

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

State of Ohio

Court of Appeals No. L-09-1194

Appellee

Trial Court No. CR-2009-1328

v.

Ryan Davidson

DECISION AND JUDGMENT

Appellant

Decided: August 20, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellee.

Tim A. Dugan, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Ryan Davidson, appellant, appeals his conviction and sentence in the Lucas County Court of Common Pleas to four counts of robbery, violations of R.C. 2911.02(A)(2) and (B) and second degree felonies. The convictions are based upon

guilty pleas made under a plea agreement. On March 12, 2009, the trial court imposed sentence: five years imprisonment on each count with the sentences to be served consecutively to each other for a total term of imprisonment of 20 years.

{¶ 2} Appellant was originally indicted on December 26, 2008, to four counts of aggravated robbery, a first degree felony. Pursuant to a plea bargain, appellant waived indictment and agreed to prosecution by information on lesser charges. The information charged four counts of robbery, violations of R.C. 2911.02(A)(2) and (B) and second degree felonies.

{¶ 3} The robbery convictions relate to incidents occurring on July 20, 2008, July 29, 2008, December 16, 2008, and December 17, 2008, at a Rite Aid Pharmacy, Charter One Bank, Subway Restaurant, and Stop and Go Carryout, in Toledo, Ohio. In each instance appellant entered an establishment with a toy gun (that he had painted black to look real), demanded money, displayed the toy gun to gain compliance, received money and left.

{¶ 4} The information charged that on each date appellant, "in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, did knowingly inflict, attempt to inflict, or threaten to inflict physical harm on another in violation of §2911.02(A)(2) and (B) OF THE OHIO REVISED CODE, ROBBERY, BEING A FELONY OF THE SECOND DEGREE * * *."

{¶ 5} The plea agreement provided that the state would not prosecute appellant for other robberies appellant admitted to have committed in a statement to police on December 17, 2009, and an agreement as to sentence. The state agreed that it would recommend a sentence cap of 20 years (if the trial court imposed a sentence of incarceration) and that appellant's guilty pleas were conditioned on the trial court accepting the recommended sentence cap. The trial court accepted the recommended sentence cap and imposed sentences of five years imprisonment on each count, the maximum prison sentence permitted under the agreement.

Anders v. California

{¶ 6} Appellant's counsel has filed an appellate brief and has also requested leave of court to withdraw as counsel under procedures set forth in *Anders v. California* (1967), 386 U.S. 738. In *Anders*, the Supreme Court of the United States established the procedure to be followed where appointed counsel concludes that there is no merit to an appeal and seeks to withdraw. Under *Anders*, counsel must undertake a "conscientious examination" of the case and, if he determines an appeal would be "wholly frivolous," advise the court and seek permission to withdraw. *Id.* at 744. The request to withdraw must be accompanied with a brief "referring to anything in the record that might arguably support the appeal." *Id.* A copy of the brief is to be furnished to the appellant. *Id.* The appellant is permitted additional time to raise any points he chooses in his own brief. *Id.*

{¶ 7} Counsel for appellant has informed appellant of his inability to find any issue of merit for appeal and has provided appellant with copies of both the appellate brief counsel filed in this appeal and counsel's motion to withdraw. Counsel notified appellant of his right to file his own, additional appellate brief within 60 days. Appellant has not filed any additional appellate brief.

{¶ 8} Counsel for appellant has identified three potential assignments of error that might arguably support an appeal:

Possible Assignment of Errors

{¶ 9} "1) The Trial Court committed plain error by finding Appellant guilty to four counts of robbery where the bill of information lacked the proper mens rea of 'reckless.'

{¶ 10} "2) The Trial Court abused its discretion by sentencing Appellant to four consecutive five year sentences.

{¶ 11} "3) Appellant received ineffective assistance of counsel, a violation of his Sixth Amendment Right to Counsel."

Claimed Structural Defect in Bill of Information

{¶ 12} Under Possible Assignment of Error No. 1, appellant argues that the information contained a mens rea structural defect in that it did not allege recklessness as an element of the offense of robbery, a violation of R.C. 2911.02(A)(2). The issue is raised in this case for the first time on appeal. The claimed error is based on the Ohio

Supreme Court's decisions in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 ("*Colon I*") and *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 ("*Colon II*") (on reconsideration).

{¶ 13} This court has previously ruled, however, that *Colon I* mens rea structural defect claims are barred by a valid guilty plea:

{¶ 14} "This court has previously considered an appeal based upon a claimed mens rea structural defect to an indictment that was asserted for the first time on appeal and in a case where the defendant was convicted pursuant to a guilty plea. *State v. Smith*, 6th Dist. No. L-07-1346, 2009-Ohio-48. We recognized that a guilty plea precludes subsequent "independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea" and, therefore, precludes challenges to the constitutionality of indictments under *Colon I* where conviction is based upon a guilty plea. *Id.* at ¶ 10, quoting *Tollett v. Henderson* (1973), 411 U.S. 258, 267 and *State v. Spates* (1992), 64 Ohio St.3d 269, 272; accord *State v. Straughter*, 10th Dist. No. 08AP-777, 2009-Ohio-641; *State v. Hayden*, 8th Dist. No. 90474, 2008-Ohio-6279; *State v. McGinnis* (Nov. 10, 2008), 3d Dist. No. 15-08-07." *State v. Trefth*, 6th Dist. Nos. WD-07-085 and WD-08-012, 2009-Ohio-1127, ¶ 8.

