

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

State of Ohio

Court of Appeals No. H-08-039

Appellee

Trial Court No. CRI-2008-0449

v.

Charles L. Thomas

DECISION AND JUDGMENT

Appellant

Decided: December 15, 2010

* * * * *

Michael B. Jackson, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Charles L. Thomas, appeals a judgment of the Huron County Court Common Pleas that was journalized on October 23, 2008. Under the judgment, appellant was convicted and sentenced on three drug trafficking offenses:

{¶ 2} 1. trafficking in cocaine, a violation of R.C. 2925.03(A)(1)(C)(4)(b) and a fourth degree felony;

{¶ 3} 2. trafficking in heroin, a violation of R.C. 2925.03(A)(1)(C)(6)(c) and a third degree felony (amount of drug equals or exceeds ten but less than fifty unit doses and offense committed in the vicinity of juvenile); and

{¶ 4} 3. trafficking in heroin, a violation of R.C. 2925.03(A)(1)(C)(6)(c) and a fourth degree felony (amount of drug equals or exceeds ten but less than fifty unit doses).

{¶ 5} In total, the trial court sentenced appellant to serve a term of imprisonment of six and one-half years on the convictions. The trial court sentenced appellant to serve a prison term of 18 months on the trafficking in cocaine count (fourth degree felony) and five years on the first heroin trafficking count (third degree felony). Those sentences were ordered to be served consecutively. On the second trafficking in heroin count (a fourth degree felony), the trial court sentenced appellant to serve an 18 month prison term but with the sentence to run concurrently with the sentence on the trafficking in cocaine count.

{¶ 6} The trial court appointed counsel for appellant to pursue appeal. Appellate counsel has advised the court, however, that he has carefully reviewed the record and thoroughly researched the issues in this case but has been unable to discover any meritorious issue for appeal. Under procedures set forth in *Anders v. California* (1967), 386 U.S. 738, counsel has sought leave to withdraw as counsel and also filed an appellate brief, provided appellant with a copy of the brief, and notified appellant of his right to file his own, additional brief.

{¶ 7} Under *Anders v. California*, 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; *State v. Duncan* (1978), 57 Ohio App.2d 93. 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 defendant. *Id.* The defendant is permitted additional time to raise any points he chooses in his own brief. *Id.*

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

{¶ 9} Counsel identified one assignment of error in his brief but also indicated that it was unfounded. Appellant's Assignment of Error No. I provides:

{¶ 10} "Statement of Assignment of Errors

{¶ 11} "I. The trial court abused its discretion when it imposed a sentence allowable by law upon defendant."

{¶ 12} Under the assignment of error, appellant "asserts that the sentence imposed upon him was contrary to law, because it was a maximum prison sentence on two of the three counts." The trial court sentenced appellant to serve a six and one-half year total term of imprisonment. The statutory range for these offenses, considered together, runs

from a minimum total of two years imprisonment to a maximum of eight. R.C. 2929.14(A)(3) and (4).

{¶ 13} After the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, "[t]rial 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 paragraph seven of syllabus. Sentencing courts, however, remain required to "carefully consider the statutes that apply to every felony case. Those include R.C. 2929.11, which specifies the purposes of sentencing, and R.C. 2929.12, which provides guidance in considering factors relating to the seriousness of the offense and recidivism of the offender. In addition, the sentencing court must be guided by statutes that are specific to the case itself." *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 38.

{¶ 14} The standard of review on appeal of felony sentencing is set forth in the Ohio Supreme Court's decision in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 26.¹ 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.*

¹The *Kalish* decision is a plurality decision.

{¶ 15} "An abuse of discretion is "more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." ' *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 450 N.E.2d 1140, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 16 O.O.3d 169, 404 N.E.2d 144." *State v. Kalish* at ¶ 19.

{¶ 16} Appellant served six and one-half years in prison for felonies committed in 1996 and 1999. The trial court commented at sentencing in this case that those charges included charges arising out of a "drug sale that went bad and resulted in the defendant firing a weapon into the home of the victims."

{¶ 17} Appellant was released from prison, on parole, in January 2006. Thereafter, appellant faced a felonious assault charge arising out of an incident that occurred in October 2007. He pled guilty to the felonious assault charge. Appellant was out on bond on the felonious assault charge in April 2008, when he committed the drug trafficking offenses concerned in this case.

{¶ 18} In its judgment, the trial court concluded that "[a] single prison term is not sufficient to protect the public and punish the Defendant due to the risk of the likelihood of recidivism and clear intention of Defendant to live outside the law given his history." The trial court also concluded that "[t]here is no reason to believe * * * [appellant] * * * will not simply continue to sell drugs and commit violent crimes." Given appellant's criminal history, there is competent credible evidence in the record supporting the trial court's conclusions.

{¶ 19} We have reviewed the record and find no evidence to support a claim that the sentence in this case is either contrary to law or constitutes an abuse of discretion. Rather, under these facts, the sentence is consistent with the purposes of sentencing under R.C. 2929.11 and reflects a consideration of the sentencing factors under R.C. 2929.12, including seriousness of the offenses and recidivism. The proposed assignment of error is not well-taken.

{¶ 20} We have also undertaken an independent review of the entire record and find no grounds for a meritorious appeal. We conclude that this appeal is wholly frivolous and grant counsel's motion to withdraw. Substantial justice was done the party complaining. We affirm the judgment of the Huron County Court of Common Pleas. Appellant is ordered to pay costs, 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>.