

[Cite as *State v. West*, 2015-Ohio-2039.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 101844 and 101845

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TODD AND TIMOTHY WEST

DEFENDANTS-APPELLANTS

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-11-548609-A and CR-11-548609-B

BEFORE: McCormack, J., Jones, P.J., and Kilbane, J.

RELEASED AND JOURNALIZED: May 28, 2015

ATTORNEYS FOR APPELLANT

Robert L. Tobik
Cuyahoga County Public Defender

By: Paul Kuzmins
Erika B. Cunliffe
Assistant Public Defenders
310 Lakeside Ave., Suite 200
Cleveland, OH 44113

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor

By: Daniel T. Van
Assistant County Prosecutor
9th Floor, Justice Center
1200 Ontario Street
Cleveland, OH 44113

TIM McCORMACK, J.:

{¶1} This court previously vacated Todd West's and Timothy West's sentences for their drug offenses after finding their offenses were allied offenses and should have been merged. Upon remand, the trial court reduced their sentences. Todd and Timothy West now appeal from their new sentence, contending that the trial court imposed a mandatory fine without addressing the issue of their indigency or ability to pay. Finding merit to the appeal, we reverse the trial court's judgment and remand the matter to the trial court for further proceedings consistent with this opinion.

Procedural Background

{¶2} In 2011, Todd West and his brother Timothy West were found guilty by a jury of illegal manufacturing/cultivating marijuana and drug trafficking after a joint trial. The trial court sentenced each of them to eight years in prison for the manufacturing/cultivating offense and eight years for the drug trafficking offense, to be served consecutively.¹ The trial court also imposed a mandatory fine of \$7,500 for each offense, totaling \$15,000, for each brother. The brothers appealed separately, in *State v. Todd West*, 8th Dist. Cuyahoga Nos. 97398 and 97899, 2012-Ohio-6138, and *State v. Timothy West*, 8th Dist. Cuyahoga Nos. 97391 and 97900, 2013-Ohio-96.

¹The brothers were also found guilty of drug possession and possession of criminal tools and received concurrent sentence. The instant appeal only pertains to the counts of illegal manufacturing/cultivating marijuana and drug trafficking.

{¶3} In both appeals, this court affirmed the conviction but reversed the sentence, concluding that the two drug offenses should have been merged. This court remanded for a merger of the offenses and for the state’s election of which count to proceed to sentencing on.

{¶4} On July 24, 2014, the trial court held separate resentencing hearings for Todd and Timothy West. In each case, the state elected to proceed on the trafficking count and the court sentenced the defendant to eight years for the offense. The court also imposed a mandatory fine of \$7,500.

{¶5} Todd and Timothy West filed separate appeals from the trial court’s judgment, in 8th Dist. Cuyahoga Nos. 101844 and 101845, the appeals before us now. This court granted their request to consolidate the two appeals for briefing and disposition. They raise one joint assignment of error, contending that the trial court imposed \$7,500 of mandatory fine for their conviction of drug trafficking without considering their affidavit of indigency.

{¶6} “When a cause is remanded to a trial court to correct an allied-offenses sentencing error, the trial court must hold a new sentencing hearing for the offenses that remain after the state selects which allied offense or offenses to pursue.” *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, paragraph one of the syllabus.

{¶7} The question of how *Wilson* should be applied to the imposition of a mandatory fine when the original sentences were vacated due to a failure to merge, i.e.,

whether the imposition of a mandatory fine upon remand is de novo, was already answered by this court in Todd and Timothy West's applications for reopening.

{¶8} Before the July 24, 2014 resentencing, both Todd and Timothy West filed an application for reopening, claiming ineffective assistance of appellate counsel. This court decided the applications before their resentencing. Although the issues raised in the applications for reopening are not pertinent to this appeal, in both decisions this court applied *Wilson* and expressed the view that the imposition of a mandatory fine would be within the scope of the resentencing.

