

ORIGINAL

11-0010

NO.

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 95128

STATE OF OHIO

Plaintiff-Movant

-vs-

MARIO HARRIS

Defendant-Respondent

MEMORANDUM IN SUPPORT OF JURISDICTION

Counsel for Plaintiff-Appellee

**WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR**

THORIN FREEMAN (#0079999)
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

Defendant-Appellee

MARIO HARRIS PRO SE A550804
P.O. BOX 8107
Mansfield Ohio 44905

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WHY THIS FELONY CASE IS A CASE OF GREAT PUBLIC OR GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

Being filed with this memorandum in support of jurisdiction is an order certifying a conflict between the Eighth District and the First District about whether the failure to include a mandatory driver's license suspension renders a sentence void. This case concerns Harris's two separate convictions for drug trafficking in CR-08-506498 and CR-08-510551. Along with the Eighth District's decision that the failure to include the mandatory driver's license suspension renders the sentence void the, Eighth District also made two additional findings that the State respectfully requests that this court consider because the decision affects thousands of cases.

The first holding is that the trial court's decision to waive the mandatory fine in a drug trafficking case without an affidavit of indigence presents the same error as failure to include a mandatory driver's license suspension—the sentence is void.

The trial court's decision to waive the mandatory fine without an affidavit of indigence should not render the sentence void. The trial court previously found Harris indigent at arraignment and waived the fine due to the finding of indigence made during arraignment. Moreover, the recent decision in *State v. Fischer*, would support a holding that the only portion of the sentence that is void is the fine and the matter should be remanded in relation to the fine only—not the entire sentence.

The Eighth District went on to hold that Harris did not have a final appealable order in CR-08-506498 because the trial court's forfeiture of items was listed in a separate journal entry from the sentencing entry. That decision purports to follow this Court's decision in *State v. Baker*. But nowhere in *Baker* is there a requirement that the forfeiture appear in the sentencing entry. Moreover, the forfeiture is not a criminal

“sentence” as defined by Crim.R. 32(C), such that the forfeiture is required to be stated in the sentencing entry. A forfeiture of items hearing could extend well beyond the finding of guilt and imposition of sentence. An appeal should not be abandoned because of an issue related to forfeiture that could involve parties that are not involved in the criminal litigation.

Because the Eighth District’s opinion in relation to what constitutes a void sentence and what constitutes a final appealable order has an effect on countless cases, the State respectfully requests that this Court review the following proposed propositions of law:

Proposed Proposition of Law I: A trial court’s failure to require a defendant to submit an affidavit of indigence under R.C. 2925.11(E) and R.C. 2929.18(B)(1) prior to waiving a mandatory fine does not make the sentence void.

Proposed Proposition of Law II: Because forfeiture of items contemplates actions and issues that extend beyond the criminal case and sentence, Crim.R. 32(C) does not require the forfeiture of items be listed in the sentencing entry.

STATEMENT OF THE CASE AND FACTS

I. CR-08-506498

Harris pleaded guilty to drug trafficking, a second degree felony, with specifications and having a weapon under disability. The trial court did not impose the mandatory fine or a driver’s license suspension required by certain sentencing statutes and imposed a 5-year sentence. In a separate entry, the trial court ordered forfeiture of certain items. Harris did not take a direct appeal.

Approximately 2-years later, Harris filed a motion arguing his sentences were void because the trial court did not impose a mandatory driver’s license suspension nor

did the trial court require an affidavit of indigence prior to waving the mandatory fine. The motion was denied and Harris appealed.

The Eighth District held that failure to suspend the driver's license and waving the mandatory fine without an affidavit of indigence made the sentence void. The Eighth District went further and held that there was never a final appealable order because the forfeiture of items was contained in a separate entry. The appeal was dismissed the appeal in relation to this case.

II. CR-08-510551

Harris pleaded guilty to trafficking in drugs, a fifth degree felony. The trial court sentenced Harris to 6 months. The trial court did not suspend Harris's drivers license.

Harris filed a motion to void his sentence after approximately 2 years. He argued that his sentence was void because the trial court did not impose the statutorily mandated driver's license suspension. The trial court denied the motion and Harris appealed.

The Eighth District held that the sentence was void for failing to impose the mandatory license suspension. The Eighth District subsequently certified a conflict on this issue that is being filed with this notice of appeal and memorandum in support of jurisdiction.

