

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio

Court of Appeals No. E-11-067

Appellee

Trial Court No. 2010-CR-277

v.

Quintin D. Miller

DECISION AND JUDGMENT

Appellant

Decided: June 8, 2012

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Jeffrey J. Whitacre, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This appeal is from the July 7, 2011 judgment of the Erie County Court of Common Pleas, which sentenced appellant, Quinton Miller, after he was convicted by a jury. Upon consideration of the assignments of error, we reverse the decision of the lower court. Appellant asserts the following single assignment of error on appeal:

THE TRIAL COURT ABUSED ITS DISCRETION AND
VIOLATED THE MANDATES OF OHIO LAW IN ASSESSING FINES
WITHOUT ANY REGARD TO APPELLANT'S INABILITY TO PAY
SAID FINES.

{¶ 2} Appellant pled guilty and was convicted of two counts of trafficking in cocaine, one count of possession of crack cocaine, and one count of possession of cocaine. There was no presentence investigation report prepared. At the time, appellant was being represented by appointed counsel based upon his affidavit of indigency. On July 7, 2011, the court sentenced appellant pursuant to the plea agreement, except for the addition of a \$2,000 fine.

{¶ 3} Before imposing the fine, the court made no express determination of whether appellant was unable to pay a fine. Immediately after sentencing, appellant's counsel objected and informed the court that it had to consider whether he was unable to pay the fine. The court responded that it had asked if there was any additional information to be presented, but nothing was offered. The court indicated that it had imposed a very minimal fine on each count considering that appellant faced up to a \$10,000 fine. The court also noted appellant had \$123 on his person when he was arrested. The court concluded appellee had "some wherewithal" and that he would be able to earn some money while in prison to apply toward the fine. Appellant then sought an appeal to this court.

{¶ 4} On appeal, appellant contends that because there was no mandatory fine in this case, the trial court abused its discretion by imposing a fine without considering whether he was unable to pay the fine.

{¶ 5} Former R.C. 2929.19(B)(6), effective April 7, 2009, now R.C. 2929.19(B)(5) , effective September 30, 2011, provides: “(5) Before imposing a financial sanction under section 2929.18 of the Revised Code or a fine under section 2929.32 of the Revised Code, the court shall consider the offender's present and future ability to pay the amount of the sanction or fine.” On appeal, we review a sentence based upon an abuse of discretion standard of review. *State v. Gabriel*, 7th Dist. No. 09 MA 108, 2010-Ohio-3151, ¶ 9.

{¶ 6} In support of his argument, appellant relies upon *State v. Mason*, 6th Dist. No. L-06-1404, 2008-Ohio-5034, and *State v. Dorsey*, 6th Dist. No. L-09-1016, 2010-Ohio-936. Both of these cases, however, involve costs and not fines. Instead, we look to *State v. Gipson*, 80 Ohio St.3d 626, 687 N.E.2d 750 (1998), which held that the trial court must consider whether a defendant is indigent and unable to pay before imposing a financial sanction. *Id.* at 634. The burden is upon the offender to affirmatively demonstrate that he or she is indigent, by filing an affidavit, and that he is unable to pay the mandatory fine. *Id.* at 635. A trial court abuses its discretion if it imposes a financial sanction without considering the defendant’s present and future means to pay the fine. *State v. Rickett*, 4th Dist. No. 07CA846, 2008-Ohio-1637, ¶ 4. However, the statute does not require that the court make any specific or express findings. *State v. Andera*, 8th

Dist. No. 92306, 2010-Ohio-3304, ¶ 51, and *State v. Martin*, 140 Ohio App.3d 326, 338, 747 N.E.2d 318 (4th Dist.2000). So long as there is sufficient evidence in the record to support a finding that the trial court did consider whether the defendant was unable to pay a fine now or in the future before imposing the sanction. *Gabriel*, at ¶ 12.

{¶ 7} In the case before us, the only consideration the court gave as to appellant's financial status was that he had \$123 on his person when he was arrested and that he has "some wherewithal." Appellant was represented by appointed counsel and had filed an affidavit of indigency. There is no additional information in the record to establish whether appellant was unable to pay the fine. Therefore, we find that the trial court abused its discretion when it ordered appellant to pay a fine without making a determination as to whether appellant was unable to pay the fine. Appellant's sole assignment of error is well-taken.

{¶ 8} Having found that the trial court did commit error prejudicial to appellant, the judgment of the Erie County Court of Common Pleas imposing a fine on appellant is reversed. This case is remanded to the trial court for resentencing solely on the issue of imposing a fine. Appellee is ordered to pay the court costs of this appeal pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
