

[Cite as *State v. Wheeler*, 2013-Ohio-3387.]

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

STATE OF OHIO	:	
	:	Appellate Case No. 25633
Plaintiff-Appellee	:	
	:	Trial Court Case No. 2012-CR-3650
v.	:	
	:	
ANDREW T. WHEELER	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	

.....

O P I N I O N

Rendered on the 2nd day of August, 2013.

.....

MATHIAS H. HECK, JR., by CARLEY J. INGRAM, Atty. Reg. #0020084, 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

LUCAS WILDER, Atty. Reg. #0074057, 120 West Second Street, 400 Liberty Tower, Dayton, Ohio 45402
Attorney for Defendant-Appellant

.....

FAIN, P.J.

{¶ 1} Defendant-appellant Andrew Wheeler appeals from his conviction and

sentence, following a guilty plea, for one count of Rape (impaired victim), in violation of R.C. 2907.02(A)(1)(c). The mandatory three-year sentence imposed was agreed upon by the parties.

{¶ 2} Wheeler's assigned appellate counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), indicating that he could find no potential assignments of error having arguable merit. By entry herein filed May 22, 2013, we afforded Wheeler the opportunity to file his own, pro se brief. He has not done so.

{¶ 3} In his brief, Wheeler's counsel states:

There were no pretrial motions or hearings. This matter did not proceed to trial. The parties jointly agreed that Mr. Wheeler would plead guilty to rape and receive three years in prison (the minimum on a first degree felony). The trial court abided by the parties' agreement. Therefore, his sentence is not reviewable under O.R.C. §2953.08(D)(1). The trial court orally notified Mr. Wheeler it would impose costs. Tr., p. 5; *State v. Joseph*, 125 Ohio St.3d 76 [2010-Ohio-954, 926 N.E.2d 278].

Counsel has examined whether the trial court conducted a proper Rule 11 plea. Counsel found no issue with the taking of the plea. With regard to sentencing, however, the trial court initially erred when it advised Mr. Wheeler he would be subject to post-release control for only three years. Tr., p. 11. A first degree felony rape carries a post-release control option of five years. O.R.C. §2967.28(B)(1). Nonetheless, the trial court caught its error and corrected it before sentencing was completed. Mr. Wheeler was advised he

would be subject to the five years post release control. Tr., p. 14.

Counsel also considered issues presented by Mr. Wheeler via letter. One of the issues brought to counsel’s attention was the possibility that Mr. Wheeler was intoxicated when he wrote an incriminating statement. Unfortunately, counsel’s review on appeal is limited to matters in the record. No motion to suppress was filed to argue on this issue. Therefore, this issue is non-reviewable.

A second issue raised was whether Mr. Wheeler was correctly explained “mandatory time.” Pursuant to O.R.C. §2929.13(F)(2), prison time for a rape (a first degree felony) is mandatory. At sentencing, the trial court did not give Mr. Wheeler a treatise on what mandatory time meant but did give him a CliffsNotes version. The trial court noted, “[A]nd it’s mandatory, so it’s not reduced by judicial release, earned credit or furlough.” Tr., p. 6. While brief, the explanation was sufficiently clear as to what mandatory time means.

{¶ 4} Based upon our review of the entire record, we find no flaws in appellate counsel’s factual or legal conclusions. We have performed our duty, under *Anders v. California, supra*, to review the record, including the transcript of the proceeding in which Wheeler pled guilty and was sentenced, independently. We have found no potential assignments of error having arguable merit. The judgment of the trial court is Affirmed.

.....

FROELICH and WELBAUM, JJ., concur.

Copies mailed to:

- Mathias H. Heck
- Carley J. Ingram
- Lucas W. Wilder
- Andrew T. Wheeler

Hon. Barbara P. Gorman