

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

State of Ohio

Court of Appeals Nos. S-11-006
S-11-013

Appellee

Trial Court No. 00 CR 199

v.

Manuel Sandoval, Jr.

DECISION AND JUDGMENT

Appellant

Decided: March 16, 2012

* * * * *

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

Brad F. Hubbell, for appellant.

Manuel Sandoval, Jr., pro se.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from the Sandusky County Court of Common Pleas. Appellant was found guilty of murder in violation of R.C. 2903.03. Appellant was sentenced to a term of 15 years to life in prison and, upon release from prison, a

mandatory 5-year term of postrelease control. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Counsel for appellant submitted a request to withdraw pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967). In support of his *Anders*' request to withdraw, counsel states that, after reviewing the record of proceedings in the trial court, counsel is unable to find any arguable issues on appeal. In conjunction with *Anders*, counsel for appellant sets forth the following two proposed assignments of error:

The trial court erred when it denied appellant a de novo sentencing hearing, corrected his voided sentence, failed to sentence him without unnecessary delay under Criminal Rule 32(a)(1), and did not sentence him to a different sentence.

The trial court erred when it denied appellant's pro se Application for Leave to File a Motion for New Trial Based upon Newly Discovered Evidence.

{¶ 3} In addition, appellant, Manuel Sandoval, Jr., submitted a pro se brief setting forth the following six additional assignments of error:

The trial court abused its discretion in failing to grant defendant-appellant's motion for leave to file a motion for new trial based upon newly discovered evidence.

The trial court erred when it failed to sentence/re-sentence him without unnecessary delay violating his Sixth and Fourteenth Amendment

rights of the United States Constitution and Crim. R. 32(A) and pursuant to R.C. 2945.71.

The trial court erred when it failed to conduct a de novo hearing at the appellant's resentencing hearing.

The Trial court erred when it corrected and reimposed the void portion of the PRC Sentence, violating the due process clause of the Ohio and U.S. Constitution.

Defendant-appellant was denied the effective assistance of counsel as guaranteed by the Sixth Amendment of the United States Constitution.

Defendant-appellant was denied the effective assistance of counsel as guaranteed by the Sixth Amendment of the United States Constitution.

{¶ 4} *Anders, supra*, and *State v. Duncan*, 57 Ohio App.2d 93 (1978), detailed the procedure to be followed by appointed counsel who wishes to withdraw upon determining there is not a meritorious, appealable issue. In *Anders*, the United States Supreme Court held that if counsel, after conscientious examination of the case, believes any appeal to be wholly frivolous, he should so advise the court and request permission to withdraw. *Id.* at 744.

{¶ 5} This request to withdraw must be accompanied by a brief identifying anything in the record that could arguably support an appeal. *Id.* Counsel must furnish his client with a copy of the brief and request to withdraw. *Id.* Once these requirements have been satisfied, the appellate court then conducts a full examination of the

proceedings held below to determine if the appeal is frivolous. If the appeal is frivolous, the appellate court may grant counsel's request to withdraw and dismiss the appeal without violating constitutional requirements or may proceed to a decision on the merits. *Id.*

{¶ 6} In the case before us, appointed counsel for appellant has satisfied the requirements set forth in *Anders, supra*. Accordingly, we shall proceed with an examination of the potential assignments of error set forth by counsel for appellant, and the pro se brief, review the record from below, and determine if this appeal is meritorious.

{¶ 7} The following undisputed facts are relevant to the issues raised on appeal. On October 19, 2000, the court sentenced appellant to a term of 15 years to life in prison and upon release from prison a mandatory 5 years of postrelease control. The judge failed to comply with the statutory requirements of the postrelease control component of the sentence. On January 10, 2011, appellant filed a pro se motion for resentencing. On January 21, 2011, the court appointed counsel to represent appellant for a resentencing hearing set for February 2, 2011. On February 2, 2011, the trial court conducted the requisite, limited postrelease control resentencing hearing. The trial court properly resentenced appellant. This appeal ensued.

{¶ 8} Subsequently, appellant filed a pro se application for leave to file a motion for new trial premised upon alleged newly discovered evidence. The purported new

evidence consists of a subjective unsworn statement by appellant's wife. The court denied appellant's application.

