

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

State of Ohio

Court of Appeals No. L-12-1300

Appellee

Trial Court No. CR0201201745

v.

Nico Vasquez

DECISION AND JUDGMENT

Appellant

Decided: December 6, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Bruce J. Sorg, Assistant Prosecuting Attorney, for appellee.

Tim A. Dugan, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Nico Vasquez, appeals the September 10, 2012 judgment of the Lucas County Court of Common Pleas which, following no contest pleas to charges of aggravated robbery and felonious assault, with firearm specifications,

sentenced appellant to a total of 15 years of imprisonment. For the reasons set forth herein, we affirm the trial court's judgment.

{¶ 2} We first note that appointed counsel has submitted a request to withdraw pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.E.2d 493 (1967). In a brief filed on appellant's behalf, appointed counsel sets forth three potential assignments of error. In support of the request to withdraw, counsel for appellant states that based on the trial court record, he was unable to find any possible errors for appeal.

{¶ 3} *Anders, supra*, and *State v. Duncan*, 57 Ohio App.2d 93, 385 N.E.2d 323 (8th Dist.1978), set forth the procedure to be utilized by an appointed counsel who desires to withdraw based upon the lack of a meritorious, appealable issue. 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* at 744. An *Anders* request must be accompanied by a brief referring to anything in the record that could arguably support an appeal. *Id.*

{¶ 4} In the course of seeking an *Anders* withdrawal, counsel must also furnish the client with a copy of the brief, the request to withdraw, and notify the client that he has the right to raise any matters that the client wishes to proffer on a pro se basis. Once these prerequisite criteria have been satisfied, the appellate court must conduct a full examination of proceedings from below in order to determine if the appeal is frivolous. If it is determined that the appeal is frivolous, then the appellate court may grant

counsel's request to withdraw and dismiss the appeal without violating constitutional requirements or it may proceed to a decision based upon the merits. *Id.*

{¶ 5} In the case before us, appointed counsel for appellant has satisfied the requirements delineated in *Anders*. This court further finds that appellant was properly notified by counsel of his right to file a brief; however, no pro se brief was filed.

{¶ 6} Accordingly, this court shall proceed with an examination of the potential assignments of error proposed by counsel for appellant and the record from below in order to determine if this appeal lacks merit and is, therefore, wholly frivolous.

{¶ 7} Counsel for appellant sets forth the following 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.

{¶ 8} The relevant facts of this case are as follows. On May 11, 2012, a five-count indictment was filed charging appellant with two counts of aggravated robbery, two counts of felonious assault, and one count of robbery. The aggravated robbery and felonious assault charges contained gun specifications. The charges stemmed from the May 2, 2012 armed robbery of a gas station in Toledo, Lucas County, Ohio.

{¶ 9} Following negotiations with the state, appellant agreed to enter no contest pleas to one count of aggravated robbery and one count of felonious assault. The plea

hearing was conducted on August 20, 2012. At the hearing, the court explained the maximum sentences that appellant could receive and then questioned appellant about his understanding of the sentences. The court then explained the postrelease control requirements. Appellant acknowledged that he committed the current offenses while on parole and indicated his understanding that his sentence was in addition to any sentence imposed for the parole violation.

{¶ 10} The court explained the effect of a no contest plea including limited appeal issues. The court reviewed the constitutional rights that appellant was waiving by making the pleas and questioned appellant to make certain that he understood. The court confirmed that appellant was neither threatened into nor promised anything to make the pleas and that he was satisfied with counsel's advice and representation.

{¶ 11} The state then presented the evidence it would have used at trial. According to the prosecutor, on May 2, 2012, at approximately 2:00 p.m., an individual brandishing a handgun and wearing a mask, hooded sweatshirt, baseball cap and gloves entered the Toledo, Lucas County, Ohio gas station demanding money. Two clerks were working in the store and the manager had just entered the store. The individual pointed the gun at all three individuals. The individual took money from the register and ran out of the store. The manager and a customer gave chase on foot. While they were chasing the man, he turned and fired two shots in the customer's direction.

{¶ 12} The individual ran through a home which was later identified as his. It was also discovered that the individual lost his baseball cap during the chase. DNA testing

was completed on the cap and appellant was determined to be a contributor to the DNA found. The store manager picked appellant out of a photo array and the store surveillance camera showed that the suspect had multiple tattoos on his arms, as does appellant.

{¶ 13} Appellant then entered his no contest pleas; the court accepted the pleas and found him guilty. The matter was referred for a presentence investigation report.

{¶ 14} The sentencing hearing was held on September 19, 2012. Extensive discussion was had regarding appellant's drug addiction and need for treatment. The court noted that appellant had multiple opportunities for treatment but that he had been removed from various programs due to his violent behavior.

{¶ 15} The court then stated that in sentencing appellant, it was obligated to protect the public and punish the defendant. The court stated that it reviewed the presentence investigation report and appellant's criminal record, read letters sent in support of appellant, and balanced the seriousness and recidivism factors. The court then found that the offenses were more serious because appellant shot at his pursuers. The court also found that consecutive sentences were necessary to protect the public and punish the defendant because they were committed while he was on parole.

{¶ 16} The sentencing entry was journalized on September 20, 2012, and the court additionally stated:

Being necessary to fulfill the sentencing purposes of R.C. 2929.11,
and not disproportionate to the seriousness of the offender's conduct or the
danger the offender poses, the court further finds the defendant's criminal

history requires consecutive sentences and the defendant was under post release control for a prior offense, therefore the sentences are ordered to be served consecutively.

This appeal followed.

{¶ 17} Appellant's first potential assignment of error raises the argument that appellant's sentence was contrary to law. Aggravated robbery, R.C. 2911.01(A)(1), a first degree felony, has an 11-year maximum sentence. Felonious assault, R.C. 2903.11(A)(1) and 2941.145, a second degree felony, has an eight-year maximum prison sentence. Further, the firearm specification carries a mandatory three-year prison term. Thus, appellant faced a 22-year maximum sentence and received 13 years of imprisonment.

{¶ 18} As set forth in detail above, the court expressly considered the principles and purposes of felony sentencing and imposed a prison term well below the maximum. The court also complied with recently enacted R.C. 2929.14(C)(4) when it imposed consecutive sentences. Thus, appellant's first potential assignment of error lacks merit.

{¶ 19} Appellant's second potential assignment of error asserts that appellant received ineffective assistance of trial counsel. Legal representation is constitutionally ineffective, and a basis for reversal or vacation of a conviction, when counsel's performance is deficient and results in prejudice to the accused. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prove ineffective assistance of counsel, a defendant must show that his counsel's performance

fell below an objective standard of reasonable representation in some particular respect or respects and that he was so prejudiced by the defect or defects that there exists a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus, citing *Strickland*. When, however, a defendant enters a guilty plea or no contest plea, he waives the right to claim that he was prejudiced by constitutionally ineffective counsel, unless the conduct complained of is shown to have prevented the defendant from making a knowing and voluntary plea. *State v. Barnett*, 73 Ohio App.3d 244, 248-249, 596 N.E.2d 1101 (2d Dist.1991).

{¶ 20} The record demonstrates that counsel filed several discovery motions and negotiated with the state to dismiss three of the five counts in the indictment. Further, during the plea hearing, appellant indicated that he was satisfied with counsel's advice and representation. Appellant's counsel has presented no argument, and we have independently found no evidence, that but for counsel's deficient representation appellant would not have entered the plea. Thus, we find that appellant's counsel's second potential assignment of error is not well-taken

{¶ 21} In counsel's third and final potential assignment of error, he argues that appellant's convictions were not supported by sufficient evidence and were against the weight of the evidence. Counsel states that he raised the argument at the request of appellant. We agree with appellant's counsel's conclusion that a no contest plea constitutes an admission of the facts but that arguments relating to weight or sufficiency

are based on evidence adduced at trial. *See State v. Dewitt*, 5th Dist. Licking No. 12-CA-35, 2012-Ohio-5162; *State v. Hall*, 2d Dist. Montgomery No. 23488, 2009-Ohio-6390.

Accordingly, since there was no trial, appellant's third potential assignment of error lacks merit.

{¶ 22} Upon our own independent review of the record, we find no other meritorious grounds for appeal. This appeal is therefore found to be without merit and is wholly frivolous. Appellant's counsel's motion to withdraw is found well-taken and is hereby granted. The judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

{¶ 23} The clerk is directed 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.

Stephen A. Yarbrough, J.

JUDGE

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>
