[Cite as *State v. Martinez*, 2010-Ohio-2791.]

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

State of Ohio — Court of Appeals No. L-09-1152, L-09-1153

Appellee — Trial Court No. CR0200802862, CR0200901668

v.

Eusebio Martinez — **DECISION AND JUDGMENT**

Appellant — Decided: June 18, 2010

* * * * *

Patricia Horner, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This appeal is a consolidated appeal of judgments against appellant, Eusebio Martinez, in two criminal prosecutions, brought in the Lucas County Court of Common Pleas. Case No. L-09-1152 arises out of an incident that occurred on July 5,

2008, and a subsequent indictment of Martinez on two counts of felonious assault[1] with firearm specifications[2] on each count. Case No. L-09-1153 arises out of an incident that occurred on July 18, 2008, and an information filed against Martinez in March 2009, charging him with voluntary manslaughter[3] with a firearm specification.[4]

{¶ 2} Under a plea agreement, Martinez pled to all charges and specifications in both cases on March 31, 2009. This involved Martinez entering an *Alford* plea (pursuant to *North Carolina v. Alford* (1970), 400 U.S. 25) to the felonious assault charges and firearms specifications in case No. L-09-1152, and waiving indictment and pleading guilty to a charge of voluntary manslaughter and firearm specification in case No. L-09-1153. The plea agreement included a joint recommendation by the state and Martinez to the trial court as to sentence. The recommendation was that the court should impose a sentence of imprisonment no longer than 15 years total on all charges in both cases. Martinez held the right to withdraw his pleas in the event the trial court did not accept the recommended sentence cap.

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[1]The felonious assault charges were for violations of R.C. 2903.11(A)(2) and constituted second degree felonies.

[2]The firearm specifications were under R.C. 2941.145.

[3]The voluntary manslaughter charge was for a violation of R.C. 2903.03(A), a first degree felony.

[4]This firearm specification was also pursuant to R.C. 2941.145.

{¶ 3} The trial court accepted the recommendation and imposed sentences totaling 15 years imprisonment on all charges. In case No. L-09-1152, the court sentenced appellant to serve three years imprisonment on each felonious assault conviction and three years on each firearm specification with the sentence for felonious assault on each count to run concurrently to the sentence for the associated firearm specification. The sentences under the respective counts were ordered to run consecutively, resulting in a total period of incarceration of six years in the case.

{¶ 4} In case No. L-09-1153, the court imposed a sentence of six years imprisonment on the voluntary manslaughter conviction and three years on the associated firearm specification. The sentences were ordered to be served consecutively, resulting in a total term of imprisonment of nine years in case No. L-09-1153.

{¶ 5} Final judgment was entered in each case on May 4, 2009. Appellant has appealed those judgments to this court.

Anders v. California

{¶ 6} With the filing of an appellant's brief, counsel for appellant has requested leave of court to withdraw as counsel under the procedure set forth in *Anders v. California* (1967), 386 U.S. 738. In *Anders*, the Supreme Court of the United States established the procedure to be followed where appointed counsel concludes that there is no merit to an appeal and seeks to withdraw. Under *Anders*, counsel must undertake a "conscientious examination" of the case and, if he determines an appeal would be

"wholly frivolous," advise the court and seek permission to withdraw. Id. at 744. The request to withdraw must be accompanied with a brief "referring to anything in the record that might arguably support the appeal." Id. A copy of the brief is to be furnished to the appellant. Id. The appellant is permitted additional time to raise any points he chooses in his own brief. Id.

{¶ 7} Counsel for appellant provided appellant with a copy of the brief she filed and also notified appellant both of her determination that no issue of merit existed for appeal and of appellant's right to file his own additional appellate brief. Appellant has not filed an additional appellate brief.

{¶ 8} Counsel has identified one potential assignment of error that might arguably support an appeal:

"Assignment of Error

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

{¶ 10} Appellant entered two pleas. The first was an *Alford* plea to charges under an indictment for felonious assault with firearm specifications. The second was a guilty plea on an information charging voluntary manslaughter with a firearm specification. We consider the challenge to the *Alford* plea first.

Alford Plea

{¶ 11} A plea made pursuant to *North Carolina v. Alford* is a type of guilty plea in which a defendant pleads guilty while maintaining innocence. *State v. Ware*, 6th Dist.

No. L-08-1050, 2008-Ohio-6944, ¶ 11; *State v. Hopkins*, 6th Dist. No. L-05-1012, 2006-Ohio-967, ¶ 14. There is no "express admission of guilt" in an *Alford* plea. *Alford* at 37.

{¶ 12} Validity of such a plea is judged by the standard of "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to defendant." *Alford* at 31; see *State v. Lucumsky*, 6th Dist. No. OT-08-060, 2009-Ohio-3214, ¶ 7. In *State v. Piacella* (1971), 27 Ohio St.2d 92, 96, the Ohio Supreme Court considered an *Alford* plea and held that "where the record affirmatively discloses that: (1) a guilty plea was not the result of coercion, deception or intimidation; (2) counsel was present at the time of the plea; (3) his advice was competent in light of the circumstances surrounding the plea; (4) the plea was made with the understanding of the nature of the charges; and, (5) the plea was motivated either by a desire to seek a lesser penalty or a fear of the consequences of a jury trial, or both, the guilty plea has been voluntarily and intelligently made."

{¶ 13} With respect to the validity of the *Alford* plea, counsel asserts: "Defendant Martinez could argue that his *Alford* plea in case No. CR 09-1668 was not entered into voluntarily, knowingly or intelligently because the trial court did not review with him fully the nature of the charges or ensure that he was wanting to seek a lesser penalty for fear of the consequences of a jury trial." Both of the issues are factors to be considered under the *State v. Piacella* standard in determining the validity of an *Alford* plea.

{¶ 14} The indictment alleged under both counts that Martinez "did knowingly cause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordnance, in violation of §2903.11(A)(2) of the Ohio Revised Code, Felonious Assault, being a felony of the second degree * * *." Each count included a "SPECIFICATION THAT OFFENDER DISPLAYED, BRANDISHED, INDICATED POSSESSION OF OR USED FIREARM-§2941.145."

{¶ 15} The plea agreement, signed by appellant after consultation with counsel, identified the offenses charged as two counts of felonious assault, violations of R.C. 2903.11(A)(2), and a specification on each count that "OFFENDER DISPLAYED INDICATED POSSESSION OF OR USED FIREARM * * *."

{¶ 16} According to the narrative statement of facts made by the state at the time of plea, evidence at trial would establish that a masked man walked up to Frederick Sheer and Mario Madrid outside the Ninja Club on Broadway Street in Toledo on July 5, 2008, and shot Sheer five times and Madrid once, with a firearm. The state contended that the evidence would show that appellant "came around the corner wearing a mask and he walked up to both men and shot them." According to the narrative statement, a number of individuals were waiting for Sheer and Madrid outside the club at the time of the incident and witnessed the shooting and had identified appellant as the shooter. Two witnesses identified Martinez in a photo array as the individual who put on the mask and fired the shots.

{¶ 17} The victims originally could not identify Martinez as the shooter. Mario Madrid subsequently informed police that he recognized Martinez's eyes from around a bandana and also recalled that Martinez had been kicked out of the club by him and Sheer two months before and had fought club members outside in the street afterwards. The state asserted that the earlier incident presented evidence of revenge as a motive for the shootings.

{¶ 18} We address each issue under *State v. Piacella* in turn. Appellant acknowledged in the plea colloquy that no one had promised him anything or threatened him in order to get him to enter his pleas and that he had entered his pleas of his own free will. He had discussed the pleas with counsel. Counsel was present at the time he pled.

{¶ 19} Given the wording of the indictment and detailed narrative statement of fact by the state as to what evidence would show at trial, we conclude that there is substantial evidence in the record supporting the trial court's determination that appellant understood the nature of the charges against him at the time he entered his *Alford* plea. Both under the indictment and the state narrative statement of facts, the nature of the charges could not be misunderstood. Cf. *State v. Greathouse*, 158 Ohio App.3d 135, 2004-Ohio-3402, ¶ 12. The felonious assault charges both involved intentional injury to another through use of a firearm.

{¶ 20} Under the plea agreement, appellant limited the maximum prison term he faced on all charges to a total of 15 years. The plea agreement also provided that if the

trial court were to refuse to limit sentence to no more than 15 years on all charges, appellant held the right to withdraw his pleas and to proceed to trial. He risked a longer sentence if he proceeded to trial and were convicted on all charges – a maximum sentence on conviction on all charges of 35 years.

{¶ 21} As to the final element under *State v. Piacella*, counsel for appellant argues that a potential issue on appeal was the fact that the trial court did not directly discuss with appellant whether he had chosen to make his *Alford* plea in order to seek a lesser penalty because of fear of the consequences of a jury trial. However, this court has previously recognized that the state's narrative statement of the evidence that would have been presented against appellant at trial, made at the plea hearing, is a sufficient basis on which to make that determination. *State v. Lacumsky* at ¶ 9-11; *State v. Kafai* (Dec. 30, 1999), 6th Dist. No. WM-99-001; *State v. McDay* (May 9, 1997), 6th Dist. No. L-96-027.[5]

{¶ 22} In our view, the record demonstrates that appellant entered the *Alford* plea as a voluntary and intelligent choice between proceeding to trial or accepting the plea bargain. The state contended that there was substantial eyewitness testimony that would

[5]Under *Piacella*, the inquiry is whether "the record affirmatively discloses" the defendant's motivation for making the *Anders'* plea. *Piacella*, 27 Ohio St.2d at 96. Such a showing is aided by direct questioning of the defendant on the issue by the trial judge during the plea colloquy. See *State v. Battigaglia*, 6th Dist. Nos. OT-09-009 and OT-09-010, 2010-Ohio-802, ¶ 22-23. An affirmative showing in the record of the defendant's motivation in making an *Anders* plea, however, may exist absent direct inquiry by the trial court.

be presented at trial to establish that appellant walked up to the two victims, wearing a mask to conceal his identity, and used a firearm to shoot one victim five times and another once.

{¶ 23} The plea bargain presented an opportunity to reduce the maximum potential sentence in the case. The plea capped the maximum sentence upon conviction to a substantially shorter prison term than he would have faced upon conviction after trial. Accordingly, the record demonstrates the decision to enter an *Alford* plea was reasonably motivated by both a desire to seek a lesser penalty and fear of the consequences of a jury trial.

{¶ 24} We conclude that appellant's *Alford* plea is valid under *State v. Piacella* and *North Carolina v. Alford* analysis.

{¶ 25} We have review the *Anders* brief but find no specific issue argued by counsel challenging the validity of the guilty plea on the voluntary manslaughter charge. The brief includes a generalized discussion of the requirements of Crim.R. 11(C) with respect to guilty pleas.

{¶ 26} We have reviewed the record including the transcript of the plea hearing and conclude that the trial court substantially complied with the nonconstitutional notifications and determinations required under Crim.R. 11(C)(2)(a) and (b) and strictly complied with the requirements of Crim.R. 11(C)(2)(c) with respect to constitutional rights before accepting either the *Alford* plea on the felonious assault charges and firearm

specifications or the guilty plea on the voluntary manslaughter with firearm specification charge.

{¶ 27} We conclude that no meritorious issue for appeal is presented in the potential issues raised by appellant's counsel in his *Anders* brief. We have conducted our own independent review of the record and proceedings in the trial court and conclude that appellant's appeal is entirely without merit. Counsel for appellant has met her responsibilities under *Anders v. California*. We, therefore, grant her motion to withdraw.

{¶ 28} On consideration whereof, this court finds that appellant was not prejudiced or prevented from having a fair trial and the judgments of the Lucas County Court of Common Pleas are affirmed. Appellant is ordered to pay the costs of appeal pursuant to App.R. 24.

JUDGMENTS 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. JUDGE
CONCUR.

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JUDGE