[Cite as *State v. Theodorou*, 2017-Ohio-9171.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105630

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

APOSTOLOS N. THEODOROU

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-16-607318-A

BEFORE: Keough, A.J., Blackmon, J., and Celebrezze, J.

RELEASED AND JOURNALIZED: December 21, 2017

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KATHLEEN ANN KEOUGH, A.J.:

{¶1} Defendant-appellant, Apostolos N. Theodorou ("Theodorou"), appeals his sentence following a guilty plea. For the reasons that follow, we affirm and remand.

{¶2} In 2016, Theodorou sold heroin laced with fentanyl to his friend, Travis Wilson, who subsequently died from an overdose. In June 2016, Theodorou was named in a fifteen-count indictment charging him with eight counts of drug trafficking, three counts of drug possession, and one count each of involuntary manslaughter, corrupting another with drugs, tampering with evidence, and possessing criminal tools. The indictment contained one-year firearm specifications and sought forfeiture of four firearms.

{¶3} In February 2017, Theodorou pleaded guilty to an amended count of involuntary manslaughter, a felony of the third degree (Count 1); corrupting another with drugs, a second-degree felony (Count 2); trafficking, a fourth-degree felony (Counts 5 and 9); drug possession, a felony of the fourth degree (Count 13); and possessing criminal tools, a fifth-degree felony (Count 15). As part of the plea agreement, Theodorou agreed to forfeit the four firearms in his possession. The court found that Counts 1 and 2 were allied offenses, and the state elected that Theodorou be sentenced on Count 2.

{¶4} The trial court sentenced Theodorou to a total of five years in prison. It denied Theodorou's request to waive fines, ordering that he pay the mandatory minimum

fine of $7,500. However, the court waived court costs and elected not to suspend Theodorou's driving privileges.[1]

{¶5} Theodorou now appeals, raising four assignments of error.

I. Sentence Unsupported by the Record

{¶6} In his first assignment of error, Theodorou contends that the trial court erred when it imposed a five-year prison term that is not supported by the record.

{¶7} Appellate review of felony sentences is governed by R.C. 2953.08, which provides that when reviewing felony sentences, this court may increase, reduce, modify a sentence, or vacate and remand for resentencing if we clearly and convincingly find that the record does not support the sentencing court's statutory findings, if applicable, or the sentence is contrary to law. R.C. 2953.08(G)(2). A sentence is contrary to law if (1) the sentence falls outside the statutory range for the particular degree of offense, or (2) the trial court failed to consider the purposes and principles of felony sentencing set forth in R.C. 2929.11 and the sentencing factors in R.C. 2929.12. *State v. Hinton*, 8th Dist. Cuyahoga No. 102710, 2015-Ohio-4907, ¶ 10, citing *State v. Smith*, 8th Dist. Cuyahoga No. 100206, 2014-Ohio-1520, ¶ 13. When a sentence is imposed soley after consideration of the factors in R.C. 2929.11 and 2929.12, appellate courts "may vacate or modify any sentence that is not clearly and convincingly contrary to law only if the

[1]Although the court stated during sentencing that "court costs are waived on all counts in this case," the judgment entry of conviction contains an ambiguity and clerical error. The entry provides "costs waived" but also orders that "the court hereby enters judgment against the defendant in an amount equal to the costs of this prosecution." This error can be corrected nunc pro tunc pursuant to Crim.R. 36.

appellate court finds by clear and convincing evidence that the record does not support the sentence." *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 23.

{¶8} In this case, Theodorou was sentenced on a number of charges — the most egregious being corrupting another with drugs, a second-degree felony, and was sentenced to a prison term of five years. The five-year sentence is within the statutory range for a second-degree felony. *See* R.C. 2929.14(A)(2) (range is two to eight years in prison). The sentences for the remaining offenses — two trafficking charges (12 months each), drug possession (12 months), and possessing criminal tools (6 months) — were ordered to run concurrent with each other, for a total prison sentence of five years. Therefore, the prison term itself is not contrary to law.

{¶9} Additionally, the record reflects that the trial court considered the purposes and principles of felony sentencing set forth in R.C. 2929.11 and the seriousness and recidivism sentencing factors in R.C. 2929.12. The trial court's journal entry of sentence states, "[t]he court considered all required factors of the law. The court finds that prison is consistent with the purpose of R.C. 2929.11." These statements alone are sufficient to satisfy the trial court's obligations under the law. *State v. Clayton*, 8th Dist. Cuyahoga No. 99700, 2014-Ohio-112, ¶ 9. The trial court is not required to make any findings in support of the factors contained in R.C. 2929.11 or 2929.12. *See, e.g.*, *State v. Gay*, 8th Dist. Cuyahoga No. 103641, 2016-Ohio-2946, ¶ 23. Nevertheless, the trial court discussed on the record the purposes and principles of felony sentencing under R.C.

