[Cite as *State v. Perez*, 2015-Ohio-1577.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- RICKY D. PEREZ Defendant-Appellant	JUDGES: Hon. W. Scott Gwin, P. J. Hon. Sheila G. Farmer, J. Hon. John W. Wise, J. Case No. 14 CA 50 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 13 CR 514
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	April 23, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
NO APPEARANCE	AARON CONRAD DANIEL SWAISGOOD CONRAD LAW OFFICE, LLC 120 1/2 East Main Street Lancaster, Ohio 43130

Wise, J.

{¶1}. Appellant, Ricky D. Perez, plead guilty to four counts of rape. Appellant was sentenced to five years in prison on Count One of the indictment, five years on Count Two, seven years on Court Four, and eight years on Count Five. All sentences were ordered served consecutive to one another for an aggregate sentence of 25 years in prison.

{¶2}. Counsel for Appellant has filed a Motion to Withdraw and a brief pursuant to *Anders v. California* (1967), 386 U.S. 738, rehearing den. (1967), 388 U.S. 924, indicating that the within appeal was wholly frivolous and setting forth two proposed Assignments of Error. Appellant has not raised any additional assignments of error pro se.

{¶3}. In *Anders,* the United States Supreme Court held if, after a conscientious examination of the record, a defendant's counsel concludes the case is wholly frivolous, then he should so advise the court and request permission to withdraw. *Id.* at 744. Counsel must accompany his request with a brief identifying anything in the record that could arguably support his client's appeal*. Id.* Counsel also must: (1) furnish his client with a copy of the brief and request to withdraw; and, (2) allow his client sufficient time to raise any matters that the client chooses. *Id.* Once the defendant's counsel satisfies these requirements, the appellate court must fully examine the proceedings below to determine if any arguably meritorious issues exist. If the appellate court also determines that the appeal is wholly frivolous, it may grant counsel's request to withdraw and dismiss the appeal without violating constitutional requirements, or may proceed to a decision on the merits if state law so requires. *Id*.

{¶4}. Counsel in this matter has followed the procedure in *Anders v. California* (1967), 386 U.S. 738.

POTENTIAL ASSIGNMENTS OF ERROR

I.

{¶5}. "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT BY FINDING THAT THE OFFENSES DID NOT MERGE FOR THE PURPOSES OF SENTENCING."

II.

{¶6}. "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT BY IMPROPERLY SENTENCING HIM TO CONSECUTIVE TERMS OF INCARCERATION IN CONTRAVENTION OF OHIO'S SENTENCING STATUTES."

{¶7}. We now will address the merits of Appellant's potential Assignments of Error.

I.

{¶8}. In his first potential Assignment of Error, Appellant argues his sentences should have been merged for sentencing.

{¶9}. Counts one and two involve one victim. The counts involving the first victim occurred on January 1, 2012. Counts four and five involve a second victim, and they occurred on July 20, 2013.

{¶10}. Appellant argues the sentences for counts one and two should have been merged with one another. Likewise, the sentences should have merged for counts four and five.

{¶11}. "In its analysis of the merger doctrine, the court noted that "[o]ffenses involving distinct, different sexual activity each constitute a separate crime with a separate animus, and are not allied offenses of similar import, *even when they are committed in the course of the same encounter.* " (Emphasis added.) *Id.* at ¶ 59, citing *State v. Nicholas,* 66 Ohio St .3d 431, 613 N.E.2d 225 (1993)." *State v. Edwards*, 2013-Ohio-519, ¶ 13 (6th Dist. Wood).

{¶12}. While counts one and two were on the same day and involved the same victim, Appellant's actions were separate and involved a distinct animus. The facts are that Appellant inserted his finger in the victim's vagina. After withdrawing his finger, Appellant inserted his penis in the victim's vagina. Similarly, in count four, Appellant inserted his penis in the second victim's vagina, followed by his decision to insert his penis in the victim's anus. These were separate actions making merger improper.

{¶13}. We find the trial court did not err in refusing to merge these counts.

{¶14}. Appellant's first Assignment of Error is overruled.

II.

{¶15}. In his second potential Assignment of Error, Appellant argues the trial court erred in imposing consecutive sentences.

{¶16}. R.C. 2929.14 governs prison terms. Subsection (C)(4) states the following:

{¶17}. (4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are

not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

{¶18}. "The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

{¶19}. "At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

{¶20}. "The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender."

{¶21}. The trial court, in sentencing Appellant to consecutive terms, noted the seriousness of the offenses, the significant harm caused to the victims, the fact that Appellant failed to seek help after committing the first offense, the fact that Appellant after succeeding in his first crime found a second victim to rape months later, and the need to protect the public from a serial rapist. The trial court also noted that the fear of getting caught or being sent to prison was not a deterrent to Appellant. Further, Appellant's criminal record revealed Appellant was on a period of probation during the commission of at least one of the offenses.

{¶22}. We find the trial court did not err in finding consecutive sentences were warranted.

{¶23}. Appellant's second proposed Assignment of Error is overruled.

{¶24}. For these reasons, after independently reviewing the record, we agree with counsel's conclusion that no arguably meritorious claims exist upon which to base an appeal. Hence, we find the appeal to be wholly frivolous under *Anders,* grant counsel's request to withdraw, and affirm the judgment of the Fairfield County Court of Common Pleas.

By: Wise, J.

Gwin, P. J., and

Farmer, J., concur.

JWW/d 0318