

ORIGINAL

IN THE SUPREME COURT OF OHIO

11-2193

Scott Orinn Brandeberry	:	On Appeal from the Lucas County Court
Appellant-Defendant	:	of Appeals Sixth Appellate District
v.	:	
STATE OF OHIO	:	Court of Appeals
Appellee, Plaintiff	:	CASE No. L-10-1161

MEMORANDUM IN SUPPORT OF JURISDICTION
 OF APPELLANT SCOTT ORINN BRANDEBERRY

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FILED
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 SUPREME COURT OF OHIO

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 Decision and Judgment of the Lucas County Court of Appeals (Nov 14, 2011)1

**EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION AND AN ISSUE OF GREAT GENERAL
AND PUBLIC INTEREST:**

The Appellant-Defendant, Scott Orinn Brandeberry, respectfully request that this Court accept jurisdiction over *State v. Brandeberry*, App. No. L-10-1161 to consider questions of substantial import involving ineffective assistance of trial counsel. This is a felony conviction from Lucas County Court of Common Pleas.

Trial counsel failed to inform the Court that Appellant-Defendant, Brandeberry, was classified under Megan's Law in 2005, Ohio Attorney General reclassified Appellant-Defendant, Brandeberry, as a Tier II sex offender under Adam Walsh Child protection and Safety Act (AWA) which changed Appellant-Defendant, Brandeberry, registration, and notification requirements. *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424.

The trial court violated Appellant-Defendant, Brandeberry, plea agreement by sentencing him to a maximum sentence of five years consecutive to the sentence he was serving in Arizona. Appellant-Defendant, Brandeberry, signed the plea agreement because trial counsel and the prosecutor agreed to have his sentence run concurrent with Arizona sentence. If Appellant-Defendant, Brandeberry, knew he would receive the maximum sentence he would not have signed a plea agreement, he would have had a jury trial. Therefore, Appellant-Defendant, Brandeberry, plea was not knowingly, intelligently, and voluntarily.

Appellate counsel submitted a request to withdraw pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, The United States Supreme Court held that if counsel believes that an appeal is wholly frivolous he should advise the court and request permission to withdraw. This request must be accompanied by a brief identifying anything in the record that could arguably support

an appeal.

Black's Law Dictionary Eighth Edition states a Brief is:

A written statement setting out the legal contentions of a party in litigation, esp. on appeal: a document prepared by counsel as the basis for arguing a case, consisting of legal and factual arguments and the authorities in support of them.

Appellate counsel presented three issues, but there was no legal or factual authorities supporting them which makes the brief ineffective and Appellate counsel ineffective. *Ander v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493.

The Sixth Appellate District stated in its Decision and Judgment that Appellant-Defendant, Brandeberry, possesses a lengthy criminal history spanning several decades, encompassing approximately 100 criminal charges, including nearly 20 felony's. This statement is not true Appellant-Defendant, Brandeberry, has 23 misdemeanor convictions and this is his eighth felony. Appellant-Defendant, Brandeberry appeal was decide on some false information and should be reconsidered.

STATEMENT OF THE CASE

On September 28, 2010, Appellant-Defendant, Brandeberry, was indicted on one count of Failure to Verify, in violation of the Ohio Revised Code Section R.C. 2950.06(F) and 2950.99(A).

On February 9, 2010, Appellant-Defendant, Brandeberry, filed a pro se Motion for Speedy Trial. On April 22, 2010, the matter was called for arraignment. Appellant-Defendant, Brandeberry was found to be indigent and counsel was appointed, wherefore, Appellant-Defendant, Brandeberry through counsel entered a plea of "not guilty" to the charge in the indictment.

On April 27, 2010, Appellant-Defendant, Brandeberry filed a Request for Discovery. On May 13, 2010, the matter was called for pretrial, with Appellant-Defendant, Brandeberry, and counsel

present. On May 17, 2010, the matter was before the trial court for a plea. Appellant-Defendant, Brandeberry, withdraw his former plea of “not guilty” and entered a plea of “guilty” to the one count in the indictment, that being offense of Failure to Verify, in violation of Ohio revised Code Section R.C. 2950.06(f) and 2950.99(A). the trial court, after inquiry, accepted the plea and referred the matter for presentence report.

