

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO,	:	
	:	Case No. 24CA4093
Plaintiff-Appellee,	:	
	:	
v.	:	<u>DECISION AND JUDGMENT</u>
	:	<u>ENTRY</u>
DARYL E. KELLY,	:	
	:	
Defendant-Appellant.	:	RELEASED: 01/02/2026

APPEARANCES:

Karyn Justice, Portsmouth, Ohio, for appellant.

Shane A. Tieman, Scioto County Prosecuting Attorney, and Jay S. Willis,
Assistant Scioto County Prosecuting Attorney, Portsmouth, Ohio, for appellee.

Wilkin, J.

{¶1} This is an appeal of a Scioto County Court of Common Pleas judgment entry in which Daryl E. Kelly (“Kelly”) was convicted of trafficking in a fentanyl-related compound. On appeal Kelly contends he received ineffective assistance of counsel because his counsel did not request a waiver of court costs. Kelly further claims the sentence he received as a result of a negotiated plea was contrary to law. After reviewing the parties’ arguments, the record, and the applicable law, we find no merit to the assignments of error and affirm the judgment of the trial court.

BACKGROUND

{¶2} On March 23, 2022 a Scioto County grand jury indicted Kelly with ten counts: Count 1, trafficking in a fentanyl-related compound, in violation of R.C.

2925.03(A)(2) and (C)(9)(f), a first-degree felony; Count 2, aggravated trafficking in drugs, in violation of R.C. 2925.03(A)(2) and (C)(1)(d), a second-degree felony; Count 3, trafficking in drugs, in violation of R.C. 2925.03(A)(2) and (C)(2)(d), a third-degree felony; Count 4, trafficking in a controlled substance analog, in violation of R.C. 2925.03(A)(2) and (C)(8)(e), a second-degree felony; Count 5, possession of a fentanyl-related compound, in violation of R.C. 2925.11(A) and (C)(11)(e), a first-degree felony; Count 6, aggravated possession of drugs, in violation of R.C. 2925.11(A) and (C)(11)(c), a second-degree felony; Count 7, possession of a controlled substance analog, in violation of R.C. 2925.11(A) and (C)(8)(d), a second-degree felony; Count 8, possession of drugs, in violation of R.C. 2925.11(A) and (C)(2)(c), a third-degree felony; Count 9, possessing criminal tools, in violation of R.C. 2923.24(A) and (C), a fifth-degree felony; and Count 10, sale or use of drugs not approved by food and drug administration, in violation of R.C. 2925.09(A) and (C), a fifth-degree felony.

{¶3} On December 22, 2022, at arraignment, Kelly entered a not guilty plea and the trial court appointed counsel to represent him. Then, on February 14, 2023, Kelly retained private counsel.

{¶4} On November 27, 2023, Kelly plead guilty to Count 1, trafficking in a fentanyl-related compound, and the remaining nine counts were dismissed. The trial court subsequently held a sentencing hearing on November 30, 2023. At the hearing, the trial court considered the factors contained in R.C. 2929.11 and R.C. 2929.12. The trial court found that the sole count required a statutorily mandatory prison term. The trial court further found that the parties' agreed-upon

mandatory minimum prison sentence (six years, to indefinite maximum prison term of nine years in prison) was a jointly-recommended sentence. The trial court also made the required indefinite prison term and post-release control notifications.

{¶5} Additionally, the trial court found that Kelly was indigent and therefore waived the mandatory fine attendant with Count 1, and also did not impose a discretionary fine, in light of the prison sentence. However, at sentencing the trial court further indicated: “I am going to order you to pay the costs of prosecution in this matter. I am going to find that he’s eligible – that he has the present and future ability to pay this financial sanction.” The trial court therefore ordered Kelly to pay the costs of the proceeding and required ODRC to withhold funds in the appropriate amount from Kelly’s account to pay the costs.

{¶6} Kelly did not file a notice of appeal from the original judgment until filing a motion for leave to file a delayed appeal on August 29, 2024. His motion for leave to file a delayed appeal was granted on October 7, 2024, and this appeal followed.

ASSIGNMENTS OF ERROR

I. APPELLANT DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL.

II. APPELLANT’S SENTENCE IS CONTRARY TO LAW.

FIRST ASSIGNMENT OF ERROR

{¶7} In his first assignment of error, Kelly asserts that he received ineffective assistance of counsel when his counsel did not request that the trial court waive the costs because he was indigent. In so doing, Kelly acknowledges

that the trial court had a statutory duty to render a judgment against him for costs, and that although the trial court is not required to waive costs when a person is indigent, it has the discretion to do so.

{¶8} The State responds that Kelly’s trial counsel not only succeeded in procuring a negotiated plea in which Kelly would plead to one count with the remaining nine counts being dismissed, but also counsel ensured as part of the plea agreement that Kelly would not be required to pay the mandatory fine. Further, the State contends that Kelly merely speculates on appeal that the trial court would have waived the costs had his trial counsel requested the court to waive the court costs, and thus, Kelly has failed to show prejudice according to ineffective counsel jurisprudence. The State asserts that, as a negotiated plea, the plea and sentence is not subject to appellate review.

A. Law

1. Court Costs.

{¶9} R.C. 2947.23(A)(1)(a) states: “[i]n all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution, including any costs under section 2947.231 of the Revised Code, and render a judgment against the defendant for such costs.” “Thus, the imposition of court costs on all convicted defendants is mandatory, whether ‘indigent or not.’ ” *State v. Rister*, 2023-Ohio-1284, ¶ 19 (4th Dist.) citing *State v. Taylor*, 2020-Ohio-3514, ¶ 6. Even so, R.C. 2947.23(C) gives a trial court continuing jurisdiction to “waive, suspend, or modify the payment of the costs of prosecution * * * at the time of sentencing or at any time thereafter.” *Id.* “Thus,

while the court must impose costs, it may also waive, suspend, or modify them.”

Id., quoting *Taylor* at ¶ 7.

2. Ineffective Assistance of Counsel

{¶10} To prevail on a claim of ineffective assistance of counsel as it pertains to the waiver of court costs, as in other circumstances, “a criminal defendant must establish (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Rister* at ¶ 20, quoting *State v. Cremeans*, 2022-Ohio-4832, ¶ 20 (4th Dist.), citing *State v. Wilson*, 2019-Ohio-2754, ¶ 25 (4th Dist.). “Failure to satisfy either part of the test is fatal to the claim.” *Id.* quoting *State v. Trout*, 2020-Ohio-3940, ¶ 31 (4th Dist.), citing *Wilson* at ¶ 25.

B. Analysis.

{¶11} The Supreme Court of Ohio has held, “when an indigent defendant makes an ineffective-assistance-of-counsel claim based upon counsel's failure to request a waiver of court costs, a court must objectively consider the facts and circumstances to determine whether the defendant established the necessary prejudice sufficient to support that claim (i.e., but for counsel's deficient performance, a reasonable probability exists that the result of the proceeding would have been different).” *State v. Lansing*, 2025-Ohio-4641, ¶ 12 (4th Dist.), citing *State v. Davis*, 2020-Ohio-309, ¶ 15. The Supreme Court of Ohio also underscored that “when considering the question of whether counsel was

ineffective for failing to request the waiver of court costs, reviewing courts must apply the test set forth in *State v. Bradley*, 42 Ohio St.3d 136, 141-142 (1989), ‘which adopted the standard that had been announced in *Strickland*[.]’ “ *Lansing* at ¶ 12, quoting *Davis* at ¶ 1.

{¶12} In addition, “a determination of indigency alone does not rise to the level of creating a reasonable probability that the trial court would have waived costs had defense counsel requested the court to do so.” *Id.* citing *Davis* at ¶ 15. We have also observed that if a trial court finds that a defendant has the ability to work and pay court costs in the future, the trial court may decide not to waive the costs. *State v. Goff*, 2023-Ohio-4823, ¶ 41 (4th Dist.). In fact, “R.C. 2947.23(C) ‘provides no explicit criteria that a court should use in deciding whether to waive * * costs.’ ” *State v. Stevens*, 2024-Ohio-198, ¶ 36, quoting *State v. Taylor*, 2020-Ohio-3514, ¶ 8. Accordingly, because court costs are not financial sanctions, “ ‘a trial court need not consider a defendant’s ability to pay,’ ” before imposing court costs; even though the trial court is permitted to do so. *Lansing* at ¶ 9, citing *State v. Dawson*, 2017-Ohio-965, ¶ 42 (8th Dist.); *State v. Stewart*, 2024-Ohio-1640, ¶ 35 (4th Dist.), quoting *State v. Taylor*, 2008-Ohio-482, ¶ 14 (4th Dist.).

{¶13} In the instant case, the record shows that the trial court fully considered Kelly’s indigency, as is shown by the fact the trial court did not impose the mandatory fine. Moreover, the trial court considered the issue of costs and specifically found that Kelly had the present and future ability to pay. Further, while the trial court found Kelly to be indigent, it is clear that he also

retained counsel at some point to represent him. In addition, initially the trial court set Kelly's bond at \$150,000. His retained counsel filed a motion to modify bond, which was granted when the trial court reduced his bond on January 18, 2023 to \$100,000, cash or surety. Despite this high cash or surety bond, Kelly was able to post it through a bondsman on May 22, 2023.

