[Cite as *State v. Farley*, 2010-Ohio-3622.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	Julie A. Edwards, P.J.
	:	William B. Hoffman, J.
Plaintiff-Appellee	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 09 CA 00092
	:	
	:	
DANNY L. FARLEY	:	O P I N I O N

Defendant-Appellant

CHARACTER OF PROCEEDING:	Criminal Appeal from Licking County Court of Common Pleas Case No. 09 CR 0045
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	August 3, 2010
APPEARANCES:	
For Plaintiff-Appellee	For Defendant-Appellant
No Appearance	GEORGE W. LEACH, LLC 153 East Main Street, Suite 210 Columbus, Ohio 43215

Edwards, P.J.

{¶1} Appellant, Danny L. Farley, was indicted on one count of Grand Theft of a Motor Vehicle a felony of the fourth degree in violation of R.C. 2913.02(A)(1) and (A)(2) and one count of Unauthorized Use of a Motor Vehicle a felony of the fifth degree in violation of R.C. 2913.03(B). The matter proceeded to a jury trial wherein Appellant was convicted by the jury of both counts and sentenced by the trial court to a total term eighteen months in prison. A timely notice of appeal was filed.

{¶2} Counsel for appellant has filed a Motion to Withdraw and a brief pursuant to *Anders v. California* (1967), 386 U.S. 738, rehearing den. (1967), 388 U.S. 924, indicating that the within appeal was wholly frivolous and setting forth one proposed Assignment of Error. Appellant did not file a pro se brief alleging any additional Assignments of Error. Appellant raises the following Assignment of Error:

{¶3} "I. INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO HAVE AN EXPERT ANALYZE AND TESTIFY TO THE NOTE ALLEGED TO HAVE BEEN WRITTEN BY APPELLANT, ADMITTING TO THE CRIME. "

{¶4} In *Anders,* the United States Supreme Court held if, after a conscientious examination of the record, a defendant's counsel concludes the case is wholly frivolous, then he should so advise the court and request permission to withdraw. Id. at 744. Counsel must accompany his request with a brief identifying anything in the record that could arguably support his client's appeal. Id. Counsel also must: (1) furnish his client with a copy of the brief and request to withdraw; and, (2) allow his client sufficient time to raise any matters that the client chooses. Id. Once the defendant's counsel satisfies these requirements, the appellate court must fully examine the proceedings below to

determine if any arguably meritorious issues exist. If the appellate court also determines that the appeal is wholly 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.

{¶5} Counsel in this matter has followed the procedure in *Anders v. California* (1967), 386 U.S. 738, we find the appeal to be wholly frivolous and grant counsel's motion to withdraw. For the reasons which follow, we affirm appellant's conviction:

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{¶6} In appellant's potential Assignment of Error, he suggests he was denied effective assistance of counsel due to trial counsel's failure to obtain an expert to prove appellant was not the author of a note containing an alleged confession.

{¶7} Appellant lived with two men at the time the crime in this case was committed. Those two men were the victim, Rick Ullom, and Bryan Hoops. Ullom purchased a 1996 Chevrolet Cavalier on May 9, 2009. On May 18, 2009, Ullom came home, put his keys on a table and went to bed. When he awoke, his car was gone. There was a note on the kitchen table which read, "When (sic) to the store, I'll be right back." and was signed with appellant's name. Ullom testified he recognized the handwriting as that of appellant.

{¶8} He further testified appellant called him repeatedly promising to return with the car. Appellant told Ullom the car was in various locations, but when Ullom went to the locations, the vehicle was not found. Ullom also received a call from appellant's nephew indicating appellant had just left high on drugs but did not have Ullom's car.

{¶9} Approximately 45 days after the car was taken, the car was discovered in an impound lot with damage including a missing radio. When appellant was questioned by police, he denied taking the car and denied writing the note.

{¶10} Both Ullom and Hoops testified at trial. Hoops testified Ullom admitted he initially gave appellant permission to take the car. However, Ullom testified he never gave appellant permission to use his car.

{¶11} Although appellant did not testify, appellant's defense at trial was he took the car with permission from Ullom, and the car broke down. Appellant maintained at trial he had advised Ullom the car was broken down and where to find it.

{¶12} In *Strickland v. Washington* (1984), 466 U.S. 668, 686, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, the United States Supreme Court stated that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." The court therein outlined a two-part test for evaluating whether assistance of counsel was so ineffective as to require reversal:

{¶13} "First the defendant must show that counsel's performance was deficient. This requires showing the counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a

breakdown in the adversary process that renders the result unreliable." *Id.* at 687, 104 S.Ct. at 2064.

{¶14} When evaluating a claim of ineffective assistance of counsel, " * * * a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " (Citation omitted.) *Strickland,* supra*,* at 689, 104 S.Ct. at 2065. See, also, *State v. Clayton* (1980), 62 Ohio St.2d 45, 16 O.O.3d 35, 402 N.E.2d 1189; *State v. Lytle* (1976), 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623, vacated in part on other grounds (1978), 438 U.S. 910, 98 S.Ct. 3135, 57 L.Ed.2d 1154.

{¶15} In *State v. Thompson* (1987), 33 Ohio St.3d 1, 514 N.E.2d 407, the Supreme Court declined to find ineffective assistance of counsel for failure to obtain an expert witness where the same testimony was obtained via cross examination. Similarly, counsel, in the instant case, was able to raise the question of authenticity via the testimony of Hoops and the police officer. Further, counsel elicited testimony establishing the note in question did not even refer to the car. The note was not the crux of the defense. Rather, the defense was the initial permission to have the car. Even had the note been declared to be inauthentic, appellant admitted to Hoops to have taken the car and phoned the victim numerous times stating he would return the car.

{¶16} Based upon the defense at trial as well as the evidence, we cannot say appellant was denied effective assistance of counsel. For this reason, appellant's Assignment of Error is overruled.

{¶17} After independently reviewing the record, we agree with counsel's conclusion that no arguably meritorious claims exist upon which to base an appeal. Hence, we find the appeal to be wholly frivolous under *Anders,* grant counsel's request to withdraw, and affirm the judgment of the Licking County Court of Common Pleas.

{¶18} Counsel's Motion to Withdraw is granted. The judgment of the Licking County Court of Common Pleas is affirmed

By: Edwards, P.J.

Hoffman, J. and

Delaney, J. concur

s/Julie A. Edwards

s/William B. Hoffman

s/Patricia A. Delaney

JUDGES

JAE/as0615

[Cite as *State v. Farley*, 2010-Ohio-3622.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
DANNY L. FARLEY	:	
Defendant-Appellant	:	CASE NO. 09 CA 00092

For the reasons stated in our accompanying Memorandum-Opinion on file, the Judgment of the Licking County Court of Common Pleas is affirmed. Costs assessed to appellant.

s/Julie A. Edwards

s/William B. Hoffman

s/Patricia A. Delaney

JUDGES