[Cite as *State v. Garza*, 2010-Ohio-5043.]

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

STATE OF OHIO

Plaintiff-Appellee

v.

JORGE GARZA

Defendant-Appellant

Appellate Case No. 09-CA-91

Trial Court Case No. 08-CR-441(A)

(Criminal Appeal from
Common Pleas Court)

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O P I N I O N

Rendered on the 15th day of October, 2010.

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FAIN, J.

{¶ 1} Defendant-appellant Jorge Garza appeals from his conviction and sentence, following a guilty plea, for Felonious Assault, with a Firearm Specification. Garza's assigned 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 counsel could find no assignments of error having arguable merit. By entry, we informed Garza that his assigned counsel had filed an *Anders* brief, and gave Garza 60 days within which to file his own, pro se brief. Garza has not done so. The State has also not filed a brief.

{¶ 2} This court has performed its independent duty, as required by *Anders v. California*, *supra*, to review the record to see whether there are any potential assignments of error having arguable merit. We find none.

I

{¶ 3} Garza was indicted in June 2008, on two counts of Felonious Assault, in violation of R.C. 2903.11(A)(2). Each count carried two firearm specifications. The case was scheduled for trial on October 27, 2008. On the morning of trial, the parties informed the court that a negotiated settlement had been reached. The transcript of the hearing indicates that the agreement was as follows: Garza would plead to the first count of Felonious Assault in the Indictment, and to the second of the two firearm specifications, which stated that Garza had possessed a firearm and used or brandished it during the course of the offense. In exchange, the State would agree to a two-year sentence on Felonious Assault, to be served consecutively with the three-year sentence on the firearm specification, for a total of five years. The parties

further agreed that Garza would be considered for judicial release when he became eligible. The State also agreed to dismiss the remaining counts in the pending case (08CR-441), and to dismiss all counts and specifications in another case pending against Garza (08CR-321).

{¶ 4} The State indicated that the facts were that in April 2008, Garza had discharged rounds from a firearm at a motor vehicle that was being driven away from the vicinity of 1351 Woodward Avenue. The vehicle was occupied by two individuals.

{¶ 5} Garza's counsel confirmed that the State had correctly stated the facts and negotiations. Counsel then stated that Garza would tender a guilty plea to the charge of Felonious Assault. Garza told the court that he had heard what had been stated by the attorneys regarding the negotiated plea. See Transcript of Sentencing Hearing, pp. 3-4. Garza also said that he could speak English, could read, was a United States citizen, had been given a written plea agreement, and had reviewed the agreement with his attorney. Id. at 4 and 7. In addition, Garza told the court that he understood what was in the plea agreement, and had signed it. Id. at. 4.

{¶ 6} The trial court then explained Garza's rights and the potential sentence, ascertained that he understood them, and accepted Garza's guilty plea.. The court imposed a two-year prison sentence on the Felonious Assault charge, and a three-year sentence on the firearm specification, to be served consecutively, as agreed by the parties. The signed plea agreement was also filed the next day. Garza filed a motion for delayed appeal nearly a year after his conviction and sentence.

II

{¶ 7} Counsel has directed us to two potential assignments of error: (1) that the trial court erred in accepting Garza's guilty plea; and (2) that the trial court erred in imposing a five-year prison sentence. Counsel has also raised a potential issue related to Garza's complaints against his trial attorney. Counsel concludes, however, that the issues concerning trial counsel are more appropriate for a post-conviction relief action.

{¶ 8} We agree with trial counsel that the potential assignments of error have no arguable merit. Consistently with Crim. R. 11(F), the underlying agreement was placed on the record in open court. Furthermore, before accepting Garza's plea, the trial court ascertained that Garza could speak English and could read, and that Garza understood the charges against him. Garza also signed a written plea agreement, which stated that he understood the nature of the charges and possible defenses he might have. The record expressly reflects that the trial court ascertained, before accepting Garza's plea, that Garza understood the nature of the charge to which he was pleading guilty.

{¶ 9} Accordingly, we agree with Garza's appellate counsel that there is no arguable merit to an assignment of error to the effect that the trial court accepted the plea without first determining that Garza understood the nature of the charge against him, in violation of Crim.R. 11(C)(2). There is also no arguable merit to a contention that the trial court violated Crim. R. 11(F) by failing to place the agreement on the record.

{¶ 10} We have additionally reviewed Garza's response to the show cause order that we filed in October 2009. The order asked Garza to respond to the fact that his

notice of appeal was not filed within thirty days after his conviction and sentence. Garza responded to the show cause order in November 2009. In responding to the order, Garza stated that he did not fully understand his plea agreement and sentence, because he is Hispanic and his understanding is not good, even though his English language abilities are fair. Garza also stated that his trial attorney did not explain certain matters to him and that he had been "tricked" into taking the plea agreement. We agree with appellate counsel that these matters would be more appropriately raised in a petition for post-conviction relief. The record does not reflect any of the matters that Garza mentions. In fact, the transcript indicates that Garza told the trial court that he could speak English, that he could read and write, that he understood the charges, and that he had graduated from high school. Garza also expressed satisfaction with his attorney. Matters not of record must be raised in post-conviction proceedings, not on direct appeal. See, *e.g., State v. Timmons* (Dec. 11, 1991), Greene App. No. 90-CA-31.

{¶ 11} Finally, we agree with Garza's appellate counsel that there is no arguable merit to the contention that the trial court erred in imposing a five-year sentence. R.C. 2953.08(D)(1) provides that:

{¶ 12} "A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge."

{¶ 13} In *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, the Supreme Court of Ohio held that "A sentence is 'authorized by law' and is not appealable within the meaning of R.C. 2953.08(D)(1) only if it comports with all mandatory sentencing

provisions." Id. at paragraph two of the syllabus. Garza's appellate counsel points out that the trial court followed all mandatory sentencing provisions. We agree.

{¶ 14} The sentence in the case before us was recommended jointly by the State and the defendant, and was accepted and followed by the trial court. The potential penalty for Felonious Assault, a second-degree felony, is from two to eight years. R.C. 2929.14(A)(2). Garza received the minimum sentence of two years, as agreed. This sentence, by statute, must be served after, and consecutively to, the mandatory three-year term for the firearm specification. See R.C. 2929.14(D)(1)(a) and (E). Because the trial court followed all mandatory sentencing procedures, Garza's sentence would not be appealable, and there would be no arguable merit to a contention that the trial court erred in imposing a five-year sentence.

{¶ 15} We agree with appellate counsel that there are no potential assignments of error having arguable merit, and that Garza's appeal is wholly frivolous. Accordingly, the judgment of the trial court is Affirmed.

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GRADY and FROELICH, JJ., concur.

Copies mailed to:

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