

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
UNION COUNTY**

STATE OF OHIO

CASE NUMBER 14-05-40

PLAINTIFF-APPELLEE

v.

OPINION

BRIAN EDWARD CAIN

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.

JUDGMENT: Judgment reversed and cause remanded.

DATE OF JUDGMENT ENTRY: April 10, 2006.

ATTORNEYS:

**KORT GATTERDAM
Attorney at Law
Reg. #0040434
145 East Rich Street
Columbus, OH 43215
For Appellant.**

**DAVID PHILLIPS
Prosecuting Attorney
Reg. #0019966
Terry L. Hord
Reg. #0025979
221 West Fifth Street
Marysville, OH 43040
For Appellee.**

Bryant, P.J.

{¶1} Defendant-appellant Brian Edward Cain (“Cain”) brings this appeal from the judgment of the Court of Common Pleas of Union County sentencing him to four years in prison.

{¶2} On April 13, 2005, the Union County Grand Jury indicted Cain on four counts: 1) tampering with evidence, 2) illegal cultivation of marijuana, 3) trafficking in cocaine, and 4) possession of cocaine. Pursuant to a plea agreement, Cain entered a guilty plea to trafficking in cocaine on July 6, 2005. The remaining charges were then dismissed. The trial court ordered that a presentence investigation be completed. On August 30, 2005, a sentencing hearing was held. At the conclusion of the hearing, the trial court sentenced Cain to four years in prison, imposed a \$5,000 mandatory fine, ordered Cain to pay court costs, ordered Cain to pay \$1,575 in restitution, and suspended his driver’s license for five years. Cain appeals from this judgment and raises the following assignments of error.

The non-minimum sentence imposed upon [Cain] violates his right to trial by jury as protected by the Fifth, Sixth, and Fourteenth Amendments to the Federal Constitution. The decisions of this Court which have reached a contrary result are incompatible with the precedent of the United States Supreme Court and must be overruled.

The trial court made numerous errors and omissions at the sentencing hearing which cumulatively deprived [Cain] of his

right to due process of law, his right to counsel and his right of allocution.

The trial court erred in imposing costs of prosecution and a mandatory fine against [Cain] when an affidavit of indigency was filed prior to sentencing and the evidence suggested [Cain] had no current or future ability to pay.

{¶3} In the first assignment of error, Cain claims that the findings made by the trial court violate the U.S. Supreme Court's ruling in *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403. Pursuant to the ruling of the Ohio Supreme Court in *State v. Foster*, ___ Ohio St.3d ___, 2006-Ohio-856, we find that Cain's sentence is void as being based upon unconstitutional statutes. Thus, the first assignment of error is sustained.

{¶4} Cain next argues that the trial court made numerous errors at the sentencing hearing which deprived him of his constitutional rights. The trial court stated that Cain lacked remorse for his offense because even though he agreed to plead guilty, he refused to accept the state's sentencing recommendation and entered evidence in mitigation. Although the trial court no longer may make findings of fact, it must still consider this factor during sentencing. The Ohio Supreme Court has held that all defendants have a right to present information in mitigation. *State v. Campbell*, 90 Ohio St.3d 320, 2000-Ohio-183. By holding otherwise this court would require a defendant to choose between exercising the right and a receiving a longer sentence or waiving the right, remaining mute and

receiving a shorter sentence. This holding would violate the right of a defendant to due process. Thus, the trial court erred by considering the exercise of a right to allocution to be a sign of lack of remorse. The second assignment of error is sustained.

{¶5} In the third assignment of error, Cain claims that the trial court erred in imposing costs and a mandatory fine when he was indigent. The trial court is required to impose court costs in every criminal case. R.C. 2947.23(A)(1). The Ohio Supreme Court held in *State v. White*, 102 Ohio St.3d 580, 2004-Ohio-5989 and reiterated in *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, that the trial court may assess court costs against an indigent defendant and the clerk of courts may attempt collection of those costs. Thus, the trial court did not err in imposing the court costs.

{¶6} Cain also claims that the trial court erred in imposing the mandatory fine upon an indigent defendant. A defendant is not automatically entitled to a waiver of the fine merely because he or she files an affidavit of indigency. *State v. Gipson* (1998), 80 Ohio St.3d 626, 687 N.E.2d 750. The defendant bears the responsibility of presenting evidence that he is indigent. *Id.* The Ohio Supreme Court held that the trial court may consider future ability to pay as well. *Id.* However, the trial court distinguished its holding in *Gipson*, where the defendant was placed on probation, from cases where the defendant was sentenced to a

lengthy prison term. *Id.* The trial court specifically did not overrule the holdings in *State v. Pendleton* (1995), 104 Ohio App.3d 785, 663 N.E.2d 395 (holding that the mere possibility of an offender's future ability to pay a fine as the basis for determining that the mandatory fine should be imposed is not proper), *State v. Lefever* (1993), 91 Ohio App.3d 310, 632 N.E.2d 589 (holding that the possible future ability to pay is not sufficient to overcome an uncontested affidavit of indigency), and *State v. Gutierrez* (1994), 95 Ohio App.3d 414, 642 N.E.2d 674 (holding that the trial court erred by imposing a fine when incarceration would preclude payment of the mandatory fine). *State v. Gilmer*, 6th Dist. No. OT-01-015, 2002-Ohio-2045.

{¶7} In this case, evidence was presented that Cain was making sufficient money to help pay bills at the house in which he was living. Cain claimed that he paid approximately \$360 per month in rent and \$100 a month to help with utilities. His girlfriend, the owner of the home, testified that he gave her some money and helped out around the house, but did not know exactly how much money.¹ Cain also testified that he spent money helping to repair the foundation of the home, though the exact amount was not clear from the record. Cain testified that he did the work himself, but had to buy supplies and rent equipment. However, the mere fact that Cain was able to pay his rent and helped to repair the home in which he

¹ Cain and his girlfriend moved into the home at the end of June. Cain entered a guilty plea on July 6 and the sentencing hearing was held on August 30. Thus only two months of rental payments could have been made before Cain was sentenced.

Case No. 14-05-40

resided in the past is not evidence of his present or future assets. Thus Cain's only evidence of assets before the trial court was an old pick-up truck of uncertain value and a savings account of approximately \$200 listed in the presentence investigation. The state argued to the trial court and to this court that Cain was a hard worker and would be able to pay the fine once he was released from prison. The trial court has broad discretion in determining whether a defendant is indigent as it is a question of fact. Given the circumstances requiring this matter be remanded for resentencing, the question of whether the defendant is indigent, and thus subject to a waiver of the mandatory fine, must be revisited by the trial court. For this reason, the assignment of error is rendered moot.

{¶8} The judgment of the Court of Common Pleas of Union County is reversed and the matter is remanded for further proceedings.

*Judgment reversed and
cause remanded.*

SHAW, J., concurs.

ROGERS, J., concurs in judgment only.

r