[Cite as *State v. Thomas*, 2019-Ohio-2654.]

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

State of Ohio — Court of Appeals No. WM-18-005

Appellee — Trial Court No. 18CR000018

v.

James E. Thomas — **DECISION AND JUDGMENT**

Appellant — Decided: June 28, 2019

* * * * *

Katherine J. Zartman, Williams County Prosecuting Attorney,
for appellee.

Karin L. Coble, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, James Thomas, appeals from the August 6, 2018 judgment of the Williams County Court of Common Pleas convicting him, following acceptance of his guilty plea, to: one count of aggravated possession of drugs (R.C. 2925.11(A)(C)(1)(a), a felony of the fifth degree); one count of aggravated possession of drugs (R.C.

2925.11(A)(C)(1)(c), a felony of the second degree) with a firearm specification; having a weapon under a disability (R.C. 2923.13(A)(2), a felony of the third degree); receiving stolen property (R.C. 2913.51(A)(C), a felony of the fourth degree); and improperly handling firearms in a motor vehicle (R.C. 2923.16(B), a felony of the fourth degree). Appellant was sentenced to an aggregate prison term of six years. For the reasons which follow, we affirm in part and reverse in part.

{¶ 2} On appeal, appellant asserts the following assignments of error:

> Assignment of Error One: Because the officer who effected the traffic stop admitted that no traffic violation occurred, the trial court erred in upholding the validity of the stop.
>
> Assignment of Error Two: The imposition of consecutive sentences is not supported by the record.
>
> Assignment of Error Three: The imposition of appointed counsel fees and the costs of confinement should be vacated where appellant is unable to pay.

{¶ 3} In his first assignment of error, appellant argues the trial court erred in denying his motion to suppress the evidence obtained as a result of an alleged unlawful vehicle stop. He asserts the stop was not valid because the officer who initiated the stop admitted that no traffic violation had occurred.

{¶ 4} A Crim.R. 12(C)(3) motion to suppress presents a mixed question of law and fact. *State v. Hairston,* Slip Opinion No. 2019-Ohio-1622, ¶ 60, quoting *State v.*

Burnside, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. The appellate court defers to the trial court's evaluation of the credibility of witnesses and determination of the questions of fact which are supported by competent and credible evidence but conducts a de novo review of application of the law to the facts. *Hairston*, quoting *Burnside*.

{¶ 5} Generally, searches or seizures that occur "outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions." *Mincey v. Arizona*, 437 U.S. 385, 390, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978), quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (footnotes omitted). The burden of establishing an exception to the warrant requirement is on the prosecution. *State v. Banks-Harvey*, 152 Ohio St.3d 368, 2018-Ohio-201, 96 N.E.3d 262, ¶ 18.

{¶ 6} A warrantless seizure may be reasonable if it is based upon objective, probable cause that the person has committed a crime. *Florida v. Royer*, 460 U.S. 491, 498, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). "Probable cause" means more than a reasonable suspicion but less than the evidence needed to convict an individual of a crime. *Illinois v. Gates*, 462 U.S. 213, 235, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); *State v. Steele*, 138 Ohio St.3d 1, 2013-Ohio-2470, 3 N.E.3d 135, ¶ 26. Where an officer has probable cause to believe a driver committed a traffic violation, the stop is reasonable, *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, 894 N.E.2d 1204, ¶ 22. The

relevant inquiry is whether the officer's observed facts and circumstances were "sufficient to warrant a reasonable belief" that a traffic violation had occurred. *Id*.

{¶ 7} Where an officer has a reasonable suspicion to believe a passenger in an automobile has an outstanding warrant for his arrest, the officer may lawfully stop the vehicle to make an arrest. *United States v. Savath*, 398 Fed.Appx. 237, 239 (9th Cir.2010), *sentence vacated on other grounds*, 300 F.Supp. 1215, 1225 (2018); *United States v. Ellison*, 462 F.3d 557, 563 (6th Cir.2006); *United States v. O'Connor*, 658 F.2d 688, 691 (9th Cir.1981); *United States v. Neemann*, 61 F.Supp.2d 944, 951 (D.Neb.1999) (reasonable suspicion is sufficient to stop a car briefly to determine if a passenger was the person subject to an outstanding warrant); *Johnson v. Grob*, 928 F.Supp. 889, 902 (W.D.Mo.1996).

