

[Cite as *State v. Hicks*, 2010-Ohio-5521.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO :
 Plaintiff-Appellee : C.A. CASE NO. 23757
 vs. : T.C. CASE NO. 07CR3486/3
 TORANCE HICKS : (Criminal Appeal from
 Defendant-Appellant : Common Pleas Court)

.

O P I N I O N

Rendered on the 12th day of November, 2010.

.

Mathias H. Heck, Jr., Pros. Attorney; Kirsten A. Brandt, Asst.
 Pros. Attorney, Atty. Reg. No.0070162, P.O. Box 972, Dayton, OH
 45422
 Attorneys for Plaintiff-Appellee

Thomas W. Kidd, Jr., Atty. Reg. No.0066359, P.O. Box 231,
 Harveysburg, OH 45032
 Attorney for Defendant-Appellant

.

GRADY, J.:

{¶ 1} Defendant, Torance Hicks, appeals from his conviction and sentence for possession of crack cocaine.

{¶ 2} The facts in this case were set forth in our previous decision in *State v. Hicks*, Montgomery App.No. 22652,

2008-Ohio-6839, at ¶3-5:

{¶3} "At approximately 9 p.m. on August 22, 2007, Dayton Police officers were executing a search warrant at 802 Harvard Boulevard in the City of Dayton. During the search, Detective Myers stepped out onto the front porch of the residence and encountered Hicks coming towards the front door. Upon seeing Detective Myers clothed in police gear, Hicks looked surprised. Myers asked if he could help Hicks, and Hicks responded that he was there to see 'Black,' or Rondric Bogan, the individual named in the search warrant. Prior to Myers leaving the house, he was aware that officers had already recovered 'a good quantity' of crack cocaine and weapons, and that the search was still ongoing.

{¶4} "Detective Myers advised Hicks that he was going to pat him down for Myers's safety and Hicks complied. During the pat-down, Myers felt Hicks's 'hands clench up and * * * his forearms tightening up.' Because Myers believed Hicks was about to either fight or flee, he told Hicks that he was not under arrest, but that he was going to be handcuffed for Myers's safety.

{¶5} "When Detective Myers resumed the pat-down, he felt 'a rocky hard substance that [he] immediately recognized to be crack cocaine' in Hicks's front pants-pocket. Myers removed the baggie containing the rocks from Hicks's pocket, and upon field testing, determined that it was in fact crack. Following the arrest of Hicks,

Detective Myers searched Hicks's vehicle prior to it being towed and found more crack cocaine in the car."

{¶ 6} Defendant was indicted on one count of possession of crack cocaine in an amount greater than twenty-five grams but less than one hundred grams, R.C. 2925.11(A), a felony of the first degree. Defendant filed a motion to suppress the physical evidence and his statements to police. The trial court overruled Defendant's motion to suppress his statements, but granted the motion as to the physical evidence. The State appealed and we reversed the trial court's decision suppressing the physical evidence. *Hicks, supra*.

{¶ 7} Following a trial to the court, Defendant was found guilty as charged. The trial court sentenced Defendant to a mandatory four year prison term and imposed a mandatory ten thousand dollar fine.

{¶ 8} Defendant timely appealed to this court from his conviction and sentence.

FIRST ASSIGNMENT OF ERROR

{¶ 9} "MR. HICKS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE UNITED STATES AND OHIO CONSTITUTIONS."

{¶ 10} In order to demonstrate ineffective assistance of trial counsel, Defendant must demonstrate that counsel's performance was deficient and fell below an objective standard of reasonable

representation, and that Defendant was prejudiced by counsel's performance; that there is a reasonable probability that but for counsel's unprofessional errors, the result of Defendant's trial or proceeding would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136.

{¶ 11} Defendant argues that he was deprived of the effective assistance of counsel when, before he was sentenced, his trial counsel failed to file an affidavit of indigency alleging that Defendant was unable to pay the mandatory fine in R.C. 2929.18 applicable to his felony drug offense. According to Defendant, as a result of his counsel's deficient performance, he was deprived of the opportunity to avoid the ten thousand dollar fine the trial court imposed upon him.

{¶ 12} R.C. 2929.18(B)(1) establishes a procedure for avoiding imposition of mandatory fines applicable to certain felony drug offenses. That section provides:

{¶ 13} "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."

{¶ 14} Defendant argues that his trial counsel's deficient performance in failing to file an affidavit of indigency before sentencing resulted in a ten thousand dollar fine being imposed upon him that could have been avoided but for counsel's deficient performance. Defendant relies upon *State v. Cochran* (June 5, 1998), Clark App. No. 97-CA-0050, but that case is factually distinguishable from the case now before us on the issue of Defendant's ability to pay the mandatory fine.

{¶ 15} The failure to file an affidavit of indigency prior to sentencing may constitute ineffective assistance of counsel if the record shows a reasonable probability that the trial court would have found Defendant indigent and relieved him of the obligation to pay the mandatory fine had the affidavit been filed.

State v. Sheffield, Montgomery App. No. 20029, 2004-Ohio-3099 (citations omitted); *State v. Howard*, Montgomery App. No. 21678, 2007-Ohio-3582.

{¶ 16} Information regarding Defendant's financial status is typically outside the record on merit appeal. Then, the more appropriate vehicle for pursuing that issue is post-conviction relief proceedings filed pursuant to R.C. 2953.21. *Cochran, supra*.

In this case there is insufficient evidence in the record before us to demonstrate a reasonable probability that the trial court would have found Defendant indigent and unable to pay the fine

had defense counsel filed an affidavit of indigency prior to sentencing.

{¶ 17} Unlike *Cochran*, Defendant was not represented at trial by a public defender or other court appointed counsel due to his indigency. Rather, Defendant retained counsel to represent him at trial, and was represented by retained counsel during the State's previous appeal to this court in this case. Defendant was twenty-nine years old at the time of sentencing, and there is nothing in the record to suggest that Defendant is not capable of being gainfully employed following his release from prison. Defendant has no prior felony convictions. Less than two months before sentencing, Defendant was able to post a twenty-five thousand dollar secured bond in order to obtain his release from jail pending trial.

{¶ 18} On these facts and circumstances, we cannot conclude that a reasonable probability exists that the trial court would have found Defendant indigent had his trial counsel filed an affidavit of indigency prior to sentencing. Absent that, Defendant cannot, on this record, demonstrate the prejudice *Strickland* requires. *Sheffield; Howard*. Ineffective assistance of counsel therefore has not been shown.

{¶ 19} The assignment of error is overruled. The judgment of the trial court will be affirmed.

FROELICH, J. And WAITE, J., concur.

(Hon. Cheryl L. Waite, Seventh District Court of Appeals, sitting
by assignment of the Chief Justice of the Supreme Court of Ohio.)

Copies mailed to:

Kirsten A. Brandt, Esq.
Thomas W. Kidd, Jr., Esq.
Hon. Frances E. McGee