[Cite as *State v. Boggs*, 2012-Ohio-4737.]

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

State of Ohio — Court of Appeals No. L-11-1150

Appellee — Trial Court No. CR0199506885

v.

Nicholas Boggs — **DECISION AND JUDGMENT**

Appellant — Decided: October 12, 2012

* * * * *

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

Veronica M. Murphy, for appellant.

Nicholas Boggs, pro se.

* * * * *

SINGER, P.J.

{¶1} Appellant appeals a judgment of the Lucas County Court of Common Pleas, denying his motions to vacate his 1996 judgment of conviction and to withdraw his guilty plea.

{¶2} In the fall of 1995, two men impersonating police officers abducted, raped and robbed two women in the northern part of Toledo, Ohio. In the first instance, the men came upon a woman in a disabled car, identified themselves as police detectives and told the woman they would drive her to "headquarters." Instead, the men took the woman into Michigan where they raped and abandoned her. As they were leaving, they took the woman's engagement ring.

{¶3} A few weeks later, the men found a second victim. Again they drove the woman into Michigan where they raped and robbed her. This time they returned the woman to near where they had taken her.

{¶4} A third attempt led to the arrest of appellant, Nicholas Boggs, and his accomplice, Alfred Moore, Jr. The third victim recognized Boggs and was able to identify him to police. *State v. Moore*, 6th Dist. No. L-06-1337, 2008-Ohio-1288, ¶ 9-12. Appellant and Moore were arrested. Appellant was named in a multi-count indictment charging two counts of kidnapping, two counts of rape and two counts of robbery.

{¶5} After an initial not guilty plea, on February 9, 1996, appellant amended his plea to guilty on one count each of rape, kidnapping and robbery. Appellant also entered a guilty plea, pursuant to *Alford v. North Carolina*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), to the second count of rape. The remaining counts were dismissed.

{¶6} Following a plea colloquy, the trial court accepted appellant's plea, found him guilty and, after a presentence investigation, sentenced him to indeterminate terms of

incarceration of 10 to 25 years for each of the rapes and the kidnapping offense and eight to 15 years for the robbery. The court ordered the four terms served consecutively. The judgment of conviction from these proceedings did not include the manner of conviction.

{¶7} Appellant did not appeal his conviction, but filed a series on motions and actions, including motions to set aside his sentence and a motion to withdraw his plea. All were denied. Following a 2005 hearing, appellant was determined to be a sexual predator. This determination was affirmed on appeal. *State v. Boggs*, 6th Dist. No. L-05-1304, 2006-Ohio-4912.

{¶8} In 2011, appellant moved to withdraw his original guilty plea and to vacate his 1996 judgment of conviction as void for want of a recitation of the manner of his conviction. On May 18, 2011, the trial court issued a nunc pro tunc entry correcting the omission of the manner of conviction in appellant's original judgment of conviction. Subsequently, the court denied both of appellant's motions. Appellant filed a pro se notice of appeal and this court appointed counsel.

{¶9} Appellant's counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), maintaining that she found no meritorious appealable issue. Appellate counsel requested leave to withdraw.

{¶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*, 57 Ohio App.2d 93, 385 N.E.2d 323 (8th Dist. 1978). 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 or she should so advise the court and request permission to withdraw. *Anders*, *supra*, 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 or her client with a copy of the brief and request to withdraw and allow the client sufficient time to raise any matters that the client 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 matter, appellate counsel has satisfied the *Anders* requirements. Additionally, appellant has filed his own pro se brief and appellee has responded.

{¶12} Appellate counsel's three potential assignments of error correspond with the first three assignments of error set forth by appellant. Both suggest as a potential/first assignment of error an assertion that appellant's "1996 sentencing judgment entry [was] void because it stated the fact of appellant's convictions but not the manner of those convictions." The second related potential/assignment of error set forth by both counsel

and appellant asserts that "[T]he trial court's nunc pro tunc entry create[d] a new right of appeal."

