[Cite as *State v. Stovall*, 2017-Ohio-2661.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104787

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

AJ STOVALL

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-582185-A

BEFORE: McCormack, P.J., Boyle, J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: May 4, 2017

ATTORNEY FOR APPELLANT

Allison S. Breneman
1220 West 6th Street, Suite 303
Cleveland, OH 44113

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor

By: Andrew T. Gatti
Assistant County Prosecutor
Justice Center, 9th Floor
1200 Ontario Street
Cleveland, OH 44113

TIM McCORMACK, P.J.:

{¶1} Defendant-appellant AJ Stovall appeals from his conviction following a guilty plea. For the following reasons, we affirm.

Procedural and Substantive History

{¶2} Stovall was charged with driving while under the influence, in violation of R.C. 4511.19(A)(1)(a), driving while under the influence, in violation of R.C. 4511.19(A)(1)(b), and forgery, in violation of R.C. 2913.13(A)(1). The forgery charge stems from Stovall's signing his brother's name on the traffic citation. Stovall failed to appear for arraignment, and a capias was issued. Stovall was then apprehended, he was arraigned in September 2015, and he entered a not guilty plea to the charges.

{¶3} In May 2016, however, Stovall withdrew his former not guilty plea and he entered a guilty plea to an amended indictment. Stovall pleaded guilty to driving while under the influence in Count 1 and forgery in Count 3. Additionally, the furthermore specification in Count 1 was amended to state that Stovall has had three DUI's in the past six years, thus making this count a felony of the fourth degree. In exchange, the state agreed to dismiss the driving while under the influence charge in the second count. Thereafter, the court sentenced Stovall to 14 months in prison on the DUI and 12 months on the forgery, to be served concurrently. The trial court imposed the mandatory minimum fine of $1,350 and ordered credit for time served.

{¶4} Immediately after the court imposed sentence, Stovall requested to withdraw his plea, stating that he had not seen purported video evidence and he was

promised probation. The court denied Stovall's request after hearing from Stovall, defense counsel, and the state.

{¶5} Stovall now appeals from his conviction, assigning the following errors for our review: he was denied effective assistance of counsel; the trial court erred in denying Stovall's request to withdraw his guilty plea; and the trial court abused its discretion by imposing a prison sentence.

Ineffective Assistance of Counsel

{¶6} In his first assignment of error, Stovall contends that trial counsel was ineffective when he failed to file an affidavit of indigency, which resulted in the trial court's imposition of a mandatory fine.

{¶7} In order to prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel was deficient in some aspect of his representation and this deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A defendant must therefore show that counsel made errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Additionally, the defendant must demonstrate that counsel's errors "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

{¶8} R.C. 2929.18(B)(1) prescribes the manner in which the court shall proceed in waiving the mandatory fine for an indigent offender:

> 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.

{¶9} Thus, in order for an offender to avoid the imposition of a fine at the time of sentencing, (1) the defendant must submit an affidavit of indigency to the court prior to sentencing; and (2) the court must make a determination that the offender is, in fact, indigent. *State v. Green*, 8th Dist. Cuyahoga No. 102837, 2016-Ohio-926, ¶ 13; *State v. Turner*, 8th Dist. Cuyahoga No. 102741, 2015-Ohio-4388, ¶ 18.

{¶10} Ohio courts have held that the failure to file an affidavit of indigency for purposes of waiving a mandatory fine constitutes ineffective assistance of counsel where the record shows a "reasonable probability" that the trial court would have found the defendant indigent and unable to pay the fine had the affidavit been filed. *Green* at ¶ 14; *Turner* at ¶ 19; *State v. Parsley*, 10th Dist. Franklin No. 09AP-612, 2010-Ohio-1689, ¶ 65; *State v. McDowell*, 11th Dist. Portage No. 2001-P-0149, 2003-Ohio-5352, ¶ 75; *State v. Gilmer*, 6th Dist. Ottawa No. OT-01-015, 2002-Ohio-2045, ¶ 5.

{¶11} Defense counsel provides, in support of Stovall's indigency, that the trial court has previously found Stovall indigent "multiple times" prior to sentencing for purposes of appointing counsel. However, a determination that a criminal defendant is indigent for the purposes of receiving appointed counsel does not equate to a determination of indigency for purposes of waiving the imposition of a fine. *State v. Hall*, 8th Dist. Cuyahoga No. 103517, 2016-Ohio-2844, ¶ 13; *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.'"); *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.").

{¶12} Here, the record shows that Stovall was employed as a plumber and had continued to work while he was out on bond. According to a general contractor who testified at Stovall's bond hearing, Stovall has "faithfully" performed "pretty big jobs" for him as a subcontractor. Defense counsel noted at the sentencing hearing that Stovall was able to "get his business back up and running," and he produced for the hearing one of his most recent invoices that he has submitted for payment and "is being paid for." Counsel also noted that Stovall "does a lot of work" for a property management company.

{¶13} In light of the above, we find the record fails to demonstrate a reasonable probability that the trial court would have found Stovall to be indigent and unable to pay the mandatory fine of $1,350. Accordingly, Stovall has failed to demonstrate prejudice resulted from counsel's failure to file an affidavit of indigency, and counsel was therefore not ineffective.

{¶14} Stovall's first assignment of error is overruled.

Motion to Withdraw Guilty Plea

{¶15} In his second assignment of error, Stovall contends that the trial court erred when it denied his motion to withdraw his postsentence guilty plea. In support, Stovall claims that he did not receive all of the discovery he requested, including a booking video. He also claims that he understood that he would not receive a prison sentence.

{¶16} Under Crim.R. 32.1, "[a] motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea." A defendant who seeks to withdraw a plea of guilty after the imposition of sentence has the burden of establishing the existence of manifest injustice. *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph one of the syllabus.

{¶17} "Manifest injustice relates to some fundamental flaw in the proceedings which result[s] in a miscarriage of justice or is inconsistent with the demands of due process." *State v. Williams*, 10th Dist. Franklin No. 03AP-1214, 2004-Ohio-6123, ¶ 5. Manifest injustice has been defined as a "clear or openly unjust act." *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 208, 699 N.E.2d 83 (1998). Under the manifest injustice standard, a postsentence motion to withdraw a plea is permitted "only in extraordinary cases." *State v. Montgomery*, 2013-Ohio-4193, 997 N.E.2d 579, ¶ 61 (8th Dist.), citing *Smith* at 264.

{¶18} The determination of whether the defendant has met his or her burden of establishing "a manifest injustice" is within the sound discretion of the trial court.

State v. Vinson, 8th Dist. Cuyahoga No. 103329, 2016-Ohio-7604, ¶ 42, citing *Smith* at paragraph two of the syllabus. We therefore will not reverse a trial court's decision to deny a defendant's postsentence motion to withdraw a guilty plea absent an abuse of the court's discretion. *Id.* An abuse of discretion occurs where the trial court's decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶19} Here, in support of his request to withdraw his guilty plea, Stovall contends that he did not receive a video that demonstrated who the police arrested on the evening in question and this video "potentially could have cleared" his name. Stovall alluded to the fact that he and his brother look like twins and people cannot tell the two apart. At the hearing, however, defense counsel advised the court that he had received and reviewed the video in its entirety, but he could not show Stovall due to a system-wide computer malfunction. When the trial court asked counsel who was in the booking video, counsel replied that he had "no opinion."

{¶20} The court questioned Stovall further about Stovall's use of his brother's information that resulted in the forgery charge, and Stovall began asking the court for fingerprint evidence. Stovall then told the court that "my whole thing is * * * I've been wanting to fight this case all the time. * * * That's the only thing I'm saying." The court then discussed Stovall's plea and the fact that Stovall accepted responsibility, advised the court that he understood everything in the plea, and told the court that he was not

promised anything or coerced into a plea. Thereafter, the court denied Stovall's request, stating that it had not heard a good reason to allow Stovall to withdraw his guilty plea.

{¶21} In light of the foregoing, and in deference to the trial court's wide discretion, we find that Stovall merely had a "change of heart" after learning that he would be serving a prison sentence rather than receiving probation. A defendant's change of heart does not demonstrate manifest injustice where the change of heart is based upon a dissatisfaction with the sentence imposed. V*inson*, 8th Dist. Cuyahoga No. 103329, 2016-Ohio-7604, at ¶ 44. "The courts frown upon allowing a defendant to plead guilty to test the potential punishment and withdraw when the sentence was unexpectedly severe." *State v. Mathis*, 8th Dist. Cuyahoga No. 100342, 2014-Ohio-1841, ¶ 23.

{¶22} As Stovall failed to demonstrate a manifest injustice, we do not find the trial court abused its discretion in denying Stovall's postsentence motion to withdraw his guilty plea.

{¶23} Stovall's second assignment of error is overruled.

Felony Sentencing

{¶24} In his third assignment of error, Stovall contends that the trial court erred when it imposed a prison sentence without "appropriately" considering the purposes and principles of felony sentencing guidelines. Specifically, Stovall directs this court's attention to the seriousness factors set forth in R.C. 2929.12(B) and (C) and the recidivism factors set forth in R.C. 2929.12(D) and (E), and he states how the trial court

"failed to note" such factors. Stovall ultimately concluded that upon reviewing the statutory guidelines as they apply to him, a sentence of community control would have been more appropriate.

{¶25} When reviewing felony sentences, the reviewing court does not review the sentence for an abuse of discretion. R.C. 2953.08(G)(2); *see also State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231. Rather, we may increase, reduce, modify a sentence, or vacate and remand for resentencing if we clearly and convincingly find that the record does not support the sentencing court's statutory findings under R.C. 2929.14(C)(4) or the sentence is contrary to law. *State v. Wenmoth*, 8th Dist. Cuyahoga No. 103520, 2016-Ohio-5135, ¶ 12, citing R.C. 2953.08(G)(2). A sentence is contrary to law if the trial court fails to consider the purposes and principles of felony sentencing set forth in R.C. 2929.11 and the sentencing factors set forth in R.C. 2929.12. *State v. Pawlak*, 8th Dist. Cuyahoga No. 103444, 2016-Ohio-5926, ¶ 58.

{¶26} R.C. 2929.11(A) provides that the overriding purposes of felony sentencing are (1) to protect the public from future crime by the offender and others; and (2) to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources. Further, the sentence imposed shall be "commensurate with and not demeaning to the seriousness of the offender's conduct and its impact on the victim, and consistent with sentences imposed for similar crimes by similar offenders." R.C. 2929.11(B).

{¶27} R.C. 2929.12 provides a nonexhaustive list of sentencing factors the trial court must consider when determining the seriousness of the offense and the likelihood that the offender will commit future offenses. The court that imposes a felony sentence has the discretion to determine the most effective way to comply with the purposes and principles of sentencing. R.C. 2929.12(A).

{¶28} Although the trial court has a mandatory duty to "consider" the statutory factors under R.C. 2929.11 and 2929.12, the court is not required to engage in any factual findings under R.C. 2929.11 or 2929.12. *State v. Combs*, 8th Dist. Cuyahoga No. 99852, 2014-Ohio-497, ¶ 52; *State v. Bement*, 8th Dist. Cuyahoga No. 99914, 2013-Ohio-5437, ¶ 17. "While trial courts must carefully consider the statutes that apply to every felony case, it is not necessary for the trial court to articulate its consideration of each individual factor as long as it is evident from the record that the principles of sentencing were considered." *State v. Gonzalez*, 8th Dist. Cuyahoga No. 102579, 2015-Ohio-4765, ¶ 6, citing *State v. Roberts*, 8th Dist. Cuyahoga No. 89236, 2008-Ohio-1942, ¶ 10. This court has held that a trial court's statement in its sentencing entry that it considered the required statutory factors, without more, is sufficient to fulfill a sentencing court's obligations under R.C. 2929.11 and 2929.12. *Gonzalez* at ¶ 7.

{¶29} Here, prior to imposing sentence, the trial court stated that it considered the purposes and principles of felony sentencing set forth in R.C. 2929.11 and "all the appropriate recidivism and seriousness factors," noting "it's a serious matter as you know." The court continued:

> This case happened sometime ago and you were successful in avoiding any consequences for a long time. You finally were brought to justice and you didn't do well on bond and you suffered some consequences for that.

The court then proceeded to address Stovall's "drinking problem":

> Well, it's unfortunate you didn't give it up long before this because you've had a ton of serious consequences and put yourself at risk and your business and your family and your boys and all those things. They're the ones that are going to suffer as well.

{¶30} Additionally, the court stated in its journal entry that it considered all required factors of law and found that prison is consistent with the purposes of R.C. 2929.11.

{¶31} To the extent that Stovall disagrees with the court's consideration of the sentencing factors, how the court weighed the factors, or the type of sentence imposed, we have no jurisdiction for review. *See State v. Switzer*, 8th Dist. Cuyahoga No. 102175, 2015-Ohio-2954, ¶ 12. The trial court has the "'discretion to determine the weight to assign a particular statutory factor.'" *Id.*, quoting *State v. Arnett*, 88 Ohio St.3d 208, 215, 2000-Ohio-302, 724 N.E.2d 793 (2000); *see also* R.C. 2929.12(A). As our standard of review is not whether the sentencing court abused its discretion, we have no jurisdiction to consider whether the court abused its discretion in how it applied R.C. 2929.11 and 2929.12. *Switzer*; *State v. Szakacs*, 8th Dist. Cuyahoga No. 101787, 2015-Ohio-1382. Under the circumstances in this case, our review is limited to a

determination of whether the sentence is contrary to law. *See Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231. And a defendant's disagreement with the trial court's discretion and the manner in which it weighed each factor does not make a sentence contrary to law. *State v. Ongert*, 8th Dist. Cuyahoga No. 103208, 2016-Ohio-1543, ¶ 14; *State v. D.S.*, 10th Dist. Franklin No. 15AP-790, 2016-Ohio-2856, ¶ 15.

{¶32} In light of the foregoing, we find that the trial court considered all of the relevant statutory factors, and Stovall has not demonstrated by "clear and convincing evidence that the record does not support the sentence." *Marcum* at ¶ 23. Accordingly, Stovall's sentence is not contrary to law.

{¶33} Stovall's third assignment of error is overruled.

{¶34} 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.

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TIM McCORMACK, PRESIDING JUDGE

SEAN C. GALLAGHER, J., CONCURS;
MARY J. BOYLE, J., CONCURS IN JUDGMENT ONLY