

COURT OF APPEALS  
LICKING COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

DAVID M. HILL

Defendant-Appellant

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JUDGES:

Hon. W. Scott Gwin, P.J.

Hon. William B. Hoffman, J.

Hon. Patricia A. Delaney, J.

Case No. 15-CA-13

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Court of Common  
Pleas, Case No. 12-CR-307

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT:

March 17, 2016

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

KENNETH OSWALT  
Licking County Prosecutor  
By: BRIAN WALTZ  
Assistant Prosecuting Attorney  
20 South Second Street 4<sup>th</sup> Floor  
Newark, OH 43055

WILLIAM T. CRAMER  
470 Olde Worthington Road  
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Westerville, OH 43082

*Delaney, J.*

{¶1} Appellant, David M. Hill, appeals the trial court's denial of Appellant's "Motion to Re-Sentence."

{¶2} Appellant negotiated a plea agreement wherein the State moved to amend the indictment from two counts of rape of a child under 13 which would carry a life sentence to two counts of rape by force which carried a maximum sentence of 11 years for each count. On November 29, 2012, Appellant plead guilty to the two amended rape counts and also plead guilty to two counts of unlawful sexual conduct with a minor. Appellant was sentenced to an agreed upon sentence of 12 years in prison. The 12 year sentence was reached by imposing a four year sentence on each rape count to run concurrent with each other. In addition, four years on each unlawful sexual conduct count consecutive to each other and consecutive to the rape count for a total sentence of 12 years.

{¶3} Appellant did not appeal his initial conviction and sentence. Rather, approximately two years later, Appellant filed a "Motion to Re-Sentence" based upon Appellant's contention the trial court lacked any evidence to support findings sufficient to impose consecutive sentences. The trial court denied the motion, and Appellant has appealed.

{¶4} 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 one proposed Assignments of Error. Appellant has also raised assignments of error pro se.

{¶5} 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.*

{¶6} Counsel in this matter has followed the procedure in *Anders v. California* (1967), 386 U.S. 738.

### **POTENTIAL ASSIGNMENTS OF ERROR**

#### **ASSIGNMENT OF ERROR FROM COUNSEL**

##### **I.**

{¶7} "THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR RESENTENCING TO ADDRESS AN ERROR IN IMPOSING CONSECUTIVE SENTENCES."

**ASSIGNMENTS OF ERROR FROM APPELLANT PRO SE**

II.

{¶8} “THE TRIAL COURT COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO ADDRESS THE CONSECUTIVE SENTENCES DURING SENTENCING.”

III.

{¶9} “THE TRIAL COURT COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO FILE A NOTICE OF APPEAL FOR HIS CLIENT WITHIN 30 DAYS OF HIS CLIENT BEING SENTENCED.”

{¶10} We now will address the merits of Appellant’s potential Assignments of Error.

I., II, III.

{¶11} Because Appellant’s three assignments of error have the same resolution, we will address all three assignments of error together.

{¶12} In his first assignment of error, Appellant argues the trial court erred in refusing to resentence Appellant. Specifically, Appellant argues he should have been resentedenced because the trial court lacked sufficient evidence to support consecutive sentences.

{¶13} In his second and third potential assignment of error, Appellant argues he received ineffective assistance of trial counsel due to counsel’s failure to address consecutive sentences and failure to file a notice of appeal.

### **Consecutive Sentence**

{¶14} The doctrine of res judicata provides that any issue that could have been raised on direct appeal, and was not, is barred in later proceedings and not subject to review. *State v. Saxon*, 109 Ohio St.3d 176, 2006–Ohio–1245, 846 N.E.2d 824, ¶ 16.

{¶15} “Alleged errors in consecutive sentencing do not render a sentence void. The Supreme Court “has declined to find sentences void based on the court's failure to comply with certain sentencing statutes, including the consecutive sentencing statute.” *State v. Butcher*, 4th Dist. Meigs No. 14CA7, 2015–Ohio–4249, ¶ 27; *State v. Holdcroft*, 137 Ohio St.3d 526, 2013–Ohio–5014, 1 N.E.2d 382, ¶ 8 (challenges to consecutive sentences must be brought on direct appeal).” *State v. Wilson*, 11th Dist. Lake No. 2015-L-067, 2015-Ohio-5465, ¶ 19.

{¶16} Because any non-void sentencing errors are required to be raised on direct appeal, Appellant is barred by the doctrine of res judicata from raising any alleged errors in any manner other than direct appeal. The trial court found Appellant’s motion was properly denied under res judicata, therefore, the potential error raised by counsel is overruled.

### **Ineffective Assistance of Trial Counsel**

{¶17} In his second and third assignments of error, Appellant argues his trial counsel was ineffective for failing to file a timely notice of appeal and for failing to address the consecutive sentences.

{¶18} We likewise find the issue of ineffective assistance of counsel could have been raised on direct appeal. For this reason, the issue is barred by res judicata. As to

the failure to file a timely notice of appeal, Appellant could have sought relief by way of filing a motion for delayed appeal.

{¶19} Appellant's proposed assignments of error are overruled.

{¶20} 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 Licking County Court of Common Pleas.

By Delaney, J.

Gwin, P.J. and

Hoffman, J. concur.

[Cite as *State v. Hill*, 2016-Ohio-1214.]