I. Void Judgment/New Right of Appeal

{¶13} If a judgment of conviction contains "(1) the fact of the conviction, (2) the sentence, (3) the judge's signature, and (4) the time stamp indicating the entry upon the journal by the clerk," it is a final order subject to appeal. *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, paragraph one of the syllabus, modifying *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio- 3330, 893 N.E.2d 163. In order to be in compliance with Crim.R. 32(C), the judgment should also contain the manner of conviction (jury verdict, after bench trial or on a plea). *Id.* at ¶ 9; *Baker, supra*, at ¶ 14. The lack of such information, however, is not substantive, *Lester* at ¶ 11, and may be rectified by a nunc pro tunc entry. *Id.* at paragraph two of the syllabus. The entry of a nunc pro tunc entry does not engender a new final order from which appeal may be had. *Id.*

{¶14} Appellant's 1996 judgment of conviction contained the fact of conviction, the sentence, the judge's signature and the clerk's time stamp. Following the trial court's nunc pro tunc entry, the entry also contained the manner of conviction. Consequently, the judgment of conviction was not void and, pursuant to *Lester*, the nunc pro tunc entry engendered no new right of appeal. Accordingly, appellant's first two assignments of error and appellate counsel's first two potential assignments of error are without merit.

II. Manifest Injustice Standard

{¶15} Appellate counsel's third potential assignment of error and appellant's third assignment of error maintain that "[T]he trial court err[ed] in applying the manifest injustice standard to the motion to withdraw the appellant's guilty plea."

{¶16} Motions to withdraw a guilty plea are treated differently depending on whether the motion is interposed before or after sentencing. If the motion is entered prior to sentencing, it should be "freely and liberally granted," *State v. Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715 (1992). If a defendant moves to withdraw a guilty plea after sentencing, the court should grant the motion only "to correct manifest injustice." Crim.R. 32.1. In either circumstance, the decision to grant such a motion rests within the sound discretion of the court, *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph two of the syllabus, and will not be disturbed absent a showing that the court's decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶17} Appellant insists that his motion should have been considered by the more lenient pre-sentencing standard because the lack of a manner of conviction in his 1996 judgment of conviction voided that judgment. Pursuant to *Lester, supra,* that was not the case. Accordingly, appellant's third assignment of error and appellate counsel's third potential assignment of error is without merit.

{¶18} Appellant, in his pro se brief, also argues the merits of his motion under either standard, asserting that that his guilty plea was not knowingly or intelligently entered because the trial court was obligated to inform of the role of the parole board in determining his eligibility for release. Appellant cites no authority to support this assertion. The matters that a trial court is required to inform a defendant prior to accepting his plea are contained in Crim.R. 11(C). There is no requirement that a defendant be apprised of the workings of the parole board as they affect his potential release. Accordingly, appellant's argument on the merits is unavailing.

III. Allied Offenses – Ineffective Assistance of Counsel

{¶19} In addition to the overlapping assignments of error between appellant an appellate counsel, appellant sets forth two additional assignment of error:

> IV: Defendant-Appellant was put in double jeopardy in violation of Amendment V of the United States Constitution and Article I, §10 of the Ohio Constitution when he was given consecutive sentences for charges that should have been sentenced concurrently under R.C. 2941.25.
>
> V. The ineffective assistance of Defendant-Appellant's trial and appellate counsel violated his right to assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, §10 of the Ohio Constitution.

{¶20} In his fourth assignment of error, appellant raises for the first time in these proceedings that the rape and kidnapping offenses were allied offenses of similar import and pursuant to R.C. 2941.25 should have been merged in the trial court. This is an argument that appellant could have raised had he pursued a direct appeal. Consequently, the issue is barred by the doctrine of res judicata. *State v. Young*, 6th Dist. No. E-11-029, 2012-Ohio-1102, ¶ 16-17. Accordingly, appellant's fourth assignment of error is without merit.

{¶21} In his final assignment of error, appellant asserts that he was denied effective assistance of counsel because his trial counsel failed to object to the various issues appellant has argued here, and because appellate counsel failed to raise and pursue the same issues. An essential feature of a claim for ineffective assistance of counsel is the deficient performance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Since we have found meritless the issues appellant claims his trial and appellate counsel were deficient in not raising, appellant was not denied effective assistance of counsel. Accordingly, appellant's fifth assignment of error is without merit.

{¶22} Upon this record, we concur with appellate counsel that appellant's appeal is without merit. Moreover, upon our own independent review of the record, we find no other grounds for meritorious appeal. Accordingly, this appeal is found to be without

merit, and wholly frivolous. Counsel's motion to withdraw is found well-taken and is, hereby, granted.

{¶23} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

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, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE