[Cite as *State v. Chapple*, 2015-Ohio-532.]

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

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 13CA3591
	:	
vs.	:	
	:	DECISION AND JUDGMENT
HAROLD W. CHAPPLE,	:	ENTRY
	:	
Defendant-Appellant.	:	**Released: 02/11/15**

APPEARANCES:

Bryan Scott Hicks, Lebanon, Ohio, for Appellant.

Mark E. Kuhn, Scioto County Prosecutor, Portsmouth, Ohio, for Appellee.[1]

McFarland, A.J.

{¶1} Harold Chapple, Appellant, appeals his convictions for trafficking in heroin, in violation of R.C. 2925.03(A)(2), and trafficking in Oxycodone in violation of R.C. 2925.03(A)(2) after he entered a negotiated 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. As a result, Appellant's counsel has moved to withdraw under *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967).

[1] The State has not filed a brief but has filed a motion for clarification as to the status of the case which was granted December 4, 2014.

Appellate counsel filed a brief and Appellant, pro se, has filed a brief. We find no merit to the assignments of error raised in the briefs 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 we find this appeal is dismissed for the reason that it is wholly frivolous. As such, we affirm the trial court's decision.

A. FACTS

{¶2} Appellant was indicted on February 1, 2013 on 13 counts. All related to the trafficking or possession of drugs except for one count of tampering with evidence. Appellant entered pleas of not guilty.

{¶3} Appellant later waived his right to speedy trial. Defense counsel filed a motion to suppress which was originally scheduled to be heard on April 19, 2013. The hearing on Appellant's motion was continued several times. The last date the hearing was scheduled was November 20, 2013. However, on that date, Appellant changed his pleas of not guilty and entered into a negotiated plea on Count 3, trafficking in drugs, a violation of R.C. 2925.03(A)(2), and on Count 5, trafficking in drugs/oxycodone/major drug offender, in violation of R.C. 2925.03(A)(2/(C)(1)(f). All remaining counts

of the indictment were dismissed. Appellant entered his plea and the motion to suppress was not heard.

{¶4} Appellant was sentenced to an agreed stated prison term of seven (7) years on Count 3 and eleven (11) years mandatory on Count 5. The trial court ordered a consecutive sentence for a total stated prison term of eighteen (18) years.

{¶5} On December 11, 2013, Appellant filed a timely notice of appeal.[2]

B. ANDERS BRIEF

{¶6} 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.*

[2] Appellant's notice of appeal was filed pro se. The trial court also filed a nunc pro tunc sentencing entry on January 15, 2014, which corrected a typographical error on page 2 to correctly reflect the 11-year sentence imposed.

{¶7} 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.

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

C. POTENTIAL ASSIGNMENTS OF ERROR

1. MR. CHAPPLE'S PLEA WAS IMPROPERLY ACCEPTED.

a. STANDARD OF REVIEW

{¶9} " '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

{¶10} Appellate counsel's brief sets forth a possible issue that the trial court erred in accepting a plea before the motion to suppress was ever heard, after multiple continuances. 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.

{¶11} 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 guilty beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself."

{¶12} 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.

{¶13} In the case sub judice, the record demonstrates the motion to suppress was originally scheduled for hearing on April 19, 2013. It was continued to June 7, 2013; July 12, 2013; August 21, 2013; October 4, 2013; October 25, 2013; and, November 20, 2013. However, on the final scheduled suppression hearing date, Appellant entered a negotiated plea.

{¶14} In reviewing the record, we note that it is too undeveloped to support Appellant's contention that the trial court erred by accepting his plea before hearing the motion to suppress. A reading of the transcript of the sentencing proceedings, moreover, clearly demonstrates the trial court engaged in the dialogue with Appellant as required by Crim.R. 11(C)(2). The trial court's dialogue with Appellant is set forth as follows:

> The Court: The record should reflect we're here today on two cases.[3] Case number 13 CR 90, State of Ohio v. Harold Chappel or Chapel?
>
> Defendant Chapple: Yeah.
>
> The Court: Chapel. Present in the courtroom today with his attorney Wright Blake. * * * We're dealing with multiple count indictments. It's my understanding today that through negotiations that both gentlemen are going to enter pleas to the same counts. It's my understanding that they're going to enter a plea to a charge of Count 3, trafficking in heroin and Count 5, trafficking in Oxycodone in violation of 2925.03, 2925.03. The record should reflect that on Count 3, trafficking in heroin, is a felony of the first degree, that Count 5, trafficking in Oxycodone, is also a felony 1, but it carries a

[3] The trial court also sentenced Appellant's co-defendant, Linward Pulliam Jr., for the same offenses and the same sentence.

major drug offender[4] specification which sets the sentence that this Court can impose. The sentence on both of these counts being F1 level, a *major drug offender*, are mandatory sentences. Mr. Chapple, do you understand that?

Defendant Chapple: Yes. * * *
The Court: It's my understanding that there is an agreement today where I will sentence you both to 18 years in the custody of the Ohio Department of Rehabilitation. Eleven of those years will be given on Count 5, the trafficking in Oxycodone, the *major drug offender* specification. And then seven years on Count 3, the trafficking in heroin. Mr. Chapple, do you understand that?

Defendant Chapple: Yes. * * *

The Court: All right. I've got to go over two forms with each of you. One's a maximum penalty form, the second is a waiver. If either of you have a question or don't understand something, stop me and I'll take time to answer any questions you might have. We have two felonies of the first degree, Count 5 carries a *major drug offender* specification. On a felony 1 in the State of Ohio, the maximum prison sentence is eleven years. On a major drug offender the set penalty for a *major drug offender* is eleven years. And to sort of clarify that, on a felony of the first degree, the range is three to eleven years. So with the *major drug offender*, the law in Ohio States that it is an eleven year sentence. Mr. Chapple, do you understand that?

Defendant Chapple: Yes. * * *

The Court: Okay. In addition I can impose court costs, order restitution or impose other financial sanctions with are (sic) probation fees. * * * Mr. Chapple, do you have any questions so far?

Defendant Chapple: No, sir. * * *

The Court: Mr. Chapple, are you [on probation]?

[4] We emphasize "major drug offender" throughout the dialogue set forth here, although the specification was not italicized in the transcript.

Defendant Chapple: Probation.

The Court: Probation. Do you understand your plea to this charge could result in the revocation of that probation and that these sentences then could run consecutive with your probation case?

Defendant Chapple: Yes.

The Court: Okay. In addition to the time I'm giving you today, you could have time added to your sentence under the theory of post release control. Post release control is our parole system, so to speak, in the State of Ohio. In these cases it's mandatory and it will be for a period of five years. But you'll enter into an agreement with the Patrol (sic) authority on how you're to conduct your life. And if you violate that agreement, certain things could happen. You could spend time in a county jail, the agreement could be modified and become more restrictive upon your lifestyle, the period of time you're on it could be increased to - - will be five years, or ultimately for a violation, the Parole Authority could send you back to prison but for no more than half your original sentence. And they can do that in increments of up to ninety days at a time for a violation. In addition the law also provides if a person is on post release control and they commit a new felony that the sentencing court, in addition to any time imposed for that new felony, could also go back and revoke this post release control. And in addition to that sentence on the new felony, could impose a consecutive sentence of the greater of one year or the remaining time that you have under post release control.* * *Mr. Chapple, do you understand that?

Defendant Chapple: Yes.

The Court: The last concept on this page deals with community control or probation. I can put a person on community control for up to five years. That person is under the supervision and direction of the Scioto County Probation Department. Mr. Chapple, do you understand that I'm not going to place you on community control?

Defendant Chappel: Yes. * * *

The Court: All right. One thing that I want to mention to you is you both have already signed your documents. Your waivers and your maximum penalty. I want to point out that after they were taken in the back the penalties of what these charges were, were circled. And when you signed them, they weren't circled. Anytime some - - anytime you sign an agreement and someone changes it after you sign it, that ought to send up red flags to you. So what I'm asking you today, Mr. Chapple, do we have your permission on this form to circle the felony 1 classification where these fall in and that these are mandatory sentences?

Defendant Chapple: Yes. * * *

The Court: Okay. I think that was the only thing that was changed. * * *

The Court: Mr. Pulliam, do you have any question on anything we've talked about thus far? * * *

The Court: Mr. Chapple, do you?

