

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

State of Ohio

Court of Appeals No. L-08-1428

Appellee

Trial Court No. CR0200802638

v.

Derrick Parker

DECISION AND JUDGMENT

Appellant

Decided: January 8, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Michael D. Bohner, Assistant Prosecuting Attorney, for appellee.

Patricia Horner, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This case is before the court on appeal of the November 3, 2008 judgment of the Lucas County Court of Common Pleas which, following a no contest plea to one count of attempted felonious assault, R.C. 2923.02 and 2903.11(A)(1), sentenced

defendant-appellant, Derrick Parker, to four years of imprisonment. For the reasons that follow, we affirm the trial court's judgment.

{¶ 2} Appellant's appointed counsel has submitted a request to withdraw as counsel pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493. *Anders v. California* concerns the duty of court-appointed counsel to pursue an appeal on behalf of an indigent defendant. In *Anders*, the Supreme Court of the United States established the procedure followed in circumstances where appointed counsel concludes that there is no merit to an appeal and seeks to withdraw from further representation of the appellant. Under *Anders v. California*, counsel must undertake a "conscientious examination" of the case and, if he determines an appeal would be "wholly frivolous," must advise the court and seek permission to withdraw. *Id.* at 744; *State v. Duncan* (1978), 57 Ohio App.2d 93. The request to withdraw must be accompanied with a brief "referring to anything in the record that might arguably support the appeal." *Id.* The defendant is provided with a copy of the brief and informed that he may raise additional issues in his own brief. *Id.*

{¶ 3} Once these requirements have been met, the appellate court must conduct a full examination of the proceedings to determine whether the appeal is wholly frivolous. *Id.* Where the appellate court concludes that an appeal is wholly frivolous, it may grant the motion to withdraw and dismiss the appeal. *Id.*

{¶ 4} Appellant's counsel filed an appellate brief asserting two potential assignments of error for consideration in this appeal. Appellant has not filed a pro se brief. Appellant's counsel's potential assignments of error are as follows:

{¶ 5} "I. The trial court erred by imposing more-than-the-minimum sentence as it violated the Due Process and Ex Post Facto Clauses of the Ohio and United States Constitution.

{¶ 6} "II. The trial court erred sentencing the defendant to prison rather than community control."

{¶ 7} In appellant's first potential assignment of error, he argues that the "retroactive application" of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, violates the Ex Post Facto Clause because it deprived him of the presumption of a minimum sentence. The crime involved in the instant case was committed on July 5, 2008, over two years following the Supreme Court of Ohio's decision in *Foster*. Thus, the application of *Foster* was prospective, rather than retroactive. See *State v. Koener*, 6th Dist. No. L-08-1045, 2009-Ohio-985. Appellant's first potential assignment of error is meritless.

{¶ 8} In appellant's second potential assignment of error he argues that the trial court erred when it sentenced him to a term of imprisonment rather than community control. As noted by appellant's counsel, following the Supreme Court of Ohio's decision in *Foster*, "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for

imposing maximum, consecutive, or more than the minimum sentences." *Id.* at paragraph seven of the syllabus.

{¶ 9} After *Foster*, sentencing courts are to continue to consider "the statutory considerations" and "factors" in the "general guidance statutes" R.C. 2929.11 and 2929.12 in imposing sentences, as these statutes do not include a "mandate for judicial fact finding." *Foster* at ¶ 36-42. "Two statutory sections apply as a general judicial guide for every sentencing. The first, R.C. 2929.11 states that the court 'shall be guided by' the overriding purposes of felony sentencing * * *." *Id.* at ¶ 36. R.C. 2929.11 lists matters to be considered "in achieving those purposes." *Id.*

{¶ 10} "The second general statute, R.C. 2929.12, grants the sentencing judge discretion 'to determine the most effective way to comply with the purposes and principles of sentencing.' R.C. 2929.12(A) directs that in exercising that discretion, the court shall consider, along with any other 'relevant' factors, the seriousness factors set forth in divisions (B) and (C) and the recidivism factors in divisions (D) and (E) of R.C. 2929.12. These statutory sections provide a nonexclusive list for the court to consider." *Foster* at ¶ 37.

{¶ 11} At appellant's October 31, 2008 sentencing hearing, the trial court stated that it had considered the presentence investigation report and the statements of defense counsel and the defendant. The court commented: "This was a vicious and cowardly act. You punched this lady so hard you broke her jaw, caused significant physical injuries, as well as psychological injuries."

{¶ 12} In its November 3, 2008 judgment entry, the trial court stated that in sentencing appellant it considered the record, oral statements, any victim impact statement and the presentence report. The court further noted that it had considered the principles and purposes of sentencing under R.C. 2929.11 and the seriousness and recidivism factors under R.C. 2929.12. The court stated that a prison sentence was consistent with the purposes under R.C. 2929.11.

{¶ 13} Based on the foregoing, we cannot say that the trial court abused its discretion when it sentenced appellant to four years of imprisonment. Appellant's second potential assignment of error is meritless.

{¶ 14} After an independent review of the record, we find that there are no other grounds for a meritorious appeal. Accordingly, it is determined that the appeal is wholly frivolous and appointed counsel's motion to withdraw is found well-taken and is granted.

{¶ 15} On consideration whereof, we find that the appellant was not prejudiced or prevented from having a fair proceeding and the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

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.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

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:
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