

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

State of Ohio

Court of Appeals No. L-09-1065

Appellee

Trial Court No. CR0200803022

v.

John A. Floro

DECISION AND JUDGMENT

Appellant

Decided: May 21, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Jeffrey D. Lingo, Assistant Prosecuting Attorney, for appellee.

Dan M. Weiss, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This matter is before the court on the judgment of the Lucas County Court of Common Pleas wherein, on February 2, 2009,¹ appellant, John A. Floro, pled no contest and was found guilty of one count of aggravated robbery, in violation of R.C. 2911.01(A)(1), a felony of the first degree. Appellant was sentenced on February 24,

¹Appellant's plea of no contest was journalized on February 17, 2009; however, a trial court order memorializing appellant's plea was journalized on February 9, 2009.

2009,² to seven years in prison, a nolle prosequi was entered as to the second count in the indictment, and appellant was ordered to pay costs and restitution in the amount of \$325.00. On February 25, 2009, appellant filed a motion with the trial court seeking to withdraw his plea and take his case to trial. On May 5, 2009, following a hearing on appellant's motion, the trial court denied appellant's motion to vacate his plea. Appellant was appointed counsel and a notice of appeal was timely filed.

{¶ 2} On November 30, 2009, appellant's counsel filed a request to withdraw pursuant to *Anders v. California* (1967), 386 U.S. 738. *Anders* and *State v. Duncan* (1978), 57 Ohio App.2d 93, set forth the procedure to be followed by appointed counsel who desires to withdraw for want of a meritorious, appealable issue. In *Anders*, the United States Supreme Court held that if counsel, after a conscientious examination of the case, determines it to be wholly frivolous he should so advise the court and request permission to withdraw. *Id.* at 744. This request, however, must be accompanied by a brief identifying anything in the record that could arguably support the appeal. *Id.* Counsel must also furnish his 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 have been satisfied, the appellate court must then conduct a full examination of the proceedings held below to determine if the appeal is indeed frivolous. If the appellate court determines that the appeal is frivolous, it may grant counsel's

²Appellant's judgment entry of sentencing was originally journalized on March 3, 2009, and then again on March 27, 2009, in accordance with a remand from this court.

request to withdraw and dismiss the appeal without violating constitutional requirements or it may proceed to a decision on the merits if state law so requires. Id.

{¶ 3} In this case, appointed counsel for appellant has satisfied the requirements set forth in *Anders*, supra. Although notified, appellant never raised any matters for our consideration. In support of his request, counsel for appellant states that, after reviewing the record of proceedings in the trial court, and after researching the applicable law, he found no arguable issue to raise on appeal. Although counsel found no meritorious issue to present on appellant's behalf on appeal, counsel addressed the potential for raising an assignment of error regarding whether the trial court abused its discretion when it denied appellant's motion to vacate/withdraw his plea within 24 hours of being sentenced.

{¶ 4} In his motion, appellant stated that he desired to withdraw his plea because he was "rail-roaded" with his sentence of seven years. The possible sentence for appellant's conviction was 3, 4, 5, 6, 7, 8, 9 or 10 years. At his plea hearing, appellant was informed of his constitutional rights, voluntarily gave up those rights, and was informed of the possible sentence he faced. Appellant indicated that no promises had been made to get him to enter the plea.

{¶ 5} At the sentencing hearing on February 24, 2009, based upon appellant's request, counsel asked the trial court to consider imposing community control or, in the alternative, sentencing appellant to three or four years in prison. Appellant's counsel informed the trial court that she told appellant that, based upon his prior convictions, it

was unlikely he would receive the minimum term of incarceration. Appellant also directly asked the trial court to consider a sentence of only three or four years.

{¶ 6} After receiving seven years, appellant filed a motion on February 25, 2009, to vacate his plea and take the case to trial. At the March 2, 2009 hearing on appellant's motion, appellant's sole basis for wanting to withdraw his plea was because he was under the impression that he would get only three or four years in prison, not seven. Appellant, however, conceded that he had never been promised a particular sentence.

{¶ 7} A post-sentence motion to withdraw a guilty plea will only be granted if the defendant can establish a manifest injustice. *State v. Smith* (1977), 49 Ohio St.2d 261, paragraph one of the syllabus; and Crim.R. 32.1. The burden of establishing the existence of such injustice is upon the defendant. *Id.* We review the trial court's denial of appellant's motion under an abuse of discretion standard, i.e., whether the trial court's attitude was unreasonable, arbitrary, or unconscionable. *State v. Xie* (1992), 62 Ohio St.3d 521, 526, citing *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 8} "The logic behind this precept is to discourage a defendant from pleading guilty to test the weight of potential reprisal, and later withdraw the plea if the sentence was unexpectedly severe." *State v. Caraballo* (1985), 17 Ohio St.3d 66, 67, citing *State v. Peterseim* (1980), 68 Ohio App.2d 211, 213, and *Kadwell v. United States* (C.A.9, 1963), 315 F.2d 667. A mere "change of heart," because the imposed sentence was not expected, is not sufficient justification to permit withdrawal of a plea. *State v. Lambros* (1988), 44 Ohio App.3d 102, 103.

{¶ 9} Based upon our review, we find that appellant entered his no contest plea knowingly, intelligently and voluntarily, was informed of the potential sentence for his offense, and was not promised any particular sentence as part of his plea agreement. Accordingly, we find that appellant failed to establish that a manifest injustice occurred and, therefore, find that the trial court did not abuse its discretion in denying appellant's post-sentence motion to withdraw his plea.

{¶ 10} Based upon the foregoing and our own independent review of the record, we find that counsel for appellant correctly determined that no meritorious issue for appeal is present in this case. This appeal, therefore, is found to be without merit and is wholly frivolous. As such, appellant's counsel's motion to withdraw is found well-taken and ordered 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.

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, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
