

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

State of Ohio

Court of Appeals Nos. L-08-1254
L-08-1255

Appellee

Trial Court Nos. CR-07-3631
CR-08-1247

v.

Anthony D. Duff

DECISION AND JUDGMENT

Appellant

Decided: September 4, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellee.

James J. Popil, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is a consolidated appeal from judgments of the Lucas County Court of Common Pleas, which found appellant guilty of one count of possession of crack cocaine, in violation of R.C. 2925.11(A) and (C), a felony of the third degree, in case No. CR-07-3631; and guilty of one count of possession of crack cocaine, in violation of R.C.

2925.11(A) and (C), a felony of the third degree, in case No. CR-08-1247. Appellant was sentenced to serve two consecutive terms of incarceration of three years on each count. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appointed counsel, James Popil, has submitted a request to withdraw pursuant to *Anders v. California* (1967), 386 U.S. 738. In a brief filed on appellant's behalf, appointed counsel sets forth three proposed assignments of error. In support of the request to withdraw, counsel for appellant states that, after reviewing the record of proceedings from the trial court below, counsel was unable to find any meritorious appealable issues.

{¶ 3} *Anders*, supra, and *State v. Duncan* (1978), 57 Ohio App.2d 93, set forth the procedure to be utilized by an appointed counsel who desires to withdraw based upon the lack of a meritorious, appealable issue. In *Anders*, the United States Supreme Court held that if counsel, after a conscientious examination of the case, determines it to be wholly frivolous, he or she "should so advise the court and request permission to withdraw." *Id.*, at 744. An *Anders* request must be accompanied by a brief referring to anything in the record that could arguably support an appeal. *Id.*

{¶ 4} In the course of seeking an *Anders* withdrawal, counsel must also furnish the client with a copy of the brief, the request to withdraw, and notify the client that he has the right to raise any matters that the client wishes to proffer on a pro se basis. Once these prerequisite criteria have been satisfied, the appellate court must conduct a full examination of proceedings from below in order to determine if the appeal is frivolous.

If it is determined that the appeal is frivolous, then the appellate court may grant counsel's request to withdraw and dismiss the appeal without violating constitutional requirements or it may proceed to a decision based upon the merits. *Id.*

{¶ 5} In the case before us, appointed counsel for appellant has satisfied the requirements delineated in *Anders*, supra. This court further finds that appellant was properly notified by counsel of his right to file a brief; however, no pro se brief was filed.

{¶ 6} Accordingly, this court shall proceed with an examination of the potential assignments of error proposed by counsel for appellant and the record from below in order to determine if this appeal lacks merit and is, therefore, wholly frivolous.

{¶ 7} Counsel for appellant sets forth the following three proposed assignments of error:

{¶ 8} "I. APPELLANT'S PLEA SHOULD BE SET ASIDE BECAUSE IT WAS NOT MADE KNOWINGLY, VOLUNTARILY, OR INTELLIGENTLY.

{¶ 9} "II. APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

{¶ 10} "III. THE TRIAL COURT COMMITTED AN ABUSE OF DISCRETION IN SENTENCING APPELLANT TO A NON-MINIMUM CONSECUTIVE TERM OF INCARCERATION."

{¶ 11} The following undisputed facts are relevant to the issues raised on appeal. In case No. CR-07-3631, stemming from an August 10, 2007 incident involving a safety search subsequent to a routine traffic stop in Toledo, appellant was indicted on one count

of possession of crack cocaine, in violation of R.C. 2925.11, a first-degree felony, and one count of cocaine trafficking, in violation of R.C. 2925.03, a first-degree felony.

{¶ 12} In case No. CR-08-1247, stemming from a July 17, 2007 incident involving undercover Toledo Police Department drug operations in North Toledo, appellant was indicted on one count of possession of crack cocaine, in violation of R.C. 2925.11, a second-degree felony, and one count of cocaine trafficking, in violation of R.C. 2925.03, a second-degree felony.

{¶ 13} On March 31, 2008, pursuant to negotiated plea agreements, appellant entered pleas of guilty to two amended counts of possession of crack cocaine, in violation of R.C. 2925.11(A) and (C), felonies of the third degree. The remaining charges pending against appellant were dismissed. A presentence investigation report was prepared. It revealed a lengthy criminal history comprised of dozens of prior convictions, including numerous prior drug-related convictions.

{¶ 14} On March 31, 2008, pursuant to the above described voluntary plea agreement, appellant withdrew his not guilty pleas and entered guilty pleas to the two amended charges. This was done both orally and in writing. On April 22, 2008, appellant was sentenced to serve two mandatory terms of incarceration of three years on each count. The sentences were ordered to be served consecutively. On August 21, 2008, appellant's motion for leave to file a delayed appeal was granted by this court.

{¶ 15} In the first proposed assignment of error, it is contended that appellant's plea was not made knowingly, voluntarily, or intelligently. Under Crim.R. 11(C), the

trial court is required to determine whether an offender's guilty plea is knowing, voluntary, and intelligently made. *State v. Engle* (1996), 74 Ohio St.3d 525.

Accordingly, we have thoroughly reviewed the transcript of proceedings from below in this matter for any indicia that appellant's Crim.R. 11 rights were in any way compromised.

{¶ 16} On the contrary, the transcript unambiguously establishes that the trial court conducted a precise and comprehensive colloquy with appellant. The record establishes that both appellant's trial counsel and the trial court thoroughly and methodically verified appellant's complete understanding and affirmation of his rights, his waiver of rights, the offenses to which he was pleading guilty, and all potential legal ramifications to be expected in connection with the guilty pleas.

{¶ 17} The transcript of the underlying change of plea hearing possesses no conduct or statement by appellant arguably reflecting the plea not to be knowing, intelligent, and voluntary. At the conclusion of the hearing appellant proclaimed, "Yes, I admit all my wrongdoing. I would like to, you know, start all over again. I'll go do what I got to do and come back and get a job and be a citizen, citizen of society. So what ever I get today I accept it proudly."

{¶ 18} We find that the record establishes unequivocal conformity with Crim.R.

11. Appellant's first proposed assignment of error is found without merit.

{¶ 19} In the second proposed assignment of error, it is argued that appellant's trial counsel was ineffective. In support, it is asserted that trial counsel should have objected to consecutive sentencing.

{¶ 20} To prevail on a claim of ineffective assistance of counsel, appellant must show that counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied upon as having produced a just result. *Strickland v. Washington* (1984), 466 U.S. 668, 686. The standard of proof requires appellant to satisfy a two-prong test. First, appellant must show that counsel's representation fell below an objective standard of reasonableness. *Id.*, at 687. Second, appellant must show prejudice by establishing a reasonable probability that, but for counsel's perceived errors, the results of the proceeding would have been different. *Id.* In conjunction with this evidentiary test, it is well-settled that appellant's burden of proof is particularly high given the presumption in Ohio that a properly licensed attorney is deemed competent. *State v. Hamblin* (1988), 37 Ohio St.3d 153, 156.

{¶ 21} We have carefully reviewed the record from below. The record encompasses ample evidence in support of the original, higher level drug offenses charged against appellant. The record establishes that appellant possessed a lengthy history of serious criminal offenses, including a multitude of prior felony drug offenses. The record establishes that appellant himself fully conceded to his engagement in cocaine trafficking and possession.

{¶ 22} Faced with an array of adverse set of facts and circumstances, trial counsel nevertheless secured appellant a plea agreement through which the two highest level felony offenses were dismissed and the remaining offenses were amended to lower level offenses. Appellant received two mandatory terms of incarceration of three years, to be served consecutively, in a case in which the initial potential incarceration time faced by appellant was significantly greater than the actual sentence imposed.

{¶ 23} The record from below contains no evidence in support of the notion that perceived mistakes of trial counsel precluded a just result or that, but for perceived errors of counsel, the results would have been different. We find appellant's second proposed assignment of error without merit.

{¶ 24} In the third proposed assignment of error, it is contended that the trial court abused its discretion in sentencing appellant to non-minimum, consecutive terms of incarceration. We need not belabor our analysis on this point. As correctly conceded by counsel for appellant, the trial court is vested with full discretion to impose any sentence within the statutory range. There is no corollary requirement to issue specific reasons or findings prior to imposition of such a sentence.

{¶ 25} Given appellant's serious and lengthy criminal history, ample evidence against him, and his violation of community control at both the municipal court and common pleas levels at the time of the new offenses, there is absolutely no support in the record for the notion that the trial court abused its discretion in sentencing appellant. We find appellant's third proposed assignment of error without merit.

{¶ 26} Based upon our own independent review of the record, we find no other grounds for a meritorious appeal. This appeal is, therefore, wholly frivolous and without merit. Appellate counsel's motion to withdraw is well-taken and is granted. The judgments of the Lucas County Court of Common Pleas are affirmed. Appellant is ordered to pay the cost of this appeal pursuant to App.R. 24.

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.

JUDGE

Thomas J. Osowik, J.

JUDGE

James J. Sweeney, J.
CONCUR.

JUDGE

Judge James J. Sweeney, Eighth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

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>.