

[Cite as *State v. Gray*, 2016-Ohio-8320.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104140

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DEANDRE L. GRAY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-599330-A

BEFORE: Stewart, J., Keough, P.J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: December 22, 2016

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MELODY J. STEWART, J.:

{¶1} Defendant-appellant Deandre L. Gray pled guilty to, and was convicted of, third-degree felony drug trafficking. The court sentenced Gray to 18 months in prison and ordered him to pay a \$5,000 fine. Gray’s sole assignment of error on direct appeal from his conviction is that the court abused its discretion by denying his attorney’s request for a continuance before sentencing. Specifically, Gray argues that the court should have postponed sentencing to give it time to order and review an updated presentence investigation report (“PSI”), and so counsel could file an affidavit of indigency to allow the waiver of mandatory fines. Finding no error in the court’s decision, we affirm.

{¶2} Immediately after taking Gray’s plea and finding him guilty, the trial court began discussing sentencing. The court indicated that Gray would be receiving a mandatory sentence in the range of 9 to 36 months because of two previous drug-related convictions — a consequence previously explained to Gray prior to his plea. At this point, Gray’s attorney interjected and requested that the court order an updated PSI before sentencing. The court indicated that it had in its possession a prior PSI on Gray from 2010 and gave it to both defense counsel and the prosecutor to review. When the court returned to Gray’s case moments later, the court asked defense counsel to explain to the court any relevant events or changes in circumstances that might be reflected in an updated PSI that were not in the 2010 report.

{¶3} Defense counsel explained that he believed that a current PSI report would show that Gray had recently obtained employment at a retail store, he had certain medical conditions and had recently undergone surgery, and that there were changes in Gray's family status since 2010, specifically the birth of his then two-month-old child. Defense counsel also explained that Gray was indigent and requested an extension of time before sentencing to file an affidavit of indigency, which would allow the court to waive the mandatory fine that attached to the drug-trafficking offense.

{¶4} Without making any decisions about postponing sentencing, the court turned to Gray and began asking him questions. The court asked Gray detailed questions about the case including how he came to be involved in drug trafficking, and listened to Gray's concerns about financially providing for his family, which included his newborn child, the mother of the child, and another child living with them. Following their discussion, the court imposed the prison sentence and a \$5,000 mandatory fine. In doing so, the court acknowledged Gray's remorse for his actions, but stated that the sentence given was appropriate because Gray had previously served time in prison and had prior drug-related offenses on his record. Moreover, after imposing the fine, the court stated:

I understand that you are indigent at this point, but you do demonstrate the fact that you have the ability to get a job. You have a job now that you were going to start work but for this case. It seems like you have done some other work prior to this time from time to time. I think that you have the ability to pay this fine in the future.

I am going to impose the costs of this case, and I'm going to defer the payment of the fine and costs of the case while you're in prison. You'll have those obligations when you get out of prison.

{¶5} Appellate courts review the denial of a continuance for an abuse of discretion. *State v. Unger*, 67 Ohio St.2d 65, 67, 423 N.E.2d 1078 (1981). Whether a court abused its discretion, is a question answered by reviewing the circumstances of each case, with particular focus on “the reasons presented to the trial judge at the time the request is denied.” *Id.*

{¶6} On these facts, we cannot say that the court abused its discretion when it declined to order an updated PSI and schedule Gray’s sentencing for a later date. In this instance, the court was not obligated to order an updated PSI before sentencing Gray on a felony offense that carried a mandatory prison term. *See* Crim.R. 32.2 (stating, “In felony cases the court shall, and in misdemeanor cases the court may, order a presentence investigation and report before imposing community control sanctions or granting probation.”) Further, as evidenced in the record, the court gave defense counsel and the defendant ample opportunity to explain any differences that might be reflected in a new PSI report compared to the 2010 report.

{¶7} It appears from the record that the court duly considered the defense’s explanation of Gray’s changed circumstances as factors in mitigation of his sentence. Consequently, we have no reason to believe that an updated report, had it been ordered, would have impacted the court’s sentencing decision.

