

[Cite as *State v. Williams*, 2009-Ohio-5964.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92419

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAMIAN WILLIAMS

DEFENDANT-APPELLANT

**JUDGMENT:
SENTENCE MODIFIED
AND CASE REMANDED FOR
MODIFICATION OF JOURNAL ENTRY**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-512529

BEFORE: Jones, J., Cooney, A.J., and Kilbane, J.

RELEASED: November 12, 2009

JOURNALIZED:

ATTORNEYS FOR APPELLANT

Robert L. Tobik
Cuyahoga County Public Defender

BY: Erika B. Cunliffe
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Louis Brodnik
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Damian Williams (“Williams”), appeals the trial court’s imposition of a mandatory fine. Finding some merit to the appeal, we reverse the decision of the trial court and vacate the fine.

{¶ 2} In 2008, Williams was charged with drug trafficking, two counts of drug possession, and possessing criminal tools. Williams entered into a plea bargain with the state and pled guilty to one count of drug trafficking and agreed to forfeit \$15,557 in U.S. currency, a cell phone, and a scale.

{¶ 3} Prior to his sentencing hearing, Williams filed an affidavit of indigency, asking the trial court to waive the mandatory \$10,000 fine. At the sentencing hearing, Williams reiterated his request that the trial court waive the fine. The trial court sentenced Williams to five years in prison and imposed the mandatory fine, but ordered that Williams start paying the fine after he was released from prison.

{¶ 4} Williams appeals, raising one assignment of error for our review, in which he argues that the trial court erred when it imposed the mandatory fine after he properly filed an affidavit of indigency and the record did not support a finding that he was able to pay the fine.

{¶ 5} A trial court’s decision to impose a fine is reviewed for an abuse of discretion. To constitute an abuse of discretion, the ruling must be more than legal error; it must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶ 6} R.C. 2925.11 directs a trial court to impose all mandatory fines specified for a particular crime, unless the court determines that the defendant is indigent. R.C. 2929.18(B)(1) states, in pertinent part:

“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.”

{¶ 7} Before imposing a financial sanction under R.C. 2929.18, the court must also consider the offender’s present and future ability to pay the amount of the sanction or fine. See R.C. 2929.19(B)(6).

{¶ 8} Ohio law does not prohibit a court from imposing a fine on an indigent defendant. *State v. Ramos*, Cuyahoga App. No. 92357, 2009-Ohio-3064; *State v. Roark*, Cuyahoga App. No. 84992, 2005-Ohio-1980. Nor does the filing of an affidavit of indigency by a defendant automatically entitle a defendant to a waiver of a mandatory fine. *State v. Gipson* (1998), 80 Ohio St.3d 626, 687 N.E.2d 750.

Thus, imposition of the mandatory fine is required unless (1) the offender’s affidavit is filed prior to sentencing, and (2) the trial court finds that the offender is an indigent person and is unable to pay the mandatory fines. *Id.* at 634; R.C. 2929.18(B)(1). As to the trial court’s findings, “there are no express factors that must be taken into consideration or findings regarding the offender’s ability to pay that must be made on the record.” *State v. Martin*, 140 Ohio App.3d 326, 338, 2000-Ohio-1942, 747 N.E.2d 318.

{¶ 9} At his sentencing hearing, Williams told the court that he had been employed prior to his arrest but was currently in jail and had no money. In his

affidavit of indigency, Williams averred that he had no income, no cash on hand, no real estate, and no automobile. The court inquired how many people Williams supported, and Williams answered that he was responsible for supporting his four children, their four mothers, and his own mother and father. Additionally, the presentence investigation report noted that Williams had debt relating to unpaid medical bills.

{¶ 10} It is unclear from the record how the trial court came to the conclusion that Williams was able to pay the fine, other than noting that Williams had a “flourishing drug business” and would not have to start paying the fine until he got out of jail. Even if it were true that Williams had a thriving business selling drugs, the fact that the police found \$15,000 in Williams’s house when he was arrested should not be considered in a consideration of his ability to pay the fine

{¶ 11} as the money was forfeited as part of his plea agreement.¹ See *State v. Covington*, Muskingum App. No. CT2005-0038, 2006-Ohio-2700.

{¶ 12} The evidence before the court was that Williams was unable to pay the fine. We agree with the court of appeals in *State v. Lefever* (1993), 91 Ohio App.3d 301, 309, 632 N.E.2d 589, 590, and *State v. Pendleton* (1995), 104 Ohio App.3d 785, 663 N.E.2d 395, that the mere possibility that an offender may be able to pay the fine in the future is not a proper basis on which to find that a defendant is not indigent.

¹Of additional concern to this court is that if the fine was imposed, Williams may feel compelled to return to a life of crime in order to pay the mandatory fine once he is released from prison.

{¶ 13} Based on the specific facts of this case, we conclude the trial court abused its discretion in imposing a fine on Williams.

{¶ 14} The sole assignment of error is sustained.

{¶ 15} Accordingly, the part of Williams's sentence ordering him to pay a mandatory fine of \$10,000 is vacated. The case is remanded to the trial court to modify the sentencing entry.

It is ordered that appellant recover of appellee 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. Case remanded to the trial court for modification of sentence.

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

LARRY A. JONES, JUDGE

COLLEEN CONWAY COONEY, A.J., and
MARY EILEEN KILBANE, J., CONCUR