On June, 3, 2010, the matter was called for sentencing. The trial court found Appellant-Defendant, Brandeberry was not amenable to community control and imposed a maximum sentence of five (5) years in prison upon Appellant-Defendant, Brandeberry, with credit for time served. Said sentence was ordered to be served consecutively to a sentence emanating from another conviction received by Appellant-Defendant, Brandeberry, in a case in the Navajo County, Arizona superior Court.

Upon the request of Appellant-Defendant, Brandeberry, on June 11, 2010, counsel was appointed for appellate purposes. On June 17, 2010, Appellant filed his Notice of Appeal. Now Appellant-Defendant, Brandeberry is requesting that this Honorable Supreme Court of Ohio accept his Appeal.

STATEMENT OF FACTS

In 2005, appellant-Defendant, Brandeberry, was convicted of Unlawful conduct with a Minor, in violation of R.C. §2907.04, a felony of the third degree. At said time, Appellant-Defendant, Brandeberry, was notified of his requirements to register as a sexual offender. Appellant-Defendant, Brandeberry was to verify his current address in Lucas County, Ohio with the Lucas County Sheriff's department on or about July 24, 2009, and failed to do so. Specifically, he failed to verify a change of address due to his moving to the State of Arizona, which he did without permission or notification either of authorities in Ohio or Arizona.

The State recommended that any sentence imposed be served concurrently with the two years sentence Appellant-Defendant, Brandeberry, was serving in the State of Arizona.

Counsel for Appellant-Defendant, Brandeberry, filed a Motion to Withdraw, request leave of this Court to Withdraw as counsel for Appellant-Defendant, Brandeberry.

LAW AND ARGUMENT

Proposition of Law I: Appellant-Defendant was denied effective assistance of counsel.

Proposition of Law II: The trial court abused its discretion by accepting the Appellant-Defendant guilty plea without ensuring that the plea was knowingly, intelligently, and voluntarily entered.

Trial counsel was ineffective when he failed to inform the trial court that Appellant-Defendant, Brandeberry, was classified under Megan's Law in 2005, Ohio Attorney General reclassified Appellant-Defendant, Brandeberry as a Tier II sex offender under Adam Walsh Child Protection and Safety Act (AWA) which changed Appellant-Defendant, Brandeberry registration and notification requirements. *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, *State v. Williams*, 129 Ohio St.3d 344, 952 N.E.2d 1108.

Appellant-Defendant, Brandeberry, requirements under Megan's Law was to register once for 20 years. After being reclassified to AWA the requirements changed to twice a year for 25 years. Ohio Supreme Court made a ruling in *State v. Williams*, 129 Ohio St.3d 344, 952 N.E.2d 1108, that S.B. 10 is punitive because it imposes new or additional burdens, duties, obligation as to past transaction.

Ohio Supreme Court also stated in *State v. Williams*, at ¶21 }

No one change compels our conclusion that S.B. 10 is punitive. It is a matter of degree whether a statute is so punitive that its retroactive application is unconstitutional. *Cook*, 83 Ohio St.3d at 418, 700 N.E.2d 570. When we consider all

the changes enacted by S.B. 10 in aggregate, we conclude that imposing the current registration requirements on a sex offender whose crime was committed prior to the enactment of S.B. 10 is punitive. Accordingly, we conclude that S.B. 10, as applied to defendants who committed sex offenses prior to its enactment, violates Section 28, Article II of the Ohio Constitution, which prohibits the General Assembly from passing retroactive laws.

Under Megan's Law Appellant-Defendant, Brandeberry, crime for Failure to Verify was a fifth degree felony, but after being placed under AWA the crime became a third degree felony. *State v. Howard*, 2011 WL 5319896.

Appellant-Defendant, Brandeberry, sentence is void due to the fact that he was sentenced under AWA and not Megan's Law and should be re-sentenced. *State v. Williams*, 129 Ohio St.3d 344, 952 N.E.2d 1108.

Trial counsel and the prosecutor used tricks to force Appellant-Defendant, Brandeberry, into pleading guilty to Failure to Verify, at which time trial counsel and the prosecutor told Appellant-Defendant, Brandeberry that his time would run concurrent with the time he was serving in Arizona and he would not receive the maximum sentence if he take the plea agreement. Trial counsel also told Appellant Defendant, Brandeberry, that he would have to agree with every question the the judge ask or the plea would not be honored, Appellant-Defendant, Brandeberry, did as informed from trial counsel and was sentenced to the maximum sentence of five years.

In order to show that trial counsel of ineffective appellant must show two components: (1) counsel's performance was deficient or unreasonable under the circumstances; and (2) the performance prejudiced the defense *state v. kole* (2001), 92 Ohio St.3d 303, 206, 750 N.E. 148.

Trial counsel performance was deficient and unreasonable under the circumstances due to the fact that counsel knew the judge could give Appellant-Defendant, Brandeberry the maximum sentence and run it consecutive with Arizona sentence. Counsel should have requested a lower degree felony from the prosecutor in return for the plea or informed Appellant-Defendant, Brandeberry, that the judge could possibly give him the maximum sentence of five years run consecutive with Arizona sentence. If counsel would have done this Appellant-Defendant, Brandeberry, could have made the choice to have a jury trial, but for counsel performance, the results of the proceeding would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct 2052, 80 L.Ed.2d 674.

Trial counsel was ineffective and Appellant-Defendant, Brandeberry request that his sentence be reversed.

Proposition of Law III: The trial court abused it's discretion in sentencing Appellant-Defendant to a maximum sentence to be served consecutive to the term Appellant-Defendant was serving in Arizona.

The trial judge abused it's discretion when sentencing Appellant-Defendant, Brandeberry to Maximum sentence of five years for Failure to Verify, R.C. 2929.11(A) states:

(A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime,

Rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

Appellant-Defendant, Brandeberry, sentence imposes an unnecessary burden on the state and local government. Appellant-Defendant, Brandeberry, moved to the State of Arizona without the State of Ohio permission and Failed to Verify his Address which he was sentenced to two (2) years in Arizona and a detainer was issued in the State of Ohio, Appellant-Defendant, Brandeberry, signed a plea with the belief his sentence would be concurrent with Arizona sentence which the judge refused to do. This sentence of five (5) years is a undue burden on the State of Ohio.

These case show that the court imposed a sentence on Appellant-Defendant, Brandeberry, that was not consistent with the sentences imposed for similar crimes committed by similar offender. *State v. Larso*, 2005 WL 1077531(Ohio App. 3 Dist.), 2005-Ohio-2241, sentenced to six months, *State v. Page*, 2011 WL 208290 (Ohio App. 8 Dist.), 2011-Ohio-83, sentenced to a mandatory three years, *State v. Howard*, 2011 WL 5319896 (Ohio App. 2 Dist.), sentenced to a mandatory three years. Appellant-Defendant, Brandeberry, is requesting that his sentence be concurrent with the State of Arizona.

CONCLUSION

Appellant-Defendant, Brandeberry, is requesting that his case be return to the trial court for re-sentence due to the fact that he was sentenced under AWA and not Megan's Law and that the court issued a sentence that is ^{not} consistent with the sentences imposed for similar crimes committed by similar offenders.

Respectfully submitted,

Scott Brandberry
Defendant-Appellant Scott Orinn Brandberry #611-775 Pro se
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CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum In Support of Jurisdiction of Appellant Scott Orinn Brandberry, was sent by ordinary U.S. Mail to the Lucas County prosecutor office at 700 Adams Street Toledo, Ohio 43604-5659 on this 21st day of December, 2011.

Scott Brandberry
Defendant-Appellant

FILED
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COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-10-1161

Appellee

Trial Court No. CR0200902878

v.

Scott Orinn Brandeberry

DECISION AND JUDGMENT

Appellant

Decided: NOV 10 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Timothy F. Braun, Assistant Prosecuting Attorney, for appellee.

Stephen D. Long, for the appellant.

Scott Orinn Brandeberry, pro se.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a sentencing judgment of the Lucas County Court of Common Pleas. Appellant entered a guilty plea to the felony charge of failure to verify, in violation of R.C. 2950.06(F) and 2950.99(A), a third degree felony. Appellant, who

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I.

possesses an exceptionally lengthy criminal history including numerous felony convictions, was sentenced to a five-year term of incarceration, to be served consecutively with a term already being served in Arizona. For the reasons set forth more fully below, the judgment of the trial court is hereby affirmed.

{¶ 2} Counsel for appellant submitted a request to withdraw pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L. Ed. 2d 493. In support of his *Anders'* request to withdraw, counsel states that, after reviewing the record of proceedings in the trial court, he is unable to find any arguable issues on appeal. In conjunction with *Anders*, counsel for appellant sets forth the following proposed assignments of error:

Potential Assignments of error:

{¶ 3} " 1. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

{¶ 4} " 2. THE TRIAL COURT ABUSED ITS DISCRETION BY ACCEPTING THE APPELLANT'S GUILTY PLEA WITHOUT ENSURING THAT THE PLEA WAS KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY ENTERED.

{¶ 5} " 3. THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING APPELLANT TO A MAXIMUM SENTENCE TO BE SERVED CONSECUTIVE TO THE TERM APPELLANT WAS SERVING IN ARIZONA."

{¶ 6} *Anders*, supra, and *State v. Duncan* (1978), 57 Ohio App.2d 93, 385 N.E.2d 323, detailed the procedure to be followed by appointed counsel who wishes to withdraw

upon determining there is a lack of a meritorious, appealable issue. In *Anders*, the United States Supreme Court held that if counsel, after conscientious examination of the case, believes any appeal to be wholly frivolous, he should so advise the court and request permission to withdraw. *Id.* at 744.

{¶ 7} This request to withdraw must be accompanied by a brief identifying anything in the record that could arguably support an appeal. *Id.* Counsel must furnish his client with a copy of the brief and request to withdraw. *Id.* Once these requirements have been satisfied, the appellate court then conducts a full examination of the proceedings held below to determine if the appeal is frivolous. If the appeal is frivolous, the appellate court may grant counsel's request to withdraw and dismiss the appeal without violating constitutional requirements or may proceed to a decision on the merits. *Id.*

{¶ 8} In the case before us, appointed counsel for appellant has satisfied the requirements set forth in *Anders*, *supra*. Accordingly, we shall proceed with an examination of the potential assignments of error set forth by counsel for appellant, review the record from below, and determine if this appeal is meritorious.

{¶ 9} The following undisputed facts are relevant to the issues raised on appeal. In 2005, appellant was convicted of unlawful sexual conduct with a minor, a felony of the third degree. This required the appellant to register as a sexual offender. Appellant violated these requirements on or about July 24, 2005, when, without permission, he moved to Arizona and failed to register the change of address. The record shows that

appellant possesses a lengthy criminal history spanning several decades, encompassing approximately 100 criminal charges, including nearly 20 felonies;

{¶ 10} Appellant was indicted on September 28, 2009, on one count of failure to verify, in violation of R.C. 2950.06(F) and 2950.00(A), a felony of the third degree. Through appointed counsel, appellant entered a "not guilty" plea on April 22, 2010. On May 17, 2010, this matter went before the court pursuant to a negotiated plea agreement. Appellant withdrew his plea of "not guilty" and entered a plea of "guilty." The record of the colloquy clearly reflects that appellant was fully briefed of all potential consequences of the guilty plea and advised that the trial court was not bound by the recommendations of the state. Appellant clearly affirmed his understanding of these matters. The trial court accepted his plea of guilty.

{¶ 11} On June 2, 2010, appellant was sentenced. The trial court imposed a sentence of five years to be served consecutive to a sentence appellant was serving in Arizona.

{¶ 12} In his first potential assignment of error, appellant argues that he was denied effective assistance of counsel.

{¶ 13} It is well-established that claims of ineffectiveness assistance of counsel are reviewed under the standard set out in *Strickland v. Washington* (1984), 466 U.S. 668. In order to prove ineffective assistance of counsel, the appellant must show both that the performance of trial counsel was defective and must also establish that, but for that defect, the trial outcome would have been different. *Id.* at 687.

{¶ 14} After careful review of the record, we find no evidence or indicia of any kind reflecting that appellant received ineffectiveness of defense counsel. We find no instances where, "but for" the conduct of counsel, the outcome would have been different. Appellant's first potential assignment of error is not well-taken.

{¶ 15} Appellant's second potential assignment of error contends that the trial court abused its discretion by accepting the appellant's guilty pleas without ensuring that the plea was knowingly, intelligently and voluntarily entered.

{¶ 16} The Supreme Court of Ohio has stated: "A trial court must strictly comply with Crim.R. 11(C)(2)(c) and orally advise a defendant before accepting a felony plea that the plea waives (1) the right to a jury trial (2) the right to confront one's accusers, (3) the right to compulsory process to obtain witnesses, (4) the right to require the state to prove guilt beyond a reasonable doubt, and (5) the privilege against compulsory self incrimination. When a trial court fails to strictly comply with this duty, the defendant's plea is invalid." *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, ¶ 31.

{¶ 17} After thorough review of the transcript of the change of plea hearing, it is clear that the trial judge properly and fully advised appellant of his rights before entering his plea of guilty. Appellant unambiguously affirmed his understanding of the consequences of the guilty plea. Appellant's second potential assignment of error is not well-taken.

{¶ 18} In his third potential assignment of error, appellant argues the trial court abused its discretion in sentencing appellant to a maximum sentence, to be served consecutive to the term appellant was serving in Arizona.

{¶ 19} This issue is reviewed pursuant to the standards established by *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio 856. *Foster* held several of Ohio's sentencing statutes unconstitutional in violation of the Sixth Amendment to the United States Constitution in the manner enumerated in *Apprendi v. New Jersey* (2000), 530 U.S. 466 and *Blakely v. Washington* (2004), 542 U.S. 296.

{¶ 20} Trial courts are no longer required to make specific findings or give their reasons for imposing maximum, consecutive, or more than minimum sentences. *Foster* vests trial courts with full discretion to impose any duration of prison sentence which falls within the statutory range.

{¶ 21} "In applying *Foster* to the existing statutes, appellate courts must apply a two-step approach. First, they must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard." *State v. Kalish*, 120 Ohio St. 3d 23, 2008-Ohio-4912, ¶ 4.

{¶ 22} In sentencing appellant, the trial court did not violate any sentencing statutes or in any way abuse its discretion when it sentenced appellant to the maximum sentence to be served consecutively with the term from Arizona. Ample evidence of appellant's propensity for recidivism and the accompanying need to protect the public supports the sentence of the trial court. Appellant's third proposed assignment of error is not well-taken.

{¶ 23} In addition to the *Anders* proposed errors, appellant has filed a litany of pro se supplemental briefs. Appellant argues at great length untenable claims of various constitutional rights violations. However, appellant's briefs do not demonstrate with legal evidence, but rather merely conclude various points of law and are not persuasive. Accordingly, we find no merit in the pro se briefs. The record clearly reflects that substantial justice has been done. Appellate counsel's motion to withdraw is found well-taken and is hereby granted.

{¶ 24} Wherefore, the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, costs of this appeal are assessed to appellant. The clerk is ordered to serve all parties, including the defendant if he or she has filed a brief, with notice of this decision.

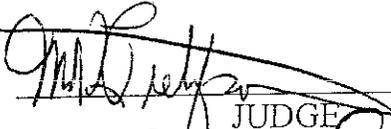
JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____

Arlene Singer, J. _____

Thomas J. Osowik, P.J.
CONCUR. _____



JUDGE



JUDGE



JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.