[Cite as *State v. McMahon*, 2015-Ohio-2878.]

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

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 2014-CA-98
	:	
v.	:	Trial Court Case No. 2013-CR-656
	:	
ANDRE L. MCMAHON	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 17th day of July, 2015.

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WELBAUM, J.

{¶ 1} This matter is before the court in connection with a brief filed on behalf of Defendant-Appellant, Andre McMahon, pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). In the brief, McMahon's counsel indicates that she can find no arguably meritorious issues for appellate review. We gave McMahon 60 days to file a pro se brief, but he failed to do so. After an independent and thorough review of the record, we find no non-frivolous issues for review. Accordingly, the judgment of the trial court will be affirmed.

I.

{¶ 2} McMahon is appealing from his conviction and sentence for possession of heroin in an amount equal to or more than ten grams but less than 50 grams, a felony of the second degree. Following a guilty plea, McMahon was sentenced to six years in prison. The trial court also imposed a mandatory fine of $7,500, and ordered McMahon to forfeit $4,134 in currency.

{¶ 3} McMahon did not appeal from his conviction. However, on September 3, 2014, McMahon filed a motion asking to file a delayed appeal. We granted his motion, and appointed counsel, who filed an *Anders* brief.

{¶ 4} The standards to be applied in this situation are well-established. In *State v. McDaniel*, 2d Dist. Champaign No. 2010 CA 13, 2011-Ohio-2186, we observed that:

> In *Anders*, the United States Supreme Court held that if counsel does a conscientious examination of the case and determines an appeal to be frivolous, counsel should advise the court and then should request permission to withdraw. *Anders*, 386 U.S. 744. Counsel must also give

> his/her client a copy of the brief along with the request to withdraw. *Id*. The appellant then must be given sufficient time to raise any matters he so chooses. *Id.* After those requirements are satisfied, the appellate court must conduct a thorough examination of the proceedings to determine if the appeal is actually frivolous. *Id*. If the appellate court does determine the appeal is frivolous, it may then grant counsel's request to withdraw and then dismiss the appeal without violating any constitutional requirements, or the court can proceed to a decision on the merits if state law requires it. *Id.*

McDaniel at ¶ 5.

{¶ 5} "*Anders* equates a frivolous appeal with one that presents issues lacking in arguable merit. An issue does not lack arguable merit merely because the prosecution can be expected to present a strong argument in reply, or because it is uncertain whether a defendant will ultimately prevail on that issue on appeal. An issue lacks arguable merit if, on the facts and law involved, no responsible contention can be made that it offers a basis for reversal." (Citation omitted.) *State v. Marbury*, 2d Dist. Montgomery No. 19226, 2003-Ohio-3242, ¶ 8, citing *State v. Pullen*, 2d Dist. Montgomery No. 19232, 2002 WL 31769193 (Dec. 6, 2002).

{¶ 6} McMahon's brief did not set forth a specific potential assignment of error, although the discussion indicates that counsel considered and rejected a potential argument about the probable cause for the traffic stop.

{¶ 7} Before addressing this issue, we note that McMahon's statement of facts includes matters not contained in the record, apparently gleaned from discussions with McMahon's former counsel. However, on appeal, we can only consider items that are

included in the original record. *State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500 (1978), paragraph one of the syllabus.

{¶ 8} According to the record, an Ohio State trooper stopped McMahon on August 27, 2013, while McMahon was driving a Chevrolet Suburban in the vicinity of Fountain and Glenwood Avenues in Springfield, Ohio. The alleged traffic violation was based on the vehicle's window tint. During the course of the stop, McMahon was asked to step out of the vehicle, and the officer observed a plastic bag containing marijuana. A search of the vehicle yielded 13.33 grams of heroin, which was located behind the rear passenger seat in the seat pouch. McMahon also had $4,134 in currency in his possession.

{¶ 9} In September 2013, McMahon was indicted on one count of trafficking in heroin in an amount equaling or more than 10 grams and less than 50 grams, a second degree felony, and on one count of possession of heroin in an amount equaling or more than 10 grams and less than 50 grams, also a second degree felony. Both counts had forfeiture specifications regarding the currency.

{¶ 10} On January 9, 2014, McMahon filed a motion to suppress, challenging the probable cause for the search. At a pretrial held on January 10, 2014, the trial court indicated that it would set the motion for hearing prior to the trial, which was scheduled for January 29, 2014. Subsequently, on January 15, 2014, McMahon filed a motion for a continuance.

{¶ 11} In support of the continuance, McMahon indicated that his expert's preliminary conclusion was that the window tint was probably not legal, but the expert thought it unlikely that the marijuana container would have been visible while McMahon was seated in the vehicle. Counsel stated that he planned to have the expert follow up

on this issue, but the expert would be out of town between January 15 and February 15, 2014. The trial court granted the continuance, and scheduled a suppression hearing for February 21, 2014.

{¶ 12} However, no suppression hearing was held on February 21, 2014. Instead, McMahon appeared in court and pled guilty to possession of heroin, as charged, which carried a mandatory prison sentence of between two and eight years. In exchange, the trafficking charge was dismissed. The court set a sentencing hearing for March 12, 2014, and on that date, sentenced McMahon to six years in prison, a $7,500 mandatory fine, and forfeiture of the currency found in his possession at the time of the arrest.

{¶ 13} By pleading guilty, "a defendant waives the right to raise on appeal the propriety of a trial court's suppression ruling." (Citations omitted.) *State v. Bogan*, 8th Dist. Cuyahoga No. 84468, 2005-Ohio-3412, ¶ 14. In some situations, courts have attached significance to whether a defendant was informed about waiver of a right to appeal pre-trial rulings, including rulings on a motion to suppress. *See, e.g., State v. Webb*, 2d Dist. Montgomery No. 26198, 2015-Ohio-553, ¶ 16; *State v. Jacobson*, 4th Dist. Adams No. 01CA730, 2003-Ohio-1201, ¶ 11-15 (considering issue in context of ineffective assistance of counsel, and concluding that in absence of evidence on the record, issue would have to be subject of post-conviction remedy).

{¶ 14} However, this would be irrelevant where the trial court never held a hearing and did not make a decision on suppression, unless the record demonstrates that the defendant was somehow misled by counsel on the issue. There is nothing in the record before us to indicate that this occurred. Accordingly, any issue about the propriety of the

search has no arguable merit.

{¶ 15} Pursuant to *Anders*, 386 U.S. at 744, 87 S.Ct. 1396, 18 L.Ed.2d 493, we have performed our duty to review the record independently, to see if any potential assignments of error exist that have sufficient merit to make the appeal not wholly frivolous. In his motion for a delayed appeal, McMahon raised an issue regarding his plea, claiming that he had not been informed of the allied offenses doctrine. McMahon contended that the State's agreement to dismiss one charge where the only two charged offenses are allied offenses is inadequate consideration for a plea bargain, and that, under these circumstances, McMahon could not have knowingly, voluntarily, or intelligently entered a guilty plea.

{¶ 16} "Upon the entry of a guilty plea, a defendant waives any and all appealable errors that might have occurred during the trial court proceedings, unless he or she demonstrates that the alleged errors precluded him or her from entering a knowing, voluntary plea." *State v. Kocian*, 6th Dist. Ottawa No. OT-07-018, 2008-Ohio-74, ¶ 8, citing *State v. Kelley*, 57 Ohio St.3d 127, 566 N.E.2d 658 (1991), and *State v. Barnett*, 73 Ohio App.3d 244, 248, 596 N.E.2d 1101 (2d Dist. 1991).

{¶ 17} As a general rule, a "court is not obligated to inform the defendant of anything beyond what is required by Crim.R. 11 before accepting a guilty plea * * *." (Citation omitted.) *State v. Mavroudis*, 7th Dist. Columbiana No. 02 CO 44, 2003-Ohio-3289, ¶ 25. However, the issue is not whether the trial court properly informed McMahon before accepting his plea. The issue is whether McMahon can make a responsible contention that his conviction and sentence should be reversed because the plea agreement was void for lack of consideration. *Marbury*, 2d Dist. Montgomery

No. 19226, 2003-Ohio-3242, at ¶ 8.

{¶ 18} The Supreme Court of Ohio has held that "[p]rinciples of contract law are generally applicable to the interpretation and enforcement of plea agreements" *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, ¶ 50, citing *United States v. Wells*, 211 F.3d 988, 995 (6th Cir. 2000). " 'A contract is generally defined as a promise, or a set of promises, actionable upon breach. Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration.' " *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶ 16, quoting *Perlmuter Printing Co. v. Strome, Inc*., 436 F.Supp. 409, 414 (N.D.Ohio 1976).

{¶ 19} The Supreme Court of Ohio has also stressed its "long-established precedent that courts may not inquire into the adequacy of consideration, which is left to the parties as ' "the sole judges of the benefits or advantages to be derived from their contracts." ' " *Williams v. Ormsby*, 131 Ohio St.3d 427, 2012-Ohio-690, 966 N.E.2d 255, ¶ 17, quoting *Hotels Statler Co., Inc. v. Safier*, 103 Ohio St. 638, 644-645, 134 N.E. 460 (1921). (Other citation omitted.) However, the court has also said that "whether there is consideration at all is a proper question for a court." *Williams* at ¶ 43. For example, " 'where a guilty plea is brought about by a promise that is legally impossible to fulfill, not only has the prosecution failed in its duty, but the defense counsel has rendered incompetent advice by not advising the defendant that portions of the plea bargain agreement are not legally fulfillable.' " *State v. Aponte*, 145 Ohio App.3d 607, 614, 763 N.E.2d 1205 (10th Dist.2001), quoting *State ex rel. Morris v. Mohn*, 165 W.Va. 145, 267

S.E.2d 443 (1980).

{¶ 20} As was noted, McMahon contends that the plea bargain lacked consideration because the State only agreed to dismiss a trafficking charge that would have been required to be merged with the possession charge. In *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, the Supreme Court of Ohio indicated that, under the facts of that case, the defendant's possession and trafficking offenses were allied offenses, and that the convictions must be merged on remand. *Id.* at ¶ 10. The stated facts in *Whitfield* are similar to those in the case before us, i.e., the defendant in *Whitfield* was stopped for a traffic offense, and drugs and currency were discovered during a search of the vehicle and the defendant. *See State v. Whitfield*, 8th Dist. Cuyahoga No. 90244, 2008-Ohio-3150, ¶ 2.

{¶ 21} Lack of consideration has not been discussed much, if at all, in the context of plea agreements, other than in situations like the one in *Aponte*, where the prosecution's promise is alleged to be illusory. Recently, however, the Fourth District Court of Appeals rejected a defendant's argument that his plea agreement lacked consideration because the charge to which he had pled was an allied offense of the charge that was dismissed as a result of the plea bargain. *State v. Moore*, 4th Dist. Adams No. 13CA965, 2014-Ohio-3024. In *Moore*, the defendant was charged with murder and child endangering, and pled guilty to murder in exchange for the State's dismissal of the child endangering charge. *Id.* at ¶ 1. On appeal, Moore contended that his guilty plea lacked consideration. *Id*. at ¶ 14. Specifically, Moore argued that he would not have pled guilty if he had known he would not receive any benefit from the agreement, since child endangering and murder are allied offenses of similar import. *Id.*

{¶ 22} In responding to Moore's argument, the Fourth District Court of Appeals noted that "[n]ormally, the dismissal of another criminal charge constitutes sufficient consideration for a plea agreement." *Id.* at ¶ 19, citing *State v. Smith*, 2d Dist. Greene No. 90CA87, 1992 WL 206739, *7 (Aug. 26, 1992). *Accord State v. Miller*, 7th Dist. Jefferson No. 98-JE-51, 2001 WL 1155853, *4 (Sept. 26, 2001), (noting that "[a] promise to forbear pursuit of a legal claim is sufficient consideration to support a contract.") (Citation omitted.)

{¶ 23} The defendant in *Moore* argued that the general rule should not be applied because dismissal of the endangering children charge could not have reduced his sentence. *Moore* at ¶ 19. However, the court of appeals rejected this contention, stating that:

> Moore's contention lacks merit for several reasons. First, although he may have successfully argued that any convictions for murder and endangering children should be merged as allied offenses of similar import, it would not have been automatic based simply on the types of offenses charged. Rather, the court would have to consider Moore's specific conduct. *See State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, syllabus ("When determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered"). Merger is a sentencing question, and the defendant bears the burden of establishing his entitlement to the protection of R.C. 2941.25. *State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661, ¶ 18. That burden was

> removed by the plea agreement. Relieving Moore of the burden constitutes consideration for the agreement.

Moore at ¶ 20.

{¶ 24} The court of appeals went on to note that:

> Furthermore, a lesser sentence is not the only benefit to be received by a defendant deciding to plead guilty to a charged offense. The defendant could also avoid the additional publicity that a trial might generate. Because some consideration exists for the plea agreement, we cannot inquire into the adequacy of the consideration. *Williams*, 131 Ohio St.3d 427, 2012-Ohio-690, 966 N.E.2d 255, ¶ 17 ("long-established precedent that courts may not inquire into the adequacy of consideration").

Moore, 4th Dist. Adams No. 13CA965, 2014-Ohio-3024, at ¶ 22.

{¶ 25} We agree with these observations, and conclude that no reasonable argument can be made that the plea was not intelligent, voluntary, or knowing, due to a lack of consideration.

II.

{¶ 26} We have performed our duty under *Anders* to conduct an independent review of the record. We have thoroughly reviewed the docket, the various filings, the written transcript of the plea colloquy, and the written transcript of the sentencing hearing. We have found no non-frivolous issues for review. Accordingly, the judgment of the Clark County Common Pleas Court is affirmed.

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DONOVAN, J., and HALL, J., concur.

Copies mailed to:

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