[Cite as *State v. McCullough*, 2015-Ohio-900.]

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

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 2014-CA-21
	:	
v.	:	Trial Court Case Nos. 2014-CR-52 and 2014-CR-54
	:	
DYLAN M. MCCULLOUGH	:	
	:	(Criminal Appeal from
Defendant-Appellant	:	Common Pleas Court)
	:	

. . . . . .

O P I N I O N

Rendered on the 13th day of March, 2015.

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WELBAUM, J.

{¶ 1} Defendant-appellant, Dylan M. McCullough, appeals from his conviction and sentence received in the Champaign County Court of Common Pleas after pleading guilty to one count of robbery. In proceeding with the appeal, McCullough's assigned counsel filed a brief under the authority of *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) indicating there are no meritorious issues to present on appeal. After conducting a review as prescribed by *Anders*, we also find no meritorious issues for appeal. Accordingly, the judgment of the trial court will be affirmed.

{¶ 2} On March 6, 2014, McCullough was indicted for two counts of aggravated burglary in violation of R.C. 2911.11(A)(1) and (B); one count of robbery in violation of R.C. 2911.02(A)(2) and (B); and one count of assault in violation of R.C. 2903.13(A) and (C). Pursuant to a plea agreement, McCullough pled guilty to the robbery charge, a felony of the second degree, and the State dismissed the remaining charges. The trial court subsequently imposed a seven-year prison sentence to be served concurrently with a nine-month prison sentence McCullough received in a separate case for the offense of complicity in the commission of trafficking marijuana. The trial court also imposed an aggregate fine of $250.

{¶ 3} On June 27, 2014, McCullough filed a pro se notice of appeal from his robbery conviction. Thereafter, McCullough's appointed appellate counsel filed an *Anders* brief indicating that there were no meritorious issues to present on appeal. We notified McCullough that his counsel found no meritorious issues and granted him 60 days to file a pro se brief assigning any errors for review. McCullough did not file a pro se brief.

{¶ 4} 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. 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.

{¶ 5} *"Anders* equated 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*.

{¶ 6} In conducting our independent review, McCullough's counsel has requested that we consider two potential assignments of error, the first of which is the following:

APPELLANT DID NOT FULLY UNDERSTAND HIS CONSTITUTIONAL RIGHTS PRIOR TO PLEADING GUILTY.

{¶ 7} In order to be constitutionally valid and comport with due process, a guilty plea must be entered knowingly, intelligently, and voluntarily. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). "In order for a plea to be knowing,

intelligent, and voluntary, the trial court must comply with Crim.R. 11(C)." (Citation omitted.) *State v. Russell*, 2d Dist. Clark No. 10-CA-54, 2011-Ohio-1738, ¶ 6. Crim.R. 11(C)(2) provides that:

> In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:
>
> (a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.
>
> (b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.
>
> (c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

{¶ 8} "The purpose of the procedure required by [Crim.R.] 11(C) is to ensure that the defendant subjectively understands each of the rights concerned and that he waives it by his plea of guilty or no contest." *State v. Thomas*, 116 Ohio App.3d 530, 534, 688 N.E.2d 602 (2d Dist.1996). "The preferred method is to use the language contained in

the rule, stopping after each right and asking whether the defendant understands that right and knows that his plea waives it." *Id*.

{¶ 9} "The trial court must strictly comply with Crim.R. 11(C)(2)(c), as it pertains to the waiver of constitutional rights." *Russell* at ¶ 7, citing *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 31. However, " '[f]ailure to use the exact language contained in Crim.R. 11(C), in informing a criminal defendant of his constitutional right to a trial and the constitutional rights related to such trial, including the right to trial by jury, is not grounds for vacating a plea as long as the record shows that the trial court explained these rights in a manner reasonably intelligible to that defendant.' " *Thomas* at 533, quoting *State v. Ballard*, 66 Ohio St.2d 473, 423 N.E.2d 115 (1981), paragraph two of the syllabus.

{¶ 10} Upon conducting an independent review of the plea hearing, we find that the trial court's plea colloquy complied with Crim.R.11(C)(2) in all respects, including the waiver of McCullough's constitutional rights. The procedure employed by the trial court demonstrates that McCullough understood each right he was waiving and that his plea was knowing, intelligent and voluntary. Accordingly, there are no meritorious issues to present on appeal with respect to McCullough's guilty plea.

{¶ 11} The second potential assignment of error set forth by McCullough's appellate counsel is as follows:

> THE TRIAL JUDGE DID NOT CONSIDER ALL NECESSARY FACTORS PRIOR TO DETERMINING [THE] SENTENCE TO THE DETRIMENT OF APPELLANT.

{¶ 12} In *State v. Rodeffer*, 2013-Ohio-5759, 5 N.E.3d 1069 (2d Dist.), we held that

we would no longer use an abuse-of-discretion standard in reviewing felony sentences, but would apply the standard of review set forth in R.C. 2953.08(G)(2), which states that:

> The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:
>
> (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
>
> (b) That the sentence is otherwise contrary to law.

{¶ 13} R.C. 2929.13(D)(1) applies to second degree felony offenses, such as McCullough's, and it states that a prison term is presumed necessary in order to comply with the purposes and principles of sentencing under R.C. 2929.11. Section (D)(2) of the statute provides that the presumption in favor of a prison term may be overcome and community control sanctions may be imposed if:

> (a) A community control sanction or a combination of community control sanctions would adequately punish the offender and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a lesser likelihood of recidivism outweigh the applicable factors under that section indicating a greater likelihood of

recidivism.

(b) A community control sanction or a combination of community control sanctions would not demean the seriousness of the offense, because one or more factors under section 2929.12 of the Revised Code that indicate that the offender's conduct was less serious than conduct normally constituting the offense are applicable, and they outweigh the applicable factors under that section that indicate that the offender's conduct was more serious than conduct normally constituting the offense.

R.C. 2929.13(D)(2)(a)-(b).

{¶ 14} In taking R.C. 2929.13(D)(2)(a) into consideration, the trial court determined that community control sanctions would not adequately punish McCullough or protect the public from future crime, because the factors under R.C. 2929.12 indicating a lesser likelihood of recidivism do not outweigh the factors indicating a greater likelihood of recidivism. The trial court found no factors indicating a lesser likelihood of recidivism and found the following factors indicated McCullough had a greater likelihood of recidivism: (1) he was committed to the Department of Youth Services after the juvenile court had previously placed him in an out-of-state educational facility; (2) he committed the robbery offense in question while he was out on bond in another case; (3) he was previously adjudicated a juvenile delinquent; (4) he has not been rehabilitated after being adjudicated a delinquent; (5) he has not responded favorably to sanctions previously imposed (McCullough had six prior criminal convictions in Champaign County); and (6) he has demonstrated a pattern of drug abuse that is related to the offense and refuses treatment. The court also noted that McCullough had a very high Ohio Risk Assessment

System score.

{¶ 15} Under R.C. 2929.13(D)(2)(b), the trial court determined that community control sanctions would demean the seriousness of McCullough's robbery offense because the factors under R.C. 2929.12 indicating that his conduct was less serious than conduct normally constituting the offense do not outweigh the factors indicating that his conduct was more serious. In making this determination, the trial court found the following factors rendered McCullough's offense more serious: (1) the robbery offense was committed after McCullough had already committed complicity to trafficking in marijuana; (2) McCullough joined another defendant in committing the offense; (3) McCullough's relationship with the victim facilitated the offense; and (4) the offense was committed as part of organized criminal activity. The only less serious factor the trial court found was that the victim was potentially involved in the dispute that led to the robbery.

{¶ 16} After the foregoing considerations, the trial court imposed a seven-year prison term as opposed to community control sanctions. Upon reviewing the pleadings, transcripts of proceedings, and the presentence investigation report, we do not clearly and convincingly find that the record does not support the trial court's findings under R.C. 2929.13(D).

{¶ 17} In continuing the review of McCullough's sentence under R.C. 2953.08(G)(2), we also do not find that McCullough's sentence is otherwise contrary to law. " '[C]ontrary to law' means that a sentencing decision manifestly ignores an issue or factor which a statute requires a court to consider." (Citation omitted.) *State v. Lofton*, 2d Dist. Montgomery No. 19852, 2004-Ohio-169, ¶ 11. "[A] sentence is not contrary to

law when the trial court imposes a sentence within the statutory range, after expressly stating that it had considered the purposes and principles of sentencing set forth in R.C. 2929.11, as well as the factors in R.C. 2929.12." *Rodeffer*, 2013-Ohio-5759, 5 N.E.3d 1069 at ¶ 32, citing *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 18.

{¶ 18} In this case, McCullough's seven-year prison sentence for robbery is within the prescribed statutory range for felonies of the second degree. *See* R.C. 2929.14(A)(2). In addition, the trial court expressly stated at the sentencing hearing and in its sentencing entry that it had considered the purposes and principles of sentencing set forth in R.C. 2929.11. The transcript of the sentencing hearing and the sentencing entry also indicate that the trial court considered the seriousness and recidivism factors set forth in R.C. 2929.12 in great detail. Accordingly, we have no basis to conclude that McCullough's sentence is otherwise contrary to law.

{¶ 19} We reiterate that we have reviewed McCullough's sentence under the standard of review set forth in *Rodeffer*. In *Rodeffer*, we held that we would no longer use an abuse-of-discretion standard in reviewing a sentence in a criminal case, but would apply the standard of review set forth in R.C. 2953.08(G)(2). Since then, opinions from this court have expressed reservations as to whether our decision in *Rodeffer* is correct. *See, e.g., State v. Garcia*, 2d Dist. Greene No. 2013-CA-51, 2014-Ohio-1538, ¶ 9, fn.1; *State v. Johnson*, 2d Dist. Clark No. 2013-CA-85, 2014-Ohio-2308, ¶ 9, fn. 1. We also note that the Supreme Court of Ohio has recently accepted conflict cases on the question of whether the standard of review for felony sentences outlined in *Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124 applies after the passage of R.C. 2953.08(G). *See*

State v. Marcum, 141 Ohio St.3d 1453, 2015-Ohio-239, 23 N.E.3d 1195. Regardless, in the case before us, we find no error in the sentence imposed under either standard of review.

{¶ 20} Having conducted an independent review of the record pursuant to *Anders*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, we agree with McCullough's 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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