

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

State of Ohio

Court of Appeals No. L-13-1196

Appellee

Trial Court No. CR0201301939

v.

Thomas Scott Miller

DECISION AND JUDGMENT

Appellant

Decided: March 28, 2014

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brad Smith, Assistant Prosecuting Attorney, for appellee.

Laurel Kendall, for appellant.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶ 1} This is an *Anders* appeal. Appellant, Thomas Miller, appeals the judgment of the Lucas County Court of Common Pleas, imposing a two-year prison sentence

following appellant's plea of guilty to disrupting public services and the court's subsequent determination that appellant violated the terms of his postrelease control.

A. Facts and Procedural Background

{¶ 2} This case arises out of an incident that occurred on June 8, 2013. On that date, appellant entered onto private property located at 1542 Champlain Street, Toledo, Ohio, and disabled the electrical utility line servicing the business located at that address. At the time, appellant was on postrelease control under a prior conviction. His stated purpose for disabling the line was so that he could steal the cable.

{¶ 3} Appellant was subsequently indicted on June 17, 2013. He was charged with one count of disrupting public services in violation of R.C. 2909.04(A)(2) and (C), one count of breaking and entering in violation of R.C. 2911.13(B), and one count of possessing criminal tools in violation of R.C. 2923.24(A) and (C). At his arraignment, appellant entered an initial plea of not guilty. However, after reaching a plea agreement with the state, a plea hearing was held on July 18, 2013, at which appellant entered a plea of guilty to disrupting public services. Pursuant to the plea agreement, the state dismissed the remaining charges. Appellant acknowledged that his conviction for disrupting public services would also constitute a violation of the terms of his postrelease control. Concerning the consequences of appellant's violation of postrelease control, the following discussion took place:

THE COURT: All right. Do you understand by entering the guilty plea today that you're in direct violation of the post release control that was granted to you, do you understand that?

[APPELLANT]: Yes.

THE COURT: And at sentencing we will have a hearing on that matter, do you understand that?

[APPELLANT]: Yes.

THE COURT: And the court, meaning this court, can either impose or not impose the remaining days on post release control. And that would be either 1 year or the time remaining on post release control, whichever is greater, so you know at the minimum it would be 1 year if the court would impose that. Do you understand that?

[APPELLANT]: Yes. That was the period of post release control I was given, 1 year [post release control].

THE COURT: Well I don't know about that, I'm just telling you the most you're facing. And so you understand that even if you were given 1 year and this was the day before you were to be released from the [post release control], you can go back to the institution for 1 year, that's the minimum. You understand that?

[APPELLANT]: Yes.

{¶ 4} Following the Crim.R. 11 colloquy, the court accepted appellant's guilty plea, ordered a presentence investigation report, and continued the matter for sentencing.

{¶ 5} At sentencing, appellant took issue with the trial court's characterization of the potential prison time associated with the postrelease control violation. Rather than facing a one-year minimum prison sentence, appellant argued that he should only receive a prison sentence for the amount of time remaining on his postrelease control. He stated that the sentencing judge in the prior proceeding informed him that, in the event he violated the terms of his postrelease control, he would be required to serve a prison sentence of one year or the length of time remaining on his postrelease control.

However, appellant insisted that the court did not inform him that the sentence would be the longer of the two options. Therefore, appellant contended that the trial court should only impose a prison term reflecting the period of postrelease control that remained unserved. Appellant also argued that he was entitled to the shorter sentence pursuant to the amendment of certain sentencing statutes under H.B. 86.

{¶ 6} In light of appellant's arguments at sentencing, the court informed appellant that he would be permitted to withdraw his guilty plea if he so wished. He was once again informed that the minimum prison sentence that would be imposed for violation of the terms of his postrelease control would be one year. Despite this information, appellant maintained his guilty plea. Accordingly, the court sentenced appellant to a prison term of one year for disrupting public services, and one year for violation of the

terms of his postrelease control, the sentences to be served consecutively. It is from this judgment that appellant has timely appealed.

{¶ 7} Based upon the belief that no prejudicial error occurred below, appellant's counsel has filed a motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

{¶ 8} *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 followed by counsel who desires to withdraw for want 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, counsel 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.*

{¶ 9} Counsel must also furnish the defendant 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.*

{¶ 10} In this case, appellant's counsel has satisfied the requirements set forth in *Anders*. Accordingly, this court shall proceed with an examination of the potential assignment of error set forth by appellant's counsel and the entire record below to determine if this appeal lacks merit and is, therefore, wholly frivolous.

B. Assignment of Error

{¶ 11} In his *Anders* brief, appellant's counsel assigns the following possible error:

The trial court committed reversible error by imposing a sentence of 365 days on Appellant as a result of his violation of post release control by the commission of a new felony, because the version of R.C. 2929.141 in place at the time of sentencing for the prior felony did not require a minimum sentence of one year.

{¶ 12} Appellant has not filed a pro se brief.

II. Analysis

{¶ 13} In his sole potential assignment of error, appellant argues that the trial court erred in sentencing him to a one-year prison term for violating the terms of his postrelease control.

{¶ 14} We review felony sentences under the two-prong approach set forth in R.C. 2953.08(G)(2). R.C. 2953.08(G)(2), which took effect on March 22, 2013, provides that an appellate court may increase, reduce, modify, or vacate and remand a disputed sentence if it clearly and convincingly finds either of the following:

(a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;

(b) That the sentence is otherwise contrary to law.

{¶ 15} Here, appellant argues that the trial court erroneously applied R.C. 2929.141, which states in relevant part:

(A) Upon the conviction of or plea of guilty to a felony by a person on postrelease control at the time of the commission of the felony, the court may terminate the term of postrelease control, and the court may do either of the following regardless of whether the sentencing court or another court of this state imposed the original prison term for which the person is on postrelease control:

(1) In addition to any prison term for the new felony, impose a prison term for the postrelease control violation. *The maximum prison term for the violation shall be the greater of twelve months or the period of postrelease control for the earlier felony minus any time the person has spent under postrelease control for the earlier felony.* * * * A prison term imposed for the violation shall be served consecutively to any prison term imposed for the new felony. The imposition of a prison term for the

postrelease control violation shall terminate the period of postrelease control for the earlier felony. (Emphasis added.)

{¶ 16} Appellant asserts that R.C. 2929.141 was amended by the Ohio legislature via the sentencing amendments contained in H.B. 86. He argues that the trial court applied the version of the statute that pre-dated the sentencing amendments.

{¶ 17} At the outset, we note that appellant raised the same argument during sentencing. The trial court explained to appellant that it did not agree with his assertion that R.C. 2929.141 was amended by H.B. 86. We agree.

{¶ 18} Notably, R.C. 2929.141 took effect on April 7, 2009, and has not been amended since that date. Thus, the language in effect at the time of appellant's prior sentencing remains the same today. Under R.C. 2929.141, the trial court is authorized to impose a one-year prison sentence for appellant's postrelease control violation. Further, the court is directed to order appellant to serve that sentence consecutive to the one-year sentence he received for disrupting public services. Thus, the trial court did not err in its imposition of sentence.

{¶ 19} Accordingly, appellant's sole potential assignment of error is not well-taken.

I. Conclusion

{¶ 20} This court, as required under *Anders*, has undertaken our own examination of the record to determine whether any issue of arguable merit is presented for appeal. We have found none. Accordingly, we grant counsel's motion to withdraw.

{¶ 21} 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.

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, P.J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

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