[Cite as *State v. Hall*, 2016-Ohio-2844.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103517

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DEONTE R. HALL

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-594707-A

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

RELEASED AND JOURNALIZED: May 5, 2016

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LARRY A. JONES, SR., A.J.:

{¶1} In this appeal, defendant-appellant Deonte Hall challenges his six-month sentence and the imposition of a fine and costs. We affirm in part, and reverse in part.

{¶2} In April 2015, Hall was charged in an eight-count indictment with two counts of aggravated robbery with firearm specifications; three counts of robbery with firearm specifications; first-degree misdemeanor theft; kidnapping with firearm specifications; and having weapons while under disability. The case proceeded to a jury trial.

{¶3} The charges were the result of Hall robbing the victim of his cell phone. The victim testified that he was on his way to a corner store to buy a single cigarette when Hall approached him, asked for money, and said he would shoot him if he did not comply. The victim did not see a gun, but believed Hall had one because he saw a "bulge" in Hall's pocket. The victim had only fifty cents and his cell phone.

{¶4} The victim testified that Hall grabbed his neck and made him stand behind a minivan while Hall removed the victim's cell phone from his pocket. Hall left the scene and the victim tried to get his phone back, but Hall told him to "stop following me or I'll shoot you." The victim went to nearby gas station and used a passerby's phone to call the police.

{¶5} The Cleveland police responded and Hall was arrested in the vicinity. The arresting officer observed a "bulge" in what he believed to be the waistband area of Hall's pants. During a pat-down search, a large hairbrush was recovered from the front pocket

of Hall's "hoodie"; two cell phones were also found on his person, one of which was confirmed to be the victim's phone. No weapon was recovered.

{¶6} Hall also testified. He told the jury that he knew the victim because they lived in the same neighborhood and he had sold drugs to him in the past. According to Hall, he saw the victim walking on the evening in question and asked him if he "needed anything," which meant drugs. The victim told Hall he did not have any money at that time, but he had a cell phone he was trying to sell. Hall asked to see the phone and the victim obliged. The two agreed that the victim would give Hall the phone in exchange for crack cocaine.

{¶7} But Hall had given the victim salt; Hall walked away as he saw the victim "tasting" it. Shortly thereafter, the police apprehended him. Hall denied that he ever had a gun or that he told the victim that he did.

{¶8} On this testimony, the jury acquitted Hall of all the charges, except the misdemeanor theft. The trial court sentenced him to six months jail time, and imposed a $1,000 fine and costs. Hall now presents two assignments of error for our review:

> I. Trial counsel was ineffective in neglecting to request the sentencing court to waive defendant's fine.
>
> II. The trial court abused its discretion by not following statutory procedure at sentencing.

{¶9} In his first assignment of error, Hall contends that his trial counsel was ineffective for not requesting the trial court to waive the fine and costs. We disagree.

{¶10} To establish constitutionally ineffective assistance of counsel, a defendant

must show (1) that his counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense and deprived him of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Issa*, 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001).

> In order to show deficient performance, the defendant must prove that counsel's performance fell below an objective level of reasonable representation. To show prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.

(Citations omitted.) *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 95. In Ohio, there is a presumption that a properly licensed attorney is competent. *State v. Calhoun*, 86 Ohio St.3d 279, 289, 714 N.E.2d 905 (1999).

{¶11} Hall contends that, under R.C. 2929.18(B), his trial counsel was bound to request the trial court to waive the fine. R.C. 2929.18 applies to the imposition of fines for felonies, and provides in part that "[b]efore imposing a financial sanction under section 2929.18 of the Revised Code * * * the court *shall* consider the offender's present and future ability to pay the amount of the sanction * * * ." (Emphasis added.) R.C. 2929.19(B)(5). The trial court here was sentencing Hall on a misdemeanor; therefore, R.C. 2929.18(B) was inapplicable. For misdemeanors, R.C. 2929.28 applies, and provides in relevant part as follows:

> (A) In addition to imposing court costs pursuant to section 2947.23 of the Revised Code, the court imposing a sentence upon an offender for a misdemeanor, including a minor misdemeanor, may sentence the offender to any financial sanction or combination of financial sanctions authorized under this section.

