

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

State of Ohio

Court of Appeals Nos. L-10-1342
L-10-1343

Appellee

Trial Court Nos. CR0200301194
CR0199802941

v.

Darek Lee Lathan

DECISION AND JUDGMENT

Appellant

Decided: September 16, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Joseph P. Walsh, for appellant.

Darek Lathan, pro se.

* * * * *

OSOWIK, P.J.

{¶ 1} This is a consolidated delayed appeal from judgments of the Lucas County Court of Common Pleas following appellant's resentencing in two cases, one involving a 1998 conviction for which he was sentenced to eight years and the other involving a 2003

conviction for which he was sentenced to six years to be served consecutively to the first sentence. For the following reasons, the judgments of the trial court are affirmed.

{¶ 2} Appointed counsel, Joseph P. Walsh, has submitted a request to withdraw pursuant to *Anders v. California* (1967), 386 U.S. 738. In his brief filed on appellant's behalf, appointed counsel sets forth three proposed assignments of error. In support of his request to withdraw, counsel for appellant states that, after reviewing the record of proceedings in the trial court, he was unable to find any appealable issues.

{¶ 3} *Anders*, supra, and *State v. Duncan* (1978), 57 Ohio App.2d 93, set forth the procedure to be followed by appointed counsel who desires to withdraw for want of a meritorious, appealable issue. In *Anders*, the United States Supreme Court held that if counsel, after a conscientious examination of the case, determines it to be wholly frivolous he should so 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.* Counsel must also furnish his client with a copy of the brief and request to withdraw and allow the client sufficient time to raise any matters that he chooses. *Id.* Once these requirements have been satisfied, the appellate court must then conduct a full examination of the proceedings held below to determine if the appeal is indeed frivolous. If the appellate court determines that the appeal is frivolous, it may grant counsel's request to withdraw and dismiss the appeal without violating constitutional requirements or may proceed to a decision on the merits if state law so requires. *Id.*

{¶ 4} In the case before us, appointed counsel has satisfied the requirements set forth in *Anders*, supra. This court further finds that appellant was notified by counsel of his right to file an appellate brief on his own behalf and has done so. Accordingly, this court shall proceed with an examination of the potential assignments of error proposed by counsel for appellant, appellant's pro se brief, and the record from below in order to determine if this appeal lacks merit and is, therefore, wholly frivolous.

{¶ 5} Counsel for appellant sets forth the following three proposed assignments of error:

{¶ 6} "I. Pursuant to *Anders v. California*, the trial court lacked authority on May 19, 2010 to impose post release control on Mr. Lathan in case CR-98-2941 because Mr. Lathan had finalized [sic] his time in that case when the court reimposed sentence.

{¶ 7} "II. Pursuant to *Anders v. California*, in the event that the trial court did have authority to impose mandatory post release control on Mr. Lathan at the May 19, 2010 resentencing hearing, the trial court imposed an unlawful term of post release control relative to his robbery conviction.

{¶ 8} "III. Pursuant to *Anders v. California*, Mr. Lathan should be granted a new trial due to the deficiency of the indictment in CR-98-2941."

{¶ 9} At the resentencing hearing held in both cases on May 19, 2010, the trial court ordered appellant to serve five years of mandatory postrelease control as to each of the two counts for which he was convicted in case No. CR98-2941. Additionally, in case No. CR03-1194, the trial court ordered appellant to serve five years of mandatory

postrelease control as to each of the two counts for which he was convicted. The prison terms in both cases were ordered to be served consecutively.

{¶ 10} As his first proposed assignment of error, appointed counsel suggests that the trial court lacked authority to impose postrelease control for appellant's conviction in case No. CR98-2941 because appellant had completed his eight-year sentence for that conviction at the time of the May 19, 2010 resentencing. This identical argument was raised by appellant in his most recent pro se appeal to this court. It was considered by this court and found to be without merit. Accordingly, based on our decision in *State v. Lathan*, L-10-1359, 2011-Ohio-4136, decided August 19, 2011, appointed counsel's first proposed assignment of error is not well-taken.

{¶ 11} As his second proposed assignment of error, appointed counsel suggests that the trial court erred by ordering a five-year term of postrelease control in case No. CR98-2941 rather than a three-year term.

{¶ 12} Appellant was ordered to serve five years of postrelease control for his conviction for robbery, a second-degree felony, in case No. CR98-2941. Pursuant to R.C. 2967.28(B)(2) the appropriate term of postrelease control for a defendant convicted of a second-degree felony and sentenced to a term of imprisonment is three years. However, the trial court's error in that respect is harmless, since appellant will be required to serve five years postrelease control for his aggravated robbery conviction in that case, as well as five years postrelease control in case No. CR03-1194. See Crim.R. 52(A). Accordingly, appointed counsel's second proposed assignment of error is not well-taken.

{¶ 13} As his third proposed assignment of error, appointed counsel suggests that appellant should be granted a new trial in case No. CR98-2941 because the indictment was deficient for failure to include the requisite mens rea for the offense of robbery. Again, this same argument was raised by appellant in his recent pro se appeal to this court. In our decision in that case, we found the argument not well-taken. See *State v. Lathan*, 6th Dist. No. L-10-1359, 2011-Ohio-4136. Accordingly, appointed counsel's third proposed assignment of error is not well-taken.

{¶ 14} We will next consider appellant's single pro se assignment of error. Appellant appears to argue, as he has in numerous previous motions and appeals, that the trial court erred by imposing postrelease control because his conviction is "void due to structural error." Appellant asserts that his indictment was deficient for failure to state a material element of the offense of robbery. Appellant does not specify, however, whether his argument applies to his indictment in trial court case No. CR98-2941, to his indictment in trial court case No. CR03-1194, or to both. We note that the argument as to the validity of appellant's indictment in case No. CR98-2941 was considered by this court previously in *State v. Lathan*, 6th Dist. No. L-10-1359, 2011-Ohio-4136, wherein we found that appellant's indictment was not deficient. This argument is without merit.

{¶ 15} Accordingly, upon our own independent review of the record, we find no grounds for a meritorious appeal. This appeal is found to be without merit. Appellant's counsel's motion to withdraw is found well-taken and is granted.

{¶ 16} The judgments of the Lucas County Court of Common Pleas are affirmed.

Costs of this appeal are assessed to appellant.

{¶ 17} The clerk is ordered to serve all parties, including the defendant, with notice of this decision.

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

Thomas J. Osowik, P.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.
