

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

State of Ohio

Court of Appeals No. S-05-030

Appellee

Trial Court No. 04CR1157

v.

James L. Hess

DECISION AND JUDGMENT ENTRY

Appellant

Decided: June 30, 2006

* * * * *

Thomas Stierwalt, Sandusky County Prosecuting Attorney, and
Norman Solze, Assistant Prosecuting Attorney, for appellee.

Phillip T. Wylykanowitz, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} This matter comes on appeal from the Sandusky Court of Common Pleas, wherein appellant, James L. Hess, was convicted of receiving stolen property, a felony of the fifth degree and a violation of R.C. 2913.51.

{¶ 2} Appellant's counsel has submitted a request to withdraw pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493. In support of his request, counsel for appellant states that, after carefully reviewing the transcript and record of proceedings in the trial court, and after researching case law and statutes

relating to potential issues, he was unable to find any arguable issues on appeal. Counsel for appellant does, however, set forth the following potential assignment of error:

{¶ 3} "Did the trial court make the necessary statutory finding on the record and was the sentence term properly imposed on the Defendant/Appellant for the crime of receiving stolen property?"

{¶ 4} *Anders*, supra, and *State v. Duncan* (1978), 57 Ohio App.2d 93, set forth the procedure to be followed by appointed counsel who desires to withdraw for want of a meritorious, appealable issue. In *Anders*, the United States Supreme Court held that if counsel, after a conscientious examination of the case, determines it to be wholly frivolous he should so advise the court and request permission to withdraw. *Id.* at 744. This request, however, must be accompanied by a brief identifying anything in the record that could arguably support the appeal. *Id.* Counsel must also furnish his client with a copy of the brief and request to withdraw and allow the client sufficient time to raise any matters that he chooses. *Id.* Once these requirements have been satisfied, the appellate court must then conduct a full examination of the proceedings held below to determine if the appeal is indeed frivolous. If the appellate court determines that the appeal is 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.*

{¶ 5} In the case before us, appointed counsel for appellant has satisfied the requirements set forth in *Anders*, supra. Accordingly, this court shall proceed with an examination of the potential assignment of error set forth by counsel for appellant and the

entire record below to determine if this appeal lacks merit and is, therefore, wholly frivolous.

{¶ 6} On December 13, 2004, appellant was indicted on two counts of receiving stolen property, felonies of the fourth and fifth degree respectively. Pursuant to a plea agreement, appellant entered a no contest plea to the fifth degree felony and the other charge was dismissed. On November 14, 2005, appellant was sentenced to 11 months in prison.

{¶ 7} The potential assignment of error raised in counsel's *Anders* brief concerns whether, in sentencing appellant, the trial court should have imposed prison time. Counsel contends that there is a presumption against imposing prison time for a fifth degree felony unless a court finds that one of the R.C. 2929.13 factors exists to overcome the presumption. Counsel bases his potential assignment of error on R.C. 2929.13(B)(1) which sets forth guidelines for sentencing offenders convicted of fifth degree felonies. R.C. 2929.13(B)(1) provides in pertinent part:

{¶ 8} "(B)(1) Except as provided in division (B)(2), (E), (F), or (G) of this section, in sentencing an offender for a felony of the fourth or fifth degree, the sentencing court shall determine whether any of the following apply:

{¶ 9} " * * *

{¶ 10} "(g) The offender at the time of the offense was serving, or the offender previously had served, a prison term."

{¶ 11} On February 27, 2006, the Ohio Supreme Court decided *State v. Foster* (2006), 109 Ohio St.3d 1, 2006-Ohio-856, which found portions of Ohio's sentencing

scheme unconstitutional as violative of the Sixth Amendment principles set forth in *Blakely v. Washington* (2004), 542 U.S. 296, and *Apprendi v. New Jersey* (2000), 530 U.S. 466. In *Foster*, the Ohio Supreme Court reviewed R.C. 2929.13 to determine whether it violated *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403. The Court determined that R.C. 2929.13 does not violate *Blakely*. *Foster*, at ¶ 69. After determining that the statute was constitutional, the Court analyzed the findings discussed in the statute. The Ohio Supreme Court found that R.C. 2929.13 "does not prevent a court from imposing a prison term without [the] findings [of R.C. 2929.13]." *Id.* The court held that "[t]here is no presumption in favor of community control [.]" *Id.* "R.C. 2929.13(B)(2)(a) would permit a judge to impose prison rather than community control without R.C. 2929.13(B) findings." *Id.* at ¶ 70. *Foster* gives the trial court discretion under R.C. 2929.13 when determining whether to impose prison or community control when sentencing offenders on fourth or fifth degree felonies.

{¶ 12} In this case, as counsel acknowledges, the trial court did find on the record that appellant had previously served a prison sentence. Under *Foster*, this finding is unnecessary. Finding no abuse of discretion in the court's sentence, counsel's potential assignment of error is not well-taken.

{¶ 13} Upon our own independent review of the record, we find no other grounds for a meritorious appeal. This appeal is, therefore, found to be without merit and is wholly frivolous. Appellant's counsel's motion to withdraw is found well-taken and is hereby granted. The judgment of the Sandusky County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Sandusky County.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Dennis M. Parish, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.