

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

State of Ohio

Court of Appeals No. H-11-024

Appellee

Trial Court No. CRI-2011-0462

v.

Branden D. Murphy

DECISION AND JUDGMENT

Appellant

Decided: April 19, 2013

* * * * *

Russell V. Leffler, Huron County Prosecuting Attorney, and
Daivia S. Kasper, Assistant Prosecuting Attorney, for appellee.

Michael B. Jackson, for appellant.

Branden Murphy, pro se.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal brought by appellant, Branden Murphy, from the judgment of the Huron County Court of Common Pleas that sentenced him to serve a period of four years incarceration with the Ohio Department of Rehabilitation and Corrections

following his conviction for violating R.C. 2911.02(A)(2), robbery, a felony of the second degree.

Facts and Procedural History

{¶ 2} On June 11, 2011, Branden D. Murphy was indicted by the Huron County Grand Jury on one count of robbery, a violation of R.C. 2911.02(A)(2), a felony of the second degree. On June 13, 2011, Murphy appeared for arraignment, was appointed counsel and entered a plea of not guilty. Discovery was conducted and the case proceeded to jury trial on September 13, 2011. The jury returned a verdict of guilty. A presentence report was prepared and appellant was then sentenced on October 25, 2011, to a period of four years incarceration. Counsel was then appointed to represent him in this appeal.

Discussion

{¶ 3} Appointed appellate counsel has filed a brief summarizing the relevant facts and proceedings. Counsel presents no argument for reversal and has advised this court that he has reviewed the record and can discern no meritorious claim on appeal.

{¶ 4} Appointed counsel has filed a brief and requested leave to withdraw as counsel pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Under *Anders*, if, after a conscientious examination of the case, counsel concludes the appeal to be wholly frivolous, he or she should so advise the court and request permission to withdraw. *Id.* at 744. This request must be accompanied by a brief identifying anything in the record that could arguably support the appeal. *Id.* In addition,

counsel must provide appellant with a copy of the brief and request to withdraw, and allow appellant sufficient time to raise any additional matters. *Id.* Once these requirements are satisfied, the appellate court is required to conduct an independent examination of the proceedings below to determine if the appeal is indeed frivolous. *Id.* If it so finds, the appellate court may grant counsel's request to withdraw, and decide the appeal without violating any constitutional requirements. *Id.*

{¶ 5} In this case, appellant's appointed counsel has satisfied the requirements set forth in *Anders, supra*. This court further notes that the appellant, Branden Murphy, has filed a pro se brief outlining his basis for reversal of the lower court's judgment.

{¶ 6} Accordingly, this court shall proceed with an examination of the potential assignments of error set forth by counsel as well as those indicated by appellant himself. We have reviewed the entire record below to determine if this appeal lacks merit and is, therefore, wholly frivolous.

{¶ 7} Counsel refers to several possible but not arguable issues: (1) there were no African Americans on the jury; (2) testimony differed from written statements; (3) the prosecutor characterized the victim as "slow" thereby evoking sympathy, and (4) ineffective assistance of counsel.

{¶ 8} In appellant's own brief that he has submitted, he asserts that the witness Deon Parker should have been pointed out to the jury as a person who committed perjury. Appellant himself further raises several arguments that include discrepancy between witness testimony, the racial composition of the three individuals that approached the

victim and witness Parker recognizing the victim from the church that he attends.

Appellant takes exception that the victim did not know his (appellant's) name until he read it in the newspaper. Finally, appellant argues that as a result of the cumulative errors, his trial counsel was ineffective.

{¶ 9} At the outset, our examination of the record fails to establish the method of acquisition of the jury pool. There is no evidence of some systemic exclusion of potential African-Americans from appellant's jury pool. We are unable to determine from the record how many African-Americans were in the jury pool at the commencement of the case. Presumably, the list was created from computer generated lists of registered voters without regard to race. There is nothing in the record to suggest that the jury pool and the panel itself was improperly constructed with respect to the race of the prospective jurors. Further, there is nothing in the record to indicate that the state used its peremptory challenges to dismiss only African-American jurors from the venire in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

{¶ 10} With respect to the witness testimony, the record establishes that there were several eyewitnesses to the events of the early morning hours of May 21, 2011, each of whom were in a position to observe the events at close hand. Each was cross-examined by counsel. Furthermore, "the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan*, 22 Ohio St.3d 120, 123, 489 N.E.2d 277 (1986).

{¶ 11} Further, the record establishes that the trial court instructed the jury in accordance with the Ohio Jury Instructions on the issue of credibility: “You’re not required to believe the testimony of any witness simply because it was given under oath. You may believe or disbelieve all or any part of the testimony of any of the witnesses. It is your province to determine what testimony is worthy of belief and what is not worthy of belief.”

{¶ 12} Appellant further asserts that his trial counsel should have been more assertive in pointing out these conflicts. The record shows that counsel cross-examined each witness to raise issues of credibility in their individual testimony.

{¶ 13} Appellant’s final assignment of error claims that he was denied effective assistance of counsel.

{¶ 14} To prevail on a claim of ineffective assistance of counsel, appellant must show that counsel’s conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied upon as having produced a just result. The standard requires appellant to satisfy a two-pronged test. First, appellant must show that the counsel’s representation fell below an objective standard of reasonableness. Second, appellant must show a reasonable probability that, but for counsel’s perceived errors, the results of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 66, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See also State v. Plassman*, 6th Dist. No. F-07-036, 2008-Ohio-3842. This burden of proof is high given Ohio’s presumption that a properly licensed attorney is competent. *State v. Hamblin*, 37 Ohio St.3d 153, 524

N.E.2d 476 (1988). *State v. Newman*, 6th Dist. No. OT-07-051, 2008-Ohio-5139, ¶ 27.

We have extensively reviewed the record from below and finding no merit in any of the proposed assignments of error submitted by either counsel or those submitted separately by appellant. We are unable to find any indicia of ineffective assistance of counsel.

Accordingly, we grant the motion of appellant's counsel to withdraw.

Conclusion

{¶ 15} The judgment of the Huron County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24. The clerk is ordered to serve all parties 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.

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

<p>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.</p>
