

[Cite as *State v. Gebhart*, 2009-Ohio-5739.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

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| STATE OF OHIO | : | |
| | : | Appellate Case No. 23347 |
| Plaintiff-Appellee | : | |
| | : | Trial Court Case No. 2006-CR-5281 |
| v. | : | |
| | : | (Criminal Appeal from |
| JESSE GEBHART | : | Common Pleas Court) |
| | : | |
| Defendant-Appellant | : | |
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OPINION

Rendered on the 30th day of October, 2009.

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MATHIAS H. HECK, JR., by CARLEY J. INGRAM, Atty. Reg. #0020084, Montgomery County Prosecutor’s Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

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Attorney for Defendant-Appellant

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FAIN, J.

{¶ 1} Defendant-appellant Jessie Gebhart appeals from a six-month sentence imposed for Receiving Stolen Property, after he was found to have violated the terms of the Intervention in Lieu of Conviction initially imposed. Gebhart’s assigned counsel has filed a brief pursuant to *Anders v. California* (1967), 386 U.S.

738, 87 S.Ct. 1396, 18 L.Ed.2d 493, indicating that he has not been able to find any potential assignment of error having arguable merit. After having independently reviewed the record, as required by *Anders*, neither have we. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 2} Gebhart was indicted in January 2007, for Receiving Stolen Property. In April 2007, Gebhart filed a motion for Intervention in Lieu of Conviction (ILC). He subsequently appeared with counsel at a plea hearing in May 2007, at which the trial court carefully explained his rights and the consequences of pleading guilty to the charge. The court explained that the guilty plea constituted an admission of guilt to the charge, and informed Gebhart that he would not be convicted of the charge on the date of the plea, because the court had granted the motion for treatment in lieu of conviction. The court further explained that if Gebhart were terminated from the ILC program, he would automatically be found guilty pursuant to his plea, and would be sentenced appropriately. Finally, the court explained the potential sentences that could arise in that event, including imposition of a prison term.

{¶ 3} After being duly informed, Gebhart signed the guilty plea. Eight ILC conditions were imposed, including a term of intensive supervision, payment of court costs, restitution, completion of drug or other programs recommended by the Crisis Care Agency, maintenance of employment, and abstention from the use of drugs and alcohol.

{¶ 4} In March 2009, a notice of ILC revocation hearing and order was filed, based on Gebhart's alleged violation of several ILC conditions. Gebhart

subsequently appeared before the court, with counsel, and admitted the violations. The court then revoked ILC, based on Gebhart's admissions, found Gebhart guilty of Receiving Stolen Property, and sentenced Gebhart to six months in jail, with 151 days credited for time already served. Several days later, the court filed Gebhart's signed entry of waivers and pleas on indictment, and also filed a termination entry, reflecting the sentence imposed at the hearing.

II

{¶ 5} Gebhart's appellate counsel has filed a brief pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, indicating that he has not been able to find any potential assignment of error having arguable merit. By entry of this court, Gebhart was advised of this fact, and was given sixty days within which to file his own, *pro se* appellate brief. He has not done so.

{¶ 6} In his brief, Gebhart's counsel has referred to one potential assignment of error, based upon the contention that the conviction and sentencing is against the manifest weight of the evidence. We agree with Gebhart's appellate counsel that, upon considering this potential assignment of error specifically, it has no arguable merit.

{¶ 7} When reviewing a weight-of-the-evidence claim, "[t]he court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the

evidence weighs heavily against the conviction.’ ” *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52 (citation omitted).

{¶ 8} The record indicates that Gebhart signed a written entry, in connection with the tendering of his plea in May 2007, in which he indicated that he was pleading guilty to the offense of “Receiving Stolen Property (.71 property) – O.R.C. §2913.51(A)-(F5).” The entry was not filed at the time of the plea, but was held, pending Gebhart’s successful completion of ILC. As part of his treatment, Gebhart was required to comply with eight conditions, including a term of intensive supervision, payment of court costs, restitution, completion of drug or other programs recommended by the Crisis Care Agency, maintenance of employment, and abstention from the use of drugs and alcohol.

{¶ 9} In early March 2009, Gebhart was notified of an ILC revocation hearing to be held later that month, based on the following alleged violations: (1) failure to maintain employment; (2) self-admitted use of heroin and positive results for opiates, methadone, and marijuana; and (3) failure to comply with treatment at Daymont West, and failure to pay toward restitution and financial obligation to the court. Gebhart appeared at the revocation hearing in March 2009, and admitted to the violations. Under the circumstances, there is no arguable merit to the contention that either the original conviction or the revocation of ILC is against the manifest weight of the evidence.

{¶ 10} Counsel suggests in his brief that Gebhart feels the sentence is too harsh for a first-time offender. We conclude that the sentence is not unduly harsh. Potential prison sentences for a fifth-degree felony may range between six and

twelve months. At the revocation hearing, Gebhart was given the minimum sentence, and was credited with 151 days of jail credit, leaving a minimal amount of time to be served. Although the trial court had discretion to impose community control sanctions instead of incarceration, the minimal sentence of incarceration that was imposed cannot reasonably be argued to constitute an abuse of discretion. By having agreed to ILC, the trial court had already given Gebhart an even better opportunity to avoid incarceration than the opportunity represented by community control sanctions, since ILC, if successfully completed, avoids a record of a felony conviction. Once Gebhart failed to successfully comply with the ILC conditions, the trial court had no reason to believe that the result would be any better if Gebhart were to be afforded the opportunity represented by community control sanctions.

{¶ 11} Pursuant to *Anders v. California, supra*, we have performed our duty to review the record independently, to see if there are any potential assignments of error having sufficient merit to make this appeal not wholly frivolous. We have discovered no potential assignments of error having arguable merit.

III

{¶ 12} This court agreeing with assigned appellate counsel that there are no potential assignments of error having arguable merit, and that this appeal is wholly frivolous, the judgment of the trial court is Affirmed.

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GRADY and FROELICH, JJ., concur.

Copies mailed to:

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Hon. Dennis J. Langer