[Cite as *State v. Lehman*, 2015-Ohio-1979.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CHAMPAIGN COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 2014-CA-17
	:	
v.	:	Trial Court Case No. 2014-CR-78
	:	
MARK LEHMAN	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 22nd day of May, 2015.

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KEVIN TALEBI, Atty. Reg. No. 0069198, Champaign County Prosecutor, 200 North Main Street, Urbana, Ohio 43078
Attorney for Plaintiff-Appellee

THOMAS W. KIDD, JR., Atty. Reg. No. 0066359, P.O. Box 231, Harveysburg, Ohio 45032
Attorney for Defendant-Appellant

MARK LEHMAN, Inmate No. A706-138, Lebanon Correctional Institution, P.O. Box 120, Lebanon, Ohio 45036
Defendant-Appellant

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WELBAUM, J.

{¶ 1} Defendant-appellant, Mark Lehman, appeals from the conviction and sentence he received in the Champaign County Court of Common Pleas after pleading guilty to one count of having a weapon while under disability and one count of obstructing official business. In proceeding with the appeal, Lehman's assigned counsel filed a brief under the authority of *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), indicating that there are no issues with arguable merit to present on appeal. After conducting a review as prescribed by *Anders*, we also find no issues with arguable merit. Accordingly, the judgment of the trial court will be affirmed.

{¶ 2} On April 3, 2014, Lehman was indicted on ten counts of having weapons while under disability, one count of resisting arrest, one count of assault, and one count of obstructing official business. The charges arose from Lehman's probation officer discovering ten firearms at Lehman's residence. After the firearms were retrieved from his home, Lehman threatened to physically harm his probation officer and attempted to fight other officers as they were placing him in custody. The alleged offenses occurred while Lehman was on post-release control for a first-degree felony rape conviction out of Miami County, Ohio.

{¶ 3} Pursuant to a plea agreement, Lehman pled guilty to one count of having a weapon while under disability in violation of R.C. 2923.13(A)(2) and (B), a felony of the third degree, and one count of obstructing official business in violation of R.C. 2921.31(A)(2) and (B), a felony of the fifth degree. In exchange for his plea, the State agreed to dismiss the remaining charges and recommend that Lehman's total prison term be less than the maximum possible prison sentence of 5.83 years. The parties also

agreed that all the firearms seized at Lehman's residence would be returned to their owner, and that Lehman could be sentenced for violating his post-release control.

{¶ 4} At sentencing, the trial court imposed a 30-month prison term for having weapons while under disability and a consecutive 12-month prison term for obstructing official business. The trial court also chose to impose a post-release control violation penalty under R.C. 2929.141(A)(1), sentencing Lehman to an 18-month consecutive sentence for the violation. As a result, Leman was sentenced to a total of 60 months (5 years) in prison. The trial court did not impose any fines or restitution.

{¶ 5} On June 10, 2014, Lehman filed a notice of appeal from his conviction and sentence and requested the appointment of appellate counsel. Following the appointment of counsel, on January 12, 2015, Lehman's appellate counsel filed an *Anders* brief indicating that there were no issues with arguable merit to present on appeal. On January 21, 2015, we notified Lehman that his counsel found no meritorious claim for review and granted him 60 days to file a pro se brief assigning any errors. Lehman did not file a pro se brief.

{¶ 6} Our task in this case is to conduct an independent review of the record as prescribed by *Anders*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493. In *Anders* cases, the appellate court must conduct a thorough examination of the proceedings to determine if the appeal is actually frivolous, and if it is, the court may "grant counsel's request to withdraw and then dismiss the appeal without violating any constitutional requirements, or the court can proceed to a decision on the merits if state law requires it." *State v. McDaniel*, 2d Dist. Champaign No. 2010 CA 13, 2011-Ohio-2186, ¶ 5, citing *Anders* at 744. "If we find that any issue presented or which an independent analysis reveals is not

wholly frivolous, we must appoint different appellate counsel to represent the defendant." (Citation omitted.) *State v. Marbury,* 2d Dist. Montgomery No. 19226, 2003-Ohio-3242, ¶ 7.

{¶ 7} *"Anders* equated a frivolous appeal with one that presents issues lacking in arguable merit. An issue does not lack arguable merit merely because the prosecution can be expected to present a strong argument in reply, or because it is uncertain whether a defendant will ultimately prevail on that issue on appeal." *State v. Pullen*, 2d Dist. Montgomery No. 19232, 2002-Ohio-6788, ¶ 4. Rather, "[a]n issue lacks arguable merit if, on the facts and law involved, no responsible contention can be made that it offers a basis for reversal." *Id*.

{¶ 8} In conducting our independent review, Lehman's appellate counsel has requested that we consider two potential assignments of error, the first of which states:

> WAS THE APPELLANT DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT WHEN HE POTENTIALLY ADVISED MR. LEHMAN TO PLEAD GUILTY TO POSSESSION OF WEAPONS UNDER DISABILITY?

{¶ 9} Under this potential assignment of error, appellate counsel claims that, based on the facts of this case, there is an argument that Lehman was not in possession of the weapons at issue and that trial counsel arguably should have advised Lehman to exercise his right to trial as opposed to pleading guilty to having weapons while under disability. Therefore, appellate counsel argues that Lehman's trial counsel may have rendered ineffective assistance if he advised Lehman to plead guilty. However, appellate counsel concedes that trial counsel's advice on this matter falls outside the

record and is, therefore, not reviewable in this direct appeal. We agree, and also find that any such advice potentially given by counsel would not amount to ineffective assistance.

{¶ 10} A claim of ineffective assistance of trial counsel requires both a showing that trial counsel's representation fell below an objective standard of reasonableness, and that the defendant was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Proof of prejudice requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus. "Tactical decisions and trial strategy cannot form the basis of a claim for ineffective assistance." *State v. Bray*, 2d Dist. Clark No. 2010 CA 14, 2011-Ohio-4660, ¶ 60. It is also well-established that when a claim of ineffective assistance requires the presentation of evidence outside the record, the proper avenue for raising such a claim is through a petition for postconviction relief rather than on direct appeal. *State v. Parrish*, 2d Dist. Montgomery Nos. 25050, 25032, 2013-Ohio-305, ¶ 15, citing *State v. Cooperrider*, 4 Ohio St.3d 226, 228-229, 448 N.E.2d 452 (1983).

{¶ 11} In this case, evidence is lacking in the record to determine what trial counsel's advice was or whether Lehman would not have pled guilty but for that advice. Furthermore, even if counsel had advised Lehman to accept the plea agreement and plead guilty to having weapons while under disability, such advice does not amount to ineffective assistance. *See State v. Chatman*, 2d Dist. 25766, 2014-Ohio-134, ¶ 7 ("An attorney's advice to take a plea deal is not ineffective assistance of counsel"). It also

cannot be determined from the record that entering the guilty plea was nothing more than sound trial strategy, since, in exchange for the plea, the State agreed to dismiss 11 other charges pending against Lehman. Therefore, having found nothing in the record that could form a non-frivolous argument in support of an ineffective assistance claim, the first potential assignment of error raised by Lehman's appellate counsel is overruled.

{¶ 12} The second potential assignment of error raised by Lehman's appellate counsel is as follows:

> WAS THE CONSECUTIVE SENTENCE FOR THE JUDICIAL SANCTION IMPOSED CONTRARY TO LAW?

{¶ 13} Under this potential assignment of error, appellate counsel challenges the trial court's jurisdiction to impose a sanction for Lehman's post-release control violation. The post-release control violation resulted from Lehman committing the instant offenses while under a five-year term of post-release control for a prior rape conviction in Miami County Court of Common Pleas Case No. 05-CR-212. Appellate counsel argues that *if* the trial court in Miami County had committed any error in sentencing Lehman to post-release control for the prior rape conviction, the post-release control portion of the Miami County sentence would be void and thus prohibit the trial court in the instant case from sentencing Lehman for a post-release control violation.

{¶ 14} The foregoing argument is potentially correct. *See State v. Dean*, 2d Dist. Champaign No. 2013-CA-17, 2014-Ohio-50, ¶ 10-11 (holding that a sentencing mistake causing the imposition of post-release control to be void ultimately deprives the trial court of jurisdiction to subsequently sentence the offender for violating his post-release control). *Id*. at ¶ 10-11. However, the validity of the Miami County post-release control

sentence was not an issue raised before the trial court in the underlying case, and it is well-established that issues raised for the first time on appeal are not properly before this court and will not be addressed. (Citations omitted.) *State v. Schneider,* 2d Dist. Greene No. 95-CA-18, 1995 WL 737910, *1 (Dec. 13, 1995).

{¶ 15} In addition, the record of the sentencing proceeding in Miami County Court of Common Pleas Case No. 05-CR-212 was not included as part of the record of the underlying Champaign County Court of Common Pleas case, and therefore, cannot be made part of the record of this appeal. It is axiomatic that "[a] reviewing court cannot add material to the record before it, which was not made part of the trial court's proceeding and then decide the appeal on the basis of the new matter." *State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500 (1978), paragraph one of the syllabus; *see State v. Murray*, 6th Dist. Lucas No. L-10-1059, 2014-Ohio-1898, ¶ 11.

{¶ 16} Without the Miami County sentencing proceedings, it is impossible to determine whether the post-release control portion of Lehman's Miami County sentence is void and whether, as a result, the Champaign County Court of Common Pleas is prohibited from imposing a sanction for Lehman violating post-release control. Because that issue depends on matters outside the record of this case, the issue would be properly brought in a petition for post-conviction relief, or through a delayed appeal in Miami County Court of Common Pleas Case No. 05-CR-212. *See State v. Herfurt*, Sixth Dist. Lucas No. L-06-1295, 2007-Ohio-6363, ¶ 8.

{¶ 17} In so holding, we also note that the imposition of a 18-month consecutive prison sentence for the post-release control violation is not otherwise contrary to law, as it comports with the requirements of R.C. 2929.141(A)(1). Therefore, the second potential

assignment of error raised by Lehman's appellate counsel has no arguable merit and is overruled.

{¶ 18} Having conducted an independent review of the record pursuant to *Anders*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, we agree with Lehman's appellate counsel that there are no issues with arguable merit to present on appeal. Accordingly, the judgment of the trial court is affirmed.

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DONOVAN, J. and HALL, J., concur.

Copies mailed to:

Kevin Talebi
Thomas W. Kidd, Jr.
Mark Lehman
Hon. Nick A. Selvaggio