[Cite as *State v. Gill*, 2009-Ohio-5994.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-08-1399

Appellee — Trial Court No. CR0200702120

v.

Teddy Gill — **DECISION AND JUDGMENT**

Appellant — Decided: November 13, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
James E. Vail, Assistant Prosecuting Attorney, for appellee.

Edward J. Fischer, for appellant.

* * * * *

SINGER, J.

{¶ 1} This appeal comes to us from the Lucas County Court of Common Pleas wherein appellant, Teddy Gill, was convicted of rape.

{¶ 2} Counsel appointed to pursue appellant's appeal has filed a brief and motion requesting withdrawal as appellate counsel, pursuant to the guidelines established in

Anders v. California (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493. Counsel states that, after careful review of the record and legal research, he cannot discern any "arguable, non-frivolous issue for appeal." *Anders*, supra, at 744. Counsel further states that he has advised appellant of his right to file a brief on his own behalf, and that a copy of both the brief and motion to withdraw have been served upon appellant. Appellant has not filed a brief on his own behalf.

{¶ 3} We are required, pursuant to *Anders*, supra, to thoroughly and independently review the record to determine that counsel has made a diligent effort and that the proceedings below were free from prejudicial error and conducted without infringement of appellant's constitutional rights.

{¶ 4} Upon consideration, we conclude that counsel's brief is consistent with the requirements set forth in *Anders*, supra, and *Penson v. Ohio* (1988), 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300.

{¶ 5} The facts giving rise to this appeal are as follows. On November 14, 2007, appellant entered a no contest plea to the charge of rape, a violation of R.C. 2907.02(A)(2) and (B). He was sentenced to serve seven years in prison and he was found to be a Tier III sex offender.

{¶ 6} Counsel for appellant has set forth the following potential assignments of error:

{¶ 7} "I. Appellant's plea should be set aside because it was not made knowingly, voluntarily or intelligently."

{¶ 8} "II. Whether appellant was prejudiced by ineffective assistance of counsel."

{¶ 9} In his first potential assignment of error, counsel addresses the issue of whether appellant's no contest plea was made knowingly, intelligently, and voluntarily. To answer this question, we must determine whether the trial court adequately protected appellant's constitutional and nonconstitutional rights, as set forth in Crim.R. 11(C). *State v. Eckles*, 173 Ohio App.3d 606, 2007-Ohio-6220, ¶ 7, citing *State v. Nero* (1990), 56 Ohio St.3d 106.

{¶ 10} Crim.R. 11(C) relevantly provides:

{¶ 11} "(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:

{¶ 12} "(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.

{¶ 13} "(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.

{¶ 14} "(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." Crim.R. 11(C)(2).

{¶ 15} The requirements listed in Crim.R. 11(C)(2)(c) are constitutional and require strict compliance. *State v. Eckles*, supra, at ¶ 7. The requirements listed in Crim.R. 11(C)(2)(a) and (b) are nonconstitutional, and require only substantial compliance. Id. at ¶ 43. As stated by the Supreme Court of Ohio in *State v. Nero* , supra, "[S]ubstantial compliance means that under the totality of the circumstances the defendant substantially understands the implications of his plea and the rights he is waiving." Id. at 108.

{¶ 16} In the instant case, the record reflects that the trial court addressed appellant personally, ensured that he had no difficulties understanding the language used by the trial court, inquired of his age, educational background and his understanding of the proceedings and the effects of his plea. In addition, the court explained the nature of the charge, the maximum penalty, the effects of a no contest plea, including fines and payment of restitution and the sentencing options, and each of the constitutional rights being waived. At all times, appellant indicated orally his understanding of the proceedings, what was being explained to him, and the rights he waived by entering a plea of no contest. When the trial court asked appellant whether anybody had threatened him to get him to enter the no contest plea, appellant answered,"[N]ope." Additionally,

counsel was present with appellant when his rights were being explained to him in open court, and counsel was present when the plea form was executed.

{¶ 17} Upon our review of the record, we find that appellant was adequately advised of all of his rights, both constitutional and nonconstitutional, pursuant to Crim.R. 11(C)(2) and that he knowingly, intelligently, and voluntarily entered his no contest plea. Appellate counsel's first potential assignment of error is found not well-taken.

{¶ 18} In his second potential assignment of error, counsel alleges that appellant's trial counsel was ineffective. To establish a violation of the Sixth Amendment right to effective assistance of counsel, an accused must show: (1) that counsel's performance was deficient; and (2) that counsel's deficient performance resulted in prejudice. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, at paragraph two of syllabus. Prejudice exists when there is a reasonable probability that but for counsel's deficient performance, the outcome of the trial would have been different. *Strickland*, supra, at 694; *Bradley*, supra, at paragraph three of the syllabus. A "reasonable probability" is a probability that is sufficient to undermine confidence in the outcome of the proceedings. *Strickland*, supra; *Bradley*, supra, at 142. The burden of proving ineffective assistance of counsel is on the accused, who must overcome a strong presumption of trial counsel's adequate performance. *Strickland*, supra, at 687; *Bradley*, supra, at 142.

{¶ 19} "The focus of an ineffective assistance of counsel inquiry is whether defense counsel's performance was such as to undermine the integrity of the adversarial process." *State v. Reker* (May 6, 1994), 2d Dist. No. CA 14124.

{¶ 20} The record reflects that appellant's trial counsel appeared on behalf of her client at all court events following her appointment. In addition, she engaged in plea negotiations and was able to reach an agreement with the state, which was approved by appellant.

{¶ 21} Prior to appellant entering pleas of no contest to the offense, counsel discussed the merits of going to trial and the ramifications of entering a plea to the charge. In addition, she reviewed the content of the plea form with appellant. When asked about his counsel by the trial judge throughout the proceedings, appellant repeatedly expressed satisfaction with his trial counsel. Counsel made a statement on behalf of appellant in mitigation, and requested that appellant receive only a community control sanction. Accordingly, we find that the record presents no basis to support a meritorious argument with respect to appellate counsel's second potential assignment of error.

{¶ 22} Upon our own independent review of the record, we find no other grounds for a meritorious appeal. This appeal is, therefore, found to be without merit and wholly frivolous. Appellate counsel's motion to withdraw is found well-taken and is hereby granted.

{¶ 23} The judgment of the Lucas County Court of Common Pleas is affirmed.

Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE