

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

State of Ohio

Court of Appeals No. L-10-1161

Appellee

Trial Court No. CR0200902878

v.

Scott Orinn Brandeberry

DECISION AND JUDGMENT

Appellant

Decided: November 10, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Timothy F. Braun, Assistant Prosecuting Attorney, for appellee.

Stephen D. Long, for the appellant.

Scott Orinn Brandeberry, pro se.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a sentencing judgment of the Lucas County Court of Common Pleas. Appellant entered a guilty plea to the felony charge of failure to verify, in violation of R.C. 2950.06(F) and 2950.99(A), a third degree felony. Appellant, who

possesses an exceptionally lengthy criminal history including numerous felony convictions, was sentenced to a five-year term of incarceration, to be served consecutively with a term already being served in Arizona. For the reasons set forth more fully below, the judgment of the trial court is hereby affirmed.

{¶ 2} Counsel for appellant submitted a request to withdraw pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L. Ed. 2d 493. In support of his *Anders'* request to withdraw, counsel states that, after reviewing the record of proceedings in the trial court, he is unable to find any arguable issues on appeal. In conjunction with *Anders*, counsel for appellant sets forth the following proposed assignments of error:

Potential Assignments of error:

{¶ 3} " 1. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

{¶ 4} " 2. THE TRIAL COURT ABUSED ITS DISCRETION BY ACCEPTING THE APPELLANT'S GUILTY PLEA WITHOUT ENSURING THAT THE PLEA WAS KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY ENTERED.

{¶ 5} " 3. THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING APPELLANT TO A MAXIMUM SENTENCE TO BE SERVED CONSECUTIVE TO THE TERM APPELLANT WAS SERVING IN ARIZONA."

{¶ 6} *Anders*, supra, and *State v. Duncan* (1978), 57 Ohio App.2d 93, 385 N.E.2d 323, detailed the procedure to be followed by appointed counsel who wishes to withdraw

upon determining there is a lack of a meritorious, appealable issue. In *Anders*, the United States Supreme Court held that if counsel, after conscientious examination of the case, believes any appeal to be wholly frivolous, he should so advise the court and request permission to withdraw. *Id.* at 744.

{¶ 7} This request to withdraw must be accompanied by a brief identifying anything in the record that could arguably support an appeal. *Id.* Counsel must furnish his client with a copy of the brief and request to withdraw. *Id.* Once these requirements have been satisfied, the appellate court then conducts a full examination of the proceedings held below to determine if the appeal is frivolous. If the appeal is frivolous, the appellate court may grant counsel's request to withdraw and dismiss the appeal without violating constitutional requirements or may proceed to a decision on the merits. *Id.*

{¶ 8} In the case before us, appointed counsel for appellant has satisfied the requirements set forth in *Anders*, *supra*. Accordingly, we shall proceed with an examination of the potential assignments of error set forth by counsel for appellant, review the record from below, and determine if this appeal is meritorious.

{¶ 9} The following undisputed facts are relevant to the issues raised on appeal. In 2005, appellant was convicted of unlawful sexual conduct with a minor, a felony of the third degree. This required the appellant to register as a sexual offender. Appellant violated these requirements on or about July 24, 2005, when, without permission, he moved to Arizona and failed to register the change of address. The record shows that

appellant possesses a lengthy criminal history spanning several decades, encompassing approximately 100 criminal charges, including nearly 20 felonies.

{¶ 10} Appellant was indicted on September 28, 2009, on one count of failure to verify, in violation of R.C. 2950.06(F) and 2950.00(A), a felony of the third degree. Through appointed counsel, appellant entered a "not guilty" plea on April 22, 2010. On May 17, 2010, this matter went before the court pursuant to a negotiated plea agreement. Appellant withdrew his plea of "not guilty" and entered a plea of "guilty." The record of the colloquy clearly reflects that appellant was fully briefed of all potential consequences of the guilty plea and advised that the trial court was not bound by the recommendations of the state. Appellant clearly affirmed his understanding of these matters. The trial court accepted his plea of guilty.

{¶ 11} On June 2, 2010, appellant was sentenced. The trial court imposed a sentence of five years to be served consecutive to a sentence appellant was serving in Arizona.

{¶ 12} In his first potential assignment of error, appellant argues that he was denied effective assistance of counsel.

{¶ 13} It is well-established that claims of ineffectiveness assistance of counsel are reviewed under the standard set out in *Strickland v. Washington* (1984), 466 U.S. 668. In order to prove ineffective assistance of counsel, the appellant must show both that the performance of trial counsel was defective and must also establish that, but for that defect, the trial outcome would have been different. *Id.* at 687.

{¶ 14} After careful review of the record, we find no evidence or indicia of any kind reflecting that appellant received ineffectiveness of defense counsel. We find no instances where, "but for" the conduct of counsel, the outcome would have been different. Appellant's first potential assignment of error is not well-taken.

{¶ 15} Appellant's second potential assignment of error contends that the trial court abused its discretion by accepting the appellant's guilty pleas without ensuring that the plea was knowingly, intelligently and voluntarily entered.

{¶ 16} The Supreme Court of Ohio has stated: "A trial court must strictly comply with Crim.R. 11(C)(2)(c) and orally advise a defendant before accepting a felony plea that the plea waives (1) the right to a jury trial (2) the right to confront one's accusers, (3) the right to compulsory process to obtain witnesses, (4) the right to require the state to prove guilt beyond a reasonable doubt, and (5) the privilege against compulsory self incrimination. When a trial court fails to strictly comply with this duty, the defendant's plea is invalid." *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, ¶ 31.

{¶ 17} After thorough review of the transcript of the change of plea hearing, it is clear that the trial judge properly and fully advised appellant of his rights before entering his plea of guilty. Appellant unambiguously affirmed his understanding of the consequences of the guilty plea. Appellant's second potential assignment of error is not well-taken.

{¶ 18} In his third potential assignment of error, appellant argues the trial court abused its discretion in sentencing appellant to a maximum sentence, to be served consecutive to the term appellant was serving in Arizona.

{¶ 19} This issue is reviewed pursuant to the standards established by *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio 856. *Foster* held several of Ohio's sentencing statutes unconstitutional in violation of the Sixth Amendment to the United States Constitution in the manner enumerated in *Apprendi v. New Jersey* (2000), 530 U.S. 466 and *Blakely v. Washington* (2004), 542 U.S. 296.

{¶ 20} Trial courts are no longer required to make specific findings or give their reasons for imposing maximum, consecutive, or more than minimum sentences. *Foster* vests trial courts with full discretion to impose any duration of prison sentence which falls within the statutory range.

{¶ 21} "In applying *Foster* to the existing statutes, appellate courts must apply a two-step approach. First, they must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard." *State v. Kalish*, 120 Ohio St. 3d 23, 2008-Ohio-4912, ¶ 4.

{¶ 22} In sentencing appellant, the trial court did not violate any sentencing statutes or in any way abuse its discretion when it sentenced appellant to the maximum sentence to be served consecutively with the term from Arizona. Ample evidence of appellant's propensity for recidivism and the accompanying need to protect the public supports the sentence of the trial court. Appellant's third proposed assignment of error is not well-taken.

{¶ 23} In addition to the *Anders* proposed errors, appellant has filed a litany of pro se supplemental briefs. Appellant argues at great length untenable claims of various constitutional rights violations. However, appellant's briefs do not demonstrate with legal evidence, but rather merely conclude various points of law and are not persuasive. Accordingly, we find no merit in the pro se briefs. The record clearly reflects that substantial justice has been done. Appellate counsel's motion to withdraw is found well-taken and is hereby granted.

{¶ 24} Wherefore, the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, costs of this appeal are assessed to appellant. The clerk is ordered to serve all parties, including the defendant if he or she has filed a brief, with notice of this decision.

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

<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>
