

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

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2014-CA-39
	:	
v.	:	T.C. NO. 14CR145
	:	
PENNIE F. SMITH	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 8th day of January, 2016.

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FROELICH, P.J.

{¶ 1} Pennie Smith pled guilty in the Champaign County Court of Common Pleas to one count of trafficking in drugs (Klonopin, schedule IV), a felony of the fifth degree, in violation of R.C. 2925.03(A)(1) and (C)(2)(a). In exchange for her plea, three other counts of trafficking in drugs were dismissed. Smith was sentenced to ten months in

prison and to three years of post-release control, and she was fined \$250 and ordered to pay court costs.

{¶ 2} Smith appeals from her conviction. Smith's counsel has filed a brief citing *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and stating that, after thoroughly examining the record and the law, she found "no meritorious assignments of error." Counsel identified two potential assignments of error, namely that the trial court erred in imposing a non-minimum sentence and in considering the death of a drug buyer when it sentenced Smith. We informed Smith that her attorney had filed an *Anders* brief on her behalf and granted her 60 days from that date to file a pro se brief. No pro se brief was filed.

{¶ 3} The case is now before us for our independent review of the record. *Penon v. Ohio*, 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988).

{¶ 4} Counsel's first proposed assignment of error is that the trial court erred in sentencing Smith "to more than the minimum applicable month prison term."

{¶ 5} "The trial court has full discretion to impose any sentence within the authorized statutory range, and the court is not required to make any findings or give its reasons for imposing maximum or more than minimum sentences." *State v. King*, 2013-Ohio-2021, 992 N.E.2d 491, ¶ 45 (2d Dist.). However, in exercising its discretion, a trial court must consider the statutory policies that apply to every felony offense, including those set out in R.C. 2929.11 and R.C. 2929.12. *State v. Leopard*, 194 Ohio App.3d 500, 2011-Ohio-3864, 957 N.E.2d 55, ¶ 11 (2d Dist.), citing *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, ¶ 38.

{¶ 6} R.C. 2929.11 requires trial courts to be guided by the overriding principles of

felony sentencing. Those purposes are “to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources.” R.C. 2929.11(A). The court must “consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.” *Id.*

{¶ 7} R.C. 2929.11(B) further provides that “[a] sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing * * *, commensurate with and not demeaning to the seriousness of the offender’s conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.” R.C. 2929.12(B) sets forth nine factors indicating that an offender’s conduct is more serious than conduct normally constituting the offense; R.C. 2929.12(C) sets forth four factors indicating that an offender’s conduct is less serious than conduct normally constituting the offense. R.C. 2929.12(D) and (E) each lists five factors that trial courts are to consider regarding the offender’s likelihood of committing future crimes. Finally, R.C. 2929.12(F) requires the sentencing court to consider the offender’s military service record, if any.

{¶ 8} The trial court addressed the purposes and principles of sentencing at the sentencing hearing and in its judgment entry. It also made findings under R.C. 2929.12(B) and (C); the court concluded that factors were present indicating that Smith’s behavior was both more serious and less serious than conduct normally constituting the offense, but that the “more serious” factors outweighed the “less serious” ones. The trial

court also concluded that Smith's history of criminal convictions, her failure to respond to sanctions previously imposed for criminal convictions, and her commission of this offense while on community control for another drug offense established that recidivism was likely.

{¶ 9} Having found Smith guilty of a felony of the fifth degree, the trial court was authorized to impose a sentence of 6, 7, 8, 9, 10, 11, or 12 months. R.C. 2929.14(A)(5). The trial court's ten-month sentence was within the statutory range, and the court made the appropriate findings in support of its sentence. Because Smith had previously been convicted of a felony, the presumption in favor of community control for a non-violent felony of the fifth degree did not apply. R.C. 2929.13(B)(1). In light of Smith's criminal record, particularly the fact that she had a prior trafficking conviction and that the current offense was committed while she was on community control, we cannot conclude that the record clearly and convincingly did not support the trial court's imposition of a non-minimum ten-month sentence, or that the trial court abused its discretion in imposing the sentence that it did. See *State v. Rodeffer*, 2013-Ohio-5759, 5 N.E.3d 1069 (2d Dist.) (discussing the standard of review for sentencing decisions). We agree with appellate counsel that an assignment of error related to the sentencing in this case does not have arguable merit.

{¶ 10} Counsel's second proposed assignment of error is that the trial court impermissibly considered the death of "the buyer" when it sentenced Smith to a prison term.

{¶ 11} During the sentencing hearing, several references were made to Daren Sickles, the buyer in the trafficking offense to which Smith pled guilty and a friend of

Smith's to whom she sold Klonopin in the days before his death. Sickles was apparently in possession of Klonopin and other drugs when he died. According to the presentence investigation, Sickles allegedly obtained some illegal drugs (heroin) or illegally-obtained drugs (Xanax) in the days before his death. The presentence investigation stated that Smith had admitted giving Klonopin to Sickles prior to his death.¹ Smith had also sold some "pills" to another man, who was known to also provide drugs to Sickles; Smith speculated that this third person may have given some of the pills that she sold him (the third man) to Sickles. Sickles' family and friends reported that Sickles had complained of chest pains and numbness in his left arm in the days before his death, but had refused to seek medical treatment. The coroner's report indicated that Sickles had an enlarged heart, but the toxicology report was not available at sentencing.

{¶ 12} Smith stated that she felt "terrible" about Sickles' death and that she did not know it was against the law to sell her prescription. Defense counsel suggested at the sentencing hearing that Smith had mistakenly believed she was selling Sickles a drug similar to one that he already took (Valium), and she made a similar assertion during the presentence investigation.

{¶ 13} There is no basis in the record to conclude that the trial court imposed a harsher prison term due to Sickles' death. The court made several references to its "real reluctance to infer" anything about the role of drugs, any particular drug, or a drug interaction, in Sickles' death; it stated that drug use may have "caught up with him [Sickles] in some fashion," but stated that the role of drugs, if any, was unclear.

¹ During the presentence investigation, Smith admitted to giving Klonopin to Sickles in the days before his death, but she did not admit to selling it.

Moreover, when discussing factors under R.C. 2929.12(C) tending to show that the offense was less serious than behavior normally constituting the offense, the court cited Sickles' role as a "willing drug buyer" and the fact that Smith did not expect to cause physical harm to anyone in committing the offense. On the record of this case, we agree with appellate counsel that an assignment of error asserting that the trial court imposed a harsher sentence because of the drug buyer's death does not have arguable merit.

{¶ 14} We have reviewed the entire record in this case, including the transcripts of the plea hearing and sentencing hearing and the presentence investigation report. We find no non-frivolous arguments for appeal.

{¶ 15} The judgment of the trial court will be affirmed.

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DONOVAN, J. and WELBAUM, J., concur.

Copies mailed to:

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