

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

State of Ohio

Court of Appeals Nos. E-10-017
E-10-037

Appellee

Trial Court No. 98-CR-421

v.

Artie Grissom

DECISION AND JUDGMENT

Appellant

Decided: January 14, 2011

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Linda Fritz-Gasteier, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Artie Grissom, appeals a judgment from the Erie County Court of Common Pleas resentencing him.

{¶ 2} Appellant's appointed counsel has requested leave to withdraw in accordance with the procedure set forth in *Anders v. California* (1967), 386 U.S. 738.

{¶ 3} In *Anders*, the United States Supreme Court held that if counsel, after a conscientious examination of the appeal, determines it to be wholly frivolous he should so advise the court and request permission to withdraw. *Id.* at 744. The request shall include a brief identifying anything in the record that could arguably support an appeal. *Id.* Counsel shall also furnish his client with a copy of the request to withdraw and its accompanying brief and allow the client sufficient time to raise any matters that he chooses. *Id.* 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 request to withdraw and dismiss the appeal without violating constitutional requirements or may proceed to a decision on the merits if state law so requires. *Id.*

{¶ 4} Here, appointed counsel has met the requirements set forth in *Anders*. We note further that appellant has not filed a pro se brief or otherwise responded to counsel's request to withdraw. Accordingly, this court shall proceed examining the potential assignments of error set forth by counsel on appellant's behalf and the entire record below to determine whether this appeal lacks merit deeming it wholly frivolous.

{¶ 5} On January 29, 1999, a jury convicted appellant of felonious assault, robbery, possession of cocaine and assault of a police officer. He was sentenced to seven years in prison for felonious assault, seven years in prison for robbery, 11 months in prison for possession of cocaine, and 17 months for assault of a police officer. The sentences for felonious assault, robbery and possession of cocaine were ordered served

consecutively. The sentence for assault of a police officer was ordered to be served concurrently with the other three sentences. This court affirmed appellant's convictions. *State v. Grissom* (Oct. 27, 2000), 6th Dist. No. E-99-029.

{¶ 6} On September 15, 2009, appellant filed a motion with the trial court seeking to have his sentences vacated and declared void pursuant to recent Supreme Court of Ohio decisions. Specifically, appellant contended that he was not adequately notified of postrelease control at his original sentencing. The trial court agreed with appellant and ordered him returned for a new sentencing hearing.

{¶ 7} On March 30, 2010, appellant was resentenced and was advised that he was subject to mandatory postrelease control of three years for felonious assault and robbery and that he may be subject to a period of up to three years postrelease control for possession of cocaine and assault of a police officer.

{¶ 8} In the brief filed on appellant's behalf, counsel offers two potential assignments of error:

{¶ 9} "I. The trial court abused its discretion when it resentenced defendant/appellant on 2 counts of a 4 count conviction where defendant had served his sentence on 2 counts.

{¶ 10} "II. The trial court abused its discretion when it did not void the judgment of conviction along with the original sentence at defendant's resentencing hearing."

{¶ 11} In her first potential assignment of error, counsel asserts that the court erred in imposing postrelease control when appellant had already served his sentence.

{¶ 12} Appellant was sentenced to prison for a total 15 years and five months. At the time of his resentencing, he had been in prison for approximately 11 years. Counsel asserts that, technically, appellant had already completed his seven year sentence for felonious assault and his 17 month sentence for assault of a police officer. As such, the trial court could not impose postrelease control for those two offenses because once a sentence has been served, the trial court lacks jurisdiction to resentence a defendant on that charge. *State v. Harrison*, 122 Ohio St.3d 512, 2009-Ohio-3547. However, this argument fails as periods of postrelease control are to be served concurrently. R.C. 2967.28(F)(4)(c). Appellant has not completed his entire sentence and he will still be subject to postrelease control upon completion of his sentence.

{¶ 13} Next, counsel asserts that the judgment appealed from may not be a final appealable order. Counsel initially appealed the court's March 30, 2010 resentencing judgment. Later, a typographical error was discovered in the judgment entry. That is, the trial court inadvertently imposed postrelease control on count two of the indictment when appellant was found not guilty of count two but guilty of count three. On May 27, 2010, the trial court corrected the error by issuing a nunc pro tunc order. Counsel filed a notice of appeal from this order. She then filed a motion for a delayed appeal with this court and she requested that appellant's two appeals be consolidated. This court granted appellant's motions. Consequently, counsel remedied any potential problems. Counsel's first potential assignment of error is without merit.

{¶ 14} In her second potential assignment of error, counsel contends that because appellant's initial sentence is void, his entire conviction is void. Counsel's contention is without merit on the authority of *State v. Fischer*, Slip Opinion No. 2010-Ohio-6238. "A motion to correct an illegal sentence presupposes a valid conviction and may not, therefore, be used to challenge alleged errors in proceedings that occur prior to the imposition of sentence. * * * It is, however, an appropriate vehicle for raising the claim that a sentence is facially illegal at any time. The scope of relief * * * is likewise constrained to the narrow function of correcting only the illegal sentence. It does not permit reexamination of all perceived errors at trial or in other proceedings prior to sentencing." *Id.* at ¶ 25, citations omitted.

{¶ 15} Counsel's second potential assignment of error is without merit.

{¶ 16} Upon this record, we concur with appellate counsel that appellant's appeal is without merit. Moreover, upon our own independent review of the record, we find no other grounds for meritorious appeal. Accordingly, this appeal is found to be without merit, and wholly frivolous. Counsel's motion to withdraw is found well-taken and is, hereby, granted.

{¶ 17} On consideration whereof, the judgment of the Erie 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

Arlene Singer, 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:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.