

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 26250
	:	
v.	:	Trial Court Case No. 2013-CR-1340
	:	
MICHAEL DARNEY	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

.....

OPINION

Rendered on the 12th day of June, 2015.

.....

MATHIAS H. HECK, JR., by TIFFANY C. ALLEN, Atty. Reg. No. 0089369, Montgomery County Prosecutor's Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45402
Attorney for Plaintiff-Appellee

BROCK A. SCHOENLEIN, Atty Reg. No. 0084707, 371 West First Street, Dayton, Ohio 45402
Attorney for Defendant-Appellant

.....

HALL, J.

{¶ 1} Michael Darney appeals from his conviction and sentence following a guilty plea to one count of violating R.C. 3734.83(A) for knowingly transporting more than ten

scrap tires without first registering to do so.

{¶ 2} Darney advances two assignments of error. First, he contends the trial court erred in ordering him to pay a mandatory fine where he filed an affidavit of indigence and the trial court made no factual findings regarding his ability to pay. Second, he claims his guilty plea was not knowingly, intelligently, and voluntarily entered because the plea form he signed failed to indicate that he faced a mandatory fine.

{¶ 3} Upon review, we find merit in his second argument and address that first. Darney's violation of R.C. 3734.83(A) was an unclassified felony. Pursuant to R.C. 3734.99(F), the potential penalty was a fine of \$10,000 to \$25,000, or two to four years of imprisonment, or both. The plea form Darney signed correctly identified his offense as an unclassified felony and correctly recited these potential penalties. (Doc. #42). During a Crim.R. 11 plea hearing, the trial court orally advised Darney of these potential penalties. (Tr. at 11). It also told him he was eligible for community control. (*Id.*). Neither the plea form nor the trial court's oral pronouncements mentioned a prison term or a fine being "mandatory."

{¶ 4} Following his plea, Darney moved for a waiver of costs and fines with a supporting affidavit of indigence. (Doc. #45). The trial court later sentenced him to community control and imposed other sanctions, including a \$10,000 fine, which it referred to at the sentencing hearing and in its termination entry as a "mandatory fine." (Doc. #47; Tr. at 17).

{¶ 5} With regard to the "mandatory" nature of the \$10,000.00 fine, the statute does not use the term "mandatory" as that term appears in other sentencing statutes (See, e.g., R.C. 2929.18(B)(1) ("the sentencing court shall impose upon the offender a

mandatory fine”). The wording of the unique sentencing statute here, R.C. 3734.99, is “and shall be fined at least ten thousand dollars, but not more than twenty five thousand dollars, or imprisoned for at least two years, but not more than four years, or both.” “[T]he word ‘shall,’” is to “be construed as mandatory unless there appears a clear and unequivocal legislative intent that [it] receive a construction other than [its] ordinary usage.” *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St.2d 102, 271 N.E.2d 834 (1971), paragraph one of the syllabus. We see no intent here to deviate from the ordinary meaning. Our interpretation of 3734.99(F) is that the trial court had the option to impose a fine, a term of imprisonment, or both, but one or the other was required.¹ We perceive the trial court’s reference to a “mandatory” fine at sentencing as technically incorrect. The court was required to impose the fine because, having declined to impose a prison term, a fine was the only other sanction available to it in the exercise of its discretion under R.C. 3734.99(F). The statute’s wording reflects a legislative intent for the chosen penalty to be discretionary, but again, at least one or the other was required.

{¶ 6} At the time of the plea the trial court said “[a]nd this particular unclassified felony carries with it a potential prison sentence as follows: a term of incarceration at no less than two years but no more than four years, with a fine of between 10,000 and \$25,000, court costs and restitution.” (T. 11). The court then told Darney he was eligible for community control. No mention was made that either a prison sentence or a fine within

¹ A separate question is whether a trial court that imposes a prison sentence may also then place the offender on community control. In *State v. Steiner*, 8th Dist. Cuyahoga No. 80488-90, 2002-Ohio-4019, the trial court had sentenced an offender under R.C. 3734.99 to four years in prison but placed him on community control sanctions and imposed a \$20,000 fine. The court of appeals held that the trial court was allowed to place the defendant on community control under R.C. 2929.15. *Id.* at ¶ 21. We leave for another day whether a sentence under that statute requires imposition of a “mandatory” prison term when no fine is imposed.

the statutory range was required.

{¶ 7} We have previously held that when a defendant faces a mandatory prison term, before accepting a plea the trial court must determine that the defendant understands the mandatory term and that he is not eligible for community control. *State v. Howard*, 2d Dist. Champaign No. 06-CA-29, 2008-Ohio-419. In *State v. McGinnis*, 8th Dist. Cuyahoga No. 92244, 2009-Ohio-6102, the Eighth District held that failure to inform a defendant of a mandatory minimum fine failed to substantially comply with Crim. R. 11 requiring reversal of that conviction, *Id.* ¶ 10, *citing State v. West*, 8th Dist. Cuyahoga Nos. 63497 and 63498, 1993 WL 87678 (Mar. 25, 1993) (finding that the trial court failed to substantially comply with Crim.R. 11(C)(2) when it failed to notify the defendant of the mandatory \$5,000 fine until after acceptance of the guilty plea). In *State v. Fields*, 1st Dist. Hamilton No. C-090648, 2010-Ohio-4114, ¶ 10, the First District held to the contrary, although that case involved an appeal of the denial of a post-conviction motion and the defendant had not demonstrated that the plea would not have been made if he had been properly informed. Nevertheless, in this case we hold that the trial court's failure to inform the defendant that it was required to impose either a prison term of two to four years or a minimum \$10,000 fine was error. We further note that the transcript reflects that even the trial court seemed uncertain about the available penalties. Accordingly, we reverse the appellant's conviction and remand this case for further proceedings.

{¶ 8} With regard to the first assignment of error, whether Darney should have been found indigent is a moot question because the plea is now vacated. We do note however that mandatory fines for drug offenses are subject to waiver in the face of indigency because of R.C. 2929.18(B)(1), which imposes mandatory fines but authorizes

waiver of the fine if an affidavit of indigence is filed and the court determines that the defendant is indigent. We are unaware of an analogous statute authorizing the waiver or suspension of a fine imposed on a defendant under R.C. 3734.99(F). Under similar circumstances, this court has held that a fine cannot be waived or suspended absent statutory language authorizing such action. *State v. Whalen*, 2d Dist. Montgomery No. 19783, 2003-Ohio-6539, ¶ 4-20. Conversely, in *State v. Air Clean Damper Co.*, 63 Ohio App.3d 656, 579 N.E.2d 763 (12th Dist.1990), a fine imposed under R.C. 3734.99 was suspended but that was under authority of now-repealed R.C. 2929.51(F).

{¶ 9} The trial court's judgment is reversed and this cause is remanded for further proceedings consistent with this opinion.

.....

DONOVAN, J., and WELBAUM, J., concur.

Copies mailed to:

Mathias H. Heck
Tiffany C. Allen
Brock A. Schoenlein
Hon. Richard S. Skelton
(successor for Judge Frances E. McGee)