

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2004-P-0112
RUSSELL J. BIONDO,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2001 CR 0292.

Judgment: Affirmed.

Victor V. Viglucci, Portage County Prosecutor and *Pamela J. Holder*, Assistant Prosecutor, 466 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Frank M. Pignatelli, 120 East Mill Street, #437, Akron, OH 44308 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Russell J. Biondo appeals from the judgment of the Portage County Court of Common Pleas, which denied his motion to vacate his fine and court costs. We affirm.

{¶2} Appellant pleaded guilty to aggravated possession of methamphetamine. The parties entered into a joint sentencing recommendation and the trial court sentenced appellant to six years in prison, fined him \$7,500 and court costs, and suspended appellant's driver's license for six months.

{¶3} Appellant appealed his conviction and we affirmed. *State v. Biondo*, 11th Dist. No. 2003-P-0015, 2004-Ohio-528.

{¶4} Appellant subsequently moved the trial court to vacate the fine and court costs. The trial court denied appellant's motion. Appellant timely appealed the trial court's judgment raising one assignment of error: "[The] trial court erred by overruling [] defendant-appellant's motion to vacate or dismiss court imposed fines and/or court costs [] where defendant-appellant raised [the] issue of his inability to pay imposed fines and costs."

{¶5} The state contends we are unable to review the issue raised by appellant under R.C. 2953.08(D). We disagree.

{¶6} R.C. 2953.08(D) provides in relevant part, "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." The state contends the fine imposed in this case was jointly recommended and authorized by law.

{¶7} At the sentencing hearing the trial court stated, "There appears there's a joint sentencing recommendation of six years in jail ***[.]"

{¶8} There is no agreement as to the fine. In fact, the following exchange took place with regard to the fine:

{¶9} "COURT: *** And also I believe there's a mandatory fine of \$7,500; is that correct?"

{¶10} "[PROSECUTOR]: Yes, Your Honor."

{¶11} “[DEFENSE COUNSEL]: I would ask for leave to file an affidavit of indigency.

{¶12} “COURT: I think under the Court of Appeals opinion I have to impose it, and you will have to file your affidavit of indigency. ***.”

{¶13} Thus, there was no joint recommendation as to the fine and R.C. 2953.08(D) does not preclude our review of the issue appellant raises.

{¶14} The state also argues this case is not ripe for review because no enforcement action has been taken on the fine under R.C. 2947.14, and therefore, appellant was not entitled to a hearing under that section. While we agree with the state that appellant is not yet entitled to a hearing under R.C. 2947.14 because no enforcement action has been taken, *State v. Meyer* (1997), 124 Ohio App.3d 373, 375, we construe appellant’s appeal as challenging the initial imposition of the fine. To the extent appellant argues his current financial condition requires a hearing on his ability to pay the fine, this argument is without merit. *Myer*, supra at 377 (stating, “Because the trial court has not yet sought to enforce the fine with incarceration, the duty to hold a hearing under R.C. 2947.14(A) is not triggered.”)

{¶15} We now turn to the substantive issue raised by appellant, i.e., whether the trial court properly considered appellant’s ability to pay (both present and future) at the time it imposed the fine and in response to appellant’s motion to vacate as required by R.C. 2929.19(B)(6).

{¶16} We review a felony sentence de novo. *State v. Bradford* (June 2, 2001), 11th Dist. No. 2000-L-103, 2001 Ohio App. LEXIS 2487, 3. We will not disturb a sentence unless we find, by clear and convincing evidence, that the record does not

support the sentence or that the sentence is contrary to law. Id. “Clear and convincing evidence is that evidence which will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established.” Id.

{¶17} R.C. 2929.19(B)(6) provides, “Before imposing a financial sanction under section 2929.18 of the Revised Code or a fine under section 2929.32 of the Revised Code, the court shall consider the offender's present and future ability to pay the amount of the sanction or fine.” Appellant argues the trial court failed to properly consider his financial condition.

{¶18} In the instant case, the trial court was required to impose a fine of \$7,500. R.C. 2929.18(B)(1). R.C. 2929.19(B)(6) requires a trial court to consider a defendant's present and future ability to pay before imposing a fine. R.C. 2929.18(B)(1) provides a mechanism for that consideration applicable to the instant case. That section provides:

{¶19} “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.”

{¶20} In the instant case, appellant did not file an affidavit of indigency prior to sentencing; therefore, the court had no option but to impose the fine. See, *State v. Gipson*, 80 Ohio St.3d 626, 1998 Ohio 659, at the syllabus (stating, “The requirement of former R.C. 2925.11(E)(5) (and the current analogous provisions of R.C. 2929.18[B][1]) that an affidavit of indigency must be ‘filed’ with the court prior to sentencing means that the affidavit must be delivered to the clerk of court for purposes of filing and must be

indorsed by the clerk of court, i.e., time-stamped, prior to the filing of the journal entry reflecting the trial court's sentencing decision.”)

{¶21} Even assuming R.C. 2929.19(B)(6) imposed some independent obligation on the trial court to consider appellant’s present and future ability to pay the fine, the record reveals it did so. The judgment entry of sentence states the trial court considered the presentence report prepared in this case. According to the presentence report, appellant’s last filed tax return (1999) indicated a gross income of \$360,000. Appellant’s financial obligations are listed as attorney’s fees and child support of \$400 a month. The record also shows appellant retained counsel to represent him in the underlying case. Thus, the record supports the trial court’s judgment imposing the mandatory fine.

{¶22} For the foregoing reasons, appellant’s sole assignment of error is without merit and the judgment of the Portage County Court of Common Pleas is affirmed.

WILLIAM M. O’NEILL, J., concurs,

DIANE V. GRENDALL, J., concurs in judgment only with a Concurring Opinion.

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Although I concur in the judgment in this case, I concur separately. The majority considers the merits of the issue concerning whether the trial court erred in denying appellant’s motion to vacate his fine and court costs. The trial court, however, lacked

jurisdiction to modify the sentence because appellant's sentence had been ordered into execution prior to appellant's motion to vacate.

A trial court's jurisdiction to modify a judgment of sentence terminates upon execution of that sentence. *State v. Frazier*, 11th Dist. Nos. 2001-L-052 and 2002-L-003, 2002-Ohio-7132, at ¶5 ("once a sentence is executed, 'a trial court no longer has the power to modify the sentence except as provided by the General Assembly'") (citation omitted); *State v. Clark*, 8th Dist. No. 82519, 2003-Ohio-3969, at ¶20 ("once the trial court has ordered into execution a valid sentence, it may no longer either amend or modify that sentence except under very limited circumstances") (citations omitted).

In the present case, the trial court entered a writ of execution for costs, pursuant to R.C. 2949.15, on January 28, 2002. Appellant has set forth no legal basis for the resumption of the trial court's jurisdiction. Accordingly, the trial court did not have jurisdiction to modify appellant's sentence once executed, even if the court was inclined to do so. Cf. *State v. Thompson*, 2nd Dist. No. 2003-CA-95, 2004-Ohio-4511, at ¶6 (defendant's motion to modify sentence "was insufficient to revive the court's jurisdiction to grant the relief it sought *** absent some specific basis in law").

On this basis, the decision of the court below should be affirmed.