[Cite as *State v. McClellan*, 2013-Ohio-4953.]

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

State of Ohio — Court of Appeals No. L-12-1194

Appellee — Trial Court No. CR0201101590

v.

Shahid McClellan — **DECISION AND JUDGMENT**

Appellant — Decided: November 8, 2013

* * * * *

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

Wesley M. Miller Jr., for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant, Shahid McClellan, appeals his sentence from the Lucas County Court of Common Pleas for one count of aggravated burglary and one count of aggravated robbery with a firearm specification.

{¶ 2} Appellant's appointed counsel has requested leave to withdraw in accordance with the procedure set forth in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). In *Anders*, the United States Supreme Court held that if counsel, after a conscientious examination of the appeal, determines it to be wholly frivolous he should so advise the court and request permission to withdraw. *Id*. at 744. The request shall include a brief identifying anything in the record that could arguably support an appeal. *Id*. Counsel shall also furnish his client with a copy of the request to withdraw and its accompanying brief, and allow the client sufficient time to raise any matters that he chooses. *Id*. 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*.

{¶ 3} Here, appointed counsel has met the requirements set forth in *Anders*. Counsel has also informed appellant of his right to file his own additional assignments of error and appellate brief, which appellant has not done. Accordingly, this court shall proceed examining the potential assignments of error set forth by counsel, as well as the entire record below to determine whether this appeal lacks merit deeming it wholly frivolous.

{¶ 4} On July 20, 2011, appellant entered no contest pleas to one count of aggravated burglary, a violation of R.C. 2911.11(A)(1), and one count of aggravated

robbery, a violation of R.C. 2911.01(A)(1). Both counts were felonies of the first degree and carried a firearm specification. He was found guilty and sentenced to nine years in prison.

{¶ 5} In his brief, appellant's counsel raises three potential assignments of error:

> 1) The Trial Court abused its discretion by giving Appellant an unreasonable sentence that was contrary to law.
>
> 2) Appellant received ineffective assistance of counsel.
>
> 3) Appellant's convictions were based on insufficient legal evidence and against the manifest weight of the evidence.

{¶ 6} In his first potential assignment of error, appellant's counsel questions whether the sentence given was unreasonable and, therefore, contrary to law.

{¶ 7} When reviewing any criminal sentence, the appellate court "must ensure that the trial court has adhered to all applicable rules and statutes in imposing the sentence." *State v. Weatherspoon*, 6th Dist. Ottawa No. OT-09-008, 2009-Ohio-6671, ¶ 9, quoting *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 14. If the sentence is clearly and convincingly contrary to law, then the sentence must be vacated. *Id*. "Since the trial court has full discretion to determine whether the sentence satisfies the statutory guidelines, the sentence will not be disturbed on appeal absent an abuse of that discretion." *Id*. at ¶ 10. An abuse of discretion is more than an error of law or lapse in judgment; it is an arbitrary, unreasonable, or unconscionable decision by the trial court. *Id*.

{¶ 8} The controlling statutes on felony sentences at issue in this case are as follows. R.C. 2929.14(A)(1) provides the prison term for felonies in the first degree as three, four, five, six, seven, eight, nine, ten, or eleven years. R.C. 2941.145(A) imposes a three year mandatory prison sentence upon use of a firearm during the commission of a felony. In regards to consecutive sentences, R.C. 2929.14(C)(4) provides:

> If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following: * * * (b) at least two of the offenses were part of one conduct and the harm caused by the offenses was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct or (c) the offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime of the offender.

{¶ 9} Appellant was sentenced to serve three years for aggravated burglary and three years for aggravated robbery. The sentences were ordered to be served

consecutively. In addition, the court imposed the mandatory three-year term for the firearm specification.

{¶ 10} During the sentencing hearing, the trial judge specifically mentioned factors such as those listed in R.C. 2929.14(C)(4), including his criminal history, the amount of harm to the victims, and the seriousness of the criminal conduct. Appellant had nine juvenile convictions on his record at the time of sentencing and the attack caused one of the victims to suffer a heart attack and the other to have serious psychological distress after appellant and his co-defendant had robbed them in their home. The court's use of these factors led to a proper conclusion to impose consecutive sentences, and the sentences, therefore, are not contrary to law.

{¶ 11} Next, appellant's counsel contends that the trial court unreasonably sentenced appellant to a nine year aggregate-prison term. This is also not contrary to law. The trial court noted the judicial system has attempted to help appellant, such as providing him with probation after his juvenile convictions. However, having violated that probation nine times and now having pled no contest to violent offenses with a gun specification, there is no valid argument that appellant's sentence was unreasonable under these facts. The sentences were within the statutory limits and accurately reflect the nature of the crimes committed. Such sentences are neither arbitrary nor unreasonable and are, therefore, not an abuse of discretion. Counsel's first potential assignment of error is not well-taken.

{¶ 12} For the second potential assignment of error, counsel argues that appellant received ineffective assistance of counsel.

{¶ 13} To establish ineffective assistance of counsel, a criminal defendant must prove two elements: "First, the defendant must 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." *State v. McIntosh*, 6th Dist. Erie No. E-07-048, 2008-Ohio-4743, ¶ 31, quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A court "must be 'highly deferential' to trial counsel and must 'indulge a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance.'" *Id*. at ¶ 32. The defendant must show that "there is a reasonable probability that, but for the counsel's unprofessional errors, the resulting proceeding would have been different." *Strickland* at 694. The Supreme Court defines a reasonable probability as "a probability sufficient to undermine confidence in the outcome." *Id*.

{¶ 14} In this case, there is no sufficient reason to hold that appellant received ineffective counsel. The record indicates that appellant's counsel successfully negotiated a plea deal which eliminated one count of aggravated robbery, a first degree felony, and two counts of robbery, both second degree felonies and a firearms specification. This plea eliminated more potential prison time for appellant and does not appear to undermine confidence in the outcome. There is no further reason to believe that trial

counsel committed any unprofessional errors warranting scrutiny on this appeal which could lead the court to conclude that, but for counsel's behavior, the result of the case would have been different. Furthermore, during the sentencing hearing, appellant was asked if he was satisfied with trial counsel and he responded, "Yes." This admission defeats any claim that appellant was dissatisfied with counsel or that he was inadequately represented at trial. Counsel's second potential assignment of error is not well-taken.

{¶ 15} The final assignment of error deals with whether appellant's convictions were against the sufficiency of the evidence and against the manifest weight of the evidence.

{¶ 16} In a criminal context, a verdict may be overturned on appeal if it is either against the manifest weight of the evidence or because there is an insufficiency of evidence. In the former, the appeals court acts as a "thirteenth juror" to determine whether the trier of fact lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). In the latter, the court must determine whether the evidence submitted is legally sufficient to support all of the elements of the offense charged. *Id*. at 386-387. Specifically, we must determine whether the state has presented evidence which, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The test is, viewing the evidence in a light most favorable to the prosecution, could any rational trier of fact have found the essential elements of the crime proven beyond a reasonable doubt. *Id*. at 390 (Cook, J.,

concurring); *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. *See also State v. Eley*, 56 Ohio St.2d 169, 383 N.E.2d 132 (1978); *State v. Barnes*, 25 Ohio St.3d 203, 495 N.E.2d 922 (1986).

{¶ 17} The elements of aggravated burglary are as follows:

> (A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply: (1) The offender inflicts, or attempts or threatens to inflict physical harm on another; (2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control.

{¶ 18} The elements of aggravated robbery are as follows:

> (A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:
>
> (1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;

The indictment filed in this case against appellant charging him with aggravated burglary and aggravated robbery mirrored the above elements.

{¶ 19} According to the prosecutor, had appellant's case gone to trial, the evidence would have shown that on March 13, 2011, appellant and a co-defendant randomly chose two people in a car and followed them to their home in Sylvania, Ohio. Once there, appellant and a co-defendant entered the home uninvited and demanded money and belongings from the two, at gunpoint. The proceeds from the robbery included credit cards, cash, and a cell phone.

{¶ 20} In this case, appellant pled no contest, and in entering that plea, he admitted to the facts contained in the indictment as true. *State v. Dewitt*, 5th Dist. Licking No. 12-CA-35, 2012-Ohio-5162, ¶ 15. "A criminal defendant who has pleaded no contest to a charge cannot later challenge his conviction on the grounds it was against the manifest weight of the evidence." *Id*., citing *State v. Jackson*, 9th Dist. Summit Nos. 24463, 24501, 2009-Ohio-4336. The conviction following a no contest plea does not derive from evidence adduced at trial, but from the no contest plea itself, which is an admission of the truth of the facts alleged in the indictment. *Id*., quoting *State v. Hall*, 2d Dist. Montgomery No. 23488, 2009-Ohio-6390, ¶ 2. Accordingly, counsel's third potential assignment of error is not well-taken.

{¶ 21} 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 granted.

{¶ 22} 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. 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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE