

[Cite as *State v. Perry*, 2017-Ohio-7324.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105307

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAVEION PERRY

DEFENDANT-APPELLANT

**JUDGMENT:
DISMISSED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-16-610816-A

BEFORE: Kilbane, J., E.A. Gallagher, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: August 24, 2017

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MARY EILEEN KILBANE, J.:

{¶1} Defendant-appellant, Daveion Perry (“Perry”), appeals from the trial court’s judgment following his guilty plea to aggravated murder, five counts of aggravated robbery, four counts of kidnapping, two counts of felonious assault, breaking and entering, obstructing official business, and tampering with evidence.¹ Perry’s well-respected counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct.1396, 18 L.Ed.2d 493 (1967), and now seeks to withdraw as appellate counsel. After thoroughly reviewing the record, we grant counsel’s motion to withdraw and dismiss this appeal.

Procedural History and Facts

{¶2} On October 21, 2016, Perry was charged in a 15-count indictment resulting from the death of a 15-year-old boy working at a fast-food restaurant in Cleveland Heights, Ohio. The state of Ohio reserved the right to seek the death penalty with the indictment. The incident, which occurred on October 14, 2016, was captured on the restaurant’s video surveillance system.

{¶3} The state met with Perry while he was in the custody of the Cleveland Heights Police Department. Perry had retained counsel at the time. The state and Perry, through retained counsel, reached an agreement where the state would “take death off the table for a full, complete confession and acceptance of responsibility [by Perry].” One of

¹Perry also pled guilty to the accompanying three-year firearm specifications.

the stipulations of the agreement provides that in order to obtain the benefit of the no death penalty indictment, Perry would knowingly, voluntarily, and in compliance with Crim.R. 11 enter a guilty plea to the indictment in full as charged. The state reserved the right, both on the indictment and in the plea contract, to proceed with a reindictment for the death penalty if Perry chose not to fulfill his part of the agreement.

{¶4} Perry was then arraigned on October 26, 2016. Immediately following the arraignment, the trial court held the guilty plea hearing. At the hearing, Perry and the state acknowledged on the record that they entered into a plea contract and explained the terms of the agreement on the record. Both parties stipulated to a case book of evidence and stipulated that the victim's family consented to the plea agreement. In exchange for Perry's guilty plea, the state agreed to not seek the death penalty. The state reserved the right to reindict with the capital specification and use Perry's confession if he changed his mind and chose to plead not guilty. After properly discussing the rights afforded to Perry under Crim.R. 11, the trial court accepted Perry's guilty plea.

{¶5} The matter proceeded to sentencing on October 28, 2016. The court reviewed all of the evidence provided to it. The court found that Perry was fully and continuously represented by counsel, he was informed of his *Miranda* rights, and he knowingly and voluntarily entered into the plea contract. The state presented a power point presentation for the court's consideration, including statements from the victim's family, Perry's criminal history, Perry's written confession, and the basis for the guilty plea. Perry made a statement on his behalf and apologized to the victim's family as well

as his family. The trial court sentenced Perry to an aggregate sentence of life in prison without parole to be served consecutive to six years in prison on the firearm specifications.

{¶6} In December 2016, Perry, pro se, sought leave to file a delayed appeal and sought appointment of appellate counsel. We granted both motions and appointed Perry counsel. Based on the belief that no prejudicial error occurred below and that any grounds for appeal would be frivolous, Perry's astute counsel filed a motion to withdraw under *Anders*.

Anders Standard

{¶7} *Anders* outlines the procedure counsel must follow to withdraw because of the lack of any meritorious grounds for appeal. In *Anders*, the United States Supreme Court held that if appointed counsel, after a conscientious examination of the case, determines the appeal to be wholly frivolous, he or she should advise the court of that fact and request permission to withdraw. *Id.*, 386 U.S. at 744, 87 S.Ct. 1396, 18 L.Ed.2d 493. This request, however, must be accompanied by a brief identifying anything in the record that could arguably support the appeal. *Id.* Counsel must also furnish the client with a copy of the brief, and allow the client sufficient time to file his or her own brief, pro se. *Id.*

{¶8} Once appellate counsel satisfies these requirements, this court must fully examine the proceedings below to determine if any arguably meritorious issues exist. *Id.*; Loc.App.R. 16(C). If we determine that the appeal is wholly frivolous, we may grant

counsel's request to withdraw and dismiss the appeal without violating constitutional requirements, or we may proceed to a decision on the merits if state law so requires. *Anders* at 744; Loc.App.R. 16(C).

{¶9} In the instant case, appointed counsel complied with the requirements of *Anders* and Loc.App.R. 16(C) and Perry filed a pro se brief.

Potential Issues for Review Under *Anders*

{¶10} Perry's appointed counsel reviewed the record and concluded he could not make any meritorious arguments on Perry's behalf. Nevertheless, counsel presents the following three potential issues for our *Anders* review: (1) the trial court erred by accepting Perry's guilty plea; (2) the conduct of trial counsel denied Perry his right to effective assistance of counsel; and (3) Perry's sentence imposed is not supported by the record.

{¶11} Here, we find that there is no meritorious issue to argue. Appellate counsel submitted a brief in support that outlined the details of Perry's plea agreement, the trial court's compliance with Crim.R. 11 during the plea colloquy, the effective assistance Perry received from trial counsel, and the fact that the court imposed an agreed sentence that cannot be appealed pursuant to R.C. 2953.08(D)(1). This court's own independent review indicates that the plea contract with the state provided for Perry to plead guilty in compliance with Crim.R. 11. After a thorough plea colloquy from the trial court, Perry pled guilty. Our review further indicates that trial counsel was effective and the trial

court imposed an agreed prison sentence, which included a sentence of life in prison without parole from which Perry cannot appeal.

{¶12} In his pro se brief, Perry challenges his plea and argues the Cleveland Heights Municipal Court lacked jurisdiction to accept his guilty plea. As discussed above, our independent review of the record reveals that Perry stated at the plea hearing that he understood the rights he was waiving by pleading guilty and that he understood the effect of his plea. Our further review of the record reveals that Perry's guilty plea was properly entered into in the Cuyahoga County Common Pleas Court on October 26, 2016, not the Cleveland Heights Municipal Court.

{¶13} Following our independent review of the entire record, we find that no meritorious argument exists and that an appeal would be wholly frivolous. Appellate counsel's request to withdraw is granted, and the appeal is dismissed.

{¶14} Appeal dismissed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, JUDGE

EILEEN A. GALLAGHER, P.J., and
MARY J. BOYLE, J., CONCUR