

**COURT OF APPEALS OF OHIO**

**EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA**

STATE OF OHIO, :  
 :  
 Plaintiff-Appellee, :  
 : No. 113130  
 v. :  
 :  
 JOHN KARR, :  
 :  
 Defendant-Appellant. :

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**JOURNAL ENTRY AND OPINION**

**JUDGMENT: AFFIRMED AND REMANDED**  
**RELEASED AND JOURNALIZED: October 10, 2024**

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Criminal Appeal from the Cuyahoga County Court of Common Pleas  
Case No. CR-22-674625-C

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***Appearances:***

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Abe Dakdouk, Assistant Prosecuting Attorney, *for appellee*.

Elizabeth Miller, Ohio Public Defender, and R. Jessica Manungo and Katherine Ross-Kinzie, Assistant State Public Defenders, *for appellant*.

EILEEN A. GALLAGHER, P.J.:

{¶ 1} John Karr (“Karr”) appeals his convictions for drug trafficking and drug possession. For the reasons that follow, we affirm but remand to the trial court for the purpose of correcting the sentencing entry.

## **I. Facts and Procedural History**

**{¶ 2}** On February 22, 2022, at approximately 2:00 a.m., Karr, his friend Sean English (“English”) and English’s girlfriend Carly Barker (“Barker”) were driving in Karr’s Chevy Malibu (“the Malibu”) in Parma. English was driving the Malibu, Karr was in the passenger front seat and Barker was in the back seat. The police pulled the Malibu over after seeing English commit several traffic violations. The police saw a baggie of crystal methamphetamine sticking out from underneath Karr’s black backpack, which was on the back seat of the Malibu.

**{¶ 3}** Karr was indicted for one count of drug trafficking and three counts of drug possession. Karr’s case went to trial, and on August 2, 2023, a jury found him guilty of drug trafficking in violation of R.C. 2925.03(A)(2), a second-degree felony, and drug possession in violation of R.C. 2925.11(A), a second-degree felony. Both counts related to the crystal methamphetamine found in plain view in Karr’s Malibu plus another packet of crystal methamphetamine found in Karr’s backpack. The court merged Karr’s two convictions as allied offenses of similar import and sentenced him to an indefinite term of three-to-four-and-a-half years in prison.

**{¶ 4}** Karr appealed, raising the following assignments of error for our review:

- I. John Karr’s convictions under Count One and Count Two were against the manifest weight of the evidence.
- II. John Karr received ineffective assistance of counsel when counsel failed to file an affidavit of indigency on Mr. Karr’s behalf, or otherwise advocate against financial sanctions.

## II. Trial Testimony and Evidence

### a. Jeffrey Romano

{¶ 5} Jeffrey Romano (“Romano”) testified that he is a patrolman employed by the City of Parma Police Department. Romano was working on February 22, 2022 and, at approximately 2:00 a.m., he observed a dark-colored Chevy Malibu driving in the city. According to Romano, the Malibu “turns off before it crosses me, which, usually at 2 o’clock in the morning, there [are] only a few cars, it stands out.” Romano followed the Malibu and observed it committing “numerous traffic violations, not stopping at stop signs correctly.” Romano activated the overhead lights and sirens on the police car and stopped the Malibu.

{¶ 6} Romano approached the Malibu on the passenger side. Romano testified that he “immediately observed a baggie of white crystal substance that appeared to me through training and experience was crystal meth. It was tucked under the backpack on the rear bench seat.” Romano testified that the backpack was black “with a gold padlock on it.” Romano proceeded “like it was a normal traffic stop because it was just me with three other people, so you don’t confront everyone and say, ‘Hey, I see your drugs are in the car.’” Romano testified that English was driving the Malibu, Karr was in the front passenger seat and Barker was in the backseat.

{¶ 7} Additional officers arrived on the scene to assist Romano and they detained English, Karr and Barker because Romano “saw drugs in plain view” and “smelled the odor of marijuana in the vehicle.” According to Romano, they

conducted “consent searches” of English, Karr and Brady. “And I don’t think we found anything on either three of the people.”

{¶ 8} The police conducted a “probable cause search of the vehicle . . . for further contraband” and recovered the aforementioned baggie of crystal methamphetamine which, according to Romano, was the size of “a baseball [or] the palm of your hand.” After refreshing his recollection with his police report from the incident, Romano testified that the police also found the following in the Malibu:

I know there were multiple bindle — a bindle folded up piece of paper with suspected drug narcotics. . . . So there was a marijuana cigarette that I recovered, a black backpack with the gold lock on it. Then there was a Backwoods backpack on the rear floor, so like the bench seat at the floorboard of the rear bench seat, and then syringes and a jar and spoon with narcotics residue in the front passenger-side door.

{¶ 9} Romano testified about several photographs one of the other officers on the scene took of the drugs and paraphernalia found in the Malibu. Some of the photographs show the baggie of crystal methamphetamine as it was found by Romano, partially visible underneath the black backpack with the gold padlock. Another photograph showed “a wooden box that contained a glass pipe used to smoke crack cocaine” that was found in “a tan pouch inside the black” backpack with the gold padlock. According to Romano, he “learned” during the search that the tan pouch belonged to Karr. Romano identified another photograph of a “paper bindle with suspected fentanyl” that was found in “[p]lain view next to — on the rear bench seat.” Romano further identified a photograph of a “jar and spoon with narcotic residue” found in the compartment of the front passenger door. Romano testified

that all the evidence found in the Malibu was documented, photographed and sent “away to get tested.”

**{¶ 10}** According to Romano, officers recovered the key to the padlock on the black backpack, which was on a lanyard found on the front passenger seat of the Malibu where Karr was sitting when the vehicle was pulled over. The police used this key to unlock the backpack. Romano testified that they “found this tan pouch inside the black [backpack], and then we found this wooden box also in the black [backpack]. The box contained a pipe with narcotic residue and the tan pouch . . . had used syringes.” The tan pouch also contained another “baggie with the rock crystal substance,” a “rubber band tie-off,” a digital scale, an empty iPhone box and bottles of methadone prescribed to Karr.

**{¶ 11}** Romano testified that he was wearing a body camera when he stopped the Malibu. However, Romano learned that the footage from his body camera that night was not available. Asked if he knew why Romano answered, “I do not.”

**{¶ 12}** On cross-examination, Romano testified about “some incorrect things” in the police report that he authored related to the drugs and drug paraphernalia which he found in Karr’s Malibu. According to Romano, the inaccuracies related to exactly where in the Malibu some of the drugs were found. More specifically, Romano testified that the report indicated some of the drugs were found in the Backwoods backpack when, in reality, they were found in the black backpack with the gold padlock. Romano explained that one of the pages of his police report lists all the evidence recovered from the Malibu and this is where the

inaccuracies occurred. Another page of the report lists the specific items found in the black backpack with the gold padlock as well as the tan pouch that was inside this backpack. According to Romano, this more specific inventory list is accurate.

{¶ 13} Romano further testified that the black backpack with the gold padlock belonged to Karr. Inside Karr’s backpack, the police found a baggie with 3.2 grams of crystal meth, a “pipe with narcotics residue,” a used syringe and a “scale with narcotics residue.” According to Romano, no narcotics were found in the Backwoods backpack, which belonged to Barker and was found “behind the driver’s seat . . . on the rear floorboard.”

{¶ 14} Romano testified that more narcotics were found in the car, such as “bindles” in plain view on the backseat and a marijuana cigarette in the “front passenger area.” Romano further testified that he found two “bindles,” one with fentanyl and one with cocaine, on the backseat of the Malibu. According to Romano, “one was tucked in between . . . the back support and the seat cushion, and one was next to [the black backpack] on the other side.”

{¶ 15} On redirect examination, Romano clarified that the tan pouch found inside the black backpack with the padlock was also locked and Karr had the key to the pouch.

#### **b. Heather Pilch-Cooper**

{¶ 16} Heather Pilch-Cooper (“Pilch-Cooper”) testified that she is a forensic scientist for the Cuyahoga County Medical Examiner’s Office. Pilch-Cooper explained that she is an expert in “drug chemistry,” and the court qualified her as an

expert witness in this case. Pilch-Cooper received “suspected narcotics from the Parma Police Department in connection with a traffic stop they performed on February 22, 2022.” She tested the items and memorialized her findings in a report, which included the following: 2.83 grams of methamphetamine in a plastic pouch; 13.21 grams of methamphetamine in a plastic bag; .26 grams of fentanyl in an open paper fold; .07 grams of cocaine and fentanyl in an open paper fold.

{¶ 17} Pilch-Cooper testified that methamphetamine is a schedule II drug in the State of Ohio.

### **c. Sean English**

{¶ 18} English testified that he recently pled guilty to three counts of drug possession and he agreed to testify in Karr’s case. According to English, he began drinking at an early age, “then that turned into pills” after sports injuries, and over time, “that turned into heroin.” English testified that he started using pills “at about 12 years old” and started using heroin at age 18 and was “currently 36” years old. He also testified that he uses methamphetamine “[u]sually about every day, pretty much.”

{¶ 19} English met Karr “in rehab back in 2011” and that he and Barker, also a drug user, had an “on and off” relationship. English, Barker and Karr were together on the night of February 22, 2022 and English and Karr went to Brunswick and were pulled over by the Ohio State Highway Patrol. At the time, Karr was driving the Malibu, English was in the passenger front seat and there were bags in the backseat. “One bag was a black bag with a lock on it. And the other ones, I wasn’t

too sure, but a couple bags in there, black bags.” English identified a photograph of the black backpack with the gold padlock that was found on the backseat of the Malibu in this case. English testified that he did not see the plastic baggie of drugs that was tucked under the backpack until he identified it in the photograph during trial. English testified that it was Karr’s backpack but he did not know what was inside because Karr kept it locked.

**{¶ 20}** According to English, the State Highway Patrol pulled the Malibu over for “license display.” No citations were issued and the trooper told them they could leave if English drove rather than Karr, because English had a valid driver’s license. English and Karr then went to Parma to meet Barker at a BP station. English offered Barker a ride home “because it was late at night.” English testified as follows about what happened next:

When I turned out to State Road, I turned right at the first street which was Tuxedo. I saw the police pull out of the street that was right next to it, the one that I turned down. And they, you know, got behind us. And so they — I kept going down Tuxedo.

...

When I came up to the stop sign, there was two more police cruisers in front that had their lights on, forcing me to go down this one-way. And it wasn’t a one-way. It was like a street that had three more stop signs that I had to go through to get to where we were going, which was 54<sup>th</sup>.

At the time as we’re going, you know, [Karr’s] panicking, and I’m panicking because they got behind me. And so it was, you know, going up to the stop sign making sure that I stop, you know.

**{¶ 21}** Asked why Karr was panicking, English said, “I don’t know at the time what the reason was, but he was just saying to make sure, you know, come to a



complete stop.” Asked if Karr did not want English to be pulled over, English responded, “Yeah.” According to English, Karr “reached out to the back” of the Malibu. “I wasn’t sure what he was doing, it was out of the corner of my eye.” The prosecutor asked English if the backpack with the gold padlock was “already in the back” of the Malibu at the time Karr reached back, and English answered, “Yes.”

**{¶ 22}** English testified that as soon as he turned onto West 54th, the police pulled them over. According to English, the police pulled him out of the Malibu, searched him and put him in the backseat of a police car. English testified that Karr and Barker were still in the Malibu at the time.

