[Cite as *State v. Dixon*, 2010-Ohio-4919.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23671
vs.	:	T.C. CASE NO. 08CR43391
LAVONE G. DIXON	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 8th day of October, 2010.

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GRADY, J.:

{¶ 1} Defendant was indicted on one count of possession of crack cocaine (10-25 grams), in violation of R.C. 2925.11(A), a felony of the second degree. On April 13, 2009, Defendant entered a plea of guilty to the charge. Defendant failed to appear for his scheduled sentencing and a warrant was issued for his arrest.

Three months later, on August 26, 2009, Defendant was brought before the court and sentenced to five years in prison and a mandatory seven thousand dollar fine. We subsequently granted Defendant leave to file a delayed appeal.

FIRST ASSIGNMENT OF ERROR

{¶ 2} "THE APPELLANT WAS PREJUDICED BY INEFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL DID NOT FILE APPELLANT'S AFFIDAVIT OF INDIGENCY PRIOR TO SENTENCING."

{¶ 3} Defendant argues that he was deprived of the effective assistance of counsel when, before he was sentenced, his trial counsel failed to file an affidavit of indigency alleging that Defendant was unable to pay the mandatory fine in R.C. 2929.18 applicable to his felony drug offense.

{¶ 4} In order to demonstrate ineffective assistance of trial counsel, Defendant must demonstrate that counsel's performance was deficient and fell below an objective standard of reasonable representation, and that Defendant was prejudiced by counsel's performance; that there is a reasonable probability that but for counsel's unprofessional errors, the result of Defendant's trial or proceeding would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136.

{¶ 5} R.C. 2929.18(B)(1) establishes a procedure for avoiding

imposition of mandatory fines applicable to certain felony drug offenses. That section provides:

{¶ 6} "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."

{¶ 7} At the plea hearing, the following exchange occurred between defense counsel and the trial court:

{¶ 8} "MR. HARRISON: And we signed a certificate of indigency on the fines.

{¶ 9} "THE COURT: There's still a hearing on the matter. That doesn't necessarily determine whether there's a mandatory fine.

{¶ 10} "MR. HARRISON: Well, I'll present it to you. You can do what you want.

{¶ 11} "THE COURT: Right. You have to file that ahead of time in order to be considered to be indigent, but there are other factors that go into whether there's a mandatory fine." (T. 10).

{¶ 12} Defendant's counsel never filed Defendant's affidavit of indigency. At sentencing, the trial court found that Defendant was not indigent for purposes of paying the mandatory fine and imposed a mandatory seven thousand dollar fine. Defendant

argues that counsel's deficient performance in failing to file the affidavit of indigency prior to sentencing resulted in a seven thousand dollar fine being imposed upon him that could have been avoided but for counsel's deficient performance.

{¶ 13} In *State v. Sheffield*, Montgomery App. No. 20029, 2004-Ohio-3099, at ¶13, we stated:

{¶ 14} "The failure to file an affidavit of indigency prior to sentencing may constitute ineffective assistance of counsel if the record shows a reasonable probability that the trial court would have found Defendant indigent and relieved him of the obligation to pay the fine had the affidavit been filed. *State v. Cochran* (June 5, 1998), Clark App. No. 97CA50; *State v. Stearns* (Oct. 9, 1997), Cuyahoga App. No. 71851; *State v. Gilmer* (April 26, 2002), Ottawa App. No. OT-01-015, 2002-Ohio-2045; *State v. McDowell* (Sept. 30, 2003), Portage App. No.2001-P-0149, 2003-Ohio-5352; *State v. Powell* (1992), 78 Ohio App.3d 784, 787, 605 N.E.2d 1337; *State v. Williams* (1995), 105 Ohio App.3d 471, 482, 664 N.E.2d 576."

{¶ 15} Typically, information regarding Defendant's financial status is outside the record in a direct appeal. That is largely the case here. Defendant speculates that he would not be able to obtain employment in the future due to his criminal record, which consists of this offense and three prior convictions for cocaine possession. However, there is no evidence in this record

demonstrating Defendant's inability to secure future employment. What the record does show is that when Defendant was sentenced he was twenty-three years old, had completed one year of college, and was able to post a ten thousand dollar surety bond in order to secure his release from jail pending trial. On these facts and circumstances, we cannot conclude that a reasonable probability exists that the trial court would have found Defendant indigent and unable to pay the applicable mandatory fine for his felony drug offense had defense counsel filed an affidavit of indigency prior to sentencing. *Sheffield*.

{¶ 16} Defendant's failure to demonstrate a reasonable probability that the court would not have imposed a fine had his counsel filed an affidavit of indigency prevents a finding that Defendant was prejudiced as a result, precluding a further finding that Defendant's trial counsel rendered ineffective assistance. *Strickland*. To the extent that Defendant's claim of ineffective assistance in that respect relies on matters outside the record, Defendant may pursue relief through a timely R.C. 2953.21 petition for post-conviction relief. Res judicata cannot bar a claim in a petition based on matters which were not the subject matter of the prior action. *Grava v. Parkman* (1995), 73 Ohio St.3d 379.

{¶ 17} Defendant's first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 18} "APPELLANT'S GUILTY PLEA WAS NOT ENTERED KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY AS REQUIRED BY LAW."

{¶ 19} Defendant argues that his guilty plea was not entered knowingly, intelligently and voluntarily because the trial court did not inform him that it was not obligated to impose a minimum sentence, and because the court misled Defendant into believing that it would impose a sentence at or near the minimum. The record does not support these contentions.

{¶ 20} In order to be constitutionally valid and comport with due process, a guilty plea must be entered knowingly, intelligently and voluntarily. ***Boykin v. Alabama*** **(1969), 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274. Compliance with Crim.R. 11(C)(2) in accepting guilty or no contest pleas portrays those qualities.**

{¶ 21} Crim.R. 11(C)(2) provides, in relevant part:

{¶ 22} "(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

{¶ 23} "(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing."

{¶ 24} There is no provision in Crim.R. 11(C)(2) that requires the trial court to inform the defendant of either the minimum sentence or the fact that the court is not obligated to impose a minimum sentence. A review of the plea hearing in this case amply demonstrates that there was no recommendation or agreement by the State as to the sentence to be imposed, and that Defendant was well aware of the fact:

{¶ 25} "THE COURT: All right. And you understand there is no agreement as to your sentence. I'll decide what your sentence is when you come back here four weeks from Wednesday, which will be May the 13th. Do you understand that?

{¶ 26} "THE DEFENDANT: Yes, ma'am." (T. 3).

{¶ 27} During the plea hearing the trial court meticulously explained to Defendant the possible penalties including the financial sanctions and mandatory driver's license suspension. As to the possible prison terms, the court stated:

{¶ 28} "THE COURT: The Court could also sentence you to a prison term of two, three, four, five, six, seven, or eight years plus a mandatory period of post-release control for a period of up to three years and prison term up to the period of post-release control or one-half of the total term originally imposed, whichever is greater, for violations of post-release control. If you were on post-release control and charged with a new felony, in addition

to being prosecuted and sentenced for that felony, that sentencing court could also sentence you for violations of post-release control.

{¶ 29} "In addition, sir, the penalty for possession of cocaine, a felony of the second degree, is mandatory and cannot be reduced by earned credit, judicial release, or furlough. That means, sir, that there is a mandatory prison sentence and you will be sentenced to prison. The sentence will be anywhere between – well, it'll be two, three, four, five, six, seven, or eight years when you come back for your sentencing. Do you understand that?

{¶ 30} "THE DEFENDANT: Yes, ma'am.

{¶ 31} "THE COURT: You understand that as a result of that you are not eligible to be sentenced to community control sanctions?

{¶ 32} "THE DEFENDANT: Yes, ma'am." (T. 5-6).

{¶ 33} During the plea hearing the following exchange occurred between Defendant and the trial court:

{¶ 34} "THE COURT: All right. And the record will reflect the Defendant and his Counsel have both signed the plea form.

{¶ 35} "Sir, do you have any questions for Mr. Harrison or me before you enter your plea today?

{¶ 36} "THE DEFENDANT: No questions. <u>I just – I ask that if you can take into consideration, please try to go either near the</u>

minimum or close to the minimum.

{¶ 37} "THE COURT: Sir, I'll decide all of that at sentencing. I know nothing about you.

{¶ 38} "THE DEFENDANT: Okay.

{¶ 39} "THE COURT: And I'm going to order a presentence investigation and that will form part of the basis of my sentencing. I know nothing about you.

{¶ 40} "THE DEFENDANT: Okay. I perfectly understand that.

{¶ 41} "THE COURT: Okay. All right. You have any other questions, sir?

{¶ 42} "THE DEFENDANT: No, ma'am." (T. 9). (Emphasis supplied).

{¶ 43} Defendant claims that when he asked the trial court to "go near the minimum or close to the minimum" and the court responded, "I'll decide all of that at sentencing," Defendant understood the court's response to mean the court would consider imposing a sentence near the minimum or close to the minimum. Accordingly, Defendant was misled into believing the court would impose a minimum sentence of two years or close to the minimum sentence rather than the mid-range five year sentence the court imposed. While Defendant' subjective interpretation of what the trial court said is to say the least imaginative, it is neither accurate nor persuasive.

{¶ 44} A review of the trial court's entire dialogue with Defendant on the issue of the possible sentence to be imposed clearly demonstrates that the court informed Defendant he would receive a mandatory prison term and that it could be either two, three, four, five, six, seven, or eight years. A more reasonable interpretation of what the court meant when it said it would "decide all of that at sentencing" is that the court meant it would decide what prison term and financial sanction to impose at the time of sentencing, and not before. The court did not mislead Defendant into believing he would receive a minimum or near minimum sentence in exchange for his guilty plea.

{¶ 45} Defendant's second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 46} "APPELLANT WAS PREJUDICED BY INEFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL DID NOT ADEQUATELY EXPLAIN TO HIM THE RANGE OF SENTENCING WHICH APPELLANT COULD RECEIVE."

{¶ 47} Defendant argues that his trial counsel performed deficiently by failing to advise him that he might receive a prison sentence in excess of three years. Whether counsel failed to do that in his dealings with Defendant other than those that occurred on the record cannot be determined from this record.

{¶ 48} The record of the plea hearing clearly shows that the trial court made it clear to Defendant that he would receive a

mandatory prison term and that it could be two, three, four, five, six, seven, or eight years. Defendant told the trial court that he understood that, he also understood there was no agreement as to his sentence, and he did not have any questions. Neither deficient performance by counsel nor the resulting prejudice that a claim of ineffective assistance requires have been demonstrated.

{¶ 49} Defendant's third assignment of error is overruled. The judgment of the trial court will be affirmed.

BROGAN, J., And FROELICH, J., concur.

Copies mailed to:

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