

[Cite as *State v. Johnson*, 2009-Ohio-4988.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-080327
	:	TRIAL NO. B-0701605
Plaintiff-Appellee,	:	
	:	<i>DECISION.</i>
vs.	:	
MARIO JOHNSON,	:	
	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Sentence Vacated in Part, and Cause Remanded

Date of Judgment Entry on Appeal: September 25, 2009

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Tanner B. McFall*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Ravert J. Clark, for Defendant-Appellant.

Note: We have removed this case from the accelerated calendar.

Per Curiam.

{¶1} Defendant-appellant Mario Johnson appeals from the sentences imposed for one count of trafficking in marijuana, punishable as a second-degree felony, and for having a weapon under a disability, punishable as a third-degree felony. Johnson had sold marijuana to a confidential police informant within 1000 feet of a school. Police officers executed a search warrant and found Johnson with over 1,100 grams of marijuana and an assault rifle.

{¶2} Johnson had agreed to plead guilty to these charges and to cooperate with other drug investigations in exchange for the state's dismissal of two additional drug charges. The state also agreed to recommend a five-year term of imprisonment. The trial court conducted the required voluntariness colloquy and informed Johnson that if he cooperated with law enforcement, the court would impose the five-year sentence. But if he failed to cooperate, the court noted, it could impose up to a 13-year prison term. The trial court then accepted the pleas and found Johnson guilty. The case was continued for sentencing, but Johnson failed to appear.

{¶3} Three months later, the trial court held a sentencing hearing and imposed the original five-year prison term. The court did not, however, impose the statutorily mandated fine for trafficking in marijuana. Because the trial court failed to impose the mandatory fine as part of the sentences imposed, we vacate the marijuana-trafficking sentence and remand the case for sentencing on that offense.

{¶4} In two related assignments of error, Johnson challenges the manner in which the trial court imposed sentence. He does not question the voluntariness of his guilty pleas.¹ Since the sentence imposed for marijuana trafficking is void and, upon

¹ See Crim.R. 11(C).

remand, the trial court must sentence Johnson for that offense, we review the first two assignments of error only as they apply to the sentence imposed for the weapons-under-a-disability offense.

{¶5} Johnson first argues that the trial court erred in failing to conduct a separate hearing at the time of sentencing to determine whether Johnson had satisfied his obligations under the plea agreement. He claims that the state did not sufficiently identify what precise level of cooperation was required for Johnson to obtain the tendered offer of the dismissal of two felony counts and the recommendation of a five-year prison term in exchange for his pleas of guilty to the two remaining charges. This claim is apparently rooted in the fact that when Johnson was finally returned for sentencing, he was agitated and fearful that the state would claim that he had failed to cooperate and would insist on a longer period of imprisonment.

{¶6} But while Johnson asserts that the state “has failed to live up to its ‘primary responsibility of insuring precision in the [plea] agreement,’ ”² the record in this case reflects that Johnson was not prejudiced by the actions of the state or the trial court. Despite Johnson’s failure to appear on the original date of sentencing, he received the precise sentence of incarceration promised in the plea agreement. Johnson was sentenced to the five-year prison term he had agreed to serve when he entered his guilty pleas. The first assignment of error is overruled.

{¶7} Johnson’s second assignment of error, in which he claims that his trial counsel was ineffective in failing to request a hearing on Johnson’s satisfaction of the plea agreement, is also overruled. Judicial scrutiny of trial counsel’s performance must be highly deferential; this court must indulge a strong presumption that counsel’s conduct

² *United States v. Johnson* (C.A.6, 1992), 979 F.2d 396, 400 (internal citation omitted).

fell within the wide range of reasonable professional assistance.³ After reviewing the record, including the facts that Johnson received the exact sentence promised if he cooperated with the state, we hold that there were no acts or omissions by Johnson's trial counsel that deprived him of a substantive or procedural right, or that rendered the trial fundamentally unfair.⁴

{¶8} Next, Johnson has informed his appellate counsel of three "issues" that, Johnson maintains, demonstrate the denial of his right to due process. Despite appellate counsel's representation to this court that none of the three issues are supported by the record in this appeal, counsel has insisted on advancing them in the third assignment of error. Counsel has urged us to "conduct an independent review to determine if any factual support is present." The state has concurred and has asked this court to independently review the record in accordance with the no-error doctrine of *Anders v. California*.⁵

{¶9} But we "cannot entertain an assignment of error raised pursuant to *Anders* in a brief that otherwise complies with App.R. 12(A) and 16(A)(7) by raising substantive assignments of error."⁶ Absent the unique circumstances identified in *Anders*, where "a conflict arises between an indigent's right to 'counsel who will vigorously and fairly advocate his rights on appeal' and 'the ethical strictures upon counsel generally to advance on behalf of a client only those issues which such counsel honestly believes fairly debatable under the law,' "⁷ errors not identified in

³ See *Strickland v. Washington* (1984), 466 U.S. 668, 689, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, 538 N.E.2d 373.

⁴ See *Lockhart v. Fretwell* (1993), 506 U.S. 364, 113 S.Ct. 838; see, also, *Strickland v. Washington*, 466 U.S. at 687, 104 S.Ct. 2052; *State v. Bradley* at paragraphs two and three of the syllabus.

⁵ (1967), 386 U.S. 738, 87 S.Ct. 1396.

⁶ *State v. Bush* (Mar. 23, 2001), 1st Dist. No. C-000452; see, also, *State v. Burrow* (Dec. 22, 2000), 1st Dist. No. C-990641.

⁷ *In re Booker* (1999), 133 Ohio App.3d 387, 390, 728 N.E.2d 504, quoting *Freels v. Hills* (C.A.6, 1988), 843 F.2d 958, 960-961.

the record and argued separately will be disregarded.⁸ The third assignment of error is overruled.

{¶10} While each assignment of error has been overruled, we have noted that the trial court failed to include the statutorily mandated fine as part of the sentence imposed for trafficking in marijuana, a second-degree-felony violation of R.C. Chapter 2925.

{¶11} Since the record is silent as to whether Johnson met the statutory prerequisites for avoiding the mandatory fine, the trial court was required under R.C. 2925.03(D)(1) and 2929.18(B)(1) to impose a mandatory fine as part of the sentence for Johnson's marijuana-trafficking conviction.⁹ And the trial court's failure to impose the statutorily mandated fine rendered Johnson's marijuana-trafficking sentence void.¹⁰

{¶12} Accordingly, we vacate the sentence imposed for trafficking in marijuana and remand the case to the trial court for a new sentencing hearing on that offense. The trial court's judgment is affirmed in all other respects.

Judgment accordingly.

HENDON, P.J., HILDEBRANDT and CUNNINGHAM, JJ.

Please Note:

The court has recorded its own entry on the date of the release of this opinion.

⁸ See *State v. Bush*.

⁹ See *State v. Fields*, 1st Dist. No. C-080825, 2009-Ohio-4187, ¶5-7; see, also, *State v. Gipson*, 80 Ohio St.3d 626, 630-631, 1998-Ohio-659, 687 N.E.2d 750; *State v. Dixon*, 2nd Dist. No. 01CA17, 2001-Ohio-7075.

¹⁰ See *State v. Fields* at ¶8; see, also, *State v. Beasley* (1984), 14 Ohio St.3d 74, 75, 471 N.E.2d 774 ("Any attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void.").