Defendant Chapple: No.

The Court: All right. The next form we have is a waiver where you're giving up some constitutional rights, and I need to go over those with you. It says I and then your name, Defendant in the above cause and a citizen of the United States having been advised by my Counsel and by the Court of the charges against me, the penalties provided by law and my rights under the Constitution, hereby waive reading of the indictment, understand that I have, and then we'll talk about four separate rights. Mr. Chapple, do you waive reading the indictment at this time? My reading the indictment to you, do you waive that?

Defendant Chapple: Yes.

The Court: Do you have any questions about the two counts that you're pleading to today?

Defendant Chapple: No. * * *

The Court: All right. Number 1 is a right to trial by jury with representation by counsel. You have a right to a jury trial in your case. * * * Okay. Mr. Chapple?

Defendant Chapple: Yes.

The Court: Do you waive your right to a jury trial?

Defendant Chapple: Yes.

The Court: Are you satisfied with the representation of Mr. Blake?

Defendant Chapple: Yes.

The Court: Number 2 is the right to confront witnesses against you, which means you have a right to sit here at trial, to see who the witnesses are, to hear what they have to say and you, through your attorneys, could cross examine those witnesses. Mr. Chapple, do you waive that right?

Defendant Chapple: Yes. * * *

The Court. There is the right to call or process for obtaining witnesses on your behalf, what we call subpoena power. You each have a right to subpoena witnesses in to testify on your behalf at trial. * * * Mr. Chapple, do you waive that right?

Defendant Chapple: Yes.

The Court: And number 4 is a right to require the State to prove your guilt beyond a reasonable doubt at trial which you cannot be compelled to testify against yourself. And that's two part. The first part states that no one can force you to take the witness stand and make you testify against yourself, Mr. Chapple, do you understand that?

Defendant Chapple: Yes. * * *

The Court: The second part is that this being a criminal case the State of Ohio has the burden of proof, and they must prove the case against you beyond a reasonable doubt. * * * Mr. Chapple, do you waive that right?

Defendant Chapple: Yes.

The Court: It goes on to say fully understanding these rights guaranteed me by the Constitution I hereby waive them in writing, I withdraw my former plea of not guilty and enter a plea of guilty to a charge of Count 3, trafficking in heroin, and Count 5, trafficking in oxycodone, with a *major drug offender* specification. The next sentence says no promises, threats, or inducements have been made to me by anyone to secure my plea of guilty. Has anyone promised you anything, threatened you or made any inducements to you whatsoever which is promising you'll come in here, waive your constitutional rights and enter a plea other than what I put her on the record today? * * * Mr. Chapple?

Defendant Chapple: No. * * *

The Court: All right. Mr. Pulliam, you've previously signed both of these documents. After I've gone over them with you in open court and on the record, do you still want your signature to remain on these documents? * * * Mr. Chapple, do you wish for your name to remain on these documents?

Defendant Chapple: Yes.

The Court: The record should reflect that in open court both gentlemen have been advised of the maximum penalties, the concepts of post release control, community control, and find that they understand those concepts. Further find today they've been advised of their constitutional rights, that they understand those rights and they've waived them today both orally and in writing. We are now ready to proceed with the plea. Can you both please stand. Harold Chapple, how do you plea to Count 3 of the indictment, a charge of trafficking in drugs, being heroin, a felony of the first degree?

Defendant Chapple: Guilty.

> The Court: How do you plea on Count 5, the charge of trafficking in drugs, being Oxycodone, with a *major drug offender,* a felony of the first degree?
>
> Defendant Chapple: Guilty. * * *
>
> The Court: All right. The sentence will be identical to both defendants. * * * On Count 5, the charge of trafficking in drugs, Oxycodone, *major drug offender*, it's going to be the sentence of this Court on that count that you be assessed no fine, but be ordered to pay costs of prosecution. Then on that you be sentenced to 11 years in the custody of the Ohio Department of Rehabilitation and Correction (sic). Further find that this is mandatory time. On Count 3, a charge of trafficking in heroin, a felony of the first degree, I'm going to impose no fine, order that you pay costs of prosecution as to the case. And on that I'm going to sentence you to 7 years in the custody of the Ohio Department of Rehabilitation and Corrections. It's my intent today to impose a combined sentence of 18 years pursuant to the agreement, pursuant to what you recall when we first came out here on the record today. And I'm going to order that Count 3 and Count 5 run consecutive to each other. * * *

{¶15} As the above illustrates, Appellant indicated he understood the nature of the charges against him, the effect of his pleas, and the waiver of his constitutional rights. The record clearly demonstrates Appellant's guilty pleas were made knowingly, intelligently, and voluntarily.