> * * *
>
> (2)(a)(i) For a misdemeanor of the first degree, not more than one thousand dollars[.]
>
> * * *
>
> (B) *If* the court determines a hearing is necessary, the court *may* hold a hearing to determine whether the offender is able to pay the financial sanction imposed pursuant to this section or court costs or is likely in the future to be able to pay the sanction or costs.
>
> If the court determines that the offender is indigent and unable to pay the financial sanction or court costs, the court shall consider imposing and may impose a term of community service under division (A) of section 2929.27 of the Revised Code in lieu of imposing a financial sanction or court costs. If the court does not determine that the offender is indigent, the court may impose a term of community service under division (A) of section 2929.27 of the Revised Code in lieu of or in addition to imposing a financial sanction under this section and in addition to imposing court costs.

(Emphasis added.) R.C. 2929.28(A) and (B).

{¶12} "When considering a claim that trial counsel was ineffective for not filing an indigency affidavit [to seek avoidance of a fine] * * * the test applied by Ohio courts is whether a reasonable probability exists that the trial court would have found appellant indigent had such affidavit been filed." *State v. Doss*, 4th Dist. Gallia No. 09CA20, 2012-Ohio-883, ¶ 19. "The same test applies to an ineffective assistance claim based on a failure of counsel to seek waiver of court costs." *Id.*

{¶13} Hall contends that there is a high probability that the trial court would have waived the fine and costs because the court found him indigent for the purpose of appointing appellant counsel. But a "determination that a criminal defendant is indigent for the purposes of receiving counsel does not prohibit the trial court from imposing a

fine." *State v. Heddleson*, 7th Dist. Belmont No. 08 BE 41, 2010-Ohio-1107, ¶ 13, citing *State v. Weyand*, 7th Dist. Columbiana No. 07-CO-40, 2008-Ohio-6360, ¶ 16 ("The ability to pay a fine over a period of time is not equivalent to the ability to pay legal counsel a retainer at the onset of criminal proceedings."); *see also State v. Johnson*, 6th Dist. Lucas No. L-03-1046, 2004-Ohio-2458, ¶ 33, quoting *State v. Smith*, 8th Dist. Cuyahoga Nos. 69799, 70451, and 71643, 1997 Ohio App. LEXIS 4892 (Nov. 6, 1997) ("The mere fact that appellant was indigent for the purpose of retaining counsel 'is a separate and distinct process from finding a defendant indigent for purposes of paying an imposed mandatory fine.'").

{¶14} Hall has not produced any evidence to indicate that there was a probability that the court would have found that he was indigent for the purpose of paying the fine and court costs. He testified that he had housing, his GED, and previously had several jobs before he started selling drugs.

{¶15} On this record, Hall has failed to demonstrate that his counsel was ineffective for not requesting that his fine and costs be waived. The first assignment of error is therefore overruled.

{¶16} For his second assignment of error, Hall contends that the trial court failed to follow the statutorily prescribed procedure at sentencing. Specifically, Hall contends that, under R.C. 2929.24(A)(1), the court could have imposed a jail sentence of not more than 180 days for his first-degree misdemeanor offense, but in sentencing him to six months jail time, the court sentenced him to three days over the maximum allowed time.

The state concedes the error. And our review finds there is merit to Hall's contention. *See State v. Pierce*, 4th Dist. Meigs No. 10CA10, 2011-Ohio-5353, ¶ 10 ("six months is not the same as one hundred eighty days because each month has a different number of days.").

{¶17} In light of the above, the second assignment of error is sustained.

{¶18} Judgment affirmed in part; reversed in part; case remanded with instructions to correct sentencing judgment entry to reflect a sentence of 180 days.

It is ordered that appellant and appellee split 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, SR., ADMINISTRATIVE JUDGE

MARY EILEEN KILBANE, J., and
PATRICIA ANN BLACKMON, J., CONCUR