[Cite as *State v. Sibley*, 2011-Ohio-4861.]

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

State of Ohio — Court of Appeals No. E-10-043

Appellee — Trial Court No. 08 CR 261

v.

Michael Sibley — **DECISION AND JUDGMENT**

Appellant — Decided: September 23, 2011

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Amy M. Logan, for appellant; Michael Sibley, pro se.

* * * * *

SINGER, J.

{¶ 1} Appellant brings this delayed appeal from a judgment of conviction for felonious assault, entered on a guilty plea in the Erie County Court of Common Pleas.

{¶ 2} On April 12, 2008, William Myers and appellant, Michael D. Sibley, became involved in a heated argument over the relative merits of the Cleveland Browns

and the Pittsburgh Steelers at the Sandusky apartment of appellant's neighbors. According to witnesses, at some point, appellant went to his own apartment and returned with a 24 inch machete, which he began to swing at Myers. According to Myers, appellant struck him in the back three times, but the blade failed to penetrate his coat. Myers tackled appellant and held him down until police arrived. Even when police ordered him to give up the knife, appellant continued to struggle until officers removed it from his hand. Once disarmed, appellant refused to comply with police orders and had to be physically restrained. Police arrested appellant.

{¶ 3} On June 11, 2008, the grand jury indicted appellant on a single court of felonious assault in violation of R.C. 2903.11(A)(2), a second degree felony. Appellant was appointed counsel and entered an initial plea of not guilty. Retained counsel was subsequently obtained.

{¶ 4} On February 13, 2009, the parties advised the court that a plea agreement had been reached. Appellant agreed to plead guilty to the indictment and accept a four-year term of incarceration. The state agreed not to oppose judicial release after six months. Following a plea colloquy, the court accepted appellant's plea. On March 26, 2009, the court sentenced appellant to a four-year term of incarceration and a $5,000 fine. Appellant did not appeal the judgment of conviction.

{¶ 5} On October 23, 2009, pro se, and on November 6, 2009, by counsel, appellant moved for judicial release. The state responded, stating that pursuant to the plea agreement it did not oppose judicial release. The state also noted that the victim,

who had originally consented to judicial release, had subsequently submitted a victim impact statement, expressing his opposition to judicial release. On December 10, 2009, the trial court denied the motion for judicial release without a hearing.

{¶ 6} On January 4, 2010, appellant again moved for judicial release. The motion was again rejected without a hearing. Subsequently, appellant filed a pro se motion for postconviction relief, suggesting that his plea was induced by counsel's representations that he would receive judicial release and that his trial counsel was ineffective. The trial court denied appellant's petition for relief.

{¶ 7} Appellant then sought to appeal his judgment of conviction, but his appeal was dismissed as untimely. *State v. Sibley* (Aug. 9, 2010), 6th Dist. No. E-10-031. On September 10, 2010, appellant moved, pro se, for leave to file a delayed appeal, asserting a breach of his plea agreement. On October 13, 2010, we granted leave and appointed appellate counsel.

{¶ 8} On January 5, 2011, appellate counsel filed a brief pursuant to *Anders v. California* (1967), 386 U.S. 738, in which she represented that she had reviewed the record in this matter and had found no grounds for appeal, save those she found frivolous. Pursuant to *Anders*, counsel discussed the grounds she deemed frivolous and moved to withdraw from representation. Counsel also stated that she had sent a copy of the brief to appellant and advised him of his right to submit his own arguments.

{¶ 9} Appellant responded with an "acquiescence of counsel to withdraw," accompanied by a "memorandum in support" in which he reargued the potential

assignments raised by appellate counsel. Appellant also submitted a reply to appellee's brief accompanied by an affidavit in which he asserts that his trial counsel promised him judicial release after six months if he agreed to the guilty plea.

{¶ 10} The procedure to be followed by appointed counsel who desires to withdraw for want of a meritorious, appealable issue is set forth in *Anders*, supra and *State v. Duncan* (1978), 57 Ohio App.2d 93. 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, 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.

{¶ 11} In this case, appointed counsel for appellant has satisfied the requirements set forth in *Anders*, supra. This court notes that appellant has filed a pro se brief or otherwise responded to counsel's request to withdraw. Accordingly, we shall proceed with an examination of the potential assignments of error set forth by counsel for

appellant, the points raised in appellant's pro se submissions and the entire record below to determine if this appeal lacks merit and is, therefore, wholly frivolous.

{¶ 12} Appellate counsel sets forth the following three potential assignments of error:

{¶ 13} "I. Appellant received ineffective assistance of counsel in violation of his rights under the U.S. and Ohio Constitution.

{¶ 14} "II. The trial court erred in accepting appellant's guilty plea in violation of criminal rule 11 and due process guarantees under the U.S. and Ohio Constitution.

