

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

STATE OF OHIO,	:	Case No. 17CA5
Plaintiff-Appellee,	:	
v.	:	<u>DECISION AND</u>
GEORGE FISHER,	:	<u>JUDGMENT ENTRY</u>
Defendant-Appellant.	:	RELEASED: 06/28/2018

APPEARANCES:

Timothy Young, Ohio Public Defender, and Carly M. Edelstein, Ohio Assistant Public Defender, Columbus, Ohio, for appellant.

Jocelyn K. Lowe, Special Prosecutor, and Matthew J. Donahue, Section Chief, Special Prosecutions Section, Ohio Attorney General's Office, Columbus, Ohio, for appellee.

Harsha, J.

{¶1} After George Fisher pleaded guilty to possession of heroin, the Jackson County Court of Common Pleas sentenced him to nine years in prison and imposed a mandatory fine of \$10,000. Now Fisher asserts that his nine-year sentence was not clearly and convincingly supported by the record.

{¶2} However there is evidence in the record that officers seized a large quantity of both heroin and cash buried on Fisher's property and that Fisher exchanged or gave heroin to other individuals. Thus in determining an appropriate sentence for drug possession, the court was free to consider the reasonable inference that he trafficked a large amount of heroin, which had a detrimental impact on people in the county. We reject Fisher's assertion.

{¶3} Next Fisher contends that the trial court erred in imposing a \$10,000 mandatory fine as part of his sentence without determining his ability to pay it. Because

Fisher did not file an affidavit of indigency before sentencing, the trial court did not act clearly and convincingly contrary to law by imposing the fine on him.

{¶4} Finally Fisher argues that his trial counsel provided ineffective assistance to him by not filing an affidavit of indigency before sentencing. His argument is meritless because the record does not include sufficient facts to establish a reasonable probability that the trial court would have decided not to impose the fine if his trial counsel had filed a timely affidavit of indigency.

{¶5} We overrule Fisher's assignments of error and affirm his sentence.

I. FACTS

{¶6} In January 2016, the Jackson County Grand Jury returned an indictment charging Fisher with one count of possession of heroin in an amount equal to or exceeding 250 grams in violation of R.C. 2925.11(A), and a major-drug-offender specification. Fisher, who retained private counsel, entered a plea of not guilty to the charge. The trial court released Fisher on his own recognizance under house arrest, with the condition that Fisher be a law-abiding citizen.

{¶7} Fisher filed a motion to suppress evidence obtained from searches of his residence and his arrest. The state's response noted the initial search of Fisher's residence was supported by an affidavit that relied upon hearsay testimony of a theft suspect, who told law enforcement officers that he traded a stolen chainsaw to Fisher for heroin:

The affidavit in support of the warrant in this matter states that a chainsaw was stolen from R & J Sales in Jackson, Ohio the day before the warrant was issued. The affidavit recounts how law enforcement officers, reviewing the security camera footage of the chainsaw theft, identified Crabtree as the culprit. In an interview the following day, Crabtree admitted to the theft and advised investigators that he had traded the

stolen chainsaw to George Fisher for a quantity of heroin at the address indicated in the warrant. The warrant was issued authorizing investigators to search for the chain saw and heroin and evidence of its trafficking. The search was executed on that day.

{¶8} In January 2017, the state sought to revoke Fisher's recognizance surety bond and obtain a warrant for his arrest because Fisher had failed to comply with the condition to abide by the laws of the state—the sheriff's office executed a second search warrant based on additional allegations of his trafficking in narcotics. The trial court granted the motion, revoked Fisher's bond, and remanded him to the sheriff's custody.

{¶9} Fisher subsequently entered a guilty plea to the January 2016 charge of possession of heroin in exchange for the dismissal of the major-drug-offender specification. After holding a hearing on the plea, the trial court proceeded to sentencing.

