[Cite as *State v. Hicks*, 2016-Ohio-8062.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104676

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTONIO HICKS

DEFENDANT-APPELLANT

JUDGMENT:
DISMISSED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-581201-A

BEFORE: Celebrezze, J., Jones, A.J., and Blackmon, J.

RELEASED AND JOURNALIZED: December 8, 2016

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FRANK D. CELEBREZZE, JR., J.:

{¶1} Appellant, Antonio R. Hicks, appeals from the trial court's June 14, 2016 judgment entry sentencing him to a prison term of 21 years to life. Appellant was appointed appellate counsel. Counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and now seeks leave to withdraw as counsel. After a thorough review of the record, we grant counsel's motion to withdraw and dismiss this appeal.

I. Factual and Procedural History

{¶2} Appellant was convicted of the 2013 murder of Diana Fields-Edmonds. On direct appeal, this court found that sufficient evidence of prior calculation and design did not exist to support appellant's aggravated murder conviction. *State v. Hicks*, 8th Dist. Cuyahoga No. 102206, 2015-Ohio-4978, ¶ 57 ("*Hicks I*"). This court remanded the case to the trial court so that the court could instead impose a sentence for murder. *Id*. at ¶ 60.

{¶3} On remand, appellant was appointed counsel and the trial court held a sentencing hearing on June 13, 2016. Sometime prior to the hearing, appellant filed a pro se motion seeking to dismiss the indictment. The trial court denied the motion, then conducted a sentencing hearing on the murder charge. The court heard from appellant, his counsel, and the state. The court imposed a mandatory sentence of 15 years to life in prison, plus three consecutive years for the gun specification. The court also reimposed the three-year sentence for having a weapon while under disability that was not disturbed

on appeal. The court then, again, ran that sentence consecutive to the others after making consecutive sentencing findings pursuant to R.C. 2929.14(C)(4).

{¶4} Appellant then sought to appeal and was appointed counsel. Appellant's counsel filed a motion to withdraw pursuant to *Anders*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, based on the belief that no prejudicial error occurred at the resentencing and that any grounds for appeal would be frivolous. Appellant filed a pro se brief arguing his convictions are against the manifest weight of the evidence, and that he could not be sentenced for murder because he was not sentenced on murder at his original sentencing hearing.

II. Law and Analysis

{¶5} In *Anders*, the United States Supreme Court held that if counsel thoroughly reviews the record and concludes that the appeal is "wholly frivolous," he or she may advise the court of that fact and request permission to withdraw from the case. *Id*. at 744. However, counsel's request to withdraw must "be accompanied by a brief referring to anything in the record that might arguably support the [a]ppeal." *Id*. Counsel must also furnish a copy of the brief to his or her client in sufficient time to allow the appellant to file his own brief, pro se. *Id*. Loc.R. 16(C) also governs motions to withdraw as appellate counsel based on counsel's belief of a frivolous appeal, and sets forth the requirements enunciated in *Anders*.

{¶6} Under *Anders* and Loc.R. 16(C), we must complete an independent examination of the trial proceedings to determine if any arguably meritorious issues exist.

Anders at 744; Loc.R. 16(C). If we determine that there are no meritorious issues, and the appeal is "wholly frivolous," we may grant counsel's request to withdraw and address the merits of the case without affording the appellant the assistance of counsel. *Anders* at 744. If, however, we find the existence of a meritorious issue, we must afford the appellant assistance of counsel before deciding the merits of the case. *Id*.

A. Manifest Weight

{¶7} Appellant claims his 2014 convictions are against the manifest weight of the evidence. That argument is outside the scope of the present appeal, and is therefore frivolous.

{¶8} An appeal from a resentencing hearing following a remand from a successful appeal is limited to those issues that arise from the resentencing hearing. The Ohio Supreme Court has made this proposition clear:

> The doctrine of res judicata establishes that "a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment." *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, at paragraph nine of the syllabus. The scope of an appeal from a new sentencing hearing is limited to issues that arise at the new sentencing hearing. *See State v. Fischer*, 128 Ohio St.3d

92, 2010-Ohio-6238, 942 N.E.2d 332, at ¶ 40. The doctrine of res judicata does not bar a defendant from objecting to issues that arise at the resentencing hearing or from the resulting sentence.

State v. Wilson, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 30. Appellant may only challenge issues on appeal that arise from the resentencing hearing. *Id*. at ¶ 33.

{¶9} In *Hicks I*, appellant challenged his aggravated murder conviction but did not attack the validity of his other convictions, including the charge of murder, of which appellant was found guilty but the trial court originally merged it with the aggravated murder charge at sentencing. That was the appropriate time to make the argument that is now advanced. Res judicata bars appellant from challenging his murder conviction on manifest weight grounds.

B. Sentencing and Merger

{¶10} Appellant next argues that the court could not impose a sentence on the murder charge because the court did not impose a sentence on the murder charge at the original sentencing hearing.

{¶11} This argument is based on a flawed understanding of the mechanics of the way in which merger is applied in Ohio. Appellant's understanding of merger is that a court imposes sentence on all counts and then the state elects which of those sentences survive merger. However, that is not the appropriate means of effecting R.C. 2941.25.

{¶12} "When the defendant's conduct constitutes a single offense, the defendant

may be convicted and punished only for that offense." *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 24. Further, "for purposes of R.C. 2941.25, a 'conviction' consists of a guilty verdict and the imposition of a sentence or penalty." *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, ¶ 12, citing *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, ¶ 135. The *Whitfield* court went on to set forth how merger of allied offenses must be handled: "A defendant may be indicted and tried for allied offenses of similar import, but may be sentenced on only one of the allied offenses." *Id*. at ¶ 17. Finally, the court set forth the procedure that trial courts should employ:

> When the state elects which of the two allied offenses to seek sentencing for, the court must accept the state's choice and merge the crimes into a single conviction for sentencing, [*State v.*] *Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 41, and impose a sentence that is appropriate for the merged offense. Thereafter, a "conviction" consists of a guilty verdict and the imposition of a sentence or penalty. *See, e.g., Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, [at] ¶ 135; [*State v.*] *McGuire*, 80 Ohio St.3d [390,] 399, 686 N.E.2d 1112 [(1997)]; [*State v.*] *Fenwick*, 91 Ohio St.3d [1252,] 1253, 745 N.E.2d 1046 [(2001)] (Cook, J., concurring). The defendant is not "convicted" for purposes of R.C. 2941.25(A) until the sentence is imposed.

Whitfield at ¶ 24.

{¶13} Appellant was found guilty of murder at trial, and the court merged that finding of guilt with the aggravated murder finding of guilt at the original sentencing hearing and no sentence was imposed on the murder charge. The court properly merged the two charges at the original sentencing hearing. Appellant's argument that because no sentence was imposed on the murder charge at his original sentencing hearing, no sentence can now be imposed is incorrect, and therefore frivolous. In *Hicks I*, this court reversed the charge of aggravated murder into which the murder charge had merged. The trial court properly sentenced appellant on remand following *Hicks I*.

III. Conclusion

{¶14} After a thorough, independent review of the record in this case, this court determines that the trial court imposed appropriate sentences under the applicable sentencing provisions, and made the required findings in order to impose consecutive sentences. Appellant's arguments about the manifest weight of his convictions and the propriety of the court's imposition of sentence for murder when no sentence was imposed at the original sentencing hearing are frivolous. Appellate counsel's motion to withdraw is granted, and the case is dismissed.

{¶15} Accordingly, the appeal is dismissed.

It is ordered that appellee recover of appellant costs herein taxed.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

LARRY A. JONES, SR., A.J., and
PATRICIA ANN BLACKMON, J., CONCUR