

[Cite as *State v. Phillips*, 2017-Ohio-9379.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO)	CASE NO. 17 BE 0010
)	
PLAINTIFF-APPELLEE)	
)	
VS.)	OPINION
)	
JOHN RICHARD PHILLIPS)	
)	
DEFENDANT-APPELLANT)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas of Belmont County, Ohio Case No. 16 CR 224
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JUDGMENT:	Affirmed.
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APPEARANCES:

For Plaintiff-Appellee:	Atty. Daniel P. Fry Belmont County Prosecutor Atty. J. Kevin Flanagan Assistant Prosecuting Attorney 147-A West Main Street St. Clairsville, Ohio 43950 No Brief Filed
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For Defendant-Appellant:	Atty. John D. Falgiani, Jr. P.O. Box 8533 Warren, Ohio 44484
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JUDGES:

Hon. Cheryl L. Waite
Hon. Mary DeGenaro
Hon. Carol Ann Robb

Dated: December 18, 2017

[Cite as *State v. Phillips*, 2017-Ohio-9379.]
WAITE, J.

{¶1} Appellant John Richard Phillips appeals a February 8, 2017 Belmont County Common Pleas Court decision finding him guilty of three counts of burglary. Appellant's counsel filed a no merit brief requesting leave to withdraw. A complete review of the case reveals no potentially meritorious issues. Accordingly, appointed counsel's motion to withdraw is granted. Appellant's convictions and sentence are affirmed.

Factual and Procedural History

{¶2} On January 24, 2017, a bill of information was presented charging Appellant with three counts of burglary, a felony of the third degree in violation of R.C. 2911.12(A)(3). On the same date, Appellant waived indictment and pleaded guilty to all counts as charged in accordance with a Crim.R. 11 plea agreement. The state did not recommend a specific prison sentence. The state agreed that it would not oppose judicial release.

{¶3} Appellant was sentenced to thirty-six months of incarceration per count which the court ordered to run consecutively, for an aggregate total of nine years of incarceration. The court credited Appellant with 85 days of jail time served. The court also ordered Appellant to pay \$1,885 in restitution. This timely appeal followed. On September 6, 2017, Appellant filed a request for modification of his sentence. In light of this pending appeal, the trial court denied the motion.

No Merit Brief

{¶4} Appellant's counsel seeks to withdraw from the appeal after finding no meritorious arguments for appeal. This filing is known as a no merit brief or an

Anders brief. See *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.E.2d 493 (1967). In our district, this filing is also referred to as a *Toney* brief. See *State v. Toney*, 23 Ohio App.2d 203, 262 N.E. 2d 419 (7th Dist.1970).

{¶15} In *Toney*, we established the procedure to be used when appellate counsel wishes to withdraw from a case deemed a frivolous appeal.

3. Where a court-appointed counsel, with long and extensive experience in criminal practice, concludes that the indigent's appeal is frivolous and that there is no assignment of error which could be arguably supported on appeal, he should so advise the appointing court by brief and request that he be permitted to withdraw as counsel of record.

4. Court-appointed counsel's conclusions and motion to withdraw as counsel of record should be transmitted forthwith to the indigent, and the indigent should be granted time to raise any points that he chooses, *pro se*.

5. It is the duty of the Court of Appeals to fully examine the proceedings in the trial court, the brief of appointed counsel, the arguments *pro se* of the indigent, and then determine whether or not the appeal is wholly frivolous.

* * *

7. Where the Court of Appeals determines that an indigent's appeal is wholly frivolous, the motion of court-appointed counsel to withdraw as counsel of record should be allowed, and the judgment of the trial court should be affirmed.

Id. at syllabus.

{¶16} On June 2, 2017, appellate counsel filed a no merit brief in this matter. On July 20, 2017, we entered a judgment entry informing Appellant that his counsel had filed a no merit brief and gave him thirty days to file his own brief. Appellant failed to file a brief. Accordingly, we must independently examine the record to determine whether there are any potentially meritorious issues in this matter. Counsel asserts that he has reviewed the plea colloquy, sentence, and questions of ineffective assistance of counsel.

