[Cite as *State v. Plemons*, 2015-Ohio-2879.]

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

STATE OF OHIO	:	Appellate Case Nos. 26434, 26435, 26436 & 26437
Plaintiff-Appellee	:	
	:	Trial Court Case Nos. 13-CR-3714
v.	:	14-CR-1242/1
	:	14-CR-1662/1
JAMES E. PLEMONS	:	14-CR-627/1
	:	(Criminal Appeal from
Defendant-Appellant	:	Common Pleas Court)
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O P I N I O N

Rendered on the 17th day of July, 2015.

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HALL, J.

{¶ 1} James E. Plemons appeals from his conviction and sentence in four consolidated cases on one count of illegally manufacturing drugs, three counts of illegal assembly or possession of chemicals for manufacturing drugs, one count of heroin possession, two counts of breaking and entering, and one count of attempted evidence tampering.

{¶ 2} Plemons advances two assignments of error. First, he contends the trial court erred in finding, without a hearing, that he reasonably could pay a mandatory fine. Second, he claims the trial court erred in imposing an aggregate nine-year prison term where the sentence is contrary to law and the record does not support the trial court's sentencing findings.

{¶ 3} The record reflects that Plemons pled guilty to the eight above-referenced charges in exchange for dismissal of nine other charges. The parties also agreed to an aggregate sentence of five, six, seven, eight, or nine years in prison with a specific recommendation by the State for an eight-year term. During Plemons' plea hearing, the trial court explained that the charges to which he was entering a plea carried an aggregate potential prison term of 27.5 years and a mandatory fine that could be as high as $57,500. The trial court also explained that some of the charges carried mandatory-minimum prison terms. The trial court noted that it was not bound by the State's proposed aggregate eight-year sentence and advised that it would impose a sentence somewhere between five and nine years in prison as jointly recommended by the parties. Following a Crim.R. 11 plea colloquy, the trial court accepted Plemons' guilty plea.

{¶ 4} During a September 23, 2014 sentencing hearing, the trial court found that Plemons had not accepted any responsibility for his criminal actions. It also noted, among other things, that he had a lengthy adult felony record and previously had received intervention in lieu of conviction, community control, shock probation, and multiple prison terms. After considering the principles and purposes of sentencing and the statutory seriousness and recidivism factors, the trial court imposed partially consecutive prison terms totaling nine years. It also made the statutory findings necessary for consecutive sentences. Finally, despite the fact that Plemons was unemployed and had no assets, the trial court found that he was in good health and, on the record before it, was capable of being employed upon his release from prison. As a result, the trial court imposed a $17,500 mandatory fine, which it refused to waive on the basis of indigence. Three days later before any termination entries had been filed, the trial court brought Plemons back to court for re-sentencing to correct an error in the length of his mandatory-minimum sentence on some charges. The trial court then made essentially the same findings that it previously had made and imposed the same aggregate nine-year prison sentence and $17,500 mandatory fine, which it again refused to waive.

{¶ 5} In his first assignment of error, Plemons contends the trial court erred in imposing the fine where the record lacks evidence of his ability to pay. Although his physical and mental health are good, Plemons notes that he filed an affidavit of indigence before sentencing. He notes too that, according to the PSI, he was homeless and unemployed at the time of sentencing. He had delinquent child-support obligations, a tenth-grade education, and numerous prior felony convictions. Plemons also asserts that he is a heroin addict who will be fifty-four years old when he completes his current prison

term. Based on these facts, he claims the trial court lacked an evidentiary basis (particularly without an evidentiary hearing) to find that he reasonably could pay his fine in the future.

{¶ 6} The governing statute is R.C. 2929.18(B)(1), which provides:

> For a first, second, or third degree felony violation of any provision of Chapter 2925 * * * of the Revised Code, the sentencing court shall impose upon the offender a mandatory fine * * *. 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.

{¶ 7} For purposes of the statute, being "indigent" and being "unable to pay" are not the same. Indigency concerns a defendant's current financial situation, whereas an inability to pay encompasses his future financial situation as well. *See*, *e.g.*, *State v. Gipson*, 80 Ohio St.3d 626, 636, 687 N.E.2d 750 (1998) ("[A] trial court's determination whether an offender is indigent and is unable to pay a mandatory fine can (and should) encompass future ability to pay. If the General Assembly had intended otherwise, the statutes would have been written to permit a waiver of the mandatory fines based solely on a defendant's present state of indigency, and would not have also required trial courts to consider the additional question whether the offender is 'unable to pay.' "); *State v. Ficklin*, 8th Dist. Cuyahoga No. 99191, 2013-Ohio-3002, ¶ 13 (recognizing that " 'indigency' refers to a present financial ability and 'is unable to pay' encompasses a future ability to pay as well").

