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COURT OF COMMON PLEAS
TOM ORLANDO

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JOURNAL ENTRY
Hon. D. Chris Cook, Judge

Date April 10, 2019 Case No. 16CR094014

STATE OF OHIO
Plaintiff

Paul Griffin
Plaintiff's Attorney

VS

DANIELLE WELLS
Defendant

Craig Jaquith
Defendant's Attorney

This matter is before the Court on Defendant's Motion For Appointment of Appellate Counsel, filed April 2, 2019. The State has not had an opportunity to respond.

The Motion is not well-taken and is hereby DENIED. See Judgment Entry.

IT IS SO ORDERED. No Record.

VOL _____ PAGE _____

JUDGE D. Chris Cook

cc: Griffin, Asst. Pros. Atty.
Jaquith, Esq.

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I. INTRODUCTION

This matter is before the Court on Defendant's Motion For Appointment of Appellate Counsel, filed April 2, 2019. The State has not had an opportunity to respond.

II. PROCEDURAL HISTORY

The Defendant was indicted on May 25, 2016, on nine (9) counts including Engaging in a Pattern of Corrupt Activity (F2), two counts of Conspiracy (F5), three counts of Money Laundering (F3), one count of Theft (F4), and two counts of Receiving Stolen Property (M1).

On December 16, 2016, she plead guilty to the indictment and the Court ordered a pre-sentence investigation report.

On January 23, 2017, the Defendant appeared for sentencing and was given a five-year community control sanction. The Court reserved an aggregate sentence of 13.5 years in prison in the event she violated the terms or conditions of her community control sanction.

Ultimately, the Defendant did violate the terms of her community control sanction by being arrested and charged for a number of new felonies.[1]

[1] In addition to these violations, the Defendant also committed several others such as failing to report to her probation officer, failing to participate in the substance abuse monitoring program, failing to appear for drug tests, and testing positive for controlled substances.

On Case No. 18CR099501, the Defendant was indicted for Safecracking (F4), Vandalism (F5), Breaking and Entering (F5), and Theft (M1). That case is set for trial on May 13, 2019.

On Case No. 18CR099509, the Defendant was indicted for Breaking and Entering (F5), Theft (M1), and Criminal Damaging (M2). That case is also set for jury trial on May 13, 2019.

As a result of these new felony charges (and the other cumulative violations), the Court held a merits hearing on November 14, 2018. At this hearing, the Defendant stipulated that she violated the terms and conditions of her community control sanctions. At the conclusion of the hearing, the Defendant was sentenced to prison for a total aggregate term of twelve (12) years.

On December 7, 2018, the Defendant filed a *pro se* appeal with the Ninth District Court of Appeals. (See: Case No. 18CA011447.) While that appeal remains pending, this Court has jurisdiction to resolve the issue at hand.[2]

Currently, the Office of the Ohio Public Defender represents the Defendant. Due to staffing limitations, however, the Public Defender's Office requests that the Court appoint "local counsel" to represent her in her pending appeal.

III. ANALYSIS

ISSUE PRESENTED

DOES AN INDIGENT DEFENDANT WHO PLEAD GUILTY TO A FELONY AND IS SENTENCED TO PRISON[3] HAVE AN ABSOLUTE RIGHT TO COURT-APPOINTED COUNSEL IN ORDER TO PURSUE A DIRECT APPEAL

This Court begins the analysis by reviewing Crim. R. 32(B), which reads, in pertinent part,

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[2] The general rule of law is that the trial court loses jurisdiction to take action in a cause after an appeal has been taken and decided * * * "When an appeal is taken from the district court the latter court is divested of jurisdiction, except to take action in aid of the appeal, until the case is remanded to it by the appellate court." *State ex rel. Special Prosecutors,* 55 Ohio St.2 94 (1978).
"It has been stated that the trial court does retain jurisdiction over issues not inconsistent with that of the appellate court to review, affirm, modify or reverse the appealed judgment, such as the collateral issues like contempt, appointment of a receiver and injunction." *Special Prosecutors, supra,* citing *In re Kurtzhalz* (1943), 141 Ohio St. 432.

[3] In the case at bar, the Defendant was actually sentenced to a community control sanction which she violated resulting in the imposition of the reserved prison sentence. This distinction is not relevant to the analysis.

(B) Notification of right to appeal.
(1) After imposing sentence in a serious offense that has gone to trial, the court shall advise the defendant that the defendant has a right to appeal the conviction.
(2) After imposing sentence in a serious offense, the court shall advise the defendant of the defendant's right, where applicable, to appeal or to seek leave to appeal the sentence imposed.
(3) If a right to appeal or a right to seek leave to appeal applies under division (B)(1) or (B)(2) of this rule, the court also shall advise the defendant of all of the following: (a) That if the defendant is unable to pay the cost of an appeal, the defendant has the right to appeal without payment; (b) That if the defendant is unable to obtain counsel for an appeal, counsel will be appointed without cost; (c) That if the defendant is unable to pay the costs of documents necessary to an appeal, the documents will be provided without cost; (d) That the defendant has a right to have a notice of appeal timely filed on his or her behalf.

Upon defendant's request, the court shall forthwith appoint counsel for appeal.

Here, the Defendant did not "go to trial" but plead guilty. As such, subsection (1) is inapplicable.

As for subsection (2), the Court did impose a sentence (prison) in a serious offense and must advise the Defendant that she has the right "*where applicable*" to appeal or to seek leave to appeal the sentence imposed.

So the question becomes, when is it "applicable" to advise the defendant of her right to appeal or to seek leave to appeal?

Finally, if the court must advise a defendant of her right to appeal or to seek leave to appeal, then the court must comply with subsection (3), including the right to have court-appointed counsel and if requested, appoint such counsel.

The Ninth District Court of Appeals has addressed this issue, though not on exactly the same facts. In the matter of *State v. White,* 9th Dist. Summit No. 21741, 2003 WL 22451372, the court stated,

> Crim.R. 32(B) provides that a trial court must advise a defendant of "the defendant's right, *where applicable,* to appeal or to seek leave to appeal the sentence imposed." (Emphasis added.) R.C. 2953.08(D), however, precludes appellate review of sentences under certain circumstances: "A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge."

> Ohio courts have uniformly held that a sentence is "authorized by law" for purposes of R.C. 2953.08(D) as long as the prison term imposed does not exceed the statutorily prescribed maximum term for the offense. See *State v. Rhodes,* 7th Dist. No.2000 CO 60, 2002–Ohio–3056, ¶ 13, and cases cited therein. Where each sentence imposed by the court is within the permissible statutory range for the count on which the defendant is sentenced, an aggregate sentence is "authorized by law" pursuant to R.C. 2953.08(D). See *State v. Johnson,* 2nd Dist. No.2000–CA–46, 2001–Ohio–7023, at 8.

The Twelfth District Court of Appeals reached a similar conclusion in *State v. Middleton,* 12th Dist. Preble No. CA2004-01-003, 2005 WL 406208, Footnote 1.

In the case at bar, the sentence of 12 years that was imposed was clearly "authorized by law" as the maximum possible sentence that the Court could have imposed was 13.5 years. Moreover, the sentence was clearly "imposed by a sentencing judge." The only element missing is that the sentence was not jointly recommended by the defendant and the prosecution. That fact, however, does not automatically trigger a Crim. R. 32(B)(2) or (B)(3) advisement.

THE RIGHT TO COUNSEL IN GENERAL

The right to counsel "is ordained by the Federal Constitution." *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799. In *Gideon*, the Unites States Supreme Court stated that, "any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth."

Indeed, the Defendant herein had private counsel during the pendency of her case and during her guilty plea. She also had an attorney (court-appointed) for her merits and sentencing hearings. But is she entitled to a court-appointed attorney to prosecute her *pro se* appeal?

THE OHIO SUPREME COURT

The Ohio Supreme Court, in a series of cases, sheds some light on the issue.

In *State v. Fitzpatrick,* 102 Ohio St.3d 321, 2004-Ohio-3167, the court stated,

> "[A] guilty plea * * * renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established." *Menna v. New York* (1975), 423 U.S. 61, 62, 96 S.Ct. 241, 46 L.Ed.2d 195, fn. 2. Therefore, a

> defendant who, like Fitzpatrick, voluntarily, knowingly, and intelligently enters a guilty plea with the assistance of counsel "may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson* (1973), 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235. See, also, *Ross v. Auglaize Cty. Common Pleas Court* (1972), 30 Ohio St.2d 323, 59 O.O.2d 385, 285 N.E.2d 25 (valid guilty plea by counseled defendant waives all nonjurisdictional defects in prior stages of proceedings); *State v. Spates* (1992), 64 Ohio St.3d 269, 271–273, 595 N.E.2d 351. *Fitzpatrick* at ¶ 78.

Here, the Defendant does not address the basis for her appeal or attack the trial court's jurisdiction to try her case nor the constitutionality of the statutes she violated. Further, she does not argue any infirmity as to the voluntariness of her guilty plea. As such, her plea of guilty ". . . precludes [the Defendant] from raising these issues on appeal." *Id.* at ¶ 79.

In *State v. Obermiller,* 147 Ohio St.3d 175, 2016-Ohio-1594, at ¶ 55, the Supreme Court noted, "A guilty plea is a complete admission of guilt under Crim.R. 11(B)(1)."

And in *State v. Beasley,* 152 Ohio St.3d 470, 2018-Ohio-16, at ¶ 15,

> A plea of no contest does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion, including a motion to suppress evidence. Crim.R. 12(I). A valid guilty plea by a counseled defendant, however, generally waives the right to appeal all prior nonjurisdictional defects, including the denial of a motion to suppress. *See State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 927, ¶ 78; *State v. Obermiller*, 147 Ohio St.3d 175, 2016-Ohio-1594, 63 N.E.3d 93, ¶ 56.

POST CONVICTION RIGHT TO COUNSEL – OHIO AND UNITED STATES SUPREME COURTS

As for Motions for Counsel (and Experts), both the United States Supreme Court and Ohio Supreme Courts have held that an indigent criminal defendant has no right to counsel post original direct appeal.

In *Coleman v. Thompson* (1991), 501 U.S. 722, 756 the Supreme Court of the United States "declined to extend the right to counsel beyond the first appeal of a criminal conviction." *Id.* at ¶ 20. And "nothing in the United States Constitution requires that the state provide counsel to every indigent criminal defendant who wants to challenge the work of his or her original appellate attorney." See *Pennsylvania v. Finley* (1987), 481

U.S. 551, 555 ("the right to appointed counsel extends to the first appeal of right, and no further"). See also: *Morgan v. Eads,* 104 Ohio St.3d 142, 2004-Ohio-6110.

Based upon Crim. R 32(B)(1), *Finley*, *Morgan*, and their progeny, it is clear that a defendant has a right to court-appointed counsel in order to appeal her conviction for a serious offense that has gone to trial. This right is generally known as the defendant's "appeal of right."

The question presented herein, which is a more difficult question, is whether or not an indigent defendant who pleads guilty, is sentenced, then appeals, is also entitled to court-appointed counsel.

I say no.

As noted *supra,* Crim. R. 32(B)(2) conditions the trial court's obligation to advise a defendant of the right to appeal and the attendant additional rights (appeal without cost, right to counsel, right to documents without cost, and a notice of appeal timely filed) "*where applicable.*"

Given that none of the cases this Court has been able to find seem to address this exact question, it appears to be one of first impression. Accordingly, the trial court must determine whether conditions exist that require, or at least justify the appointment of counsel for an indigent defendant who wishes to appeal after a guilty plea.

Certainly, a number of situations could arise to justify the appointment of counsel in such cases. For instance, the defendant could allege that for some reason her counsel was ineffective; that her plea was not voluntarily, intelligently, or knowingly made; that there was some fraud upon the court or in the proceedings; or, that a statute she violated is unconstitutional, etc. Any one of these (or more) concerns would propone in favor of appointing counsel.

Nevertheless, the defendant in such situations must at least express *some* reason or basis for the appeal to justify the request for court-appointed counsel.

Here, the Defendant did not express any reason or basis for her appeal or give this Court any indication of why (or what) she wants to appeal. By all accounts, it appears that the Defendant simply disagrees with the length of her sentence – a sentence clearly within the statutory range for her offenses.

The determination by this Court that an indigent criminal defendant who pleads guilty and is sentenced does not have an automatic right to appeal or to court-appointed

counsel to prosecute an appeal allays the practical problems conferring such a right would create.[4]

If this Court were to determine otherwise, that every defendant who pleads guilty and is sentenced has an absolute or unconditional right to advisement of their right to appeal and to court-appointed counsel, what would prevent every defendant from appealing her sentence for no reason other than she thinks it is too harsh? And, why does Crim. R. 32(B)(1) mandate that a defendant has a right to appeal and counsel if indigent but Crim. R. 32(B)(2) requires the same only "*where applicable*?"

The obvious conclusion is that where a defendant is convicted *after trial,* the right to advisement of an appeal, and to court-appointed counsel if indigent, is absolute.[5] Conversely, if the Defendant's conviction stems from a guilty plea, the right to advisement of appeal and to court-appointed counsel is discretionary.

In the case at bar, the Defendant has posited no reason or basis for wanting to appeal nor has she sought leave. As such, this Court cannot in good-faith determine whether to appoint counsel for her. If the Defendant lacks any colorable basis to appeal or simply disagrees with the length of her sentence, then the right to counsel is "not applicable." On the other hand, if the Defendant states or indicates in a subsequent motion why she wants to appeal or the basis for her appeal, then this court, in its discretion, can consider appointing her counsel.

IV. CONCLUSION

The Defendant in this case plead guilty to multiple felonies, was sentenced to a community control sanction, admitted to violating her community control sanction, then was sentenced to prison for an aggregate prison term less than the maximum term allowed by law. She now moves this Court to appoint her counsel to prosecute an appeal she filed *pro se*, without leave.

Pursuant to Crim. R. 32(B)(2), after imposing sentence in a serious offense, a trial court must advise a defendant of the defendant's right, *where applicable,* to appeal or seek leave to appeal the sentence imposed. If the facts warrant a finding that such notice is applicable, the trial court must also advise the defendant that if she is unable to pay the costs, they will be waived, counsel and documents will be provided without cost, and that she has a right to have her appeal timely filed.

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[4] Of course, a defendant can always "seek leave" to appeal and request court-appointed counsel. Crim. R. 32(B)(2).
[5] The same is true if a defendant pleads no-contest.

Conversely, if the trial court does not, in its discretion deem it applicable to notify the defendant of her appeal rights, there is no attendant obligation to advise or provide for the waiver of the filing fees, court-appointed counsel, free documents, or the filing of a timely notice.

It follows logically then that Crim. R. 32(B) does not mandate in all situations after a guilty plea that counsel be appointed for an indigent defendant who wishes to file an appeal.

Instead, such a defendant must either 1) seek leave to appeal the sentence imposed and request court-appointed counsel if indigent (Crim. R. 32(B)(2); or 2) if an appeal has already been filed (*pro se* or otherwise), posit some reasons, facts, or circumstances sufficient to justify the appointment of counsel.

Here, the Defendant has failed to do either. She did not seek leave of this Court to appeal her sentence but instead, filed an appeal *pro se.* And, in her Motion For Appointment of Appellate Counsel, she fails to state any reason or basis for her appeal or need for counsel. As such, this Court cannot determine whether her request for court-appointed counsel is "applicable."

Accordingly, Defendant's Motion For Appointment of Appellate Counsel is not well-taken and is hereby DENIED. Should the Defendant wish to file a supplemental Motion that explains why counsel should be appointed or what issues she wishes to pursue, this Court will certainly consider same.

IT IS SO ORDERED. No Record.

JUDGE D. Chris Cook