

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

State of Ohio

Court of Appeals No. S-13-011

Appellee

Trial Court No. 12 CR 437

v.

Jose L. Ortiz

DECISION AND JUDGMENT

Appellant

Decided: March 28, 2014

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney,
and Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

John A. Brikmanis, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Jose L. Ortiz, appeals the October 23, 2012 judgment of the Sandusky County Court of Common Pleas which, following guilty pleas to possession of cocaine and possession of marijuana, sentenced him to six years of imprisonment, a \$5,000 fine and costs. Because we find that the costs of prosecution and the mandatory

fine were imposed on appellant without first determining his present or future ability to pay, we affirm, in part, and reverse, in part.

{¶ 2} According to appellant's uncontested statement of facts, on April 4, 2012, appellant's probation officers met with him at his home. Toward the end of the visit, police arrived and informed appellant that they could enter because they were assisting the probation officers; police also indicated that they had received an anonymous tip that appellant was growing marijuana. Upon entering, police found what they believed to be marijuana; officers then left and obtained a search warrant. Executing the warrant, officers also found cocaine and a large sum of cash.

{¶ 3} On May 3, 2012, appellant was indicted on felony possession of cocaine and marijuana. Appellant was also charged with having a weapon while under a disability. Appellant entered not guilty pleas, submitted an affidavit of indigency, and secured court-appointed counsel. On October 17, 2012, appellant withdrew his not guilty pleas and entered guilty pleas to the charges in the indictment; appellant was sentenced on October 23, 2012, to three years of imprisonment for each count to be served consecutively, but concurrent to a one-year imprisonment term for appellant's conviction for air pollution in case No. 12 CR 438.

{¶ 4} Thereafter, on February 4, 2013, appellant filed a pro se motion to vacate the order requiring that he pay the costs of prosecution and the \$5,000 fine. Appellant stated that due to his incarceration and impending indigence once out of custody, he would not

have the means to pay the fines. Appellant offered the alternative of a payment plan. On February 11, 2013, the court denied the motion as being premature.

{¶ 5} On appeal, appellant raises four assignments of error for our consideration:

I. Appellant was denied his Sixth and Fourteenth Amendment right to effective assistance of counsel when counsel failed to file a motion to suppress the tainted evidence police obtained during a search of his home.

II. The trial court erred by sentencing appellant to pay the costs of fees and expenses for his prosecution pursuant to R.C. 2941.51(D) without showing evidence of appellant's present or future ability to pay costs.

III. The trial court must set aside the fine of \$5,000 imposed on Mr. Ortiz due to his indigency.

IV. Defendant could not have knowingly and voluntarily entered his plea of guilty to an unclassified felony.

{¶ 6} In appellant's first assignment of error he contends that he was denied the effective assistance of counsel where appointed counsel failed to file a motion to suppress evidence from the warrantless search of his residence.

{¶ 7} The standard for determining whether a trial attorney was ineffective requires appellant to show: (1) that the trial attorney made errors so egregious that the trial attorney was not functioning as the "counsel" guaranteed appellant under the Sixth Amendment, and (2) that the deficient performance prejudiced appellant's defense.

Strickland v. Washington, 466 U.S. 668, 686-687, 104 S.Ct. 2052, 80 L.Ed.2d 674

(1984). In essence, appellant must show that the proceedings, due to his attorney's ineffectiveness, were so demonstrably unfair that there is a reasonable probability that the result would have been different absent his attorney's deficient performance. *Id.* at 693. Furthermore, a court must be "highly deferential" and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" in reviewing a claim of ineffective assistance of counsel. *Id.* at 689. A properly licensed attorney in Ohio is presumed to execute his or her duties in an ethical and competent manner. *State v. Hamblin*, 37 Ohio St.3d 153, 155-156, 524 N.E.2d 476 (1988).

{¶ 8} As correctly noted by the state, trial counsel is not presumed ineffective for failing to file a motion to suppress. *State v. Madrigal*, 87 Ohio St.3d 378, 721 N.E.2d 52 (2000). Such failure constitutes ineffective assistance of counsel only where the record demonstrates a reasonable probability that the motion would have been granted. *State v. Jackson*, 8th Dist. Cuyahoga No. 86542, 2006-Ohio-1938, ¶ 18.

{¶ 9} In the present case, because appellant was a probationer at the time of the search, the probable cause requirement for conducting a warrantless search was replaced by a "reasonable grounds" standard. *State v. Helmbright*, 10th Dist. Franklin Nos. 11AP-1080, 11AP-1081, 2013-Ohio-1143, ¶ 19-21, citing *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987); R.C. 2967.131(C). The fact that the probation officers contacted police (who had also received a tip about drug activity at appellant's residence) to help effectuate the search does not alter the analysis. *See State v. Carter*, 5th Dist. Stark No. CA-9102, 1993 WL 274293 (June 28, 1993).

{¶ 10} Additionally, as a result of the plea agreement, appellant was sentenced to six years of imprisonment though he faced a maximum of 14 years; the charge of having a weapon while under a disability and the probation violation were dismissed. Based on the foregoing, we find that appellant's counsel was not constitutionally ineffective. Appellant's first assignment of error is not well-taken.

{¶ 11} In appellant's second and third assignments of error he challenges the trial court's imposition of the costs of prosecution as well as the \$5,000 mandatory fine. The state contends that because the court considered appellant's future ability to pay, the order should be affirmed.

{¶ 12} R.C. 2947.23(A)(1) requires a sentencing court to impose the costs of prosecution against all convicted defendants. *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, ¶ 8. Sentencing courts retain discretion to waive those costs where they are assessed against indigent defendants. *Id.* at ¶ 14. However, to secure a waiver of the costs of prosecution on the basis of indigency, a convicted defendant must make a motion for waiver of those costs at the time of sentencing. *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, ¶ 23

{¶ 13} Likewise, for certain crimes, including felony drug convictions, the trial court is required to impose a mandatory fine. R.C. 2929.18(B). The imposition of a mandatory fine may be waived where, prior to sentencing, the defendant alleged in an affidavit that he is indigent and unable to pay the fine. *Id.*

{¶ 14} The decision to impose or waive a fine is within the trial court's discretion. *State v. Brinkman*, 168 Ohio App.3d 245, 2006-Ohio-3868, 859 N.E.2d 595, ¶ 13 (6th Dist.). In making its determination, a court is not required to conduct a hearing as long as the record supports that it considered whether defendant has a present or future ability to pay. *Id.* at ¶ 17.

{¶ 15} In the present case, appellant's affidavit of indigency was filed on October 17, 2012. In addition, appellant was found indigent for purposes of appointment of defense counsel. At the October 17, 2012 plea hearing, the parties noted:

[Prosecuting Attorney]: [A]t least on the felony one, half of the fine is a mandatory fine, but if he's indigent and files an Affidavit of Indigency, then that would vacate that particular portion.

[Defense Counsel]: He has filed one with the Court as for Court appointed counsel, so he would –

[Prosecuting Attorney]: I think he would be best to do another one on file before the sentencing entry today.

{¶ 16} On that day, appellant filed an affidavit of indigency. At the October 23, 2012 sentencing hearing, it appears that the court had not yet seen appellant's affidavit when the court stated: "Note just from the record, we'll impose a fine of \$5,000 which is subject to being set aside due to indigency." The court's sentencing judgment entry states, in relevant part: "The court finds that the Defendant has, or may reasonably be expected to have in the future, the means to reimburse Sandusky County for the fees and

expenses; and therefore, pursuant to R.C. 2941.51(D), and he shall pay the costs of prosecution.” The court further stated: “The Defendant is to pay a fine of \$5,000.00.” Thereafter, appellant’s pro se motion to vacate the costs and fines was summarily denied as “premature.”

{¶ 17} Reviewing the record, we find that a presentence investigation report was not prepared in this case; a 2010 report was referred to at sentencing. Further, there was no evidence presented regarding appellant’s work history or potential for income. Accordingly, because the record is devoid of evidence demonstrating appellant’s present or future ability to pay, we find that the court erred when it ordered appellant to pay the costs of prosecution and the mandatory fine. *See State v. Miller*, 6th Dist. Erie No. E-11-067, 2012-Ohio-2551; *State v. Dorsey*, 6th Dist. Lucas No. L-09-1016, 2010-Ohio-936. Appellant’s second and third assignments of error are well-taken.

{¶ 18} Appellant’s fourth and final assignment of error argues that his guilty plea to an “unspecified” felony air pollution count was not knowing and voluntary. Appellant’s contention is based on the argument that the record was “unclear” as to the statutory section and felony level to which appellant was entering a plea.

{¶ 19} Appellant entered the plea in case No. 12 CR 438. Appellant did not file a notice of appeal from that case. Accordingly, the matter is not properly before this court and appellant’s fourth assignment of error is not well-taken.

{¶ 20} On consideration whereof, we find that the portion of the judgment of the Sandusky County Court of Common Pleas imposing the costs of prosecution and fine

upon appellant is reversed. The case is remanded to the trial court for resentencing solely on the issues of costs and the fine. Pursuant to App.R. 24, appellee is ordered to pay the costs of this appeal.

Judgment affirmed, in part,
and reversed, in part.

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

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Stephen A. Yarbrough, P.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>