{¶ 8} Under the statute, "the burden is upon the offender to affirmatively demonstrate that he or she is indigent and is *unable to pay* the mandatory fine." (Emphasis sic) *Gipson* at 635. Contrary to the suggestion in Plemons' brief, a trial court need not affirmatively find that an offender is able to pay. *Id*. Rather, the fine is mandatory unless the offender establishes current indigence and an inability to pay. *Id*. We note too that a hearing is not required on a defendant's ability to pay a mandatory fine, and a trial court need not make specific findings on the issue. *State v. Barker*, 2d Dist. Montgomery No. 26061, 2014-Ohio-3946, ¶ 15. A trial court need only consider the issue, which it frequently can do by reviewing a pre-sentence investigation report that contains enough pertinent information. *Id*. "We review a trial court's decision on an offender's present and future ability to pay a mandatory fine for an abuse of discretion." *Id*. at ¶ 16. An abuse of discretion often involves a decision that is unreasonable. *Id*.

{¶ 9} Having reviewed the record, we see no abuse of discretion in the trial court's refusal to waive Plemons' mandatory fine. Preliminarily, we believe the pre-sentence affidavit in this case was not sufficient to raise the issue. As set forth above, the fine in this case was mandatory unless Plemons alleged in a pre-sentence affidavit "that [he] is indigent *and* unable to pay the mandatory fine[.]" (Emphasis added). R.C. 2929.18(B)(1). Here the affidavit Plemons filed just before his sentencing hearing is a hand-completed copy of Ohio Public Defender form 206R which is the "Financial Disclosure/Affidavit of Indigency" form utilized for determining whether a defendant is entitled to appointment of counsel. Therein, he averred that he was indigent and was "financially unable to retain private counsel without substantial hardship[.]" Neither his affidavit nor an accompanying financial disclosure form even mentioned his ability to pay the mandatory fine, which, as

explained above, encompasses future ability to pay and differs from the issue of current indigency. Merely alleging indigency and an inability to afford private counsel does not establish an inability to pay a fine. Indeed, "[a] finding of indigence for purposes of appointed counsel does not shield the defendant from paying a fine." *State v. Lewis*, 2d Dist. Greene No. 2011-CA-75, 2012-Ohio-4858, ¶ 16. " 'This is because the ability to pay a fine over a period of time is not equivalent to the ability to pay legal counsel a retainer fee at the onset of criminal proceedings.' " *Id*., quoting *State v. Kelly*, 145 Ohio App.3d 277, 284, 762 N.E.2d 479 (12th Dist.2001). Plemons' failure to file a pre-sentence affidavit alleging that he is indigent and is unable to pay the mandatory fine is, alone, a sufficient reason to affirm the trial court's decision. Absent such an affidavit, R.C. 2929.18(B)(1) made the fine mandatory.

{¶ 10} Even setting aside the deficiency in Plemons' affidavit, we see no abuse of discretion in the trial court's imposition of the fine. Although the issue is perhaps a close one on the facts before us, the trial court acted within its discretion in reasoning, based in part on Plemons' undisputed good physical and mental health, that he could obtain employment and make payments toward his fine upon his release from prison at age fifty-four. The PSI reflects that Plemons intends to reside with his sister when he is released. (PSI at 9). Due to his incarceration, he presumably will have broken any heroin addiction and will be capable of working. Such an inference is not unreasonable. In this regard, we note that Plemons in fact was "working" at the time of his current crimes. Those offenses involved him repeatedly being caught either manufacturing methamphetamine or in possession of the materials needed to do so. It is not unreasonable to infer that a defendant who is capable of manufacturing

methamphetamine also is capable of gainful employment. *See*, e.*g*., *Lewis* at ¶ 10 ("Lewis pled guilty to illegally manufacturing methamphetamine. His ability to manufacture drugs indicates that he is able-bodied and intelligent enough to obtain employment, perhaps manufacturing something legal."). Obviously, neither this court nor the trial court can predict the future. On the record before us, however, we cannot say the trial court abused its discretion in declining to find that Plemons, an able-bodied, middle-aged man who was "working" although not formally "employed," would be unable to pay his mandatory fine in the future.