Nothing happened yet, and then the only thing I heard was — because I couldn’t see anything because I was in the back of the cop car with the lights going, and it was late at night. At that point, the cop said [Karr] tried to run, which that’s the only thing I heard at that point. I couldn’t see anything, and then that’s when I got arrested. I got taken to the station at that point.

**{¶ 23}** The prosecutor asked English how far of a distance it was from the passenger front seat, where Karr was sitting, to the backseat of the Malibu. English answered, “I mean, it was within reach.” English clarified that “within reach” meant a person “putting [their] hand backwards.” Asked what drugs found in the Malibu were his, English answered, “The heroin.”<sup>1</sup> Asked how much heroin, English stated, “It was just probably about \$20 worth.”

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<sup>1</sup> There is no evidence in the record that heroin was found in the Malibu in this case.

{¶ 24} The prosecutor asked English if he had seen Karr since this incident. English testified that “just earlier today” Karr asked English if he was going to testify when the two of them were in the same holding cell.

{¶ 25} English testified that the Malibu “belonged” to Karr and testified that Andrea Gall is Karr’s “girlfriend or ex-girlfriend.” According to English, when Barker entered the Malibu that night, she did not have “anything with her or on her person.” Asked if Barker entered the vehicle with any drugs, English answered, “I have no idea on that.”

{¶ 26} On cross-examination, English testified that, to his knowledge, Barker did not have a small bag with her when she entered the Malibu. When English got in the Malibu, there were two bags already in the car. One had a padlock and the “other one was a bluish bag, a Navy bluish.” According to English, he was taking Barker to “somewhere in Parma” when they got pulled over. English testified that he did not see Karr “with any drugs on his person” when they were in the Malibu.

#### **d. Matthew Mindlin**

{¶ 27} Matthew Mindlin (“Mindlin”) testified that he is a detective with the Parma Police Department and is currently in the narcotics unit and the SWAT unit.

Asked what “some signs” of drug traffickers are, Mindlin testified as follows:

Traffickers usually travel in cars with numerous people. They usually don’t travel alone. They usually carry numerous phones. They usually have a digital scale with them. Normal things that you would think for trafficking, baggies, currency, different levels of narcotics, whether they carry a large amount of one narcotic or whether they carry on larger and numerous other narcotics.

...

A lot of times, traffickers nowadays, especially with the fentanyl epidemic, bring Narcan due to clients that they sell fentanyl to, overdosing. They will administer the Narcan to them directly.

**{¶ 28}** Mindlin explained what Narcan is by stating, “If someone overdoses on fentanyl or heroin, it will bring them back for a short period of time to bring them to a hospital . . . .”

**{¶ 29}** Mindlin was assigned a case concerning an incident that occurred on February 22, 2022, when patrolman Romano stopped a car with Karr, English and Barker inside. Mindlin interviewed Karr, English and Barker. The audio of this interview with Karr was recorded. The State played this recording for the jury and, in it, Karr told Mindlin that Karr was “getting methadone treatment” and he missed a dose due to his interview with the police. Karr then asked Mindlin if he could get his treatment. In the interview, Karr revealed that he was “an intravenous user of heroin.” According to Mindlin, Karr “claims that the methamphetamine in the car is not his, but that the black bag in the back that has a lock on it is his, along with the wooden box inside of it that is also contained in the bag is his.”

**{¶ 30}** The prosecutor asked Mindlin, “Was [Karr] surprised when he learned there was 17 grams of meth” found in the Malibu to which Mindlin answered, “Yes.” According to Mindlin, Karr claimed the crystal methamphetamine belonged to English. Karr admitted that the “meth pipe” found in his locked backpack was his. Karr told Mindlin that he did not use “meth or uppers, he just uses heroin.”

**{¶ 31}** Mindlin sent the evidence found in the Malibu to the lab for testing and knew that the lab results “came back with around 16 grams” of methamphetamine and trace amounts of fentanyl and cocaine.