Plea Hearing

{¶17} Pursuant to Crim.R. 11(C), a trial court must advise a defendant of certain rights before the court can accept the defendant's plea. These rights are divided into constitutional and nonconstitutional rights. Beginning with a defendant's constitutional rights, a trial court must advise a defendant of the following: (1) right to a jury trial; (2) right to confront witnesses against him; (3) compulsory process to obtain witnesses in his favor; (4) the state's burden to prove his guilt beyond a reasonable doubt at a trial; and (5) that he cannot be compelled to testify at trial. *State v. Bell*, 7th Dist. No. 14 MA 0017, 2016-Ohio-1440, ¶ 9, citing Crim.R 11(C)(2); *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 19-21. In

order for the defendant's plea to be valid, the trial court must strictly comply with these requirements. *Veney* at ¶ 31.

{¶8} The trial court must also advise a defendant of his nonconstitutional rights: (1) the nature of the charges; (2) the maximum penalty the defendant is subject to, including postrelease control, if applicable; (3) whether the defendant is eligible for probation or community control sanctions; and (4) that a trial court may immediately proceed to sentencing after the plea is accepted. *Id.* at ¶ 10-13. Unlike the constitutional rights, a trial court need only substantially comply with these requirements. *Id.* "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." *Bell* at ¶ 10, citing *Veney* at ¶ 15. If the advisement of a defendant's nonconstitutional rights is not substantially complied with, the defendant must demonstrate a prejudicial effect. *Id.*

{¶9} During the colloquy, the trial court informed Appellant of his right to a jury trial where the state would be required to prove each element beyond a reasonable doubt, his right to compel witnesses to testify on his behalf, his right to confront witnesses against him, and that he could not be compelled to testify at trial. (1/24/17 Plea Hrg. Tr., pp. 8-10.) As such, the trial court strictly complied with advising Appellant of his constitutional rights.

{¶10} The trial court also advised Appellant of the charges against him and that the maximum penalty was 36 months of incarceration per count and a \$10,000 fine per count. (*Id.* at p. 3.) The court informed him that he would be subject to

postrelease control and advised him of the consequences if he were to violate postrelease control. (*Id.* at pp. 8-9.) The court told him that he was eligible for community control sanctions. The court also informed him that it could immediately proceed to sentencing after accepting his guilty plea. Thus, the trial court at least substantially complied with advising Appellant of his nonconstitutional rights.

{¶11} As the record demonstrates that the trial court strictly complied with Appellant's constitutional rights and at least substantially complied with his nonconstitutional rights, there are no appealable issues regarding his plea.

Sentencing

{¶12} An appellate court is permitted to review a felony sentence to determine if it is contrary to law. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 23. Pursuant to *Marcum*, "an appellate court may vacate or modify any sentence that is not clearly and convincingly contrary to law only if the appellate court finds by clear and convincing evidence that the record does not support the sentence." *Id.*

{¶13} When determining a sentence, a trial court must consider the purposes and principles of sentencing in accordance with R.C. 2929.11, the seriousness and recidivism factors within R.C. 2929.12, and the proper statutory ranges set forth in R.C. 2929.14.

{¶14} As noted by appellate counsel, the trial court did not expressly refer to any of these statutes. However, where the court's sentence falls within the statutory limits, "it will be presumed that the trial court considered the relevant factors in the

absence of an affirmative showing that it failed to do so' unless the sentence is 'strikingly inconsistent' with the applicable factors." *State v. Grillon*, 7th Dist. No. 10 CO 30, 2012-Ohio-893, ¶ 131 citing *State v. James*, 7th Dist. No. 07-CO-47, 2009-Ohio-4392, ¶ 50.

{¶15} The maximum penalty for a felony of the third degree is 36 months. R.C. 2929.14 (A)(3)(b). While Appellant received the maximum penalty on all three counts, his sentence is within the permissible statutory range. The record shows that the trial court weighed the seriousness and recidivism factors of R.C. 2929.12. The court noted that Appellant had an extensive criminal record, including both juvenile adjudications and adult convictions. The court also noted that Appellant showed a pattern of alcohol and drug abuse beginning at age twelve but there had been no attempt to seek treatment. The court found that there were no factors supporting the less serious and recidivism factors. The court acknowledged that Appellant could have been charged with felonies of the second degree. The court also stated that it had considered the principles and purposes of sentencing.

{¶16} Although appellate counsel did not expressly review the trial court's imposition of consecutive sentences, a review is provided, here. Pursuant to R.C. 2929.14(C)(4), before a trial court can impose consecutive sentences on a defendant, the court must find:

[T]hat 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.

{¶17} A trial court judge must make the R.C 2929.14(C)(4) findings at the sentencing hearing and must additionally incorporate its findings into the sentencing entry. *State v. Williams*, 2015-Ohio-4100, 43 N.E.3d 797, ¶ 33-34 (7th Dist.), citing *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37. A court need not state reasons to support its finding, nor is it required to use any “magic” or “talismanic” words, so long as it is apparent from the record that the court conducted

the proper analysis. *Id.*, citing *State v. Jones*, 7th Dist. No. 13 MA 101, 2014-Ohio-2248, ¶ 6; *State v. Verity*, 7th Dist. No. 12 MA 139, 2013-Ohio-1158, ¶ 28-29.

{¶18} At the sentencing hearing, the trial court found that consecutive sentences were necessary to protect the public and to punish Appellant. (2/6/17 Sentencing Hrg. Tr., p. 8.) The court found that consecutive sentences were not disproportionate to the seriousness of Appellant's conduct. The court also found Appellant's conduct was so great or unusual that a single term did not adequately reflect the seriousness of his conduct and that his criminal history demonstrated that consecutive terms were necessary to protect the public.

{¶19} It is noted that the trial court combined the R.C. 2929.14(C)(4)(b), (c) findings. R.C. 2929.14(C)(4)(b) requires a finding that "[a]t 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." Here, the trial court found that the harm was so great or unusual that a single term did not adequately reflect the seriousness of Appellant's conduct. However, the court did not make a finding that at least two offenses were committed as part of a course of conduct. Thus, the trial court did not properly make a finding under R.C. 2929.14(C)(4)(b). However, the court made an additional finding that Appellant's criminal history demonstrates that consecutive sentences are necessary to protect the public. As a trial court is only required to make one finding under R.C.

2929.14(C)(4)(a)-(c), the court in this case properly made a finding pursuant to R.C. 2929.14(C)(4)(c). The court incorporated its R.C. 2929.14(C)(4) findings into its sentencing entry. As such, there are no appealable issues in the trial court's imposition of consecutive sentences.

Ineffective Assistance of Counsel

{¶20} To successfully assert a claim of ineffective assistance of counsel, an appellant must demonstrate that counsel's performance was deficient and must also show resulting prejudice. *State v. White*, 7th Dist. No. 13 JE 33, 2014-Ohio-4153, ¶ 18, citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, 794 N.E.2d 27, ¶ 107.

{¶21} Deficient performance occurs when counsel's performance falls below an objective standard of reasonable representation. *State v. Ludt*, 7th Dist. No. 09 MA 107, 2009-Ohio-2214, ¶ 3, citing *Strickland supra*. In other words, there must be "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Lyons v. Schandel*, 7th Dist. No. 14 CA 898, 2015-Ohio-3960, ¶ 13, citing *Strickland, supra*.

{¶22} Here, Appellant pleaded guilty to all counts as charged. As such, our review is limited to counsel's performance at the plea hearing and sentencing hearing. It is noted that Appellant entered this plea on the same day the bill of information was filed and that Appellant received maximum and consecutive sentences. However, the record is devoid of any evidence of ineffective assistance of counsel.

{¶23} In fact, at the plea hearing, Appellant stated that he was satisfied with his counsel's performance and that counsel reviewed the evidence with him and answered all of his questions. (1/24/17 Plea Hrg. Tr., p. 8.) Also at the plea hearing, trial counsel informed the court of Appellant's history of drug addiction and asked for and was granted an evaluation at a treatment facility. (*Id.* at 12.) As the record does not reflect ineffective assistance of counsel, there are no appealable issues as to trial counsel's performance.

Conclusion

{¶24} For the reasons provided, there are no potentially meritorious issues within this appeal. Accordingly, counsel's motion to withdraw is hereby granted. Appellant's convictions and sentence are affirmed.

DeGenaro, J., concurs.

Robb, P.J., concurs.