[Cite as *State v. Ison*, 2016-Ohio-1528.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. W. Scott Gwin, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 15CA17
	:	
THOMAS ISON	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas, Case No. 2014 CR 0416 R
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	April 7, 2016

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
BAMBI COUCH PAGE RICHLAND CO. PROSECUTOR DANIEL M. ROGERS 38 South Park St. Mansfield, OH 44902	KRISTIN E. BROWN 233 Marion Ave. Mansfield, OH 44903

Delaney, J.

{¶1} Appellant Thomas Ison appeals from the February 5, 2015 Sentencing Entry of the Richland County Court of Common Pleas. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} The following facts are adduced in part from the pre-sentence investigation (P.S.I.) which has been filed under seal for our review.

{¶3} On April 29, 2014, a confidential informant (C.I.) bought 26.56 grams of cocaine and .20 grams of heroin from appellant in a controlled buy. Metrich, the narcotics enforcement division of the Mansfield Police Department, used $1,250 in "buy money" to facilitate the purchase.

{¶4} On May 20, 2014, a C.I. bought 14.90 grams of heroin from appellant in a controlled buy for $1,050.

{¶5} On May 27, 2014, a C.I. purchased 15.03 grams of heroin from appellant for $1,050 in a controlled buy.

{¶6} On June 12, 2014, Metrich executed a search warrant at appellant's residence which yielded 36 grams of suspected heroin and marijuana. Police also seized $1,447.00 in cash and a 2002 Cadillac Seville.

{¶7} On August 12, 2014, appellant was charged by indictment with the following counts: I) trafficking in cocaine in an amount exceeding 20 grams but less than 27 grams pursuant to R.C. 2925.03(A)(1) and (C)(4)(e), a felony of the second degree; II) trafficking in heroin in an amount less than one gram pursuant to R.C. 2925.03(A)(1) and (C)(6)(a), a felony of the fifth degree; III) trafficking in heroin in an amount greater than 10 grams but less than 50 grams pursuant to R.C. 2925.03(A)(1) and (C)(6)(e), a felony of the

second degree; IV) trafficking in heroin in an amount greater than 10 grams but less than 50 grams pursuant to R.C. 2925.03(A)(1) and (C)(6)(e), a felony of the second degree; V) possession of cocaine in an amount greater than 20 grams but less than 27 grams pursuant to R.C. 2925.11(A) and (C)(4)(d), a felony of the second degree; VI) possession of heroin in an amount less than one gram pursuant to R.C. 2925.11(A) and (C)(6)(a), a felony of the fifth degree; VII) possession of heroin in an amount greater than 10 grams but less than 50 grams pursuant to R.C. 2925.11(A) and (C)(6)(d), a felony of the second degree; VIII) possession of heroin in an amount greater than 10 grams but less than 50 grams pursuant to R.C. 2925.11(A) and (C)(6)(d), a felony of the second degree; IX) possession of heroin in an amount greater than 10 grams but less than 50 grams pursuant to R.C. 2925.11(A) and (C)(6)(d), a felony of the second degree; X) possession of marijuana in an amount equal to or exceeding 100 grams but not exceeding 200 grams pursuant to R.C. 2925.11(A) and (C)(3)(b), a misdemeanor of the fourth degree; XI) possession of Lisdexamfetamine, a Schedule I controlled substance, in an amount less than bulk pursuant to R.C. 2925.11(A) and (C)(1)(a), a felony of the fifth degree; and XII) possession of AB-NACA, "Spice," a Schedule I controlled substance, in an amount equal to or exceeding 20 grams but not exceeding 30 grams, pursuant to R.C. 2925.11(A) and (C)(8)(c), a felony of the third degree.

{¶8} Counts I, II, V, VI, IX, X, XI, and XII contained forfeiture specifications relating to the 2002 Cadillac Seville used or intended to be used in commission or facilitation of the offenses pursuant to R.C. 2941.1417. Counts IX, X, XI, and XII contained forfeiture specifications relating to the $1447.00 in cash pursuant to R.C. 2941.1417.

{¶9} Appellant entered pleas of not guilty and the matter was scheduled for jury trial.

{¶10} On November 13, 2014, appellant withdrew his pleas of not guilty and entered guilty pleas to Counts I, III, IV, IX and both property forfeiture specifications. The trial court accepted appellant's pleas of guilty and deferred sentencing pending the P.S.I.

{¶11} On February 4, 2015, appellant appeared before the trial court for sentencing and received an aggregate sentence of 12 years, representing four consecutive terms of 3 years each. The sentencing entry of the trial court states,

> The sentences are made consecutive because consecutive sentences are necessary to protect the public from future crime or to punish the offender, and consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and because:
>
> At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct; and
>
> The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶12} The sentence includes a mandatory 3-year term of post release control, mandatory fines of $7,500 on each count, and forfeiture of the cash and vehicle.

{¶13} On February 9, 2015, appellant filed an affidavit of indigency.

{¶14} Appellant now appeals from the Sentencing Entry of the trial court dated February 5, 2015.

{¶15} Appellant raises three assignments of error:

ASSIGNMENTS OF ERROR

{¶16} "I. DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT IMPOSED A CONSECUTIVE SENTENCE WHICH WAS UNAUTHORIZED BY LAW AND CONTRARY TO THE PRESUMPTION OF A CONCURRENT SENTENCE."

{¶17} "II. DEFENDANT'S SENTENCE IS CONTRARY TO THE SENTENCING ENTRY, WHICH INDICATES THAT DEFENDANT'S SENTENCE IS CONSECUTIVE, AND ALSO DOES NOT ADDRESS RESTITUTION OR FINES."

{¶18} "III. DEFENDANT'S COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE AN AFFIDAVIT OF INDIGENCY PRIOR TO SENTENCING FOR RESTITUTION, FINES, AND COSTS."

ANALYSIS

I., II.

{¶19} Appellant's first two assignments of error relate to the imposition of consecutive sentences and will be considered together. In his first assignment of error, appellant argues the trial court erred in imposing a consecutive sentence. In his second assignment of error, appellant contends the judgment entry of sentence does not accurately reflect the sentence imposed at the sentencing hearing. We disagree.

{¶20} The Ohio Supreme Court recently announced the standard of review appellate courts are to apply to felony sentences. In *State v. Marcum,* __ Ohio St.3d___, 2016-Ohio-1002 at ¶ 22, the Court held that R.C. 2953.08(G)(2)(a) compels us to modify or vacate sentences if we find by clear and convincing evidence that the record does not support any relevant findings under "division(B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code." Id., citing *State v. Belew*, 140 Ohio St.3d 221, 2014-Ohio-2964, 17 N.E.3d 515, ¶ 12 (Lanzinger, J., dissenting from the decision to dismiss the appeal as having been improvidently accepted). Clear and convincing evidence is that measure or degree of proof which is more than a mere "preponderance of the evidence," but not to the extent of such certainty as is required "beyond a reasonable doubt" in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established. Id., citing *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

{¶21} The presumption in Ohio is that sentences are to run concurrently unless the trial court makes the required findings for imposing consecutive sentences set forth in R.C. 2929.14(C)(4). See, R.C. 2929.41(A).

{¶22} R.C. 2929.14(C) states:

> (4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are

> not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> (a) The offender committed the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to Section 2929.16, 2929.17 or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) The harm caused by the multiple offenses was so great or unusual that no single prison terms for any of the offenses committed as part of a single course of conduct adequately reflects' the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶23} 2011 Am.Sub.H.B. No. 86, which became effective on September 30, 2011, revived the language provided in former R.C. 2929.14(E) and moved it to R.C. 2929.14(C)(4). The revisions to the felony sentencing statutes now require a trial court to make specific findings when imposing consecutive sentences.

{¶24} The Ohio Supreme Court has also addressed the requirements for imposing consecutive sentences in a comprehensive fashion, finding a trial court must make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry; the trial court has no obligation to state reasons to support its findings. *State v. Starcher,* 5th Dist. Stark No.2015CA00058, 2015–Ohio–

5250, ¶ 31, citing *State v. Bonnell,* 140 Ohio St.3d 209, 16 N.E.3d 659, 2014–Ohio–3177, 16 N.E.3d 659, syllabus. The Court further explained "a word-for-word recitation of the language of the statute is not required, and as long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld." *Bonnell* at ¶ 29.

{¶25} R.C. 2929.14(C)(4) thus requires the court to find that (1) consecutive sentences are necessary to protect the public from future crime or to punish the offender, (2) consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and (3) at least one of the three findings set forth in R.C. 2929.14(C)(4)(a)-(c) applies.

{¶26} In the instant case, the trial court made the requisite findings on the record at the sentencing hearing and in its judgment entry of sentence. At sentencing, appellant asked the trial court about the possibility of concurrent sentences and the trial court stated in pertinent part, "This is four separate incidents, three of which are sales and one of which is a possession. So it's four different incidents. So that's why they're run consecutive."

{¶27} Appellant argues the trial court based the consecutive terms in part upon its incorrect belief appellant had a federal conviction, but a review of the record does not indicate the trial court based its sentence on this factor, only that it was mentioned as an aside. The P.S.I. considered by the trial court reflects appellant's multi-state criminal history including multiple drug-related convictions. Appellant also argues there is no support for the trial court's statement that Count IX, possession of heroin, occurred in a

separate incident from the heroin trafficking charges in Counts III and IV, but this argument is belied by the indictment and the P.S.I., which document three separate heroin-related incidents on different dates.

{¶28} In appellant's second assignment of error, he argues the sentencing judgment entry does not reflect consecutive sentences, restitution, or fines, but our review of the record demonstrates all of these items on page 2 of the trial court's February 5, 2015 Sentencing Entry.

{¶29} In short, we find the trial court adequately supported its imposition of consecutive sentences on the record at the sentencing hearing and in the judgment entry. Consecutive sentences are supported by clear and convincing evidence. The sentencing entry of the trial court comports with the sentence imposed at the hearing.

{¶30} Appellant's first and second assignments of error are thus overruled.

III.

{¶31} In his third assignment of error, appellant argues he received ineffective assistance of trial counsel. We disagree.

{¶32} To succeed on a claim of ineffectiveness, a defendant must satisfy a two-prong test. Initially, a defendant must show that trial counsel acted incompetently. See*, Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In assessing such claims, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id*.* at 689, citing *Michel v. Louisiana,* 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955). "There are countless ways to provide effective

assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland,* 466 U.S. at 689. The question is whether counsel acted "outside the wide range of professionally competent assistance." *Id.* at 690.

{¶33} Even if a defendant shows that counsel was incompetent, the defendant must then satisfy the second prong of the *Strickland* test. Under this "actual prejudice" prong, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694.

{¶34} Appellant first argues trial counsel was ineffective in failing to notice the omissions in the sentencing judgment entry. In light of our finding supra that the argued omissions in the sentencing entry do not exist, we reject his claim of ineffective assistance on that basis.

{¶35} Appellant further argues, though, that trial counsel was ineffective in failing to file an affidavit of indigence prior to sentencing. R.C. 2929.18(B)(1) establishes a procedure for avoiding imposition of mandatory fines applicable to certain felony drug offenses. That section provides in pertinent part:

> * * * *. 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.

{¶36} If an affidavit of indigence is not filed, the court "*shall* impose upon the offender a mandatory fine." (Emphasis added.) *State v. Moore,* 135 Ohio St.3d 151, 2012–Ohio–151, 985 N.E.2d 432, ¶ 13. The timeliness of an affidavit pursuant to R.C. 2929.19(B)(1) is thus critical: "the fact that the affidavit was not properly filed prior to sentencing is, standing alone, a sufficient reason to find that the trial court committed no error by imposing the statutory fine." *State v. Hale*, 5th Dist. Perry No. 14-CA-00010, 2014-Ohio-4981, ¶ 13, citing *State v. Gipson,* 80 Ohio St.3d 626, 633, 1998-Ohio-659, 687 N.E.2d 750.

{¶37} Appellant has still fallen short of demonstrating ineffective assistance of counsel, however. Trial counsel's failure to file an affidavit of indigence "only establishes ineffective assistance of counsel when the record shows a reasonable probability that the trial court would have found the defendant indigent." *State v. Foreman*, 3rd Dist. Hancock No. 5-07-17, 2008-Ohio-4408, ¶ 18, citing State v. *Gore,* 6th Dist. Lucan No. L-05-1242, 2006-Ohio-5622, ¶ 14 and *State v. Powell*, 78 Ohio App.3d 784, 605 N.E.2d 1337 (3rd Dist.1992). There is no indication in this record appellant would have been found indigent.

{¶38} In considering whether a "reasonable probability" exists that a trial court would have found a defendant indigent to avoid having to pay a mandatory fine, courts have "considered factors such as age, criminal record, employment history, ability to post bond, ability to retain counsel for trial, and the untimely affidavit of indigence[.]" *State v. Foreman*, 3rd Dist. Hancock No. 5-07-17, 2008-Ohio-4408, ¶19, citing *State v. Howard,* 2d Dist. Montgomery No. 21678, 2007-Ohio-3582, ¶ 16. As appellee points out, appellant was found indigent for purposes of appointment of counsel, although we acknowledge "[t]here is a difference between a finding of indigence for purposes of receiving appointed

legal counsel and the finding of indigence to avoid having to pay a mandatory fine." *State v. Powell*, 78 Ohio App.3d 784, 789, 605 N.E.2d 1337 (3rd Dist.1992).

{¶39} We note appellant makes only a summary argument regarding the affidavit of indigence, failing to demonstrate that if counsel had filed an affidavit of indigence, the trial court would have found him indigent. The record in the instant case reveals appellant was 33 years old at the time of sentencing and had worked the same job for 4 years. As noted supra, he has a lengthy criminal record but reported he is in good health. The P.S.I. describes his "Education, Employment, Financial Situation" as "moderate" and recommends, e.g., that appellant is ordered to pay "all cost (*sic*) associated with case." We also note appellant entered guilty pleas to trafficking large amounts of narcotics and had $1447 in cash on hand.

{¶40} We find no reasonable probability exists appellant would have been found unable to pay the mandatory fine. Appellant has thus failed to demonstrate ineffective assistance of counsel.

{¶41} Appellant's third assignment of error is overruled.

CONCLUSION

{¶42} Appellant's three assignments of error are overruled and the judgment of the Richland County Court of Common Pleas is affirmed.

By: Delaney, J. and

Farmer, P.J.

Gwin, J., concur.