

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

State of Ohio

Court of Appeals No. S-09-018

Appellee

Trial Court No. 08-CR-1264

v.

Paink Jones, Jr.

DECISION AND JUDGMENT

Appellant

Decided: June 11, 2010

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney,
and Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Jeffrey A. Kane, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Paink Jones, Jr., appeals the June 15, 2009 judgment of the Sandusky County Court of Common Pleas convicting him of the offense of driving while intoxicated, a felony of the fourth degree, and sentencing him to serve a term of 30

months of imprisonment. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appointed counsel 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 one proposed assignment of error. In support of the request to withdraw, counsel for appellant states that, based on the trial court record and the presentence investigation report, he was unable to find the court abused its discretion.

{¶ 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." *Anders* 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 sole potential assignment 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 proposed assignment of error:

{¶ 8} "Did the trial Court abuse its discretion in sentencing the Defendant to a maximum sentence?"

{¶ 9} On October 31, 2008, appellant was arrested on a charge of driving while intoxicated. Appellant was subsequently indicted on December 30, 2008, on one count of driving while intoxicated, a violation of R.C. 4511.19(A)(1)(a) and (G)(1)(d)(i), with a specification of five or more previous convictions of equivalent offenses and a maximum prison sentence of five years, and one count of driving while intoxicated, a violation of R.C. 4511.19(A)(1)(d) with the same specification. At the arraignment hearing held on January 21, 2009, appellant entered a not guilty plea to both counts.

{¶ 10} On March 30, 2009, however, appellant appeared in open court, withdrew his earlier plea and entered a plea of guilty to one count of R.C. 4511.19(A)(1)(a) and (G)(1)(d)(i), without specification, a fourth degree felony. In exchange for appellant's

guilty plea, the state agreed to remove the specification from the first count and dismiss the second count of driving while intoxicated. On June 10, 2009, the case came before the trial court for a sentencing hearing. At the hearing, the court reviewed appellant's lengthy criminal record in the presentence investigation report and found appellant not to be amenable to community control. The court imposed the maximum sentence of 30 months of incarceration.

{¶ 11} In the sole proposed assignment of error, it is contended that the trial court abused its discretion in imposing the maximum sentence of 30 months of imprisonment.

{¶ 12} Appellant pled guilty and was sentenced after the issuance of the Supreme Court of Ohio's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. After *Foster*, "trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *Id.* at ¶ 100. "Since *Foster*, trial courts no longer must navigate a series of criteria that dictate the sentence and ignore judicial discretion." *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶ 25.

{¶ 13} Under *Foster*, sentencing courts are to continue to consider "the statutory considerations" or "factors" in the "general guidance statutes" in imposing sentences, as these statutes do not include a "mandate for judicial fact-finding." *Foster* at ¶ 36-42. R.C. 2929.11 sets forth the overriding purposes and principles of felony sentencing and R.C. 2929.12 provides the seriousness and recidivism factors that the court shall consider.

No specific language must be used to show consideration of the statutory factors. *State v. Arnett* (2000), 88 Ohio St.3d 208, 215.

{¶ 14} We further note that "[a] trial court's discretion to impose a sentence within the statutory guidelines is very broad and an appellate court cannot hold that a trial court abused its discretion by imposing a severe sentence on a defendant where that sentence is within the limits authorized by the applicable statute." *State v. Harmon*, 6th Dist. No. L-05-1078, 2006-Ohio-4642, ¶ 16, citing *Harris v. U.S.* (2002), 536 U.S. 545, 565. *State v. Friess*, 6th Dist. No. L-05-1307, 2007-Ohio-2030, ¶ 6.

{¶ 15} In imposing sentence, the trial court reviewed appellant's long criminal history and other items in the presentence investigation report and determined that appellant was not amenable to an available community control sanction. The court then sentenced appellant to a term of 30 months incarceration, a term within the statutory guidelines for driving while intoxicated, a fourth degree felony. R.C. 4511.19(A)(1)(a) and (G)(1)(d)(i). We have reviewed the record of the sentencing hearing below and conclude that the trial court acted within its discretion in imposing sentence. The proposed assignment of error is not well-taken.

{¶ 16} Upon our own independent review of the record, we find no other grounds for a meritorious appeal. This appeal is found to be without merit and wholly frivolous. Appellate counsel's motion to withdraw is found well-taken and is hereby granted.

{¶ 17} On consideration whereof, this court finds that appellant was not prejudiced or prevented from having a fair proceeding and the judgment of the Sandusky 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.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Keila D. Cosme, 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:
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