[Cite as *State v. Marcum*, 2015-Ohio-549.]

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

STATE OF OHIO

Plaintiff-Appellee

v.

CHRISTOPHER W. MARCUM

Defendant-Appellant

Appellate Case No. 26255

Trial Court Case No. 2013-CR-1883

(Criminal Appeal from
Common Pleas Court)

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O P I N I O N

Rendered on the 13th day of February, 2015.

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WELBAUM, J.

{¶ 1} This is an appeal from Christopher W. Marcum's conviction in the Montgomery County Court of Common Pleas after he entered an *Alford* plea of guilty to two counts of attempt to commit rape. In proceeding with the appeal, Marcum's appointed appellate counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). After conducting a review as prescribed by *Anders*, we find no meritorious issues for appellate review. Accordingly the judgment of the trial court will be affirmed.

{¶ 2} On January 3, 2014, Marcum was indicted for three counts of rape in violation of R.C. 2907.02(A)(1)(b) (victim less than 13 years of age), a felony of the first degree, and two counts of gross sexual imposition in violation of R.C. 2907.05(A)(4) (victim less than 13 years of age), a felony of the third degree. Marcum initially pled not guilty to the charges and requested the trial court to determine whether he was competent to stand trial due to being diagnosed with schizophrenia and bipolar disorder. Thereafter, the trial court ordered Marcus to undergo a mental examination at the Forensic Psychiatry Center for Western Ohio ("the Center"). Following the examination, a competency hearing was held on February 26, 2014. During the competency hearing, the parties stipulated to the contents of the psychiatric report prepared by the Center, and the trial court found Marcum competent to stand trial.

{¶ 3} After the competency determination, Marcum engaged in plea negotiations with the State. Pursuant to a plea agreement, Marcum agreed to enter an *Alford* plea of guilty to two reduced counts of attempt to commit rape in violation of R.C. 2923.02 and R.C. 2907.02(A)(1)(b) (victim less than 13 years of age), which are felonies of the second degree. In

exchange for his plea, the State agreed to dismiss the three remaining counts against him and to jointly recommend a prison term between 10 and 15 years.

{¶ 4} Due to Marcum's decision to enter an *Alford* plea, during his April 24, 2014 plea hearing, the trial court conducted a thorough inquiry on the record to determine whether Marcum had rationally calculated that it was in his best interest to accept the plea agreement despite maintaining his innocence. In making this determination, the trial court heard testimony regarding the State's evidence against Marcum and the strength of its case. The trial court also ensured that Marcum understood the charges and evidence against him and what the potential penalties would be if a jury found him guilty of the indicted charges versus the penalties he faced as a result of his plea.

{¶ 5} Marcum, who was represented by counsel, indicated on the record that it would be difficult for him to prove the alleged victims were lying and that he understood he could potentially receive a much longer sentence if he took his case to trial. Based on the information presented at the plea hearing, the trial court found Marcum rationally calculated that it was in his best interest to accept the plea. Following that finding, the trial court conducted a standard plea colloquy that fully complied with Crim.R. 11.

{¶ 6} After entering a voluntary and intelligent *Alford* guilty plea, on May 9, 2014, the trial court sentenced Marcum to six years in prison for the first count of attempted rape and seven years for the second count to be served consecutively for a total prison term of 13 years. During sentencing, the trial court noted that it reviewed Marcum's presentence investigation report and considered "all the statutory factors" that it was required to review before imposing a sentence. Sentencing Trans. (May 9, 2014), p. 59.

{¶ 7} Additionally, the trial court noted that in order to sentence Marcum within the

agreed-upon sentencing range of 10 to 15 years, it was required to issue consecutive sentences, as the prescribed sentencing range for attempted rape is between two and eight years in prison. *See* R.C. 2929.14(A)(2). Although the trial court was not required to make consecutive-sentence findings due to the sentence being jointly recommended by the parties, *see State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, 829 N.E.2d 690, ¶ 25, out of precaution, the trial court made consecutive-sentence findings on the record at the sentencing hearing.[1]

{¶ 8} Following his conviction and sentence, Marcum filed a timely notice of appeal. On August 12, 2014, Marcum's appellate counsel filed a brief pursuant to *Anders*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, wherein counsel indicated that he found no potential assignments of error having arguable merit and asked this court to conduct an independent review of the record to determine whether there are any meritorious issues to present on appeal. On August 20, 2014, we notified Marcum that his appellate counsel was unable to find any meritorious claims to present for review and granted him leave to file a pro se brief within 60 days. Marcum did not file a pro se brief. Thereafter, on November 3, 2014, the State filed a motion to submit the appeal for a decision on the merits.

{¶ 9} Our task in this case is to conduct an independent review of the record as prescribed by *Anders*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493. In *Anders* cases, the appellate court must conduct a thorough examination of the proceedings to determine if the appeal is actually frivolous, and if it is, the court may "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." *State v. McDaniel*, 2d Dist.

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[1] The trial court did not incorporate its consecutive-sentence findings in the sentencing entry as required by *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659; however, there is no error given that the trial court was not required to make said findings due to the sentence being jointly recommended by the parties.

Champaign No. 2010 CA 13, 2011-Ohio-2186, ¶ 5, citing *Anders* at 744. "If we find that any issue presented or which an independent analysis reveals is not wholly frivolous, we must appoint different appellate counsel to represent the defendant." (Citation omitted.) *State v. Marbury*, 2d Dist. Montgomery No. 19226, 2003-Ohio-3242, ¶ 7.

{¶ 10} "*Anders* equate[s] 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." *State v. Pullen*, 2d Dist. Montgomery No. 19232, 2002-Ohio-6788, ¶ 4. Rather, "[a]n issue lacks arguable merit if, on the facts and law involved, no responsible contention can be made that it offers a basis for reversal." *Id*.

{¶ 11} Pursuant to our duty under *Anders*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, we have conducted an independent review of the record, and having done so, we agree with appellate counsel that there are no meritorious issues to present on appeal. Accordingly, the judgment of the trial court is affirmed.

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FROELICH, P.J. and HALL, J., concur.

Copies mailed to:

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