

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

State of Ohio

Court of Appeals No. L-08-1074

Appellee

Trial Court No. CR-200501997

v.

Gregory J. Herfurt

DECISION AND JUDGMENT

Appellant

Decided: December 31, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Jennifer Donovan, Assistant Prosecuting Attorney, for appellee.

Jeff Simpson, for appellant.

* * * * *

HANDWORK, P.J.

{¶ 1} This case is before the court on appeal from a judgment of the Lucas County Court of Common Pleas.

{¶ 2} On May 9, 2005, the Lucas County Grand Jury indicted appellant, Gregory J. Herfurt, on two counts of receiving stolen property in violation of R.C. 2913.51. Both

violations are felonies of the fourth degree. Initially, appellant entered pleas of not guilty to each count. On June 9, 2009, appellant withdrew his pleas of not guilty and entered a plea of guilty to one count of attempted receipt of stolen property, a violation of R.C. 2923.02 and 2913.51, a felony of the fifth degree. At the change of plea hearing, the trial judge told appellant that he would be subject to postrelease control "under the supervision of the Adult Parole Authority" after serving his sentence.

{¶ 3} On June 30, 2005, the common pleas court held appellant's sentencing hearing. It was revealed that appellant has an extensive criminal record both as a juvenile and as an adult. Appellant's adult convictions include 11 previous felony convictions and 29 misdemeanor convictions. On July 1, 2005, the court below entered a judgment sentencing appellant to 11 months in prison and ordering him to pay \$500 in restitution to each of the victims.

{¶ 4} The judge did not mention postrelease control either during the sentencing hearing or in her judgment entry on sentencing. Nevertheless, the record of this cause contains a document captioned "Notice pursuant to R.C. 2929.19(B)(3)" and is also file-stamped July 1, 2005. It is signed by both appellant and his attorney and reads, in material part:

{¶ 5} "A term of post-release [sic] control after prison **will** be imposed following prison release for an F1 or F2, a felony sex offense as defined in RC 2967.28 or for an F3, during which defendant caused or threatened to cause physical harm to a person; otherwise, post-release [sic] control, **may** be imposed. For violating post-release [sic]

control conditions, the adult parole authority, or parole board may impose a more restrictive or longer control sanction, including a nine month prison term for each violation up to a maximum of 50% of the stated term originally imposed. If the violation is a new felony, defendant may be returned to prison for the greater of one year or the time remaining on postrelease control in addition to prison upon conviction of the new felony." (Emphasis in the original)

{¶ 6} On February 7, 2006, the trial court, sua sponte, entered a nunc pro tunc judgment entry in this case, adding the language: "Defendant is again reminded of the limited right to appeal the plea, as well as the right to appeal the sentence under certain circumstances as provided for in R.C. 2953.08, and post-release [sic] control notice under R.C. 2929.19 (B)(3) and R.C. 2967.28."

{¶ 7} Upon his release from prison, appellant again engaged in criminal activity and was convicted on one count vandalism and one count of receiving stolen property, both felonies of the fourth degree. See *State v. Herfurt*, 6 Dist. No. L-06-1295, 2007-Ohio-6363, ¶ 1. He was sentenced to consecutive one year terms of incarceration on each count. *Id.* The trial court further found that these convictions violated the postrelease control imposed by the Adult Parole Authority in the present case and imposed a consecutive one year term of incarceration for this violation for a total of three years in prison. *Id.*

{¶ 8} Appellant appealed these convictions to this court. *Id.* Two of his assignments of error on appeal in that case alleged constitutional violations stemming

from the February 7, 2006 nunc pro entry in the present case. Id. at ¶ 3 and ¶ 4. We found that we could not address these assignments of error because neither the judgment entries nor the sentencing hearing in the present case were part of the record of the case on appeal. Id. at ¶ 7.

{¶ 9} On March 12, 2008, appellant filed, pursuant to App.R. 5 a delayed criminal appeal of the June 20, and February 7, 2006 judgments and was appointed counsel for the purposes of this appeal. Appellant's counsel subsequently submitted a request to withdraw pursuant to *Anders v. California* (1967), 386 U.S. 738, which sets forth the procedure to be followed by appointed counsel who desires to withdraw for want of a meritorious, appealable issue. Pursuant to *Anders*, if counsel, after a conscientious examination of the case, determines it to be wholly frivolous he or she should 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. In addition, counsel must furnish his client with a copy of the brief and request to withdraw and must allow the client sufficient time to raise any matters that he or she chooses. Id. Once these requirements have been satisfied, the appellate court must conduct a full examination of the proceedings held below in order to determine whether the appeal is, in fact, frivolous. Id. If the appellate court determines that the appeal is frivolous, it may grant counsel's request to withdraw and may dismiss the appeal without violating constitutional requirements, or it may proceed to a decision on the merits if state law so requires. Id.

{¶ 10} In the case before us, appointed counsel for appellant satisfied the requirements set forth in *Anders*. Although notified, appellant never raised any matters for our consideration. Accordingly, we shall proceed with an examination of the arguable assignment of error set forth by counsel for appellant, and of the entire record below, in order to determine whether this appeal lacks merit and is, therefore, wholly frivolous.

{¶ 11} Appellate counsel asserts that the only arguable issue "for appeal is whether or not the nunc pro tunc order of the trial court was proper."

{¶ 12} R.C. 2967.28(C) provides:

{¶ 13} "Any sentence to a prison term for a felony of the third, fourth, or fifth degree * * * shall include a requirement that the offender be subject to a period of up to three years of postrelease control after the offenders release from imprisonment if the parole board, in accordance with division (D) of this section determines that a period of postrelease control is necessary for that offender."

{¶ 14} Pursuant to R.C. 2929.19((B)(3)(d), a trial court must, at his sentencing hearing, notify a defendant who is convicted of a third, fourth or fifth degree felony that he may be supervised under R.C. 2967.28.

{¶ 15} Because the trial court did notify appellant, in writing, at the time of sentencing of the fact that he would be subject to postrelease control, and the court entered its nunc pro tunc entry before appellant was released from prison, we find that the

nunc pro tunc entry was valid. See R.C. 2929.191. Accordingly, appellant's sole arguable error is without merit.

{¶ 16} After engaging in further independent review of the record, we conclude that there are no other grounds for a meritorious appeal. This appeal is therefore found to be without merit and is wholly frivolous. Appointed counsel's motion to withdraw is found well-taken and is hereby 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(A).

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

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.
CONCUR.

JUDGE

<p>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.</p>