{¶10} The state argued that the trial court should impose the maximum prison term of 11 years because: (1) heroin had a major impact on the county; (2) heroin was not grown or processed in the county so it had to be brought into it; (3) law enforcement received a tip from a friend of a robbery suspect who sold a stolen chainsaw for three grams of heroin at Fisher's residence; (4) law enforcement officers conducted a search of Fisher's residence based on the information; (5) they recovered almost 200 grams of heroin from Fisher's property in the search; and (6) the heroin was buried on the property with several thousands of dollars in cash, which Fisher admitted officers had missed in executing the first search warrant:

S.P.A. SCARSELLA: Thank you, Your Honor. As the Court is aware um... from its daily docket one of the major issues affecting this county has been uh... use of Heroin throughout the * * * of the County.

Obviously, Heroin is not grown here in Jackson County, not processed here in Jackson County. It has to be brought in and it has to be sold and during this investigation. It came to law enforcements attention that an individual stole a chainsaw, an individual by the name of Mr. Crabtree, and * * * Mr. Crabtree had asked one of his friends to drive him somewhere, and she did that and * * * he steals the chainsaw, and then she drives him out to Mr. Fisher's residence where he sold the chainsaw for three (3) grams of Heroin, She, not knowing any of this was going to be going on when she agreed to drive her friends around immediately went to Jackson Police Department and reported what she had done. A search warrant was conducted of Mr. Fisher's residence at that point and time, almost two hundred (200) grams of heroin was recovered from his property. * * * which was buried * * * along with several thousands of dollars in cash on his property that he admitted to Investigator Music and Major Chalfant from the Sheriff's Office that they missed when they were there for the 1st search warrant. The amount of Heroin, Your Honor that Mr. Fisher * * * that he had on his person was astronomical. The State has agreed to dismiss the Major Drug Offender Specification and to amend, to allow for a range of sentences between three (3) and eleven (11) years. However, the State contends that the only appropriate sentence in this case would be an eleven (11) year prison sentence. Mr. Fisher was responsible for a significant amount of Heroin in this County. The Court is aware as to how Heroin has affected this County * * *.

(Sic.)

{¶11} Fisher's trial counsel objected to any characterization by the state that the heroin has been seized from Fisher's person, as opposed to his property, but otherwise did not contradict anything the state had detailed. Instead, she argued that Fisher should receive a prison term on the "low end" because: (1) Fisher was 60 years old; (2) he did not have a criminal record; (3) he had several illnesses, including high blood pressure, diabetes, and a back injury; (4) he was "on disability from the State," which provided him with an income; (5) his crimes resulted from his romantic relationship with a 35-year-old woman, who is a heroin addict; and (6) his possession of heroin was because "he didn't want her to get sick" and "[h]e wanted to provide her with what she needed."

{¶12} Fisher was given the opportunity to speak at sentencing, but he declined to do so. He thus did not controvert the state's statements on sentencing.

{¶13} Based on several factors, including Fisher's actions in possessing and selling a large amount of heroin and the detrimental impact heroin had on families and children in the county, the trial court decided a nine-year sentence was warranted:

We are on here on the fact that you possessed huge amounts of Heroin. Every day, I watch the train wreck of lives caused by Heroin. We read about the overdoses in this county that go on from Heroin, and you sold it for money. * * * You're the adult here. This is your actions, and therefore, it's your responsibility. I don't doubt at one point you were a productive member of society...but, you have become a corrosive element in society by your sale of tremendous amounts of Heroin. This is one of the largest Heroin cases I've ever seen. You know the people who are dying in this County because of Heroin? The families that has been ruined, the children who have lost their parents because of Heroin. This is an epidemic in our society that you are fueling for money. In coming up with the term, the Court has taken into consideration that plea bargain has * * * and that we are not having a Trial. On the other hand, you're also getting the benefit of not defending another case. So, when I take all these factors into consideration, and considering all the sentencing factors in Revised Code Section 2929.11 and 2929.12. The Court is going to sentence you to a term of nine (9) years in prison.

(Sic.)