{¶8} Lastly, although defense counsel specifically requested a continuance so he could file an affidavit of indigency on behalf of his client, the specific facts of this case show that the court would not have waived the fine even if an affidavit of indigency had been filed. R.C. 2929.18(B)(1) establishes the procedure for avoiding imposition of mandatory fines applicable to felony drug offenses. It provides:

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.

When considering whether the offender is indigent for purposes of waiving the mandatory fine, the court must consider the offender's present and future ability to pay the fine. *State v. Ficklin*, 8th Dist. Cuyahoga No. 99191, 2013-Ohio-3002, ¶ 12, citing *State v. Gipson*, 80 Ohio St.3d 626, 634, 687 N.E.2d 750 (1998).

{¶9} Despite not having an affidavit of indigency before it, the court expressly considered Gray's present and future ability to pay the mandatory fine at the sentencing hearing after speaking to Gray and his defense counsel about Gray's past and current employment, and Gray's medical issues. Specifically, the court explained that it believed, based on Gray's past success in obtaining employment, that Gray would be able to pay the fine in the future after being released from prison.

{¶10} Courts have interpreted the provision in R.C. 2929.18(B)(1) — that the offender file an affidavit of indigency prior to sentencing — as a strict jurisdictional requirement that is one of two prerequisites that must be met before a trial court is vested with the authority to waive a mandatory fine. *See, e.g., State v. Moore*, 135 Ohio St.3d 151, 2012-Ohio-5479, 985 N.E.2d 432, ¶ 14 (stating, “[b]ecause the fine is a statutory punishment, the trial court’s failure to impose the fine 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.”); *Gipson* at 633 (stating, “we believe that the required filing of an affidavit of indigency for purposes of avoiding a mandatory fine is, in effect, a jurisdictional issue.”); *State v. Eader*, 9th Dist. Summit No. 26762, 2013-Ohio-3709, ¶ 28. The second prerequisite under the statute requires that the court find the offender is indigent and unable to pay the mandatory fine. Although also a jurisdictional requirement for waiving a mandatory fine, the second prerequisite affords the court discretion to review the offender’s circumstances and determine whether the offender is unable to pay. *See State v. Campbell*, 12th Dist. Warren No. CA2012-08-070, 2013-Ohio-3088, ¶ 10. The statute does not designate whether an affidavit of indigency must be filed before a court can consider an offender’s ability to pay the fine, and the statute does not prevent a trial court from giving the defendant time to file an affidavit of indigency upon considering the second requirement and determining that the defendant is not able to pay the fine. *See Gipson* at 632-634 (explaining that an affidavit of indigency does not have to be filed prior to the sentencing hearing as long as

it is filed before the journal entry reflecting the court's sentence and accepting the trial court's presentence discussion of the offender's future ability to pay the fine as evidence that the court did not abuse its discretion by not waiving the mandatory fine even if the affidavit of indigency had been timely filed). Accordingly, we cannot say that the court abused its discretion by proceeding to sentencing when it determined, after duly considering Gray's indigency circumstances, that Gray would be able to pay the fine in the future.¹

{¶11} 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.

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

¹ We are aware of certain decisions from this court and other Ohio appellate courts, where panels have found that a trial court abuses its discretion when it proceeds immediately to sentencing after a finding of guilt on offenses involving mandatory fines, without affording the defendant an opportunity to file an affidavit of indigency. See *State v. Hatcher*, 8th Dist. Cuyahoga No. 70857, 1997 Ohio App. LEXIS 3403 (July 31, 1997), *State v. Roberts*, 8th Dist. Cuyahoga No. 66692, 1995 Ohio App. LEXIS 485 (Feb. 9, 1995); *State v. Benedict*, 4th Dist. Washington No. 94 CA 28, 1995 Ohio App. LEXIS 5692 (Nov. 3, 1995). Those cases are factually distinguishable from this case however. In those cases, the court either denied the request for a continuance without explanation or proceeded to sentencing without considering the possibility that the defendant was indigent and unable to pay the mandatory fine.

MELODY J. STEWART, JUDGE

EILEEN T. GALLAGHER, J., CONCURS;
KATHLEEN ANN KEOUGH, P.J., DISSENTS (WITH SEPARATE OPINION)

KATHLEEN ANN KEOUGH, P.J., DISSENTING:

{¶12} Respectfully I dissent. I would find that the trial court abused its discretion in not allowing Gray’s counsel a two-day continuance to file an affidavit of indigency.

{¶13} The trial court proceeded to sentencing immediately after Gray and his codefendant pleaded guilty, even though no one had been advised prior to the plea hearing that the court would do so. Gray’s counsel requested a new PSI prior to the plea hearing, a fact the trial court acknowledged before imposing sentence. The court apparently did not want to take the time to obtain a new PSI, however, because although defense counsel informed the court that there were events that had occurred since the 2010 PSI that could be significant for purposes of sentencing (specifically, Gray’s medical and job issues, as well as a change in family status), the court refused counsel’s request for a new PSI. Instead, the court gave Gray’s counsel a 2010 PSI to review.

{¶14} After sentencing Gray’s codefendant, the trial court confirmed that Gray’s counsel had reviewed the 2010 PSI. Defense counsel then informed the court that Gray had told him only that morning before the plea hearing that he had recently had surgery and suffered from bronchitis. Counsel informed the court that he could not verify Gray’s medical conditions, however. Counsel also told the court that Gray “purports” to have a

job at a phone store, a fact counsel also could not confirm because he had only learned of it that morning.

{¶15} Nevertheless, the trial court then proceeded to sentence Gray based on the 2010 PSI. With regard to the mandatory fine, defense counsel told the court that Gray was indigent and asked the court for a two-day continuance to file an affidavit of indigency. The trial court refused the continuance and sentenced Gray to 18 months in prison and a \$5000 fine. The court found that Gray had the ability to get a job and would be able to pay the fine after he was released from prison (even though the trial court also ordered, as statutorily required, that Gray's driver's license be suspended for nine months after he was released from prison).

{¶16} I find the trial's court's refusal to allow defense counsel the requested two-day continuance to file an affidavit of indigency to be an abuse of discretion. The statutes providing for mandatory fines "clearly require imposition of a mandatory fine unless (1) the offender's affidavit of indigency is filed prior to sentencing, and (2) the trial court finds that the offender is an indigent person and is unable to pay the mandatory fines." *Gipson*, 80 Ohio St.3d 626 at 634. The Ohio Supreme Court has held that the burden is on the defendant to affirmatively demonstrate that he is indigent and unable to pay the fine. *Id.* By denying defense counsel a short continuance to file an affidavit of indigency, the trial court denied Gray an opportunity to demonstrate he was indigent and unable to pay the fine. And although the majority asserts that counsel could have filed the affidavit prior to filing of the journal entry of sentencing, it is apparent that such filing

would have been pointless in this case; the trial court had already made its decision without the benefit of the affidavit.

{¶17} The trial court's error in refusing to allow the minimal continuance was compounded by its refusal to obtain a new PSI, which would have shown Gray's work history since 2010. Defense counsel's statement that Gray "purports" to have a new job demonstrates that counsel was not sure that Gray did, in fact, have a new job. In any event, counsel told the court that he had not verified Gray's employment because he had just learned about it that morning prior to the plea hearing, and that a new PSI was necessary to ascertain Gray's work history, medical conditions, and change in family status — all issues that could have affected the trial court's conclusion that Gray would be able to get a job and pay the fine after he was released from prison. The fact that the court was not required to get a new PSI does not mean it should not have done so in this instance.

{¶18} Although the trial court had not informed anyone prior to the plea hearing that it would immediately proceed to sentencing, it refused to get a new PSI and refused to allow a two-day continuance so that Gray could file an affidavit of indigency. The court apparently wanted to conclude the case because it had already sentenced Gray's codefendant. But the docket reflects that even allowing for a brief two-day continuance, sentencing would have been completed close to a month before the scheduled trial date. "Though justice ought not to be unnecessarily delayed, the oft-quoted adage 'justice

delayed is justice denied’ is, at times, inapposite to ensuring justice is served.” *State v. Cutts*, 5th Dist. Stark No. 2008CA00079, 2009-Ohio-3563, ¶ 267.

{¶19} Under the totality of the circumstances, I would find that the trial court abused its discretion in denying counsel’s request for a two-day continuance to file an affidavit of indigency. I would sustain the assignment of error and remand for a new sentencing hearing.