[Cite as *State v. Bernadine*, 2011-Ohio-4023.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-P-0056**
- vs -	:	
NANCY L. BERNADINE,	:	8-12-11
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 2010 CR 0128.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Antonios C. Scavdis, Jr., Scavdis & Scavdis, L.L.C., 261 West Spruce Avenue, P.O. Box 978, Ravenna, OH 44266 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Nancy L. Bernadine, appeals from the Judgment Entry of the Portage County Court of Common Pleas, sentencing her to total term of eight years of imprisonment and ordering her to pay a $10,000 fine and $1,180 in restitution to the Portage County Drug Task Force. The issues to be decided in this case are whether a trial court may find a defendant indigent for the purpose of arraignment but not for the purpose of paying a fine, whether a trial court's acknowledgement that it viewed the Presentence Investigation Report satisfies R.C.

2929.19(B)(6)'s requirement to consider a defendant's ability to pay, and whether a trial court is required to state its consideration of sentencing factors on the record. For the following reasons, we affirm the decision of the court below.

{¶2} On March 5, 2010, Bernadine was indicted on four counts of Trafficking in Cocaine, two counts of Complicity to Trafficking in Cocaine, one count of Complicity to Trafficking in Marijuana, one count of Possessing Criminal Tools, one count of Unlawful Sale of a Dangerous Drug, and one count of Permitting Drug Abuse.

{¶3} On March 10, 2010, the trial court issued a Judgment Entry, stating that the court "finds [Bernadine] is indigent and hereby appoints" counsel to represent Bernadine.

{¶4} On May 20, 2010, Bernadine entered a written plea of guilty to one count of Trafficking in Cocaine, a felony of the second degree in violation of R.C. 2925.03(A) and (C)(4)(e), one count of Complicity to Trafficking in Cocaine, a felony of the second degree in violation of R.C. 2923.03 and 2925.03(A) and (C)(4)(e), and one count of Complicity to Trafficking in Cocaine, a felony of the third degree in violation of R.C. 2923.03 and 2925.03(A) and (C)(4)(d). Upon application of the State, the trial court entered a Nolle Prosequi on the remaining seven counts of the indictment. A pre-sentence investigation (PSI) was conducted and presented at sentencing.

{¶5} On June 28, 2010, the trial court held a sentencing hearing. During this hearing, Bernadine's counsel stated that Bernadine had an ongoing drug problem but had not had a conviction since 2005. He also stated that she had been seeking treatment and was doing well with her sobriety. Bernadine made a statement and explained that she had been under a lot of stress with her family, had been unable to

pay her bills, and attempted suicide several months prior to the events leading to her arrest.

{¶6} At the hearing, James Stephens, Bernadine's caseworker for over two years, made a statement that Bernadine seemed very motivated to recover from her drug addiction. Bernadine's sister, Debra Burrows, also made a statement that Bernadine was doing well in her recovery.

{¶7} The State asserted that Bernadine had prior drug-related convictions, including two for Trafficking in Cocaine. The State also noted that in this case, Bernadine sold drugs on several different dates to undercover officers. Based on the foregoing, the State recommended that Bernadine be given at least an eight year sentence. During the hearing, the court stated that Bernadine was making "excuses" for her behavior.

{¶8} On June 29, 2010, the trial court entered a Judgment Entry, sentencing Bernadine to a term of seven years for Trafficking in Cocaine and seven years for the second-degree felony count of Complicity to Trafficking in Cocaine. These two terms were to run concurrently. The court also sentenced Bernadine to a term of one year for the third-degree felony count of Complicity to Trafficking in Cocaine, to run consecutively with the seven year term, for a total term of eight years of imprisonment. The court also assessed a $10,000 drug fine, and court costs, to be paid within fifteen years, and ordered Bernadine to pay $1,180 in restitution to the Portage County Drug Task Force.

{¶9} On July 22, 2010, Bernadine filed a Motion for Waiver of Fines, Restitution and Costs Assessed to Indigent Defendant. Bernadine asserted that because she was found indigent by the trial court on March 10, 2010, the $10,000 fine, $1,180 in

restitution, plus court costs, should be waived by the trial court. On July 27, 2010, the trial court issued a Judgment Entry overruling this Motion.[1]

{¶10} Bernadine timely appeals and asserts the following assignments of error:

{¶11} "[1.] The trial court erred in imposing a mandatory fine upon appellant.

{¶12} "[2.] The trial court erred in imposing a $10,000.00 drug fine and ordering restitution of $1,180.00 upon appellant without considering appellant's present and future ability to pay the financial sanction or fine.

{¶13} "[3.] The trial court erred in imposing more than a minimum prison sentence because it is contrary to law and an abuse of discretion."

{¶14} In her first assignment of error, Bernadine argues that the trial court erred in imposing a mandatory fine, as well as denying her Motion for Waiver, because she had been determined to be indigent by the trial court prior to sentencing.

{¶15} The State argues that the trial court's finding of indigency was related to her right to counsel and not to her ability to obtain a waiver of a mandatory fine.

{¶16} A court's imposition of a mandatory fine is reviewed under an abuse of discretion standard. *State v. Gipson*, 80 Ohio St.3d 626, 630, 1998-Ohio-659; *State v. Kidd*, 11th Dist. No. 2006-L-193, 2007-Ohio-4113, at ¶82.

{¶17} "For a first, second, or third degree felony violation of any provision of Chapter 2925 *** of the Revised Code, the sentencing court shall impose upon the offender a mandatory fine of at least one-half of, but not more than, the maximum statutory fine amount authorized for the level of the offense pursuant to division (A)(3) of

1. We note that in its July 27, 2010 Judgment Entry, the trial court included the statement that Bernadine "is granted until January 1, 2011 to pay [her fines] in full." The trial court provided no explanation for this change in the due date from the fifteen year period for payment given in the June 29, 2010 Judgment Entry of sentence. Neither party requested that the date be changed or raised this issue before the trial court, which is the appropriate forum.

this section." R.C. 2929.18(B)(1). The maximum statutory fine amount authorized in R.C. 2929.18(A)(3) is "not more than fifteen thousand dollars" for a felony of the second degree and "not more than ten thousand dollars" for a felony of the third degree. R.C. 2929.18(A)(3)(b) and (c).

{¶18} "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." R.C. 2929.18(B)(1). The requirement of R.C. 2929.18(B)(1) "that an affidavit of indigency must be 'filed' with the court prior to sentencing means that the affidavit must be delivered to the clerk of court for purposes of filing and must be indorsed by the clerk of court, *i.e*., time-stamped, prior to the filing of the journal entry reflecting the trial court's sentencing decision." *Gipson*, 80 Ohio St.3d 626, at the syllabus. "[T]he fact that the affidavit was not properly filed prior to sentencing is, standing alone, a sufficient reason to find that the trial court committed no error by imposing the statutory fine." *State v. Grissom*, 11th Dist. No. 2001-L-107, 2002-Ohio-5154, at ¶32 (citation omitted).

{¶19} In this case, the record shows that the sole Affidavit of Indigency, filled out by Bernadine prior to the appointment of trial counsel, was not properly filed with the trial court. Although Bernadine indicated in her brief that she submitted an Affidavit of Indigency with the court prior to sentencing, a copy of this Affidavit is not found to be included in the record, except where attached to Bernadine's Motion for Waiver of Fines, Restitution and Costs Assessed to Indigent Defendant. It is not recorded on the trial court's docket or filed separately in the trial court file with a time stamp or endorsed by the clerk, as required. The only copy found in the record, attached to the Motion for

Waiver, was filed with the court on July 22, 2010, more than three weeks after the sentencing Judgment Entry was filed. Such a filing is not sufficient to satisfy R.C. 2929.18(B)(1). See *Gipson*, 80 Ohio St.3d at 633.

{¶20} Bernadine argues that because the trial court found her to be indigent, it should not have ordered her to pay a mandatory fine or costs.

{¶21} However, we note that Bernadine was found to be indigent during arraignment, for the purposes of appointing trial counsel. This court has distinguished between indigency "as it relates to a defendant's constitutional right to counsel and proof of indigency required to avoid a mandatory statutory fine," holding that a trial court may find a defendant indigent for the purposes of appointing counsel but still find him able to pay a future fine. *Grissom*, 2002-Ohio-5154, at ¶¶34-35; *State v. McDowell*, 11th Dist. No. 2001-P-0149, 2003-Ohio-5352, at ¶70 (the "trial court's finding that appellant was an indigent requiring appointment of counsel is irrelevant to our determination of whether appellant was an indigent and entitled to avoid a mandatory fine"). Therefore, the trial court did not abuse its discretion when finding Bernadine indigent for the purposes of appointing counsel but not for the purposes of waiving the mandatory fine.

{¶22} Bernadine's first assignment of error is without merit.

{¶23} In her second assignment of error, Bernadine argues that the trial court erred by imposing the $10,000 fine and $1,180 in restitution because the court did not consider her present and future ability to pay the fine and restitution.

{¶24} The State argues that Bernadine did not meet her burden under plain error to prove that the court erred in ordering her to pay a fine and restitution. The State also

asserts that there was evidence Bernadine would be able to make these payments in the future.

{¶25} "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." R.C. 2929.19(B)(6). R.C. 2929.18 "does not require a court to hold a hearing on the issue of a defendant's ability to pay; rather, a court is merely required to consider the offender's present and future ability to pay." *State v. Bielek*, 11th Dist. No. 2010-L-029, 2010-Ohio-5402, at ¶11 (citation omitted). "However, some evidence must be present in the record to indicate that the trial court considered an offender's present and future ability to pay." *State v. Sampson*, 11th Dist. No. 2007-L-075, 2007-Ohio-7126, at ¶14 (citation omitted).

{¶26} We note that Bernadine failed to object to the trial court's order to pay restitution and the mandatory fine. Failure to object to the court's order of restitution or fines constitutes a waiver of all error except plain error. *Bielek*, 2010-Ohio-5402, at ¶13; *State v. Brantley*, 8th Dist No. 94508, 2010-Ohio-5760, at ¶12.

{¶27} Crim.R. 52(B) provides: "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." An alleged error is plain error only if the error is obvious, and "but for the error, the outcome of the trial clearly would have been otherwise." *State v. Long* (1978), 53 Ohio St.2d 91, at paragraph two of the syllabus; *State v. Sanders*, 92 Ohio St.3d 245, 257, 2001-Ohio-189.

{¶28} "[W]hen the record indicates a court has considered a pre-sentence investigation report detailing pertinent financial information or when a transcript reflects that a court has considered the defendant's ability to pay, the court has adequately

complied with the statute." *State v. Ankrom*, 11th Dist. No. 2006-L-124, 2007-Ohio-3374, at ¶23. See, also, *State v. Lewis*, 8th Dist. No. 90413, 2008-Ohio-4101, at ¶12 ("[a] trial court complies with R.C. 2929.19(B)(6) when the record shows that the court considered a pre-sentence investigation report *** that provides pertinent financial information regarding the offender's ability to pay restitution"); *State v. Martin*, 140 Ohio App.3d 326, 338-339, 2000-Ohio-1942 (where the trial court indicated on the record that it had considered the PSI report as well as the appellant's oral statement at the sentencing hearing and the PSI contained information about the defendant's age, health, education, and work history, the court was found to have considered the defendant's present and future ability to pay); *State v. Miller*, 2nd Dist. No. 08CA0090, 2010-Ohio-4760**,** at ¶39 ("[i]nformation contained in a presentence investigation report relating to defendant's age, health, education, and employment history, coupled with a statement by the trial court that it considered the presentence report," is "sufficient to demonstrate that the trial court considered defendant's ability to pay a financial sanction"); *State v. Dunaway*, 12th Dist. No. CA2001-12-280, 2003-Ohio-1062, at ¶¶37-38 (the trial court considered a defendant's present and future ability to pay when it stated that it considered the PSI).

{¶29} In this case, there is no specific indication in either the transcript of the sentencing hearing or in the sentencing Judgment Entry that the trial court considered Bernadine's present and future ability to pay the fines and restitution ordered by the court. However, the trial court did indicate in its Judgment Entry that it reviewed the PSI. The PSI included information regarding Bernadine's age and physical health. In addition, it included information about her current employment and the amount of money she makes monthly. The PSI also included information about her educational

background, which would show her ability to obtain future employment. All of these factors were relevant and sufficient for the court to consider Bernadine's present and future ability to pay the fine and restitution, especially when reviewing the court's judgment under the plain error standard. See *State v. Barker*, 8th Dist. No. 93574, 2010-Ohio-4480, at ¶¶13-14 (where the court made a reference to the PSI and the standard of review was plain error, the court found that a "cursory reference in the record" met "the low threshold of R.C. 2929.19(B)(6)").

{¶30} Bernadine's second assignment of error is without merit.

{¶31} In Bernadine's third assignment of error, she argues that although her sentence on each charge is within the statutory ranges, the seven year sentences are close to the maximum allowed and the trial court failed to comply with the rules and statutes when imposing her sentence.

{¶32} The State argues that Bernadine has failed to rebut the presumption that the trial court considered the appropriate sentencing criteria.

{¶33} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court held that "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." Id. at paragraph seven of the syllabus. In light of *Foster*, this court has held that the trial court has full discretion to sentence within the statutory ranges. *State v. Weaver*, 11th Dist. No. 2006-L-113, 2007-Ohio-1644, at ¶33; *State v. Martin*, 11th Dist. No. 2006-L-191, 2007-Ohio-2579, at ¶19; *State v. Sanders*, 11th Dist. No. 2006-L-222, 2007-Ohio-3207, at ¶18.

{¶34} "In applying *Foster* to the existing statutes, appellate courts must apply a two-step approach. First, they must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard." *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶4.

{¶35} A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. "The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender." R.C. 2929.11(A). A court imposing a sentence for a felony "has discretion to determine the most effective way to comply with the purposes and principles of sentencing." R.C. 2929.12(A). "In the exercise of this discretion, a court 'shall consider' the non-exclusive list of seriousness and recidivism factors set forth in R.C. 2929.12(B), (C), (D), and (E)." *Sanders*, 2007-Ohio-3207, at ¶15.

{¶36} There is no "mandate" for the sentencing court to engage in any factual finding under these statutes. Rather, "[t]he court is merely to 'consider' the statutory factors." *Foster*, 2006-Ohio-856, at ¶42. Post-*Foster*, this court has adopted the holding of the Ohio Supreme Court in *State v. Adams* (1988), 37 Ohio St.3d 295, that "[a] silent record raises the presumption that a trial court considered the factors contained in R.C. 2929.12." *State v. Masterson*, 11th Dist. No. 2009-P-0064, 2010-Ohio-4939, at ¶12, citing *Adams*, 37 Ohio St.3d 295, at paragraph three of the syllabus. See, also, *State v. Bokisa*, 8th Dist. No. 95293, 2011-Ohio-845, at ¶11, citing *Kalish*, 2008-Ohio-4912, at ¶18, fn. 4 ("[i]n *Kalish*, the Supreme Court also made clear that even after *Foster*, 'where the trial court does not put on the record its consideration of

R.C. 2929.11 and 2929.12, it is presumed that the trial court gave proper consideration to those statutes'").

{¶37} In this case, the record supports the inference that the trial court properly considered the factors in R.C. 2929.12 and adhered to the purposes and principles of sentencing set forth in R.C. 2929.11. The trial court stated that it considered all evidence presented by counsel, oral statements, the PSI, and Bernadine's statement in reaching its decision. The trial court also noted during the hearing that Bernadine sold large quantities of drugs and had been charged with several trafficking charges. The court also stated that Bernadine was making excuses for her conduct, which is relevant to whether she showed remorse. In addition, the record indicates that Bernadine had a serious and ongoing problem with both using and selling drugs, which was a relevant factor for the court to consider under R.C. 2929.12.

{¶38} Moreover, although the trial court did not specifically address the statutory factors on the record, it is presumed that the court considered such factors, especially in light of the evidence in the record. It is Bernadine's obligation to rebut such a presumption. *State v. Nenzoski*, 11th Dist. No. 2007-P-0044, 2008-Ohio-3253, at ¶63 ("[t]he burden is on the defendant to come forward with evidence to rebut the presumption that the trial court considered the sentencing criteria") (citation omitted). Bernadine failed to do so and is unable to show that the court failed to consider the statutory factors.

{¶39} In addition, Bernadine's entence of seven years for Trafficking in Cocaine and seven years for Complicity to Trafficking in Cocaine falls within the prescribed range for a felony of the second degree, which is between two and eight years. R.C. 2929.14(A)(2). Bernadine's sentence for Complicity to Trafficking in Cocaine, a felony

of the third degree, was one year, which fell within the prescribed range of one to five years for a felony of the third degree. R.C. 2929.14(A)(3).

{¶40} Although Bernadine's seven year sentences were close to the maximum, the trial court was not required to make findings or explain its reasoning for imposing such a sentence. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, at paragraph three of the syllabus ("[t]rial courts have full discretion to impose a prison sentence within the statutory range and are [not] required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences"). Therefore, the trial court did not abuse its discretion in imposing the eight year total sentence.

{¶41} Bernadine's third assignment of error is without merit.

{¶42} For the foregoing reasons, the Judgment Entry of the Portage County Court of Common Pleas, sentencing Bernadine to a total term of eight years of imprisonment and ordering her to pay a $10,000 fine and $1,180 in restitution to the Portage County Drug Task Force, is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, P.J.,

THOMAS R. WRIGHT, J.,

concur.