[Cite as *State v. Albert*, 2019-Ohio-1012.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 18AP-504
v.	:	(C.P.C. No. 17CR-4646)
Thomas Albert,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 21, 2019

On brief: *Ron O'Brien*, Prosecuting Attorney, and *Sheryl. L. Prichard*, for appellee.

On brief: *Crysta R. Pennington*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

SADLER, J.

{¶ 1} Defendant-appellant, Thomas Albert, appeals from a judgment of the Franklin County Court of Common Pleas convicting him of aggravated robbery, in violation of R.C. 2911.01, and attempted murder, in violation of R.C. 2923.02 and 2903.02, with a repeat violent offender specification. Before this court is a counseled brief filed pursuant to *Anders v. California*, 386 U.S. 738 (1967). For the reasons that follow, we affirm.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} Nicole Pellerin, the victim, was 25 years old when she moved to Columbus, Ohio from New Hampshire. At trial, Pellerin testified she worked at a warehouse for nine months before becoming unemployed due to her addiction to crack cocaine and heroin. Pellerin related that in May 2017, "I was using a lot" and staying with a friend on the east

side of Columbus near Livingston Avenue. (Tr. Vol. II at 119.) Pellerin first met appellant, whom she came to know as T-Mac, in April 2017 when he pulled his car over to the side of the road at Livingston Avenue and Bulen and invited her in. Pellerin believed her interaction with appellant would result in her obtaining more money to buy drugs. Pellerin exchanged sexual relations with appellant for money, and she claimed appellant told her his real name, but she could not remember it.

{¶ 3} The two exchanged telephone numbers, and Pellerin began texting with appellant. During the exchanges, the two discussed Pellerin possibly staying overnight at appellant's place but that did not occur. When appellant next caught up with Pellerin while she was walking on Livingston Avenue, Pellerin told appellant she could not stay at his place because she had other things going on. When Pellerin met appellant a second time, they discussed Pellerin possibly selling a pair of basketball shoes for appellant. Appellant also told Pellerin he lived on Defford Court and asked her to visit him there.

{¶ 4} Pellerin described her relationship with appellant at that time by stating "[w]e were just friends pretty much. Just talking, getting to know each another." (Tr. Vol. II at 132.) She testified they were texting "maybe a few times a week." (Tr. Vol. II at 133.) Eventually, appellant gave Pellerin a pair of basketball shoes to sell to an acquaintance. Pellerin stated appellant wanted $70 for the shoes of which $20 was to go to her. When Pellerin's acquaintance decided not to buy the shoes, she gave them back to appellant.

{¶ 5} On May 17, 2017, Pellerin received a text from an unidentified man asking her to meet him in a few hours near the Dollar General Store on Livingston Avenue between Barkley and Lilly. Pellerin testified she later suspected appellant had been using a different phone, and he was the person who had texted her. According to appellant, shortly after midnight, she received another text from the same number asking her to meet at Oakwood and Sycamore. As Pellerin was walking in the location of Oakwood and Sycamore, appellant appeared from behind a telephone pole and began walking toward her. Pellerin testified that "[w]hen [appellant] got close enough and he had started coming towards me, he just started slicing me in my face." (Tr. Vol. II at 140.) Pellerin tried to turn her back and call for help while she wiped blood from her face, but appellant took her phone. During the attack on Pellerin, appellant stole $70 from her in addition to her cell phone.

{¶ 6} When a local resident by the name of Tyheria McKenney heard someone saying "Oh, my God, oh, my God. Please help me. Oh, my God. I'm going to die," she went outside to investigate and found Pellerin "covered in blood from head to toe." (Tr. Vol. II at 182, 183.) McKenney observed cuts on Pellerin's hip, stomach, arms, and her face or head. McKenny testified that Pellerin began walking up and down the street and told McKenney she was looking for her phone and money. McKenney called 911 on Pellerin's behalf, and Pellerin was taken to Grant Hospital by ambulance. Pellerin was hospitalized, in critical condition, with numerous cuts to her face and body from a knife or other sharp object.

{¶ 7} At the hospital, Pellerin told Columbus Division of Police Detective Bryan Williams that her attacker was called "T" or "T-Mac." (Tr. Vol. II at 63.) When Pellerin later met with police after the attack, she picked appellant's photograph out of a photo array and told the officer that she was "[a] hundred percent" sure the man in the photograph was her assailant. (Tr. Vol. II at 146; State's Ex. 5.) At trial, Pellerin testified she had not seen appellant since the attack, but she was able to make an in-court identification of appellant as her assailant.

{¶ 8} On August 23, 2017, a Franklin County Grand Jury indicted appellant on charges of aggravated robbery, in violation of R.C. 2911.01, a felony of the first degree; robbery, in violation of R.C. 2911.02, a felony of the second degree; felonious assault, in violation of R.C. 2903.11, a felony of the second degree; attempted murder, in violation of R.C. 2923.02 and 2903.02, a felony of the first degree; and kidnapping, in violation of R.C. 2905.01, a felony of the first degree. Each count in the indictment was accompanied by a repeat violent offender specification, a violation of R.C. 2941.149(A). The jury found appellant guilty of all counts and specifications in the indictment, with the exception of kidnapping. The trial court ruled that the count in the indictment charging appellant with robbery merged with the count charging appellant with aggravated robbery and that the count in the indictment charging appellant with felonious assault merged with the count in the indictment charging appellant with attempted murder. Accordingly, the trial court convicted appellant of aggravated robbery and attempted murder with a repeat violent

offender specification.[1] The trial court imposed a prison term of four years for aggravated robbery, eleven years for attempted murder, and ten years for the repeat violent offender specification. The trial court ordered appellant to serve the prison term for attempted murder consecutive to the prison term for aggravated robbery and consecutive to the prison term for the repeat violent offender specification, for an aggregated prison term of 25 years. The trial court imposed an additional 770 days as a sanction for the violation of post-release control to be served consecutive to the other prison terms.

{¶ 9} Though appellant timely appealed to this court from the judgment of the trial court, his appellate counsel elected to file an *Anders* brief on appellant's behalf. In *State v. Matthews*, 10th Dist. No. 11AP-532, 2012-Ohio-1154, this court reviewed the procedure an appellate court must follow as established in *Anders*:

> In *Anders*, the United States Supreme Court held that if, after a conscientious examination of the record, a defendant's counsel concludes that the case is wholly frivolous, she should so advise the court and request permission to withdraw. *Id*. at 744. Counsel must accompany her request with a brief identifying anything in the record that could arguably support the client's appeal. *Id*. Counsel also must: (1) furnish the client with a copy of the brief and request to withdraw; and (2) allow the client sufficient time to raise any matters that the client chooses. *Id*.

Matthews at ¶ 9. *See also State v. A.H.*, 10th Dist. No. 16AP-487, 2017-Ohio-7680, ¶ 16.

{¶ 10} Here, appellant's counsel filed a brief, pursuant to *Anders*, in which counsel asserted one potential assignment of error for our review. Additionally, in accordance with *Anders*, counsel furnished appellant with "copies of both this motion and the attached *Anders* brief." (Aug. 26, 2018 Mot. to Withdraw at 2.) After receiving the *Anders* brief filed by counsel, this court notified appellant of his appellate counsel's representations, granted counsel's motion to withdraw, and granted appellant leave until November 2, 2018 to file a supplemental brief. (Aug. 27, 2017 Journal Entry.) Appellant did not file a supplemental brief.

{¶ 11} "Where a defendant does not file a pro se brief in response to an *Anders* brief, an appellate court will examine the potential assignment of error and the entire record

[1] The record reflects the trial court accepted counsel's stipulation that appellant would be convicted of only one repeat violent offender specification.

below to determine if the appeal lacks merit." *A.H.* at ¶ 18, citing *State v. Cooper*, 10th Dist. No. 09AP-511, 2009-Ohio-6275. "After fully examining the proceedings below, if we find only frivolous issues on appeal, we then may proceed to address the case on its merits without affording appellant the assistance of counsel." *Matthews* at ¶ 10, citing *Penson v. Ohio*, 488 U.S. 75, 80 (1988). "However, if we conclude that there are nonfrivolous issues for appeal, we must afford appellant the assistance of counsel to address those issues." *A.H.* at ¶ 18, citing *Anders* at 744; *Penson* at 80.

II. ASSIGNMENT OF ERROR

{¶ 12} Though counsel's *Anders* brief does not identify specific assignments of error, as required by App.R. 16(A)(3), in the interest of justice, we will interpret counsel's "Issue Presented For Review" as appellant's potential assignment of error. *Miller v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 12AP-12, 2012-Ohio-3382, ¶ 6; *Hagberg v. Cincinnati Ins. Co.*, 10th Dist. No. 06AP-618, 2007-Ohio-2731, ¶ 7. Accordingly, the *Anders* brief sets forth the following potential assignment of error:

> The trial court erred by imposing consecutive sentences without making the necessary findings under R.C. 2929.14(C).

III. STANDARD OF REVIEW

{¶ 13} In *State v. Higginbotham*, 10th Dist. No. 17AP-147, 2017-Ohio-7618, this court summarized the appropriate standard of appellate review as follows:

> This court reviews claims that a sentencing court failed to comply with R.C. 2929.14(C)(4) when imposing a consecutive sentence "under the standard set forth by the Supreme Court of Ohio in *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659." *State v. Hargrove*, 10th Dist. No. 15AP-102, 2015-Ohio-3125, ¶ 10.
>
> In *Bonnell*, the Supreme Court held that a sentencing court is not required "to give a talismanic incantation of the words of the statute, provided that the necessary findings can be found in the record and are incorporated into the sentencing entry." *Id.* at ¶ 37. The court further stated that "a word-for-word recitation of the language of the statute is not required, and as long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld." *Id.* at ¶ 29.

Id. at ¶ 9-10.

IV. LEGAL ANALYSIS

A. Appellant's Potential Assignment of Error

{¶ 14} In appellant's potential assignment of error, appellant argues the trial court erred by imposing consecutive sentences without making the necessary findings under R.C. 2929.14(C). We disagree.

{¶ 15} R.C. 2929.14(C)(4) provides as follows:

> If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶ 16} "[I]f the trial court does not make the factual findings required by R.C. 2929.14(C)(4), then 'a prison term, jail term, or sentence of imprisonment shall be served concurrently with any other prison term, jail term, or sentence of imprisonment imposed by a court of this state, another state, or the United States.' " *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, ¶ 23, quoting R.C. 2929.41(A). Accordingly, under R.C. 2929.14(C)(4), "judicial fact-finding is * * * required to overcome the statutory presumption in favor of concurrent sentences." *Bonnell* at ¶ 23.

{¶ 17} At the sentencing hearing, the trial court made the following findings on the record:

> I make the findings that the sentence for the aggravated robbery has to be served consecutively consistent with 2929.14(C). I believe that consecutive sentences are, again, necessary to protect the public from future crime and to fairly punish [appellant]; that they are not disproportionate to the seriousness of his misconduct and the danger he poses to the public; and that the collective harm was so great that no single prison term adequately reflects the seriousness of his misconduct. And in addition, that his history of criminal conduct, as I've already said, demonstrates that consecutive sentences are necessary to protect the public from future crime.

(Tr. Vol. III at 20-21.)

{¶ 18} Our review of the sentencing hearing transcript reveals the trial court fully complied with the mandates of R.C. 2929.14(C)(4). Not only did the trial court find that consecutive sentences for aggravated robbery and attempted murder were necessary to protect the public from future crime, the trial court also made the alternative finding that consecutive sentences were necessary to punish appellant. The trial court then made both of the proportionality findings required by R.C. 2929.14(C)(4).

{¶ 19} The trial court went on to make the findings described in R.C. 2929.14(C)(4)(a) and (c), even though only one of those findings is required to support the imposition of consecutive sentences. Specifically, as set out above, the trial court found, pursuant to R.C. 2929.14(C)(4)(c), appellant's history of criminal conduct demonstrates consecutive sentences are necessary to protect the public from future crime by appellant. The transcript of the sentencing hearing further discloses the trial court made the finding described in R.C. 2929.14(C)(4)(a) that appellant committed the offenses of attempted murder and aggravated robbery while he was under post-release control for a 2006 conviction of rape and abduction. (Tr. Vol. III at 15-16.)[2]

{¶ 20} Based on the foregoing, we hold the trial court made the specific statutory findings at the sentencing hearing necessary to overcome the statutory presumption in favor of concurrent sentences and to support the imposition of consecutive sentences for

[2] The trial court arguably made the finding described in R.C. 2929.14(C)(4)(b) when it stated "the collective harm was so great that no single prison term adequately reflects the seriousness of his misconduct." (Tr. Vol. III at 21.) However, as only one of the findings described in R.C. 2929.14(C)(4)(a) through (c) is required to sustain consecutive sentences, we need not analyze the adequacy of this finding in order to affirm the sentence imposed in this case.

aggravated robbery and attempted murder. Nevertheless, because a court speaks through its journal, a sentencing court should also incorporate its statutory findings into the sentencing entry. *Bonnell* at ¶ 30. Here, the trial court's judgment entry provides, in relevant part, as follows:

> The court made the findings on the record necessary to impose consecutive sentences under R.C. * * * 2929.14(C)(4) namely that consecutive sentences are necessary to protect the public from future crime, and to fairly punish [appellant]; consecutive sentences are not disproportionate to the seriousness of the offender's misconduct and to the danger that he poses to the public; the harm caused was so great or unusual that no single prison term for any of the offenses committed adequately reflects the seriousness of [appellant's] misconduct; the multiple offenses were committed while [appellant] was under post-release control for a prior offense; and [appellant's] criminal history demonstrates that consecutive sentences are necessary to protect the public from future crime by [appellant].

(June 19, 2018 Jgmt. Entry at 3.)

{¶ 21} The trial court's judgment entry incorporates each of the findings in support of consecutive sentences that the trial court made on the record at the sentencing hearing. The trial court could not have done a better job of incorporating the statutory findings into the judgment entry.

{¶ 22} Based on our review of the sentencing hearing transcript and the trial court's judgment entry of conviction and sentence, we conclude the trial court fully complied with R.C. 2929.14(C)(4) in imposing consecutive sentences for attempted murder and aggravated robbery. Accordingly, we overrule appellant's potential assignment of error.

V. CONCLUSION

{¶ 23} Following our review of appellant's sole potential assignment of error asserted in the *Anders* brief and our independent review of the record, we find the potential assignment of error lacks merit. Additionally, we are unable to find any nonfrivolous issues for appeal. Accordingly, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT, P.J., and BROWN, J., concur.

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