

Hon. Joseph J. Vukovich

Dated: June 27, 2003

DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court, the parties' briefs, and oral arguments before this court. Defendant-Appellant, Lillie Keylor, appeals the judgment of the Monroe County Court of Common Pleas which sentenced her for two felony offenses. The issues we must resolve are whether the trial court erred when it ordered Keylor pay fines in the amount of \$18,000 as part of her sentence because it stated in its judgment entry that it would not consider judicial release until Keylor paid all of her monetary sanctions and whether its sentence was cruel and unusual.

{¶2} We conclude that although the trial court's reference to whether it would consider judicial release is gratuitous, it does not rise to the level of error. The statute states a trial court must hold a hearing to determine an offender's ability to pay a fine if it is imprisoning that offender for failing to pay a fine. In this case, the trial court is sentencing Keylor for the offense, not imprisoning her for failing to pay a fine. Thus, its decision does not violate the statute. Because the trial court's judgment complied with statute, it was not cruel and unusual punishment. Accordingly, the trial court's judgment is affirmed.

Facts

{¶3} Keylor was employed as a clerk of the Monroe County Court. During her employment, she took money that was paid to the court as fines on traffic citations. Specifically, when state violators paid their tickets, she would take the money and destroy the records of the tickets so they did not appear in the county court records.

{¶4} The State charged Keylor with two offenses, theft in office and falsifying records, each of which is a third degree felony and Keylor pled guilty to those offenses. In exchange for her plea, the State agreed not to bring any other charges concerning her theft. But Keylor was required to make a complete confession indicating the dates and the amounts she stole and make restitution in a lump sum prior to sentencing. The amount of restitution was to be determined at a restitution hearing.

{¶5} Subsequently, the trial court held two status conferences regarding the State's investigation into the amount stolen. At those status conferences, the parties also informed the court about their search into Keylor's ability to pay restitution. Eventually, the trial court held a restitution hearing where the parties agreed to a total restitution, including costs, of \$105,055.28. After this, the trial court sentenced Keylor. It ordered Keylor pay the full amount of the restitution and sentenced her to a term of four years imprisonment on each offense, to be run concurrently. In addition, the trial court ordered Keylor pay a \$9,000 fine for each offense, for a total fine of \$18,000. It is from this judgment that Keylor timely appeals. She asserts two assignments of error.

Inability to Pay Fine

{¶6} In her first assignment of error, Keylor asserts:

{¶7} "It is an abuse of discretion and contrary to the requirements of O.R.C. 2929.19(B)(6) for the trial court to impose a monetary sanction (fine) without considering the Defendant's ability to pay."

{¶8} The trial court ordered Keylor pay restitution, fines, and costs. It further stated that "[a]ll restitution, interest, fines and costs must be paid in full before the Court will consider granting a motion for judicial release." Keylor argues the trial court's act of conditioning judicial release upon payment of the monetary sanctions violates R.C. 2929.14 and 2929.19(B)(6) because the trial court did not hold a hearing to determine her ability to pay the monetary sanctions. In response, the State argues that the trial court has the discretion to decide whether it will hold a hearing to determine the ability to pay a monetary sanction.

{¶9} A trial court has broad discretion when sentencing a defendant and a reviewing court should not interfere with its decision unless the trial court abused that discretion by failing to consider the statutory sentencing factors. *State v. Boone* (Sept. 22, 1999), 7th Dist. No. 96-CA-9. An abuse of discretion connotes more than an error of law or judgment; it implies the trial court acted unreasonably, arbitrarily, or unconscionably. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶10} Keylor argues that the versions of R.C. 2929.14 both prior to and after the passage of S.B. 2 affect this case since some of the acts constituting the charged offense

were committed prior to July 1, 1996, the effective date of S.B. 2. This is true as "[t]he amended sentencing provisions of Am.Sub.S.B. No. 2 apply only to those crimes committed on or after July 1, 1996." *State v. Rush* (1998), 83 Ohio St.3d 53, paragraph two of the syllabus.

{¶11} R.C. 2929.19(B)(6) requires that a trial court "consider the offender's present and future ability to pay the amount of the sanction or fine" before imposing a monetary sanction. But R.C. 2929.18(E) provides that the trial court "may hold a hearing if necessary to determine whether the offender is able to pay the sanction or is likely in the future to be able to pay it." Because R.C. 2929.18(E) does not require a hearing every time a trial court imposes a fine, a hearing only needs to be held at the trial court's discretion. *State v. Higgenbotham* (Mar. 21, 2000), 7th Dist. No. 97 BA 70, at 7. "In the event appellant is later brought before the court for failing to pay the fine, then he would be entitled to a hearing as to the ability to pay such." *Id.* The trial court only needs to consider the impact of the fine upon the offender if evidence is offered at the sentencing hearing. *State v. Frazier* (Oct. 9, 1997), 8th Dist. No. 71675-78. The same was true prior to the effective date of S.B. 2. See *State v. Johnson* (1995), 107 Ohio App.3d 723.

{¶12} More importantly, Keylor did not object to the amount of the fine during the sentencing hearing. "Where the offender does not object at the sentencing hearing to the amount of the fine and does not request an opportunity to demonstrate to the court that he does not have the resources to pay the fine, he waives any objection to the fine on appeal." *Frazier* at 6. Thus, Keylor waived any argument concerning her ability to pay these fines.

{¶13} *Frazier* and subsequent cases, such as *State v. Rigor* (Dec. 14, 2000), 8th Dist. No. 76201, and *State v. Elder* (May 11, 1998), 12th Dist. No. CA97-07-142, dealt with arguments concerning a trial court's violation of R.C. 2929.19(B)(6) when imposing a monetary sanction. So Keylor's failure to object to the amount of the sanctions at the sentencing hearing does not affect her ability to argue that the condition that the sanctions be paid before the court considers judicial release violates R.C. 2947.14.

{¶14} R.C. 2947.14 contains the same language both prior to and after S.B. 2.

{¶15} "(A) If a fine is imposed as a sentence or a part of a sentence, the court or

magistrate that imposed the fine may order that the offender be committed to the jail or workhouse until the fine is paid or secured to be paid, or the offender is otherwise legally discharged, if the court or magistrate determines at a hearing that the offender is able, at that time, to pay the fine but refuses to do so. The hearing required by this section shall be conducted at the time of sentencing. * * *

{¶16} "(D) No person shall be ordered to be committed to a jail or workhouse or otherwise be held in custody in satisfaction of a fine imposed as the whole or a part of a sentence except as provided in this section." R.C. 2947.14(A), (D).

{¶17} Even though the statute states that the hearing must be held "at the time of sentencing", Ohio's courts including this one, have read R.C. 2947.14 in its entirety and concluded that "the hearing requirement of R.C. 2947.17(A) [sic] does not arise until the trial court decides to incarcerate the offender for failure to pay." *State v. Meyer* (1997), 124 Ohio App.3d 373, 375; *Johnson; Higgenbotham*.

{¶18} "By requiring a hearing prior to incarceration for nonpayment of fines, R.C. 2947.14(A) protects the right of a criminal defendant not to be imprisoned for nonpayment of a fine due to indigency. See *Williams v. Illinois* (1970), 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586, and *Tate v. Short* (1971) 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130. An offender may be incarcerated for his unwillingness to pay a fine, but not, consistent with the constitutional principles of due process and equal protection, for his inability to pay. Mere pronouncement of a fine, however, as opposed to its enforcement, does not invoke the constitutional concern." *Meyer* at 377.

{¶19} In *Meyer*, the trial court imposed the fine as a condition of the offender's probation. The appellate court rejected any argument that the trial court erred because it did not hold a hearing at the time it sentenced the offender to probation and the fine. Instead, it held that the trial court only needed to hold a hearing to determine the offender's ability to pay if his probation was being revoked due to his failure to pay. *Id.*

{¶20} Here, the trial court is announcing, not enforcing, the fine. Although, it's statement that it will not consider judicial release until Keylor has paid all of her monetary sanctions is gratuitous, it does not violate R.C. 2947.14.

{¶21} Finally, we note that the trial court's discretion when determining whether to

grant judicial release is very broad. R.C. 2929.20, which allows for judicial release, does not limit a trial court's discretion with respect to denying a motion for judicial release in any way. *State v. Greene*, 2nd Dist. No. 02-CA-17, 2002-Ohio-2595, ¶5. Indeed, such a denial is not a final appealable order because it does not affect an offender's substantial rights since that offender is obligated to serve her term of imprisonment for the crime she has committed. *State v. Woods* (2001), 141 Ohio App.3d 549; *Greene*; see, also, *State v. Coffman* (2001), 91 Ohio St.3d 125 (denial of a motion for shock probation is never a final appealable order). Thus, Keylor's argument is trying to raise an issue which she would be unable to raise if she moved for judicial release and that motion was denied because she had failed to pay her monetary sanctions. We will not let Keylor argue this error merely because the trial court made this statement at her sentencing hearing rather than when it was denying judicial release.

{¶22} Simply stated, the statutes Keylor relies on to argue the trial court erred by not holding a hearing do not support her position. Instead, they require that trial court's hold a hearing to determine an offender's ability to pay when the trial court is incarcerating an offender for her failure to pay. The judgment Keylor appeals from is a judgment of sentence for a crime and she is being incarcerated for committing that crime, not for failing to pay fines which have been imposed. Accordingly, the trial court did not need to hold a hearing to determine her ability to pay the fine. Furthermore, she did not object to the amount of the fine at the sentencing hearing. Accordingly, Keylor's first assignment of error is meritless.

Cruel and Unusual Punishment

{¶23} In her second assignment of error, Keylor asserts:

{¶24} "The monetary sanction (fine) imposed upon Appellant violated the cruel and unusual punishment clause of the Eighth Amendment and represents a clear abuse of discretion."

{¶25} According to Keylor, the \$18,000 fine was excessive since she was also ordered to pay \$105,055.42 in restitution and since she could not secure her release from prison until it was paid. The State argues that, given the facts and circumstances of the case, the fine was not excessive.

{¶26} As stated above, Keylor's failure to object to the amount of the fine at the sentencing hearing waives any argument concerning her ability to pay the fine imposed upon her. *Frazier*. She can now only raise her inability to pay the fine if she is incarcerated due to her failure to pay the fine. *Meyer; Johnson; Higgenbotham*. Accordingly, we may not address whether the fine imposed was excessive. Keylor's arguments within this assignment of error are meritless.

{¶27} Because each of Keylor's assignments of error are meritless, the judgment of the trial court is affirmed.

Judgment affirmed.

Waite, P. J., and Vukovich, J., concur.