[Cite as *State v. Denniss*, 2009-Ohio-3498.]

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

State of Ohio

Appellee

v.

John L. Denniss

Appellant

Court of Appeals Nos. L-06-1361
L-06-1380

Trial Court No. CR-2004-2608

DECISION AND JUDGMENT

Decided: July 17, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Veronica M. Murphy, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} Appellant, John L. Denniss, appeals the judgment of the Lucas County Court of Common Pleas. Denniss was appointed counsel for appellate purposes and his appellate counsel has filed a "no merit" brief and a request to withdraw, pursuant to *Anders v. California* (1967), 386 U.S. 738. For the following reasons, we grant counsel's request to withdraw and affirm the trial court's judgment.

{¶ 2} Denniss was indicted for one count of aggravated burglary, a violation of R.C. 2911.11(A)(1) and a felony of the first degree, and one count of felonious assault, a violation of R.C. 2903.11(A)(1) and a felony of the second degree. At trial, the victim, Danielle Lenz, testified to the incident forming the basis for the charges.

{¶ 3} In the early morning hours of July 20, 2003, Lenz was awoken by what she later learned to be a brick hitting the top of her bedroom window frame. Her two children were asleep and a male friend of Lenz was sleeping in her bedroom. She heard the children's father, Denniss, yelling threats to her from outside. She and Denniss had separated the previous year.

{¶ 4} Lenz telephoned 911. She then asked her male friend to leave, fearing that Denniss would provoke him into a fight or damage her friend's car. She locked the door behind her friend. While waiting for the police to arrive, she saw Denniss somehow slowly start to open the front door and enter the house.

{¶ 5} Lenz slammed her body against the door to prevent Denniss from entering, but he was already half inside and pushed it open further. Once inside, he began punching Lenz in the face repeatedly. When she fell to the ground, Denniss kicked her in the face with what she thought were steel-toed boots. After he kicked her, Denniss left and Lenz managed to re-lock the door and call 911 again. Tape recordings of her 911 calls were played at trial.

{¶ 6} Police took Lenz to the hospital, where she identified Denniss as her assailant to hospital staff. Lenz was treated for a broken nose and received 13 stitches to

her face. Her hospital records of her treatment were entered into evidence, along with photos of her physical condition shortly after the incident. During her testimony at trial, Lenz showed the jury her remaining facial scarring.

{¶ 7} Officer Mark Pollauf, who responded to Lenz's calls, testified to Lenz's condition and the condition of the scene when he arrived. Pollauf also testified to photographs of the scene, depicting blood spatters on the door and carpet where he found Lenz.

{¶ 8} During Lenz's cross-examination, Denniss's counsel attempted to admit into evidence a tape recording of a telephone call between Denniss and Lenz. Upon the state's objection, Denniss's counsel argued that the tape was for impeachment purposes, to contradict Lenz's testimony that her relationship with Denniss ended in January 2002. Throughout the proceedings, Denniss's counsel tried to elicit testimony implying that Lenz accused Denniss of this incident in retaliation for disputes regarding child custody and child support.

{¶ 9} At the close of the state's case in chief, the trial court denied Denniss's motion for a directed verdict. Denniss then presented the testimony of his cousin, Larry, and Larry's wife, Melissa. Denniss resided with Larry and Melissa when the incident occurred. Both Larry and Melissa testified that Denniss resided in their home's basement, which had its own separate entranceway. They testified to their activities on the evening prior to the early morning assault. Both believed that Denniss was in their house all evening, but neither actually saw him or knew whether Denniss had left the house.

{¶ 10} Denniss's brother, Thomas, also testified. Thomas had lent a snowmobile trailer to Denniss a month prior to the incident. Thomas asserted that the trailer, when connected to a truck, would cause the tail lights on a truck to "short out." Thomas did not know whether Denniss had, in fact, connected this trailer to Denniss's truck. Rather, he implied that Denniss could not possibly have driven a truck with no tail lights to Lenz's house in the early morning hours. Be that as it may, Thomas had no personal knowledge as to the condition of Denniss's truck or Denniss's whereabouts on July 20, 2003.

{¶ 11} The jury returned a verdict of guilty for both counts. At sentencing, the trial court imposed terms of three years incarceration for each count, and ordered the terms to run consecutively, for a total term of six years incarceration.

{¶ 12} Denniss's appointed appellate counsel has filed a "no merit" brief pursuant to *Anders v. California* (1967), 386 U.S. 738. 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. See, also, *State v. Duncan* (1978), 57 Ohio App.2d 93. 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.

{¶ 13} In this case, appointed counsel has fulfilled the requirements of *Anders*. She asserts 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, she was unable to find an arguable, non-frivolous issue for appeal. Upon consideration, we conclude that counsel's brief is consistent with the requirements set forth in *Anders*, supra and *Penson v. Ohio* (1988), 488 U.S. 75. Denniss has not filed his own brief.

{¶ 14} Denniss's counsel raises three possible issues for appeal: (1) ineffective assistance of counsel, (2) Denniss's right to a speedy trial, and (3) the trial court's denial of full admissibility of the tape recorded telephone call between Denniss and Lenz. Upon our own independent review of the record, we find no merit in each issue raised by Denniss's counsel.

{¶ 15} First, Denniss's counsel acknowledges that she could not find any arguable instance where Denniss's trial counsel rendered ineffective assistance. Upon our own review of the record, we agree and find no merit in the first proposed assignment of error.

{¶ 16} Second, Denniss's counsel raises the possibility that Denniss's rights under the Interstate Act on Detainers ("IAD"), R.C. 2963.30, were violated. The IAD's speedy trial provisions apply to defendants incarcerated in another state when criminal charges are filed; Denniss was incarcerated in Michigan on unrelated charges when the instant

charges were filed. Denniss's trial counsel had filed a motion to dismiss based on a violation of the IAD, which the trial court denied. Upon review of the issue, we find no error in the trial court's determination.

{¶ 17} Pursuant to the IAD, a defendant must be brought to trial within 180 days after the defendant delivers to the prosecution and the appropriate court notice of his incarceration and a request for a "final disposition" on the indictment, information, or complaint. Article III of the IAD applies only to those periods during which "a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner * * *." The existence of a detainer is, therefore, a prerequisite to the applicability of the IAD. *State v. Wells* (1994), 94 Ohio App.3d 48, 53, citing *U.S. v. Mauro* (1978), 436 U.S. 340.

{¶ 18} In order to trigger the 180-day period in which the defendant must be brought to trial, Article III of the IAD requires the defendant to send his notice and request first to the "warden commissioner of corrections or other official having custody of him," who then forwards the defendant's request with a certificate. The warden's certificate must state, inter alia, the defendant's term of commitment, the time already served, and the time remaining to be served. Once these requirements are met, the 180-day time period begins to run.

{¶ 19} In order to start the 180-day period, defendants must "substantially comply" with the IAD's notice and request requirements. "Substantial compliance" is found where the defendant has done "everything that can reasonably be expected." *State v. York* (1990), 66 Ohio App.3d 149, 153, citing *State v. Ferguson* (1987), 41 Ohio App.3d 306. A defendant does not substantially comply if he sends a notice and request directly to the prosecution or appropriate court without first forwarding it to his warden in order to have the required accompanying certificate attached. *State v. York*, 66 Ohio App.3d at 154, citing *Norton v. Parke* (C.A. 6, 1989), 892 F.2d 476.

{¶ 20} On June 20, 2003, the state filed a complaint in Toledo Municipal Court. On December 3, 2003, Denniss sent a pro se notice to the Lucas County Prosecutor's office invoking his right to a speedy trial pursuant to the IAD. However, Denniss did not first send his notice to the warden of the Michigan institution, and this notice did not contain the required accompanying certificate. Denniss then filed a motion to dismiss in the Toledo Municipal Court, and approximately one month later, the charge was dismissed at the state's request.

{¶ 21} The Lucas County grand jury then issued a two-count indictment, containing the charges of which Denniss was convicted herein. On January 11, 2006, Dennis filed another request seeking final disposition of the charges pursuant to the IAD. Unlike his first request, this request did have attached the certificate required pursuant to the IAD. A trial date was set, but after several continuances were granted on Denniss's

request, Denniss filed a motion to dismiss alleging a violation of his speedy trial rights pursuant to the IAD.

{¶ 22} In resolving the second motion to dismiss, the trial court correctly found no merit to Denniss's claim that his rights pursuant to the IAD were violated during the pendency of proceedings in the Toledo Municipal Court. First, because Denniss had sent his request for disposition directly to the prosecutor's office, without first forwarding it to his warden and without the required certificate of inmate status, the IAD's 180-day time period was not triggered. *State v. York* (1990), 66 Ohio App.3d at 153-154.

{¶ 23} Next, Denniss argued that his second request for disposition, which was properly forwarded to his warden and which did contain the required certificate, started the 180-day period. The state conceded that the 180-day period started with its receipt of this request. When denying the motion to dismiss, the trial court found that Denniss's several requests for continuances tolled the time period and that, including the tolled periods, Denniss was brought to trial within 180 days.

{¶ 24} The tolling provisions would apply, had Denniss remained incarcerated in Michigan during the pendency of proceedings. The IAD applies only "* * * whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty days * * *." Denniss, however, was released from the Michigan Department of Corrections and arrested by Ohio authorities on March 29, 2006 – 77 days after his

request for final disposition. After his incarceration in Michigan ended, the IAD ceased to apply. Therefore, the trial court correctly denied Denniss's motion to dismiss, albeit on different grounds. The proposed second assignment of error has no merit.

{¶ 25} Third, appellate counsel raises the possibility that the trial court erred in limiting the admissibility of three recorded telephone conversations between Denniss and Lenz, which Denniss had recorded. Denniss argued that the recorded conversations would impeach Lenz's credibility because they showed he and Lenz had an ongoing intimate relationship, that Lenz was trying to use the instant charges for purposes of child custody proceedings, and because Lenz had testified to ending their prior intimate relationship.

{¶ 26} The trial court denied admission of the recordings on ground of irrelevance. Upon review of the tape recordings, which were made a court exhibit and included in the record on appeal, we agree. The recorded conversations contain arguments between Lenz and Denniss over custody of the children and concern time periods far prior to the assault and burglary. While Denniss raises accusations in the conversations concerning Lenz's personal actions, all of which are irrelevant to the instant charges, Lenz denies the bulk of them. In any event, we agree that the taped conversations do not contain any evidence relevant to whether Denniss committed burglary and aggravated assault. We find no merit in the third proposed assignment of error.

{¶ 27} In sum, appellate counsel for Denniss correctly determined that there was no meritorious appealable issue present in this case. Upon a thorough review of the

record, we also independently find no grounds for a meritorious appeal. This appeal is, therefore, found to be without merit and is wholly frivolous. Denniss's counsel's motion to withdraw is found well-taken and is hereby granted.

{¶ 28} The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

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.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE