[Cite as *State v. Mills*, 2013-Ohio-2254.]

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

State of Ohio — Court of Appeals No. E-12-043

Appellee — Trial Court No. 2009-CR-486

v.

Siron K. Mills — **DECISION AND JUDGMENT**

Appellant — Decided: May 31, 2013

* * * * *

Matthew A. Craig, for appellant.

* * * * *

JENSEN, J.

A. Introduction

{¶ 1} Appellant, Siron K. Mills, filed two distinct motions to withdraw his guilty plea with the trial court. In the first motion, filed on July 12, 2010, appellant sought to withdraw his entire plea, arguing that he would not have pled guilty had he understood

the "suppressible nature" of the evidence against him. The motion was denied, and appellant was sentenced to a term of two years, six months in jail, from which no appeal was taken, until recently. The second motion, filed May 28, 2012, sought to withdraw part of his plea and was granted, effectively reducing his sentence by six months. Appellant's second assignment of error pertains to the trial court's apparent failure to record the resentencing hearing. For the reasons that follow, we dismiss the appeal.

B. Statement of Facts and Procedural History

{¶ 2} This case stems from an incident that occurred on March 27, 2009 when a police officer with the Sandusky Police Department initiated a traffic stop of a vehicle driven by appellant for an alleged "lane change violation." Reports indicate that the officer detected an odor of alcohol and asked appellant to exit his car. Instead, appellant drove away. Once apprehended, appellant's vehicle was searched, and cocaine was found.

{¶ 3} On January 11, 2010, a grand jury indicted appellant on four counts: (1) possession of 128 grams of cocaine, in violation of R.C. 2925.11(A), a felony in the second degree; (2) preparation of cocaine for sale in violation of R.C. 2925.03(A)(2), a felony in the second degree; (3) tampering with evidence in violation of R.C.2921.12(A)(1), a felony in the third degree; and (4) failure to comply with the order or signal of a police officer in violation of R.C. 2921.331(B), a felony in the third degree.

{¶ 4} Appellant retained private counsel to represent him. At a June 24, 2010 hearing, appellant pled guilty to the lesser, amended charges set forth in Counts 1 and 4. In exchange, Counts 2 and 3 were dismissed.

{¶ 5} Appellant then hired new counsel. Through his counsel, appellant filed a Motion to Withdraw Plea on July 12, 2010. The basis for the motion was that because the search of his vehicle had been illegal, the evidence gained during the search was "suppressible," *and* had appellant known that grounds existed to exclude the evidence of his guilt, he would not have pled guilty.

{¶ 6} On August 23, 2010, the trial court held a hearing during which it denied the motion. Following a thorough review with appellant of his rights pursuant to Crim.R. 11, the court then sentenced appellant to a prison term of two years as to Count 1 and six months as to Count 4, to be served consecutively. Appellant did not appeal the denial of his motion or his sentence and began serving his jail sentence on August 24, 2010.

{¶ 7} On May 28, 2012, appellant, acting pro se, filed a Motion to Withdraw Guilty Plea, arguing "double jeopardy" as to Count 4. The prosecutor agreed that Count 4 ought to be dismissed and that appellant should be resentenced.

{¶ 8} A hearing was held on July 19, 2012, attended by appellant, during which the court granted appellant's motion as to Count 4. The court then vacated its earlier sentencing order and issued a Judgment Entry Resentencing appellant to a prison term of two years and a fine of $5000.00. The entry also reflects that the prosecutor entered a "nolle prosequi" as to Counts 2, 3 and 4.

{¶ 9} Appellant was released from prison on July 25, 2012. On August 16, 2012, appellant appealed the Judgment Entry Resentencing. Counsel was appointed for purposes of this appeal only.

C. Counsel's *Ander's* Motion.

{¶ 10} On February 12, 2013, appellant's appointed counsel filed a motion to withdraw as counsel for lack of a meritorious, appealable issue under *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)*; see also State v. Duncan*, 57 Ohio App.2d 93, 385 N.E.2d 323 (8th Dist.1978). Counsel states that it is his belief "that any appealable issues in the case *sub judice* are either frivolous or are otherwise inconsequential to any reasonable objective of [appellant.]"

{¶ 11} In *Anders*, the United States Supreme Court set forth the procedure to be followed by appointed counsel who desires to withdraw for want of a meritorious, appealable issue. The 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. *Anders*, 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 it may proceed to a decision on the merits if state law so requires. *Id.*

{¶ 12} Following *Anders* procedure, appellate counsel filed a motion to withdraw from the case and a brief setting forth potential grounds for appeal. Counsel hand-delivered both filings to appellant and advised him of his right to file his own appellate brief. Appellant has not filed an additional brief or otherwise responded.

D. Potential Assignments of Error.

{¶ 13} Next, we examine the potential assignments of error and the entire record below to determine if this appeal lacks merit and is, therefore, wholly frivolous. In the *Anders* brief, counsel raised the following assignments of error:

> I. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING DEFENDANT/APPELLANT'S FIRST MOTION TO WITHDRAW HIS PLEA.
>
> II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO CONDUCT A HEARING ON THE RECORD PRIOR TO RE-SENTENCING.

{¶ 14} With regard to the first assignment of error, Article IV, Section 3(B)(2) of the Ohio Constitution provides that an appellate court may review timely appeals from final orders of inferior courts. A sentencing order is a final appealable order if it includes: (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. *State v. Lester*, 130 Ohio St.3d 303, 2011–Ohio–5204, 958 N.E.2d 142, paragraph one of the syllabus.

{¶ 15} The August 23, 2010 Journal Entry denying appellant's motion and sentencing appellant satisfies all four elements and constitutes a final appealable order. Accordingly, App.R. 4(A) requires that an appeal therefrom, to be considered timely, must have been filed "within thirty days of the later of entry of the judgment or order appealed * * *." Appellant's appeal of the August 23, 2010 journal entry was not filed until August 16, 2012 and therefore is untimely. It follows that this court lacks jurisdiction to consider it. *State v. Gordon*, 5th Dist. Case No. 2-CA-92, 2003-Ohio-1900, ¶ 10. Appellant's first potential assignment of error is not well-taken.

{¶ 16} The second potential assignment of error pertains to appellant's other motion to withdraw his guilty plea filed on June 1, 2012. Acting pro se, appellant moved to withdraw his plea as to Count 4 (failure to comply with an order of a police officer.) In his motion, appellant apprized the trial court and county prosecutor, for the first time, that he had already pled to the charge of "disobeying an officer," on May 8, 2009. Appellant claimed he pled to the charge when his case was initially called in the Sandusky Municipal Court. The county prosecutor concurred and explained to the trial court,

> It appears from [appellant's] pleadings as well as the State of Ohio's research that [appellant] is correct. It appears [appellant] pled guilty to a lesser offense, disobeying an officer, a misdemeanor of the first degree on

May 8th, 2009. The case was then bound over and presented to the Erie County Grand Jury in January 2010. The defendant was indicted on Count 4 (four), failure to comply and pled guilty to it. He was sentenced to 6 months to run consecutive to Count I. * * * The State of Ohio agrees with [appellant] and would request he be brought back before this Court to be resentenced.

{¶ 17} A rehearing was held on July 19, 2012, and was attended by appellant who was transported from the Lorain Correctional Institute. By Judgment Entry dated July 19, 2012, the court granted appellant's Motion to Withdraw Guilty Plea as to Count 4. The court also vacated its earlier sentencing order and issued a Judgment Entry Resentencing appellant to a prison term of two years and a fine of $5000.00 as to Count 1. The entry further reflects that the prosecutor entered a "nolle prosequi" as to Counts 2, 3, and 4.

{¶ 18} The only potential issue raised by appointed counsel is that the trial court failed to record the July 19, 2012 hearing.

{¶ 19} Crim.R. 22 provides, in part, "In serious offense cases all proceedings shall be recorded." A "serious" offense is any felony or any misdemeanor for which a defendant may be confined for more than sixth months. Crim.R. 2(C). The lack of a transcript in such proceedings, however, is not per se prejudicial. Where, as here, there is no allegation, much less evidence, of any irregularity in the proceedings and where the record includes a detailed judgment entry in which the court recites compliance with

Crim.R. 11, no prejudice will be found. *State v. McClusky*, 6th Dist. No. WD-03-018, 2004-Ohio-85, ¶19 ("Consequently, we must conclude that the absence of a transcript of the plea hearing in this matter did not operate to appellant's prejudice."). We have reviewed the trial record, including the judgment entry and note that it is four pages in length. It recounts appellant's Crim.R. 11 rights, including advising appellant of the effect of his guilty plea, the waiver of various constitutional rights, and the maximum penalties he faced. We find no evidence of prejudice caused by the apparent failure of the trial court to record the hearing. Therefore, we find that appellant's second potential assignment of error is not well-taken.

{¶ 20} This court, as required under *Anders*, has undertaken its own independent examination of the record to determine whether any issue of arguable merit is presented for appeal. We have found none. Accordingly, we find this appeal is without merit and wholly frivolous. We grant counsel's motion to withdraw as counsel and affirm the judgment of the Erie County Court of Common Pleas.

{¶ 21} Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal. The clerk is ordered to serve all parties, including the defendant, 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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE