[Cite as *State v. Robinson*, 2015-Ohio-2635.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 13CA18
v.	:	DECISION AND
JESSICA ROBINSON,	:	JUDGMENT ENTRY
Defendant-Appellant.	:	06/25/2015

APPEARANCES:

Robert W. Bright, Middleport, Ohio, for Appellant.

Brigham M. Anderson, Lawrence County Prosecuting Attorney, and W. Mack Anderson, Lawrence County Assistant Prosecuting Attorney, Ironton, Ohio, for Appellee.

Hoover, P.J.

{¶ 1} Defendant-appellant, Jessica Robinson (hereinafter "appellant"), appeals the judgment of conviction and sentence of the Lawrence County Common Pleas Court. After pleading guilty to one count of complicity to the illegal manufacture of drugs, appellant was sentenced to five years in prison. Appellant was also ordered to pay court costs and fines.

{¶ 2} Appellant first claims that the trial court erred when it imposed a mandatory fine. At the sentencing hearing, the trial court had determined that appellant was likely to succeed if a motion to waive the mandatory fine and an affidavit of indigency were timely filed. Indeed, the record reflects that appellant timely filed the motion and affidavit. However, the trial court failed to address the motion and affidavit and the issue of the mandatory fine. Accordingly, we sustain appellant's first assignment of error.

{¶ 3} Next, appellant contends that the trial court erred by imposing a prison sentence that was more than a minimum sentence required by statute. However, because she has failed to establish by clear and convincing evidence that the sentence is contrary to law, this assignment of error is meritless.

{¶ 4} Finally, appellant claims that she received ineffective assistance of counsel at the trial court level. However, because appellant entered a guilty plea, she has waived her right to raise ineffective assistance of counsel on appeal. Moreover, appellant has not demonstrated that her trial counsel provided deficient representation that affected the knowing, intelligent, and voluntary character of her guilty plea. And even if the issue has not been waived, because the record supports neither a finding of deficient performance by counsel nor prejudice, appellant fails to establish that her trial counsel was ineffective.

{¶ 5} Therefore, we affirm the trial court's judgment in part; but we reverse the portion of the sentence imposing the mandatory fine. We remand this matter for further proceedings consistent with this opinion.

I. FACTS

{¶ 6} The following facts are adduced from police incident reports and investigative reports that were filed with the trial court in response to appellant's discovery demand.

{¶ 7} On the evening of July 20, 2013, law enforcement officers were dispatched to apartment 30 of the Lawrence Village Apartments in South Point, Lawrence County, Ohio, on complaints of smoke coming from the front upstairs window of the apartment. Deputy Randy Rogers of the Lawrence County Sheriff's Office responded to the scene. On his initial approach to the apartment, Deputy Rogers confirmed that smoke or vapor was emitting from the front upstairs window. Deputy Rogers rang the doorbell and pounded on the door but received no

response. At that time, neighbors advised Deputy Rogers that appellant lived in the apartment. The neighbors believed that appellant and at least two other people were inside the apartment. Deputy Rogers then rang the doorbell and pounded on the door again, announcing himself as a police officer. Again, Deputy Rogers received no response. Deputy Rogers then tried to force the door open but noted that the steel door had been dead-bolted. One of the neighbors then informed Deputy Rogers that the manager of the apartment complex was on the telephone. The manager, who was in Ironton, Ohio, at the time, wanted to know if Deputy Rogers needed a key.

{¶ 8} Deputy Rogers specified in his incident report that he advised the manager to meet him even though he feared for the safety of the occupants and thought it would take too long to wait for the manager. Deputy Rogers then requested back up and advised the night shift commander of his intentions to force entry into the apartment. Around that time, an individual identified as Cora Harmon walked by carrying a salt shaker. The neighbors at the scene informed Deputy Rogers that Harmon had been in apartment 30 earlier in the day. Deputy Rogers then initiated conversation with Harmon and Harmon advised that she was headed to apartment 30. Harmon told Deputy Rogers that no one else was inside of the apartment. Harmon did admit to being at the apartment earlier, with two other females, but she did not know the source of the smoke coming from the apartment window. Harmon did tell Deputy Rogers, however, that the other girls would not let her go upstairs. The neighbors were also voicing their beliefs that drugs were being manufactured in the apartment.

{¶ 9} As Deputy Rogers spoke with Harmon, Officer Wes Hawthorne of the South Point Police Department, Officer Angela Blevins of the Coal Grove Police Department, and Deputy John Chapman of the Lawrence County Sheriff’s Office arrived on the scene to assist Deputy Rogers. Officer Blevins placed Harmon in a patrol car and watched the front of the apartment as

Deputy Rogers and Officer Hawthorne went to the back entrance of the apartment. Deputy Rogers indicates in his incident report that the back door of the apartment was locked, but that the window next to the back door was completely open. Deputy Rogers also observed Coleman camp fuel on the back porch. At that point, Deputy Rogers indicates in his report that he again feared for the safety of the residents and decided to reach through the window and unlock the back door. Deputy Rogers and Officer Hawthorne then entered the apartment and announced their presence but received no response.

