

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-934 (C.P.C. No. 08CR-11-8308)
Brian M. Green, Jr.,	:	
Defendant-Appellant.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on December 15, 2011

Ron O'Brien, Prosecuting Attorney, and *Sarah W. Creedon*,
for appellee.

Scott & Nemann, and *Joseph E. Scott*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Brian M. Green, Jr., appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm that judgment.

{¶2} On November 21, 2008, a Franklin County Grand Jury indicted appellant with two counts of aggravated vehicular homicide in violation of R.C. 2903.03, both felonies of the second degree. The charges arose from a car accident involving appellant that killed two women. Appellant entered a not guilty plea to the charges and proceeded

to a jury trial. After two trials both ended in mistrials, appellant entered guilty pleas to two counts of aggravated vehicular homicide in violation of R.C. 2903.03, both felonies of the third degree. The trial court accepted appellant's guilty plea, found him guilty, and sentenced him accordingly.

{¶3} Appellant appealed to this court. Appellant's appellate counsel, however, filed a brief pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, stating that he could find no meritorious issues for appellate review. We notified appellant of his appellate counsel's representations and afforded him ample time to file a pro se brief. Appellant did not file a brief. This case is now before us for our independent review of the record to decide whether the case is wholly frivolous. *Penson v. Ohio* (1988), 488 U.S. 75, 109 S.Ct. 346; *In re D.M.C.*, 10th Dist. No. 09AP-484, 2009-Ohio-6667, ¶10.

{¶4} Appellate counsel identified two possible issues for appeal before concluding they were not meritorious: (1) did the trial court err by sentencing appellant to a maximum sentence for his convictions, and (2) did appellant enter a knowing, voluntary, and intelligent guilty plea when the trial court did not inform him that he was subject to a lifetime driver's license suspension.

Appellant's First Potential Error- Maximum Sentences

{¶5} Appellant first claims the trial court potentially erred by imposing maximum sentences for his two convictions. We disagree.

{¶6} Appellant pled guilty to two counts of aggravated vehicular homicide in violation of R.C. 2903.03, both felonies of the third degree. The trial court sentenced

appellant to five year prison terms for each count, which is the statutory maximum for a felony of the third degree. R.C. 2929.14(A)(3).

{¶7} We review a trial court's sentence to determine if it is clearly and convincingly contrary to law. *State v. Burton*, 10th Dist. No. 06AP-690, 2007-Ohio-1941, ¶19 (standard of review is clearly and convincingly contrary to law); R.C. 2953.08(G). In applying this standard, we look to the record to determine whether the sentencing court considered and properly applied the [non-excised] statutory guidelines and whether the sentence is otherwise contrary to law. *State v. Carse*, 10th Dist. No. 09AP-932, 2010-Ohio-4513, ¶60; *Burton*. However, in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, the Supreme Court of Ohio held in a plurality opinion that an appellate court must apply a two-step approach when reviewing a trial court's sentence: (1) determine whether trial court adhered to all applicable rules and statutes in imposing the sentence; and (2) determine whether a sentence within the permissible statutory range constitutes an abuse of discretion). Under either standard of review, the trial court did not err when it imposed maximum sentences for appellant's convictions. *State v. Swanson*, 10th Dist. No. 10AP-502, 2011-Ohio-776, ¶18 (reviewing maximum sentences under both standards).

{¶8} We see no basis to argue that the trial court failed to consider and apply the appropriate statutory sentencing criteria or that it imposed a sentence not authorized under the applicable statute. The trial court noted in its sentencing entry that it considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors in R.C. 2929.12. See *State v. Vaughn*, 10th Dist. No. 09AP-73, 2009-Ohio-4970, ¶21 (noting that such language in judgment entry belies a claim that the trial court failed to

consider statutory guidelines). Additionally, R.C. 2929.14(A)(3) authorizes a five-year prison sentence for each of appellant's convictions. Therefore, appellant's sentence is not clearly and convincingly contrary to law. *Id.* at ¶22; *State v. Hernton*, 11th Dist. No. 2008-L-104, 2009-Ohio-1487, ¶19 (sentence not contrary to law where trial court considered all statutory guidelines and sentence was within statutory range); *State v. Gray*, 7th Dist. No. 07 MA 156, 2008-Ohio-6591, ¶20-22 (same). Nor did the trial court abuse its discretion when it imposed maximum sentences. The facts here are egregious. Two young people died as the result of a car accident involving appellant, an accident that the trial court¹ concluded was caused by drag racing. (Sentencing Hearing Tr. 23.) The trial court did not err by imposing maximum sentences in this case.

Appellant's Second Potential Error- Guilty Plea

{¶9} Appellant also claims that the trial court potentially violated Crim.R. 11 by accepting his guilty plea that was not knowingly, voluntarily, or intelligently made. Again, we disagree.

{¶10} A trial court must comply with Crim.R.11 when it accepts a guilty plea. Among other requirements, the rule requires a trial court to determine that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, to inform the defendant of and determine that the defendant understands the effect of the plea of guilty. Crim.R.11(C)(2)(a) and (b). A trial court need only substantially comply with these non-constitutional requirements of Crim.R.11. *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, ¶12. Substantial

¹ The same trial judge presided over appellant's two trials and had ample knowledge of the facts in this case.

compliance means that, under the totality of the circumstances, the defendant objectively understands the implication of his plea and the rights he is waiving. *State v. Jones*, 10th Dist. No. 03AP-20, 2003-Ohio-4513, ¶7 (citing *State v. Carter* (1979), 60 Ohio St.2d 34, 38).

{¶11} Appellant claims that the trial court possibly violated Crim.R.11 because it failed to inform him that he was subject to a lifetime driver's license suspension, a possible consequence of his guilty plea. Although the trial court did not personally inform appellant that his convictions subjected him to a possible lifetime driver's license suspension, the plea agreement appellant signed before entering his guilty plea did inform him of this possibility. Therefore, appellant was aware that a lifetime driver's license suspension was a possible consequence of his guilty plea. Accordingly, the trial court substantially complied with Crim.R. 11.

{¶12} Additionally, even if the trial court had not substantially complied with Crim.R. 11, appellant must also demonstrate prejudice as a result. *State v. Terrell*, 10th Dist. No. 09AP-1003, 2010-Ohio-3026, ¶8. In order to establish prejudice in this context, appellant must show that he would not have entered his guilty plea but for the trial court's failure to comply with Crim.R. 11. *State v. Jones*, 10th Dist. No. 03AP-20, 2003-Ohio-4513, ¶10. Appellant does not make this showing and, in fact, concedes that there is no reason to believe that he would not have entered his guilty plea otherwise. Based on the record before us, we agree with that concession.

{¶13} After our independent review of the record, we are unable to find any non-frivolous issues for appeal, and we agree that the issues raised in appellant's *Anders* brief

are not meritorious. Accordingly, we find no error in the trial court's judgment of conviction and sentence pursuant to appellant's guilty plea. *State v. Hinkle*, 10th Dist. No. 07AP-911, 2008-Ohio-4002, ¶12. The judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

SADLER and DORRIAN, JJ., concur.
