[Cite as *State v. Tepfenhart*, 2019-Ohio-651.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 2018-CA-81
	:	
v.	:	Trial Court Case No. 2017-CR-561
	:	
ANGEL LYNN TEPFENHART	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 22nd day of February, 2019.

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WELBAUM, P.J.

{¶ 1} Defendant-Appellant, Angel Tepfenhart, appeals from the conviction and sentence imposed following her no-contest plea to receiving stolen property. On October 29, 2018, Tepfenhart's assigned counsel filed a brief under the authority of *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), indicating there are no issues with arguable merit to present on appeal. Counsel mentioned one potential assignment of error related to sentencing, but concluded that this alleged error had no arguable merit.

{¶ 2} On November 9, 2018, we notified Tepfenhart that her counsel found no meritorious claim for review and granted her 60 days to file a pro se brief assigning any errors. However, Tepfenhart did not file a pro se brief.

{¶ 3} The State filed a request for an extension of time to file its brief, and we granted the request on December 21, 2018. While we extended the State's response time to January 14, 2018, the State has not filed either a brief or a request for a further extension of time. This matter, therefore, is ready for resolution.

{¶ 4} After reviewing the entire record, including the presentence investigation report ("PSI"), and conducting our independent *Anders* review, we find no issues with arguable merit for Tepfenhart to advance on appeal. Accordingly, the judgment of the trial court will be affirmed.

I. Facts and Course of Proceedings

{¶ 5} On September 25, 2017, an indictment was filed in the trial court, alleging that Tepfenhart had violated R.C. 2913.51(A), by receiving stolen property on or about

September 6, 2017. The charge was a fourth-degree felony because the theft involved a motor vehicle. *See* R.C. 2913.51(C).

{¶ 6} After Tepfenhart pled not guilty at her arraignment, the court set bond at $2,500 cash/surety. Tepfenhart posted bond on October 3, 2017. On January 18, 2018, she pled no contest to the violation as charged. As part of the plea bargain, the State agreed to a PSI and to recommend community control at sentencing, which was set for February 8, 2018. However, Tepfenhart failed to appear for the sentencing hearing, and on February 12, 2018, the court issued a warrant for her arrest.

{¶ 7} Tepfenhart was not apprehended until April 21, 2018, when an automobile in which she was a passenger was involved in a collision. When the police arrived, Tepfenhart lied about her name; as a result, she was arrested and charged with falsification. Following her arrest, Tepfenhart appeared for a hearing in the trial court on April 27, 2018. At that time, the court noted that she had failed to appear for sentencing and had also failed to appear for her presentence investigation interview. The court then placed Tepfenhart in jail until the sentencing hearing, which took place on May 21, 2018.

{¶ 8} During the sentencing hearing, the State recommended community control, as it had promised, but the court sentenced Tepfenhart to 17 months in prison, with credit for time served. This appeal followed.

II. Discussion

{¶ 9} In an *Anders* review, we are required to decide "after a full examination of all the proceedings," whether an appeal is "wholly frivolous." *Anders*, 386 U.S. at 744, 87 S.Ct. 1396, 18 L.Ed.2d 493. *See also Penson v. Ohio*, 488 U.S. 75, 84-85, 109 S.Ct.

346, 102 L.Ed.2d 300 (1988). Issues are not frivolous simply because the State "can be expected to present a strong argument in reply." *State v. Pullen*, 2d Dist. Montgomery No. 19232, 2002-Ohio-6788, ¶ 4. Instead, an issue will lack arguable merit "if on the facts and law involved, no responsible contention can be made that it offers a basis for reversal." *Id*.

{¶ 10} After conducting an independent review of the record pursuant to *Anders*, we agree with Tepfenhart's appellate counsel that, based on the facts and relevant law, there are no issues with arguable merit to present on appeal

{¶ 11} Appellate counsel, consistent with her duties under *Anders*, set forth one potential assignment of error, as follows: "The trial court erred by imposing a prison term instead of Community Control Sanctions when Tepfenhart had no prior felony convictions and the State recommended Community Control." Tepfenhart's counsel also discussed the circumstances surrounding the entry of the no contest plea in her appellate brief. Counsel concluded that the appeal was wholly frivolous with respect to both issues.

A. No Contest Plea

{¶ 12} Under Crim.R. 11(C)(2), trial courts cannot accept no contest pleas without first personally addressing defendants and doing all the following:

> (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.
>
> (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.
>
> (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.

{¶ 13} In accepting Tepfenhart's no contest plea, the trial court fully complied with the requirements of Crim.R. 11(C)(2). *See* January 18, 2018 Transcript of Proceedings (Plea), pp. 1-11. The plea was also placed on the record as required by Crim.R. 11(F). Accordingly, the record indicates that Tepfenhart pled no contest knowingly, intelligently, and voluntarily, and any argument concerning the plea would be wholly frivolous.

B. Sentencing

{¶ 14} As was noted, the trial court sentenced Tepfenhart to 17 months in prison rather than imposing the community control sentence that the State recommended. The standards applicable to sentencing issues are well-established.

{¶ 15} First, we are allowed to vacate or modify felony sentences on appeal only if we decide "by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law." *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1. This standard is very deferential, because "the question is not whether the trial court had clear

and convincing evidence to support its findings, but rather, whether we clearly and convincingly find the record fails to support the trial court's findings." *State v. Cochran*, 2d Dist. Clark No. 2016-CA-33, 2017-Ohio-217, ¶ 7.

{¶ 16} Furthermore, trial courts have " 'full discretion to impose any sentence within the authorized statutory range, and the court is not required to make any findings or give reasons for imposing maximum or more than minimum sentences.' " *Id*. at ¶ 9, quoting *State v. Nelson*, 2d Dist. Montgomery No. 25026, 2012-Ohio-5797, ¶ 62.

{¶ 17} In this case, the sentence of 17 months was within the statutory range for fourth-degree felonies (six to 18 months) and was not the maximum sentence for the crime. *See* R.C. 2913.51(A) and (C); R.C. 2929.14 (A)(4).

{¶ 18} As pertinent to the issue of community control, R.C. 2929.13(B)(1)(a) provides that if a conviction is for a fourth degree felony, community control is mandatory if all the provisions in R.C. 2929.13(B)(1)(a)(i)-(iv) apply. Nonetheless, courts also have discretion to impose a prison term under certain circumstances, including situations where "[t]he offender violated a term of the conditions of bond as set by the court," or had "committed the offense while under a community control sanction, while on probation, or while released from custody on a bond or personal recognizance." R.C. 2929.13(B)(1)(b)(iii) and (xi). The trial court correctly noted that community control was not mandatory in this case because Tepfenhart failed to comply with the terms of her bond and was also awaiting sentencing in another case. *See* May 21, 2018 Transcript of Proceedings (Disposition), p. 6.

{¶ 19} When trial courts sentence offenders, they are guided by the overriding purposes of felony sentencing as stated in R.C. 2929.11. As a corollary, R.C.

2929.12(A) provides that in exercising discretion to decide the most effective way to implement R.C. 2929.11, courts "shall consider" the following matters: (1) the factors in R.C. 2929.12(B) and (C) "relating to the seriousness of the conduct"; (2) the factors in R.C. 2929.12(D) and (E) "relating to the likelihood of the offender's recidivism"; (3) the factors in R.C. 2929.12(F) "pertaining to the offender's service in the armed forces of the United States"; and (4) "any other factors that are relevant to achieving those purposes and principles of sentencing."

{¶ 20} The trial court did consider these factors. *See* Disposition at pp. 4-7. In addition, the court reiterated all the appropriate findings and considerations in the judgment of conviction. *See* Doc. #17, pp. 1-2.

{¶ 21} The record overwhelmingly supports the trial court's findings, which include that Tepfenhart had prior adjudications of delinquency, was not satisfactorily rehabilitated, had a history of criminal convictions and had not favorably responded to sanctions. The court also remarked that Tepfenhart had committed the crime of receiving stolen property while awaiting sentencing in another criminal case, had failed to appear for sentencing, had not paid fines and costs for prior offenses, and had been arrested for another offense while an arrest warrant was pending, due to her failure to appear for sentencing.

{¶ 22} According to the record and the PSI, Tepfenhart was 22 years old at the time of sentencing. Starting at age 14 and continuing nearly until she became 18, Tepfenhart was charged with many separate juvenile offenses and probation violations. She was also confined in detention several times, with no apparent effect on her conduct. Tepfenhart also had a number of adult convictions, including three separate convictions for operating motor vehicles without a valid license, a conviction for criminal trespass, and

an OVI conviction. When Tepfenhart committed the violation involved in the current case, she was awaiting sentencing for the OVI conviction; numerous unpaid fines were also pending in connection with the adult convictions. When Tepfenhart was apprehended after failing to appear for sentencing in the current case, she gave the police a false name and was charged with falsification.

{¶ 23} There is no arguable basis for concluding that the trial court erred in sentencing Tepfenhart to prison rather than community control, when prior sanctions and detention had no discernible effect. Accordingly, no responsible contention can be made that the potential assignment of error asserted offers a basis for reversal. This appeal, therefore, is wholly frivolous. *See Pullen*, 2d Dist. Montgomery No. 19232, 2002-Ohio-6788, at ¶ 8.

III. Conclusion

{¶ 24} Consistent with our duties under *Anders*, we have conducted an independent review of the record, including the pleadings, transcripts, and PSI, and agree with Tepfenhart's counsel that there are no non-frivolous issues for appeal. Accordingly, the trial court's judgment is affirmed.

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HALL, J. and DONOVAN, J., concur.

Copies sent to:

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