

[Cite as *State v. Acevedo*, 2007-Ohio-6195.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 89166**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**JOSE ACEVEDO**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-484277

**BEFORE:** Boyle, J., Cooney, P.J., and Gallagher, J.

**RELEASED:** November 21, 2007

**JOURNALIZED:**



[Cite as *State v. Acevedo*, 2007-Ohio-6195.]

## **ATTORNEYS FOR APPELLANT**

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BOYLE, M.J., J.:

{¶ 1} Defendant-appellant, Jose Acevedo (“Acevedo”), appeals the fine imposed as a part of the sentence he received for drug trafficking. For the following reasons, we affirm.

{¶ 2} Acevedo, along with four others, was indicted by the Cuyahoga County Grand Jury on four counts: two counts of drug trafficking of more than 1,000 grams of cocaine, in violation of R.C. 2925.03; one count of drug possession of the same



drug and amount, in violation of R.C. 2925.11; and one count of possessing criminal tools, in violation of R.C. 2923.24.

{¶ 3} In a package deal, all five codefendants pled to an amended indictment, agreeing to serve a term of incarceration. Acevedo pled guilty to an amended count of drug trafficking. The amount of cocaine was amended to more than ten grams, but less than one hundred grams, making it a third-degree felony, rather than a first-degree felony. The remaining counts were nolle.

{¶ 4} A month later, all five defendants appeared together for sentencing. The trial court sentenced Acevedo to the recommended agreed sentence of one year in prison. The court also ordered him to pay a \$10,000 fine, \$5,000 of which was mandatory, and court costs. The trial court also imposed postrelease control as part of his sentence for the requisite statutory period. Acevedo did not file an affidavit of indigency.

{¶ 5} Acevedo raises two assignment of error:

{¶ 6} “[1.] The trial court erred in imposing a fine after the appellant was found to be indigent.

{¶ 7} “[2.] The trial court erred in imposing a fine where the court failed to consider whether the appellant had the present or future ability to pay the fine.”

{¶ 8} In his first assignment of error, Acevedo contends that he was denied due process of law when the trial court fined him, although he had been previously declared indigent. He further argues that his defense counsel objected to the



imposition of the fine, but that the trial court never addressed his objection. We do not agree with Acevedo's arguments.

{¶ 9} R.C. 2929.18 provides that, “the court imposing a sentence upon an offender for a felony may sentence the offender to any financial sanction or combination of financial sanctions authorized \*\*\*.”

{¶ 10} R.C. 2929.18 further mandates:

{¶ 11} “(B)(1) For a first, second, or third degree felony violation \*\*\*, the sentencing court shall impose upon the offender a mandatory fine of at least one-half of, but not more than, the maximum statutory fine amount authorized for the level of the offense pursuant to division (A)(3) of this section. 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.”

{¶ 12} The Supreme Court of Ohio has held, “that an affidavit of indigency must be ‘filed’ with the court prior to sentencing[,which] means that the affidavit must be delivered to the clerk of court for purposes of filing and must be indorsed by the clerk of court, i.e., time-stamped, prior to the filing of the journal entry reflecting the trial court’s sentencing decision.” *State v. Gipson* (1998), 80 Ohio St.3d 626, syllabus. In addition, “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 a statutory fine.” *Id.* at 633. The burden is on the offender to affirmatively demonstrate that he or she is indigent and unable to pay the mandatory fine. *Id.* at 635. See *State v. Movie!*, 8th Dist. No. 88984, 2007-Ohio-5947.

{¶ 13} The record reflects that immediately after the trial court orally imposed Acevedo’s sentence, his defense counsel orally moved the court “to consider the fact that my client is indigent and therefore found indigent by the court and not subject to this fine.” This is the “objection” Acevedo claims the trial court failed to rule upon.

{¶ 14} A closer look at the record, however, reveals that immediately following Acevedo’s counsel’s “objection,” one of the codefendant’s counsel interjected with the same request that the codefendant’s fines be waived (the codefendant was sentenced first and Acevedo was second).

{¶ 15} The trial court then continued sentencing the remaining three codefendants. Their counsels, respectively, also raised the issue of indigency, and requested their fines be waived. After sentencing all five codefendants, the trial court ruled: “All those motions regarding fines will be denied.”

{¶ 16} Therefore, we determine that Acevedo failed to file the mandated affidavit of indigency, before or after his sentencing hearing. In addition, the trial court addressed and denied Acevedo’s oral motion to waive the imposition of fines.

{¶ 17} Accordingly, Acevedo’s first assignment of error is overruled.



{¶ 18} In his second assignment of error, Acevedo claims that the trial court failed to consider whether he had the present or future ability to pay the fines when it imposed them.

{¶ 19} Here, Acevedo claims that the trial court never addressed his motion to waive the fines. However, we already determined that it did. Additionally, the record indicates that Acevedo's defense counsel told the trial court that Avecedo "was working at the time he was charged." R.C. 2929.19(B)(6) requires only that the trial court "consider the offender's present and future ability to pay," which the trial court did.

{¶ 20} Accordingly, Acevedo's second assignment of error is overruled.

{¶ 21} Therefore, the judgment of the trial court is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



MARY JANE BOYLE, JUDGE

COLLEEN CONWAY COONEY, P.J., and  
SEAN C. GALLAGHER, J., CONCUR