{¶ 15} Accordingly, we find appellant's Possible Assignment of Error No. 1 is not well-taken.

Claimed Abuse of Discretion as to Sentence

{¶ 16} Under the Possible Assignment of Error No. 2, appellant argues that the trial court abused its discretion in imposing consecutive sentences of five years imprisonment on each count, resulting in a total aggregate sentence of 20 years.

{¶ 17} The Ohio Supreme Court's decision of *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 26, sets forth the standard of review on appeal of felony sentencing. Appellate courts "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 in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard." *Id.*

{¶ 18} Appellant stands convicted of four counts of robbery in violation of R.C. 2911.01(A)(2) and (B), a second degree felony. R.C. 2929.14(A)(2) provides the statutory range of sentences for second degree felonies of a minimum of two years and maximum of eight years imprisonment on each count. The trial court's imposition of a sentence of five years on each of the four counts in this case is within the statutorily approved range of sentences and also within the agreed sentence cap. Therefore, appellant's sentence is not contrary to law.

{¶ 19} After the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856, "[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 syllabus. Sentencing courts, however, remain required to "carefully consider the statutes that apply to every felony case. Those include R.C. 2929.11, which specifies the purposes of sentencing, and R.C. 2929.12, which provides guidance in considering factors relating to the seriousness of the offense and recidivism of the offender. In addition, the sentencing court must be guided by statutes that are specific to the case itself." *State v. Mathis*, 109 Ohio St.3d 54, 846 N.E.2d 1, 2006-Ohio-855, ¶ 38.

{¶ 20} R.C. 2929.1 1(A) provides:

{¶ 21} "A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both."

{¶ 22} R.C. 2929.12 sets forth a non-exhaustive list of "factors to consider in felony sentencing" including factors relating to the seriousness of the conduct and factors relating to the likelihood of recidivism. R.C. 2929.12(A). Under the statute, a sentencing

court may consider factors not listed in the statute where relevant to the principles and purposes of felony sentencing. Id.

{¶ 23} At sentencing, the trial court reviewed appellant's criminal history, including convictions for criminal trespass as a juvenile and possession of a stolen vehicle as an adult. The court considered the seriousness of the offense. The court read aloud a victim's statement recounting one victim's fear for her life during the robbery of a Charter One Bank branch due to her belief the gun used by appellant was real. After the incident, the victim quit work because of the "traumatic event" and stated that she has lived in fear since the robbery. In imposing sentence, the trial court noted that the offenses were a series of events, were violent in nature, and were premeditated.

{¶ 24} In our view the trial court considered the purposes of felony sentencing under R.C. 2929.11 of protecting the public from future crime by appellant through deterrence and punishment of offenders. The court considered the seriousness of the crime and the prospect of recidivism under R.C. 2929.12. We find no abuse of discretion by the trial court in imposing consecutive sentences of five years imprisonment on each count.

{¶ 25} Appellant's Possible Assignment of Error No. 2 is not well-taken.

Ineffective Assistance of Counsel

{¶ 26} To prevail on a claim of ineffective assistance of counsel, a defendant must prove two elements: "First, the defendant must show that counsel's performance was

deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense."

Strickland v. Washington (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. In the context of convictions based upon guilty pleas, the prejudice element requires a showing "that there is a reasonable probability that, but for the counsel's errors," the defendant would not have pled guilty. *Hill v. Lockhart* (1985), 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203; *State v. Xie* (1992), 62 Ohio St.3d 521,524.

{¶ 27} When considering a claim of ineffective assistance of counsel, the court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance * * *." *Strickland v. Washington*, 466 U.S. at 689.

{¶ 28} Appellant argues ineffective assistance of counsel under Possible Assignment of Error No. 3. Counsel raises the issue of whether appellant's trial counsel was deficient in recommending that he accept the plea bargain. The negotiated plea agreement reduced the maximum potential sentence on each of the four counts from eight years to a cap of five. No potential defenses to the robbery charges were argued or presented in the record. The record reflects that appellant made a statement to police on December 17, 2008, after he was informed of his *Miranda* rights, and made admissions of guilt.

{¶ 29} We have reviewed the record and have not discovered any evidence to support an argument under *Strickland* and *Lockhart* analysis that trial counsel was deficient or that appellant's guilty pleas would not have been made but for ineffective assistance of trial counsel. Accordingly, we conclude that appellant's Possible Assignment of Error No. 3 is not well-taken.

{¶ 30} As required under *Anders v. California*, we have undertaken our own independent review of the record and find no grounds of merit for an appeal. We conclude this appeal is wholly frivolous within the meaning of *Anders v. California* and grant counsel's motion to withdraw. Substantial justice was done the party complaining. We affirm the judgment of the Lucas County Court of Common Pleas. Appellant is ordered to pay costs, 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>.