{¶14} We find that Kelly has not established his counsel was ineffective. First, we find that Kelly has not demonstrated that his counsel's performance was deficient. With the adoption of R.C. 2947.23(C), " 'the timing of a motion to seek waiver of costs is a matter of trial strategy.' " *State v. Rister*, 2023-Ohio-1284, ¶ 22 (4th Dist.), quoting *State v. Phillips*, 2022-Ohio-478, ¶ 15, fn. 2. (4th Dist.). Further, "as a matter of trial strategy, counsel may decline to seek a waiver of costs at sentencing upon a belief that raising it at a later time would be more advantageous, or because counsel focuses priority on another issue such as mitigating punishment, or both." *Rister* at ¶ 27. Certainly, Kelly's retained counsel's representation was effective when he negotiated a plea to a sole count of the indictment when Kelly had been charged with nine other charges, and Kelly received a mid-range sentence for a first-degree felony.

{¶15} Second, we find that Kelly has simply not met his burden of establishing prejudice in light of the fact that indigency status alone is not determinative of whether court costs should be paid. See *State v. Lansing*, 2025-Ohio-4641, ¶14 (4th Dist.). Here, the record demonstrates that the trial court was aware of Kelly's financial situation, including that he had the ability to pay costs in the future, which it deemed an important fact in its requiring him to

pay costs. We cannot see a reasonable probability that his attorney's asking for a waiver would have achieved a different result. See, e.g., *State v. Walton*, 2024-Ohio-6071, ¶ 41 (4th Dist.) (defendant did not establish prejudice when court acknowledged defendant was indigent, incarcerated on other offenses, and unemployed, but still ordered costs to be deducted from defendant's commissary account). Hence, we find Kelly has failed to show prejudice and therefore find no merit to his argument. We therefore overrule his first assignment of error.

SECOND ASSIGNMENT OF ERROR

{¶16} In his second assignment of error, although acknowledging that the parties jointly recommended a mandatory definite sentence of six years' incarceration up to nine years as an indefinite sentence, Kelly now asserts that the imposition of more than the minimum mandatory sentence is contrary to law. Specifically, Kelly cites R.C. 2929.11 to avow that the record does not support the trial court's finding that a six-year minimum definite sentence is commensurate with the offense, and further that the trial court failed to state sufficient reasons to support these findings.

{¶17} The State responds that Kelly provided no explanation as to why the trial court should have imposed a sentence less than what had been jointly recommended. In addition, the State asserts that a guilty plea waives all claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea, unless an appellant asserts that his plea was involuntary, and here, Kelly does not assert that his plea was infirm. Finally, the State avers that

Kelly has failed to show by clear and convincing evidence that the record does not support the sentencing court's findings or is otherwise contrary to law.

A. Law

1. Standard of Review

{¶18} We review Kelly's sentence pursuant to the dictates of R.C.

2953.08(G). *See State v. Marcum*, 2016-Ohio-1002, ¶ 16. R.C. 2953.08(G)(2), provides that

[t]he court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.

The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

- (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
- (b) That the sentence is otherwise contrary to law.

{¶19} However, R.C. 2953.08(D)(1) provides that “[a] sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge.” *Id.*

Consequently, if an imposed, agreed sentence is ‘contrary to law[,]’ [it] is appealable by a defendant[.]” *State v. Underwood*, 2010-Ohio-1, ¶ 16.

{¶20} The Supreme Court has recognized that “ ‘contrary to law’ [means] ‘in violation of statute or legal regulations at a given time[.]’ ” *State v. Jones*, 2020-Ohio-6729, ¶ 34, quoting *Black’s Law Dictionary* 328 (6th Ed.1990). Therefore, “ ‘a sentence is generally not contrary to law if the trial court considered the R.C. 2929.11 purposes and principles of sentencing as well as the R.C. 2929.12 seriousness and recidivism factors, properly applied post-release control, and imposed a sentence within the statutory range.’ ” *State v. Ogden*, 2025-Ohio-1168, ¶ 12 (4th Dist.), quoting *State v. Allen*, 2021-Ohio-648, ¶ 14 (4th Dist.).

{¶21} The Supreme Court of Ohio outlined the purpose behind the policy in R.C. 2953.08(D)(1):

The General Assembly intended a jointly agreed-upon sentence to be protected from review precisely because the parties agreed that the sentence is appropriate. Once a defendant stipulates that a particular sentence is justified, the sentencing judge no longer needs to independently justify the sentence.

State v. McFarland, 2023-Ohio-3499, ¶ 14 (4th Dist.), quoting *State v. Porterfield*, 2005-Ohio-3095, ¶ 25.

B. Analysis.

{¶22} In his second assignment of error, Kelly acknowledges that the trial court followed the parties’ jointly-recommended sentence, but states that the trial court’s imposition of more than the mandatory minimum sentence for a first-degree felony is contrary to law. Kelly also concedes that the trial court stated it considered R.C. 2929.11 and R.C. 2929.12. However, he claims that the sentence is not commensurate with the seriousness of the conduct constituting

the offense and invites us to revisit the various factors of R.C. 2929.11 to determine whether his sentence is contrary to law. In addition, Kelly asserts that the trial court failed to state sufficient reasons for its findings.

{¶23} The Supreme Court of Ohio clarified that appellate courts are prohibited from second-guessing a trial court's weighing of the R.C. 2929.11 and R.C. 2929.12 factors: "[n]othing in R.C. 2953.08(G)(2) permits an appellate court to independently weigh the evidence in the record and substitute its judgment for that of the trial court concerning the sentence that best reflects compliance with R.C. 2929.11 and 2929.12." *State v. Jones*, 2020-Ohio-6729, ¶ 42. "In other words, 'R.C. 2953.08(G)(2) does not allow an appellate court to modify or vacate a sentence based on its view that the sentence is not supported by the record under R.C. 2929.11 and 2929.12. *State v. Sims*, 2023-Ohio-1179, ¶ 145 (4th Dist.), quoting *State v. Bryant*, 2022-Ohio-1878, ¶ 22. "Consequently, appellate courts cannot review a felony sentence when 'the appellant's sole contention is that the trial court improperly considered the factors of R.C. 2929.11 or 2929.12 when fashioning that sentence.'" *Id.*, quoting *State v. Stenson*, 2021-Ohio-2256, ¶ 9 (6th Dist.), citing *Jones* at ¶ 42.

{¶24} Contrary to Kelly's argument, a trial court is *not* required to state the reasons for its findings under R.C. 2929.11 or R.C. 2929.12 on the record. Even though " '[t]he record must indicate that the trial court considered all relevant factors required by R.C. 2929.11 and R.C. 2929.12, the trial court 'has no obligation to state reasons to support its findings.'" *State v. Bolden*, 2025-Ohio-2010, ¶ 8 (8th Dist.), citing *State v. Evans*, 2021-Ohio-1411, ¶ 13 (8th Dist.),

citing *State v. Bonnell*, 2014-Ohio-3177, syllabus. “This is because R.C. 2929.11 and 2929.12 are not fact-finding statutes.” *Id.* citing *State v. Seith*, 2016-Ohio-8302, ¶ 12 (8th Dist.). Instead, “a trial court is required only to ‘carefully consider’ the factors in R.C. 2929.11 and R.C. 2929.12 when imposing sentence, and is not required to make any ‘findings,’ or state ‘reasons’ regarding those considerations.” *State v. Pierce*, 2024-Ohio-82, ¶ 52 (4th Dist.), citing *State v. Mathis*, 2006-Ohio-855, ¶ 38. In addition, “R.C. 2953.08(G)(2)(b) does not provide a basis for an appellate court to modify or vacate a sentence based on its view that the sentence is not supported by the record under R.C. 2929.11 and R.C. 2929.12.” *Id.*, citing *State v. Moore*, 2021-Ohio-3149, ¶ 7 (4th Dist.).

{¶25} In the case sub judice, at both the sentencing hearing and in its judgment entry, the trial court stated that it considered the R.C. 2929.11 purposes and principles of sentencing and the R.C. 2929.12 seriousness and recidivism factors, properly applied post-release control, and imposed a six-year mandatory minimum with an indefinite maximum of nine years, which is within the statutory range for a first-degree felony.

{¶26} Accordingly, we cannot find that the sentence is contrary to law. We therefore overrule Kelly’s second assignment of error, as it is without merit.

CONCLUSION

{¶27} Based on the record of the trial court and parties’ argument, Kelly has not shown how he was prejudiced by his counsel’s performance regarding the trial court’s decision to impose court costs. Further, the trial court considered the R.C. 2929.11 purposes and principles of sentencing as well as the R.C.

2929.12 seriousness and recidivism factors, properly applied post-release control, and imposed a sentence within the statutory range. Thus, Kelly's sentence is not contrary to law. We therefore overrule Kelly's assignments of error and affirm the trial court. Any pending motions are denied as moot.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and any pending motions are denied as moot. Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County 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.

Abele, J. and Hess, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Kristy S. Wilkin, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.