

IN THE SUPREME COURT OF OHIO

ORIGINAL

14-0152

STATE OF OHIO

Case No. _____

Plaintiff-Appellee,

Hamilton County Court of Appeals

Case No.C-1200858

vs.

Trial Ct. No. B-0901344

DEONDRE ANDREWS,

Defendant-Appellant.

MEMORANDUM IN SUPPORT OF JURISDICTION

Counsel for Appellant

DEONDRE ANDREWS

Inmate No. 649110

Lebanon Correctional Institution

3791 State Route 63

Lebanon, Ohio 45036

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EXPLANATION WHY THIS CASE PRESENTS A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case presents a substantial constitutional question. The first substantial constitutional question is whether:

Does the trial court violates a defendant's right to be free excessive fines and punishment as guaranteed by the Eighth Amendment to the United States Constitution when it imposes fines and restitution and the appellant possibly pay in the present or future?

STATEMENT OF THE CASE AND FACTS

The appellant, Mr. Andrews case was remanded on appeal based on appellants argument that the:

The trial court erred by ordering him to pay \$35,000 in restitution and a \$10,000 fine as part of his sentence. He argues that the trial court failed to conduct a hearing to determine the amount of restitution, and that the amount of restitution ordered was not supported in the record. He also argues that the trial court erred by imposing a fine upon him when he was demonstrably indigent.

State v. Andrews, 2012-Ohio-4664; 2012 Ohio App. LEXIS 4116. On remand the trial

court again imposed the \$35,000 restitution order and the \$10,000 fine. At the resentencing hearing the defendant timely submitted an affidavit of indigency detailing his lack of prior work experience, the extensive time he was serving in prison, the measly he was to receive in prison for work duties (roughly \$18.00 per month), and the stigma of being labeled a “violent convicted felon” upon release which would preclude him from obtaining gainful employment and would prohibit him from paying any future fines and restitution.

The trial court disregarded this evidence, and the First District Court of Appeals affirmed. See *State v. Andrews*, Case No. C-120858 (1st Dist.).

Based on the foregoing, Mr. Andrews respectfully submit that the trial court imposed excessive fines and restitution in violation of the Eighth Amendment to the United States Constitution.

Mr. Andrews respectfully ask this Court to reverse the trial court judgment and the First District Court of Appeals decision and vacate the fines and restitution.

LAW AND ARGUMENT

Proposition of Law No. 1: A violation of both the Eighth Amendment to the United States Constitution and Section 9, Article I of the Ohio Constitution occurs where a Defendant is sentenced a \$35,000 restitution order and \$10,000 fine and the defendant has no means in the present or future to pay either?

The Eighth Amendment to the United States Constitution, which applies to the state of Ohio by virtue of the Fourteenth Amendment, see *Robinson v. California*, 370 U.S. 660 (1962), provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." (Emphasis supplied). In this case involving Deondre Andrews, the Hamilton County trial court's sentence him to a \$35,000 restitution order and \$10,000 fine which is an excessive fine in violation of the Eighth Amendment to the U.S. Constitution and to Section 9, Article I of the Ohio Constitution.

The record in this case reveals that the defendant does not have the means to pay a \$35,000 restitution order and a \$10,000 fine, in the present or future. The \$35,000 restitution order and \$10,000 fine would only cause hardships in the defendant's future as a debt that cannot be paid, especially by a defendant who has no

prior work history, has served more than a decade in prison and will have hardships in obtaining gainful employment upon release.

To protect defendant's rights to be free from excessive fines under the Eighth Amendment to the United States Constitution, the General Assembly enacted R.C. 2929.18(A)(1) which provides that a court imposing sentence upon an offender for a felony may also sentence the offender to financial sanctions, including restitution. R.C. 2929.19(B)(5) provides: "Before 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 or fine." "The trial court does not need to hold a hearing on the issue of financial sanctions, and there are no express factors that the court must take into consideration or make on the record." *State v. Culver*, 160 Ohio App.3d 172, 2005 Ohio 1359, 826 N.E.2d 367, ¶ 57 (2d Dist.) (upholding financial sanctions where this Court could infer that the trial court considered *Culver's* ability to pay, given "*Culver's* then gainful employment, his long employment history, and the fact that he had always had the ability to work. At the time of the hearing, *Culver* was

making \$500 a week * * *. The court also inquired into *Culver's* assets. And finally, in the sentencing entry, the court deferred payment until two months after *Culver* was released from prison.") *Id.*, ¶ 59; see also, *State v. Frock*, 2d Dist. Clark No. 2004 CA 76, 2007 Ohio 1026, ¶ 9 ("Given the lengthy sentence [of 19 1/2 years] imposed in this case - and the dearth of encouraging information about *Frock* in the PSI - we are constrained to conclude that the record fails to demonstrate that the court considered *Frock's* present ability to pay restitution [in the amount of \$17,029.00].") (emphasis added).

A trial court need not even state that it considered an offender's ability to pay. *State v. Parker*, Champaign App. No. 03CA0017, 2004 Ohio 1313, ¶ 42. *State v. Russell*, 2d Dist. Montgomery No. 23454, 2010 Ohio 4765, ¶ 62. The record should, however, contain 'evidence that the trial court considered the offender's present and future ability to pay before imposing the sanction of restitution.' *State v. Robinson*, Hancock App. No. 5-04-12, 2004 Ohio 5346, 2004 WL 2260101, at ¶ 17." *Culver*, ¶ 57. "The trial court may comply with its obligation by considering a presentence

investigation report ('PSI'), which includes information about the defendant's age, health, education, and work history. *State v. Ratliff*, 194 Ohio App.3d 202, 2011 Ohio 2313, 955 N.E.2d 425, ¶ 12 (2d Dist.)." *State v. Willis*, 2d Dist. Montgomery No. 24477, 2012 Ohio 294, ¶ 4.

It should be noted that in *Willis*, the defendant was 31 years old, he received a two year sentence, and the trial court ordered restitution in the amount of \$20,352.08. When defense counsel requested that restitution be waived, the trial court responded, "it's speculative as to the future ability or inability in the way of projecting that so that request is overruled." *Id.*, ¶ 7. The Second District, in reversing and remanding the matter for further proceedings on the issue of restitution, concluded as follows:

* * * We appreciate the court's frustration with the conjecture possibly involved in considering future ability to pay. However, this is a legislative mandate and, based on the court's response, it appears that the trial court did not "consider" and determine, given the facts before it, whether Willis would likely be able to pay \$20,352.08 in restitution upon his release from prison. We cannot presume that the trial court met its obligation under R.C. 2929.19(B)[(5)]. *Id.*

Herein, it should be initially note that Andrews was sentenced to an aggregate

term of 7/12 years in a companion case, plus 7 years herein. The record reflects that he has no past employment history or demonstrated ability to work. The matter herein bears some similarity to *Willis*, in that in imposing sentence, the trial court concluded that restitution "theoretically" could be paid from "possible" prison employment, that Andrews "could" pursue further education, and further, the court acknowledged that "it's a lot of speculation" regarding Andrews future ability to pay. While the State asserted that "Andrews will have the opportunity to earn wages for work while in the institution, and approved sources may deposit funds into his account," from which restitution may be paid, this argument is entirely speculative and ignores the statutory mandate in R.C. 2929.19(B)(5) that the trial court determine ability to pay. Unlike *Willis*, wherein a two-year sentence bears the probability of release and employment, Andrews decade sentence does not. As in *Frock*, there is a dearth of encouraging information about Andrews in the PSI, other than his good health, and it should be concluded that the court imposed a restitution order and fine based upon theoretical scenarios and speculation and not upon the facts before it. For the foregoing reasons, Andrews

proposition of law should be adopted and the \$35,000 restitution order and \$10,000 fine vacated.

Accordingly, the appellant ask this Court find that his right to counsel has been violated under the Eighth Amendment to the United States Constitution.

Conclusion

Based on the foregoing, the appellant respectfully ask this Court reverse the judgment of the trial court and the First District Court of Appeals and find his rights under the Eighth Amendment to the United States Constitution.

Respectfully submitted,



DEONDRE ANDREWS

Inmate No. 649110

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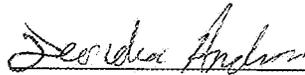
Lebanon, Ohio 45036

Certificate of Service

I, DEONDRE ANDREWS, hereby certify that a true and accurate copy of the foregoing Notice of Appeal was sent by regular U.S. Mail, this 14 day of January, 2014, to:

Joseph T. Deters
HAMILTON COUNTY PROSECUTOR
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Deondre Andrews", is written over a horizontal line.

DEONDRE ANDREWS

Inmate No. 649110

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COPY

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO, : APPEAL NO. C-120858
Plaintiff-Appellee, : TRIAL NO. B-0901344
vs. : JUDGMENT ENTRY.
DEONDRE ANDREWS, :
Defendant-Appellant. :

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. See S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Deondre Andrews appeals the judgment of the Hamilton County Court of Common Pleas ordering him to pay a fine and restitution in a prosecution for felonious assault with a firearm specification.

Andrews was convicted after entering a guilty plea. The trial court sentenced him to an aggregate term of seven years' imprisonment and ordered him to pay a fine of \$10,000 as well as \$35,000 in restitution.

This court affirmed the trial court's judgment except for its imposition of the fine and restitution. *State v. Andrews*, 1st Dist. Hamilton No. C-110375, 2012-Ohio-4664, ¶ 38. We vacated those portions of the judgment and remanded the cause "for a hearing on Andrews's present and future ability to pay a fine and restitution." *Id.*

OHIO FIRST DISTRICT COURT OF APPEALS

After a hearing, the trial court imposed the same fine and ordered the same amount of restitution.

In a single assignment of error, Andrews again argues that the trial court erred in not considering his ability to pay the fine and restitution. He argues that, because he has no assets and will be imprisoned for a number of years, the trial court's imposition of the fine and restitution was erroneous.

Before imposing restitution under R.C. 2929.18 or a fine under R.C. 2929.32, the trial court must consider the defendant's present and future ability to pay the amount of restitution or fine. *Id.* at ¶ 30. The court need not consider any specific factors or make specific findings, "but there must be some evidence in the record that the court at least considered" the defendant's ability to pay. *Id.* at ¶ 31.

In the case at bar, the trial court held a hearing and explicitly considered Andrews's ability to pay. The trial court found that he had the ability to pay based on his youth, the absence of any physical or mental disability, and the fact that he had benefitted financially from the offense. We find no error in the trial court's decision.

Accordingly, we overrule the assignment of error and affirm the judgment of the trial court.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HENDON, P.J., HILDEBRANDT and DEWINE, JJ.

To the clerk:

Enter upon the journal of the court on December 13, 2013
per order of the court _____
Presiding Judge