

[Cite as *State v. McGhee*, 2011-Ohio-31.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 24002
v.	:	T.C. NO. 08CR1731
	:	
ROBERT MCGHEE	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

**OPINION**

Rendered on the 7<sup>th</sup> day of January, 2011.

CARLEY J. INGRAM, Atty. Reg. No. 0020084, Assistant Prosecuting Attorney, 301 W. Third Street, 5<sup>th</sup> Floor, Dayton, Ohio 45422  
Attorney for Plaintiff-Appellee

AARON HARTLEY, Atty. Reg. No. 0083170, 5613 Brandt Pike, Huber Heights, Ohio 45424  
Attorney for Defendant-Appellant

ROBERT MCGHEE, #A597-223, London Correctional Institute, P. O. Box 69, London, Ohio 43140  
Defendant-Appellant

DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Robert McGhee, filed April 26, 2010. Following a jury trial, McGhee was convicted of felonious assault

(serious harm) with a firearm specification, felonious assault (deadly weapon) with a firearm specification, carrying a concealed weapon, and having weapons while under disability. On March 12, 2010, in McGhee's direct appeal, we reversed his convictions for felonious assault and remanded the matter for merger of those offenses, determining that they were allied offenses of similar import. *State v. McGhee*, Montgomery App. No. 23226, 2010-Ohio-977. McGhee was resentenced on March 28, 2010. Counsel for McGhee filed a brief pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493. McGhee was advised of his counsel's *Anders* brief representations and that he could file a pro se brief assigning any errors for review by this court. McGhee was further advised that absent such a filing, the appeal would be deemed submitted on its merits. No pro se brief has been received. The case is now before us for our independent review of the record. *Penon v. Ohio* (1988), 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300.

{¶ 2} Counsel for McGhee asserts one potential assignment of error as follows:

{¶ 3} "WHETHER THE TRIAL COURT ERRED, TO THE PREJUDICE OF APPELLANT, WHEN IT NEGLECTED TO INSTRUCT THE JURY REGARDING SELF-DEFENSE AND THAT AN ASSAULT IS EXCUSABLE OR JUSTIFIED WHEN ONE LAWFULLY ACTING IN SELF-DEFENSE INJURES A BYSTANDER BY A RANDOM SHOT, IF THE KILLING

{¶ 4} OR INJURING OF THE ASSAILANT WOULD HAVE BEEN JUSTIFIABLE AS DONE IN SELF-DEFENSE."

{¶ 5} This is not a proper argument in McGhee's appeal from his resentencing. We further note that McGhee assigned as error in his direct appeal the trial court's failure to

instruct the jury on self-defense, and that he conceded therein that such an instruction had not been requested. We determined that “the evidence at trial did not support an instruction on self-defense, and the trial court did not commit error - plain or otherwise - when it failed to give an instruction on self-defense.” *McGhee*, ¶ 54.

{¶ 6} Upon our independent review of the record, we find no issues of arguable merit. Accordingly, the judgment of the trial court is affirmed.

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FAIN, J. and GRADY, J., concur.

Copies mailed to:

Carley J. Ingram  
Aaron Hartley  
Robert McGhee  
Hon. Mary L. Wiseman