{¶ 11} Finally, we reject Plemons' assertion that the trial court should have held an evidentiary hearing to determine why he was unemployed and whether he could be employed in the future. Plemons argues that he "may have been unemployed because he was unemployable." (Appellant's brief at 10). As noted above, however, the PSI contained sufficient information for the trial court to infer, in the exercise of its discretion, that Plemons would be employable in the future. If Plemons possessed evidence or information to the contrary beyond what was in the record, he should not have refused to participate in a PSI interview. (PSI at 9). The first assignment of error is overruled.

{¶ 12} In his second assignment of error, Plemons challenges his aggregate nine-year prison sentence. He raises three arguments. First, he claims the sentence is contrary to law because the trial court failed to weigh the statutory seriousness and recidivism factors properly. Plemons attributes his current offenses, and most of his prior ones, to what he describes as an untreated heroin addiction. He notes too that his current offenses did not harm anyone. Based on his own evaluation of the seriousness and recidivism factors, Plemons claims he needs drug rehabilitation more than prison and,

therefore, that a nine-year sentence is contrary to law. Second, he contends the trial court's findings for partially-consecutive sentences are unsupported by the record. Third, he points out that the trial court failed to include those findings in one of its termination entries.

{¶ 13} Upon review, we find no merit in Plemons' first two arguments. We note that R.C. 2953.08(D)(1) precludes appellate review of a sentence if it "is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge." " 'A sentence is "authorized by law" and is not appealable within the meaning of R.C. 2953.08(D)(1) only if it comports with all mandatory sentencing provisions.' " *State v. Parks*, 2d Dist. Montgomery No. 24493, 2012-Ohio-1981, ¶ 29, quoting *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, paragraph two of the syllabus.

{¶ 14} In the present case, Plemons' nine-year sentence is authorized by law because each of the individual sentences he received comports with all mandatory sentencing provisions, as does the aggregate prison term. Each sentence is within the authorized statutory range, the trial court indicated that it had considered the principles and purposes of sentencing as well as the statutory seriousness and recidivism factors, and the trial court made the findings required by R.C. 2929.14(C)(4) to impose partially-consecutive sentences totaling nine years. Plemons' disagreement with the trial court's weighing of the seriousness and recidivism factors and its findings for partially-consecutive sentences does not render his sentence unauthorized by law or otherwise contrary to law. *See*, *e.g.*, *State v. Rodeffer*, 2013-Ohio-5759, 5 N.E.3d 1069 (2d Dist.), ¶ 32 ("[A] sentence is not contrary to law when the trial court imposes a

sentence within the statutory range, after expressly stating that it had considered the purposes and principles of sentencing set forth in R.C. 2929.11, as well as the factors in R.C. 2929.12.").

{¶ 15} The trial court's aggregate nine-year sentence also is within the range to which the State and Plemons explicitly agreed. At the plea hearing, the trial court recited its understanding that "the State and the Defendant have agreed that the Defendant will be sentenced to a term of 5, 6, 7, 8 or 9 years in prison." (Plea Tr. at 2). The prosecutor and defense counsel concurred. (*Id*.). "This court's case law * * * establishes that a sentence within a jointly-recommended range is a jointly-recommended sentence for purposes of R.C. 2953.08." *State v. Chattams*, 2d Dist. Montgomery No. 26151, 2015-Ohio-453, ¶ 5, citing *State v. DeWitt*, 2d Dist. Montgomery No. 24437, 2012-Ohio-635, ¶ 13-15; *see also State v. Parks*, 2d Dist. Montgomery No. 24493, 2012-Ohio-1981, ¶ 39 ("Because Parks's sentence is authorized by law, the range was agreed to by both the State and the defense, and the sentencing court imposed it, Parks has waived his right to appeal that sentence."). Here Plemons' aggregate sentence was authorized by law, was within the range agreed to by the parties, and was imposed by a sentencing judge. Therefore, R.C. 2953.08(D)(1) precludes him from challenging it on appeal.

