

[Cite as *State v. Calhoun*, 2015-Ohio-2155.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 101816

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**ERIC L. CALHOUN**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
**REVERSED AND REMANDED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-13-573020-A

**BEFORE:** Keough, J., Celebrezze, A.J., and E.T. Gallagher, J.

**RELEASED AND JOURNALIZED:** June 4, 2015

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KATHLEEN ANN KEOUGH, J.:

{¶1} Defendant-appellant, Eric Calhoun, appeals from the trial court's court judgment entry of sentencing that imposed mandatory fines after the sentencing hearing, outside the presence of the defendant, and after a finding of indigency was declared. For the reasons that follow, we reverse and remand for the trial court to vacate the imposition of fines in the court's sentencing journal entry and to conduct a limited resentencing hearing in accordance with R.C. 2929.18(B)(1).

{¶2} In 2013, Calhoun was charged with four counts of aggravated vehicular homicide, two counts of aggravated vehicular assault, and one count each of failure to stop after an accident and driving while under the influence of alcohol and/or drugs. On the day that trial was scheduled to begin, Calhoun pleaded guilty to the indictment as charged. With the agreement of the parties, the trial court directly proceeded to sentencing.

{¶3} The court sentenced Calhoun to 20 years in prison, and imposed the requisite period of postrelease control and driver's license suspension. During the sentencing hearing, the court did not address the mandatory fines associated with the charges. However, the judgment entry of sentencing included the imposition of the mandatory fines, totaling \$25,000. Calhoun now appeals, raising two assignments of error regarding the court's imposition of fines.

{¶4} In his first assignment of error, Calhoun contends that he was denied due process of law when the trial court imposed a mandatory fine, after his sentencing hearing was adjourned, when neither he nor his trial counsel was present. The state concedes this error. Accordingly, the court erred in imposing the mandatory fine as part of the judgment entry of conviction when it did not advise Calhoun of the imposition of fines in open court at the sentencing hearing. The assignment of error is sustained.

{¶5} In his second assignment of error, Calhoun contends that the trial court abused its discretion by imposing a monetary fine after he was declared indigent by the trial court.

{¶6} At sentencing, the trial court stated on the record, “[O]kay. Your attorney has filed an Affidavit of Indigency and I will find you to be indigent. I will waive any court costs.” (Tr. 41.) Despite this indigency finding, the trial court imposed the mandatory fines in its judgment entry of sentencing. While the state concedes that the trial court erred when it imposed the fines outside the presence of Calhoun, the state contends that the appropriate remedy in this matter is to remand the case to the trial court to properly advise and impose the mandatory fines on Calhoun at sentencing.

{¶7} On the other hand, Calhoun contends that the court’s acknowledgment of the affidavit of indigency being filed and the declaration of indigency precludes the trial court from imposing the mandatory fines. In support, Calhoun cites to *State v. Moore*, 135 Ohio St.3d 151, 2012-Ohio-5479, 985 N.E.2d 432.

{¶8} In *Moore*, the Ohio Supreme Court held,

A trial court's failure to include the mandatory fine required by R.C. 2925.11(E)(1)(a) and 2929.18(B)(1) when an affidavit of indigency is not filed with the court prior to the filing of the trial court's journal entry of sentencing, renders that part of the sentence void. Resentencing is limited to the imposition of the mandatory fine.

*Id.* at the syllabus.

{¶9} In reaching this conclusion, the court analyzed R.C. 2929.18(B)(1), finding that a trial court does not have discretion in imposing the fine. *Id.* at ¶ 13. "If the affidavit of indigency is not filed, the court '*shall* impose upon the offender a mandatory fine.' (Emphasis added). [R.C. 2929.18(B)(1)]. However, if the affidavit is timely filed and the court determines that the offender is indigent, the court '*shall not* impose the mandatory fine upon the offender.' (Emphasis added). [R.C. 2929.18(B)(1)]." *Moore*, quoting R.C. 2929.18(B)(1).

{¶10} Nevertheless, an offender who files an affidavit alleging he is indigent and unable to pay the mandatory fine is not automatically entitled to a waiver of that fine. *State v. Gipson*, 80 Ohio St.3d 626, 634, 687 N.E.2d 750 (1998). R.C. 2929.18(B)(1) requires the imposition of a mandatory fine *unless* (1) the 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 (2) the court determines that the offender is an indigent person *and* is unable to pay the mandatory fine. (Emphasis added.)

{¶11} In this case, and as for the first prong of R.C. 2929.18(B)(1), the trial court stated on the record that the affidavit was "filed." However, after reviewing the trial

court record, the affidavit does not appear on the trial court's docket as journalized or filed, and the affidavit does not appear in the trial court file.

{¶12} The Ohio Supreme Court in *Gipson* considered and explained what it means when the word “filed” is used in R.C. 2929.18(B)(1) as it pertains to an affidavit of indigency.

The requirement of [R.C. 2929.18(B)(1)] that an affidavit of indigency must be “filed” with the court prior to sentencing 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.

*Id.* at the syllabus.

{¶13} In *Gipson*, the defendant did not file his affidavit of indigency prior to sentencing. *Gipson*, 80 Ohio St.3d at 633, 687 N.E.2d 750. Instead, he filed his affidavit two weeks after sentencing with his motion to abate the mandatory fine. *Id.* The court noted that the transcript of the sentencing hearing reflected that the defendant offered an affidavit at the time of sentencing, but because he did not file the affidavit prior to sentencing, it was improperly considered by the trial court. *Id.*

{¶14} However, the *Gipson* court stated, albeit in dicta, its awareness of Civ.R. 5(E), which allows for filings of papers with a judge. *Gipson* at 633, fn 3.

Civ.R. 5(E) provides that “the filings of pleadings and other papers with the court, *as required by these rules*, shall be made by filing them with the clerk of court, *except that the judge may permit the papers to be filed with the judge, in which event the judge shall note the filing date on the papers and forthwith transmit them to the office of the clerk.*”

(Emphasis sic.) *Gipson*, quoting Civ.R. 5(E). The Ohio Supreme Court noted that there was no indication that the affidavit of indigency was ever handed to the trial judge at the sentencing hearing or that the trial judge accepted Gipson’s affidavit as a formal “filing.” *Id.* This is the distinguishing factor between *Gipson* and the case before this court.

{¶15} Here, the affidavit was handed to the trial judge, who noted that it was filed. Whether the judge’s statement was an acceptance of a formal “filing,” is not clear from the record. But what is clear, and the state conceded at oral argument, was that Calhoun presented an affidavit of indigency to the trial judge for consideration, the trial court noted that it was “filed,” and subsequently declared Calhoun indigent.

{¶16} If the trial judge accepted it as a filing, pursuant to Civ.R. 5(E), it is trial judge’s responsibility to note the filing date on the papers and forthwith transmit them to the office of the clerk. Because the affidavit does not appear on the court’s docket and the affidavit is not in the court file, it can be reasonably concluded that the procedure set forth in Civ.R. 5(E) was not followed or that the court did not accept it as a filing.

{¶17} A strict reading of the statute would require this court to conclude that because the affidavit of indigency was not filed prior to the journal entry of sentencing, then the court was required to impose the mandatory fines. However, the facts and circumstances are unique to this case and cannot be ignored. The trial court noted that the affidavit of indigency was filed in this case, declared Calhoun indigent, and waived court costs. However, the court made no mention in open court regarding the mandatory

fines or Calhoun's inability to pay those fines, yet imposed the fines after the sentencing hearing was concluded.

{¶18} Accordingly, the portion of Calhoun's judgment of entry of conviction imposing mandatory fines is vacated. However, due to the particular circumstances in this case, we remand the matter to the trial court to conduct a limited resentencing hearing in accordance with R.C. 2929.18(B)(1), including consideration of Calhoun's affidavit of indigency, if it is properly filed. Furthermore, if the court imposes the mandatory fine, the court shall advise Calhoun of such fines in open court.

{¶19} Judgment reversed and remanded for further proceedings consistent with this opinion.

It is ordered that appellant recover from 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.

KATHLEEN ANN KEOUGH, JUDGE

EILEEN T. GALLAGHER, J., CONCURS IN JUDGMENT ONLY WITH SEPARATE OPINION;

FRANK D. CELEBREZZE, JR., A.J., CONCURS WITH THE SEPARATE OPINION.)



EILEEN T. GALLAGHER, J., CONCURRING IN JUDGMENT ONLY:

{¶20} I agree with the majority's decision to reverse and remand for a limited resentencing hearing in accordance with R.C. 2929.18(B)(1), but write separately to narrowly state that reversal in this case is necessary based on the trial court's failure to comply with Civ.R. 5(E).

{¶21} While the majority reaches the correct result, it fails to specifically state its basis for reversal. In my view, this court must conclusively determine whether the trial court accepted Calhoun's affidavit of indigency as a filing to the bench pursuant to Civ.R. 5(E). Either the trial court did accept the affidavit as filed, or it did not. Significantly, each scenario results in a different outcome.

{¶22} For example, if we determined there is nothing in the record to suggest the trial court accepted the affidavit as a filing to the bench, I believe this court would be mandated to impose costs and mandatory fines based on the strict application of R.C. 2929.18(B)(1) and defense counsel's failure to timely file the affidavit with the clerk of courts prior to sentencing. If, however, the trial court did accept the affidavit as a filing prior to sentencing, but subsequently failed to "transmit" the document to the clerk of courts as required under Civ.R. 5(E), I believe the trial court's inaction would constitute reversible error and would permit the defendant to refile his or her affidavit of indigency for consideration on remand. Accordingly, I believe a determination of whether the trial court accepted Calhoun's affidavit of indigency as a filing to the bench is outcome determinative and, therefore, must be resolved by this court.

{¶23} With respect to the circumstances of this case, I believe there is no ambiguity regarding the trial court's acceptance of Calhoun's affidavit of indigency. As stipulated to by the parties' at oral arguments, defense counsel presented the trial court with the affidavit just after the guilty plea was entered into and just prior to the sentence being imposed. Thereafter, the trial court acknowledged that defense counsel had "filed" an affidavit of indigency and, pursuant to the affidavit, was waiving court costs. Under these circumstances, I believe it is appropriate to conclude that the trial court "permit[ted] the papers to be filed with the judge" under Civ.R. 5(E), but committed reversible error when it failed to comply with its reciprocal duty to "note the filing date on the papers and forthwith transmit them to the office of the clerk."

{¶24} It is important to note that the trial court, in its discretion, has the authority to deny a request to file an affidavit of indigency with the bench. However, once the trial court permits the affidavit to be filed with the bench, defense counsel is relieved of its obligations to file the affidavit with the clerk prior to sentencing pursuant to R.C. 2929.18(B)(1), and that obligation transfers to the trial court under Civ.R. 5(E). Because the trial court failed to comply with Civ.R. 5(E) in this case, I concur with the majority's decision to reverse and remand the matter for further proceedings.