

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

State of Ohio

Court of Appeals Nos. L-08-1334
L-08-1335

Appellee

Trial Court Nos. CR0200701978
CR0200801046

v.

William Lee Cable

DECISION AND JUDGMENT

Appellant

Decided: October 9, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Mark T. Herr, Assistant Prosecuting Attorney, for appellee.

Jack J. Brady, for appellant.

* * * * *

HANDWORK, P.J.

{¶ 1} This case is before the court on appeal from the judgment of the Lucas County Court of Common Pleas which, following a no contest plea, found appellant, William Lee Cable, guilty of two counts of robbery. Appellant pled no contest and was found guilty of robbery, in violation of R.C. 2911.02(A)(2), a felony of the second

degree, and was sentenced to serve three years in prison.¹ In a second case, appellant waived his right to be prosecuted by indictment and consented to be prosecuted by information.² Appellant pled no contest to a second count of robbery, in violation of R.C. 2911.02(A)(2), a felony of the second degree, and R.C. 2941.141, a firearm specification with a mandatory one year term of incarceration. Appellant was sentenced to serve four years in prison as to the second count of robbery and one year as to the firearm specification, to be run consecutively to each other, and consecutively to the three year term of incarceration as to the first count of robbery, for a total of eight years in prison. Appellant was granted leave to file a delayed appeal.

{¶ 2} On February 11, 2009, appellant's counsel filed a request to withdraw pursuant to *Anders v. California* (1967), 386 U.S. 738. *Anders* 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.*

¹Appellant's judgment entries of sentencing were originally journalized on February 7, 2008, and then again on June 23, 2009, in accordance with a remand from this court.

²In exchange, a nolle prosequi was entered with respect to case No. CR0200702054.

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 it may proceed to a decision on the merits if state law so requires. *Id.*

{¶ 3} In this case, appointed counsel for appellant has satisfied the requirements set forth in *Anders*, supra. Although notified, appellant never raised any matters for our consideration. In support of his request, counsel for appellant states that, after reviewing the record of proceedings in the trial court, and after researching the applicable law, he found no meritorious issue to raise on appeal and determined that any issue raised would be frivolous. Although counsel found no meritorious issue to present on appellant's behalf on appeal, counsel addressed the potential for raising assignments of error regarding ineffective assistance of counsel and whether the indictment was fatally defective, thereby denying appellant his right to due process.

{¶ 4} Upon review of the record, the plea hearing and sentencing, we find no meritorious issue for appeal. In Ohio, a properly licensed attorney is presumed competent and the burden is on the appellant to show counsel's ineffectiveness. *State v. Lytle* (1976), 48 Ohio St.2d 391; *State v. Hamblin* (1988), 37 Ohio St.3d 153. Specifically, appellant must demonstrate that counsel's performance was deficient and

that the deficient performance prejudiced the defense, such that, without the deficient representation, the outcome of the trial would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 686.

{¶ 5} In this case, counsel challenged appellant's statement to the police in a hearing on a motion to suppress, and challenged appellant's competence to stand trial pursuant to R.C. 2945.37, as appellant had entered a plea of not guilty by reason of insanity. Additionally, although appellant was indicted on several counts of aggravated robbery, counsel negotiated pleas of no contest to two counts of robbery and one count of a firearm specification. Moreover, after being notified of his rights, appellant stated that counsel went over the evidence against him and discussed what could be done to fight that evidence, and that he was satisfied with counsel's advice and competence as an attorney. Accordingly, we agree with appellate counsel that any assignment of error regarding counsel's competence in this matter would be wholly frivolous.

{¶ 6} With respect to the indictment, based upon *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 ("*Colon I*"), we find that the language in the information and indictment did not contain the reckless mens rea for robbery or aggravated robbery. However, relying on *State v. Moss*, 6th Dist. No. L-07-1401, 2008-Ohio-4737, we find that *Colon I* is inapplicable to the present case. Based upon the Ohio Supreme Court's holding in *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 ("*Colon II*"), this court has stated that a "structural error analysis will only apply to cases in which multiple errors permeate the entire proceeding, and contain the following factors: a defective

indictment; the defendant has had no notice of the specific mens rea of the offense; the jury instructions do not include the applicable mens rea; and, during trial, the prosecution applies an improper mens rea to the crime charged." *Moss*, ¶ 17. Thus, applying a plain error analysis, where a plea of no contest has been entered and a "review of the record reveals no further errors to demonstrate that the defect in the indictment so permeated the proceedings so as to create structural error," and "[n]othing in the record indicates that the court failed to properly consider whether the facts met all the elements of the crime, including the appropriate mens rea," no violation of the defendant's due process rights has occurred and *Colon I* is inapplicable. *Moss*, ¶ 19. Accordingly, we also find that any potential assignment of error concerning a defective indictment would be without merit and wholly frivolous.

{¶ 7} Furthermore, upon our own independent review of the record, we find that no other grounds for a meritorious appeal exist in this case. This appeal, therefore, is found to be without merit and is wholly frivolous. As such, appellant's counsel's motion to withdraw is found well-taken and ordered granted. 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, P.J.

JUDGE

Thomas J. Osowik, J.

JUDGE

James R. Sherck, J.
CONCUR.

JUDGE

Judge James R. Sherck, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

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>.