

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

State of Ohio
Appellee

Court of Appeals No. L-11-1252
Trial Court No. CR0201101605

v.

Victor Cheno
Appellant

DECISION AND JUDGMENT
Decided: December 21, 2012

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Andrew J. Lastra, Assistant Prosecuting Attorney, for appellee.

Veronica M. Murphy, for appellant.

* * * * *

YARBROUGH, J.

{¶ 1} This is an *Anders* appeal. Appellant, Victor Cheno, appeals from a judgment of the Lucas County Court of Common Pleas finding him guilty of aggravated robbery.

I. Facts and Procedural Background

{¶ 2} On July 7, 2010, Cheno, his brother, and three other individuals wearing masks and latex gloves entered a Sylvania Township branch of Key Bank and proceeded

to rob the bank. One individual was armed with a sawed-off shotgun. Another individual was armed with a rifle.

{¶ 3} Upon entrance, the shotgun was fired in order to get the attention of the bank employees. Hearing the shotgun blast, the bank manager opened his office door to see what was happening. The individual with the shotgun aimed the gun at the manager and fired a round at him. The shot struck the office door and narrowly missed the manager's head.

{¶ 4} Cheno was subsequently arrested and charged with numerous felonies including aggravated robbery, felonious assault, and attempt to commit murder. At his arraignment on April 25, 2011, Cheno entered a plea of not guilty. However, on August 22, 2011, Cheno withdrew his not guilty plea and entered a guilty plea pursuant to *North Carolina v. Alford* to the first count of the indictment, aggravated robbery, in violation of R.C. 2911.01(A)(1), a felony of the first degree.

{¶ 5} In exchange for Cheno's guilty plea, the state recommended a maximum prison sentence of five years. In addition, the state dismissed the remaining charges against Cheno.

{¶ 6} After questioning Cheno to ensure that he understood the effect of his plea and the potential sentence that could be imposed on him, the trial court accepted the plea and referred Cheno to the probation department for a presentence report. At his sentencing hearing on September 14, 2011, Cheno was sentenced to seven years in prison, plus five years of mandatory postrelease control on the aggravated robbery

charge. Cheno timely appealed and his counsel has filed a motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

II. Analysis

{¶ 7} *Anders, supra* 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 appointed counsel who desires to withdraw for want of a meritorious, appealable issue. In *Anders*, the United States Supreme Court held that if counsel, after a conscientious examination of the case, determines it 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.*

{¶ 8} Counsel must also furnish his 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 may proceed to a decision on the merits if state law so requires. *Id.*

{¶ 9} In this case, Cheno's appointed counsel has satisfied the requirements set forth in *Anders, supra*. This court further notes that Cheno has not filed a pro se brief or otherwise responded to counsel's request to withdraw. Accordingly, this court shall proceed with an examination of the potential assignments of error set forth by Cheno's

counsel and the entire record below to determine if this appeal lacks merit and is, therefore, wholly frivolous.

{¶ 10} In her brief, Cheno's counsel assigns the following possible grounds for appeal: (1) ineffective assistance of counsel; and (2) excessive or improper sentence.

Ineffective Assistance of Counsel

{¶ 11} In his first potential assignment of error, Cheno argues that he received ineffective assistance of counsel.

{¶ 12} To support a claim for ineffective assistance of counsel, Cheno must satisfy the two-prong test developed in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That is, Cheno must show counsel's performance fell below an objective standard of reasonableness, and a reasonable probability exists that, but for counsel's error, the result of the proceedings would have been different. *Id.* at 687-688, 694.

{¶ 13} Here, Cheno received effective assistance of counsel. First, Cheno's counsel performed competently during the discovery process, making two separate requests for discovery. Second, Cheno's counsel was able to negotiate an acceptable plea agreement with the state. Third, Cheno's counsel argued on Cheno's behalf at the sentencing hearing by speaking of the progress Cheno had made in the Youth Treatment Center. Finally, during the plea hearing, Cheno stated that he believed his lawyer represented him well. Upon our consideration of the record, we find nothing that would

indicate that the performance of Cheno's counsel was less than reasonable. Accordingly, Cheno's first potential assignment is not well-taken.

Excessive or Improper Sentence

{¶ 14} In Cheno's second possible assignment of error, he argues that the imposition of a seven-year sentence is excessive and constitutes an abuse of discretion.

{¶ 15} The Ohio Supreme Court decision in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, sets forth a two-step analysis to be employed in reviewing felony sentences on appeal. First, appellate courts are required to "examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law." *Id.* at ¶ 26. Second, if the first prong is satisfied, the appellate court reviews the decision imposing sentence under an abuse of discretion standard. *Id.*

{¶ 16} Here, the trial court's decision was not contrary to law. In the judgment entry, the trial court stated that it considered the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12. Further, it properly applied postrelease control, and Cheno concedes that the sentence is within the statutory range. Accordingly, the sentence is not clearly and convincingly contrary to law.

{¶ 17} Next, we determine whether the trial court abused its discretion. An abuse of discretion implies that the trial court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). Cheno argues that the trial court abused its discretion by imposing a sentence

that exceeds the cap of five years recommended by the state pursuant to the plea agreement.

{¶ 18} We note at the outset that trial courts may reject plea agreements and are not bound by the state's recommended cap. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 28. Therefore, we cannot say that the trial court abused its discretion by virtue of imposing a sentence that exceeded the maximum term recommended by the state pursuant to the plea agreement.

{¶ 19} Further, the trial court articulated its reasons for exceeding the recommended sentence. The trial court examined Cheno's criminal history and noted that Cheno had been convicted of three felonies and two misdemeanors before pleading guilty to aggravated robbery. Those convictions included receiving stolen property, theft, and failure to comply with the order or signal of a police officer. In addition, the trial court considered the violent nature of the offense prior to imposing the sentence.

{¶ 20} With those considerations in mind, the trial court decided that the recommended sentence of five years was inappropriate. That decision is supported by the record, and is not a product of an unreasonable, arbitrary, or unconscionable attitude. Upon our review of the record, we conclude that the trial court did not abuse its discretion when it sentenced Cheno to seven years in prison. Accordingly, Cheno's second assignment is not well-taken.

III. Conclusion

{¶ 21} This court, as required under *Anders*, has undertaken our own examination of the record to determine whether any issue of arguable merit is presented for appeal. We have found none. Accordingly, we grant the motion of counsel to withdraw.

{¶ 22} The judgment of the Lucas County Court of Common Pleas is affirmed. Costs are assessed to Cheno pursuant to App.R. 24. The clerk is ordered to serve all parties 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, P.J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

<p>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.</p>
