

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

State of Ohio

Court of Appeals No. WD-10-008

Appellee

Trial Court No. 2008CR0529

v.

Cory Mendoza aka Waltz

DECISION AND JUDGMENT

Appellant

Decided: August 16, 2011

* * * * *

Cory Mendoza, pro se.

* * * * *

OSOWIK, P.J.

{¶ 1} This matter is before the court on appellant's pro se application to reopen his direct appeal pursuant to App.R. 26(B) and *State v. Murnahan* (1992), 63 Ohio St.3d 60.

{¶ 2} The record reflects that in October 2008, appellant was indicted as follows as the result of an automobile collision in which two people died and two were injured: Counts 1 and 2, aggravated vehicular homicide; Counts 3 and 4, aggravated vehicular

assault; Count 5, driving while under the influence of alcohol; Count 6, endangering children; Count 7, failure to comply with an order or signal of a police officer; and Count 8, failure to stop after an accident. Appellant was found guilty by a jury of all counts.

{¶ 3} The trial court imposed the following prison terms, to be served consecutively: Count 1, a mandatory ten years; Count 2, a mandatory ten years; Count 3, eight years; Count 4, four years; Count 7, four years; Count 8, three years. As to Counts 5 and 6, the trial court ordered appellant incarcerated in the Wood County Justice Center for ten days and six months, respectively, with those two sentences to be served concurrently with the prison terms. Further, the trial court ordered that appellant be placed in solitary confinement every year on the anniversary of the crash.

{¶ 4} Appellant filed a timely appeal and on April 22, 2011, this court affirmed the judgment of the trial court as to the sentences with the exception of the solitary confinement portion, which we ordered the trial court to vacate. On July 11, 2011, appellant filed this pro se application for reopening of his appeal with a memorandum in support thereof.

{¶ 5} The Supreme Court of Ohio has held that an individual seeking reconsideration pursuant to App.R. 26(B) must first "put forth a colorable claim of ineffective assistance of appellate counsel * * *." *State v. Murnahan*, supra, at 66. In order to prove ineffective assistance of counsel, a defendant must show (1) that defense counsel's representation fell below an objective standard of reasonableness and (2) that counsel's deficient representation was prejudicial to defendant's case. *State v. Bradley*

(1989), 42 Ohio St.3d 136, paragraph two of the syllabus, citing *Strickland v. Washington* (1984), 466 U.S. 668. In Ohio, a properly licensed attorney is presumed competent and the burden is on the appellant to show counsel's ineffectiveness. *State v. Lytle* (1976), 48 Ohio St.2d 391; *State v. Hamblin* (1988), 37 Ohio St.3d 153.

{¶ 6} In support of his application, appellant asserts that appellate counsel was ineffective for failing to argue that his sentence for Count 5 – the 10-day jail sentence for his conviction for driving under the influence of alcohol -- should have merged with his sentences for Counts 1, 2, 3 and 4. As set forth above, the record reflects that appellant's 10-day sentence on Count 5 (as well as his six-month jail sentence for endangering children) was ordered to be served concurrently with his six consecutive prison sentences.

{¶ 7} An examination of Ohio case law suggests that appellant has raised a genuine issue as to whether his OVI sentence should have merged with his sentences for Counts 1, 2, 3 and 4. App.R. 26(B) provides that upon finding such an issue, this court shall grant the application.

{¶ 8} Accordingly, appellant's motion for reopening is granted, solely on the issue of whether his ten-day OVI sentence should have merged with his sentences for aggravated vehicular homicide and aggravated vehicular assault.

{¶ 9} The clerk shall serve notice of this order on the parties and the clerk of the trial court.

{¶ 10} This case shall proceed as on an initial appeal on the sole issue stated, pursuant to App.R. 26(B)(7).

{¶ 11} Finding that appellant is indigent, the court sua sponte appoints Christopher Cowan, 713 S. Front Street, Columbus, Ohio, 43206, to represent appellant in this appeal. Appellant's brief shall be filed within 20 days of the date of this judgment.

{¶ 12} It is so ordered.

MOTION GRANTED.

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, P.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>.