{¶ 10} Once inside the apartment, Deputy Rogers observed a trash can containing vomit near the back door. The ceiling fans, exhaust fan, and the air conditioner in the apartment were all operating. Deputy Rogers also noticed a chemical odor in the residence. Based on these observations, Deputy Rogers requested additional officers for "possible detainment of meth hazards."

{¶ 11} No individuals were located on the first floor of the residence. However, in the upstairs master bedroom, where the smoke was billowing from the window, two women including appellant were found lying on the floor. In a second upstairs bedroom, a man was located lying on the floor with a pillow over his face. All three subjects appeared unresponsive at first; therefore, emergency medical services were dispatched to the scene. However, at about the same time that medical personnel arrived, the subjects awoke and spoke briefly with Deputy Rogers. Deputy Rogers's report also indicates that the smoke detector on the second floor had been ripped down and was in pieces and that a broken fan was located at the top of the stairs. The source of the smoke, however, was not determined.

{¶ 12} After removing the three individuals from the apartment, law enforcement officers wearing protective gear conducted a search of the apartment. At the same time, Investigator

David Marcum of the Lawrence County Prosecutor's Office questioned the individuals that were found inside the apartment as well as Cora Harmon. Neighbors at the scene also advised the officers that an individual named Elvis Adkins had been at the residence just prior to Deputy Rogers's arrival, but his whereabouts were unknown.

{¶ 13} According to Investigator Marcum's supplemental report, he arrived at the apartment complex at approximately midnight on July 21, 2013. Upon his arrival, he spoke with Deputy Rogers who informed him of the situation. Investigator Marcum's report also identified the individuals located in the apartment as appellant, Ashley Kelley, and Patrick Kelley.

{¶ 14} Investigator Marcum's report also contains summaries of his interviews with appellant, Ashley Kelley, Patrick Kelley, Cora Harmon, and Elvis Adkins[1]. The interviews occurred on July 21 after Investigator Marcum informed each individual of their Miranda rights.[2] According to the report, Harmon indicated in her interview that appellant resided in apartment 30 and that Harmon had been to the apartment on July 20 to visit Ashley Kelley. At first, Harmon denied any knowledge of methamphetamine being produced in the apartment. Later, Harmon did say that Patrick Kelley had gone to the upstairs bathroom twice, and that appellant had told her that the upstairs bathroom was out-of-order. Harmon also indicated that appellant had been spraying an air freshener in the apartment because of a strong odor. In a follow-up interview, Harmon admitted to providing Patrick Kelley with pseudoephedrine tablets and lithium batteries on the night of the incident with the understanding that Kelley would use the items to manufacture methamphetamine.

[1] Adkins was eventually located by an Ohio State Highway Patrolman walking along U.S. Route 52 in South Point, Ohio.

[2] Signed waiver of Miranda rights forms for each individual was provided in discovery and is a part of the appellate record.

{¶ 15} Investigator Marcum interviewed Ashley Kelley who stated that she arrived at the apartment around 6:30 p.m. or 7:00 p.m. with Harmon. Ashley Kelley indicated that she had gone to the apartment to get money from Patrick Kelley, her husband. According to Ashley Kelley, Harmon accompanied her to visit Elvis Adkins, who was also present at the apartment. Ashley Kelley claimed that Adkins regularly produces methamphetamine. Ashley Kelly also claimed that Adkins and her husband were producing methamphetamine in the upstairs bathroom when she arrived and that the two had been producing methamphetamine together for several months. Ashley Kelley further indicated that she had used methamphetamine that night and that she had provided her husband with Coleman fuel that same night. Harmon had provided Patrick Kelley with lithium batteries and pseudoephedrine tablets. Ashley Kelley also claimed that her husband had been making methamphetamine in a Gatorade bottle when the police arrived and that Adkins had left the apartment just prior to law enforcement's arrival.

{¶ 16} Investigator Marcum's report indicates that appellant, during her interview, confirmed that she resided in apartment 30. According to appellant, Ashley Kelley, Patrick Kelley, Harmon, and Adkins had been at her residence since about 4:00 p.m. on July 20. Appellant also stated that she had purchased pseudoephedrine tablets on July 19. Appellant consumed two of the tablets and provided the remaining tablets to Patrick Kelley to produce methamphetamine. According to Investigator Marcum's report, appellant witnessed Patrick Kelley with a "Gatorade bottle with a bunch of stuff in it" and "some type of liquid with white crystals". Patrick Kelley had been carrying the bottle around just prior to law enforcement's arrival. Appellant also stated that Patrick Kelley had manufactured methamphetamine at her apartment twice in the previous two months, and that Adkins had manufactured methamphetamine there on at least one occasion.

{¶ 17} Patrick Kelley, as detailed in Investigator Marcum's supplemental report, also admitted to manufacturing methamphetamine at appellant's apartment on two occasions. He also admitted to using a Gatorade bottle to manufacture methamphetamine on the night of the incident. The Gatorade bottle was never located in the residence, but Investigator Marcum theorizes in his report that Adkins left the residence with the bottle when law enforcement first arrived.

{¶ 18} Adkins told Investigator Marcum, in his interview, that he was homeless and that he stayed with appellant on occasion at her apartment. Adkins denied being a methamphetamine cook, but admitted to using methamphetamine with Patrick Kelley at appellant's apartment on the night of the incident. Adkins also admitted to purchasing drain cleaner and coffee filters for others to use in the production of methamphetamine. Adkins stated that he left the apartment with Harmon approximately 45 minutes before officers arrived.

{¶ 19} Investigator Perry Adkins of the Lawrence County Prosecutor's Office also filed a report regarding this case. Investigator Adkins was called to the scene because he is certified to process and neutralize clandestine methamphetamine labs. Investigator Adkins and another law enforcement officer who was certified to process and neutralize methamphetamine labs suited in protective gear and searched the apartment. According to Investigator Adkins's report, located in the apartment was an active HCL gas generator used to transform liquid methamphetamine into solid methamphetamine. The HCL gas generator contained some type of acid and salt and was emitting HCL gas. The HCL gas generator was neutralized. Other materials used in the production or use of methamphetamine that were located in the apartment included: empty blister packs of pseudoephedrine tablets; liquid drain cleaner; Coleman camp fuel; a half-used cold pack; cut-open lithium batteries; a plastic bottle containing a salt-like substance; coffee

filters; hypodermic syringes; and a pipe cutter. Investigator Adkins noted that in his opinion, methamphetamine was being produced in the apartment.

{¶ 20} Appellant, Ashley Kelley, Patrick Kelley, and Harmon were charged the night of the incident, and eventually appellant was indicted on one count of complicity to the illegal manufacture of drugs, a second-degree felony in violation of "[R.C.] 2923.03/2925.04(A)(3)(a)"[3]. At her arraignment, appellant entered a plea of not guilty. After an exchange of discovery and pre-trial negotiations, appellant subsequently changed her not guilty plea to a guilty plea.

{¶ 21} The trial court found appellant guilty; and a sentencing hearing was held immediately following the plea hearing. During the sentencing hearing, appellant's trial counsel informed the trial court that appellant intended to "file the necessary documents to remit the uh mandatory fine." The trial judge found this strategy prudent and advised counsel to file the necessary documents "in the next uh two or three days, if not today." The trial judge further explained to appellant that the law provides for the waiver of a mandatory fine if the defendant is indigent and that upon the filing of an updated financial affidavit, waiver of the mandatory fine "is relatively automatic[,] * * * the motion gets filed, I look at the affidavit, I sign the entry and the mandatory fines uh are then released against you." The trial judge then went on to sentence appellant to five years in prison, ordered her to pay court costs and $7,500 in fines, and ordered that her driver's license be suspended for three years.

{¶ 22} Thereafter, appellant filed her motion for remittance of fines and indigency affidavit on the afternoon of October 15, 2013. On the morning of October 16, 2013, the trial court filed its sentencing entry. The entry included the order that appellant pay $7,500 in fines,

[3] While the indictment alleges that appellant aided and abetted another in the illegal manufacture of drugs in violation of R.C. "2923.03/2925.04(A)(3)(a)", we note that subsection (A)(3)(a) does not actually exist under the statute.

and made no mention of the motion for remittance and indigency affidavit. Appellant then initiated this appeal.[4]

II. ASSIGNMENTS OF ERROR

{¶ 23} Appellant assigns the following errors for our review:

First Assignment of Error:

> THE JUDGMENT OF THE TRIAL COURT SHOULD BE REVERSED BECAUSE THE TRIAL COURT ERRED IN IMPOSING A MANDATORY FINE UPON THE APPELLANT.

Second Assignment of Error:

> THE JUDGMENT OF THE TRIAL COURT SHOULD BE REVERSED BECAUSE THE TRIAL COURT ERRED IN SENTENCING THE APPELLANT TO MORE THAN A MINIMUM SENTENCE.

