

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

State of Ohio

Court of Appeals No. L-10-1127

Appellee

Trial Court No. CR 200602612

v.

Eduardo Hopkins

DECISION AND JUDGMENT

Appellant

Decided: August 19, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

John Peter Millon, for appellant.

* * * * *

YARBROUGH, J.

{¶ 1} Appellant Eduardo Hopkins appeals from an April 14, 2010 judgment of the Lucas County Court of Common Pleas denying his "Motion for Sentencing." Hopkins' appointed counsel has filed a "no merit" brief and requested leave to withdraw as counsel, pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493.

For the following reasons, we grant Hopkins' counsel's motion to withdraw; however, an arguable issue exists requiring appointment of new appellate counsel.

{¶ 2} Hopkins was indicted on one count of possession of cocaine in violation of R.C. 2925.11(A) and (C)(4)(f), and one count of trafficking in cocaine in violation of R.C. 2925.03(A)(2) and (C)(4)(g), both felonies of the first degree. On October 17, 2006, Hopkins pleaded guilty, pursuant to *North Carolina v. Alford*, to the second count on the lesser included offense of attempted trafficking in cocaine in violation of R.C. 2923.02 and R.C. 2925.03(A)(2) and (C)(4)(g), a felony of the second degree. The remaining count was dismissed. Sentencing was held immediately thereafter, and the trial court ordered Hopkins to serve three years in the Ohio Department of Rehabilitation and Corrections, consecutive to an 18-month sentence imposed in another case.

{¶ 3} On February 9, 2010, Hopkins filed a "Motion for Sentencing" in which he argued that the October 17, 2006 judgment entry was void because it failed to notify him that his sentence included a mandatory term of three years of postrelease control. In his motion, Hopkins sought to have the trial court vacate the October 17, 2006 sentence and conduct a de novo sentencing hearing. On April 14, 2010, the trial court denied this motion, finding that the October 17, 2006 judgment entry was not defective, and, even assuming that it was, the failure to include a postrelease control requirement did not "negate, limit, or otherwise affect the mandatory period of post-release control that is required under division (B) of section 2967.28 of the Ohio Revised Code."

{¶ 4} On May 10, 2010, Hopkins timely filed his notice of appeal from the April 14, 2010 judgment denying his motion for resentencing. While this appeal was pending, and before briefs had been filed, the trial court sua sponte held a full resentencing hearing on August 18, 2010. This hearing was held in light of Hopkins' impending release from prison, and the Ohio Supreme Court's precedent in *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, and *State v. Barnes*, 118 Ohio St.3d 1404, 2008-Ohio-2388.

{¶ 5} Following the resentencing, Hopkins' appointed counsel filed his brief and motion requesting withdrawal as appellate counsel, pursuant to the guidelines established in *Anders v. California*, supra. Counsel states that, after reviewing all the relevant facts and legal arguments regarding this case, he concludes that the filing of an appeal would be without merit and frivolous. Counsel further certifies that a copy of both the brief and motion to withdraw have been served upon Hopkins. Hopkins has not filed a pro se brief or otherwise responded to counsel's request to withdraw. The state has filed a brief in response, but does not oppose counsel's motion to withdraw. Upon consideration, we conclude that counsel's brief is consistent with the requirements set forth in *Anders*, supra.

{¶ 6} We are required, pursuant to *Anders*, to review the record and independently determine whether counsel has made a diligent effort and that the proceedings below were free from prejudicial error. *Anders*, supra, at 744. If we find any legal issue that is arguable on the merits, and therefore not wholly frivolous, new appellate counsel must be appointed to argue the appeal.

{¶ 7} Counsel set forth the following sole potential assignment of error in his *Anders* brief:

{¶ 8} "1. Trial court erred, to the detriment of Appellant, by failing to properly notify the Appellant of the mandatory 3 year period of post release control and the accompanying penalties for violating post release control at the PLEA and SENTENCING HEARING on October 17, 2006, but corrected said error *sua sponte* as per the requirements of O.R.C. 2929.191."

{¶ 9} Counsel argues that the October 17, 2006 sentencing failed to notify Hopkins that his postrelease control was mandatory, and therefore the sentence is contrary to law and void. As a result, counsel asserts that the trial court erred when it denied Hopkins' motion for resentencing. Nevertheless, counsel concludes that this appeal is frivolous because the trial court *sua sponte* resentenced Hopkins on August 18, 2010, thereby properly remedying the October 17, 2006 sentence, and affording Hopkins the relief he sought in his motion for resentencing.

{¶ 10} However, we cannot agree that the August 18, 2010 judgment corrected any alleged deficiencies in the October 17, 2006 sentence because the August 18, 2010 judgment is void. While we are certainly mindful of the pressure that is on trial courts to correct any deficiencies in sentencing regarding postrelease control prior to the offender's release from prison, the fact remains that, in this case, the trial court lacked jurisdiction to resentence Hopkins. Once an appeal is taken, the trial court is divested of jurisdiction until the appeal is decided or remanded, except where the retention of jurisdiction is "not

inconsistent with the court of appeals' jurisdiction to reverse, modify, or affirm the judgment." *Yee v. Erie Cty. Sheriff's Dept.* (1990), 51 Ohio St.3d 43, 44. Here, the trial court decided the very issue to be determined on appeal—whether Hopkins was entitled to be resentenced—when it conducted the resentencing hearing while the appeal was pending before this court. Therefore, although the trial court's action was entirely understandable, it was nonetheless void for a lack of jurisdiction.

{¶ 11} Consequently, we conclude that the issue of whether the trial court erred when it denied Hopkins' motion for resentencing is not wholly frivolous, but rather is arguable on the merits. Because an *Anders* brief is not a substitute for an appellate brief on the merits, we must "appoint counsel to pursue the appeal and direct that counsel to prepare an advocate's brief * * * " before we can decide the merit of the issue. *McCoy v. Court of Appeals of Wisconsin, District 1* (1988), 486 U.S. 429, 444, 108 S.Ct. 1895, 100 L.Ed.2d 440. See, also, *Penson v. Ohio* (1988), 488 U.S. 75, 85, 109 S.Ct. 346, 102 L.Ed.2d 300. Newly appointed counsel must also be free to argue any other issue he or she may find after a review of the record.

{¶ 12} Accordingly, appellate counsel's motion to withdraw is found well-taken and is, hereby, granted. We appoint Timothy Longacre, 416 N. Erie Street, Suite 100, Toledo, Ohio, 43604, as appellate counsel in this matter, and direct him to prepare an appellate brief discussing the arguable issues identified in this decision, and any further arguable issues that may be found in the record within 30 days of the date of this decision

and judgment. The clerk is ordered to serve, by regular mail, all parties, including Eduardo Hopkins, with notice of this decision.

MOTION GRANTED.

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, P.J.

JUDGE

Stephen A. Yarbrough, 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>
