[Cite as *State v. Pierce*, 2011-Ohio-190.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- RUSSELL L. PIERCE Defendant-Appellant	JUDGES: Hon. William B. Hoffman, P.J. Hon. Sheila G. Farmer, J. Hon. Patricia A. Delaney, J. Case No. 10-CA-3 O P I N I O N

CHARACTER OF PROCEEDING:	Denial of Motion to Correct Sentence
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	January 18, 2011

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
GREGG MARX Assistant Prosecuting Attorney Fairfield County, Ohio 201 S. Broad St., Ste 400 Lancaster, Ohio 43130	DAVID A. SAMS P.O. Box 40 West Jefferson, Ohio 43162

Hoffman, P.J.

{¶1} The instant appeal arises from the trial court's entry dated December 15, 2009 denying Appellant's "Motion to Correct Sentence." The December 15, 2009 entry states in its entirety, "This matter came on for consideration on Defendant's Motion to Correct the Sentence filed October 29, 2009 and the State's Memorandum Contra Defendant's Motion to Correct the sentence file December 14, 2009. After reviewing the pleadings and the record in this case and applying the applicable law, the court overrules the Defendant's motion."

{¶2} On September 5, 2002, Appellant was sentenced to a term of probation for one count of Trafficking in Drugs, a felony of the fourth degree, in violation of R.C. 2925.03(A) and 2925.03(C)(2)(c). The trial court reserved a term of 15 months in prison should Appellant violate the terms of his probation. Appellant's probation was revoked by entry dated August 2, 2005. Appellant's 15 month prison sentence was imposed on August 2, 2005.

{¶3} On April 22, 2009, Appellant filed a "Motion to Correct the Sentence & Jail-Time Credit" which was denied by the trial court on May 6, 2009. Appellant did not appeal the trial court's May 6, 2009 entry. Appellant's second "Motion to Correct the Sentence" filed on October 29, 2009 raised the same arguments as the first motion filed on April 22, 2009. Appellant requested in the motions he be granted jail time credit for time spent in jail in Arizona. Further, Appellant argued he was convicted of a felony of the fifth degree and should have been sentenced within the range of a felony fifth degree rather than for a felony of the fourth degree. Therefore, he argued the maximum sentence for his conviction would be twelve months.

{¶4} Appellant filed a pro se notice of appeal from the trial court's entry of December 15, 2009. Counsel was subsequently appointed to represent Appellant in this appeal. Counsel for Appellant has filed a Motion to Withdraw and a brief pursuant to *Anders v. California* (1967), 386 U.S. 738, rehearing den. (1967), 388 U.S. 924, indicating that the within appeal was wholly frivolous and setting forth three proposed Assignments of Error. Appellant did not file a pro se brief alleging any additional Assignments of Error. Appellee also filed a brief.

I.

{¶5} "THE PLEA WAS UNKNOWING, UNINTELLIGNET (SIC) AND INVOLUNTARY."

II.

{¶6} "THE TRIAL COURT ERRED IN REVOKING PROBATION."

III.

{¶7} "THE SENTENCE WAS CONTRARY TO LAW."

{¶8} In *Anders,* the United States Supreme Court held if, after a conscientious examination of the record, a defendant's counsel concludes the case is wholly frivolous, then he should so advise the court and request permission to withdraw. Id*.* at 744. Counsel must accompany his request with a brief identifying anything in the record that could arguably support his client's appeal*.* Id*.* Counsel also must: (1) furnish his client with a copy of the brief and request to withdraw; and, (2) allow his client sufficient time to raise any matters that the client chooses. Id*.* Once the defendant's counsel satisfies these requirements, the appellate court must fully examine the proceedings below to determine if any arguably meritorious issues exist. If the appellate court also determines

that the appeal is wholly frivolous, it may grant counsel's request to withdraw and dismiss the appeal without violating constitutional requirements, or may proceed to a decision on the merits if state law so requires. Id.

{¶9} Counsel in this matter has followed the procedure in *Anders v. California (1967), 386 U.S. 738*, we find the appeal to be wholly frivolous and grant counsel's motion to withdraw. For the reasons which follow, we affirm the trial court:

I. and II.

{¶10} Because we reach the same result for the same reasons as to the first and second assignments of error, they will be addressed together.

{¶11} In his first assignment of error, Appellant argues the plea he entered on September 5, 2002 was not knowing, intelligent and voluntary. Appellant did not take a direct appeal from the trial court's entry of September 5, 2002.

{¶12} In his second assignment of error, Appellant suggests the trial court erred in revoking his probation on August 2, 2005. Likewise, Appellant did take a direct appeal from the entry revoking his probation.

{¶13} Appellant is attempting to raise issues relative to entries he did not appeal. Issues relating to the original plea, sentence or probation revocation should have been raised in a timely appeal from those judgment entries. See *State v. Ricks* 2010 WL 3794034, 5 (Ohio App. 9 Dist.). Pursuant to App.R. 4, the time for filing an appeal from those entries has expired. For this reason, these assignments or error are denied as barred by res judicata.

III.

{¶14} In his third assignment of error, Appellant argues his sentence was contrary to law. Because this is essentially the same argument raised in the Appellant's "Motion to Correct the Sentence" which was denied by the trial court in the entry being appealed, this Court will consider the merits of this argument.

{¶15} Appellant was indicted on one count of Trafficking in Drugs. According to the indictment, the offense was a felony of the fourth degree in violation of R.C. 2925.03(A) and R.C. 2925.03(C)(2)(c). Pursuant to the sentencing entry dated September 5, 2002, Appellant was sentenced for this offense. The entry specifically identifies the conviction as being a conviction for a felony of the fourth degree. At the plea hearing, the prosecutor states, "[T]he Defendant is presently charged with a fourth-degree felony. And at this time, we do believe the Defendant will plead guilty as charged. " Appellant went on to plead guilty to the offense as charged in the indictment.

{¶16} During the explanation of possible penalties at the time of the initial plea and sentence, the trial court states, "The fact that this is a fifth degree felony, you are eligible for a community control sentence of up to five years instead of prison." The trial court clearly misspoke as to the degree of felony. The indictment, the judgment entry of conviction, as well as the remaining information presented at the plea hearing all identify Appellant's charge as being one of a felony of the fourth degree.

{¶17} Appellant received a sentence which is in the statutory range for a felony of the fourth degree. There is nothing in the record to support Appellant's contention he was convicted of a felony of the fifth degree. For this reason, Appellant's third assignment of error is overruled.

{¶18} For these reasons, after independently reviewing the record, we agree with counsel's conclusion that no arguably meritorious claims exist upon which to base an appeal. Hence, we find the appeal to be wholly frivolous under *Anders,* grant counsel's request to withdraw, and affirm the judgment of the Fairfield County Court of Common Pleas.

By: Hoffman, P.J.

Farmer, J. and

Delaney, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
RUSSELL L. PIERCE	:	
Defendant-Appellant	:	Case No. 10-CA-3

For the reasons stated in our accompanying Opinion, after independently reviewing the record, we agree with counsel's conclusion no arguably meritorious claims exist upon which to base an appeal. Hence, we find the appeal to be wholly frivolous under *Anders,* grant counsel's request to withdraw, and affirm the judgment of the Fairfield County Court of Common Pleas. Costs to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY