[Cite as *State v. McNeely*, 2014-Ohio-1897.]

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

State of Ohio — Court of Appeals No. L-13-1027

Appellee — Trial Court No. CR0200403177

v.

Robert McNeely — **DECISION AND JUDGMENT**

Appellant — Decided: May 2, 2014

* * * * *

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

Edward J. Fischer, for appellant.

Robert McNeely, pro se.

* * * * *

JENSEN, J.

{¶ 1} Appellant, Robert McNeely, appeals the trial court's resentencing judgment entry, which added postrelease control to a previously appealed and affirmed conviction and sentence, and an order denying McNeely's motion to withdraw plea. McNeely's

court-appointed attorney has filed a no-merit brief on appeal and seeks to withdraw as counsel. McNeely, however, has filed a pro se brief setting forth three assignments of error. For the following reasons, we affirm the judgment of the Lucas County Court of Common Pleas and grant counsel's motion to withdraw.

{¶ 2} On July 1, 2004, the Lucas County Grand Jury issued an indictment charging Robert McNeely with three counts of rape in violation of R.C. 2907.02, a felony of the first degree.[1] Attorney Mark C. Geudtner was appointed trial counsel. As a result of a plea bargain, the charges were amended, by way of information, to three counts of sexual battery in violation of R.C. 2907.03(A)(5), felonies of the third degree.[2] McNeely entered a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). He was referred to the Court Diagnostic and Treatment Center for a psychological evaluation.

{¶ 3} On November 16, 2004, the court convicted McNeely of the sexually oriented offenses and held a sexual offender classification hearing pursuant to R.C. 2950.09. Upon consideration of a psychologist's report, the court found by clear and convincing evidence that McNeely was not a sexual predator as defined by R.C. 2950.01(E), but that he was a habitual child victim offender as defined by R.C. 2950.01(B). The court further found that McNeely was required to comply with the sex offender registration requirements for 20 years. McNeely was notified of his classification duties and ordered to serve consecutive

[1] *State v. McNeely*, Lucas C.P. No. CR0200402337.

[2] *State v. McNeely*, Lucas C.P. No. CR0200403177.

four-year prison terms for each count of sexual battery, for a total of 12 years in prison. McNeely appealed.

{¶ 4} On December 30, 2005, the judgment and sentence of the Lucas County Court of Common Pleas was affirmed in all material respects in *State v. McNeely*, 6th Dist. Lucas No. L-04-1371, 2005-Ohio-6999. However, we remanded the matter to the trial court to correct its sentencing entry to reflect the proper sexual offender classification. On February 21, 2006, resentencing was held pursuant to this court's mandate. The sex offender classification was corrected to reflect McNeely's classification as a habitual sex offender as opposed to the harmless, yet erroneous, finding that he was a habitual child-victim offender.

{¶ 5} On July 2, 2012, McNeely, pro se, filed a petition for resentencing pursuant to *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, asserting the trial court failed to properly impose postrelease control. McNeely requested, and the trial court granted, a motion for new counsel. Attorney James Popil was appointed.

{¶ 6} On August 21, 2012, McNeely, pro se, filed a motion to withdraw guilty plea pursuant to Crim.R. 32(C). In support of his motion, McNeely alleged that he was never made aware of a DNA report prepared by the Bureau of Criminal Identification & Investigation ("BCI") prior to entering his plea. Therefore, McNeely asserted his pleas were not knowingly, voluntarily, and intelligently made. The state filed a written response indicating that the test results had been forwarded to attorney Mark Geudtner. On December 4, 2012, McNeely, through attorney James Popil, filed a second motion to

withdraw guilty plea pursuant to Crim.R. 32.1. The second motion supplemented McNeely's original motion by alleging attorney Mark Geudtner was ineffective in his representation when he failed to share the BCI report with McNeely. An evidentiary hearing was held on December 20, 2012.

{¶ 7} In January 2013, the trial court held a resentencing hearing and properly notified McNeely of the mandatory five-year period of postrelease control. The trial court issued an order denying McNeely's motions to withdraw guilty plea. McNeely appealed. Attorney Edward Fischer was appointed as counsel for the appeal.

{¶ 8} Based upon the belief that no prejudicial error occurred below, McNeely's counsel has filed a motion to withdraw pursuant to *Anders v. California*, 386 U.S. 783, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). *Anders* 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, after a conscientious examination of the case, counsel determines the appeal 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.*

{¶ 9} Counsel must also furnish the 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.*

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

{¶ 11} McNeely's counsel identified the following potential assignment of error:

> WHETHER THE APPELLANT'S INITIAL TRIAL COUNSEL WAS INEFFECTIVE WITH RESPECT TO THE REPRESENTATION PROVIDED DURING PLEA NEGOTIATIONS.

{¶ 12} McNeely, pro se, asserts the following assignments of error:

> ASSIGNMENT OF ERROR I: EVIDENCE DOES NOT SUPPORT CONVICTION.
>
> ASSIGNMENT OF ERROR II: DE NOVO RESENTENCING IS VOID AND NULL.
>
> ASSIGNMENT OF ERROR III: INEFFECTIVE ASSISTANCE OF COUNSEL.

{¶ 13} In his brief, McNeely's counsel asserts that the only potential assignment of error for our review is whether the trial court erred when it denied appellant's

postconviction motion to withdraw plea based upon McNeely receiving ineffective assistance of counsel from attorney Geudtner prior to McNeely entering his plea. In response, the state asserts that the "record in the case below demonstrates that there is not one iota of evidence to support defendant's claims that his trial counsel was ineffective." We agree.

{¶ 14} At the postconviction hearing on the motions to withdraw plea, McNeely testified that he never received a copy of any report prepared by BCI. To the contrary, attorney Geudtner testified that according to his billing records, he met with McNeely at the Lucas County jail upon receiving two BCI reports—a rape kit and a DNA analysis—and explained the scientific evidence contained therein. Attorney Geudtner further testified that he explained to McNeely that an absence of DNA did not equate to a lack of sexual contact because semen was found in the victim's underwear. Attorney Geudtner believed that the semen corroborated the victim's story and the plea agreement was in McNeely's best interest.

{¶ 15} Upon hearing the evidence, the trial court indicated that attorney Geudtner's billing records corroborated Geudtner's testimony that he had discussed the BCI reports with McNeely. The trial court also indicated that the evidence presented demonstrated that a BCI expert had discussed the DNA test in McNeely's presence during an October 19, 2004 hearing on McNeely's motion to admit evidence in *State v. McNeely*, Lucas C.P. No. CR0200402337. The trial court further indicated that he found attorney Geudtner's testimony to be credible, while finding McNeely's testimony to be

not credible. The trial court held that McNeely failed to show a manifest injustice warranting the withdrawal of his guilty plea as required by *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977). Upon our review of the record, we find that the trial court did not abuse its discretion when it denied McNeely's postsentence motion to withdraw his guilty plea. Accordingly, counsel's sole potential assignment of error is not well-taken.

{¶ 16} In his first assignment of error, McNeely, pro se, argues that no physical evidence connected him to offenses. However, "[w]hen a defendant enters a plea of guilty as a part of a plea bargain he waives all appealable errors which may have occurred at trial, unless such errors are shown to have precluded the defendant from entering a knowing and voluntary plea." *State v. Barnett*, 73 Ohio App.3d 244, 248, 596 N.E.2d 1101 (2d Dist.1991), citing *State v. Kelley*, 57 Ohio St.3d 127, 566 N.E.2d 658 (1991). Here, McNeely entered an *Alford* plea pursuant to a plea bargain, thereby waiving his insufficiency of physical evidence claim. McNeely's first assignment of error is not well-taken.

{¶ 17} In his second assignment of error, McNeely, pro se, argues the trial court erred when it failed to determine his motion to withdraw plea under a presentence Crim.R. 32.1 standard. However, this court has previously held that a motion to withdraw a plea made prior to resentencing to correct the postrelease control portion of the sentence is properly addressed as a postsentence motion. *See State v. Beachum*, 6th Dist. Sandusky Nos. S-10-041, S-10-042, 2012-Ohio-285, ¶ 22. Accordingly, the trial

court did not err in addressing appellant's motion based on the "manifest injustice" standard applicable to a postsentence motion to withdraw a plea. McNeely's second assignment of error is not well-taken.

{¶ 18} In his third assignment of error, McNeely, pro se, asserts ineffectiveness on behalf of attorney Geudtner for failure to provide him with BCI's DNA report. For the reasons stated in our response to appellate counsel's sole proposed assignment of error, we find McNeely's third assignment of error not well-taken.

{¶ 19} In the performance of our duty, under *Anders, supra*, to conduct an independent review of the record, we have found no potential assignment of error having arguable merit. We conclude that this appeal is wholly frivolous. We grant the motion of counsel to withdraw.

{¶ 20} The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant McNeely is ordered to pay the costs of this appeal pursuant to App.R. 24. The clerk is ordered to serve all parties, including the defendant if he has filed a brief, 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, J. _____

JUDGE

Thomas J. Osowik, J. _____

JUDGE

James D. Jensen, J. _____
CONCUR.

JUDGE