[Cite as *State v. Royse*, 2018-Ohio-352.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Patricia A. Delaney, P.J.
Plaintiff-Appellee	:	Hon. W. Scott Gwin, J.
	:	Hon. William B. Hoffman, J.
-vs-	:	
	:	Case No. 17-COA-029
	:	
JASON ROYSE	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Ashland County Court of Common Pleas, Case No. 17 CRI 054
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	January 22, 2018

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
CHRIS TUNNELL ASHLAND CO. PROSECUTOR 110 Cottage St. Ashland, OH 44805	MATTHEW J. MALONE 10 East Main St. Ashland, OH 44805

Delaney, P.J.

{¶1} Appellant Jason Royse appeals from his conviction and sentence upon one count of domestic violence following a plea of guilty. Appellate counsel filed a brief pursuant to *Anders v. California,* 386 U.S. 738, 87 S.Ct. 1396, 18 L.E.2d 493 (1967), asserting he found no potential assignments of error having arguable merit. We have performed our duty under *Anders* to review the record independently, and we also find no potential assignments of error having arguable merit. *See, State v. Parrish*, 2nd Dist. Montgomery No. 25599, 2013-Ohio-5622, ¶ 1.

{¶2} Appellee is the state of Ohio and did not appear.

FACTS AND PROCEDURAL HISTORY

{¶3} This case arose on March 26, 2017, when appellant knowingly caused physical harm to a family or household member. Appellant has a prior conviction for domestic violence. Appellant was charged by indictment with one count of domestic violence pursuant to R.C. 2919.25(A), a felony of the fourth degree [Count I], and one count of disrupting public services pursuant to R.C. 2909.04(A)(1), also a felony of the fourth degree [Count II].

{¶4} Appellant opted to enter a plea of guilty to Count I and appellee moved to dismiss Count II. The motion to dismiss was granted and the trial court ordered a pre-sentence investigation, which is filed in the record under seal. At a sentencing hearing on July 24, 2017, the trial court imposed a prison term of nine months.

{¶5} Appellant now appeals from his conviction and sentence. Appellate counsel has filed a brief pursuant to *Anders,* supra, stating that he can find no potential assignments of error having arguable merit. By entry filed on October 10, 2017, appellant

was advised that an *Anders* brief had been filed on his behalf, and he was advised to file his own pro se brief on or before November 3, 2017.

{¶6} Appellant has not filed a pro se brief.

{¶7} Appellate counsel raised the following possible assignments of error:

ASSIGNMENTS OF ERROR

{¶8} "I. POSSIBLE ERROR ONE: CRIM.R. 11 COLLOQUY"

{¶9} "II. POSSIBLE ERROR TWO: SENTENCING"

ANALYSIS

{¶10} In *Anders,* the United States Supreme Court held that if, after a conscientious examination of the record, a defendant's counsel concludes the case is wholly frivolous, then he should so advise the court and request permission to withdraw. *Id.* at 744. Counsel must accompany his request with a brief identifying anything in the record that could arguably support his client's appeal. *Id.* Counsel also must: (1) furnish his client with a copy of the brief and request to withdraw; and, (2) allow his client sufficient time to raise any matters that the client chooses. *Id.* Once the defendant's counsel satisfies these requirements, the appellate court must fully examine the proceedings below to determine if any arguably meritorious issues exist. If the appellate court also determines that the appeal is wholly 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.*

{¶11} Counsel in this matter has followed the procedure in *Anders*. We turn to the merits of appellant's potential assignments of error.

I.

{¶12} In his first potential assignment of error, appellant addresses the trial court's obligations pursuant to Crim.R. 11 at the change-of-plea hearing, but acknowledges the trial court complied with Crim.R. 11 in accepting his guilty plea.

{¶13} Our analysis of appellant's first assignment of error begins with Crim.R. 11(C)(2). This rule provides the trial court with the various rights that must be discussed with a defendant prior to the acceptance of a guilty plea and states:

> (2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of 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 right 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.

{¶14} Crim.R. 11(C)(2) creates two separate sets of rights that the trial court is required to discuss with a defendant prior to its acceptance of a guilty plea. *State v. Holmes,* 5th Dist. Licking No. 09 CA 70, 2010–Ohio–428, ¶ 10. The first set addresses constitutional rights; the second set addresses non-constitutional rights. *See, e.g., State v. Dunham,* 5th Dist. No. 2011–CA–121, 2012–Ohio–2957, ¶ 11 citing *State v. Ballard,* 66 Ohio St.2d 473, 475, 423 N.E.2d 115 (1981), citing *State v. Stewart,* 51 Ohio St.2d 86, 364 N.E.2d 1163 (1977). Ultimately, "the basis of Crim.R. 11 is to assure that the defendant is informed, and thus enable the judge to determine that the defendant understands that his plea waives his constitutional right to a trial. And, within that general purpose is contained the further provision which would inform the defendant of other rights and incidents of a trial." *Ballard*, supra, 66 Ohio St.2d at 480.

{¶15} On appeal, the issue becomes whether the record demonstrates that the defendant was informed of the relevant constitutional rights and incidents of a trial to warrant the conclusion that he or she understands what a trial is, and that a guilty plea represents a *knowing* and *voluntary* forfeiture of those rights stemming from a trial. Id.

