[Cite as *State v. Hicks,* 2009-Ohio-2740.]

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

STATE OF OHIO	:	
	:	Appellate Case No. 22786
Plaintiff-Appellee	:	
	:	Trial Court Case No. 08-CR-444
v.	:	
	:	(Criminal Appeal from
DONALD R. HICKS	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 5th day of June, 2009.

. . . . . .

MATHIAS H. HECK, JR., by KELLY D. MADZEY, Atty. Reg. #0079994, Montgomery County Prosecutor's Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

DONALD R. HICKS, Inmate #578-535, Ross Correctional Institution, P.O. Box 7010, Chillicothe, Ohio 45601
Defendant-Appellant

SCOTT N. BLAUVELT, Atty. Reg. #0068177, 246 High Street, Hamilton, Ohio 45011
Attorney for Defendant-Appellant

. . . . . .

FAIN, J.

{¶ 1} Defendant-appellant Donald R. Hicks appeals from his conviction and sentence, following a guilty plea, on one count of Felonious Assault, in violation of R.C.

2903.11(A)(1), a second-degree felony. Hicks's assigned appellate counsel has filed a brief under the authority of *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, indicating that he could find no potential assignments of error having arguable merit. Neither can we. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 2} In January, 2008, a complaint was filed in the Kettering Municipal Court charging Hicks with having engaged in sexual conduct with his daughter, who was under the age of thirteen at the time. On April 28, 2008, Hicks appeared in the Montgomery County Common Pleas Court. At that time, it was reported to the trial court that Hicks and the State had "worked out a resolution" whereby Hicks would be charged by a bill of information with Felonious Assault, a felony of the second degree, Hicks would waive indictment, and Hicks would plead guilty to the charge. Hicks would also waive notice of the bill of information. The charge of sexual conduct with a minor, which had apparently resulted in an indictment, would be dismissed. The victim of the Felonious Assault to which Hicks would plead guilty would be his daughter, the same as the victim of the sexual conduct charge.

{¶ 3} The trial court conducted a colloquy with Hicks in which the trial court explained the significance of the waivers and Hicks's plea of guilty. Hicks denied that he was under the influence of drugs, alcohol or medication. He also denied that there was "anything that would keep [him] from understanding what's going on here." The trial court explained the penalties to which Hicks would be subject, and ascertained that had gone over the Felonious Assault charge with his trial counsel. The trial court then

accepted Hicks's guilty plea, and set a sentencing hearing. In his pro se brief, Hicks contends that he entered the functional equivalent of an *Alford* plea, being a plea accompanied by a protestation of innocence. *North Carolina v. Alford* (1970), 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162. But at no point during the plea colloquy did Hicks protest, or even suggest, that he was innocent.

{¶ 4} On May 23, 2008, Hicks appeared in open court for sentencing. The trial court had a pre-sentence investigation report, which we have read. The trial court listened to a statement by the mother of the victim, who asked for the maximum penalty. The trial court then listened to Hicks's trial counsel speak on the issue of the sentence. Trial counsel did not suggest that Hicks was innocent of the charge.

{¶ 5} Finally, the trial court invited Hicks to speak. The entire text of his statement to the trial court is as follows:

{¶ 6} "Obviously, I do love my daughter. I hope the best for her. Obviously, I have no communication the last four months. Do not plan on harming her in any way and never would. Her mother stated her child, it is our child that I did raise for eight years while her Mom was in and out of her life and not there completely for her maybe like she should have been. Just this last year, she decided to stand by her visitation every other weekend and (indiscernible) just happened. And obviously she's not going to be a part of my life anymore. Well, but not by my choice."

{¶ 7} We have watched the videotape of the proceedings. While we cannot be sure of what was said, the antepenultimate sentence sounds as though it should read: "Just this last year, she decided to stand by her visitation every other weekend and, of course, this happened."

{¶ 8} Even at the sentencing hearing, which several weeks after the trial court accepted Hicks's guilty plea, Hicks did not clearly protest his innocence, asserting merely that he did not then plan on harming his daughter in any way and that he never would. This is not clearly incompatible with having admitted that he had assaulted her.

{¶ 9} The presentence investigation report, which was not available to the trial court at the plea hearing, but which was available by the sentencing hearing, does reflect that Hicks denied the specific accusation against him (digital penetration), and claimed that any improper touching was inadvertent – the result of his daughter having lain down beside him while he was asleep.

{¶ 10} The trial court sentenced Hicks to imprisonment for five years, a sentence in the middle of the range of two to eight years that was available to the trial court. From his conviction and sentence, Hicks appeals.

{¶ 11} Hicks's assigned counsel has filed an *Anders* brief, indicating that he could find no potential assignments of error having arguable merit. Counsel did indicate that he had considered:

{¶ 12} "(1) Whether the trial court erred in weighing the statutory sentencing factors and imposing a prison sentence for a first-time felony offender; [and]

{¶ 13} "(2) Whether the trial court erred in imposing a prison sentence in excess of the minimum sentence of two years for a felony of the second degree."

{¶ 14} We agree with appellate counsel that these potential assignments of error have no arguable merit. Under *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, a trial court has discretion when imposing a felony sentence. We cannot say that the trial court abused its discretion when imposing the sentence that it did. The offense of which

Hicks was accused – digital penetration of a child under the age of thirteen – is a felony of the first degree. Furthermore, it is a Tier III sex offense, with lifetime registration and community-notification requirements. Hicks had already received a substantial break by being allowed to plead to Felonious Assault, instead. Furthermore, Hicks's relationship to the victim facilitated the offense.

{¶ 15} In his pro se brief, Hicks first assigns as error that his *appellate* counsel was ineffective for having failed to raise certain assignments of error. We agree with the State that a claim of ineffective assistance of appellate counsel is not cognizable in the direct appeal in which the alleged ineffective assistance of appellate counsel has occurred. See *State v. Leigh* (November 2, 2001), Montgomery App. No. 18294. This works no hardship on a defendant-appellant whose assigned counsel has filed an *Anders* brief. To establish ineffective assistance of appellate counsel, the appellant would have the burden of establishing that his appellate counsel's representation fell below an objectively reasonable standard of representation and that, as a result, he was prejudiced. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136. But in filing his pro se brief, the defendant-appellant has the much easier task of identifying a potential assignment of error having arguable merit; i.e., a potential assignment of error that renders the appeal other than wholly frivolous. Once we agree with the defendant-appellant that there is a potential assignment of error having arguable merit, it is our duty to assign new counsel who can make that argument for him.

{¶ 16} In his Second Assignment of Error in his pro se brief, Hicks identifies as an assignment of error that his appellate counsel should have raised, that Hicks was

constitutionally entitled to a minimum sentence term because he was a first-time offender, and did not commit the "worst form" of the offense. Hicks relies upon parts of the sentencing statute – R.C. 2929.14(B)(1) and (2), and (C) – that have been severed from the statute as unconstitutional in *State v. Foster*, supra, as well as cases that pre-date *Foster*. After *Foster*, "trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than minimum sentences." *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 1. Consequently, we reject Hicks's Second Assignment of Error as having no arguable merit.

{¶ 17} In his Third Assignment of Error, Hicks argues that the trial court abused its discretion by failing to impose community control sanctions, rather than a prison term. Hicks acknowledges that he has not read the pre-sentence investigation report, but states that "he does assume that the probation department did recommend community control." This assumption is not borne out by the record. Although the probation department did not recommend a specific prison sentence, it did recommend that a prison sentence be imposed, specifically opining that "to avoid any type of incarceration, would demean the seriousness of this offense."

{¶ 18} We conclude that any contention that the trial court abused its discretion by failing to impose a community control sanction, as opposed to incarceration, has no arguable merit.

{¶ 19} In a "Supplemental Amendment" to his pro se brief, Hicks offers a Fourth Assignment of Error: "The trial Court erred when it sentenced the Defendant to consecutive sentences without making factual findings on the record, or to a jury."

There is nothing in the record to support this assignment of error. The sentencing entry imposes a single sentence, for a single offense. No reference is made to any other sentence to which the five-year sentence imposed in this case could be ordered to be served consecutively. Therefore, we find no arguable merit to this proposed assignment of error.

{¶ 20} In the performance of our duty, under *Anders v. California*, supra, to conduct an independent review of the record, we have found no potential assignments of error having arguable merit. We conclude that this appeal is wholly frivolous. Therefore, the judgment of the trial court is Affirmed.

. . . . . .

DONOVAN, P.J., and GRADY, J., concur.

Copies mailed to:

Mathias H. Heck
Kelly D. Madzey
Donald R. Hicks
Scott N. Blauvelt
Hon. A. J. Wagner