

[Cite as *State v. Kerby*, 2010-Ohio-3346.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY**

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|---------------------|---|--------------------------------|
| STATE OF OHIO | : | |
| | : | Appellate Case No. 09-CA-59 |
| Plaintiff-Appellee | : | |
| | : | Trial Court Case No. 01-CR-922 |
| v. | : | |
| | : | |
| WILLIAM KERBY | : | (Criminal Appeal from |
| | : | Common Pleas Court) |
| Defendant-Appellant | : | |
| | : | |

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OPINION

Rendered on the 16th day of July, 2010.

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Attorney for Plaintiff-Appellee

CARY BISHOP, Atty. Reg. #0077369, 79 Trails East Drive, Pataskala, Ohio 43062
Attorney for Defendant-Appellant

WILLIAM KERBY, #455-089, Lebanon Correctional Institution, Post Office Box 56, Lebanon, Ohio 45036
Defendant-Appellant

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BROGAN, J.

{¶ 1} William Kerby appeals from the trial court's order denying his motion to withdraw his no-contest pleas to aggravated murder with a firearm specification,

murder with a firearm specification, aggravated robbery with a firearm specification, tampering with evidence, and felonious assault.

{¶ 2} In his withdrawal motion, Kerby contended he should be permitted to withdraw his previously entered no-contest pleas because the indictment charging him with aggravated murder and aggravated robbery failed to allege that he “knowingly” possessed a deadly weapon or firearm. The trial court overruled Kerby’s motion without elaboration.

{¶ 3} Kerby’s appointed appellate counsel filed an *Anders* brief stating he could find no arguable merit to his client’s appeal. See *Anders v. California*, 386 U.S. 738 (1967). Kerby filed his own brief asserting the trial court erred in denying his withdrawal motion because his convictions for aggravated murder and aggravated robbery were “void” because the indictment failed to allege that he knowingly possessed the deadly weapon he was alleged to have possessed in having committed these offenses. Kerby relies on the definition of “possession” in R.C. 2901.21(D)(1), which provides that the accused acted knowingly. Kerby was not charged with possession, but with “having” a deadly weapon. R.C. 2911.01(A)(1).

{¶ 4} The State argues we should overrule Kerby’s assignment of error because of the Ohio Supreme Court’s recent holding in *State v. Lester*, 123 Ohio St.3d 396, 2009-Ohio-4225. In *Lester*, the Court specifically addressed whether aggravated robbery under R.C. 2911.01(A)(1) also imposes strict liability for the element of brandishing, displaying, using, or indicating possession of a deadly weapon. The Court reviewed its prior holding in *State v. Wharf* and stated, “[t]he element of having a deadly weapon in one’s possession or under one’s control under

R.C. 2911.02(A)(1) – an element identical to the first part of R.C. 2911.01(A)(1) – does not, therefore, require that a defendant act with a specific intent.” *Lester* at ¶ 20. The Court went on to conclude that “the General Assembly, by not specifying a mens rea in R.C. 2911.01(A)(1), plainly indicated its purpose to impose strict liability as to the element of displaying, brandishing, indicating possession of, or using a deadly weapon.” *Id.* At ¶ 32. The same applies to “having” the weapon.

{¶ 5} We agree with appointed counsel’s statement that there is no arguable merit to this appeal. The judgment of the trial court is Affirmed.

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GRADY and FROELICH, JJ., concur.

Copies mailed to:

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Hon. Douglas M. Rastatter