2929.11 and the serious and recidivism factors contained in R.C. 2929.12. Therefore, the sentence is not contrary to law. Accordingly, the only avenue that this court "may vacate or modify any sentence that is not clearly and convincingly contrary to law" is if we find by clear and convincing evidence that the record does not support the sentence. *Marcum* at ¶ 23.

{¶10} Theodorou contends that there is clear and convincing evidence that the record does not support the trial court's findings and the five-year sentence because the trial court failed to consider all of the "less serious" and "less likely" recidivism factors, and gave undue weight to the more serious and more likely recidivism factors.

{¶11} The seriousness and recidivism factors listed in R.C. 2929.11 are nonexhaustive lists, and the trial court can consider any other relevant factors it deems appropriate. Additionally, the weight to be given to any one sentencing factor is purely discretionary and rests with the trial court. *State v. Price*, 8th Dist. Cuyahoga No. 104341, 2017-Ohio-533, ¶ 20, quoting *State v. Ongert*, 8th Dist. Cuyahoga No. 103208, 2016-Ohio-1543, ¶ 10; *see also State v. Switzer*, 8th Dist. Cuyahoga No. 102175, 2015-Ohio-2954, ¶ 12, quoting *State v. Arnett*, 88 Ohio St.3d 208, 215, 724 N.E.2d 793 (2000).

{¶12} Theodorou contends that a "less likely" recidivism factor that the court did not consider is that "the unique circumstances of the case, namely the unexpected overdose death of the decedent, makes this offense unlikely to recur." While this statement may be true for the decedent in this case, the record reflects that despite the

death of his friend, Theodorou sold heroin again on at least two occasions; thus, the death of another was more than likely to recur. Additionally, the court expressed concern about the number of firearms that were recovered when he was arrested.

{¶13} Accordingly, based on the record before this court, we cannot find by clear and convincing evidence that the record does not support the sentence. Theodorou's first assignment of error is overruled.

II. Disproportionate Sentence

{¶14} Theodorou contends in his second assignment of error that the trial court erred when it sentenced him to a five-year prison term and imposed a $7,500 fine, because it is disproportionate to sentences imposed for similar crimes upon similarly situated offenders.

{¶15} R.C. 2929.11(B) states in pertinent part, "[a] sentence imposed for a felony shall be * * * commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders." "A felony sentence should be proportionate to the severity of the offense committed, so as not to 'shock the sense of justice in the community.'" *State v. Smith*, 8th Dist. Cuyahoga No. 95243, 2011-Ohio-3051, ¶ 66, quoting *State v. Chaffin*, 30 Ohio St.2d 13, 17, 282 N.E.2d 46 (1972).

{¶16} "A defendant alleging disproportionality in felony sentencing has the burden of producing evidence to 'indicate that his sentence is directly disproportionate to sentences given to other offenders with similar records who have committed these

offenses * * *.'" *Smith* at *id*., quoting *State v. Breeden*, 8th Dist. Cuyahoga No. 84663, 2005-Ohio-510, ¶ 81. In order to support a contention that his or her sentence is disproportionate to sentences imposed upon other offenders, a defendant must raise this issue before the trial court and present some evidence, however minimal, in order to provide a starting point for analysis and to preserve the issue for appeal. *See, e.g.*, *State v. Cole*, 8th Dist. Cuyahoga No. 93271, 2010-Ohio-3408, ¶ 31, citing *State v. Edwards*, 8th Dist. Cuyahoga No. 89181, 2007-Ohio-6068.

{¶17} Prior to sentencing, the defense submitted a sentencing memorandum that included a proportionate sentence analysis demonstrating that similarly situated offenders who committed similar crimes received sentences ranging from community control sanctions up to four years in prison. Accordingly, the issue was properly preserved for appellate review.

{¶18} Considering the sentences and facts involving Theodorou's codefendants, Joshua Taylor and Kaitlyn McCall, Taylor was placed on community control sanctions for five years after pleading guilty to two fourth-degree felonies. The statements made at McCall and Theodorou's sentencing reveal that Taylor stayed on scene and called paramedics to help Wilson. McCall received a prison term of 18 months after pleading guilty to two third-degree felonies. The sentencing statements reveal that McCall fled the scene and discarded Wilson's cell phone during her flight. In his case, Theodorou pleaded guilty to felonies of the second, third, fourth and fifth degree. The record shows that even after selling Wilson the heroin that caused his death, Theodorou continued

selling heroin. Accordingly, Theodorou's sentence is not disproportionate to the sentences his codefendants received when considering the facts and the degree of the offenses involved.

