[Cite as *State v. Jones*, 2010-Ohio-2576.]

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

State of Ohio — Court of Appeals No. L-09-1182

Appellee — Trial Court No. CR0200703497

v.

Chad Alan Jones — **DECISION AND JUDGMENT**

Appellant — Decided: June 4, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Louis E. Kountouris, Assistant Prosecuting Attorney, for appellee.

Patricia Horner, for appellant.

* * * * *

COSME, J.

{¶1} This matter is before the court on the judgment of the Lucas County Common Pleas Court. Appellant, Chad Alan Jones, plead no contest and was found

guilty of possession of crack cocaine, in violation of R.C. 2925.11(A) and (C)(4)(c), a felony of the third degree, and was sentenced to three years of incarceration.

{¶2} On appeal, appellate counsel advised the court that she had reviewed the record and could discern no meritorious claims for appeal. Appellate counsel moved to withdraw pursuant to *Anders v. California* (1967), 386 U.S. 738. After independently reviewing the record, we agree the record does not contain meritorious claims upon which appellant could prevail on appeal. Therefore, we grant the motion of appellate counsel to withdraw and affirm the judgment of the trial court.

I. BACKGROUND

{¶3} On November 29, 2007, appellant was indicted by a Lucas County Grand Jury of possession of crack cocaine, in violation of R.C. 2925.11(A) and (C)(4)(c), and trafficking in crack cocaine, in violation of R.C. 2925.03(A) and (C)(4)(d), felonies of the third degree.

{¶4} On March 10, 2008, appellant appeared for trial on the two drug charges. But after asking to use the bathroom, he left the courthouse. The trial court issued a capias for appellant's arrest. While executing a search warrant in an unrelated case, police discovered appellant on the premises and took him into custody. Appellant was charged with failure to appear in *State v. Jones* (Mar. 13, 2008) Lucas C.P. No. CR-200801573.

{¶5} These matters were set for trial. On March 17, 2008, after the jury was empanelled, but before testimony was taken, appellant agreed to enter a plea to the possession of crack cocaine in this case and the failure to appear in Case No. CR-200801573 (which is not before us on appeal) in exchange for dismissal of the trafficking in crack cocaine charge.

{¶6} Prior to accepting appellant's plea of no contest, the trial court confirmed that appellant's plea was knowingly, voluntarily, and intelligently made by engaging in a dialogue with appellant as required by Crim.R. 11. The trial court sentenced appellant to three years on the possession of crack cocaine charge and twelve months on the failure to appear charge. The trial court further ordered that these two sentences be served consecutively.

{¶7} The trial court appointed counsel for purposes of appeal. Appellate counsel filed an *Anders* brief and asked that she be permitted to withdraw. Although a copy of appellate counsel's *Anders* brief was served upon him, appellant has not filed a supplemental brief raising any additional assignments of error appellant believes the appellate court should address. All the criteria set forth in *Anders* have been met. See *Anders*, 386 U.S. at 744. See, also, *State v. Artiaga*, 6th Dist. No. L-02-1021, 2002-Ohio-5903. The state's brief merely asks we find both assignments of error "not well-taken."

II. ANDERS BRIEF

{¶8} Upon receiving an *Anders* brief, we must "conduct 'a full examination of all the proceedings to decide whether the case is wholly frivolous.'" *Penson v. Ohio* (1988), 488 U.S. 75, 80, quoting *Anders*, 386 U.S. at 744. After fully examining the proceedings below, if we find only frivolous issues on appeal, we then may proceed to address the case on its merits without affording appellant the assistance of counsel. Id. See *State v. Kent* (Mar. 4, 1998), 4th Dist. No. 96CA794; *State v. Hart* (Dec. 23, 1997), 4th Dist. No. 97CA18. If we find, however, that meritorious issues for appeal exist, we must afford appellant the assistance of counsel in order that counsel may address the issues. *Anders*, 386 U.S. at 744; *Penson*, 488 U.S. at 80. See, e.g., *State v. Alexander* (Aug. 10, 1999), 4th Dist. No. 98CA29. With the foregoing principles in mind, we turn our attention to the potential assignments of error counsel posited in the appellate brief and then to the record before us.

III. COMPLIANCE WITH CRIM.R. 11

{¶9} Appellate counsel's first potential assignment of error asserts:

{¶10} "I. Defendant's plea was not made voluntarily, intelligently or knowingly."

{¶11} Appellate counsel suggests appellant was prejudiced by the trial court's failure to strictly comply with Crim.R. 11.

{¶12} We disagree.

{¶13} Before accepting a no contest plea for a felony, a trial court must substantially comply with Crim.R. 11(C), which recites the procedure for a court to accept a plea. *State v. Nero* (1990), 56 Ohio St.3d 106, 108, citing *State v. Stewart* (1977), 51 Ohio St.2d 86. "Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving." Id.

{¶14} After thoroughly reviewing the record, we find the trial court substantially complied with Crim.R. 11(C) when it accepted appellant's no contest plea. There is no question - in light of appellant's own words at the plea hearing - that the no contest plea was knowingly and voluntarily entered into. See *State v. Turner*, 6th Dist. No. L-03-1271, 2004-Ohio-5758.

{¶15} Accordingly, appellate counsel's first potential assignment of error is not well-taken.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

{¶16} Appellate counsel's second potential assignment of error asserts:

{¶17} "II. Defendant's trial counsel was ineffective."

{¶18} Appellate counsel suggests that because trial counsel did not file a motion to suppress or a motion to dismiss the indictment, he did not actively challenge the evidence against appellant. In particular, appellant argues trial counsel failed to

challenge the validity of the search warrant or his arrest, seek dismissal of the indictment because the police report indicated a felony level that differed from the indictment, and ensure that he did not have to appear for trial in prison garb.

{¶19} To prevail on a claim of ineffective assistance of counsel, appellant must satisfy the two-prong test enunciated in *Strickland v. Washington* (1984), 466 U.S. 668. Accord *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus. Initially, appellant must show that counsel's performance was deficient. To meet that requirement, appellant must show counsel's error was so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Once the first prong is established, appellant must show the error was prejudicial. "[F]ailure to satisfy one prong of the Strickland test negates a court's need to consider the other." *State v. Beavers*, 10th Dist. No. 08AP-1070, 2009-Ohio-4214, ¶ 8, citing *Strickland*, 466 U.S. at 697.

{¶20} Under the first prong, there is a strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. Appellant must overcome the presumption that his trial counsel's decision not to pursue a motion to suppress or a motion to dismiss was not sound trial strategy.

{¶21} This presumption means that a great amount of deference must be given to counsel's trial strategy. *State v. Carter* (1995), 72 Ohio St.3d 545, 558. Even a questionable trial strategy does not compel a finding of ineffective assistance of counsel.

State v. Smith (2000), 89 Ohio St.3d 323, 328; *State v. Clayton* (1980), 62 Ohio St.2d 45, 49.

{¶22} In this case, trial counsel was far from ineffective. The transcript reveals a discussion concerning the circumstances of the case and counsel's basis for declining to pursue a motion to suppress or a motion to dismiss. A review of the applicable case law supports trial counsel's determination that filing these motions was not warranted.

A. Motion to Suppress

{¶23} Although appellant suggested that the validity of the search warrant or his arrest should have been challenged, there was no evidence the search warrant was obtained for the purpose of executing an arrest warrant for appellant. See *State v. Crawford*, 3d Dist. Nos. 8-04-21, 8-04-22, 8-04-23, 2005-Ohio-243. Further, a search warrant carries with it the limited authority to detain occupants of the premises while a proper search is executed, establishing probable cause to arrest. *Michigan v. Summers* (1981), 452 U.S. 692. See *State v. Schultz* (1985), 23 Ohio App.3d 130. See, also, *State v. Bobo* (1989), 65 Ohio App.3d 685, 689. A warrant for appellant's arrest existed and the officers executed that warrant when they learned of appellant's identity.

B. Motion to Dismiss

{¶24} Appellant also suggested that because the felony level given in the police report differed from the felony level given in the indictment, the indictment must be fatally flawed. However, the grand jury, not the police officer or police department, determines the charges in a felony case. See R.C. 2939.08; Crim.R. 6. The grand jury is not restricted to the charge made in the police report, affidavit or information. "[G]rand juries have plenary and inquisitorial powers and may lawfully upon their own motion originate charges against offenders." *State v. Klingenberger* (1925), 113 Ohio St. 418, 426; *State v. Adams* (1982), 69 Ohio St.2d 120, 125. The grand jury did not exceed its authority by returning an indictment that differed from the initial complaint and affidavit. *State v. Marbley* (May 18, 1995), 8th Dist. No. 67685.

C. Prison Garb

{¶25} We must consider whether appellant was compelled to wear prison garb at trial. This court has recognized a defendant may be prejudiced by appearing at trial in jail clothes. *State v. Collins*, 6th Dist. No. L-05-1399, 2007-Ohio-3578, ¶ 27, citing *Estelle v. Williams* (1976), 425 U.S. 501, 507.

{¶26} The United States Supreme Court held, in *Estelle v. Williams* (1976), 425 U.S. 501, that a defendant's right to due process is violated when he is compelled to stand trial before a jury while wearing identifiable prison clothing. Id. at 512. At the same

time, the court declined to establish a per se rule that would invalidate any conviction where the accused wore prison garb at trial. Id. See *State v. Smith*, 2d Dist. No. 21058, 2006-Ohio-2365, ¶ 26. In reaching its decision, the court recognized both that a defendant may be prejudiced by appearing in jail clothing and that a defendant might purposely elect, as a matter of trial strategy, to stand trial in such attire. Id. at 504-505. See *State v. Gandy*, 1st Dist. No. C-050804, 2006-Ohio-6282, ¶ 4. Taking into consideration these apparently opposing principles, the relevant inquiry becomes not merely whether the defendant appeared before the jury in prison attire, but, rather, whether his appearance, so attired, was compelled. *Estelle*, 425 U.S. at 507; *Gandy* at ¶ 4; and *Smith* at ¶ 26.

{¶27} In this case, the trial court addressed the fact that appellant did not have street clothes prior to the jury being called to the courtroom for voir dire. At that time, the following exchange took place between the trial court, appellant, and appellant's attorney, Ernest E. Bollinger:

{¶28} "MR. BOLLINGER: * * * I spoke with his mother on 2 occasions and asked her to bring clothes for him for trial, and I believe that the Court's bailiff also talked to his mother for the same purpose and he does not have clothes today.

{¶29} "THE COURT: Mr. Jones, just so you know * * *

{¶30} "As it relates to your clothes, we have been prepared -- I was ready to try this case back on March 10th of 2008. I still have my notes from that day. We had a jury

ready to try the case at that time. Your attorney apparently has advised your family to have clothes here for the trial. I had my clerk call your mother and talk with her yesterday to make sure that she knew you should have clothes today because we were going to proceed with the trial this morning.

{¶31} "I take it, the fact that you don't have clothes, that you're willing to proceed this morning in the jail outfit. It makes no difference to me whatsoever, but I am not going to continue the case because you didn't get clothes here when you were given ample opportunity to have the clothes present.

{¶32} "The Court is going to take a 5-minute recess and we'll get the jury up here ready for voir dire. The Court will be in recess."

{¶33} The record contains no objection from appellant concerning his attire. "[T]he failure to make an objection to the court as to being tried in such clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation." *Estelle,* 425 U.S. at 512-513.

{¶34} In this case, defendant was aware of the need to procure clothing for his trial. Arrangements were made for appellant to have civilian clothes; however, appellant's mother did not perform this assigned function by the time of trial. The record indicates that appellant had sufficient opportunity to arrange to have the clothing he wished to wear present prior to trial. Appellant's own failure to do so cannot be held against the state. See *State v. Wilson* (1978), 57 Ohio App.2d 11. Furthermore,

defendant did not request financial assistance from the court; therefore, it is presumed there was sufficient ability on the part of defendant to procure his desired clothing.

{¶35} Finally, the record reflects that efforts were made by trial counsel and the court to provide appellant with civilian attire to wear for trial. Because appellant was not compelled to appear before the jury in prison attire, nor did he object to proceeding at the time of the trial, no grounds exist upon which he can appeal. *Estelle*, 425 U.S. at 503; *State v. Jackson*, 6th Dist. No. L-07-1184, 2008-Ohio-1563, at ¶ 54-55.

{¶36} In order to demonstrate that he was prejudiced by counsel's deficient performance, appellant must prove that "there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Bradley*, 42 Ohio St.3d at 142.

{¶37} The evidence related by the state during the plea hearing suggests there was ample evidence to show that appellant did possess crack cocaine. Four officers heard appellant discuss the purchase of the crack cocaine with the undercover informant who set up the buy. Two officers personally witnessed the transaction take place in the kitchen of the home at 1027 Woodville Road, Toledo, Lucas County, Ohio. The substance was tested and found to be crack cocaine.

{¶38} As to the failure to appear charge, the state related that appellant appeared at the courthouse for trial on the drug charges on March 10, 2009. Appellant asked that he be allowed to step out and use the bathroom. He was permitted to do so, but did not return to the courtroom. Appellant has not shown that there is a reasonable probability that, but for trial counsel's alleged errors, the result of the trial, had it occurred, would have been different. Thus, appellant failed to prove either his trial counsel's performance was deficient or that he was prejudiced by it.

{¶39} Further, we may not reverse the conviction unless we find plain error. In criminal cases, plain error is governed by Crim.R. 52(B) which states:

{¶40} "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." An alleged error "does not constitute a plain error * * * unless, but for the error, the outcome of the trial clearly would have been otherwise." *State v. Long* (1978), 53 Ohio St.2d 91, paragraph two of the syllabus.

{¶41} The Supreme Court of Ohio has repeatedly admonished this exception to the general rule is to be invoked reluctantly. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." Id. at paragraph three of the syllabus. See *State v. Thompson* (1987), 33 Ohio St.3d 1, 10; *State v. Williford* (1990), 49 Ohio St.3d 247, 253. In this case, we find no plain error.

{¶42} Accordingly, we find appellate counsel's second potential assignment of error not well-taken.

V. CONCLUSION

{¶43} Based on the foregoing and our own independent review of the entire record, we find the trial court substantially complied with Crim.R. 11, and that appellant's plea was made voluntarily, knowingly and intelligently. Further, appellant's trial counsel was not ineffective. This appeal is, therefore, found to be without merit and is wholly frivolous. Appellate counsel's first and second potential assignments of error are not well-taken.

{¶44} We find that substantial justice has been done the complaining party and the judgment of the Lucas County Common Pleas Court is affirmed. The motion of appellate counsel to withdraw is granted. 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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE