

[Cite as *State v. Smith*, 2015-Ohio-2266.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101802

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DARIEN SMITH

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-13-579355-A, CR-13-579371-A, and CR-13-579728-K

BEFORE: E.T. Gallagher, J., Celebrezze, A.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: June 11, 2015

FOR APPELLANT

Darien Smith, pro se
Inmate # 660-012
Lake Erie Correctional Institution
501 Thompson Road
P.O. Box 8000
Conneaut, Ohio 44030

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor

BY: Marc C. Bullard, 9th Floor
Mary McGrath, 8th Floor
Assistant Prosecuting Attorneys
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

EILEEN T. GALLAGHER, J.:

{¶1} Defendant-appellant, Darien Smith (“Smith”), pro se, appeals one of his convictions and the imposition of a mandatory fine. He raises two assignments of error for our review:

1. The trial court abused its discretion in imposing a mandatory fine when evidence demonstrated a present inability to pay the fine.
2. Appellant was denied his Ohio and U.S. Constitutional right to effective assistance of counsel when venue and obvious cumulative errors existed on the face of the record where counsel did not utter Ohio Criminal Rule 12 filings, plain error notice.

{¶2} We find no merit to the appeal and affirm the trial court’s judgment.

I. Facts and Procedural History

{¶3} Smith was charged with numerous counts of drug trafficking, drug possession, and having a weapon while under disability in eight separate cases. The indictments were filed after Drug Enforcement Agency (“DEA”) agents searched Smith’s home and found large quantities of cocaine and \$290,000 in cash, which was forfeited to the federal government. Cuyahoga County deputies took Smith into custody for offenses committed in Cuyahoga County while he was a prisoner in the Lake County jail awaiting trial on a drug trafficking offense. After Smith was indicted in Cuyahoga County, the Lake County prosecutor dismissed the Lake County case.

{¶4} Pursuant to a plea agreement, Smith pleaded guilty to certain counts alleged in Cuyahoga C.P. Nos. CR-13-579355-A, CR-13-579728-K, and CR-13-579371-A, and all other counts were nolle. The remaining five cases were also dismissed. In CR-13-579355-A, Smith pleaded guilty to five counts of drug trafficking and one count

of having a weapon while under disability. In CR-13-579728-K and CR-13-579371-A, Smith pleaded guilty to one count of drug trafficking in each case. Smith also pleaded guilty to several forfeiture specifications.

{¶5} As part of the plea deal, the parties agreed the court would sentence Smith to 11-year prison terms on Counts 11 and 25 in CR-13-579355-A, which were first-degree felonies, to be served concurrently with each other and all other sentences. Count 25 included a major drug offender specification. The parties also agreed that because the drug transactions occurred on separate dates, none of the drug trafficking convictions were allied offenses of similar import. The first-degree felony drug trafficking offenses carried a mandatory fine of \$10,000, and a discretionary fine up to \$20,000.

{¶6} Smith filed affidavits of indigency in each of the three cases in which he entered guilty pleas. Smith averred that he had no money, no source of income, and no property of any kind. The state acknowledged that Smith forfeited everything in his possession, but argued the court should consider Smith's future ability to pay the fines after his release from prison. The state also reminded the court that the state legislature created mandatory fines to punish high level drug dealers and requested that the court impose "at least some of the mandatory fines." After considering arguments from both sides, the court found that Smith was not indigent and imposed a mandatory fine of \$10,000, plus the additional \$10,000 discretionary portion of the fine, for a total fine of \$20,000. This appeal followed.

II. Law and Analysis

A. Mandatory Fine

{¶7} In the first assignment of error, Smith argues the trial court abused its discretion when it imposed a \$20,000 fine as part of his sentence. He contends the court lacked authority to impose the fine because he was indigent.

{¶8} R.C. 2929.18(B) governs mandatory fines. Pursuant to R.C. 2929.18(B)(1), the trial court shall impose a mandatory fine equal to “at least one-half of, but not more than, the maximum statutory fine.” R.C. 2925.03(D) requires that a defendant who is convicted of a first-degree felony trafficking offense shall be ordered to pay a fine of no more than \$20,000 and no less than \$10,000, unless, as specified in R.C. 2929.18, the court determines the defendant is indigent. R.C. 2929.18(B)(1).

{¶9} Ohio law does not prohibit a court from imposing a fine on an “indigent” defendant. That is, the filing of an affidavit of indigency does not automatically entitle a defendant to a waiver of a mandatory fine. *State v. Knox*, 8th Dist. Cuyahoga Nos. 98713 and 98805, 2013-Ohio-1662, ¶ 36. Under Ohio law, a trial court must impose a mandatory fine unless (1) the offender files an affidavit of indigency prior to sentencing, and (2) “the trial court finds that the offender is an indigent person and is unable to pay the mandatory fines.” *State v. Gipson*, 80 Ohio St.3d 626, 634, 687 N.E.2d 750 (1998). In making its indigency determination, the court must consider both the offender’s present and future ability to pay the fine. R.C. 2929.19(B)(5).

{¶10} The trial court need not make an “affirmative finding that an offender is able to pay a mandatory fine.” *Id.* at 635. Instead, “the burden is upon the offender to

affirmatively demonstrate that he or she is indigent and is unable to pay the mandatory fine.” *Id.* We review the trial court’s decision to impose a fine on an indigent defendant for an abuse of discretion. *State v. Ficklin*, 8th Dist. Cuyahoga No. 99191, 2013-Ohio-3002, ¶ 5. An abuse of discretion implies that the trial court’s attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶11} Smith filed an affidavit of indigency in each case in which he entered guilty pleas. He averred that he was unemployed, had no alternative source of income, did not own any real estate or vehicle titled in his name, and owned no stocks, bank accounts, or any other property. At the sentencing hearing, Smith told the court that he was not employed and had not been employed since 2009, when he worked for a brief period of time at Popeyes Louisiana Kitchen. Although he was represented by hired counsel, Smith’s family paid the attorney fees. And since the cash found in his home was forfeited to the federal government, Smith and his lawyer asserted that, at the time of sentencing, he was “destitute.” However, these findings are only relevant to determine Smith’s indigency at the time of sentencing. They fail to establish that Smith would be unable to pay the fines after his release from prison.

{¶12} Smith was only 30 years old at the time of sentencing. The record shows that Smith is intelligent, physically healthy, and capable of performing honest work, if he were so motivated. For example, he was able to earn his GED while he was in prison serving a sentence for prior drug trafficking convictions. Mandatory fines are not

designed merely to punish the offender; they are intended to deter drug trafficking by eliminating the financial incentives provided by such activity. Smith provided no evidence to support his claim that he will be unable to pay the fine after he is released from prison. Therefore, the trial court acted within its discretion when it imposed the \$20,000 fine as part of Smith's sentence.

{¶13} Accordingly, the first assignment of error is overruled.

B. Venue

{¶14} In the second assignment of error, Smith argues his constitutional right to the effective assistance of counsel was violated because his trial counsel failed to object to a defect in venue. The bill of particulars filed in Cuyahoga C.P. No. CR-13-579355-A states that the offense alleged in Count 25 occurred on Fox Run Drive, Willoughby, Ohio, which is located in Lake County. Smith contends the Cuyahoga County Common Pleas Court lacked jurisdiction to hear this count because it occurred in Lake County.

{¶15} However, there is no constitutional or statutory provision that prohibits a grand jury in one county from indicting on offenses that occurred in another county. *State v. Jackson*, 141 Ohio St.3d 171, 2014-Ohio-3707, 23 N.E.3d 1023, ¶ 130-131. Indeed, R.C. 2901.12 provides:

When an offender, as part of a course of criminal conduct, commits offenses in different jurisdictions, the offender may be tried for all of those offenses in any jurisdiction in which one of those offenses or any element of one of those offenses occurred.

Thus, the Cuyahoga County Common Pleas Court had authority to hear Count 25 if the offense alleged therein was part of a course of criminal conduct.

{¶16} Although venue is not a material element of any offense, “venue is a fact that must be proved beyond a reasonable doubt unless it is waived by the defendant.” *Jackson* at ¶ 143. A guilty plea is not only an admission of the essential elements of the offense, it is also an admission of the facts alleged in an indictment, including venue. *Crim.R. 11(B)*; *State v. Pruitt*, 8th Dist. Cuyahoga Nos. 86707 and 86986 ,2006-Ohio-4106, ¶ 12; *State v. McCartney*, 55 Ohio App.3d 170, 563 N.E.2d 350, (9th Dist.1988). Therefore, Smith’s guilty plea precludes him from challenging the factual issue of venue. *State v. Johnson*, 8th Dist. Cuyahoga No. 96064, 2011-Ohio-4954, ¶ 16, citing *McCartney*.

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

{¶18} Judgment affirmed.

It is ordered that appellee recover of 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.

EILEEN T. GALLAGHER, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
ANITA LASTER MAYS, J., CONCUR