

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

State of Ohio

Court of Appeals No. S-10-044

Appellee

Trial Court No. 09CR000892

v.

Rudy Levario, Jr.

DECISION AND JUDGMENT

Appellant

Decided: September 30, 2011

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney, and
Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Jon M. Ickes, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals his conviction for cocaine possession entered on a guilty verdict following a jury trial in the Sandusky County Court of Common Pleas.

{¶ 2} On July 27, 2009, Fremont police executed a search warrant on a home occupied by appellant, Rudy Levario, Jr. On top of the refrigerator in the kitchen of appellant's home, police found a vitamin bottle containing what would later be confirmed as seven-tenths of a gram of crack cocaine. Police later testified that appellant admitted the cocaine was his.

{¶ 3} Appellant was indicted for drug possession, entered a not guilty plea and the matter proceeded to trial. At trial, the officers who conducted the search testified to the discovery of the drugs and appellant's admission of possession. A forensic chemist testified that the substance seized in appellant's home was cocaine. Appellant presented no witnesses.

{¶ 4} The matter was submitted to the jury, which found appellant guilty of drug possession, a fifth degree felony. Appellant was sentenced to a five-year period of community control. From the judgment of conviction, appellant now brings this appeal.

{¶ 5} Appellant's counsel has filed a brief pursuant to *Anders v. California* (1967), 386 U.S. 738, in which counsel states that he has reviewed record in this matter and has been unable to find any arguable issues for appeal. Pursuant to *Anders*, counsel seeks leave to withdraw.

{¶ 6} The procedure to be followed by appointed counsel who desires to withdraw for want of a meritorious, appealable issue is set forth in *Anders*, supra and *State v. Duncan* (1978), 57 Ohio App.2d 93. 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. *Id.* at 744. 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 his client with a copy of the brief, 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.*

{¶ 7} In this case, appointed counsel has satisfied the requirements set forth in *Anders*, *supra*. We note further that appellant 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 counsel for appellant and the entire record below to determine if this appeal lacks merit and is, therefore, wholly frivolous.

{¶ 8} Appellant's counsel sets forth two potential assignments of error:

{¶ 9} "First Assignment of Error

{¶ 10} "There was insufficient evidence introduced at trial to sustain the jury verdict of guilty.

{¶ 11} "Second Assignment of Error

{¶ 12} "Prejudicial heresay (sic) evidence was introduced to the jury without objection of defense counsel."

{¶ 13} In appellate counsel's first potential assignment of error, he suggests that there may have been an insufficiency of evidence with which to convict.

{¶ 14} In considering a challenge to the sufficiency of the evidence, a reviewing court must determine whether the evidence submitted at trial is legally sufficient to support all of the elements of the offense charged. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386-387. Specifically, we must determine whether the state presented evidence which, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The test is, viewing the evidence in a light most favorable to the prosecution, could any rational trier of fact have found the essential elements of the crime proven beyond a reasonable doubt. *Id.* at 390 (Cook, J. concurring); *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. See, also, *State v. Eley* (1978), 56 Ohio St.2d 169; *State v. Barns* (1986), 25 Ohio St.3d 203.

{¶ 15} Like appellate counsel we have thoroughly reviewed the transcript of these proceedings and find that the state presented evidence going to all of the elements of the offense for which appellant was convicted. Although appellant's trial counsel tried to undermine this evidence, noting that the drugs were not actually found on appellant's person and suggesting that, at four foot, nine inches tall, appellant was too short to have placed the drugs on the top of the refrigerator, there was nonetheless sufficient evidence

before the jury to find appellant guilty of the offense charged. We must concur with appellate counsel that this potential assignment of error is without merit.

{¶ 16} With respect to the admission of hearsay evidence without trial counsel's objection, as appellate counsel notes, such admission was harmless beyond a reasonable doubt because the statements at issue were either later testified to by the speaker first quoted or were irrelevant. See Crim.R. 52(A). Accordingly, we concur with appellate counsel that this potential assignment of error is without merit.

{¶ 17} Upon this record, we concur with appellate counsel that appellant's appeal is without merit. Moreover, upon our independent review of the record, we find no other grounds for meritorious appeal. Accordingly, this appeal is found to be without merit, and wholly frivolous. Counsel's motion to withdraw is found well-taken and is, hereby, granted.

{¶ 18} On consideration whereof, the judgment of the Sandusky County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

{¶ 19} The clerk is ordered to serve all parties, including the defendant if he or she has filed a brief, 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.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Stephen A. Yarbrough, 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:
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