[Cite as *State v. Trevino*, 2009-Ohio-6983.]

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

State of Ohio — Court of Appeals No. L-08-1394

Appellee — Trial Court No. CR-0200802196-000

v.

Wenseslado Trevino II — **DECISION AND JUDGMENT**

Appellant — Decided: December 31, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brenda Majdalani, Assistant Prosecuting Attorney, for appellee.

Edward J. Fischer, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Wenseslado Trevino, II, appeals a judgment of the Lucas County Court of Common Pleas sentencing him for convictions to four offenses:

{¶ 2} 1. Count 1, Pandering Sexually Oriented Matter Involving a Minor in violation of R.C. 2907.322(A)(1), a second degree felony;

{¶ 3} 2. Count 2, Attempted Pandering Sexually Oriented Matter Involving a Minor in violation of R.C. 2923.02 and 2907.322(A)(1), a third degree felony;

{¶ 4} 3. Count 3, Pandering Sexually Oriented Matter Involving a Minor in violation of R.C. 2907.322(A)(5) and (C), a fourth degree felony; and

{¶ 5} 4. Count 4, Illegal Use of a Minor in a Nudity-Oriented Material or Performance in violation of R.C.2907.323(A)(3) and (B), a fifth degree felony.

{¶ 6} The judgment was journalized on October 3, 2008. The convictions resulted from no contest pleas under a plea bargain. Under the agreement, two additional charges were dismissed.

{¶ 7} The trial court sentenced appellant to serve terms of imprisonment on each count: five years on Count 1, four years on Count 2, 17 months on Count 3, and 11 months on Count 4. The court ordered the sentences to be served concurrently. This results in a five year total prison term.

{¶ 8} The trial court appointed counsel for appellant to pursue appeal. Appellate counsel, however, has filed a motion to withdraw as counsel, pursuant to the procedures announced in *Anders v. California* (1967), 386 U.S. 738 due to his inability to find meritorious grounds for appeal. In an affidavit filed in support of the motion, appellate counsel indicates that he has reviewed the record on appeal, conducted research of case law and statutory law, and spoke to appellant's trial counsel and, nevertheless, has not discovered any arguable issue of merit for appeal.

{¶ 9} Under *Anders v. California*, counsel must undertake a "conscientious examination" of the case and, if he determines an appeal would be "wholly frivolous," must advise the court and seek permission to withdraw. Id., at 744; *State v. Duncan* (1978), 57 Ohio App.2d 93. The request to withdraw must be accompanied with a brief "referring to anything in the record that might arguably support the appeal." Id. A copy of the brief is to be furnished to the defendant. Id. The defendant is permitted additional time to raise any points he chooses in his own brief. Id.

{¶ 10} Once these requirements have been met, the appellate court must conduct a full examination of the proceedings to determine whether the appeal is wholly frivolous. Id. Where the appellate court concludes that an appeal is wholly frivolous, it may grant the motion to withdraw and dismiss the appeal. Id.

{¶ 11} Pursuant to *Anders*, counsel has submitted a brief presenting three potential issues for appeal, identified as proposed assignments of error:

{¶ 12} "First Proposed Assignment of Error:

"Whether the appellant was prejudiced by the ineffective assistance of counsel.

{¶ 13}"Second Proposed Assignment of Error:

"Whether the appellant's plea should be set aside because it was not made knowingly, voluntarily, or intelligently.

{¶ 14} "Third Proposed Assignment of Error:

"Whether the trial court erred by imposing an excessive sentence."

{¶ 15} Counsel provided appellant a copy of his brief and notified him of his right to file his own assignments of error and to submit his own appellate brief. Appellant has not filed a brief or assignments of error.

{¶ 16} We consider the potential issue of ineffective assistance of counsel first. To prevail on a claim of ineffective assistance of counsel, a defendant must prove two elements: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v. Washington* (1984), 466 U.S. 668, 687. In the context of convictions based upon guilty or no contest pleas, the prejudice element requires a showing "that there is a reasonable probability that, but the counsel's errors," the defendant would not have pled guilty or no contest. *Hill v. Lockhart* (1985), 474 U.S. 52,59 (guilty plea); *State v. Xie* (1992), 62 Ohio St.3d 521,524 (guilty plea); *State v. Bryant,* 6th Dist Nos. L-08-1138 and L-08-1139, 2009-Ohio-3917, ¶ 7 (no contest plea); *State v. Hurst*, 4th Dist. No. 08CA43, 2009-Ohio-3127, ¶ 71 (no contest plea); *State v. Barnett*, 11th Dist. No. 2006-P-0117, 2007-Ohio-4954, ¶ 52 (no contest plea).

{¶ 17} When considering a claim of ineffective assistance of counsel, the court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance * * *." *Strickland v. Washington,* 466 U.S. at 689.

{¶ 18} Appellate counsel states that that appellant may question whether trial counsel failed to properly conduct pretrial discovery, investigate, or research issues in the case or that appellant may claim that counsel failed to properly advise him concerning the ramifications of pleading no contest. However, to the extent consideration of such claims requires consideration of materials outside of the record, they do not present issues that can be considered on direct appeal. *State v. Carter* (2000), 89 Ohio St.3d 593, 606, 2000-Ohio-172; *State v.* Cooperrider (1983), 4 Ohio St.3d 226, 228; State *v. Davis*, 6th Dist. No. L-05-1056, 2006-Ohio-2350, ¶ 21.

{¶ 19} We have reviewed the record and have not discovered any evidence to support an argument under *Strickland* and *Lockhart* analysis that appellant's no contest pleas would not have been made but for ineffective assistance of trial counsel. Accordingly, we conclude that appellant's First Proposed Assignment of Error is without merit.

{¶ 20} The Second Proposed Assignment of Error concerns whether appellant's no contest pleas were not knowingly, voluntarily, or intelligently made. "When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. Failure on any of these points renders enforcement of the plea unconstitutional under both the United States Constitution and Ohio Constitution." (Citations omitted.) *State v. Engle* (1996), 74 Ohio St.3d 525, 526.

{¶ 21} The transcript of the plea hearing reflects that the trial court, pursuant to Crim.R. 11(C)(2), spoke to appellant, in open court before accepting the no contest pleas

and inquired whether the no contest pleas were voluntarily made and whether they were made with knowledge of the nature of the charges and maximum penalties involved. The court questioned appellant separately as to each charge as to whether he understood the nature of the charges against him and the range of penalties that could be imposed upon conviction, including classification as a sex offender and associated registration and notice requirements and postrelease control. The court advised appellant that he would be subject to postrelease control for a period of five years after release from confinement and also advised appellant of penalties that could be imposed for violations of postrelease control.

{¶ 22} The record reflects that the trial court, pursuant to Crim.R. 11(C)(2)(c), informed appellant that, by pleading no contest, he waived rights, including his right to a jury trial, the right to have the state of Ohio prove his guilt beyond a reasonable doubt, the right to confront and cross-examine witnesses, the right to call witnesses to testify on his behalf at trial, the right to employ the power of the court to call witnesses to testify on his behalf, the right not to testify against himself, and, for practical purposes, the right to appeal.

{¶ 23} The no contest pleas were made pursuant to a plea agreement. Under the agreement, two additional counts, charging appellant with telecommunications harassment (violations of R.C. 2917.21(A)(2) and (C)(1) and (2) and fifth degree felonies), were dismissed. The dismissed charges carried prison terms from six to 12 months each upon conviction. R.C. 2929.14(A)(5).

{¶ 24} The trial court questioned appellant, before accepting the no contest pleas, as to whether any promises had been made to him apart from the plea bargain to secure the change of pleas. Appellant denied that any other promises had been made. Appellant also acknowledged that there was no promise made as to sentence.

{¶ 25} We find no evidence in this record to support a claim that appellant's no contest pleas were not knowingly, voluntarily, and intelligently made. Appellant's Second Proposed Assignment of Error is without merit.

{¶ 26} The Third Proposed Assignment of Error concerns whether the trial court erred by imposing an excessive sentence. In total, appellant was sentenced to imprisonment for five years. The charges on which he was convicted carried a total range of sentence running from four years to 15 and one-half years in prison and up to a maximum fine of $32,500.

{¶ 27} The Ohio Supreme Court's decision in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 26[1] sets forth the standard of review on appeal of felony sentencing. Appellate courts "must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard." Id.

[1]The *Kalish* decision is a plurality decision.

{¶ 28} After the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." Id. at paragraph seven of syllabus. Here, the sentence imposed is well within the statutory range.

{¶ 29} The record includes expert witness testimony concerning risks of recidivism of sexual offenses by appellant. The record also discloses that appellant's criminal history includes six prior convictions for telephone harassment and one prior conviction for criminal child enticement.

{¶ 30} We find no evidence in the record to support a claim that the five year sentence in this case is either contrary to law or constitutes an abuse of discretion. Rather, the sentence is consistent with the purposes of sentencing under R.C. 2929.11 and reflects a consideration of sentencing factors under R.C. 2929.12, including seriousness of the offense and recidivism. Appellant's Third Proposed Assignment of Error is without merit.

{¶ 31} We have also undertaken an independent review of the entire record and find no grounds for a meritorious appeal. We conclude this appeal is wholly frivolous and grant counsel's motion to withdraw. Substantial justice was done the party complaining. We affirm the judgment of the Lucas County Court of Common Pleas. Appellant is ordered to pay costs, 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.

Peter M. Handwork, P.J. _____

JUDGE

Mark L. Pietrykowski, J. _____

_____

Arlene Singer, J. _____ JUDGE

CONCUR.

_____

JUDGE