{¶16} To conform to the various constitutional requirements of Crim.R. 11(C), the trial court must explain to the defendant that he or she is waiving: (1) the Fifth Amendment privilege against self-incrimination; (2) the right to a trial by jury; (3) the right to confront one's accusers; (4) the right to compulsory process of witnesses; and (5) the right to

require the state to prove guilt beyond a reasonable doubt. *State v. Singh*, 141 Ohio App.3d 137, 750 N.E.2d 598 (2000). The court must strictly comply with these requirements, and the failure to strictly comply invalidates a guilty plea.

{¶17} The remaining requirements of Crim.R. 11(C) pertain to non-constitutional rights. Unlike the previously stated constitutional rights, which necessitate strict compliance, non-constitutional rights require that the trial court demonstrate substantial compliance. *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990). Substantial compliance means "that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving." *Nero* at 108, 564 N.E.2d 474.

{¶18} In addition, if the trial court fails to substantially comply with Crim.R. 11(C), the defendant must also demonstrate that he or she was prejudiced by this lack of compliance. *State v. Johnson*, 40 Ohio St.3d 130, 134, 532 N.E.2d 1295 (1988). See, also, Crim.R. 52(A) and 33(E). The test of prejudice queries whether the plea would have been made despite the trial court's failure to substantially comply with the prerequisites of Crim.R. 11(C).

{¶19} The record before us establishes that the trial court discussed the domestic violence charge with appellant. Specifically, the court informed appellant of the elements of the offense and the possible penalties that could result from a conviction. Appellant informed the trial court that he understood the domestic violence charge and the possible penalties. The record further demonstrates that the court notified appellant of the constitutional and non-constitutional rights encompassed by Crim.R. 11(C)(2), and the

effect that a guilty plea would have on such rights. Again, appellant told the court that he understood the effect of his guilty plea.

{¶20} Our review of the record of the plea hearing reveals the trial court advised appellant of his constitutional rights, the potential penalty for the offense, and the possibility of post-release control. Further, the trial court inquired as to the voluntariness of appellant's plea of guilty. In short, the trial court complied with Crim.R. 11, and we agree this potential assignment of error is without merit.

{¶21} Appellant's first Assignment of Error is overruled.

II.

{¶22} In his second proposed assignment of error, appellant acknowledges the sentence imposed by the trial court is not clearly and convincingly contrary to law.

{¶23} We review felony sentences using the standard of review set forth in R.C. 2953.08. *State v. Marcum*, 146 Ohio St.3d 516, 2016–Ohio–1002, 59 N.E.3d 1231, ¶ 22; *State v. Howell*, 5th Dist. Stark No. 2015CA00004, 2015–Ohio–4049, ¶ 31. R.C. 2953.08(G)(2) provides we may either increase, reduce, modify, or vacate a sentence and remand for resentencing where we clearly and convincingly find that either the record does not support the sentencing court's findings under R.C. 2929.13(B) or (D), 2929.14(B)(2)(e) or (C)(4), or 2929.20(I), or the sentence is otherwise contrary to law. *See, also, State v. Bonnell*, 140 Ohio St.3d 209, 2014–Ohio–3177, 16 N.E.2d 659, ¶ 28.

{¶24} Accordingly, pursuant to *Marcum* this Court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that: (1) the record does not support the trial court's findings under relevant statutes, or (2) the sentence is otherwise contrary to law.

{¶25} In the instant case, the trial court considered the purposes and principles of sentencing [R.C. 2929.11] as well as the factors that the court must consider when determining an appropriate sentence. [R.C. 2929.12]. The trial court has no obligation to state reasons to support its findings. Nor is it 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.

{¶26} Upon a thorough review, we find the record clearly and convincing supports the sentence imposed by the trial court. The sentence of nine months was within the statutory framework set forth in R.C. 2929.14(A)(4) for a felony of the fourth degree. Further, the trial court stated in its sentencing entry that it had considered the record, oral statements, and the presentence investigation report, as well as the principles and purposes of sentencing set forth in R.C. 2929.11 and the seriousness and recidivism factors set forth in R.C. 2929.12. The sentence is therefore not contrary to law.

{¶27} An appeal is wholly frivolous if the record is devoid of any legal points arguable on the merits. *State v. Middaugh*, 5th Dist. Coshocton No. 02 CA 17, 2003-Ohio-91, ¶ 13. If the appellate court determines the appeal is frivolous, it may then grant counsel's request to withdraw and then dismiss the appeal without violating any constitutional requirements, or the court can proceed to a decision on the merits if state law requires it. *Anders* at 744.

{¶28} In this case, the requirements in *Anders* have been satisfied. Upon our independent review of the record, we agree with counsel's conclusion that no arguably meritorious claims exist upon which to base an appeal. Hence, we find the appeal to be wholly frivolous under *Anders,* grant counsel's request to withdraw, and affirm the

judgment of the Licking County Court of Common Pleas. See, *State v. Hill*, 5th Dist. Licking No. 15-CA-13, 2016-Ohio-1214, ¶ 20, appeal not allowed, 147 Ohio St.3d 1412, 2016-Ohio-7455, 62 N.E.3d 185.

CONCLUSION

{¶29} Counsel's motion to withdraw is granted. The judgment of the Ashland County Court of Common Pleas is affirmed.

By: Delaney, P.J.,

Gwin, J. and

Hoffman, J., concur.