LAW AND ARGUMENT

PROPOSED PROPOSITION OF LAW I: A TRIAL COURT'S FAILURE TO REQUIRE A DEFENDANT TO SUBMIT AN AFFIDAVIT OF INDIGENCE UNDER R.C. 2925.11(E) AND R.C. 2929.18(B)(1) PRIOR TO WAIVING A MANDATORY FINE DOES NOT MAKE THE SENTENCE VOID.

When a person is convicted of certain drug offenses, there is a mandatory fine. R.C. 2925.11(E) and R.C. 2929.18(B)(1) require an indigent defendant to sign and file an

affidavit of indigence before the trial court can waive the mandatory fine. Some districts now hold that a trial court's failure to require the affidavit prior to waiving the fine results in a void sentence.¹

This line of cases has developed based on dicta in this Court's precedent in *State v. Gipson*.² In *Gipson*, the trial court imposed a mandatory fine. The defendant had yet to file his affidavit of indigence but asked the trial court to waive the mandatory fine. The trial court refused. The Eighth District held that the trial court *abused its discretion* in finding that the defendant could pay the fine. This Court accepted this case to review whether the trial court abused its discretion in imposing a mandatory fine. In fact, the first sentence of this Court's opinion in *Gipson* shows that the opinion does not prevent a judge from waiving the fine without an affidavit:

The sole issue in this appeal may be phrased in terms of the following question: Did the trial court abuse its discretion and/or commit an error of law by imposing the mandatory fine and by requiring Gipson to satisfy that fine over the course of his probation?³

This Court did state in dicta that the filing of the affidavit was an issue of jurisdiction but went on to hold that the failure to file the affidavit of indigence prior to sentencing *was a sufficient reason* to find that the trial court did not commit error by imposing the mandatory fine.⁴ This Court's decision is ultimately that a trial court can require the affidavit of indigence prior to waiving the mandatory fine but is not required to have an affidavit of indigence to be allowed to waive the fine.

¹ *State v. Harris*, Cuyahoga App. No. 95128, 2010-Ohio-5374, at ¶ 7; *State v. Fields*, 183 Ohio App. 3d 647, 2009-Ohio-4187, at ¶s 4-8.

² *State v. Gipson*, 80 Ohio St.3d 626, 1998-Ohio-659.

³ *Id.* at 633.

⁴ *Id.*

The First District has taken the line of dicta in *Gipson* relating to jurisdiction and held that the failure of the trial court to require the filing of the affidavit of indigence divests a trial court of jurisdiction to waive the mandatory fine. But many facts can be developed during the course of a trial or presentence investigation that would show that a defendant does not and will not have the ability to pay the mandatory fine. The filing of the affidavit of indigence under R.C. 2925.11(E) and R.C. 2929.18(B)(1) should not be considered a jurisdictional bar to waiving a mandatory fine.

Assuming the failure to file the affidavit of indigence divests a trial court of jurisdiction to waive a mandatory fine, the proper remand order is now controlled by this Court's recent decision in *State v. Fischer*. The only portion of Harris's sentence that is void is the fine and the remand should only relate to the fine—Harris is not entitled to resentencing on the underlying count.⁵ If this Court does not wish to accept this case for a merit review, then the State respectfully requests summary reversal in relation to the order remanding for a complete resentencing and remand for a limited hearing under *Fischer*, relating to the mandatory fine and not the underlying prison sentence.

The State respectfully requests that this Court accept the State's proposed proposition of law or summarily reverse the holding that Harris is entitled to a de novo resentencing.

PROPOSED PROPOSITION OF LAW II: BECAUSE FORFEITURE OF ITEMS CONTEMPLATES ACTIONS AND ISSUES THAT EXTEND BEYOND THE CRIMINAL CASE AND SENTENCE, CRIM.R. 32(C) DOES NOT REQUIRE THE FORFEITURE OF ITEMS BE LISTED IN THE SENTENCING ENTRY.

⁵ *State v. Fischer*, ___ Ohio St.3d ___, 2010-Ohio-6238.

As the law currently stands in the Eighth District, cases are dismissed for a lack of a final appealable order if the sentencing entry does not contain a reference to how and where forfeited items are to be handled. The Eighth District's line of cases making this the law was stated in the Court's opinion in relation to Harris's case number CR-08-506498.⁶ But Harris's guilty plea to the forfeiture specification was announced in the sentencing entry—that is all Baker and Crim.R. 32(C) require. The actual forfeiture and disposition of the property can be issued—and sometimes must be entered—in a different order. The Eighth District's analysis purportedly relies on this Court's decision in *State v. Baker*. But this Court's analysis in *Baker* does not even mention the issue of forfeiture under R.C. 2981 as a requirement under Crim.R. 32(C).

The actual *order* of forfeiture should not have to be included in the sentencing entry to create a right of direct appeal. The forfeiture must be resolved only in relation to the plea or finding guilt in relation to the forfeiture but not the actual order of forfeiture. The main reason for this is that the entry of forfeiture does not mean that the issue of forfeiture is resolved.

R.C. 2981—the forfeiture statute—contemplates continued litigation even after an order of forfeiture has been signed by a trial court. R.C. 2981.06 contemplates the possibility that a trial court may issue restraining orders relating to the forfeited property. And third parties may become involved in the underlying criminal action to address any forfeited property. An appeal for a criminal defendant related to guilt and punishment should not be delayed because of pending litigation concerning forfeited property.

⁶ *State v. Harris*, Cuyahoga App. No. 95128, 2010-Ohio-5374, at ¶ 7.

Moreover, requiring the actual forfeiture be included in the sentencing entry does not follow the plain language of Crim.R. 32(C). This Court held that the under Crim.R. 32(C) entry must contain the “sentence.”⁷

The word “sentence” is defined as a “sanction.”⁸ The word sanction is defined as “any sanction imposed pursuant to any provision of sections 2929.14 to 2929.18 or 2929.14 to 2929.28 of the Revised Code.”⁹

Forfeitures are entered under R.C. 2981. That is not a section defined as a sanction or a sentence. Thus, Crim.R. 32(C) does not contemplate forfeiture as an issue to create a final appealable order. Actual forfeiture can be made by a separate entry.

Because the forfeiture is not a sentence and Crim.R. 32(C) was drafted well before the forfeiture codifications, Crim.R. 32(C) does not require the actual order of forfeiture be included in the sentencing entry.

The entry entered by the trial court on June 3, 2008 includes the plea to all specifications, the sentence, has the judge’s signature, and a time stamp. That is all Crim.R. 32(C) requires. That order was a final appealable order and the Eighth District’s decision that the order was not final should be reversed.

CONCLUSION

Before the Court is the State’s contemporaneous filing concerning an order certifying a conflict about whether failure to impose a mandatory driver’s license suspension makes the sentence void. But this case also presents two additional issues that have significance and warrants this Court’s review. The Eighth District’s opinion

⁷ *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330.

⁸ R.C. 2929.01(EE).

⁹ R.C. 2929.01(DD).

also discusses other sentencing factors that make a sentence void and the opinion contains an improper extension of this Court's reading of Crim.R. 32(C) to require the actual order of forfeiture in a sentencing entry. The State requests that the following propositions, along with the certified conflict, be accepted and this Court resolve the following additional questions:

- Does the waiver of a mandatory fine without an affidavit of indigence filed under R.C. 2925.11(E) and R.C. 2929.18(B)(1) divest the trial court of jurisdiction to waive the fine and create a void sentence and;
- Does the actual order of forfeiture have to be included in the sentencing entry to comply with Crim.R. 32(C) and this Court's decision in *State v. Baker*?

Resolution of these issues is necessary as the Eight District's decision in this case has far reaching effects beyond the certified question.

Respectfully submitted,

WILLIAM D. MASON,
CUYAHOGA COUNTY PROSECUTOR



THORIN FREEMAN (#0079999)
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction of Appellant was mailed by regular U.S. Mail on the 3rd day of January, 2010 to Mario Harris A550804 Richland Correctional Institution P.O. Box 8107 Mansfield Ohio 44905 the Ohio Public Defender .



Thorin Freeman (0079999)
Assistant Prosecuting Attorney

[Cite as *State v. Harris*, 2010-Ohio-5374.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95128

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARIO HARRIS

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED IN PART AND REMANDED FOR
RESENTENCING; DISMISSED IN PART**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-506498 and CR-510551

BEFORE: Stewart, J., Rocco, P.J., and Dyke, J.

RELEASED AND JOURNALIZED: November 4, 2010

FOR APPELLANT

Mario Harris, Pro Se
Inmate No. 550-804
Richland Correctional Institution
P.O. Box 8107
Mansfield, OH 44901

ATTORNEYS FOR APPELLEES

William D. Mason
Cuyahoga County Prosecutor

BY: Thorin Freeman
Assistant County Prosecutor
The Justice Center
1200 Ontario Street, 8th Floor
Cleveland, OH 44113

MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Mario Harris, appeals the orders in two criminal cases that deny his motions for sentencing. Appellant argues that because the trial court failed to impose the driver's license suspension and fine mandated by statute for drug trafficking convictions, his sentences are void and he must be resentenced. Because this appeal challenges the denial of appellant's motions for sentencing filed in two separate criminal cases, we will address each case separately.

{¶ 2} In Case No. CR-510551, appellant was charged in a three-count indictment with drug possession in violation of R.C. 2925.11(A), drug trafficking in violation of R.C. 2925.03(A)(2), and possession of criminal tools in violation of R.C. 2923.24(A).¹ Each count included a forfeiture specification for a vehicle used in the commission of the offense. On May 27, 2008, appellant entered a guilty plea to the trafficking offense with the forfeiture specification. The remaining counts were nolle.

{¶ 3} In the judgment entry dated May 27, 2008, the trial court imposed a prison term of six-months, to be served consecutive to the sentence in Case No. CR-506498, and ordered forfeiture of the vehicle. However, the trial court neglected to suspend appellant's driver's license. Pursuant to statute, appellant's fifth degree felony trafficking conviction carries with it a mandatory driver's license suspension of between six months and five years. R.C. 2925.03(G). When a sentence fails to impose a mandated term such as a driver's license suspension, that sentence is void. *State v. Donahue*, 8th Dist. No. 89111, 2007-Ohio-6825, at ¶22. Where a sentence is void because it does not contain a statutorily mandated term, the proper remedy is to resentence the defendant. *Id.*, citing *State v. Beasley* (1984), 14 Ohio St.3d 74, 471

¹ We call attention to the fact that all documents and journal entries subsequent to the indictment show the defendant's name as "Mario Harris," while the indictment shows the defendant's name as "Calvin Harris."

N.E.2d 774. Therefore, we reverse the judgment in Case No. CR-510551 and remand for resentencing.

Case No. CR-506498

{¶ 4} In Case No. CR-506498, the grand jury indicted appellant on multiple counts including drug trafficking, drug possession, possession of criminal tools, and having a weapon while under disability. The trafficking offenses included a schoolyard specification, a one-year firearm specification, and a forfeiture specification for cash, cell phones, and a Smith & Wesson revolver. The weapons under disability offense included a forfeiture specification for the revolver.

{¶ 5} On May 27, 2008, appellant entered a guilty plea to one count of drug trafficking in violation of R.C. 2925.03(A)(1) with the schoolyard, firearm, and forfeiture specifications (a third degree felony), and one count of having a weapon while under disability in violation of R.C. 2923.13(A)(3) with the forfeiture specification. The remaining counts were nolle. The guilty pleas, disposition of the remaining counts, and order of forfeiture were recorded in a judgment entry dated May 27, 2008.

{¶ 6} By separate entry dated June 3, 2008, the court sentenced appellant to a mandatory one-year prison term on the firearm specification, to be served consecutive to a three-year term on the trafficking offense, and a one-year term on the weapons under disability offense, for a total of five

years. However, the court neglected to suspend appellant's driver's license or to impose a fine. Pursuant to statute, a third-degree felony drug trafficking conviction carries with it a mandatory fine and driver's license suspension. R.C. 2925.03(D)(1)(2) and (G).

{¶ 7} While this case presents the same error as in the prior case, a procedural error by the trial court in announcing its judgment mandates we reach a different result. In issuing judgment, the trial court employed two separate journal entries to record appellant's plea and sentence. However, only one document can constitute a final appealable order. *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, at ¶17. Since the second judgment entry fails to account for the the order of forfeiture recorded in the first entry, it is not a final appealable order. As a result, we are without jurisdiction to review any order of the trial court relating to Case No. CR-506498, including the trial court's denial of appellant's motion to resentence. While our disposition of the prior case suggests the proper course of action for the trial court, we find we have no choice but to dismiss the appeal in this case for lack of a final appealable order.

{¶ 8} Accordingly, appellant's single assignment of error is sustained in part. The judgment in Case No. CR-510551 is reversed and remanded for resentencing. The appeal in Case No. CR-506498 is dismissed for lack of a final appealable order.

It is ordered that the parties bear their own costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas 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.

MELODY J. STEWART, JUDGE

KENNETH A. ROCCO, P.J., and
ANN DYKE, J., CONCUR