{¶ 8} At the motion to suppress hearing, Officer Korkis testified that, prior to February 2, 2018, he recalled examining an active felony arrest warrant for appellant, received from the Bryan Police Department, and photographs of appellant posted at the station. The officer was also personally familiar with appellant because the officer had pulled appellant over for a traffic violation a couple of months prior to his arrest in this case.

{¶ 9} Officer Korkis further testified that while on patrol in the afternoon of February 2, 2018, he was 70 percent sure he identified appellant riding as a passenger in an automobile headed toward the officer. The officer was traveling 30-35 m.p.h. and was approximately two driveway widths away from the other vehicle, which had just pulled

out of a driveway. Because he was not entirely certain whether the passenger was appellant, the officer made a U-turn and began to follow the vehicle. When the vehicle turned right, the officer observed appellant's reflection in the car's passenger-side mirror and confirmed to a 99-percent certainty that the passenger was appellant. The officer believed he had a reasonable suspicion sufficient to stop the vehicle.

{¶ 10} However, the officer contacted the MAN Unit Deputy because she had given the officer the vehicle's license plate number regarding another investigation in December 2017. The deputy indicated she was in the process of preparing a search warrant for the driver's automobile. The officer testified the deputy told the officer to continue with his own duties. In her written report, however, the deputy indicated she told the officer to stop the vehicle if he could find a reason to do so.

{¶ 11} Because the officer was not 100 percent certain that appellant was the passenger, the officer continued to follow the vehicle. The car continued a short distance before signaling and turning into a gas station. Believing, based on his own estimation, that the driver had not activated a turn signal 100 feet prior to the turn, the officer initiated a traffic stop as the vehicle turned into a gas station. The dash cam, which was activated when the officer activated his overhead lights, was admitted into evidence.

{¶ 12} In response to the motion to suppress, Officer Korkis measured the distance from where the driver had activated his turn signal to the gas station and found it was 133 feet. He admitted on cross-examination that he had never been trained how to estimate distances. A defense licensed private investigator measured the distance based on a dash

camera photograph provided to him by the defense. He determined the car signaled 165 feet prior to the turn.

{¶ 13} Because the officer believed the passenger was appellant, the officer called for backup and proceeded with the traffic stop. He asked appellant if he was James Thomas and directed the driver and appellant to place their hands on the dash. Appellant denied being James Thomas and claimed to be his brother. Officer Korkis recognized appellant and kept his weapon focused on both occupants because appellant was suspected to be armed and dangerous. After his backup arrived, the driver and appellant were removed from the car and appellant finally admitted he was James Thomas. Officer Korkis searched appellant and found a loaded gun, drugs, and other items on appellant's person where appellant indicated and an unloaded weapon where appellant had been sitting in the vehicle and a stun gun under the seat. As appellant was moved away from the car, he spontaneously told Officer Plotts there were seven more loaded guns in the trunk, which were recovered later with written permission of the driver who owned the vehicle.

{¶ 14} The trial court did not make a finding of fact as to whether the facts and circumstances supported the officer's belief that he had probable cause to stop the vehicle because of a traffic violation. Instead, the trial court found Officer Korkis had a reasonable suspicion the passenger in the vehicle was appellant, who had an outstanding felony arrest warrant, and the stop of the vehicle in which he was a passenger was not an unreasonable seizure.

{¶ 15} We agree with the trial court. Whether or not the traffic stop was constitutional, there was a second basis for finding the stop was reasonable. Because the officer had a reasonable suspicion the passenger was appellant whom the officer knew had an outstanding warrant for arrest, the officer could stop the vehicle to verify appellant's identity and arrest him. Therefore, we find appellant's first assignment of error not well-taken.

{¶ 16} In his second assignment of error, appellant argues that the trial court erred in imposing consecutive sentences. He argues that the possession of eight tablets of morphine and two guns was not "so great or unusual" to justify consecutive sentences. Furthermore, he argues the trial court did not weigh the proportionality of the consecutive sentences against appellant's conduct and the other factors of R.C. 2929.14(C)(4).

{¶ 17} We need not address this issue because the parties presented a jointly-recommended sentence at the sentencing hearing, which consisted of a three-year mandatory prison term to be served consecutive to a three-year non-mandatory prison term. The agreed recommended sentence was within the statutory ranges for the offenses. The aggregate sentence imposed by the court totaled the jointly-recommended sentence. A joint recommendation to impose consecutive sentences eliminates the need for a trial judge to make the consecutive-sentence findings set out in R.C. 2929.14(C)(4) and that such a sentence, once imposed, is not subject to review under R.C. 2953.08(D), effective March 22, 2013. *State v. Sergent*, 148 Ohio St.3d 94, 2016-Ohio-2696, 69 N.E.3d 627, ¶ 43.

{¶ 18} Therefore, we find appellant's second assignment of error not well-taken.

{¶ 19} In his third assignment of error, appellant argues the trial court erred by imposing appointed counsel fees and the costs of confinement because appellant is unable to pay the costs.

{¶ 20} Appointed counsel fees must be imposed as a financial sanction pursuant to R.C. 2941.51(D) if the offender "has, or reasonably may be expected to have, the means to meet some part of the cost of the services rendered to the person." *Id*. No hearing on this matter is expressly required, but the court must enter a finding that that the offender has the ability to pay and that determination which is supported by clear and convincing evidence on the record. *State v. Nettles*, 6th Dist. Lucas No. L-17-1205, 2018-Ohio-4540, ¶ 32-33; *State v. Johnson*, 6th Dist. Lucas No. L-16-1165, 2017-Ohio-8206, ¶ 24-25.

{¶ 21} In the case before us, we agree with appellant that the trial court erred as a matter of law by imposing attorney fees without finding appellant had or would have the ability to pay the attorney fees and there is no indication in the record that the trial court considered appellant's ability to pay his attorney fees.

{¶ 22} While appellant asserts the trial court imposed the costs of confinement as a financial sanction pursuant to R.C. 2929.18(A)(5)(ii), neither the sentencing hearing nor the sentencing judgment support this contention. Therefore, we find that issue not well-taken.

{¶ 23} Furthermore, we note the trial court committed plain error by not imposing the mandatory minimum fine for a drug trafficking offense as required by R.C. 2929.18(B)(1) for the conviction of violating R.C. 2925.11(A)(C)(1)(c), a felony of the second degree. While appellant asserted at the sentencing hearing that he was indigent, he did not file a sufficient R.C. 2929.18(B)(1) affidavit of indigency with an attestation of inability to pay the fine in the future. Therefore, the trial court lacked jurisdiction to waive this mandatory fine. *State v. Gipson*, 80 Ohio St.3d 626, 631-635, 687 N.E.2d 750 (1998). An affidavit of indigency for purposes of the appointment of counsel is not sufficient to support a waiver under R.C. 2929.18(B)(1). *State v. Williams*, 11th Dist. Lake No. 2012-L-111, 2014-Ohio-65, ¶ 16-17.

{¶ 24} The record in the case before us indicates the trial court simply failed to address the issue of the R.C. 2929.18(B)(1) mandatory fine and exercise its discretion to determine the appropriate amount of the fine beyond the statutory minimum in light of appellant's "present and future ability to pay" the amount of the fine pursuant to R.C. 2929.19(B)(5).

{¶ 25} The failure to impose a mandatory fine renders that portion of the sentence void. A void sentence is "not precluded from appellate review by principles of res judicata and may be reviewed at any time, on direct appeal or by collateral attack." *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 40. Therefore, we must remand this case for resentencing and imposition of the mandatory fine. Ohio Constitution, Article IV, Section 2(B)(2); R.C. 2953.08(G)(2); *State v. Williams*, 148

Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234, ¶ 30 (the remedy for a void sentence is to remand for resentencing); *State v. Moore*, 135 Ohio St.3d 151, 2012-Ohio-5479, 985 N.E.2d 432, ¶ 13-15 ("a sentence that does not properly include a statutorily mandated term is contrary to law" and void).

{¶ 26} Therefore, we find appellant's third assignment of error well-taken.

{¶ 27} Having found that the trial court did commit error prejudicial to appellant and that substantial justice has not been done in part, the judgment of the Williams County Court of Common Pleas is affirmed in part and reversed in part, and the judgment is vacated only insofar as the trial court erred in imposing appointed attorney fees. This case is remanded to the trial court for resentencing regarding the imposition of the mandatory minimum fine. In all other respects, the judgment is affirmed. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

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.

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JUDGE

Arlene Singer, J.

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JUDGE

Christine E. Mayle, P.J.
CONCUR.

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JUDGE