{¶16} Furthermore, Appellant's claim that the trial court erred by failing to hear the motion to suppress, after multiple continuances, is not supported by the record. In *State v. Taylor*, 4th Dist. Washington No. 07CA11, 2008-Ohio-482, this court observed the fact that defense counsel filed a motion to suppress and later withdrew the motion was evidence of a

tactical decision. *Id*. at ¶ 12. We cited *State v. Madrigal,* 87 Ohio St.3d 378, 389, 2000-Ohio-448, 721 N.E.2d 52, stating, "It is not mere speculation to presume that defense counsel obtained information concerning the suppression motion that led to its withdrawal." In the case sub judice, the record does not demonstrate Appellant withdrew his motion to suppress. However, it is reasonable to presume his decision not to go forward with a hearing may have been a tactical one.

{¶17} In *State v. Resendiz,* 12th Dist. Preble No. CA2009-04-012, 2009-Ohio-6177, the appellant contended he suffered ineffective assistance of counsel due to defense counsel's failure to file a motion to suppress or discuss the option with him. This omission, Appellant contended, resulted in his plea being less than knowing and voluntary, and was prejudicial to him to the extent he was unable to challenge the evidence against him. Again, in reviewing the standards regarding ineffective assistance of counsel claims, the 12th District Court noted the failure to file a motion to suppress amounted to ineffective assistance only where the record demonstrates that the motion would have been successful if made. *Id.* at ¶ 29. The appellate court further noted:

> "Defense counsel's decision not to file a suppression motion is further bolstered by the effect such a motion would have had on the negotiated plea. The Preble County Prosecutor's Office has a policy which provides that all settlement offers are revoked if

> a suppression motion is pursued. While we do not necessarily condone this policy, defense counsel's decision to forego a motion to suppress in view of this policy can reasonably be presumed to be a strategic act. *State v. Phillips*, 74 Ohio St.3d 72, 85, 1995-Ohio-171, 656 N.E.2d 643."

{¶18} The record does not reveal to us why Appellant's motion to suppress was not heard or further pursued. The reason may have been a tactical one. And, based on the limited record, the likelihood of the motion's success is speculative. As such, we cannot find Appellant was prejudiced by the fact the motion was not heard. Counsel's argument that the trial court improperly accepted Appellant's plea without hearing the motion to suppress is not supported by the record and has no merit.

2. THE TRIAL COURT ERRED AS A MATTER OF LAW AND TO THE PREJUDICE OF APPELLANT'S RIGHT UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION BY ENTERING JUDGMENT OF CONVICTION AND SENTENCE UPON HIM FOR BEING A MAJOR DRUG OFFENDER IN THE ABSENCE OF A FINDING BY THE JURY BEYOND A REASONABLE DOUBT.

{¶19} In this case, the record indicates Appellant entered into a negotiated plea agreement and an agreed sentence. Because of the agreed nature of the sentence, it is not reviewable on appeal. *State v. Rammel*, 2nd Dist. Montgomery Nos. 25899 and 25900, 2014-Ohio-1281, ¶ 10. Thus, we need not consider Appellant's argument under this assignment of error and it is therefore overruled.

D. CONCLUSION

{¶20} In the case sub judice, the trial court's findings are supported by the record. As such, we also conclude that the potential assignments of error advanced by appellate counsel and Appellant pro se are wholly without merit. The motion of counsel for Appellant requesting to withdraw as counsel is granted. We find this appeal to be wholly without merit and accordingly affirm the trial court's decision.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be 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.

Abele, J.: Concurs in Judgment and Opinion.
Harsha, J.: Concurs in Judgment Only.

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.