Third Assignment of Error:

> THE JUDGMENT OF THE TRIAL COURT SHOULD BE REVERSED BECAUSE THE APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE TRIAL COURT LEVEL.

III. LAW AND ANALYSIS

A. Assignment of Error I

{¶ 24} In her first assignment of error, appellant contends that the trial court erred by imposing the mandatory fine despite her filing of a motion for remittance of fines and affidavit of indigency.

{¶ 25} " 'A trial court has broad discretion when imposing a financial sanction upon an offender and a reviewing court should not interfere with its decision unless the trial court abused that discretion by failing to consider the statutory sentencing factors.' " *State v. Mock*, 187 Ohio

[4] Appellant's initial appellate counsel filed both a motion to withdraw as counsel and an *Anders* brief. We disagreed with appellate counsel's assessment that the appeal was wholly frivolous, and instead identified several arguable issues for appeal. Accordingly, we granted appellate counsel's motion to withdraw, but appointed present counsel to prepare the appellate brief currently before the Court.

App.3d 599, 2010-Ohio-2747, 933 N.E.2d 270, ¶ 56 (7th Dist.), quoting *State v. Weyand*, 7th Dist. Columbiana No. 07-CO-40, 2008-Ohio-6360, ¶ 7. An abuse of discretion implies that the trial court's attitude is arbitrary, unreasonable, or unconscionable. *State v. Darmond*, 135 Ohio St.3d 343, 2013–Ohio–966, 986 N.E.2d 971, ¶ 34.

{¶ 26} Pursuant to R.C. 2929.18(B)(1), a sentencing court is required to impose a mandatory fine for a first, second, or third degree felony violation of any provision of Chapter 2925, 3719, or 4729 of the Revised Code. Here, appellant pled guilty to one second-degree felony charge of complicity to the illegal manufacture of drugs in violation of R.C. 2923.03/2925.04, thereby subjecting her to the mandatory fine set forth in R.C. 2929.18(B)(1).

{¶ 27} R.C. 2929.18(B)(1), however, also prohibits a trial court from imposing a mandatory fine when the court determines that the defendant is indigent and unable to pay the fine. Specifically, that portion of the statute states:

> 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.

{¶ 28} "Before imposing a financial sanction under R.C. 2929.18, the court must consider the offender's present and future ability to pay the amount of the sanction or fine." *Mock*, 187 Ohio App.3d 599, 2010-Ohio-2747, 933 N.E.2d 270, at ¶ 59, citing R.C. 2929.19(B)(6). Moreover, "Ohio law does not prohibit a court from imposing a fine on an indigent defendant", and the filing of an affidavit of indigency by a defendant does not automatically entitle a defendant to a waiver of a mandatory fine. *Id*. at ¶ 60. Thus, the

imposition of a mandatory fine under R.C. 2929.18(B)(1) is required unless (1) the offender's affidavit is filed prior to sentencing and (2) the trial court finds that the offender is an indigent person *and* is unable to pay the mandatory fines. *State v. Gipson*, 80 Ohio St.3d 626, 634, 687 N.E.2d 750 (1998).

{¶ 29} Here, appellant's motion for remittance of fines and indigency affidavit was filed after the sentencing hearing, but prior to the sentencing entry being filed. The Ohio Supreme Court has held that an indigency affidavit filed pursuant to R.C. 2929.18(B)(1) is timely, if the affidavit is indorsed, i.e., time-stamped by the clerk of court prior to the filing of the court's sentencing entry. *Gipson* at syllabus. Thus, appellant's indigency affidavit was timely filed. Nonetheless, after reviewing the record it appears that the trial court never considered the motion and indigency affidavit; i.e. the trial court never determined whether appellant was indigent and unable to pay the fine. This assumption is supported by the trial judge's comments at the sentencing hearing, which indicated that he was likely to waive imposition of the mandatory fine upon the timely filing of an indigency affidavit.

{¶ 30} Consequently, the record establishes that appellant timely filed a motion to waive imposition of the mandatory fine along with the required indigency affidavit, but that the trial court abused its discretion by not ruling on the motion. In fact, it appeared that the trial court determined that appellant was still indigent and likely unable to pay a mandatory fine at the time of sentencing. Therefore, the portion of the trial court's sentence imposing the mandatory fine must be reversed and remanded so that the trial court can properly rule on the motion and determine whether appellant is indigent and unable to pay the mandatory fine. Appellant's first assignment of error is sustained.

B. Assignment of Error II

{¶ 31} In support of her second assignment of error, appellant argues that the trial court is required to make findings supporting a non-minimum sentence at the sentencing hearing, citing *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, 793 N.E.2d 473.

{¶ 32} As an initial matter, we must address the State's contention that we are barred from reviewing this assignment of error. The State contends that the five-year prison sentence was imposed pursuant to a negotiated plea agreement that also included an agreed sentence, and thus is not subject to appellate review. *See* R.C. 2953.08(D)(1) ("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."); *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, 829 N.E.2d 690, ¶ 25 ("A sentence imposed upon a defendant is not subject to review under [R.C. 2953.08(D)] 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."); *State v. Davis*, 4th Dist. Scioto Nos. 13CA3589, 13CA3593, 2014-Ohio-5371, ¶ 25 (concluding that an agreed upon sentence is not reviewable on appeal pursuant to R.C. 2953.08(D)). Appellant, on the other hand, contends that while the guilty plea was negotiated, no agreement was ever reached by the parties regarding the proper sentence.

{¶ 33} After reviewing the record, we conclude that it is unclear whether there was an agreed sentence in this case. At the sentencing hearing, defense counsel stated: " * * * Uh that is correct as the plea. Uh, five years is negotiated. Um we will file the necessary documents to remit the uh mandatory fine." However, when given the opportunity to speak at sentencing, the appellant stated:

> * * * I wanted to go to trial but of course I mean my co-defendant's trial didn't go very good but I just don't think it's fair that I should get five years in prison when I've never done anything. I've never been in trouble a day in my life and if you were to give me every ingredient to manufacture, I don't even know how. I just don't see how it's fair that I should have to give five years for something that I don't even know how to do and I've never been in trouble a day in my life. I just, I think that [I] should get that one chance to prove myself.

Given the conflicting remarks between appellant and her trial counsel, we believe it's only fair to assume that the sentence was not agreed upon, and thus, we will address appellant's second assignment of error. *See State v. Pulliam*, 4th Dist. Scioto No. 14CA3609, 2015-Ohio-759, ¶¶ 10-12 (distinguishing between negotiated plea deals which include an agreed sentence and negotiated plea deals which do not include an agreed sentence for determining whether sentencing assignment of error is reviewable); *see also DeHart v. Aetna Life Ins. Co.*, 69 Ohio St.2d 189, 192, 431 N.E.2d 644 (1982) ("[I]t is a fundamental tenet of judicial review in Ohio that courts should decide cases on the merits.").

{¶ 34} Moving to the merits of appellant's second assignment of error, we are surprised at appellant's reliance on *Comer*, for the proposition that a trial court cannot impose a greater than the minimum sentence on a first time offender unless it makes certain findings and gives reasons for those findings. The Ohio Supreme Court abrogated *Comer* nine years ago in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. Specifically, *Foster* declared as unconstitutional portions of Ohio's felony sentencing statutes that required judges to make certain findings before imposing maximum, consecutive, or more than the minimum sentences. *Foster* at syllabus. As a result, the Court severed those sections from Ohio's felony sentencing

scheme and held that the trial court has full discretion to impose a prison sentence within the statutory range and is no longer required to give findings for imposing non-minimum, consecutive, or maximum sentences. *Id*. at paragraph seven of the syllabus.

{¶ 35} Portions of the *Foster* decision was abrogated when the United States Supreme Court ruled that it was constitutionally permissible to require judicial fact-finding as a prerequisite for the imposition of consecutive sentences. *See Oregon v. Ice*, 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517 (2009). Subsequently, the Ohio Supreme Court acknowledged that the General Assembly could legislate in the area pertaining to the imposition of consecutive sentences. *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768, ¶ 36. Thereafter, the General Assembly enacted 2011 Am.Sub.H.B. No. 86 ("H.B. 86"). This new legislation, effective September 30, 2011, revived the judicial fact-finding requirement for consecutive sentences, but did not revive the requirement for maximum and more than the minimum sentences. *State v. White*, 2013-Ohio-4225, 997 N.E.2d 629, ¶ 7 (1st Dist.). In fact, the provisions requiring findings for maximum and more than minimum sentences that the General Assembly did not intend to revive were explicitly repealed by the enactment of H.B. 86. *Id*. at ¶ 8. In the wake of *Foster*, and the General Assembly's enactment of H.B. 86, a trial court need not make findings or give reasons for imposing more than the minimum or maximum sentences.

{¶ 36} We review felony sentences under the standard set forth in R.C. 2953.08(G). *State v. Brewer*, 2014-Ohio-1903, 11 N.E.3d 317, ¶ 33 (4th Dist.). R.C. 2953.08(G)(2) specifies that an appellate court may increase, reduce, modify, or vacate and remand a challenged felony sentence if the court clearly and convincingly finds either that "the record does not support the sentencing court's findings" under the specified statutory provisions or "the sentence is otherwise contrary to law."

