

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

State of Ohio

Court of Appeals No. L-09-1054

Appellee

Trial Court No. CR0200702794

v.

Julius Cheers

DECISION AND JUDGMENT

Appellant

Decided: September 30, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Bruce J. Sorg, Assistant Prosecuting Attorney, for appellee.

Daniel H. Grna, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} In this appeal from a judgment of the Lucas Court of Common Pleas, appellant, Julius Cheers, pled no contest to one count of aggravated robbery with a firearm specification in violation of R.C. 2911.01(A)(1) and 2941.145, a felony of the first degree. The trial court found Cheers guilty and sentenced him to four years in

prison on the conviction for aggravated robbery to be served consecutive to the mandatory three years in prison on the conviction for the firearm specification.

{¶ 2} Appellant timely appealed his convictions and was appointed counsel for the purposes of that appeal. Appellant's counsel, however, submitted a motion to withdraw pursuant to *Anders v. California* (1967), 386 U.S. 738. See, also, *State v. Duncan* (1978), 57 Ohio App.2d 93. Under *Anders*, if counsel, after a conscientious examination of the case, determines it to be wholly frivolous, he or she must advise the court of the same and request permission to withdraw. *Id.* at syllabus. This request must be accompanied by a brief identifying anything in the record that could arguably support the appeal. *Id.* Counsel must also furnish his or her 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 are satisfied, the appellate court is required to 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 any constitutional requirements or may proceed to a decision on the merits if state law so requires. *Id.* at 744.

{¶ 3} In the case before us, appointed counsel for appellant satisfied the requisites set forth in *Anders*. Appellant was notified, and, in a letter, told counsel that he believed the following errors occurred in the court below:

{¶ 4} "(1) The indictment was insufficient to support appellant's convictions."

{¶ 5} "(2) The trial judge failed to find that appellant's plea was voluntary."

{¶ 6} We shall now proceed with an examination of the potential assignments of error set forth by counsel for appellant, and of the entire record below, in order to determine whether this appeal lacks merit and is, therefore, wholly frivolous.

{¶ 7} Under his first arguable assignment of error, appellant contends that the indictment does not set forth all of the elements necessary to support a conviction for aggravated robbery. The failure to timely object to a defect in an indictment waives all but plain error. *State v. Horner*, ___ Ohio St.3d ___, 2010-Ohio-3830, paragraph two of the syllabus, overruling *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624.

{¶ 8} Here, appellant did not object to the indictment; consequently, our review of appellant's allegation is limited to whether there was an obvious deviation from a legal rule that affected appellant's substantial rights. Crim.R. 52(B); *State v. Hardges*, 9th Dist. No. 24175, 2008-Ohio-5567, ¶ 9.

{¶ 9} An indictment is sufficient to inform a defendant of the crime charged if the language of the indictment tracks the language of the statute a defendant purportedly violated. *State v. Landrum* (1990), 53 Ohio St.3d 107, 119. R.C. 2911.01(A)(1) provides: "No person, in attempting or committing a theft offense, * * * or in fleeing immediately after the attempt or offense, shall * * * [h]ave a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it * * *." Our review of the

indictment in this cause discloses that it tracks the language of the statute word for word. Therefore, appellant's first arguable assignment of error is meritless.

{¶ 10} Appellant's second potential assignment of error asserts that the entry of his no contest plea was not voluntary.

{¶ 11} Crim.R. 11(C)(2) states:

{¶ 12} "In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

{¶ 13} "(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

{¶ 14} "(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

{¶ 15} "(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself."

{¶ 16} In this case, a review of the change of plea hearing reveals that the trial court did not inform appellant of his right to use compulsory process for obtaining witnesses in his behalf. Because the rights set forth in Crim.R.11(C)(2)(c) are constitutional in nature, a trial court must strictly comply with its obligation to inform a pleading defendant of those rights. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, ¶ 21-22. Therefore, appellant's second possible assignment of error is not wholly frivolous.

{¶ 17} We are directed by *Anders* to appoint new counsel to represent a defendant in a criminal appeal if, upon review, we find an error which is not wholly frivolous. *Id.* at 744. We appoint Clayton Gerbitz, P.O. Box 208, Swanton, Ohio, 43558, as appellate counsel in this matter, and direct him to prepare an appellate brief discussing the arguable issue identified in this decision, and any further arguable issues which may be found in the record within thirty days of the date of this decision.

MOTION GRANTED.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/rod/newpdf/?source=6>.