{¶ 9} In the first proposed assignment of error, counsel asserts that the "Trial Court erred when it denied him a de novo sentencing hearing, corrected his voided sentence, failed to sentence him without unnecessary delay under Criminal Rule 32(a)(1), and did not sentence him to a different sentence." Pursuant to a wealth of controlling case law, it is well-established that when a judge fails to properly impose statutorily mandated postrelease control as part of a defendant's sentence, a complete de novo sentencing hearing is not required. Rather, the postrelease control component of the sentence can be separated from the rest of the sentence as an independent component. *State v. Fisher*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 28, *see also* R.C. 2929.191(C). Accordingly, counsel's first proposed assignment of error is not well-taken.

{¶ 10} In the second proposed assignment of error withdrawing counsel argues that the trial court erred when it denied appellant's pro se application for leave to file a motion for new trial.

{¶ 11} Under Crim.R. 33, a motion for new trial based on newly discovered evidence must be filed within 120 days of the verdict. If the request is beyond that time frame, then the defendant must seek leave to file. Leave is granted only where the defendant can show by clear and convincing evidence he was unavoidably prevented from discovering the evidence within the time limit. Clear and convincing evidence

establishes in the mind of the fact finder a firm belief as to the facts sought to be established. Where there is competent credible evidence to support the trial court's decision, an appellate court should not substitute its judgment in the place of the trial court's judgment. *State v. Taylor*, 8th Dist. No. 78155, 2000 WL 1739301, *2 (Nov. 22, 2000). The defendant is "unavoidably prevented" where "the party had no knowledge of the existence of the ground supporting the motion and could not have learned of that existence within the time prescribed for filing the motion in the exercise of reasonable diligence." *State v. Lake*, 5th Dist. No. 2010 CA 88, 2011-Ohio-261, ¶ 37.

{¶ 12} The Ohio Supreme Court has held that a motion for new trial based on newly discovered evidence is only appropriate where the evidence:

(1) discloses a strong probability that it will change the result if a new trial is granted; (2) has been discovered since trial; (3) is such as could not in the exercise of due diligence have been discovered before trial; (4) is material to the issues; (5) is not merely cumulative to former evidence; and (6) does not merely impeach or contradict the former evidence.

{¶ 13} *State v. Davis*, 10th Dist. No. 03AP-1200, 2004-Ohio-6065, ¶ 7, citing *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947), paragraph one of the syllabus, citing *State v. Lopa*, 96 Ohio St. 410, 117 N.E. 319 (1917).

{¶ 14} Here, the alleged new evidence appellant relies on is his wife's unsworn statement. Appellant's representation of her statement as constituting newly discovered evidence so as to warrant a new trial is misplaced. Significantly, her statement does not

reflect a recantation or admission of perjury. It does not contain new facts or evidence. Thus, appellant was not prevented from discovering what does not comprise new evidence. Accordingly, counsel's second proposed assignment of error is not well-taken.

{¶ 15} We will next consider pro se appellant's assignments of error.

{¶ 16} We note that appellant's first pro se assignment of error is substantively identical to withdrawing counsel's second assignment of error. It is likewise not well-taken on the same basis we previously set forth in addressing withdrawing counsel's second assignment.

{¶ 17} Likewise, given our prior determination in response to withdrawing counsel's first assignment of error, and based upon the seminal case of *Fisher*, 128 Ohio St.3d 92, 942 N.E.2d 332, pro se appellant's second assignment of error alleging failure to sentence without unnecessary delay is similarly not well-taken.

{¶ 18} Pro se appellant's third assignment of error is rooted in the same premise as his second assignment of error and is likewise not well-taken.

{¶ 19} Pro se appellant's fourth assignment constitutes a unilateral conclusion unsupported by law. There exists no legal support whatsoever for appellant's proposition. Thus, we need not belabor the point. Pro se appellant's fourth assignment of error is not well-taken.

{¶ 20} Pro se appellant's fifth and sixth assignments of error are identical and will be considered simultaneously. Appellant asserts he was denied effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674

(1984), sets forth the standard for judging ineffective assistance claims: “When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.” *Id.* at 687-688. Furthermore, “the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694.

{¶ 21} Applying the first prong, there is nothing in appellant’s pro se brief evidencing appointed counsel’s representation fell below an objective standard of reasonableness. In fact, appointed counsel demonstrated familiarity with relevant case law. Pro se appellant fails to satisfy the first prong, thus no further review is warranted. Pro se appellant’s fifth and sixth assignments of error are not well-taken.

{¶ 22} This court has conducted a full examination of the record of proceedings and has determined that this appeal is wholly frivolous. Appellant counsel’s motion to withdraw is found well-taken and is granted. The judgment of the Sandusky County Court of Common Pleas is affirmed. Pursuant to App.R. 24, costs are assessed to appellant.

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.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, 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:
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