**[Cite as *State v. Keough*, 2009-Ohio-6260.]**

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

State of Ohio — Court of Appeals No. L-08-1073

Appellee — Trial Court No. CR-200601044

v.

Ronald B. Keough — **DECISION AND JUDGMENT**

Appellant — Decided: November 20, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Robert A. Miller, Assistant Prosecuting Attorney, for appellee.

Veronica M. Murphy, for appellant.

* * * * *

HANDWORK, P.J.

**{¶ 1}** This case is before the court on appeal from a judgment of the Lucas County Court of Common Pleas, wherein, after a jury trial, appellant, Ronald Keough, was found guilty of one count of aggravated arson, a violation of R.C. 2909.02(A)(1), a

felony of the first degree. The trial court imposed a sentence of four years in prison. The following relevant evidence was adduced at appellant's trial.

**{¶ 2}** On the morning of October 31, 2005, one of appellant's neighbors called 911 to report a fire at appellant's house, which was located at 1915 South Berkey Southern Road. The Spencer Township Volunteer Fire and Rescue Department was the first unit to respond. When they arrived at the residence, the Fire Department Chief, Michael Koepplinger, who lives around the corner from appellant's house, had already determined that a "back draft situation existed." This means that the fire was very "hot"; therefore, if a window or door was opened, it would create a greater danger to firefighters and neighboring residences. Chief Koepplinger removed the house's electric meter, turned off the propane, and called for assistance from the Springfield Township Fire Department.

**{¶ 3}** The firefighters cut a hole in the roof of the house to release the hot gases and eliminate the back draft. They then entered through the front door, which was unlocked, and crawled down the hallway spraying water from a hose and moving debris out of their way. The firefighters encountered a large hole in the floor. Nearby they found an open five gallon gas can laying on its side in the hallway. The can was half full of gasoline. A dog that was trained to detect ignitable materials was then brought to the site of the fire in order to determine the presence of flammable liquids in the home. The dog alerted to six areas in the residence, including two alerts near the hole in the floor. Samples of wood and/or carpeting were taken from these areas and tested. Four of the

six samples tested positive for gasoline, including two samples taken near the hole. In addition, a pair of boots belonging to appellant was tested. Gasoline was also present on the boots.

**{¶ 4}** An electric space heater was plugged into an outlet and was next to the hole in the floor. It was sent by appellant's home insurer to an independent firm of electrical engineers for testing and comparison with a like electrical space heater. The tests revealed that the protective metal covering, the "shroud," was removed from the space heater and that combustible material, paper, was placed in the space heater. After testing the heater by placing paper inside its element and turning it on, it was determined to be the source of the fire in appellant's house. It was also determined that the fire was caused purposely.

**{¶ 5}** Appellant claimed that he did not stay in his home on the night of October 30, 2005. Nonetheless, Roscoe Shaffer, who owns a grocery store approximately one-quarter mile away from appellant's residence, testified that appellant drove to the store from the direction of his home, parked his van, and came into the store early on the morning of October 31, 2005. According to Shaffer, appellant wanted to cash a check. Because it was too early in the morning, Shaffer did not have the money to exchange for the check, and appellant left. A videotape from the store's surveillance camera corroborated Shaffer's story.

**{¶ 6}** Approximately 10 to 15 minutes after appellant left his store, Shaffer heard the fire siren and, subsequently, saw firemen headed in the direction of appellant's home.

Shaffer then received a telephone call informing him that it was Keogh's house that was on fire. Due to the fact that appellant's girlfriend, Michelle, previously worked at the grocery store, Shaffer became worried that she might be in danger. He tried calling Michelle's home but no one answered. Shaffer then drove to her grandfather's house and found appellant sitting in his van in the driveway. When Shaffer told appellant that his house was on fire, appellant never reacted.

**{¶ 7}** At trial, it was revealed that appellant's house was insured in the amount of $90,300 and its contents for $67,725. Appellant, however, owed $2,500 in back property taxes. Furthermore, despite the fact that his house had been listed for sale for three months, appellant received no bids even after he lowered the purchase price.

**{¶ 8}** Based upon the foregoing evidence, the jury found appellant guilty of aggravated arson and the court imposed a sentence of four years in prison. Appellant timely appealed his conviction and was appointed counsel for the purposes of his appeal. Appellant's counsel, however, submitted a motion to withdraw pursuant to *Anders v. California* (1967), 386 U.S. 738. See, also, *State v. Duncan* (1978), 57 Ohio App.2d 93. Pursuant to *Anders*, an appointed attorney may, after a conscientious examination of the case, advise the appellate court that he or she finds the appeal to be wholly frivolous and request permission to withdraw. Id. This request must be accompanied by a brief identifying anything in the record that could arguably support the appeal. Id. Counsel must also furnish his or her client with a copy of the brief and request to withdraw and allow the client sufficient time to raise any matters that he chooses. Id. Once these

requirements are satisfied, the appellate court is required to conduct a full examination of the proceedings held below to determine if the appeal is indeed frivolous. Id. If the appellate court determines that the appeal is frivolous, it may grant counsel's request to withdraw and dismiss the appeal without violating any constitutional requirements or may proceed to a decision on the merits if state law so requires. Id. at 744.

**{¶ 9}** In the case before us, appointed counsel for appellant satisfied the requirements set forth in *Anders*. Although notified, appellant never raised any matters for our consideration. Accordingly, we shall proceed with an examination of any arguable assignments of error set forth by counsel for appellant, and of the entire record below, in order to determine whether this appeal lacks merit and is, therefore, wholly frivolous.

**{¶ 10}** Appellate counsel sets forth the following three possible errors:

**{¶ 11}** "Ineffective Assistance of Counsel

**{¶ 12}** "Burden of Proof

**{¶ 13}** "Sentencing"

**{¶ 14}** Appellant's first possible assignment of error asserts ineffective assistance of trial counsel. In *Strickland v. Washington* (1984), 466 U.S. 668, 687, the United States Supreme Court devised a two-prong test to determine ineffective assistance of counsel. Both of these prongs must be satisfied before a court can determine that trial counsel was ineffective. Id. First, the accused must show that his trial counsel's performance was so deficient that the attorney was not functioning as the counsel guaranteed by the Sixth

Amendment of the United States Constitution. Id. Second, he must establish that counsel's "deficient performance prejudiced the defense." Id. The failure to prove any one prong of the Strickland two-part test makes it unnecessary for a court to consider the other prong. *State v. Madrigal,* 87 Ohio St.3d 378, 389, 2000-Ohio-448, citing *Strickland* at 697. In Ohio, a properly licensed attorney is presumed competent. *State v. Smith* (1985), 17 Ohio St.3d 98, 101, citing *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 301.

**{¶ 15}** The record of the present case reveals that appellant's appointed trial counsel represented her client both during trial and at appellant's sentencing. She sought discovery and filed a number of important motions, including a motion requesting a competency hearing for her client. Appellant, after an examination by a psychiatrist, was found incompetent to stand trial at that point in time, but was, after psychological treatment, found competent to stand trial. In addition, trial counsel had another expert review records related to the fire and its cause. She also performed a thorough cross-examination of all witnesses at appellant's trial and tested the credibility of these witnesses. Finally, at appellant's sentencing hearing, she asked the court to consider her client's mental health due to his "long standing paranoid schizophrenia." Accordingly, we conclude that trial counsel's representation of appellant was not deficient, and the basis for his first possible assignment of error is unfounded.

**{¶ 16}** In his second arguable assignment of error, appellant maintains, in essence, that the trial court's judgment is against the manifest weight of the evidence. In determining whether a verdict is against the manifest weight of the evidence, this court

sits as a "thirteenth juror." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. Thus, we review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses. Id. In resolving conflicts in the evidence, we must determine whether the finder of fact "'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Moreover, this court must keep in mind that it is the trier of fact's duty to determine the credibility of a witness; accordingly, our ability to consider credibility is limited. *State v. Reynolds*, 10th Dist. No. 3692, 2004-Ohio-3692, ¶ 13 (citation omitted).

**{¶ 17}** R.C. 2909.02 reads, in material part:

**{¶ 18}** "(A) No person by means of fire or explosion, shall knowingly do any of the following:

**{¶ 19}** "(1) Create a substantial risk of physical harm to any person other than the offender;"

**{¶ 20}** Upon weighing all the evidence as set forth above and upon a limited consideration of the credibility of the witnesses offered at trial, we find that the trial court's judgment finding appellant guilty of aggravated arson is not against the manifest weight of the evidence. Specifically, appellant created, through the use of gasoline and a space heater, a substantial risk of harm to the volunteer firefighters whose duty it was to respond and to put out the fire in his home. Therefore, appellant's second arguable error lacks merit.

**{¶ 21}** In his third and final possible assignment of error, appellant makes no specific argument with regard to any error in sentencing. Instead he notes that a violation of R.C. 2909.09(A)(1) is a felony of the first degree and carries a penalty of three to ten years. In reviewing a felony sentence, a court must first determine whether a trial court has complied with all applicable rules and statutes in order to determine whether the sentence is clearly and convincingly contrary to law. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 14. If the first portion of the test is met, we review the trial court's decision in imposing the term of imprisonment under an abuse of discretion standard. Id. ¶ 18-19. Consequently, the sentence imposed by a trial court cannot be overturned unless the judge's attitude in determining that sentence was unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

**{¶ 22}** Here, the court below, after a consideration of all of the required statutory factors, as well as the principles and purposes of sentencing, sentenced appellant to four years in prison and declined the prosecution's request for an order compelling him to pay his home insurer restitution. Based upon the danger to firefighters caused by appellant's actions, we cannot say the sentence imposed by the common pleas court was arbitrary, unreasonable, or unconscionable. Appellant's third possible assignment of error is meritless.

**{¶ 23}** After engaging in further independent review of the record, we conclude that there are no other grounds for a meritorious appeal. This appeal is therefore found to be without merit and is wholly frivolous. Appointed counsel's motion to withdraw is

found well-taken and is hereby granted. The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24(A).

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, P.J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE