

[Cite as *State v. Clemons*, 2015-Ohio-520.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 101230

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STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KRISEAN J. CLEMONS

DEFENDANT-APPELLANT

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**JUDGMENT:**  
AFFIRMED

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-13-573742-A

**BEFORE:** S. Gallagher, P.J., Keough, J., and McCormack, J.

**RELEASED AND JOURNALIZED:** February 12, 2015

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SEAN C. GALLAGHER, P.J.:

{¶1} Appellant Krisean J. Clemons appeals his sentence, as well as the trial court's refusal to waive a mandatory fine and court costs. For the reasons stated herein, we affirm.

{¶2} On May 6, 2013, appellant was indicted on multiple drug-related charges. He ultimately entered a plea of guilty to Count 13 for trafficking in heroin, a felony of the second degree, with an attendant one-year firearm specification and several forfeiture specifications. The remaining counts were nolle. Appellant filed a motion to waive the mandatory fines and costs.

{¶3} Prior to sentencing, the trial court reviewed appellant's presentence investigation report ("PSI"). At sentencing, the court heard statements from appellant, his mother, his counsel, the assistant prosecuting attorney, and the lead detective in the matter.

{¶4} In early 2013, law enforcement learned an individual known as Bullet, who is the appellant, was selling heroin. Four controlled purchases of heroin from appellant were conducted with the use of an informant. Appellant was arrested on an attempted fifth controlled buy. Appellant made a brief attempt to flee. He had about 20 grams of heroin, \$780, and multiple cell phones in his possession. He was driving a vehicle he obtained from a buyer in exchange for heroin. Two firearms, a scale, and a sharp-stone press were also recovered from the vehicle. According to the lead detective, appellant was very heavily involved in trafficking heroin and a big part of the heroin problem in the Garfield Heights area.

{¶5} Appellant was 20 years old at the time of sentencing. He had graduated from high school and at one point attended college at Central State, before making the poor decision to sell drugs because it was more lucrative. Appellant had a juvenile record that included multiple misdemeanor offenses and one offense that would have been a felony if committed by an adult.

The PSI reflected that appellant lived with his mother, he only recently started a job paying \$8 per hour, he owed approximately \$6,000 in student loans, and his girlfriend was pregnant with his child.

{¶6} At appellant's initial appearance following his arrest, he was declared indigent and assigned counsel. Appellant posted a \$25,000 surety bond, and he retained two attorneys separately during the course of proceedings to represent him in the matter.

{¶7} The trial court imposed a one-year prison term on the firearm specification to be served prior and consecutive to five years for the underlying trafficking offense. The court also imposed the minimum mandatory fine of \$7,500, court costs, \$400 in restitution, a one-year driver's license suspension, and three years of mandatory postrelease control. It was represented that the \$400 restitution was paid at the time of the plea.

{¶8} Appellant timely filed this appeal. He raises three assignments of error for our review.

{¶9} Under his first assignment of error, appellant claims the trial court abused its discretion in failing to waive the mandatory fine. Appellant was convicted of drug trafficking, a felony of the second degree. The trial court imposed the minimum mandatory fine of \$7,500 pursuant to R.C. 2929.18(B)(1) and R.C. 2929.18(A)(3)(b).

{¶10} "[A] trial court has broad discretion when imposing financial sanctions upon a defendant, and an appellate court will review the trial court's decision for an abuse of discretion."

*State v. Ficklin*, 8th Dist. Cuyahoga No. 99191, 2013-Ohio-3002, ¶ 5. For certain crimes, including felony drug convictions, a trial court is required to impose a mandatory fine unless the offender files an affidavit prior to sentencing alleging he is indigent and unable to pay and the court determines the same. R.C. 2929.18(B)(1). Further, before imposing a financial sanction

under R.C. 2929.18(B), the trial court must “consider the offender’s present and future ability to pay the amount of the sanction or fine.” R.C. 2929.19(B)(5). “Generally, a trial court complies with this requirement when it considers a presentence investigation report that contains information about the offender’s financial situation and his ability to pay the financial sanction.” *State v. Simpson*, 8th Dist. Cuyahoga No. 101088, 2014-Ohio-4580, ¶ 21. A court is not required to make findings, but rather is required only to make the requisite consideration. *Id.* Ultimately, “the burden is upon the offender to affirmatively demonstrate that he or she is indigent and is unable to pay the mandatory fine.” *See State v. Gipson*, 80 Ohio St.3d 626, 635, 1998-Ohio-659, 687 N.E.2d 750.

{¶11} Appellant cites to *State v. Davis*, 8th Dist. Cuyahoga No. 99976, 2014-Ohio-2052, in support of his position that the trial court abused its discretion in failing to waive the fine. Davis was an unemployed 23-year-old with no property or other sources of income, he had a prior felony conviction and a juvenile record, he lived with his mother, and he had a daughter. Additionally, Davis only had a ninth-grade education, had not received his GED, and had a suspended driver’s license. Upon these specific facts, the majority in *Davis* found Davis would be unable to pay the fine and that the trial court abused its discretion in imposing a fine. *Id.* In reaching this determination, the trial court agreed with the reasoning 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.” *Id.* at ¶ 11, quoting *State v. Williams*, 8th Dist. Cuyahoga No. 92419, 2009-Ohio-5964, ¶ 12. However, in *Gipson*, the Ohio Supreme Court instructed that the proper inquiry is whether an offender is “unable to pay” a mandatory fine. *Gipson* at 635. The court did not believe the General Assembly intended “to preclude a trial court from imposing fines on able-bodied defendants who are fully capable of work but who happen to be indigent and

unemployed at the moment of sentencing.” *Id.* at 636. Thus, a trial court does not abuse its discretion in imposing a mandatory fine upon an indigent defendant when it could have reasonably determined the defendant was not unable to pay the fine over a period of time. *See id.* at 634. As recognized by the dissent in *Davis*, “[t]he trial court is in the best position to evaluate the totality of the circumstances regarding [the defendant’s] future ability to pay.” *Davis* at ¶ 17 (E.A. Gallagher, J., dissenting).

{¶12} We view the majority opinion in *Davis* as unique to the facts of that case. *Davis* is not persuasive authority for the facts in this case. Consistent with *Gipson*, the trial court was required to consider both appellant’s present and future ability to pay the amount of the financial sanction and had discretion to impose the mandatory fine if it could have reasonably determined appellant was not unable to pay the fine. *See Ficklin*.

{¶13} In this case, the trial court reviewed the PSI and considered the information presented at sentencing with regard to appellant’s financial situation and his present and future ability to pay the fine. Although appellant had only recently been employed, he was an able-bodied young man who had a high school diploma and at one point attended college. He was only 20 years old at the time of sentencing, and with a six-year prison sentence, he will have many years of employability remaining upon his release from prison. Further, appellant had posted a \$25,000 surety bond and had hired two attorneys to represent him in the matter. Upon this record, the trial court could reasonably conclude that appellant was not unable to pay the mandatory fine.

{¶14} We find the trial court did not abuse its discretion in imposing the minimum mandatory fine. Appellant’s first assignment of error is overruled.

{¶15} Under his second assignment of error, appellant claims the trial court abused its discretion in failing to waive court costs for an indigent defendant.

{¶16} “[A] motion by an indigent criminal defendant to waive payment of costs must be made at the time of sentencing.” *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278, ¶ 12. “If the defendant makes such a motion, then the issue is preserved for appeal and will be reviewed under an abuse-of-discretion standard. Otherwise, the issue is waived and costs are res judicata.” *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, ¶ 23. In this case, a timely motion was made.

{¶17} “A determination that a defendant is indigent for purposes of appointed counsel does not shield the defendant from paying court costs or a financial sanction[,]” which may be paid over a period of time. *Simpson*, 8th Dist. Cuyahoga No. 101088, 2014-Ohio-4580, at ¶ 20. As with the current version of R.C. 2947.23, former R.C. 2947.23, which is applicable herein, requires a trial court to assess the costs of prosecution against all convicted defendants, even those who are indigent. *Joseph* at ¶ 11; *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, ¶ 8. Although a waiver of court costs against an indigent defendant is permissible, it is not required. *Joseph* at ¶ 11, citing *White* at ¶ 14.

{¶18} Upon our review, we can reasonably determine that the trial court took into account appellant’s indigent status when ordering him to pay costs. The trial court’s decision was discretionary, and we are unable to find an abuse of discretion. Appellant’s second assignment of error is overruled.

{¶19} Under his third assignment of error, appellant claims the trial court erred in failing to impose a minimum sentence. We review appellant’s sentence to determine whether it is contrary to law. R.C. 2953.08(G)(2).

{¶20} A trial court “has the full discretion to impose any term of imprisonment within the statutory range, but it must consider the sentencing purposes in R.C. 2929.11 and the guidelines contained in R.C. 2929.12.” *State v. Hodges*, 8th Dist. Cuyahoga No. 99511, 2013-Ohio-5025, ¶ 7. The court is not required to engage in any factual findings under R.C. 2929.11 or 2929.12. *State v. Tate*, 8th Dist. Cuyahoga No. 97804, 2014-Ohio-5269, ¶ 58. Consideration of the appropriate factors set forth in R.C. 2929.11 and 2929.12 can be presumed unless the defendant affirmatively shows to the contrary. *State v. Jones*, 8th Dist. Cuyahoga No. 99759, 2014-Ohio-29, ¶ 13.

{¶21} In this case, the trial court imposed a five-year sentence for the second-degree felony offense along with a consecutive one-year prison term on the firearm specification. The sentence is within the statutory range, and the record demonstrates that the trial court considered the purposes and principles of felony sentencing as outlined by R.C. 2929.11 and 2929.12.

{¶22} The trial court reviewed the PSI, considered the defendant’s previous record and the nature and circumstances of the offense at hand, and heard statements from the parties at sentencing. The court expressly stated that it had considered the purposes and principles of sentencing. The court considered the heroin epidemic, the great harm it is causing the community, and appellant’s contribution to the problem. The court also considered that appellant violated his conditions of bond by failing a drug test. The court considered the significance of appellant’s actions in his attempt to flee from law enforcement officers during his arrest.

{¶23} We find that the record does not demonstrate that the sentence is clearly and convincingly contrary to law. Appellant’s third assignment of error is overruled.

{¶24} Judgment affirmed.

It is ordered that appellee recover from 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.

SEAN C. GALLAGHER, PRESIDING JUDGE

KATHLEEN ANN KEOUGH, J., and  
TIM McCORMACK, J., CONCUR