[Cite as *State v. Gavin*, 2015-Ohio-2549.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO,	:	
	:	Case No. 14CA3672
Plaintiff-Appellee,	:	
	:	
vs.	:	DECISION AND JUDGMENT
	:	ENTRY
SHAMEKA GAVIN,	:	
	:	
Defendant-Appellant.	:	**Released: 06/25/15**

APPEARANCES:

Matthew F. Loesch, Portsmouth, Ohio, for Appellant.

Mark E. Kuhn, Scioto County Prosecutor, Portsmouth, Ohio, for Appellee.

McFarland, A.J.

{¶1} Shameka Gavin appeals her convictions for trafficking in drugs/cocaine in violation of R.C. 2925.03(A)(2)&(C)(4), and tampering with evidence, in violation of R.C. 2921.12(A)(1)(B) after she entered a guilty plea in the Scioto County Common Pleas Court. Appellant's counsel has advised this Court that, after reviewing the record, he cannot find a meritorious claim for appeal. However, counsel has requested this court to independently review the transcript of proceedings and determine whether the trial court erred by failing to comply with Crim.R. 11 in accepting Appellant's guilty plea**.** As a result, Appellant's counsel has moved to

withdraw under *Anders v. California,* 386 U.S. 738, 87 S.Ct. 1396 (1967). We find no merit to the potential assignment of error raised in counsel's brief and, after independently reviewing the record, find no additional error prejudicial to the Appellant's rights in the trial court proceedings. The motion of counsel for Appellant requesting to withdraw as counsel is granted, and this appeal is dismissed for the reason that it is wholly frivolous.

FACTS

{¶2} Appellant was indicted on March 6, 2014 on 6 counts. All related to the trafficking or possession of cocaine or marijuana, except for one count of tampering with evidence and one count of possession of criminal tools. Defense counsel was appointed. Appellant entered pleas of not guilty.

{¶3} Appellant later waived her right to speedy trial. Defense counsel filed a demand for discovery and a request for a bill of particulars to which the State of Ohio provided responses. According to the transcript of proceedings, on October 30, 2014, in open court, Appellant changed her pleas of not guilty and entered into a negotiated plea, pursuant to R.C. 2953.08(D) and Criminal Rule F, on Count 1, trafficking in drugs/cocaine, a violation of R.C. 2925.03(A)(2)&(C)(4)(F), a felony of the second degree,

and on Count 5 tampering with evidence, in violation of R.C. 2921.12(A)(1)(B), a felony of the third degree. Appellant was advised that she was waiving her right to appeal and waiving her Constitutional rights. She was also advised that her sentence as to Count 1 was a two-year mandatory prison term, which would be run consecutively with her sentence on Count 5, a non-mandatory prison term of two years, for an aggregate four-year prison term. Appellant was advised after the mandatory term had been served she would be eligible for judicial release. When Appellant was asked if she was satisfied with the efforts of her counsel, she responded affirmatively.

{¶4} Appellant was sentenced to a total net mandatory sentence of twenty-four months on Count 1 and twenty-four months on Count 5. The trial court ordered a consecutive sentence, for a total aggregate sentence of forty-eight (48) months, with twenty-four (24) months being mandatory.

{¶5} Appellant's notice of appeal is from the October 31, 2014 judgment entry of sentence. The October 31, 2014 judgment entry of sentence incorrectly indicated Appellant had pled to Count 1, trafficking in drugs/cocaine, and "felonious assault." However, this entry described the correct term of the aggregate forty-eight (48) month consecutive prison

sentence, with twenty-four (24) months being mandatory. All remaining counts of the indictment were dismissed.

{¶6} On November 18, 2014, the trial court filed a nunc pro tunc judgment entry of sentence. The nunc pro tunc entry correctly reflected the transcript of proceedings and reflected Appellant's pleas to Counts 1 and 5 respectively, as trafficking in drugs and tampering with evidence. On November 26, 2014, Appellant filed a timely notice of appeal from the judgment entry of sentence dated October 31, 2014.

ANDERS BRIEF

{¶7} Under *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967), counsel may ask permission to withdraw from a case when counsel has conscientiously examined the record, can discern no meritorious claims for appeal, and has determined the case to be wholly frivolous. *Id.* at 744; *State v. Adkins,* 4th Dist. Gallia No. 03CA27, 2004-Ohio-3627, ¶ 8. Counsel's request to withdraw must be accompanied with a brief identifying anything in the record that could arguably support the client's appeal. *Anders* at 744; *Adkins* at ¶ 8. Further, counsel must provide the defendant with a copy of the brief and allow sufficient time for the defendant to raise any other issues, if the defendant chooses to. *Id.*

{¶8} Once counsel has satisfied these requirements, the appellate court must conduct a full examination of the trial court proceedings to determine if meritorious issues exist. If the appellate court determines that the appeal is frivolous, it may grant counsel's request to withdraw and address the merits of the case without affording the appellant the assistance of counsel. *Id.* If, however, the court finds the existence of meritorious issues, it must afford the appellant assistance of counsel before deciding the merits of the case. *Anders* at 744; *State v. Duran,* 4th Dist. Ross No. 06CA2919, 2007-Ohio-2743, ¶ 7.

{¶9} In the current action, Appellant's counsel advises that the appeal is wholly frivolous and has requested permission to withdraw. Pursuant to *Anders,* counsel has filed a brief raising one potential assignment of error for this Court's review.

POTENTIAL ASSIGNMENT OF ERROR

"I. WHETHER THE TRIAL COURT ERRED BY FAILING TO COMPLY WITH CRIM.R. 11 IN ACCEPTING APPELLANT'S GUILTY PLEA."

A. STANDARD OF REVIEW

{¶10} A defendant's right to appeal a sentence is based upon specific grounds stated in R.C. 2953.08(A). Subsection (D) provides an exception to the defendant's ability to appeal:

> "A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge." *State v. Underwood,* 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923.

Appellant was given an agreed sentence. R.C. 2953.08(D) normally bars a defendant from appealing a jointly recommended sentence that has been accepted by the trial judge, as is the case sub judice. See, *State v. Floyd,* 4th Dist. Lawrence No. 10CA14, 2011-Ohio-558, ¶ 9. However, because Appellant is arguing that the trial court did not comply with Crim.R. 11 in accepting her guilty plea, R.C. 2953.08, which deals solely with sentencing, is not controlling. *State v. Gibson,* 7th Dist. Mahoning No. 07MA98, 2008-Ohio-4518 at ¶ 7. See, also, *State v. Royles,* 1st. Dist. Hamilton No. C-060875-76, 2007-Ohio-5348 at ¶ 10 (noting that while an appellate court cannot review an agreed sentence, it can review the validity of the plea leading to the agreed sentence).

{¶11} " 'When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution.' " *State v. Felts,* 4th Dist. Ross No. 13CA3407, 2014-Ohio-2378, ¶ 14, quoting *State v. Veney,* 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 7, quoting *State v.*

Engle, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). In determining whether a guilty or no contest plea was entered knowingly, intelligently, and voluntarily, an appellate court examines the totality of the circumstances through a de novo review of the record to ensure that the trial court complied with constitutional and procedural safeguards. *Felts, supra*; *State v. Cooper*, 4th Dist. Athens No. 11CA15, 2011-Ohio-6890, ¶ 35.

B. LEGAL ANALYSIS

{¶12} Appellate counsel's brief sets forth the only possible issue presented for review and argument as that the trial court erred in failing to comply with Crim. R. 11 in accepting Appellant's guilty plea. In determining whether to accept a guilty plea, the trial court must determine whether the defendant has knowingly, intelligently, and voluntarily entered the plea. *State v. Houston,* 4th Dist. Scioto No. 12CA3472, 2014-Ohio-2827, ¶ 7; *State v. Puckett,* 4th Dist. Scioto No. 03CA2920, 2005-Ohio-164, ¶ 9; *State v. Johnson*, 40 Ohio St.3d 130, 532 N.E.2d 1295 (1988), syllabus; Crim.R. 11(C). To do so, the trial court should engage in a dialogue with the defendant as described in Crim. R. 11(C). *Houston, supra*; *Puckett,* ¶ 9.

{¶13} Crim.R. 11(C) provides:

> (2) 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.

{¶14} An appellant who challenges his plea on the basis that it was not knowingly and voluntarily made must show a prejudicial effect. *Houston,* ¶ 8; *State v. Nero,* 56 Ohio St.3d 106, 564 N.E.2d 474 at 476-477, citing *State v. Stewart,* 51 Ohio St.2d 86, 364 N.E.2d 1163 (1977); Crim.R. 52(A). The test is whether the plea would have otherwise been made. *Houston, supra*; *Stewart, supra* at 93, 364 N.E.2d at 1167.

{¶15} In the case sub judice, the trial court's colloquy with Appellant is set forth as follows:

> The Court: Let the record reflect we're here on 14CR160(A), captioned State of Ohio versus Shameka Gavin. It's the Court's

understanding she's going to enter a guilty plea to a charge of Trafficking in Drugs, being Cocaine, a felony of the second degree, in violation of 2925.03(A)(2)(C)(4)(F), and also, Count 5, Tampering with Evidence, a felony of the third degree, in violation of 2921.12(A)(1)(B) of the Revised Code. The record should further reflect it's a negotiated plea, pursuant to Section 2953.08(D), and Criminal Rule F, that on Count 1, the Trafficking in Drugs, she'll receive a two-year mandatory prison term, running consecutively with each other, for an aggregate four-year prison term. Her driver's license will be suspended for a period of six months. Is that your understanding, Mr. Brazinski?

Mr. Brazinski: It is, Your Honor.

The Court: Ms. Gavin, is this your understanding?

Defendant: Yes.

The Court: Ma'am, you understand by proceeding in this fashion that you're waiving your right to appeal?

Defendant: Yes.

* * *

The Court: You've been advised by your lawyer and by the Court of the charges against you, the penalties provided by law, and your rights under the Constitution, and you've waived a reading of the indictment by signing this document entitled waiver. Is that your signature, Ma'am?

Defendant: Yes, sir.

The Court: You understand by signing this document you're giving up the right to a trial by jury with representation by counsel.

Defendant: Yes, sir.

The Court: You're giving up the right to confront the witnesses against you.

Defendant: Yes, sir.

The Court: You're giving up the right to compulsory process for obtaining witnesses on your own behalf.

Defendant: Yes, sir.

The Court: And you're giving up the right to require the State to- - to prove you're guilty beyond a reasonable doubt at a trial.

Defendant: Yes, sir.

The Court: And furthermore, you understand you cannot be made to testify against yourself.

Defendant: Yes, sir.

{¶16} As is evident, the trial court explained Appellant's Constitutional rights. The transcript further reflects the court explained the maximum prison term for both Counts 1 and 5, and the maximum fine amounts. And, the transcript reveals the trial court explained to Appellant that she would be supervised by the Adult Parole Authority for a mandatory three-year period upon her release. The trial court further explained to Appellant the repercussion of violating the rules of post-release control.

{¶17} Additionally, the record contains Appellant's signature on two forms which explained the maximum penalties for both counts. After explaining to Appellant all that was required pursuant to Crim.R.11, the trial court pronounced sentence. Our review of the record demonstrates that the

trial court fully complied with the dictates of Crim.R. 11(C)(2)(a),(b), and (c). We find the trial court did not err with regard to accepting Appellant's guilty plea. As such, Appellant's potential assignment of error has no merit and is hereby overruled.