{¶14} The trial court also imposed a mandatory five-year period of post-release control, assessed costs against him, imposed a mandatory fine of \$10,000, and suspended his driver's license for five years. The parties further submitted an agreed judgment entry on forfeiture clearing all real estate of any lien and encumbrances so that Fisher would be its sole owner, returning a four-wheeler and a mower to Fisher's son, releasing \$7,500 to Fisher's trial counsel for attorney's fees, and forfeiting the remainder of the property, including a motorcycle, seized by law enforcement to the sheriff. The trial court issued entries reflecting Fisher's sentence and the forfeiture.

{¶15} We granted Fisher’s motion for leave to file a delayed appeal from his sentencing entry, but we denied his motion for the appointment of counsel at state expense because he failed to file a financial disclosure form. In September 2017, the trial court appointed counsel to Fisher to assist him in his appeal “upon its own Motion and due to defendant’s indigency.”

II. ASSIGNMENTS OF ERROR

{¶16} Fisher assigns the following errors for our review:

I. GEORGE FISHER’S SENTENCE IS NOT SUPPORTED BY COMPETENT, CREDIBLE EVIDENCE IN THE RECORD. FIFTH, SIXTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION; ARTICLE I, SECTIONS 10 AND 16, OHIO CONSTITUTION.

II. THE TRIAL COURT ERRED BY ORDERING MR. FISHER TO PAY A \$10,000 FINE WITHOUT CONSIDERING MR. FISHER’S PRESENT AND FUTURE ABILITY TO PAY AS REQUIRED BY R.C. 2929.19(B)(5).

III. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE OHIO CONSTITUTION, SECTION 10, ARTICLE I, WHEN, PRIOR TO SENTENCING, TRIAL COUNSEL FAILED TO FILE AN AFFIDAVIT OF INDIGENCY ON MR. FISHER’S BEHALF.

III. STANDARD OF REVIEW

{¶17} Fisher’s first two assignments of error contest two different aspects of his felony sentence: the nine-year prison term and the \$10,000 fine.

{¶18} When reviewing felony sentences, appellate courts must apply the standard of review set forth in R.C. 2953.08(G)(2). *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1, 22-23. Under R.C. 2953.08(G)(2), “[t]he appellate court’s standard for review is not whether the sentencing court abused its discretion.” Instead, R.C. 2953.08(G)(2) provides that an appellate court may increase,

reduce, modify, or vacate and remand a challenged felony sentence if the court clearly and convincingly finds either:

- (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
- (b) That the sentence is otherwise contrary to law.

{¶19} Moreover, although R.C. 2953.08(G)(2)(a) does not mention R.C. 2929.11 and 2929.12, the Supreme Court of Ohio has determined that the same standard of review applies to those statutes. *Marcum* at ¶ 23 (although “some sentences do not require the findings that R.C. 2953.08(G)[2][a] specifically addresses[,] * * * it is fully consistent for appellate courts to review those sentences that are imposed solely after consideration of the factors in R.C. 2929.11 and 2929.12 under a standard that is equally deferential to the sentencing court”); *State v. Butcher*, 4th Dist. Athens No. 15CA33, 2017-Ohio-1544, ¶ 84. Consequently, an appellate court may only vacate or modify a sentence if it is clearly and convincingly contrary to law or if the appellate court finds by clear and convincing evidence that the record does not support the sentence. See *Marcum* at ¶ 23; *Butcher* at ¶ 84.

{¶20} “Once the trial court considers R.C. 2929.11 and 2929.12, the burden is on the defendant to demonstrate by clear and convincing evidence that the record does not support his sentence.” *State v. Akins-Daniels*, 8th Dist. Cuyahoga No. 103817, 2016-Ohio-7048, ¶ 9; *State v. O’Neill*, 3d Dist. Allen No. 1-09-27, 2009-Ohio-6156, fn. 1 (“The defendant bears the burden to demonstrate, by clear and convincing evidence, that the sentence is not supported by the record, that the sentencing statutes' procedure was not followed, or there was not a sufficient basis for the imposition of a prison term;

or that the sentence is contrary to law”); *State v. Leonhart*, 4th Dist. Washington No. 13CA38, 2014-Ohio-5601, ¶ 5 (“because [appellant] failed to establish by clear and convincing evidence either that the record does not support the trial court’s findings or that the sentence is otherwise contrary to law, these assignments of error are meritless”). “Clear and convincing evidence is ‘that measure or degree of proof which is more than a mere “preponderance of the evidence,” but not to the extent of such certainty as is required “beyond a reasonable doubt” in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.’ ” *State ex rel. Husted v. Brunner*, 123 Ohio St.3d 288, 2009-Ohio-5327, 915 N.E.2d 1215, ¶ 18, quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

IV. LAW AND ANALYSIS

A. Prison Term

{¶21} In his first assignment of error Fisher asserts that his nine-year prison term is not supported by competent, credible evidence in the record (but concedes his sentence is not contrary to law). To support his claim that the nine-year prison sentence is not clearly and convincingly supported by the record, Fisher argues that although the trial court stated that it balanced the seriousness and recidivism factors under R.C. 2929.12, a true balancing of these factors clearly weighs in favor of the minimum four-year mandatory prison sentence for his heroin possession conviction. In essence Fisher claims the court sentenced him for a trafficking offense, rather than possession.

{¶22} R.C. 2929.12(A) provides that the trial court must consider the factors set forth in divisions (B) and (C) relating to the seriousness of the defendant's conduct, as well as the factors set forth in divisions (D) and (E) relating to the likelihood of recidivism, along with any other relevant factors. The trial court considered the fact that Fisher possessed and sold a large amount of heroin, which had a detrimental impact on families and children in Jackson County. Fisher argues that the trial court's conclusion is baseless because he never pleaded guilty to trafficking in heroin and there is nothing in the record to support that crime.

{¶23} We reject Fisher's contention because courts, including this one, have consistently held that evidence of other crimes, including crimes that do not result in formal criminal charges, or criminal charges that are dismissed as a result of a plea bargain, may be considered at sentencing. See *State v. Staggs*, 4th Dist. Gallia No. 16CA19, 2017-Ohio-7368, ¶ 15, and cases cited. The state represented in its memorandum in opposition to Fisher's motion to suppress evidence and at the sentencing hearing that Fisher traded heroin to a person in exchange for a stolen chainsaw, and that searches of Fisher's residence uncovered an additional 200 grams of heroin, plus thousands of dollars of money buried on his property. Neither Fisher nor his trial counsel denied the state's representations. For purposes of determining the appropriate sentence for heroin possession, the trial court was free to credit these representations and to reasonably infer from the large amounts of heroin and the cash hidden on Fisher's property that he trafficked in heroin. And Fisher admitted that he trafficked heroin to at least his girlfriend. See *State v. Bradshaw*, 4th Dist. Scioto No.

17CA3803, 2018-Ohio-1105, ¶ 70 (trafficking in drugs includes an exchange or gift of drugs).

{¶24} The trial court was likewise authorized to consider the detrimental impact of the large amount of heroin that Fisher was responsible for bringing into Jackson County. See *State v. Guerrero-Sanchez*, 2d Dist. Montgomery No. 27327, 2017-Ohio-8185, ¶ 64 (“The impact on the community is a proper factor to consider during sentencing”).

{¶25} In addition the trial court revoked Fisher’s recognizance surety bond while the case was pending because he had failed to comply with the condition that he abide by the laws of the state based on additional allegations of trafficking in narcotics. At sentencing the state noted that Fisher had admitted that a substantial amount of money he had buried on his property was not seized by the officers during their execution of the first search warrant. And Fisher never claimed on the record that the revocation of his bond was erroneous. See *State v. Hunt*, 4th Dist. Meigs No. 14CA5, 2014-Ohio-5848, ¶ 29-30 (trial court properly considered state’s motion to revoke bond in determining the appropriate sentence under R.C. 2929.11 and 2929.12).

{¶26} Although the trial court acknowledged that Fisher had at one time been a productive member of society, the record supports its determination that an appropriate sentence for his conviction for possession of heroin warranted more than the minimum three-year prison term, i.e., nine years. Because Fisher failed to prove by the requisite clear and convincing evidence that the record does not support his nine-year prison term, we overrule his first assignment of error.

B. Mandatory Fine

{¶27} In his second assignment of error Fisher contends that the trial court erred by ordering him to pay a \$10,000 fine as part of his sentence without considering his present and future ability to pay. In effect, Fisher argues that the trial court's imposition of a fine against him was clearly and convincingly contrary to law.

{¶28} "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." *State v. Robinson*, 4th Dist. Lawrence No. 13CA18, 2015-Ohio-2635, ¶ 26. Fisher pleaded guilty to possession of heroin in violation of R.C. 2925.11(A) and (C)(6)(e), which subjected him to the mandatory fine in R.C. 2929.18(B)(1).

{¶29} "[T]he 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." (Emphasis sic.) *Robinson* at ¶ 28, citing *State v. Gipson*, 80 Ohio St.3d 626, 634, 687 N.E.2d 750 (1988); R.C. 2929.18(B)(1) ("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"); R.C. 2925.11(E)(1)(a) ("If the violation is a felony of the first, second, or third degree, the court shall impose upon the offender the mandatory fine specified for the offense under division (B)(1) of section 2929.18 of the Revised Code unless, as specified in that division, the court determines that the offender is indigent").

{¶30} The fact that the affidavit was not properly filed prior to sentencing is, standing alone, a sufficient reason to find that the trial court committed no error by imposing the statutory fine. See *Gipson* at 633; *State v. Johnson*, 10th Dist. Franklin No. 16AP-689, 2017-Ohio-5527, ¶ 43 (“Because appellant did not file an affidavit of indigency [prior to sentencing] alleging he is ‘unable to pay the mandatory fine,’ the trial court was required to impose a fine on appellant of at least \$10,000, one-half of the \$20,000 authorized by statute”).

{¶31} Because Fisher did not file an affidavit of indigency prior to sentencing alleging that he was unable to pay the mandatory fine, the trial court did not err in imposing the fine; instead, it was required to do so. *Gipson* at 633; *Johnson* at ¶ 43. Therefore, Fisher has not met his burden of establishing that the trial court’s imposition of a fine on him was clearly and convincingly contrary to law. We overrule his second assignment of error.

C. Ineffective Assistance of Counsel

{¶32} In his third assignment of error Fisher claims that his trial counsel provided ineffective assistance by failing to file an affidavit of indigency prior to sentencing to avoid the mandatory fine.

{¶33} To prevail on a claim that trial counsel was ineffective for not filing an affidavit of indigency to seek avoidance of a fine, the appellant must establish a reasonable probability exists that the trial court would have found the appellant indigent upon filing of the affidavit. *State v. Smith*, 4th Dist. Lawrence No. 16CA10, 2017-Ohio-7864, ¶ 35; *State v. Arnold*, 4th Dist. Meigs No. 11CA21, 2014-Ohio-264, ¶ 17.

{¶34} Because information regarding an accused's financial status is typically outside the record on appeal, particularly where the defendant did not file a timely affidavit of indigency and claim an inability to pay any fine in the trial court proceedings, "the more appropriate vehicle for pursuing that issue is post-conviction relief proceedings filed pursuant to R.C. 2953.21" rather than direct appeal from the sentence. See, e.g., *State v. Hicks*, 2d Dist. Montgomery No. 23757, 2010-Ohio-5521, ¶ 16; *State v. Lewis*, 2d Dist. Greene No. 2011-CA-75, 2012-Ohio-4858, ¶ 14; *State v. Williams*, 11th Dist. Lake No. 2012-L-111, 2014-Ohio-65, ¶ 27.

{¶35} And we are not persuaded that Fisher has met his burden of proving a reasonable probability of a different outcome had he filed a timely affidavit of indigency. He cites the following factors in support of his claim on appeal: (1) the trial court appointed counsel for Fisher for this appeal because of his indigency; (2) the trial court approved an agreed forfeiture entry in which Fisher "forfeited all of his property except his residence"; (3) Fisher will be close to 70 years old when he is released from prison and he will have limited ability to earn an income; and (4) Fisher is disabled and receiving disability benefits from the government.

{¶36} Notwithstanding Fisher's claims to the contrary, a finding of indigence for purposes of appointed counsel does not shield a defendant from paying a fine because the ability to pay a fine over time is not equivalent to the ability to pay legal counsel based on the defendant's current financial situation. *State v. Lykins*, 2017-Ohio-9390, ___ N.E.3d ___, ¶ 17 (4th Dist.); *State v. Plemons*, 2d Dist. Montgomery Nos. 26434, 26435, 26436, and 26437, 2015-Ohio-2879, ¶ 9. "[S]imply because a trial court finds a defendant indigent for purposes of appointed counsel does not mean that the defendant

lacks the future ability to pay” for purposes of a fine. *Lykins* at ¶ 17, citing *State v. Noble*, 4th Dist. Athens No. 15CA20, 2017-Ohio-1440, ¶ 58.

{¶37} And the agreed entries of forfeiture did not, as Fisher claims on appeal, necessarily result in the forfeiture of *all* his property except his residence. The first forfeiture entry states that it addresses only “the property seized” in the case; there is no indication in the record how much of Fisher’s property was not seized. The second forfeiture entry disposes only of one motorcycle.

{¶38} As for the disability, there is no indication whether the disability is temporary or permanent, and there is no evidence whether the disability benefits Fisher receives would cover his living expenses. And although Fisher will be nearly 70 when he is released from prison, there is insufficient evidence on the record to determine whether that fact alone would render him unable to obtain gainful employment.

{¶39} On the other hand the record contains the following evidence that suggests that Fisher would not be indigent for purposes of paying the fine: (1) he retained and was represented by private counsel throughout the trial court proceedings, including through sentencing; (2) he posted a surety bond for his release on his own recognizance while the case was pending; and (3) he retained all of his real property free of any liens or encumbrances on his title. *See State v. Harrison*, 2015-Ohio-1419, 31 N.E.2d 220, ¶ 93 (3d Dist.) (“while the trial court found Harrison indigent and appointed counsel to represent him at the outset of the case and on appeal, Harrison retained and was represented by private counsel before, during, and after trial, up to and including sentencing”).

{¶40} The “facts” relied upon by Fisher are insufficient to meet his burden to establish the reasonable probability that the trial court would have found him unable to pay the fine if his trial counsel had filed an affidavit of indigency before sentencing. See *Lewis* at ¶ 16 (“Although indigency for purposes of receiving appointed counsel could be sufficient for a court to waive a mandatory fine, that fact alone is not coextensive with a reasonable probability that the trial court would have waived the fine if his attorney had filed an affidavit”) and ¶ 17 (rejecting assertion that defendant has a disability and cannot obtain employment because the record contained insufficient evidence to support it; if true, the defendant’s remedy was a petition for postconviction relief instead of an appeal from his sentence).

{¶41} Therefore, we overrule Fisher’s third assignment of error.

V. CONCLUSION

{¶42} Fisher has not established by the requisite clear and convincing evidence that his nine-year prison sentence was unsupported by the record or that his \$10,000 mandatory fine was contrary to law. He also has not proven that his trial counsel provided ineffective assistance by failing to file an affidavit of indigency prior to sentencing. Having overruled his assignments of error, we affirm his sentence.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Jackson County Court of Common Pleas 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 proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier 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 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.

Hoover, J. & Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, 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.