{¶19} A review of the relevant case law regarding defendants convicted of selling heroin to individuals who later passed away from a drug overdose reveals that Theodorou's five-year prison sentence is not disproportionate. See *State v. Edmonson*, 8th Dist. Cuyahoga No. 104528, 2017-Ohio-745 (defendant found guilty of involuntary manslaughter, corrupting another with drugs, and multiple counts of drug trafficking and possession; the court imposed an overall sentence of nine years, but specifically, imposed an eight-year prison sentence for the offense of corrupting another with drugs); *State v. Potee*, 12th Dist. Clermont No. CA2016-06-045, 2017-Ohio-2926 (defendant found guilty of involuntary manslaughter, two counts of corrupting another with drugs, and trafficking — sentenced to prison for fifteen and one-half years); *State v. Zusman*, 11th Dist. Lake No. 2014-L-087, 2015-Ohio-3218 (defendant found guilty of involuntary manslaughter, corrupting another with drugs, trafficking, tampering with evidence, and possessing criminal tools — sentenced to 12.5 years in prison); *State v. Kramer*, 3d Dist. Defiance No. 4-15-14, 2016-Ohio-2984 (defendant found guilty of involuntary manslaughter and ordered to serve a prison sentence of nine years); *State v. Karkoska*, Cuyahoga C.P. No. CR-13-580222 (defendant pleaded guilty to involuntary manslaughter, corrupting another with drugs, trafficking, drug possession, and possessing criminal tools — sentenced to four years in prison).

{¶20} These cases are just a cursory glance of the ever-increasing line of cases courts consider in Ohio, and most likely across the country, due to the opioid epidemic. Accordingly, we find that Theodorou's five-year prison sentence and payment of the mandatory minimum fine is not disproportionate to sentences imposed for similar crimes upon similarly situated offenders, and does not "shock the sense of justice in the community."

{¶21} The second assignment of error is overruled.

III. Imposition of Fine

{¶22} In his third assignment of error, Theodorou contends that the court abused its discretion when it imposed a $7,500 fine, despite his timely filed motion to waive fines and costs, with a supporting affidavit of indigency.

{¶23} An offender who files an affidavit alleging he is indigent and unable to pay the mandatory fine is not automatically entitled to a waiver of that fine. *State v. Gipson*, 80 Ohio St.3d 626, 634, 687 N.E.2d 750 (1998). R.C. 2929.18(B)(1) requires the imposition of a mandatory fine unless (1) the 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 (2) the court determines that the offender is an indigent person *and* is unable to pay the mandatory fine. (Emphasis added.) The trial court need not, however, make an "affirmative finding that an offender is able to pay a mandatory fine." *Id.* at 635. Instead, "the burden is upon the offender to affirmatively demonstrate that he or she is indigent and is unable to pay the mandatory fine." *Id.*

{¶24} Before imposing a financial sanction under R.C. 2929.18, the trial court must consider "the offender's present and future ability to pay the amount of the sanction or fine." R.C. 2929.19(B)(6). Neither statute nor case law prescribes express factors a court must consider or findings a court must make when determining the offender's present and future ability to pay. *State v. Loving*, 180 Ohio App.3d 424, 2009-Ohio-15, 905 N.E.2d 1234, ¶ 9 (10th Dist.). Rather, the record need only reflect that the court considered the offender's present and future ability to pay before it imposed a financial sanction on the offender. *Id.*

{¶25} In this case, the court noted that Theodorou filed the requisite affidavit of indigency. After considering arguments for and against waiver, the court denied Theodorou's request, imposing the mandatory minimum fine of $7,500, but waiving court costs. The record reflects that the trial court considered Theodorou's present and future ability to pay the financial sanction. Before imposing sentence, the trial court noted that it considered the record, the oral statements made during sentencing, plea negotiations, mitigation reports, letters, and the presentence investigation report, which revealed that Theodorou was in his early thirties, owned his own home, worked previously as a loan officer, posted bond, and retained counsel. This information allowed the court to make an informed decision about Theodorou's future ability to pay the fine, and we find no abuse of discretion by the trial court.

{¶26} Accordingly, Theodorou's third assignment of error is overruled.

{¶27} Judgment affirmed. However, the case is remanded for the trial court to issue a nunc pro tunc order showing that it waived court costs.

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. The defendant's convictions having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for correction and execution of sentence.

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

KATHLEEN ANN KEOUGH, ADMINISTRATIVE JUDGE

PATRICIA ANN BLACKMON, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR