[Cite as *State v. Hamrick*, 2014-Ohio-5332.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 13 CO 24
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
CHRISTOPHER M. HAMRICK	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas of Columbiana County, Ohio Case No. 13 CR 30
JUDGMENT:	Affirmed.
APPEARANCES:	
For Plaintiff-Appellee:	Atty. Robert Herron Columbiana County Prosecutor Atty. Ryan P. Weikart Assistant Prosecuting Attorney 105 South Market Street Lisbon, Ohio 44432
For Defendant-Appellant:	Atty. Coleen Hall Dailey 323 E. Main Street Alliance, Ohio 44601

JUDGES:

Hon. Cheryl L. Waite
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: November 24, 2014

[Cite as *State v. Hamrick*, 2014-Ohio-5332.]
WAITE, J.

{¶1} Counsel for Appellant Christopher M. Hamrick has filed a no merit brief and a motion to withdraw in this criminal appeal pursuant to *State v. Toney*, 23 Ohio App.2d 203, 262 N.E.2d 419 N.Ed.2d 419 (1970). For the following reasons, counsel's motion to withdraw is sustained and Appellant's conviction and sentence are affirmed.

{¶2} On January 24, 2013, Appellant contacted John Kephart, Jr., seeking to sell Kephart a used Honda dirt bike. Kephart owns a motorcycle store and service shop in New Middletown, Ohio. After determining that the motorcycle was stolen, Kephart arranged to meet Appellant, supposedly to buy the motorcycle. The meeting was actually arranged under the guidance of the Salem Police Department to catch Appellant with the stolen vehicle. Appellant showed up at the arranged meeting place on the motorcycle and was immediately arrested.

{¶3} Appellant was indicted in Columbiana County on one count of receiving stolen property, R.C. 2913.51(A), a fourth degree felony, on February 27, 2013. Jury trial began on April 15, 2013. Immediately prior to the jury being impaneled, Appellant expressed dissatisfaction with his court appointed counsel and indicated he wanted other representation. The court inquired as to the reasons for Appellant’s dissatisfaction. (4/15/13 Tr., p. 21.) Appellant said that he did not like counsel's explanation of the possible prison term. The court proceeded to explain the sentencing process and the possible prison terms. Appellant then complained about the discovery process, and again expressed his generalized dissatisfaction with counsel.

{¶4} Counsel stated that he explained the possible prison terms and sentencing process, and Appellant signed a document acknowledging that he understood the possible sentences. The document also asked Appellant to decide whether he wanted to accept the current plea offer or go to trial. Appellant decided not to accept the plea. There were further plea negotiations two days before trial, but no agreement was reached.

{¶5} Appellant stated that he wanted his counsel to procure a plea agreement with a sentence recommendation that was binding on the judge, but the judge explained that was not possible. After further discussion, the court asked Appellant if he wished to accept the most recent plea offer or proceed immediately to trial. Appellant stated that he wanted to go to trial, but that he wanted different counsel. The court explained that no reason why counsel should be excused had been offered, and held that any breakdown in communication was due to Appellant's unwillingness to cooperate with counsel. (4/15/13 Tr., p. 32.) The court asked again if Appellant wanted to proceed with his trial using his current appointed counsel, and he agreed to proceed with trial. (4/15/13 Tr., p. 34.)

{¶6} At the end of the two-day trial, the jury convicted Appellant of receiving stolen property. Sentencing was scheduled for April 19, 2013. The prosecutor described Appellant's extensive criminal record, including breaking and entering, theft, many convictions for receiving stolen property, unauthorized use of a motor vehicle, possession of drug paraphernalia, and misuse of a credit card. In all, Appellant had seven prior felony convictions and six prior misdemeanor theft

convictions, including three drug related convictions. Appellant violated probation seven times while serving those sentences. The prosecutor noted Appellant's high likelihood of recidivism and asked for the maximum prison term of eighteen months to be imposed. Both Appellant and his counsel gave statements at sentencing. Appellant insisted he was innocent, that he thought the stolen bike was actually his, and that he had not been involved in a crime since 2008.

{¶7} The court stated that it considered the principles and purposes of sentencing under R.C. 2929.11 and considered the sentencing factors in R.C. 2929.12. (4/19/13 Tr., p. 11.) The court determined that Appellant was not a candidate for community control due to his past felony record. The court imposed a sixteen-month prison term with 85 days of jail time credit. The court advised Appellant as to his postrelease control. The trial court appointed new counsel for appeal, and this timely appeal followed.

{¶8} Appellate counsel is now asking to withdraw pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and pursuant to our ruling in *Toney, supra*. " 'It is well settled that an attorney appointed to represent an indigent criminal defendant on his or her first appeal as of right may seek permission to withdraw upon a showing that the appellant's claims have no merit. To support such a request, appellate counsel must undertake a conscientious examination of the case and accompany his or her request for withdrawal with a brief referring to anything in the record that might arguably support the appeal. The reviewing court must then decide, after a full examination of the proceedings, whether the case is

wholly frivolous.' " (Citations omitted.) *State v. Odorizzi*, 126 Ohio App.3d 512, 515, 710 N.E.2d 1142 (7th Dist.1998).

{¶9} In *Toney*, we set forth the procedure to be used when counsel of record determines that an indigent's appeal is frivolous:

> 3. Where a court-appointed counsel, with long and extensive experience in criminal practice, concludes that the indigent's appeal is frivolous and that there is no assignment of error which could be arguably supported on appeal, he should so advise the appointing court by brief and request that he be permitted to withdraw as counsel of record.
>
> 4. Court-appointed counsel's conclusions and motion to withdraw as counsel of record should be transmitted forthwith to the indigent, and the indigent should be granted time to raise any points that he chooses, *pro se*.
>
> 5. It is the duty of the Court of Appeals to fully examine the proceedings in the trial court, the brief of appointed counsel, the arguments *pro se* of the indigent, and then determine whether or not the appeal is wholly frivolous.
>
> 6. Where the Court of Appeals makes such an examination and concludes that the appeal is wholly frivolous, the motion of an indigent

> appellant for the appointment of new counsel for the purposes of appeal should be denied.
>
> 7. Where the Court of Appeals determines that an indigent's appeal is wholly frivolous, the motion of court-appointed counsel to withdraw as counsel of record should be allowed, and the judgment of the trial court should be affirmed.

Toney at syllabus.

{¶10} Counsel did raise two potential errors. The first is whether the court should have appointed new counsel when Appellant complained just as trial was set to begin. The Sixth Amendment to the United States Constitution provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defense." *See also Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). That right, however, does not guarantee that an indigent defendant has a right to the specific counsel of his or her choice. *State v. Murphy*, 91 Ohio St.3d 516, 523, 747 N.E.2d 765 (2001); *State v. Cowans*, 87 Ohio St.3d 68, 72, 717 N.E.2d 298 (1999); *Thurston v. Maxwell*, 3 Ohio St.2d 92, 93, 209 N.E.2d 204 (1965). The right to counsel does not guarantee the defendant a meaningful relationship with counsel. *See Morris v. Slappy*, 461 U.S. 1, 13-14, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983). In order for a criminal defendant to seek discharge of a court-appointed attorney, the defendant must show a breakdown in the attorney-client relationship of such magnitude as to jeopardize the defendant's right to the effective assistance of counsel. *See State v. Coleman*, 37 Ohio St.3d

286, 525 N.E.2d 792 (1988), paragraph four of the syllabus. "[C]ourts have 'wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar.' " *State v. Hanson*, 8th Dist. No. 99362, 2013-Ohio-3916, ¶24, quoting *United States v. Gonzalez–Lopez*, 548 U.S. 140, 152, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006). Therefore, decisions relating to the substitution of counsel are within the sound discretion of the trial court. *Wheat v. United States*, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988).

{¶11} The trial judge conducted a lengthy colloquy with Appellant about his dissatisfaction with counsel and decided it had no reasonable basis. Counsel performed his duties admirably both before and during trial, and there is nothing in the record that explains Appellant's dissatisfaction other than his own personal feelings. There was no actual breakdown in communication. Appellant simply disliked what counsel was communicating. This is not a basis for reversible error.

{¶12} Counsel's second suggestion of error involves the manifest weight of the evidence. Weight of the evidence deals with the inclination of the greater amount of credible evidence to support one side of the issue over the other. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). In reviewing a manifest weight of the evidence argument, the appellate court examines the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the

conviction must be reversed and a new trial ordered. *Id.* A reversal on weight of the evidence is ordered only in exceptional circumstances. *Id.*

{¶13} In conducting an appellate review, we proceed under the theory that when there are two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not within the province of the appellate court to choose which one should be believed. *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999). Rather, we defer to the trier of fact who is best able to weigh the evidence and evaluate the credibility of witnesses by viewing the demeanor, voice inflections, eye movements, and gestures of the witnesses testifying before it. *See Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E. 1273 (1994); *State v. DeHass*, 10 Ohio St.2d 230, 231, 227 N .E.2d 1212 (1967).

{¶14} Appellant was convicted of one count of receiving stolen property. R.C. 2913.51(A), which states: "No person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense."

{¶15} The record indicates that a 2003 Honda CR 250 motorcycle was stolen on January 21, 2013, from the business of Ryan McCoy. He reported the theft to the Salem Police Department. McCoy also posted the stolen motorcycle on Facebook, an internet social media website. On January 24th, Appellant contacted Kephart by phone to sell the bike. Appellant had no documentation for the vehicle, and offered to sell the bike for $800 when it was worth $2,500. Kephart was alarmed by this and

after some research, discovered the bike was listed as stolen on a Facebook page. He contacted McCoy and the Salem Police, and a meeting was arranged under the pretense that Kephart would purchase the bike so that the police could recover it. Appellant arrived at the agreed meeting place and the police confiscated the bike and arrested Appellant.

{¶16} Detective David Talbert of the Salem Police Department arranged for the controlled delivery of the bike, witnessed the delivery, and made the arrest. Talbert saw Appellant operating the vehicle as he approached the delivery point. Talbert identified the vehicle as the one stolen from McCoy, and the title to the vehicle was admitted as evidence. Talbert was also monitoring the transaction via recording and transmitting devices placed on Kephart and on his cell phone. Talbert monitored the text messages between Appellant and Kephart, and he testified that the messages showed that Appellant had knowledge that the motorcycle was stolen. The text messages are part of the record. The text messages indicated that Appellant wanted the motorcycle transported by a boxed-enclosed vehicle rather than in the open, and that he wanted the boxed truck for his safety in case Kephart was working with the police. Talbert testified that use of an enclosed truck is a way for someone selling a stolen motorcycle to conceal it as it is transported. In another text, Appellant asked Kephart to swear that he was not a "snitch [for] the cops." (4/15/13 Tr., p. 214.)

{¶17} Talbert testified that decals had been removed from the motorcycle after it had been stolen, and that it is common for someone selling a stolen vehicle to

alter the appearance of the vehicle in some way before the sale. Talbert also testified that selling property for much less than it is worth typically flags the sale of stolen property.

{¶18} McCoy testified as to the ownership of the motorcycle and that it had been stolen on January 21, 2013.

{¶19} Kephart's testimony corroborated the testimony of Detective Talbert. Kephart testified that Appellant said he did not have title to the bike, that the bike was worth $2,500, and that Appellant offered to sell it for $800. Appellant even offered to give Kephart an Xbox video game system as an added incentive to purchase the bike. Kephart testified that Appellant chose the location of their meeting place and changed it a number of times until he finally agreed to complete the sale in an alley in Salem.

{¶20} The record supports the guilty verdict. Appellant was found in possession of a stolen motorcycle that he attempted to sell, without having title or any other indicia of ownership beyond mere possession. He attempted to conceal the sale by asking for a boxed truck to transport the bike, sought a dramatically lower price than the vehicle was worth, made comments to the buyer about his fear that the police might be involved in the transaction, and then brought the bike to a back alley to sell it to Kephart. Both Kephart and the police witnessed the transaction. The owner of the bike identified it and the date on which it was stolen. There is no manifest weight argument to be made in this case.

{¶21} In conclusion, there are no non-frivolous issues to be reviewed in this appeal. Counsel's motion to withdraw pursuant to *Toney* and *Anders* is hereby granted and the judgment of the trial court is affirmed.

Vukovich, J., concurs.

DeGenaro, P.J., concurs.