{¶ 15} "III. Appellant's sentence is void due to the trial court's failure to adequately inform appellant of the post-release control sanctions at sentencing."

I. Ineffective Assistance

{¶ 16} To establish a claim of ineffective assistance of counsel, an appellant must first show, "* * * that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. * * * Unless a defendant makes both showings, it cannot be said that the conviction * * * resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland v. Washington* (1984), 466 U.S. 668, 687. Accord *State v. Smith* (1985), 17 Ohio St.3d 98, 100.

{¶ 17} Both appellate counsel and appellant, pro se, raise as potential error that there may have been ineffective assistance of counsel, albeit for different reasons.

Appellate counsel posits that retained trial counsel may have been ineffective for failing to refile an affidavit of indigency for appellant after the plea, but before sentencing. By filing such an affidavit, appellant may have been relieved of the $5,000 fine that was imposed. Citing this court's *State v. Casares*, 6th Dist. No. WD-09-080, 2010-Ohio-6218, ¶ 12, counsel properly observes that failure to file an affidavit of indigency to avoid a fine may be ineffective assistance of counsel only where the record discloses a reasonable probability that the court would have found him indigent and unable to pay the fine. As counsel points out, at the time of sentencing, appellant had a record of continued employment and, indeed, appellant's employer desired that he return to work as soon as possible. Given this, we must concur with counsel that there was not a reasonable probability that the court would have found appellant unable to pay on the record before it. Accordingly, we fail to find this omission a basis for an ineffective assistance of counsel claim.

{¶ 18} Appellant's pro se claim of ineffective assistance of counsel is premised on his assertion that his retained trial counsel promised him prior to the plea that there was an agreement that he would get judicial release after six months.

{¶ 19} Plea agreements are contracts between the state and the defense for a resolution of criminal proceedings. *State v. Burks*, 10th Dist. No. 04AP–531, 2005-Ohio-1262, ¶ 18, citing *Santobello v. New York* (1971), 404 U.S. 257, 261. Generally, such an agreement does not bind the court "* * * as the ultimate decision of whether or not the agreement is accepted rests with the trial judge." Id. Indeed on the record at the plea

hearing the court advised appellant that while the court considers the recommendations of the parties it is not bound by them. When asked if he understood this, appellant responded, "Yes." Accordingly, we agree with appellate counsel that the first potential assignment of error is without merit.

II. Crim.R. 11

{¶ 20} Appellate counsel puts forth as her second potential assignment of error the possibility that appellant's guilty plea might not have been knowingly, intelligently and voluntarily entered because of an infirmity in the plea colloquy. An examination of the record of the plea colloquy reveals it to be in conformity with Crim.R. 11 and not otherwise irregular. Our own examination of the colloquy shows that the plea hearing was conducted in conformity with the rule and we find nothing to suggest appellant's plea was other that intelligently and voluntarily offered. The potential assignment of error set forth by appellate counsel is found to be without merit.

{¶ 21} With respect to appellant's own submission, he insists there was an out of court discussion between appellant's trial counsel, the prosecutor, appellant and his victim that resulted in an agreement that appellant receive judicial release after six months imprisonment. Appellant has filed an affidavit, suggesting that his trial counsel had expressly told him that the judge agreed with the deal.

{¶ 22} A "[d]efendant's own self-serving declarations or affidavits alleging a coerced guilty plea are insufficient to rebut the record on review which shows that his plea was voluntary." *State v. Kapper* (1983), 5 Ohio St.3d 36, 38. In this matter, in open

court and in a written plea agreement, appellant was promised nothing more than that the state would not oppose judicial release after six months. The judge expressly advised appellant that the court was not bound by the sentencing recommendation and appellant testified that he understood. There is nothing other than appellant's self-serving affidavit to contradict this record. As a result, appellant's assertion of another understanding is without support. As a result, appellant's complaint is without merit.

III. Postrelease Control

{¶ 23} In her final potential assignment of error, appellate counsel examines whether appellant was advised of postrelease control pursuant to *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, and concludes that proper notification was had. Our independent examination of the record confirms this. Accordingly, appellate counsel's remaining potential assignment of error is without merit.

{¶ 24} Appellant, under this assignment of error, reiterates his assertion of a deal other than that articulated in the record. For the reason stated above, this assertion is unsupported.

{¶ 25} This court finds that appellant's appointed counsel has complied with *Anders v. California*, supra. We have fully reviewed the record and find that no error occurred which would be prejudicial to appellant. Therefore, the appeal is without foundation and is frivolous. Counsel's motion for leave to withdraw as appellate counsel is found well-taken and is hereby granted.

{¶ 26} On consideration whereof, the judgment of the Erie County Court of Common Pleas is affirmed. It is ordered that appellant pay the court costs of this appeal pursuant to App.R. 24.

{¶ 27} 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

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE