[Cite as *State v. Brock*, 2009-Ohio-4590.]

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

State of Ohio — Court of Appeals No. L-08-1304

Appellee — Trial Court No. CR0200801763

v.

Corey Michael Brock — **DECISION AND JUDGMENT**

Appellant — Decided: September 4, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Lindsay D. Navarre, Assistant Prosecuting Attorney, for appellee.

Nicole I. Khoury, for appellant.

* * * * *

SHERCK, J.

{¶ 1} Appellant, Corey Michael Brock, appeals the judgment of the Lucas County Court of Common Pleas. After a jury trial, Brock was convicted of felonious assault, a felony of the second degree, and was sentenced to three years of community control. In this appeal as of right, his appointed appellate counsel has filed a "no merit"

brief and a request to withdraw, pursuant to *Anders v. California* (1967), 386 U.S. 738. For the following reasons, we grant counsel's request to withdraw and affirm the trial court's judgment.

{¶ 2} In addition to the indictment for felonious assault, Brock was also indicted separately for two counts of domestic violence, both felonies of the fourth degree. The two indictments were tried together to a jury. Brock was convicted of felonious assault and one count of domestic violence; the jury entered a judgment of acquittal on the second count of domestic violence. The trial court entered judgments of conviction for one count of felonious assault and one count of domestic violence.

{¶ 3} At the outset, we note that Brock's appointed trial counsel only filed one notice of appeal, from the one judgment of conviction for felonious assault. Brock's appointed appellate counsel's two proposed assignments of error both relate to both judgments of conviction and discuss both counts. The judgment of conviction on the indictment for domestic violence – while tried together with the felonious assault charge – was not appealed and is not properly before us for review. Therefore, we must limit our review of counsel's proposed assignments of error to the judgment appealed.

{¶ 4} The following facts were adduced at trial. On the morning of November 23, 2006, Brock and his girlfriend, Kimberly, with whom he had been cohabitating, argued. The argument escalated and Kimberly attempted to leave their house over Brock's objections. Brock grabbed Kimberly by the hair as she fled, pulled her into the house, and threw her to the floor, rendering her unconscious. Kimberly's

daughter, who had been listening on the staircase, testified that she saw Brock throw Kimberly to the floor. She then saw Brock take a sword and swing it towards Kimberly. Brock missed, hit the stove instead, and then dropped the sword as he ran out of the house. Kimberly's daughter and her sister tried to wake Kimberly. When Kimberly woke, she found that she had lost a tooth in the fight and had extensive bruising. Photographs of Kimberly's injuries, taken at the police station, were introduced into evidence.

{¶ 5} Kimberly and her daughter discovered that Brock, before he left, had barricaded the front door from the outside with furniture. Later that same night, Brock returned to pack a bag. Arguments renewed, and Brock threw Kimberly and her daughter off of the front porch. Both women ran to a neighbor's house, where Kimberly called 911. A recording of that telephone call was introduced into evidence. Photographs, taken at the police station, of the bruising that Kimberly's daughter sustained in the fall were introduced into evidence.

{¶ 6} Police officers, who responded to Kimberly's 911 call, testified that they found the front door barricaded. They confiscated three "Samari swords" and a machete from the house. An expert witness in domestic violence also testified for the state.

{¶ 7} At the close of the state's evidence, the trial court denied Brock's Crim.R. 29 motion. Brock's brother, Douglas Brock, then testified. Douglas explained that he had been at Brock's residence the evening prior, and saw Kimberly intoxicated. He and Brock both thought they saw Kimberly with another man, which, apparently, was offered

to explain why Brock was upset with Kimberly and how the arguments began. Douglas Brock also testified that Kimberly had lied to him before. A self-described "good friend" of Brock, Meelan Shaffer, testified that he was also at Brock's house the evening before and saw Kimberly intoxicated. Shaffer also testified that he saw Brock and Kimberly argue about the other man in the house, and then saw them "tussling." During the brief physical altercation, Shaffer explained, Kimberly said that she had a loose tooth fall out.

{¶ 8} For the conviction for felonious assault, the trial court sentenced Brock to three years of community control.

{¶ 9} 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 should so advise the court and request permission to withdraw. Id. at 744. See, also, *State v. Duncan* (1978), 57 Ohio App.2d 93. This request, however, must be accompanied by a brief identifying anything in the record that could arguably support the appeal. Id. Counsel must also furnish his client with a copy of the brief and request to withdraw and allow the client sufficient time to raise any matters that he chooses. Id. Once these requirements have been satisfied, the appellate court must then conduct a full examination of the proceedings held below to determine if the appeal is indeed frivolous. If the appellate court determines that the appeal is frivolous, it may grant counsel's request to withdraw and dismiss the appeal without violating constitutional requirements or may proceed to a decision on the merits if state law so requires. Id.

{¶ 10} In this case, appointed counsel has fulfilled the requirements of *Anders*. She asserts that, after carefully reviewing the record, and after researching case law and statutes relating to potential issues, she was unable to find an arguable, non-frivolous issue for appeal. Upon consideration, we conclude that counsel's brief is consistent with the requirements set forth in *Anders*, supra and *Penson v. Ohio* (1988), 488 U.S. 75. Brock has not filed his own brief.

{¶ 11} Brock's appellate counsel has raised two potentially arguable matters for review. First, she raises the possibility that Brock's trial counsel rendered ineffective assistance. Second, she points to the possibility that Brock's convictions were against the manifest weight of the evidence.

{¶ 12} In support of the first proposed assignment of error, Brock's counsel states that Brock's trial counsel did not allow Brock to testify on his own behalf. She also states that "Mr. Brock indicated that there were several tape recorded conversations that were relevant to his case, presented to his counsel and never introduced at trial."

{¶ 13} The standard for a defendant to show he was deprived of ineffective assistance of counsel is high. A defendant's counsel's "performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* (1976), 48 Ohio St.2d 391; *Strickland v. Washington* (1984), 466 U.S. 668, followed.)" *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus.

{¶ 14} Issues which are arguably a matter of counsel's trial tactics and strategies do not constitute ineffective assistance. *State v. Clayton* (1980), 62 Ohio St.2d 45, 49, citing *State v. Lytle* (1976), 48 Ohio St.2d 391, 396. While a defendant has a fundamental right to testify on his own behalf if he wishes, *State v. Bey* (1999), 85 Ohio St.3d 487, 499, the decision of whether to have the defendant testify is also an important "tactical decision." Id., quoting *Brooks v. Tennessee* (1972), 406 U.S. 605, 612. Several state courts have held that the decision remains within the purview of trial strategy. *State v. Carpenter*, 6th Dist. No. E-00-033, 2002-Ohio-2266, ¶ 68; *State v. Mabry* (Oct. 9, 1996), 9th Dist. No. 2514-M. Regardless, the record does not indicate that Brock asserted his right to testify. As such, we may find this right waived. Further, having reviewed the entire record, any possible decision to discourage Brock from testifying did not cause him prejudice. Likewise, the record contains no indication of the existence of any tapes and neither Brock nor his counsel raised the issue of the admissibility of tapes. Thus, the relevance of any possible tapes is speculative, and the decision not to admit them does fall within the realm of a reasonable trial strategy. We find no arguable issue as to whether Brock was prejudiced by ineffective assistance of counsel.

{¶ 15} Next, Brock's appointed appellate counsel raises the possible issue that Brock's conviction was against the manifest weight of the evidence. To reiterate, this appeal is limited to Brock's conviction for felonious assault, a violation of R.C. 2903.11(A)(1). Plainly, the manifest weight of the evidence adduced at trial demonstrates that Brock knowingly caused serious physical harm to Kimberly. We have

reviewed the entire record and we cannot say that a miscarriage of justice resulted. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. This is not the extraordinary case where the evidence weighs heavily against conviction. Id. This potential assignment of error is without merit.

{¶ 16} Having independently reviewed the entire record, we agree with Brock's counsel and conclude that there exist no arguable, non-frivolous issues for appeal. Brock's counsel's motion to withdraw is well-taken and is hereby granted. Accordingly, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs 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.

Peter M. Handwork, P.J. ____________________ JUDGE

Thomas J. Osowik, J.

James R. Sherck, J. ____________________ JUDGE
CONCUR.

____________________ JUDGE

Judge James R. Sherck, retired, 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.