[Cite as *State v. Sullivan*, 2013-Ohio-675.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 12AP-526
v.	:	(C.P.C. No. 11CR-06-3093)
Derek L. Sullivan,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on February 26, 2013

Ron O'Brien, Prosecuting Attorney, and *Valerie B. Swanson*, for appellee.

Thomas F. Charlesworth, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

McCORMAC, J.

{¶ 1} Defendant-appellant, Derek L. Sullivan, was indicted by the Franklin County Grand Jury in case No. 11CR-06-3093 for two counts of robbery in violation of R.C. 2911.02. As part of the plea agreement, appellant entered a plea of guilty to Count 1 of the indictment, to wit: robbery, a felony of the second degree, and Count 2 of the indictment, to wit: robbery, a felony of the third degree, was dismissed. The trial court accepted appellant's guilty plea and found him to be guilty of robbery, a felony of the second degree. A pre-sentence investigation was ordered for litigation purposes and to verify appellant's convictions and parole status.

{¶ 2} On May 17, 2012, appellant came before the trial court for sentencing. The trial judge sentenced appellant to four years in the Ohio Department of Rehabilitation and

Correction. Based on a previous conviction noted in the pre-sentence investigation, the full sentence was held to mandatory incarceration, and appellant was found to be ineligible for judicial release. Appellant was given three years of mandatory post-release control and 346 days of jail-time credit.

{¶ 3} A statement of facts surrounding the guilty plea and sentencing, as described above by the trial court, is necessary in order to determine the appeal that is presented to us.

{¶ 4} The state's basis for the plea of the event that took place on March 26, 2012 was that appellant entered a Huntington Bank on June 6, 2011 and handed the teller a note demanding money. The state alleges that appellant said "[g]ive me all your money; I have a gun; don't say anything, and I won't hurt you or the others." (Mar. 26, 2012 Tr., 5.) The teller then allegedly gave money to appellant that included a dye pack. The dye pack allegedly exploded, and a Columbus police officer saw appellant as he was walking along a street in the direction of the Columbus Police Department. An officer noticed that appellant had red all over him, and she knew from experience that dye packs explode. She also knew what the aftermath of an exploding dye pack looks like.

{¶ 5} The officer apprehended appellant. A gun was not discovered. However, appellant made several statements including "[t]he dye pack is burning my hands; I can't believe I took a dye pack; now it's hurting me." (Mar. 26, 2012 Tr., 5.) Additionally, two of the bank tellers identified appellant as being the man who robbed the bank.

{¶ 6} After presentation of these facts, appellant's counsel told the court that he was satisfied that appellant was acting knowingly, intelligently, and voluntarily in changing his plea. Appellant addressed the court. He stated that he wanted to change his plea from not guilty to guilty.

{¶ 7} The court, after appropriate questioning, was satisfied that appellant was proceeding voluntarily. Appellant then explained that he understood his rights and the consequences of pleading guilty. Appellant acknowledged that he signed a two-page guilty plea form, which he read and reviewed with his attorney. He also stated that he understood the plea form. After the trial court's full and complete explanation of the nature of the plea and the mandatory effect thereof, appellant explained that he wanted to talk to his attorney for a few minutes before he went through with his plea. The court

recessed for 11 minutes, and appellant stated he would like the court to accept his guilty plea. The court accepted the plea and found appellant guilty.

{¶ 8} On May 17, 2012, appellant came before the court for sentencing. Appellant was given an opportunity to address the court at which time, by oral motion on the record, he stated that he wished to withdraw his guilty plea. He also stated that he had told his trial counsel several times during the plea recess that he was "not comfortable going through with this," and that his attorney had put pressure on him to go ahead with the plea. (May 17, 2012 Tr., 13.)

{¶ 9} Appellant again stated he was uncomfortable and reiterated he would like to be allowed to withdraw his guilty plea. He also stated he wanted to litigate the case, and that he thought he had a good chance of winning. After these statements, the trial court denied the motion to withdraw the plea.

{¶ 10} After the motion to withdraw the plea was denied, the trial court sentenced appellant to four mandatory years in prison with three years of mandatory post-release control. He was also given 346 days of jail-time credit.

{¶ 11} Appellant immediately asked to appeal the decision of the court to deny the motion to withdraw his guilty plea.

{¶ 12} New counsel was appointed for appellant to pursue his appeal.

{¶ 13} Substitute counsel has asserted two assignments of error. The first assignment of error is: "The trial court erred when it denied Mr. Sullivan's pre-sentence motion to withdraw his guilty plea." Appellant's counsel states that the refusal to withdraw the guilty plea, which was withdrawn before sentencing, was one where appellant could prevail on that issue. However, substitute counsel was specifically ordered by appellant that an argument based on his inability to withdraw the guilty plea not be made to this court. Because appellant has been found to be sane and competent to proceed in court and to decide what he wanted to present, the issue of the failure of the court to allow appellant to withdraw his request to change his guilty plea has been waived and is not before this court.

{¶ 14} Appellant's first assignment of error is overruled.

{¶ 15} Appellant's second assignment of error is that "Under *Anders v. California* [386 U.S. 738 (1967)], the court is obligated to review the transcript for any non-frivolous issues or errors that could be appealed." Appellant's counsel asserts that he can find no viable error that would not be frivolous other than the aforementioned denial of withdrawal of the guilty plea prior to sentencing which was waived by appellant. The *Anders* doctrine rose from an appointed attorney's desire to withdraw from representing a defendant where a review of the record indicated that there was no possible defense or error that could be raised that was not frivolous. *Anders* allowed that to happen, but with some specific conditions attached to the withdrawal.

{¶ 16} In *United States v. Prado-Prado*, 188 F.Appx. 329, 331 (2006), the court found that appointed counsel was not required to address the defendant's guilty plea in his *Anders* brief because the defendant instructed counsel not to do so. However, in *United States v. Garcia*, 483 F.3d 289, 290-91 (2007), the court agreed with *Prado-Prado* but thought that there ought to be some confirmation in the record that appellant actually requested counsel not to pursue this argument. That request is confirmed specifically in this record.

{¶ 17} In *Penson v. Ohio*, 488 U.S. 75 (1988), the United States Supreme Court stated that, under *Anders*, counsel for an appellant must conduct a "conscientious examination" of the case to support a request to withdraw with a brief referring to anything in the record that might arguably support an appeal. Counsel did so in this case and came to the conclusion that there were no non-frivolous issues. Counsel found that a conscientious review of the transcript revealed that the trial court complied with Crim.R. 11(C)(2). He additionally found that, based on Crim.R. 7(B), appellant's indictment seemed to be proper. The counsel alleges that, by filing his *Anders* brief and pointing to any possible non-frivolous errors on the record, he has fulfilled his appellate duty. If there are no non-frivolous errors, counsel should be allowed to withdraw. If there are non-frivolous errors, new counsel should be appointed.

{¶ 18} The next step in the *Anders* procedure is that the court to whom the appeal is being made must conduct its own independent examination of the record to see if there is any reasonable basis for any other error, other than a waived error, to be the basis for a non-frivolous appeal.

{¶ 19} Appellant claims that his indictment is fatally flawed. However, the charging statement and indictment will be sufficient as long as it gives "the accused notice of the offense of which he is charged." R.C. 2941.05. Additionally, each count of the indictment or information shall state the numerical designation of the statute that the defendant is alleged to have violated; but an "[e]rror in the numerical designation or omission of the numerical designation shall not be ground for dismissal of the indictment or information, or for reversal of a conviction, if the error or omission did not prejudicially mislead the defendant." Crim.R. 7(B).

{¶ 20} Crim.R. 12(C)(2) states that "[d]efenses and objections based on defects in the indictment" must generally be raised "[p]rior to trial." Specifically, defenses and objections based on defects in an indictment, other than objections based on a failure to show jurisdiction in the court or to charge an offense, must be raised before trial. Crim.R. 12(C)(2). The Supreme Court of Ohio has held that "failure to timely object to the allegedly defective indictment constitutes a waiver of the issues involved." *State v. Biros*, 78 Ohio St.3d 426, 436 (1997). Also, "[a] criminal defendant who enters a voluntary plea of guilty while represented by competent counsel waives all nonjurisdictional defects in the proceedings." *State v. Fortner*, 10th Dist. No. 08AP-191, 2008-Ohio-5067, ¶ 8, citing *State v. Davis*, 4th Dist. No. 06CA21, 2007-Ohio-3944, ¶ 17.

{¶ 21} In *Foutty v. Maxwell*, 174 Ohio St. 35, 38 (1962), the court found that an indictment was not fatally defective even though it did not contain the section number of the revised code under which the defendant was charged. The court found that "the indictment clearly informed the petitioner of the crime with which he was charged – the basic purpose of an indictment." It went on to say that including the section number would have added nothing to the description of the events, and, as such, the omission of the section number in no way invalidated the indictment.

{¶ 22} In *State v. Hughley*, 20 Ohio App.3d 77, 81-82 (11th Dist.1984), the court found that even though the indictment did not clearly state the numerical designation of the statute with which the defendant was charged, the defendant was still sufficiently notified of the exact charge against him since each count of the indictment did contain a substantial language of the specific code section.

{¶ 23} In *State v. Dudas*, 11th Dist. No. 2008-L-109, 2009-Ohio-1001, the defendant asserted that the state was required to list the specific subsections of the various statutes he was charged with violating in the indictment. The court did not agree with this argument. First, it stated that, by failure to make this argument to the trial court prior to being convicted, the defendant was precluded from asserting it in the appeal. The court also found that this argument was waived by defendant's guilty plea. Finally, the court found that, even if the defendant was not precluded from asserting this argument, the argument lacked merit. Finally, the *Dudas* court concluded that Crim.R. 7 "only requires that the elements of a crime charged be set forth in the indictment." *Id.* at ¶ 40.

{¶ 24} Appellant's indictment herein contains sufficient language to charge appellant with robbery. Each count included numerical section numbers. The failure to specify the subsections was not error and does not constitute a jurisdictional defect. Moreover, appellant was not prejudiced by the failure of the state to specify the subsections of the statute that he was charged under in the indictment because the indictment quoted the statutory language of the subsections. R.C. 2911.02(A) states:

> No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:
>
> * * *
>
> (2) Inflict, attempt to inflict, or threaten to inflict physical harm on another;
>
> (3) Use or threaten immediate use of force against another.

Count 1 of appellant's indictment states that appellant, "in attempting or committing a theft offense * * * or in fleeing immediately after the attempt or offense, did recklessly inflict, attempt to inflict, or threaten to inflict physical harm on another." The language of the indictment is an exact quote of the language in R.C. 2911.02(A)(2). Count 2 of the indictment then quotes some language from R.C. 2911.02(A)(3). The indictment states that appellant, "in attempting or committing a theft offense * * * or in fleeing immediately after the attempt or offense, did recklessly use or threaten the immediate use of force against another."

{¶ 25} Because each count of the indictment contained the substantial language of the code, appellant had sufficient notice of the charges against him and he was not materially prejudiced or mislead. Also as previously stated, appellant waived any flaw in the indictment by pleading guilty. The alleged flaws in the indictment do not relate to the court's jurisdiction over the case. The indictment was also sufficient to charge appellant with armed robbery because the indictment contained all the essential elements of the crime. Finally, appellant was represented by competent counsel. As such, appellant's claim is without merit, and the claimed errors are frivolous.

{¶ 26} The court herein, as required by *Anders*, has fully examined all the proceedings to decide whether the appeal is wholly frivolous. In doing so, we find that none of the points raised by appellant are "arguable on their merits" and are all frivolous. *Id*. at 744.

{¶ 27} Appellant's second assignment of error is overruled.

{¶ 28} Since there are no non-frivolous errors, counsel for appellant is allowed to withdraw. All assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

TYACK and BROWN, JJ., concur.

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under authority of the Ohio Constitution, Article IV, Section 6(C).