{¶ 37} Applying this standard of review, appellant's five year sentence for complicity to the illegal manufacture of drugs is not clearly and convincingly contrary to law. "[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." *Brewer* at ¶ 38. "The sentence must also comply with any specific statutory requirements that apply, e.g. a mandatory term for a firearm specification, certain driver's license suspensions, etc." *Id.*

{¶ 38} Here, the trial court specified that it considered the principles and purposes of sentencing under R.C. 2929.11, balanced the seriousness and recidivism factors under R.C. 2929.12, and properly applied post-release control. In addition, the trial court imposed a five year prison sentence for appellant's second-degree felony conviction for complicity to the illegal manufacture of drugs, which was within the statutory range of three to eight years. *See* R.C. 2929.14(A)(2) ("For a felony of the second degree, the prison term shall be two, three, four, five, six, seven, or eight years."); R.C. 2925.04(C)(3)(a) ("If the drug involved in the violation of division (A) of this section is methamphetamine * * * the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree that is not less than three years."). Moreover, as discussed above, the trial court was not required to make findings or give reasons for imposing more than the minimum sentence. *See also State v. Lister*, 4th Dist. Pickaway No. 13CA15, 2014-Ohio-1405, ¶ 10 ("[M]aximum sentences do not require specific findings"). Therefore, appellant's five year sentence is not clearly and convincingly contrary to law.

{¶ 39} Because appellant's challenge to her felony sentence is meritless, we overrule her second assignment of error.

C. Assignment of Error III

{¶ 40} In her third assignment of error, appellant contends that she was denied her right to effective counsel because her counsel failed to file pretrial motions to suppress evidence and to preserve and test the evidence.

{¶ 41} Criminal defendants have a right to counsel, including a right to the effective assistance from counsel. *McMann v. Richardson,* 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970), fn. 14; *State v. Stout,* 4th Dist. Gallia No. 07CA5, 2008–Ohio–1366, ¶ 21. To establish constitutionally ineffective assistance of counsel, a criminal defendant must show (1) that his counsel's performance was deficient and (2) that the deficient performance prejudiced the defense and deprived him of a fair trial. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Issa,* 93 Ohio St.3d 49, 67, 752 N.E .2d 904 (2001); *State v. Goff,* 82 Ohio St.3d 123, 139, 694 N.E.2d 916 (1998). "In order to show deficient performance, the defendant must prove that counsel's performance fell below an objective level of reasonable representation. To show prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *State v. Conway,* 109 Ohio St.3d 412, 2006–Ohio–2815, 848 N.E.2d 810, ¶ 95. "Failure to establish either element is fatal to the claim." *State v. Jones,* 4th Dist. Scioto No. 06CA3116, 2008–Ohio–968, ¶ 14.

{¶ 42} "When considering whether trial counsel's representation amounts to deficient performance, 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " *State v. Walters,* 4th Dist. Washington Nos. 13CA33, 13CA36, 2014–Ohio–4966, ¶ 23, quoting *Strickland* at 689. "Thus, 'the defendant must overcome the presumption that, under the circumstances, the challenged action might be

considered sound trial strategy.' " *Id.*, quoting *Strickland* at 689. " 'A properly licensed attorney is presumed to execute his duties in an ethical and competent manner.' " *Id*., quoting *State v. Taylor*, 4th Dist. Washington No. 07CA1, 2008–Ohio–482, ¶ 10. "Therefore, a defendant bears the burden to show ineffectiveness by demonstrating that counsel's errors were so serious that he or she failed to function as the counsel guaranteed by the Sixth Amendment." *Id*.

{¶ 43} Appellant argues that her counsel was ineffective for failing to file a suppression motion. She contends that law enforcement illegally entered her apartment and should have obtained a search warrant prior to entering and searching the residence. As a result, she claims her counsel should have filed a motion to suppress the items seized from the search so that she could have had a better chance of defending herself at trial, or alternatively, gained greater leverage in the plea negotiation process.

{¶ 44} Appellant also claims that counsel was ineffective for failing to file a motion to have the evidence tested or to preserve evidence. She contends that had a test of the evidence been negative for methamphetamine, she would have had a higher probability of successfully defending against the indictment.

{¶ 45} " '[A] guilty plea waives all appealable errors except for a challenge as to whether the defendant made a knowing, intelligent and voluntary acceptance of the plea.' " *State v. Neu*, 4th Dist. Adams No. 12CA942, 2013-Ohio-616, ¶ 13, quoting *State v. Patterson*, 5th Dist. Muskingum No. CT2012-0029, 2012-Ohio-5600, ¶ 30. Thus, when a defendant has entered a guilty plea,

> "the defendant must show that there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. The mere fact that, if not for the alleged ineffective

> assistance of counsel, the defendant would not have entered a guilty plea is not sufficient to establish the necessary connection between ineffective assistance and the plea. Ineffective assistance will only be found to have affected the validity of plea when it precluded defendant from entering the plea knowingly and voluntarily. The relevant inquiry is not whether defendant ultimately would have prevailed at trial, but whether defendant would have pled guilty if properly advised by counsel."

Id. at ¶ 16, quoting 25 Ohio Jurisprudence 3d, Criminal Law: Procedure, Section 78.

{¶ 46} In this case, appellant fails to argue that her counsel engaged in any conduct that made her plea less than knowing, intelligent, and voluntary. The deficiency alleged by appellant – that her trial counsel failed to file a motion to test the evidence or to preserve the evidence – is completely unrelated to her guilty plea. Plus, a review of the colloquy at appellant's change-of-plea hearing coupled with the fact that appellant and co-defendants made incriminating statements to law enforcement demonstrates that appellant entered her plea knowingly, voluntarily, and intelligently. Accordingly, appellant's claim that counsel provided deficient performance in failing to file a motion to test or preserve evidence is clearly without merit.

{¶ 47} Furthermore, we note that "[b]y pleading guilty, [appellant] waived any ineffective assistance of counsel arguments that are based on the failure to pursue suppression motions." *Neu* at ¶ 22, citing *State v. Taylor*, 8th Dist. Cuyahoga No. 97798, 2012-Ohio-5065, ¶ 11, and *State v. Huddleson*, 2d Dist. Montgomery No. 20653, 2005-Ohio-4029, ¶ 9; *see also State v. Jackson*, 7th Dist. Mahoning No. 13MA121, 2014-Ohio-2249, ¶ 17 ("[A] defendant who pleads guilty generally waives the right to make allegations of ineffective assistance of counsel * * * for failure to move for suppression unless he alleges that the error caused the plea to be less

than knowing, voluntary, and intelligent.") Here, appellant does not claim that her counsel's failure to file a motion to suppress caused her plea to be less than knowing, intelligent, and voluntary. Thus, this failure cannot form the basis of her ineffective assistance claim.

{¶ 48} Even if we were to assume, *arguendo*, that appellant has not waived the issue of ineffective assistance by virtue of her guilty plea; we still find that she cannot prevail on appeal. In other words, even considering the merits of appellant's ineffective assistance argument, we find that the record does not support a finding of deficient performance by counsel, or prejudice resulting from counsel's performance.

{¶ 49} The failure to file a motion to suppress does not constitute per se ineffective assistance of counsel. *State v. Waters*, 4th Dist. Vinton App. No. 13CA693, 2014–Ohio–3109, ¶ 13; *State v. James*, 4th Dist. Ross No. 13CA3370, 2013–Ohio–5475, ¶ 19; *State v. Walters*, 4th Dist. Adams No. 12CA949, 2013–Ohio–772, ¶ 20. "Instead, the failure to file a motion to suppress amounts to ineffective assistance of counsel only when the record demonstrates that the motion would have been successful if made." *Walters* at ¶ 13, citing *State v. Resendiz*, 12th Dist. Preble No. CA2009, 04–012, 2009–Ohio–6177, ¶ 29. We conclude there was not a reasonable probability that the motion would have been successful if made.

{¶ 50} Here, exigent circumstances appear to have justified the warrantless entry into the apartment. R.C. 2933.33 states:

> (A) If a law enforcement officer has probable cause to believe that particular premises are used for the illegal manufacture of methamphetamine, for the purpose of conducting a search of the premises without a warrant, the risk of explosion or fire from the illegal manufacture of methamphetamine causing injury to the public constitutes exigent circumstances and reasonable grounds to believe

that there is an immediate need to protect the lives, or property, of the officer and other individuals in the vicinity of the illegal manufacture.

{¶ 51} Several courts have applied this statute to permit officers to enter a residence without a warrant where they possessed probable cause to believe a methamphetamine lab was located inside or near the residence. *See State v. Schorr*, 5th Dist. Fairfield No. 13-CA-45, 2014-Ohio-2992 (exigent circumstances and probable cause existed to enter home where active methamphetamine lab was located underneath the residence); *State v. Campbell*, 11th Dist. Ashtabula No. 2013-A-0035, 2013-Ohio-5823 (exigent circumstances and probable cause existed where officers serving an arrest warrant on a suspected methamphetamine producer recognized a strong "meth odor" coming from inside the house); *State v. Armbruster*, 9th Dist. Summit No. 26645, 2013-Ohio-3119 (exigent circumstance and probable cause existed where officer received tip of active methamphetamine lab in hotel room and officer smelled strong chemical odor associated with methamphetamine production coming from the room); *State v. Parson*, 2nd Dist. Montgomery No. 23398, 2010-Ohio-989 (exigent circumstances and probable cause existed where officers received tip of active methamphetamine lab at apartment, smelled strong chemical odor, and observed methamphetamine making materials in plain view); *State v. Timofeev*, 9th Dist. Summit No. 24222, 2009-Ohio-3007 (exigent circumstances and probable cause existed where police received tip from informant of active methamphetamine lab in basement of residence, test of white substance in purse of occupant leaving residence came back positive for methamphetamine, and after knocking on residence door, suspect peered out and then darted back inside residence); *State v. White*, 9th Dist. Summit No. 23955, 23959, 2008-Ohio-2432 (police trained in methamphetamine labs, after conducting "knock and announce," detected strong odor, probable cause and exigent circumstances found to exist).