{¶ 16} The only remaining issue is Plemons' third argument, which addresses the trial court's failure to incorporate its statutory consecutive-sentence findings at the sentencing hearing into its termination entry in one of the four consolidated cases. Although the trial court made all of the findings necessary to impose consecutive sentences, it did not include those findings in its amended termination entry in case

number 2013-CR-3714. There the trial court's November 10, 2014 amended termination entry imposed concurrent prison terms of five years and six years but ordered those concurrent terms to be served consecutive to the sentences imposed in the other three consolidated cases. Unlike the termination entries in the other three cases, however, the amended termination entry in case number 2013-CR-3714 failed to incorporate the findings made at the sentencing hearing in support of partially-consecutive sentences.

{¶ 17} Upon review, we agree with Plemons that the amended termination entry in case number 2013-CR-3714 lacked consecutive-sentence findings. Such an omission does not render a sentence contrary to law or necessitate a reversal. Rather, it is a clerical mistake that may be corrected through a nunc pro tunc entry to reflect what actually occurred in open court during the sentencing hearing. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659.

{¶ 18} Here, however, even a nunc pro tunc entry is not required. This is so because the trial court did not make the sentence in case number 2013-CR-3714 consecutive to anything at sentencing, and the amended termination entry in that case is void. As set forth above, Plemons originally appeared for sentencing on September 23, 2014. At that time, the trial court imposed concurrent prison terms of five years and six years in case number 2013-CR-3714. (Sentencing Tr. at 10). The trial court then proceeded to impose sentences in the other three cases that it made partially consecutive to one another and to the aggregate six-year sentence in case number 2013-CR-3714. The end result was an aggregate nine-year term. (*Id*. at 10-12).

{¶ 19} Before filing any judgment entries, however, the trial court brought Plemons back from jail three days later on September 26, 2014 for a de novo sentencing to correct

an error in two of the four cases. The error involved imposing a mandatory three-year sentence on certain charges rather than a mandatory five-year sentence. Although the error did not involve case number 2013-CR-3714, the trial court held a completely new sentencing hearing. At that time, it again imposed concurrent prison terms of five years and six years in case number 2013-CR-3714. (*Id*. at 24-25). Those sentences were the first sentences imposed and the first case that was addressed by the trial court. At no time during the resentencing hearing did the trial court advise Plemons the aggregate six-year sentence in case number 2013-CR-3714 would be ordered to be served consecutive to other sentences. Instead, as it had before, the trial court ordered the sentences in the other three cases to be served partially consecutive to one another and to the aggregate six-year sentence in case number 2013-CR-3714. (*Id*. at 25-27, 29-30). As before, the end result was an aggregate "for a total of nine years" (*Id.* At 27) in all four cases. Consistent with what the trial court stated at the resentencing hearing, its September 30, 2014 termination entry in case number 2013-CR-3714 imposed concurrent prison terms of five years and six years. The entry said nothing about that aggregate six-year term being consecutive to any other sentence. That being so, the entry also did not contain consecutive-sentence findings. (Doc. #101 in case number 2013-CR-3714). The other three termination entries the trial court filed on September 30, 2014 in the other three cases *did* impose partially-consecutive sentences and *did* contain the required consecutive-sentence findings, which also had been made at both the initial sentencing hearing and at the resentencing hearing.

{¶ 20} Plemons filed a separate notice of appeal in each of the four consolidated cases on October 23, 2014. While those appeals were pending before us, the trial court

filed a November 10, 2014 amended termination entry in case number 2013-CR-3714. Although the reason for the filing is unclear, the amended termination entry was the same as the earlier one except it ordered the aggregate six-year sentence in case number 2013-CR-3714 to be served *consecutive* to the sentences imposed in the other three cases. Plemons promptly filed an amended notice of appeal from this amended termination entry. As noted above, he argues on appeal that the amended termination entry failed to incorporate consecutive-sentence findings made at sentencing, as required by *Bonnell*.

{¶ 21} Based on the foregoing facts and procedure, we conclude that the trial court's November 10, 2014 amended termination entry in case number 2013-CR-3714 is void. The trial court filed valid September 30, 2014 termination entries in case number 2013-CR-3714 and the other three cases. Plemons was conveyed to prison that same day. He filed a notice of appeal in each of the four cases on October 23, 2014. By that time, the trial court lacked jurisdiction to file its November 10, 2014 amended termination entry in case number 2013-CR-3714, purporting to make a previously concurrent sentence consecutive. We reach this conclusion for at least two reasons. First, a trial court generally lacks jurisdiction to modify its own valid final judgment in a criminal case. *See*, *e.g*., *State v. Palmer*, 2d Dist. Montgomery No. 20101, 2004-Ohio-3571, ¶ 7 (recognizing that "Ohio trial courts do not possess the inherent authority to modify a criminal sentence once that sentence has been executed absent specific statutory authority to do so"); *State v. Simin*, 9th Dist. Summit No. 25309, 2011-Ohio-3198, ¶ 10; *State v. Allen*, 5th Dist. Licking No. 13 CA 1, 2013-Ohio-1414, ¶ 20. Second, the trial court's amended termination entry in case number 2013-CR-3714 is inconsistent with our

appellate jurisdiction to reverse, modify, or affirm the September 30, 2014 judgment on appeal.

{¶ 22} For the foregoing reasons, we conclude that the only existing valid judgment entry in case number 2013-CR-3714 is the September 30, 2014 termination entry the trial court filed. That termination entry did not purport to make Plemons' six-year prison sentence consecutive to any other sentence in any other case. Therefore, it did not need to include consecutive-sentence findings. As a result, Plemons' appellate argument about the absence of such findings in case number 2013-CR-3714 is unpersuasive.

{¶ 23} Finally, we note that the voidness of the trial court's November 10, 2014 amended termination entry in case number 2013-CR-3714 has no effect on the length or validity of Plemons' aggregate nine-year prison term in all four cases. The trial court simply did not need to make the sentence in case number 2013-CR-3714 consecutive to anything because it made the sentences in the three other cases partially consecutive to each other and to the sentence in case number 2013-CR-3714. Specifically, the trial court imposed an aggregate six-year prison term in case number 2013-CR-3714. In addition to various concurrent terms imposed in the other cases, it also imposed a consecutive one-year term in case number 2014-CR-627, a consecutive one-year term in case number 2014-CR-1242, and a consecutive one-year term in case number 14-CR-1662 for a cumulative aggregate sentence of nine years in prison. In short, it was unnecessary for the trial court to make the six-year sentence in case number 2013-CR-3714 consecutive to the sentences in the other cases where the sentences in the other cases were made consecutive to the sentence in case number 2013-CR-3714. Plemons' second assignment of error is overruled.

{¶ 24} The trial court's judgment is affirmed.

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FAIN, J., concurs.

FROELICH, P.J., concurring in part and dissenting in part:

{¶ 25} I would find that the trial court abused its discretion in imposing the maximum mandatory fine. There is no dispute that the Appellant is currently unable to pay the fine; he is homeless and without employment or assets. The majority suggests that, since Appellant is capable of manufacturing methamphetamine, he therefore could later transfer this "ability" to a lawful enterprise; this presumes that there is such a skill set, as well as that he was, in fact, skilled at his illegal endeavors, which these arrests and his entire criminal history belie.

{¶ 26} Moreover, it must be remembered that a fine (as opposed to, for example, costs via R.C. 2947.23) cannot later be waived, suspended, or modified; nor can it be discharged in bankruptcy. Further, after another decade in prison, the chances of his obtaining lawful employment which would be able to make a dent in his fine obligation, not to mention the $22,000 child support arrearage (which will grow during his imprisonment), are theoretical at best; and even this assumes he is not injured while incarcerated – a hypothetical possibility, true, but nonetheless one that illustrates the fallacy of presuming that since he is now "able" to pay the fine, he will likewise be when he is released.

{¶ 27} More likely is a scenario in which a person who has served the lengthy and lawful prison sentence will have the irremovable burden of debt for the rest of his life – a sanction not intended by the legislature or safe for the community which he will reenter.

{¶ 28} There is a preliminary question about the adequacy of the affidavit. As the

majority notes, R.C. 2929.18(B)(1) requires an affidavit be filed with the court prior to sentencing attesting that the offender is indigent and unable to pay the mandatory fine. The Appellant filed an affidavit (on a form usually used to request appointed counsel) prior to sentencing that swore he was indigent.[1] I agree that such inability includes future inability, but, on this record, it literally puts form over substance to require the additional self-serving surplusage, that, because the affiant is indigent, and will be in prison for the next decade, he is unable to pay.

{¶ 29} In all other respects, I concur with the judgment of the court.

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Copies mailed to:

Mathias H. Heck
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Hon. Mary K. Huffman

[1]Appellant was represented in the trial court by retained counsel, but there is no indication who paid the attorney or, if Appellant paid, that he had any remaining assets.