

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

State of Ohio

Court of Appeals No. E-09-018

Appellee

Trial Court No. 2007-CR-516

v.

Willie L. Otis

DECISION AND JUDGMENT

Appellant

Decided: May 21, 2010

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Timothy H. Dempsey, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Willie Otis, appellant, appeals a May 27, 2008 judgment of the Erie County Court of Common Pleas of conviction and sentence on two counts of felonious assault of a peace officer. The offenses are felonies of the first degree and violations of R.C. 2903.11(A)(2).

{¶ 2} Under a plea agreement, Otis pled guilty to the offenses and joined with the state to recommend an eight year prison term on each count. The trial court imposed the recommended sentence. It sentenced appellant to imprisonment for eight years on each count with the sentences ordered to run concurrently. Together, the sentences imposed a total period of incarceration of eight years.¹

{¶ 3} The felonious assault of police officer charges were two counts of an eight count indictment against Otis. Under the plea agreement, Counts 3 through 8 were dismissed. Specifications under both counts that appellant did cause or threaten to cause physical harm during the commission of the felonious assaults were also dismissed. Those counts of the indictment that were dismissed under the plea agreement included:

{¶ 4} 1. Count 3, charging the offense of domestic violence, a third degree felony and a violation of R.C. 2919.25(A);

{¶ 5} 2. Counts 4 and 5, charging two counts of resisting arrest, fourth degree felonies and violations of R.C. 2921.33(C)(1);

{¶ 6} 3. Count 6, charging the offense of endangering children, a first degree misdemeanor and a violation of R.C. 2919.22(A);

{¶ 7} 4. Count 7, charging the offense of obstructing official business, a fifth degree felony and a violation of R.C. 2921.31(A); and

¹Appellant was incarcerated at the time of the sentencing hearing in this case and serving his sentence on a prior criminal conviction. The trial court ordered that the sentences imposed in this case run concurrently with the sentence for the other criminal conviction.

{¶ 8} 5. Count 8, charging the offense of violation of a temporary protection order, a first degree misdemeanor and a violation of R.C. 2919.27(A)(1).

{¶ 9} Appellant's counsel filed an appellant's brief on behalf of Otis but has also requested leave of court to withdraw as counsel in the appeal. The request is made under procedure set forth in *Anders v. California* (1967), 386 U.S. 738. In *Anders*, the Supreme Court of the United States established the procedure to be followed where appointed counsel concludes that there is no merit to an appeal and seeks to withdraw as counsel for appellant in an appeal. Under the procedure, counsel must undertake a "conscientious examination" of the case and, if he determines an appeal would be "wholly frivolous," must advise the court and seek permission to withdraw. *Id.* at 744. The request to withdraw must be accompanied with a brief "referring to anything in the record that might arguably support the appeal." *Id.* A copy of the brief is to be furnished to the appellant. *Id.* The appellant is permitted additional time to raise any points he chooses in his own brief. *Id.*

{¶ 10} Where these requirements are met, an appellate court must conduct a full examination of the proceedings to determine whether the appeal is wholly frivolous. *Id.* Where the court concludes that the appeal is wholly frivolous, it may grant the motion to withdraw and dismiss the appeal. *Id.*

{¶ 11} Counsel for appellant has presented five potential grounds for appeal:

{¶ 12} "Possible Assignments of Error

{¶ 13} "I. The trial court abused its discretion and sentenced appellant contrary to law.

{¶ 14} "II. The trial court violated the purposes and principles of felony sentencing under ORC 2929.11 and ORC 2929.12.

{¶ 15} "III. Appellant was denied the right to a speedy trial under ORC 2945.71.

{¶ 16} "IV. Appellant was denied the right to a preliminary hearing under Criminal Rule 5(B)."

{¶ 17} Counsel indicates that he has served appellant with a copy of the brief he filed in this appeal. Counsel also states that he has advised appellant in writing that he has been unable to find any meritorious issues for appeal and that appellant may wish to file his own brief. He informed appellant of his right to file such a brief within 60 days. Appellant has not filed any additional appellate brief.

{¶ 18} The first two possible assignments of error concern sentence. The Ohio Supreme Court's decision in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 26² sets forth the standard of review on appeal of felony sentencing. Appellate courts "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 in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard." *Id.*

²The *Kalish* decision is a plurality decision.