**{¶ 32}** Mindlin testified that the body camera and dash camera footage for this case was unavailable because it was purged, which means it “was cleansed from the system.” Mindlin also testified that, using the Malibu’s VIN number, he established that, in October 2022, the titleholder of the Malibu was Andrea R. Gall. In January 2022, just prior to the date of the arrest, Karr was the owner of the vehicle. On February 23, 2022, one day after the incident at issue here, title of the Malibu was transferred out of Karr’s name.

**{¶ 33}** Mindlin testified about the inmate property form associated with Karr’s arrest and listed the following property as belonging to Karr: “Says numerous credit cards, jewelry. And in the miscellaneous section, it says, clothing, belt, flashlight, pens, a small lock, charger, a ball cap, a bandana, a black bag, and Narcan.” Other items included a wallet, eight keys and four lighters.

**{¶ 34}** On cross-examination, Karr’s defense counsel asked Mindlin about his testimony that “drug dealers carry Narcan these days.”

Q: Isn’t it also a fact that users carry Narcan?

A: Yes.

Q: Police officers carry Narcan?

A: Yes.

Q: Firefighters carry Narcan?

A: Correct.

Q: It's not just a drug dealer thing; correct?

A: Correct.

Q: What about methadone, that is also something that a user would carry; is that also correct?

A: Correct, sir.

Q: That is something connected to someone using opiates or heroin; correct?

A: Yes, sir.

**{¶ 35}** Mindlin next testified that, from the time Karr was arrested, he was adamant that the drugs were not his. On redirect examination, Mindlin testified that Karr also said the syringes, scale and other items found in inside the locked tan pouch and the black backpack with the gold padlock were not his although Karr had the keys to both locks.

### **III. Law and Analysis**

#### **a. Manifest Weight of the Evidence**

**{¶ 36}** A manifest weight of the evidence challenge attacks the credibility of the evidence presented and questions whether the state met its burden of persuasion. *State v. Whitsett*, 2014-Ohio-4933, ¶ 26 (8th Dist.). Weight of the evidence “addresses the evidence’s effect of inducing belief,” i.e., “whose evidence is more persuasive — the state’s or the defendant’s?” *State v. Wilson*, 2007-Ohio-2202, 25, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386-387 (1977). When considering an appellant’s claim that a conviction is against the manifest weight of the evidence, the appellate court functions as a “thirteenth juror” and may disagree

“with the factfinder’s resolution of . . . conflicting testimony.” *Thompkins* at 387, citing *Tibbs v. Florida*, 457 U.S. 31, 42 (1982). The appellate court examines the entire record, weighs the evidence and all reasonable inferences that may be drawn therefrom, considers the witnesses’ credibility and determines whether, in resolving conflicts in the evidence, the trier of fact “clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist. 1983). Reversal on manifest weight grounds is reserved for the “exceptional case in which the evidence weighs heavily against the conviction.” *Id.*

#### **i. Drug Trafficking and Drug Possession**

{¶ 37} In his first assignment of error, Karr argues that his convictions for drug trafficking and drug possession are against the manifest weight of the evidence. Karr takes issue only with the 13.21-gram bag of crystal methamphetamine found on the rear seat of his Malibu tucked underneath his black backpack with the gold padlock. As quoted from his appellate brief, Karr argues that “the record does not show that [he] knew about the plastic baggie in the backseat containing 13.21g of methamphetamine, or that he exercised dominion and control over the particular baggie found in the backseat, near . . . Barker, and tucked behind the black . . . bag next to her.” Karr further argues that it is against the manifest weight of the evidence that he “knew the drugs were there, constructively possessed them, and transported them, knowing that they were intended for sale.”

**{¶ 38}** Karr does not take issue with the 2.83-gram bag of crystal methamphetamine found inside the tan pouch in this backpack. The reason for Karr’s very specific argument is that his convictions for drug trafficking and possession are based on the total amount of crystal methamphetamine recovered from the Malibu — 16.04 grams. This amount exceeds five times the “bulk amount” but is less than 50 times the “bulk amount,” which as will be detailed below, elevates both offenses to second-degree felonies.

**{¶ 39}** Pursuant to R.C. 2925.03(A)(2), drug trafficking is defined in pertinent part as follows:

No person shall knowingly . . . [p]repare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance . . . when the offender knows or has reasonable cause to believe that the controlled substance . . . is intended for sale or resale by the offender or another person.

**{¶ 40}** Pursuant to R.C. 2925.03(C)(1)(d), if the drug involved in the offense is a schedule II drug and “the amount of the drug involved equals or exceeds five times the bulk amount but is less than [50] times the bulk amount,” the drug trafficking offense is a second-degree felony.

**{¶ 41}** Pursuant to R.C. 2925.11(A), drug possession is defined as, “No person shall knowingly obtain, possess, or use a controlled substance . . . .” Under R.C. 2925.11(C)(1)(c), if the drug involved in the offense is a schedule II drug and “the amount of the drug involved equals or exceeds five times the bulk amount but is less than [50] times the bulk amount,” the drug possession offense is a second-degree felony.

{¶ 42} R.C. 2925.01(D)(1)(g) defines the “bulk amount” of crystal methamphetamine, which is a “schedule II stimulant,” as three grams.

{¶ 43} As related to drug offenses, R.C. 2925.01(K) defines “possession” as “having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found.” In addition to physically possessing drugs, a defendant may be found to “constructively possess” drugs. *See State v. Howard*, 2013-Ohio-5125, ¶ 10 (8th Dist.). “Constructive possession exists when an individual exercises dominion and control over an object, even though that object may not be within his immediate physical possession.” *State v. Hankerson*, 70 Ohio St.2d 87, 91 (1982). “Constructive possession may be established by circumstantial evidence.” *Howard* at ¶ 10.

## ii. Analysis

{¶ 44} Testimony and photographs introduced at trial establish that a part of the baggie containing the 13.12 grams of crystal methamphetamine was in plain view when Romano pulled over the Malibu. Specifically, the baggie was partially visible underneath Karr’s locked backpack. Evidence in the record showed that Karr owned the Malibu and that he knew the other two occupants of the car that night, English and Barker. Evidence in the record also established that all three people were drug users. Three types of illegal drugs were found in the Malibu along with drug paraphernalia, including items that Mindlin testified were indicative of trafficking, such as a digital scale and Narcan. Furthermore, evidence in the record



established that Karr reached from the front seat of the Malibu to the rear seat of the Malibu when he was “panicking” because the police were about to pull the Malibu over.

{¶ 45} Upon review of the record, we find that the weight of the evidence supports Karr’s convictions for drug trafficking and possession of the bulk amount of crystal methamphetamine found in his Malibu. In *State v. Byers*, 2011-Ohio-342, ¶ 6 (8th Dist.), this court held the following regarding a factual situation similar to the facts here:

[C]ircumstantial evidence [showed] that Byers constructively possessed the drugs hidden beneath the cup-holder. The discovery of drugs partially hidden in the sleeve of Byers’s jacket, the recovery of a drug scale disguised as a cell phone, and the large amount of cash found on Byers were facts showing his intent to traffic. With an intent to traffick drugs being manifest from the evidence, the jury could rationally conclude that additional drugs found beneath the cup-holder were likewise intended for use in drug trafficking. These drugs were obviously hidden, but nonetheless within the quick and easy reach of both Byers and Mitchell, thus indicating his ability to exercise dominion and control over them. This was circumstantial evidence of possession.

*See also State v. Stewart*, 2004-Ohio-4073, ¶ 21 (8th Dist.) (“It is immaterial that the heroin was found in the back seat of appellant’s car where [another person] was seated as ‘possession’ can be constructive where, like here, the heroin was within appellant’s reach and appellant was able to exercise dominion or control over the heroin.”); *State v. Moore*, 2011-Ohio-5830, ¶ 12 (8th Dist.) (“Even if [another person] ‘owned’ the drugs, there was competent, credible evidence demonstrating that Moore knew the drugs were in the car, and that he was able to control the

‘premises’ where the drugs were located. Therefore, Moore’s conviction for the possession of crack cocaine is supported by the manifest weight of the evidence.”).

{¶ 46} We cannot say that the jury clearly lost its way nor that there was a manifest miscarriage of justice by Karr’s convictions for possessing and trafficking drugs. Accordingly, Karr’s first assignment of error is overruled.

#### **b. Ineffective Assistance of Counsel**

{¶ 47} To succeed on a claim of ineffective assistance of counsel, a defendant must establish that his or her attorney’s performance was deficient and that the defendant was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668 (1984). However, “a court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel’s performance.” *Id.* at 697. *See also State v. Bradley*, 42 Ohio St. 3d 136 (1989).

{¶ 48} In Ohio, every properly licensed attorney is presumed to be competent. *State v. Black*, 2019-Ohio-4977, ¶ 35 (8th Dist.), citing *State v. Smith*, 17 Ohio St.3d 98, 100 (1985). Because there are “countless ways to provide effective assistance in any given case,” on a claim of ineffective assistance of counsel, the court must give great deference to counsel’s performance and “indulge a strong presumption” that counsel’s performance “falls within the wide range of reasonable professional assistance.” *Strickland* at 689; *see also State v. Pawlak*, 2014-Ohio-2175, ¶ 69 (8th Dist.) (“A reviewing court will strongly presume that counsel

rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.”).

**{¶ 49}** In his second assignment of error, Karr argues that he received ineffective assistance of counsel when his attorney “failed to file an affidavit of indigency on [his] behalf, or otherwise advocate against financial sanctions.”

**{¶ 50}** Pursuant to R.C. 2925.03(D)(1), an offender convicted of drug trafficking is subject to fines as part his or her sentence. If the drug trafficking conviction is a first, second or third-degree felony, “the court shall impose upon the offender the mandatory fine specified for the offense under [R.C. 2929.18(B)(1)] unless, as specified in that division, the court determines that the offender is indigent.” The fine for second-degree felony drug trafficking is \$7,500 – \$15,000. *See* R.C. 2929.18(A)(3)(b) and (B)(1). However, “[i]f 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 . . . , the court shall not impose the mandatory fine upon the offender.” R.C. 2929.18(B)(1).

**{¶ 51}** In *State v. Debose*, 2022-Ohio-837, ¶ 31 (8th Dist.), this court held that “the trial court was required to impose a mandatory fine in this case unless (1) Debose filed an affidavit prior to sentencing asserting that he was indigent and unable to pay the mandatory fine and (2) the trial court determined that Debose was indigent and unable to pay the mandatory fine.” The *Debose* Court also noted that Ohio law recognizes a distinction between determining that an offender is indigent

for the purpose of court-appointed counsel and determining indigency for the purpose of paying a fine. *Id.* at ¶ 34. *See also State v. Cotto*, 2019-Ohio-985, ¶ 10 (8th Dist.) (“[T]he court’s initial determination that Cotto was entitled to representation by appointed counsel is not determinative of any subsequent finding regarding his ability to pay a mandatory fine.”).

{¶ 52} Furthermore, the Ohio Supreme Court has held that “an offender who files an affidavit alleging that he or she is indigent and is unable to pay a mandatory fine is *not* automatically entitled to a waiver of that fine.” (Emphasis in original.) *State v. Gipson*, 80 Ohio St.3d 626, 634 (1998). Rather, in deciding whether to waive a mandatory fine, courts must consider “the offender’s present and future ability to pay the fine.” *State v. Cruz*, 2018-Ohio-2052, ¶ 26 (8th Dist.), citing R.C. 2929.19(B)(5). The *Cruz* Court further held that “the failure to file an affidavit alleging that a defendant is indigent and unable to pay a mandatory fine only constitutes ineffective assistance of counsel when the record shows a reasonable probability that the trial court would have found the defendant indigent and unable to pay the fine had the affidavit been filed.” *Cruz* at ¶ 25.

{¶ 53} In this case, the court declared Karr indigent for the purpose of trial on February 16, 2023. The court waived “any costs imposed pursuant to [R.C.] 2743.70 and 2949.091” and assigned the public defender as trial counsel. The court again declared Karr indigent at his sentencing hearing on August 3, 2023, appointed appellate counsel and ordered Karr’s trial transcript at the State’s expense.

However, at Karr’s sentencing hearing, the court ordered him “to pay a fine in the sum of \$7,500 . . . .”

**{¶ 54}** After sentencing Karr to prison, the court asked if there was “anything further from the State.” The prosecutor raised the issue of mandatory fines for drug trafficking convictions and the following colloquy occurred:

THE STATE: I believe, Your Honor, it is a mandatory fine of up to \$15,000 is what my research is showing, but the minimum would be half of the mandatory.

THE COURT: That’s my recollection. The law hasn’t changed that \$7,500. I understand, [defense counsel], you wish to make a motion as to indigency?

DEFENSE COUNSEL: Yes, correct, Your Honor.

THE COURT: All right. The Court will note the defendant’s indigency. I will order a mandatory fine, because it’s mandatory, of \$7,500, noting the defendant’s lack of ability to pay for that, and we will deal with that issue.

If there is any further motions that need to be filed on behalf of [Karr] as it relates to that, [defense counsel] can file that here with this Court if I need to make any changes on that decision, but your mandatory fine will be — I know it’s up to \$15,000. The Court will assess it at the \$7,500 minimum amount at this point in time.

**{¶ 55}** As to the fines related to Karr’s drug trafficking conviction pursuant to R.C. 2925.03(D)(1) and 2929.18, the court found Karr indigent and found that he lacked the ability to pay a fine. These are the two findings the court is required to make under R.C. 2929.18(B)(1) based on a defendant’s allegations in his or her affidavit of indigency. In *State v. Pierce*, 2019-Ohio-3762, ¶ 25 (8th Dist.), this court found that “Pierce’s argument that trial counsel was ineffective because he failed to file [an affidavit] of indigency is baseless because the trial court declared Pierce

indigent.” In other words, the filing of an affidavit of indigency in this case is moot. In applying *Pierce*, we cannot say that Karr was prejudiced by his counsel’s performance because the court made the precise findings that an affidavit of indigency is designed to promote.

**{¶ 56}** We can say, however, that the trial court erred by finding Karr indigent and unable to pay a fine and contemporaneously imposing that fine. R.C. 2929.18(B)(1) states that “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.” The bulk of cases in this State concerning the imposition and waiver of fines pursuant to R.C. 2929.18 involve the court’s discretion to impose fines based on the defendant’s allegations of indigency and inability to pay. This case, however, is not about the court’s discretion. After finding that Karr was indigent for the purpose of a fine and finding that he lacked the ability to pay a fine, the court was required to “not impose the mandatory fine upon” him.

**{¶ 57}** As Karr failed to show that his counsel was ineffective, his second assignment of error is overruled; however, the \$7,500 fine imposed at sentencing is vacated as being contrary to law.

**{¶ 58}** Judgment affirmed but this case is remanded to the trial court to issue a sentencing journal entry consistent with this opinion.

It is ordered that appellee recover from appellant 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 common pleas court 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.

A handwritten signature in black ink, appearing to read "Eileen A. Gallagher". The signature is written in a cursive style with a horizontal line underneath it.

EILEEN A. GALLAGHER, PRESIDING JUDGE

MICHELLE J. SHEEHAN, J., and  
SEAN C. GALLAGHER, J., CONCUR