

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

State of Ohio

Court of Appeals No. S-10-019

Appellee

Trial Court No. 05 CR 900

v.

Terrell Allums

DECISION AND JUDGMENT

Appellant

Decided: September 16, 2011

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney, and
Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Christopher S. Clark, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This appeal is from the April 7, 2010 judgment of the Sandusky County Court of Common Pleas, which denied the motion of appellant, Terrell Allums, to vacate his conviction and sentence and conduct a resentencing hearing. Upon consideration of the assignments of error, we affirm the decision of the lower court.

{¶ 2} Pursuant to the guidelines set forth in *Anders v. California* (1967), 386 U.S. 738, appellant's court-appointed counsel has filed an appellate brief and motion to withdraw as counsel. He mailed a copy of the brief and motion to appellant and informed him that he had a right to file his own brief.

{¶ 3} Appellant's counsel states in his motion that he thoroughly reviewed the record in this case and concluded that the trial court did not commit any error prejudicial to appellant. However, in compliance with the requirements of *Anders v. California*, supra, appellant's counsel has submitted a brief setting forth the following potential assignments of error which were first presented by appellant in three pro se motions:

{¶ 4} "I. The trial court erred in failing to properly address Appellant's motion dated May 27, 2010, [sic] and considered on April 2, 2010, requesting that his sentence be voided and that a resentencing hearing be scheduled pursuant to *State v. Bezak*.

{¶ 5} "II. The trial court erred in finding that the failure of the court to advise appellant at the September 20, 2006 sentencing hearing that the sentence was mandatory was harmless error."

{¶ 6} Appellant's appointed counsel has included arguments which support these assignments of error, but concludes that they are unsupported by the record and/or by the law. Therefore, he concludes that an appeal would be frivolous. This court now has the obligation to fully examine the record in this case to determine whether the appeal is frivolous. *Anders v. California* (1967), 386 U.S. 738, 744.

{¶ 7} Appellant was charged on August 29, 2005, with possession of cocaine, in violation of R.C. 2925.11(A) and (C)(4)(f), a felony of the first degree. The indictment indicated that the penalty for such a violation was: "[a] mandatory term of 10 years imprisonment * * *." On April 5, 2006, appellant entered a guilty plea. The written guilty plea indicated that the court could sentence appellant to "* * * prison for a term of 3, 4, 5, 6, 7, 8, 9, or 10 years. The sentence is mandatory." The written guilty plea also indicates that appellant was subject to postrelease control for up to five years after his release from imprisonment. Appellant was sentenced on September 21, 2006, and the sentencing judgment indicated that appellant was subject to a mandatory term of imprisonment of seven years. The judgment indicated that the court advised appellant that he was subject to postrelease control for five years upon his release from prison, but the court did not notify appellant of this fact at the sentencing hearing.

{¶ 8} On May 9, 2009, appellant filed a "Motion for Sentencing." Appellant argued that when he was sentenced, the court did not notify him that if he violated a postrelease control sanction, that the parole board could impose upon the offender a residential sanction that includes a new prison term of up to nine months for each violation pursuant to former R.C. 2943.032(E), effective July 1, 1996 (which language remains a part of the current version of the statute). He contended that the court's judgment entry incorrectly states that the court had told appellant this information. Relying upon *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, overruled in part by *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, ¶ 27-28, appellant argues that when

the mandatory postrelease control sanction is not included in the sentence, the sentence is void and the defendant is entitled to a new sentencing hearing.

{¶ 9} Appellant filed a second motion on January 7, 2010, arguing that he should be able to withdraw his plea rather than just be resentenced. On February 1, 2010, the court denied this motion on the authority of *Ohio v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, but ordered that appellant attend a hearing where he could be advised by the court of his obligations and possible penalties regarding postrelease control.

{¶ 10} The trial court conducted this hearing on April 2, 2010, and entered its judgment on April 7, 2010 and a nunc pro tunc entry on August 2, 2011. The court advised appellant of his postrelease control sanctions pursuant to R.C. 2929.191(B)(1). Furthermore, the court found that appellant was notified that his sentence was mandatory and that the dismissal of the major drug offender specification constituted consideration for the agreement. The court pointed to the indictment, which described the penalty as mandatory for the charged offense, and the sentencing entry indicated that appellant was serving a mandatory term. The court also noted that appellant had been represented by private counsel at the time. For all of these reasons, the court concluded that its failure to orally specify at the sentencing hearing that appellant's sentence was mandatory constituted harmless error under the circumstances.

{¶ 11} In his first potential assignment of error on appeal, appellant argued that when the court learned that it had failed to personally notify appellant at his sentencing

hearing that he was subject to postrelease control sanctions, it should have voided his sentencing judgment and scheduled a resentencing hearing. We disagree.

{¶ 12} When appellant was sentenced the court did fail to personally notify appellant that he was subject to postrelease control pursuant to R.C. 2943.032(E). However, *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, paragraph two of the syllabus, holds that the trial court must apply the procedures set forth in R.C. 2929.191 to correct its error. Pursuant to the statute, the trial court properly conducted a hearing with appellant present and informed appellant of the postrelease control sanctions. Therefore, appellant's first potential assignment of error is not well-taken.

{¶ 13} Secondly, appellant argues that the trial court erred by finding that its failure to notify him of the mandatory nature of his sentence was harmless error.

{¶ 14} Crim.R. 11(C)(2)(a) requires that, before a trial court accepts a plea of guilty, the court must substantially comply with the rule and inform the defendant of: "the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing." This court has held that the court substantially complies with the statute if "under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving." *State v. Abuhashish*, 6th Dist. No. WD-07-048, 2008-Ohio-3849, ¶ 33, citing *State v. Nero* (1990), 56 Ohio St.3d 106, 108.

{¶ 15} In this case, we find that appellant had actual notice of the mandatory nature of his sentence from the indictment, the plea negotiations, and the written plea agreement. Therefore, we find that the trial court substantially complied with Crim.R. 11(C)(2)(a). Appellant's second potential assignment of error is not well-taken.

{¶ 16} Upon a review of the record, we find that appellant's trial counsel sufficiently and properly advocated on appellant's behalf. After having reviewed the entire lower court's proceedings, we have determined that there is no merit to the potential errors considered by appellant's appointed counsel. In addition, our review of the record does not disclose any other errors by the trial court which would justify a reversal of the judgment.

{¶ 17} Therefore, we find this appeal to be wholly frivolous. Counsel's request to withdraw as appellate counsel is found well-taken and is hereby granted. Having found that the trial court did not commit error prejudicial to appellant, the judgment of the Sandusky County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is hereby ordered to pay the court costs incurred on appeal.

{¶ 18} The clerk is ordered to serve all parties, including the defendant if he or she has filed a brief, with notice of this decision.

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, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

CONCUR.

JUDGE

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>.