

[Cite as *State v. Barker*, 2010-Ohio-4480.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93574

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ERIC BARKER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART
AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-512323 and CR-496085

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

RELEASED AND JOURNALIZED: September 23, 2010

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LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Eric Barker (“Barker”), appeals his sentence. Finding some merit to the appeal, we affirm in part and reverse in part.

{¶ 2} In 2007, Barker was charged with drug possession with a one-year firearm specification and carrying a concealed weapon. In 2008, Barker was charged in a separate case with aggravated burglary, burglary, and two counts of felonious assault. Barker initially pled not guilty in both cases, but decided to change his plea. Barker pled guilty to drug possession and carrying a concealed weapon in the first case, and pled guilty to one count of felonious assault and one

count of burglary in the second case. The trial court sentenced him to a total of three years in prison and imposed a \$1,000 fine.

{¶ 3} Barker now appeals, raising the following three assignments of error for our review:

“I. Defendant’s sentence is void as a result of the trial court’s failure to advise Defendant of postrelease control in accordance with Ohio R.C. 2929.199(B)(3)(c) [sic].

“II. The trial court erred in imposing fines upon the defendant.

“III. The trial court erred in failing to give Defendant jail time credit and in denying Defendant’s subsequent motions for jail time credit.”

Postrelease Control

{¶ 4} First, Barker argues that his sentence is void because the trial court failed to properly advise him of postrelease control.

{¶ 5} R.C. 2929.191, effective July 11, 2006, promulgated a statutory remedy for trial courts to use to correct an error in imposing postrelease control. In *State v. Singleton*, 124 Ohio St .3d 173, 2009-Ohio-6434, 920 N.E.2d 958, the Ohio Supreme Court addressed the effect of R.C. 2929.191 on a trial court’s failure to properly impose postrelease control. The court held that for criminal sentences imposed prior to July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall conduct a de novo sentencing hearing. *Id.* at paragraph one of the syllabus.

{¶ 6} The *Singleton* court further held that for criminal sentences imposed on or after July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall apply the remedial procedures set forth in

R.C. 2929.191. The Court specifically recognized that for sentences imposed after July 11, 2006, R.C. 2929.191 does not afford the defendant a de novo sentencing hearing. The Court found:

{¶ 7} “The hearing contemplated by R.C. 2929.191(C) and the correction contemplated by R.C. 2929.191(A) and (B) pertain only to the flawed imposition of postrelease control. R.C. 2929.191 does not address the remainder of an offender’s sentence. Thus, the General Assembly appears to have intended to leave undisturbed the sanctions imposed upon the offender that are unaffected by the court’s failure to properly impose postrelease control at the original sentencing.” *Id.* at ¶24.

{¶ 8} In this case, the trial court advised Barker of postrelease control during the plea hearing, but failed to advise him of postrelease control during the sentencing that took place in 2009. Therefore, pursuant to *Singleton*, his sentence is not void. We remand the case for the remedial correction afforded by R.C. 2929.191.

{¶ 9} The first assignment of error is sustained.

Fines

{¶ 10} Barker argues next that the trial court erred when it imposed a \$1,000 fine as part of his sentence without considering his present and future ability to pay and that the trial court ordered a \$250 fine on each count, to run concurrent. The state counters that because Barker failed to object to or challenge the fine at the sentencing hearing, he has waived all but plain error on appeal.

{¶ 11} R.C. 2929.19(B)(6) provides that before imposing a financial sanction a trial court must consider the offender's present and future ability to pay the amount of the sanction or fine. But the failure to bring an error to the attention of the trial court at a time when the court could correct that error constitutes a waiver of all but plain error. *State v. Johnson*, 164 Ohio App.3d 792, 2005-Ohio-6826, 844 N.E.2d 372, ¶22. In other words, when a defendant 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. *State v. Johnson* (1995), 107 Ohio App.3d 723, 669 N.E.2d 483; *State v. Keylor*, Monroe App. No. 02MO12, 2003-Ohio-3491, ¶9.

{¶ 12} In this case, the trial court did not specifically state that it was considering Barker's present or future ability to pay the fine. But the trial court need not explicitly state that it considered a defendant's ability to pay a financial sanction. Rather, courts look to the totality of the record to see if this requirement has been satisfied. See *State v. Lewis*, Cuyahoga App. No. 90413, 2008-Ohio-4101, appeal not allowed by 120 Ohio St.3d 1506, 2009-Ohio-361, 900 N.E.2d 623.

{¶ 13} The record indicates that the court ordered a presentence investigation report. The trial court also indicated in its journal entry that it considered all factors as required by law. This, coupled with our plain error analysis, leads us to conclude that the trial court did not commit plain error in imposing fines for Barker's convictions.

{¶ 14} While it certainly facilitates appellate review when the trial court states that it considered the defendant's ability to pay, we cannot say that a cursory reference in the record does not meet the low threshold of R.C. 2929.19(B)(6), as a matter of law, especially given the circumstances of this case. See *State v. Andera*, Cuyahoga App. No. 92306, 2010-Ohio-3304.

{¶ 15} As to Barker's argument that the fine should only be \$250, we find that the record is sufficient to show that the fine was \$250 for each count as evidenced by the journal entry.

{¶ 16} Thus, because the record lacks clear and convincing evidence that the fine imposed on Barker is contrary to law and there is no indication that the trial court abused its discretion in imposing it, we affirm the imposition of fines upon him. See *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124.

{¶ 17} The second assignment of error is overruled.

Jail Time Credit

{¶ 18} In his third assignment of error, Barker argues that the trial court did not give him credit towards his sentence for the amount of time he had spent in jail prior to his pleading guilty. The state concedes this assignment of error. Therefore, we sustain the third assignment of error and remand the case for the trial court to calculate and apply jail time credit.

{¶ 19} Accordingly, judgment is affirmed in part and reversed in part. Case is remanded for proceedings consistent with this opinion.

It is ordered that appellee and appellant share the 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.

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

LARRY A. JONES, JUDGE

SEAN C. GALLAGHER, A.J., CONCURS IN
JUDGMENT ONLY;

MARY EILEEN KILBANE, J., CONCURS