{¶18} Because we have thoroughly reviewed the record in the context of an *Anders'* appeal, we briefly address the nunc pro tunc judgment entry of sentence. It is well-settled that courts possess the inherent authority to correct errors in judgment entries at any time so that the record speaks the truth. *State v. McCord,* 12th Dist. Clermont No. 2013-12-096, 2014-Ohio-3187, ¶ 8**;** *State v. Lester,* 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, ¶ 18; Crim.R. 36. Thus, a trial court may enter a nunc pro tunc entry where the original judgment entry contains "a clerical error, mistake, or omission that is mechanical in nature and apparent on the record and does not involve a legal decision or judgment." *Lester* at ¶ 18. The Ohio Supreme Court has indicated such entries may be used at any time to correct errors in the record that arise from oversight or omission. See generally *State v. Qualls,* 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718, at ¶ 13. Nunc pro tunc entries may generally be used to correct clerical mistakes and errors. *State v. Creech,* 4th Dist. Scioto No. 12CA3500, 2013 Ohio-3791,

¶ 38; see also, *State v. Messenger*, 4th Dist. Athens No. 10CA34, 2011-Ohio-2017, at ¶ 9; *State v. Damron*, 4th Dist. Scioto No. 10CA3375, 2011-Ohio-165, at ¶ 10; *State v. Johnson,* 4th Dist. Scioto Nos. 07CA3135 & 07CA3136, 2007-Ohio-7173, at ¶ 11. A nunc pro tunc entry reflects what a court "actually decided, not what the court might or should have decided or what the court intended to decide." *State v. Ware,* 141 Ohio St.3d 160, 2014-Ohio-5201, 22 N.E.3d 1082, ¶ 16, quoting *State ex rel. Fogle v. Steiner,* 74 Ohio St.3d 158, 164, 656 N.E.2d 1288 (1995).

{¶19} Here, Appellant appealed the October 31, 2014 entry which listed her convictions as "trafficking in drugs/cocaine" and "felonious assault." In *State v. Carter,* 8th Dist. Cuyahoga No. 10180, 2015-Ohio-1834, Carter contended that the trial court sentenced him on charges that he did not plead guilty to and, therefore, the case needed to be remanded so that he could be resentenced. The 8th district appellate court agreed. The appellate court noted that Carter pled guilty to Counts 3 and 7, but the court sentenced him on Counts 1 and 5. The trial court's original sentencing judgment entry also stated the wrong counts. The trial court later issued a nunc pro tunc judgment to reflect that Carter had been sentenced on Counts 3 and 7. The appellate court concluded the trial court's nunc pro tunc entry

did not reflect what actually occurred at sentencing and, therefore, was improper. *Id.* at 41.

{¶20} In *State v. Hitchcock*, 4th Dist. Hocking No. 02CA16, 2003-Ohio-1456, this court reviewed a sentencing hearing transcript and the trial court's original sentencing and nunc pro tunc entries. The subsequent nunc pro tunc entry specified for which offenses the trial court actually sentenced Hitchcock. We noted the subsequent entry did not change what the trial court actually decided and thus, was not an improper use of nunc pro tunc authority. *Id.* at ¶ 14.

{¶21} *Hitchcock* is similar to the case sub judice in that the nunc pro tunc entry was utilized to reflect what actually occurred. Here, Appellant pled to, and the transcript of proceedings reflects that Appellant pled to Count 1, trafficking in drugs/cocaine and Count 2, tampering with evidence. The nunc pro tunc judgment entry of sentence corrected this defect, by listing her convictions as "trafficking in drugs/cocaine" and "tampering with evidence." This is a permissible correction because it accurately reflects what the court actually decided at Appellant's plea hearing, as verified by the transcript of proceedings. The transcript of proceedings demonstrates that the trial court correctly referred to Counts 1 and 5 throughout the transcript and at no time referenced a "felonious assault" charge.

{¶22} Here, we have reviewed the record in its entirety and find no error which resulted in prejudice to the Appellant. We conclude that the potential assignment of error advanced by appellate counsel is wholly without merit. The motion of counsel for Appellant requesting to withdraw as counsel is granted. This appeal is dismissed for the reason that it is wholly frivolous.

APPEAL DISMISSED.

JUDGMENT ENTRY

It is ordered that the APPEAL BE DISMISSED. Costs are assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hoover, P.J. & Abele, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Matthew W. McFarland,
Administrative Judge

NOTICE TO COUNSEL
Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.