[Cite as *State v. Johnson*, 2002-Ohio-5373.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 01 CA 163
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
ANDREW JOHNSON	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Youngstown Municipal Court of Mahoning County, Ohio Case No. 01 CRB 1786

JUDGMENT: Motion to Withdraw Granted. Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

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City Prosecutor
Atty. John Regginello
Assistant Prosecuting Attorney
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Youngstown, Ohio 44503

For Defendant-Appellant:

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Andrew Johnson, Pro-se
1433 Forest View Drive
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JUDGES:
Hon. Cheryl L. Waite
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: September 30, 2002

WAITE, J.

{¶1} This matter comes before this Court on a motion by Appellant's appointed counsel seeking dismissal for lack of any appealable issue. For the following reasons, this Court grants the motion and affirms the judgment of the trial court.

{¶2} On June 12, 2001, Youngstown police officers cited Andrew Johnson ("Appellant") for violating Youngstown Municipal Ordinance §521.08, which prohibits littering. Appellant had allowed litter and household related items to accumulate on the front of his property located on 1433 Forestview Street in Youngstown. (Tr. pp. 4-7). Police also ticketed Appellant under §521.04 for leaving a refrigerator by the side of his house. That ordinance essentially forbids the obstruction or damage to city sidewalks by dangerous debris.

{¶3} Appellant pleaded not guilty and the matter proceeded to a bench trial on August 27, 2001. At trial, Appellant maintained that although the debris scattered over the front of his property was his, he was not responsible for the mess. According to Appellant, police created the mess when they removed the material, including a hot water heater, several large boards, numerous cushions, and a fold up bed, from Appellant's vehicle before towing it the previous week. (Tr. pp. 20-22). Appellant maintained that the vehicle had been towed improperly. Appellant testified that he did not immediately remove the mess because when he complained about the incident to his city councilman and the NAACP, the NAACP advised him to leave the debris where it was. (Tr. p. 23).

{¶4} At the close of the prosecution's case, the trial court partially granted Appellant's motion pursuant Crim.R. 29, dismissing the citation under §521.04 . The court essentially concluded that although the refrigerator was outdoors, it was not obstructing or damaging a sidewalk or public way. (Tr. pp. 13-14). Nevertheless, the court ultimately found Appellant guilty of littering because he could have cleaned up the mess on his property but did not do so promptly. (Tr. p. 25). The court refused to attribute any blame to the NAACP for delaying the clean-up.

{¶5} The trial court then fined Appellant $150.00, but suspended the fine in lieu of community service. The record does not indicate the extent of Appellant's community service commitment or whether he completed his community service. A notice of appeal was filed on August 29, 2001. We note that although the trial court indicated that it would willingly grant a request to stay the execution of Appellant's sentence pending the outcome of an appeal, no stay was ever requested.

{¶6} Trial counsel subsequently sought leave to withdraw from the case as appellate counsel, claiming that Appellant had insisted on going to trial against counsel's advice. On December 12, 2001, this Court granted trial counsel's request and appointed substitute counsel. On April 24, 2002, substitute counsel filed a Motion to Withdraw as

Counsel under the auspices of *State v. Toney* (1970), 23 Ohio App.2d 203, 262 N.E.2d 419.

{¶7} On May 9, 2002, this Court sent notice to Appellant granting him thirty days to raise any assignment of error. Appellant has not filed a pro se brief.

{¶8} An attorney appointed to represent an indigent criminal defendant on his or her first appeal as of right may seek permission to withdraw where he can show that there is no merit to the appeal. See generally, *Anders v. California* (1967) 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493. To support such a request, appellate counsel is required to undertake a conscientious examination of the case and accompany his or her request for withdrawal with a brief referring to anything in the record that might arguably support an appeal. *Toney,* at 207; citing *Anders*. The reviewing court must then decide, after a full examination of the proceedings, whether the case is wholly frivolous. *Id.*

{¶9} In *Toney*, this Court established guidelines to be followed in the event counsel of record determines that an indigent's appeal is frivolous:

{¶10} "3. Where a court-appointed counsel, with long and extensive experience in criminal practice, concludes that the indigent's appeal is frivolous and that there is no assignment of error which could be arguably supported on appeal, he should so advise

the appointing court by brief and request that he be permitted to withdraw as counsel of record.

{¶11} "4. Court-appointed counsel's conclusions and motion to withdraw as counsel of record should be transmitted forthwith to the indigent, and the indigent should be granted time to raise any points that he chooses, *pro se*.

{¶12} "5. It is the duty of the Court of Appeals to fully examine the proceedings in the trial court, the brief of appointed counsel, the arguments *pro se* of the indigent, and then determine whether or not the appeal is wholly frivolous.

{¶13} "6. Where the Court of Appeals makes such an examination and concludes that the appeal is wholly frivolous, the motion of an indigent appellant for the appointment of new counsel for the purpose of appeal should be denied.

{¶14} "7. Where the Court of Appeals determines that an indigent's appeal is wholly frivolous, the motion of court-appointed counsel to withdraw as counsel of record should be allowed, and the judgment of the trial court should be affirmed." Id. at syllabus.

{¶15} Appellant's court-appointed counsel suggested two areas of potential error in the trial court. First, counsel speculates that trial counsel may have been ineffective for failing to call as witnesses the Youngstown police officer who actually wrote the tickets

alleging that Appellant violated the ordinances; and the city councilman who Appellant claimed actually witnessed part of the ticketing incident.

{¶16} Judicial scrutiny of trial counsel's performance is highly deferential. *State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373; citing *Strickland v. Washington* (1984), 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674. Accordingly, to maintain an ineffective assistance of counsel claim, Appellant must meet two requirements. First, he must show that trial counsel's performance was so deficient and his, "* * * errors so serious that [he] was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Strickland*, *supra* at 687. Second, Appellant must demonstrate that the deficient performance prejudiced the defense. *Id.*, see also *State v. Lytle* (1976), 48 Ohio St.2d 391, 397, 358 N.E.2d 623; vacated in part on other grounds, 438 U.S. 910.

{¶17} The decision to use the testimony of specific witnesses at trial is quintessentially a matter of trial strategy left to counsel's discretion. *State v. Smith* (1996), 115 Ohio App.3d 419, 426, 685 N.E.2d 595; citing, *State v. Clayton* (1980), 62 Ohio St.2d 45, 49, 402 N.E.2d 1189; and *State v. Hunt* (1984), 20 Ohio App.3d 310, 486 N.E.2d 108. Further, to demonstrate ineffective assistance of counsel, Appellant must overcome a presumption that the undertakings of a properly licensed attorney are sound trial strategy. *Strickland*, supra at 689. In attempting such an undertaking hindsight may

not be used to distort the assessment of what was reasonable in light of trial counsel's perspective at the time. *State v. Cook* (1992), 65 Ohio St.3d 516, 524-525, 605 N.E.2d 70.

{¶18} The record reflects that trial counsel was not ineffective. There are a variety of reasons why counsel may have chosen not to call these witnesses. It is possible that one or both of these witnesses possess recollections of the incident which may have differed or conflicted with that offered by Appellant. Whatever the reason, the record gives this Court no reason to believe that trial counsel's decision to forego calling these two individuals was anything other than a sound strategic decision.

{¶19} With respect to Appellant's second possible area of error, counsel proposes that it may be argued that the citations should have been dismissed under a "fruit of the poisonous tree" kind of analysis. Counsel suggests that if, as Appellant testified at trial, the littering occurred in this case because of the police department's improper decision to tow his vehicle, then the tickets should have been tossed out because they, too, were improper. However, this argument would have no merit because, as counsel acknowledged in his motion to withdraw, a violation under the littering ordinance is a strict liability offense. As the trial court noted during sentencing:

{¶20} "When we own property, it's our responsibility to maintain our property without stuff accumulating on it. Our yards are no place for water tanks; our yards are no places for refrigerators out yards are no places for cushions, pallets and pieces of wood that make our neighborhoods look like hell. * * * It doesn't matter how it got there. I don't care how it got there. You allowed it to remain there and you can't do that because it's your house and you have to make it look nice. If you're not going to keep it looking nice, I'm going to keep it looking nice. That's how we do things here in this country." (Tr. pp. 27-28).

{¶21} Under the circumstances, Appellant's efforts to comply with the ordinance or his reasons for failing to comply are irrelevant. See, e.g. *Village of Gates Mills v. Welsh* (2001), 146 Ohio App.3d 368, 766 N.E.2d 204 (no culpable mental state for violation of leash law); and *State v. Williams* (January 22, 1991), 2nd Dist. No. 11857 (holding that driving under the influence as set forth under R.C. §4511.19 is a strict liability offense).

{¶22} In sum, a careful review of the record, including the pleadings filed, the docketing statement and the transcript of Appellant's trial and sentencing, demonstrates nothing erroneous or irregular that might warrant additional scrutiny from this Court. Appellant was given the opportunity to present any issues he thought warranted this Court's scrutiny and failed to do so. Therefore, since we find that the record suggests no

appealable issues, this Court grants court-appointed counsel's motion to withdraw and hereby affirms the judgment of the trial court.

Vukovich, P.J., concurs.

DeGenaro, J., concurs in judgment only.