[Cite as *State v. Conner*, 2015-Ohio-1274.]

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

State of Ohio — Court of Appeals No. L-13-1275

Appellee — Trial Court No. CR0201301822

v.

Norman Conner — **DECISION AND JUDGMENT**

Appellant — Decided: March 31, 2015

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Frank H. Spryszak, Assistant Prosecuting Attorney, for appellee.

Jack J. Brady, for appellant.

Norman Conner, pro se.

* * * * *

SINGER, J.

{¶ 1} Appellant, Norman Conner, appeals his sentence from the Lucas County Court of Common Pleas for two counts of felonious assault, both with a firearm specification. For the reasons that follow, we affirm.

{¶ 2} Appellant's appointed counsel has hereby requested leave to withdraw and submitted a no-error brief 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 conscientiously examining the appeal, determines it to be wholly frivolous, counsel should 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 he chooses. *Id*.

{¶ 3} The appellate court must then conduct a full examination of the proceedings held below to determine if the appeal is indeed frivolous. *Id*. 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*.

{¶ 4} In this case, appellant's counsel has filed a no-error brief pursuant to 6th Dist.Loc.App.R. 10, which provides, in relevant part:

> (G) No-Error Briefs. In a criminal appeal in which counsel has been appointed for the appellant, counsel may file a no-error brief under the procedure identified in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967), and its progeny, if counsel concludes that the appeal presents no issue of arguable merit prejudicial to the defendant and is wholly frivolous.

(1) Contents of a no-error brief. A no-error brief shall not contain assignments of error and shall contain the following:

(a) A statement that counsel's conscientious examination of the record has led counsel to conclude that the appeal presents no issue of arguable merit prejudicial to the defendant and is wholly frivolous.

(b) A request that the court independently examine the record to determine if it discloses an issue of arguable merit prejudicial to the defendant.

(c) Reference to any part of the record that might arguably support the appeal.

(2) Statement of compliance. Counsel shall state, either in the no-error brief or in an affidavit, that counsel has done all of the following:

(a) Conscientiously examined the record;

(b) Concluded that the record discloses no issue of arguable merit, and that the appeal is wholly frivolous;

(c) Communicated this conclusion to the appellant; and

(d) Informed appellant that appellant may file a pro se brief within 45 days concerning any issues appellant wants to raise on appeal.

(3) Motion to withdraw. Counsel shall file a motion to withdraw as counsel and shall indicate in the motion that counsel remains appointed to

assist the appellant in the prosecution of the appeal unless and until the motion is granted.

(4) Service. Counsel shall serve on the appellant, and shall serve as otherwise required by App.R. 13, copies of the no-error brief, counsel's affidavit, if any, and counsel's motion to withdraw.

{¶ 5} Based on a review of counsel's no-error brief, we find that he has complied with all the requirements set forth in *Anders* and 6th Dist.Loc.App.R. 10(G). Appellant has submitted a pro se brief and so this court must now examine his assignments of error to determine if they contain any issues of arguable merit.

Factual Background

{¶ 6} On February 5, 2011, appellant was the passenger in a car which was stopped by a police officer. Sergeant Daniel Raab testified he initiated the stop because the car lacked a front license plate. Before approaching, Sergeant Raab shined a spotlight on the car. He testified that he saw appellant appear to put something under his seat. Once he confronted the driver, he asked for identification from both subjects. The driver did not have a driver's license. Raab testified that he watched as appellant put on a pair of gloves. He also testified that the driver appeared very nervous and stared at Raab's hand which was on his handgun. Raab returned to his car and requested assistance because he found the circumstances to be suspicious.

{¶ 7} When Toledo Police Officers Calzone and Lemke arrived, the three approached the car. Raab asked the driver to get out of the car. Calzone approached the

passenger's side and opened the door. As appellant turned toward Calzone, Calzone saw he was holding a gun. He yelled "gun" to alert his fellow officers. Calzone testified that he grabbed appellant's hands and told appellant to drop the gun which appellant refused to do. Calzone testified that appellant verbally threatened to shoot the officers. During a struggle, appellant fired the gun lodging a bullet in the leg of the driver. Appellant fired the gun a second time towards the head of Officer Lemke before he was successfully subdued by the officers.

{¶ 8} Appellant was charged with three counts of felonious assault, pursuant to R.C. 2903.11(A)(2), each with a firearm specification. Following a bench trial, he was convicted on two counts. He was sentenced to eight years for each count of felonious assault, and an additional three years for each specification, to be served consecutively.

Arguments

{¶ 9} In his pro se brief, appellant raises four potential assignments of error:

I. Whether the appellant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendment.

II. Whether the State presented sufficient evidence to convict appellant beyond a reasonable doubt.

III. Whether appellant was denied his right to the Confrontation Clause.

IV. Whether appellant's consecutive sentences are contrary to law.

{¶ 10} In his first assignment of error, appellant claims he was denied effective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, appellant must show that counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied upon as having produced a just result. The standard proof requires appellant to satisfy a two-pronged test. First, appellant must show that counsel's representation fell below an objective standard of reasonableness. Second, appellant must show a reasonable probability that, but for counsel's perceived errors, the results of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This burden of proof is high given Ohio's presumption that a properly licensed attorney is competent. *State v. Hamblin*, 37 Ohio St.3d 153, 524 N.E.2d 476 (1988).

{¶ 11} Appellant argues that counsel's refusal to call appellant's forensic expert as a witness prejudiced his defense. The decision whether to employ an expert usually resides within the discretion of defense trial counsel and is considered to be a "debatable trial tactic." *State v. Davis*, 6th Dist. No. WD-07-031, 2008-Ohio-3574, ¶ 30.

{¶ 12} The expert at issue here expressed in a written statement that he could not conclusively determine that the shell casings found at the scene came from appellant's gun. This is consistent with the testimony of the state's expert for one of the shell casings, and does not refute the testimony concerning the other shell casing. Because appellant's trial counsel cross-examined the state's forensic evidence, and presented the same doubts that his own expert would have, the decision to not call appellant's expert

was a trial strategy and did not prejudice the defense under the *Strickland* test. Appellant's first assignment of error is not well-taken.

{¶ 13} In his second assignment of error, appellant contends that the state did not present sufficient evidence to convict him.

{¶ 14} In a criminal appeal, a verdict may be overturned 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).

{¶ 15} Appellant was convicted on two counts of felonious assault, violations of R.C. 2903.11(A)(2). The elements of felonious assault are as follows: "[N]o person shall

knowingly do either of the following: * * * Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance."

{¶ 16} It is undisputed that there was a gun involved in this incident and that it was in appellant's possession. The officers involved testified that appellant repeatedly threatened to kill them. Two shots were fired, one causing injury. We find this to be legally sufficient evidence to support all of the elements of the offenses charged. Appellant's second assignment of error is found not well-taken.

{¶ 17} Appellant's third assignment of error states that he was denied his right to confront witnesses because the detective that processed the crime scene was not called as a witness at trial. Appellant is specifically concerned about a white glove that was found in the car when the detective inspected the vehicle at a later date. The record shows that at an October 30, 2013 pretrial conference, the issue of this detective's testimony was discussed with appellant, his trial counsel and the trial judge. Defense counsel found the glove evidence somewhat suspicious but explained on the record:

> I find it to be every bit as suspiciously coincidental as Mr. Conner does. However, [if the detective testifies] perhaps he can provide an explanation. Whereas [if the detective does not testify] I am in a position to make a better suspiciously coincidental argument. We're better off without him.

{¶ 18} The judge then asked appellant if he understood his counsel's reasoning and appellant said that he did.

{¶ 19} In *State v. McClain*, 6th Dist. Lucas No. L-10-1088, 2012-Ohio-5264, this court stated that "a defendant may, either as a matter of trial strategy or due to his failure to comply with procedural rules, waive his Confrontation Clause right." As appellant and his counsel decided not to call the detective for cross-examination as a matter of strategy, appellant waived his right to confrontation. Appellant's third assignment of error is not well-taken.

{¶ 20} In his fourth assignment of error, appellant contends that his consecutive sentences are contrary to the law. Appellant argues that the sentences should be merged for being allied offenses of similar import under R.C. 2941.25. In *State v. Johnson*, 128 Ohio St.3d 153, 2012-Ohio-6314, 942 N.E.2d 1061, the Ohio Supreme Court created a two-part test to determine if offenses should merge. The first prong requires that the court determine if the multiple offenses "were committed by the same conduct." *Id*. at ¶ 47. The second prong is whether "it is possible to commit one offense and commit the other with the same conduct, not whether it is possible to commit one without committing the other." *Id*. (Emphasis in original). If both of these questions are answered affirmatively then the offenses should be merged. "[I]f the court determines that the commission of one offense will never result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." *Id*. at ¶ 51.

{¶ 21} This court has also recognized that if the same offense is committed against multiple victims, there is a separate animus and merger is not required. *State v. Keefe*, 6th Dist. Erie No. E-12-014, 2013-Ohio-629, ¶ 10.

{¶ 22} Appellant argues that both offenses were committed with the same weapon and the struggle was continuous, so the offenses should be merged. We disagree. Because there were three separate officers and appellant was charged with separate counts of assault against each one, there was a separate animus for each officer and the offenses are not subject to merger. Therefore, the consecutive sentences are appropriate and appellant's final assignment of error is not well-taken.

{¶ 23} Upon this record, this court concurs with appellant's counsel that appellant's appeal is without merit. Also, upon our own independent review of the record, it is appropriate to conclude that there is no other ground upon which a meritorious appeal may be founded. Consequently, this appeal is found to be without merit and thus wholly frivolous. Counsel's motion to withdraw is found well-taken and is granted.

{¶ 24} 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, 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

Stephen A. Yarbrough, P.J. _____
CONCUR.
JUDGE