{¶9} In Timothy West's application for reopening, *State v. Timothy West*, 8th Dist. Cuyahoga Nos. 97391 and 97900, 2013-Ohio-4185, he claimed his appellate counsel should have argued the ineffectiveness of trial counsel for not presenting an affidavit of indigency prior to sentencing to waive the fine. This court concluded that there was no prejudice, because his appellate counsel successfully raised the merger issue and obtained a de novo sentencing for him for the drug offenses. Applying *Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, this court stated that Timothy West may pursue the mandatory fine matter at the new sentencing hearing. *Timothy West* at ¶ 21.

{¶10} In Todd West's application for reopening, *State v. Todd West*, 8th Dist. Cuyahoga Nos. 97398 and 97899, 2014-Ohio-198, this court expressed the same view. This court stated that, upon resentencing, the defendant may pursue the issue of an affidavit of indigency in order to waive any possible fine. *Id.* at ¶ 31.

The Resentencing and Instant Appeal

{¶11} R.C. 2929.18(B)(1) governs the indigency issue in the context of the imposition of mandatory fines. It states:

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 record reflects that before the July 24, 2014 resentencing hearing, both brothers had filed motions asking the trial court to waive fines and costs. Each motion attached a properly time-stamped affidavit of indigency, accompanied by a “Financial Disclosure/Affidavit of Indigency” from Richland Correctional Institution. At each resentencing hearing, the trial court, apparently unaware of this court’s decisions in the applications to reopen and under the incorrect belief that the issue of mandatory fines was outside the scope of resentencing, declined to consider the indigency issue.

{¶13} The trial court was obligated to follow the directives of this court and considered the indigency issue before imposing mandatory fines when resentencing Todd and Timothy West. Where a defendant has filed an affidavit of indigency before sentencing, as both defendants had done here, the trial court is obligated to determine whether the defendant is indigent or able to pay before it imposes the mandatory fine. *State v. Moore*, 8th Dist. Cuyahoga No. 100401, 2014-Ohio-2979, ¶ 25, citing *State v. Shepard*, 8th Dist. Cuyahoga No. 95433, 2011-Ohio-2525. While the trial court is not

prohibited from imposing a fine on an indigent defendant, *State v. Ramos*, 8th Dist. Cuyahoga No. 92357, 2009-Ohio-3064, ¶ 7, the record here did not reflect the requisite consideration by the trial court of the issue of the defendant's ability to pay in the resentencing proceeding.

{¶14} For the foregoing reasons, the trial court's imposition of a mandatory fine is vacated and the case is remanded for the limited purpose of a consideration by the trial court of the defendants' claim of indigency.²

{¶15} This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellants recover of said 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.

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

²Our review of the record reveals another error, apparently inadvertent, in the trial court's sentence entry regarding Todd West. In our decision in Todd West's application for reopening, we granted his application in part regarding the forfeiture of \$2,700 seized from his residence and we ordered the \$2,700 be immediately returned to Todd. *Todd West*, 8th Dist. Cuyahoga Nos. 97398 and 97899, 2014-Ohio-198, ¶ 32. However, the sentence entry upon remand stated, erroneously, that *all* items listed in the forfeiture specification were to forfeit to the state. We consider this error clerical. The trial court is instructed to correct the judgment entry regarding the forfeiture as consistent with our opinion in *Todd West*, 2014-Ohio-198.

TIM McCORMACK, JUDGE

LARRY A. JONES, SR., P.J., and
MARY EILEEN KILBANE, J., CONCUR

KEYWORDS:

State of Ohio v. West, et al., Appeal Nos. 101844 and 101845

Mandatory fine; indigency or ability to pay. While the trial court is not prohibited from imposing a fine on an indigent defendant, the record did not reflect the requisite consideration by the trial court on the issue of the defendant's ability to pay in a resentencing proceeding. The matter is therefore remanded for the limited purpose of a consideration of the defendant's claim of indigency.