{¶ 52} In this case, law enforcement was dispatched to the apartment after receiving information that smoke was coming from an upstairs window of the apartment. Deputy Rogers arrived first and observed smoke or vapor coming from the window. As his report indicates, he knocked and announced his presence but received no response, learned from neighbors that people were believed to be present inside the apartment, learned from neighbors that drugs were suspected of being manufactured in the apartment, spoke with Harmon who described suspicious activity within the apartment, and observed Coleman camp fuel on the back porch of the apartment. There are also other police reports indicating that neighbors complained of a strange chemical odor coming from the apartment. Given these facts, the officers possessed probable cause to believe that there was a methamphetamine lab inside the apartment. Furthermore, given the smoke, the apartment's location within a populated apartment complex, the reports of suspected drug production, and the reports of individuals present inside the apartment, the risk of explosion and serious injury was obvious.

{¶ 53} Because probable cause existed to suspect the presence of an active methamphetamine lab, and because exigent circumstances justified a warrantless intrusion of the apartment, appellant's counsel was not ineffective for failing to move to suppress the evidence obtained from the search of the apartment. Put another way, counsel could reasonably have decided that filing a motion to suppress would have been a futile act.

{¶ 54} Appellant also claims that counsel was ineffective for failing to file a motion to have the evidence tested or to preserve evidence. She contends that had a test of the evidence been negative for methamphetamine, she would have had a higher probability of successfully defending against the indictment. However, the record shows that law enforcement officials never located the source of the smoke. It was theorized in the police reports that Elvis Adkins

may have left with the reaction vessel, i.e. the Gatorade bottle, when law enforcement first arrived on scene. And, the HCL gas-generator, according to Investigator Adkins's report, was immediately neutralized using Amphomag and the hazardous waste from the Amphomag solution was placed in a refuse container at the Lawrence County Courthouse. Thus, counsel could have reasonably determined that there was nothing useful to test from the collected evidence.

{¶ 55} Appellant has failed to establish deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation. The record shows that her counsel's decision not to file a motion to test the evidence or a motion to suppress evidence seized based on the warrantless entry was not ineffective where counsel could have reasonably decided that the filing of those motions would have been futile.

{¶ 56} Moreover, even if we assume her counsel made errors, appellant has failed to show any prejudice, i.e. a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. The record shows that appellant and her co-defendants all admitted to being involved in methamphetamine production after being Mirandized by law enforcement. Appellant told Investigator Marcum that she gave pseudoephedrine tablets to Patrick Kelley to produce methamphetamine and she witnessed Kelley on the day of the incident with a Gatorade bottle with some type of liquid with white crystals. Appellant also admitted to permitting methamphetamine production at her apartment on prior occasions. Despite this evidence, appellant's counsel was able to obtain a plea offer that resulted in a sentence of five years—less than the eight-year maximum prison term she could have received had she been convicted at trial. Appellant has failed to provide any evidence that there was a reasonable

probability that she would have not been found guilty or, having been found guilty, that the trial court would have sentenced her to a lesser prison term.

{¶ 57} Appellant has not established that her counsel was constitutionally ineffective. Therefore, we overrule her third assignment of error.

IV. CONCLUSION

{¶ 58} Appellant's assignments of error two and three are overruled. However, for the reasons stated above, appellant's first assignment of error is sustained. Therefore, we affirm the trial court's judgment in part; but reverse the portion of the sentence imposing the mandatory fine and remand this matter for further proceedings consistent with this opinion.

JUDGMENT AFFIRMED IN PART,
REVERSED IN PART,
AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED IN PART AND REVERSED IN PART and that the CAUSE IS REMANDED for proceedings consistent with this opinion. Appellant and Appellee shall split the 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 Lawrence County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of the proceedings in that court. If a stay is continued by this entry, it will terminate at the earliest of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to the expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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

For the Court

By:_____
Marie Hoover, Presiding 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.