[Cite as *State v. Taylor*, 2009-Ohio-4818.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 08 MA 107
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
EDWARD TAYLOR, II	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio
Case No. 07 CR 1562

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Atty. Paul J. Gains
Mahoning County Prosecutor
Atty. Rhys B. Cartwright-Jones
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For Defendant-Appellant:

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JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: September 9, 2009

[Cite as *State v. Taylor*, 2009-Ohio-4818.]
WAITE, J.

{¶1} Counsel for Appellant, Edward Taylor, II, has filed a no merit brief and motion to withdraw as counsel in this criminal appeal pursuant to *State v. Toney* (1970), 23 Ohio App.2d 203, 262 N.E.2d 419. Appellant was given an opportunity to file a pro se brief, but no brief was filed. Appellant pleaded guilty to voluntary manslaughter, robbery, kidnapping, and felonious assault, along with one firearm specification in the trial court. In exchange for the plea, the state agreed to recommend a 25-year prison term, and the trial court ultimately sentenced Appellant to a prison term of 22 years. Counsel has considered a number of possible areas of appeal, none of which has any merit. As a consequence, counsel's motion to withdraw is granted, and the judgment of the trial court is affirmed.

{¶2} On December 12, 2007, Appellant was indicted in Mahoning County on one count of aggravated murder, one count of aggravated robbery, one count of kidnapping, and one count of felonious assault, with firearm specifications to all counts. Appellant was accused of causing the death of James Dow, while he and three other men were committing or attempting to commit robbery.

{¶3} On February 22, 2008, Appellant filed a motion to suppress evidence seized during a warrantless search of a residence. The court scheduled the matter for a hearing on February 29, 2008. However, prior to the trial court's decision as to the motion to suppress, Appellant pleaded guilty to one count of voluntary manslaughter, in violation of R.C. 2903.03(A), a felony of the first degree, one count of robbery, in violation of R.C. 2911.01(A)(2), a felony of the second degree, one count of kidnapping, in violation of R.C. 2905.01(A)(2), a felony of the first degree,

and one count of felonious assault, in violation of R.C. 2903.11(A)(2), a felony of the second degree. He also pleaded guilty to one of the firearm specifications, a violation of R.C. 2941.145(A), which carries a mandatory three-year prison term.

{¶4} The signed plea agreement is part of the record. The parties jointly agreed to a 25-year prison term. The state entered in the plea contingent upon Appellant's continued cooperation in the state's cases against D'Metri Lee and Appellant's co-defendants, Aaron Sherrod and Michael Lee.

{¶5} At the sentencing hearing on May 14, 2008, the trial court sentenced Appellant to ten years in prison on the voluntary manslaughter charge, five years in prison for the kidnapping charge, two years for the robbery and felonious assault charges, respectively, and a three-year prison term for the firearm specifications, all to run consecutively. The aggregate sentence amounted to 22 years in prison, three years less than the sentence to which the parties jointly agreed. The sentencing entry was filed on May 16, 2008. This timely appeal was filed on May 30, 2008.

{¶6} "It is well settled that an attorney appointed to represent an indigent criminal defendant on his or her first appeal as of right may seek permission to withdraw upon a showing that the appellant's claims have no merit. See, generally, *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493; *State v. Toney* (1970), 23 Ohio App.2d 203, 52 O.O.2d 304, 262 N.Ed.2d 419. To support such a request, appellate counsel must undertake a conscientious examination of the case and accompany his or her request for withdrawal with a brief referring to anything in the record that might arguably support the appeal. *Id*. The reviewing

court must then decide, after a full examination of the proceedings, whether the case is wholly frivolous. *Id*." (Emphasis in original.) *State v. Odorizzi* (1998), 126 Ohio App.3d 512, 515, 710 N.E.2d 1142.

{¶7} In *Toney*, this Court set forth the procedure to be used when counsel of record determines that an indigent's appeal is frivolous:

{¶8} "3. Where a court-appointed counsel, with long and extensive experience in criminal practice, concludes that the indigent's appeal is frivolous and that there is no assignment of error which could be arguably supported on appeal, he should so advise the appointing court by brief and request that he be permitted to withdraw as counsel of record.

{¶9} "4. Court-appointed counsel's conclusions and motion to withdraw as counsel of record should be transmitted forthwith to the indigent, and the indigent should be granted time to raise any points that he chooses, *pro se*.

{¶10} "5. It is the duty of the Court of Appeals to fully examine the proceedings in the trial court, the brief of appointed counsel, the arguments *pro se* of the indigent, and then determine whether or not the appeal is wholly frivolous.

{¶11} "6. Where the Court of Appeals makes such an examination and concludes that the appeal is wholly frivolous, the motion of an indigent appellant for the appointment of new counsel for the purposes of appeal should be denied.

{¶12} "7. Where the Court of Appeals determines that an indigent's appeal is wholly frivolous, the motion of court-appointed counsel to withdraw as counsel of

record should be allowed, and the judgment of the trial court should be affirmed." (Emphasis in original.) *Toney*, supra, at syllabus.

{¶13} A plea of guilty effectively waives all non-jurisdictional appealable errors which may have occurred prior to the plea, unless such errors are shown to have precluded the defendant from voluntarily entering the plea. *Ross v. Common Pleas Court of Auglaize County* (1972), 30 Ohio St.2d 323, 323-324, 285 N.E.2d 25; *State v. Kelley* (1991), 57 Ohio St.3d 127, 566 N.E.2d 658, paragraph two of the syllabus.

{¶14} The record does not reveal any evidence that Appellant's guilty plea was not made knowingly, intelligently and voluntarily. The record contains a written plea agreement and the transcript of a full plea hearing. The trial court engaged in an extensive colloquy with Appellant regarding the rights that are waived as a result of a guilty plea. Appellant asked the trial court to repeat those rights, and the trial court went over each right a second time. Likewise, the trial court explained the effect of the guilty plea. Appellant expressed himself very clearly during the plea hearing, asked and answered questions, and freely entered his plea.

{¶15} The day before the sentencing hearing was scheduled to proceed, the state filed a motion to continue the hearing in order to amend the indictment to include the appropriate mental state for the crimes of robbery and kidnapping pursuant to the Supreme Court's holding in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, which had been issued approximately one month prior to the sentencing hearing. In the motion, the state explained that the Ohio Prosecuting Attorneys' Association had held a meeting shortly after the issuance of

the *Colon* decision, where it was determined that the state should re-indict all felony cases in which the original indictment did not contain the requisite mental state. (5/13/08 Motion, pp. 1-2.) Neither the indictment nor the trial court in its Crim.R. 11(C) colloquy mentioned the requisite mental state for the crimes of robbery and kidnapping.

{¶16} At the sentencing hearing, Appellant's trial counsel essentially waived the defect in the indictment, saying, "it further states in the case that they supplied me with the motion, that we would have to object to proceeding, and we have no objection to proceeding at this time. We would like to do that. There's no reason to believe there's going to be any different situation at a later date." (5/14/08 Tr., p. 6.) The trial court added, "* * * I mean, what the prosecutor's contemplating is reindicting somebody for the same thing. In fact, reindicting to what this man was originally charged with and going through everything that we've done before would be the addition of one or two words into the particular charges in Counts 2 and 3." (5/14/08 Tr., p. 6.)

{¶17} The trial court proceeded to identify the requisite mental state for both crimes, stating that it was "knowledge." (5/14/08 Tr., pp. 6-7.) The trial court then asked Appellant's trial counsel, "so are you and your client agreeing that in Counts 2 and 3, as he entered the plea, he's agreeing that he admits that he committed these crimes knowingly?" Appellant's trial counsel responded, "[t]hat is correct, Your Honor. There's no reason to delay this matter." (5/14/08 Tr., p. 7.) As a

consequence, the trial court denied the state's motion for a continuance and proceeding to sentencing.

{¶18} In *Colon*, supra, the Supreme Court of Ohio held that, "[w]hen an indictment fails to charge a mens rea element of a crime and the defendant failed to raise that defect in the trial court, the defendant has not waived the defect in the indictment." *Colon* at syllabus. The Supreme Court undertook a structural-error analysis in *Colon* and concluded that the conviction in that case should be reversed.

{¶19} However, the application of the rule of law announced in *Colon*, supra, was narrowed in scope by the Supreme Court in *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169 (*Colon II*). Ruling on the state's motion for reconsideration, the Supreme Court wrote, "[a]pplying structural-error analysis to a defective indictment is appropriate only in rare cases, such as *Colon I*, in which multiple errors at the trial follow the defective indictment. In *Colon I*, the error in the indictment led to errors that 'permeate[d] the trial from beginning to end and put into question the reliability of the trial court in serving its function as a vehicle for determination of guilt or innocence.' " (Internal citations omitted). *Colon II* at ¶8.

{¶20} The Supreme Court held, "when a defendant fails to object to an indictment that is defective because the indictment did not include an essential element of the charged offense, a plain-error analysis is appropriate." Id. at ¶7. The Court specifically confined the application of *Colon I* to the facts in that case. Id. at ¶8.

{¶21} The above-captioned case is clearly distinguishable from *Colon*, supra. Here, Appellant pleaded guilty to the crimes at issue. Earlier this year, we held that a defendant that enters a guilty plea waives any defect in the indictment, including the failure to state an essential element of the crime. *State v. Cain*, 7th Dist. No. 08 MA 123, 2009-Ohio-1015, ¶12-13; see also *State v. Kovach*, 7th Dist. No. 08 MA 125, 2009-Ohio-2892, ¶41. In *Cain*, we wrote:

{¶22} "The main distinguishing feature between this case and *Colon I* is that Cain pleaded guilty, and did not have a trial that involved multiple errors that were inextricably linked to his indictment. Thus, pursuant to the reasoning of *Colon I* and *Colon II*, structural error analysis is not appropriate for this case. The longstanding rules of waiver pursuant to guilty pleas continue to apply. By pleading guilty to aggravated robbery and felonious assault, Cain waived any alleged defect in the indictment for purposes of appeal." Id. at ¶13. The same is true in the case sub judice.

{¶23} Turning to sentencing, a criminal defendant cannot appeal a sentence that is, "authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge." R.C. 2953.08(D)(1). This includes any issues that might conceivably arise under *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. See, e.g., *State v. Haney*, 2nd Dist. No. 06CA105, 2007-Ohio-5174. The parties in this case agreed on the 25-year prison sentence, and a 22-year sentence was imposed by the trial judge. Therefore, there are no possible sentencing issues to raise on appeal.

{¶24} Appellant's counsel is correct that this appeal is wholly frivolous. The record does not indicate any viable arguments with respect to the plea, the plea hearing, or the trial court's acceptance of the plea. Accordingly, counsel is permitted to withdraw and the conviction and sentence are affirmed.

Donofrio, J., concurs.

DeGenaro, J., concurs.