{¶ 19} The first potential argument raised by counsel is that appellant's sentences are contrary to law. The sentence on each count, however, was within the statutory range under R.C. 2929.14(A)(1) and was jointly recommended to the trial court by appellant and the state under the plea agreement. Such sentences are not contrary to law. See *State v. Trent*, 6th Dist. No. E-07-039, 2009-Ohio-508, ¶ 10-11; *State v. Salce*, 6th Dist. No. H-06-032, 2007-Ohio-3687, ¶ 11.

{¶ 20} Possible Assignment of Error No. I is not well-taken.

{¶ 21} The second potential argument is that the sentences imposed violated the purposes and principles of sentencing under R.C. 2929.11 and 2929.12. R.C. 2929.11 and 2929.12 serve as "an overarching guide for trial judges to consider in fashioning an appropriate sentence." *Kalish* at ¶ 17.

{¶ 22} In the sentencing judgment, the trial court indicated that it had "considered the record, oral statements, and the principles and purposes of sentencing under Ohio Revised Code §2929.11." R.C. 2929.11(A) provides:

{¶ 23} "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. 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."

{¶ 24} R.C. 2929.12 sets forth a non-exhaustive list of "factors to consider in felony sentencing" including factors relating to the seriousness of the conduct and factors relating to the likelihood of recidivism. R.C. 2929.12(A). Under the statute, a sentencing court may consider factors not listed in the statute where relevant to the principles and purposes of felony sentencing. *Id.*

{¶ 25} Here appellant committed felonious assault against two police officers responding to a report of domestic violence. The state reported at sentencing that the injuries to at least one of the two officers were serious, a seriousness of the crime factor under R.C. 2929.12(B)(2). At the time of the offense, appellant was on release from custody while on parole from serving a prison sentence for another offense, a recidivism factor under R.C. 2929.12(D)(1).

{¶ 26} Certainly the principles of felony sentencing include the protection of police officers from assault while responding to complaints of domestic violence through punishment of offenders and deterrence of others. Additionally, given that appellant sought the sentence imposed and the existence of sentencing factors concerning the seriousness of appellant's conduct and recidivism, we find no basis in the record upon which to conclude that the trial court abused its discretion in determining sentence. Possible Assignment of Error No. II is not well-taken.

{¶ 27} Under Possible Assignment of Error No. III, appellant argues that he was denied his right to a speedy trial under R.C. 2945.71. Appellant, however, waived any claim of denial of his statutory right to a speedy trial by entering guilty pleas. *State v.*

Kelley (1991), 57 Ohio St.3d 127, paragraph one of syllabus; *State v. McIntosh*, 6th Dist. No. E-07-048, 2008-Ohio-4743, ¶ 36. Possible Assignment of Error No. III is not well-taken.

{¶ 28} Under Possible Assignment of Error No. IV, appellant contends that he was denied the right to a preliminary hearing within time limits set forth in Crim.R. 5(B). Appellant raised no objection in the trial court to the denial. The Erie County Grand Jury issued an indictment of appellant on the criminal charges concerned in this appeal on September 14, 2007.

{¶ 29} Claimed error based upon an asserted denial of a preliminary hearing within the requirements of Crim.R. 5(B) is also waived by a guilty plea. *State v. Wolford* (Sept. 22, 2000), 6th Dist. No. WM-99-018; *State v. Hairston* (May 20, 1999), 8th Dist. No. 75259 and 75260. Furthermore, the requirements of Crim.R. 5(B) are not self-executing and are extinguished where the grand jury subsequently issues an indictment before the defendant seeks relief from the trial court for noncompliance with the rule. *State ex rel. Pena v. Konteh*, 6th Dist. No. L-07-1248, 2007-Ohio-3955, ¶ 8; *State v. Wood* (1976), 48 Ohio App.2d 339, 342.

{¶ 30} Here appellant has not only pled guilty to the offenses on which he stands convicted, he also did not raise any objection with the trial court asserting failure to conduct a preliminary hearing within the requirements of Crim.R. 5(B) before the grand jury issued its indictment on the charges. Accordingly, we conclude that Possible Assignment of Error No. IV is not well-taken.

{¶ 31} We conclude that no meritorious issue for appeal is presented in the potential issues raised by appellant's counsel in his *Anders* brief. We have conducted our own independent review of the record and proceedings in the trial court and conclude that appellant's appeal is entirely without merit. Counsel for appellant has met his responsibilities under *Anders v. California*. We, therefore, grant his motion to withdraw.

{¶ 32} On consideration whereof, this court finds that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Erie 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, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

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>.