputy Phelps-Powers said she acted, based on her prior experience, that someone inside could be in need of aid. That was a reasonable and articulable suspicion. Nevertheless, absent corroborating circumstances which demonstrated that suspected need, there was no objectively reasonable basis to believe that there was an emergency threatening the life or limb of a person inside. In short, there was

no need of law enforcement so compelling which the State demonstrated that made the warrantless search of the apartment objectively reasonable. *Mincey*.

{¶ 80} The warrantless search of Defendant's apartment was illegal, and that illegality tainted Defendant's subsequent consent to the search in which the evidence was seized that Defendant sought to suppress, as "fruit of the poisonous tree." *Wong Sun v. Untied States* (1963), 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441. The trial court erred when it denied the motion to suppress. I would reverse and remand for further procedures.

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