

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

State of Ohio

Court of Appeals No. F-10-027

Appellee

Trial Court No. 10CR69

v.

Carl M. Smith

DECISION AND JUDGMENT

Appellant

Decided: March 9, 2012

* * * * *

Emily K. Richter, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Fulton County Court of Common Pleas, following a plea, in which appellant pled no contest to and was convicted of one count of robbery, in violation of R.C. 2911.02(A)(3), a third degree felony. On October 22, 2010, following a hearing, appellant was sentenced to serve four years in prison.

{¶ 2} Appellant was appointed counsel for the purposes of appeal. Appointed counsel, Emily Richter, has submitted a request to withdraw, pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). In support of her request, counsel states that, after reviewing the record of proceedings in the trial court and “having researched the relevant case law and statutes,” she has “concluded that this appeal presents only legally frivolous issues.” Nevertheless, counsel has proposed the following questions for our review:

I. Whether the trial court reversibly erred at Smith’s plea? [sic]; and,

II. Whether the trial court reversibly erred at Smith’s sentencing? [sic]

{¶ 3} *Anders, supra*, and *State v. Duncan*, 57 Ohio App.2d 93, 385 N.E.2d 323 (8th Dist.1978), set forth the procedure to be followed by appointed counsel who desires to withdraw for want of a meritorious, appealable issue. In *Anders*, the United States Supreme Court held that if counsel, after a conscientious examination of the case, determines it to be wholly frivolous, he or she should so advise the court and request permission to withdraw. *Anders*, at 744. The request, however, must be accompanied by a brief identifying anything in the record that could arguably support the appeal. *Id.* Counsel must also furnish his or her client with a copy of the brief and a request to withdraw and allow the client sufficient time to raise any matters that he chooses. *Id.* Once these requirements have been satisfied, the appellate court must then conduct a full examination of the proceedings held below to determine if the appeal is indeed frivolous. If the appellate court determines that the appeal is 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} The record shows that appointed counsel has satisfied the requirements set forth in *Anders*. Although notified of his right to file a brief on his own behalf, appellant has not raised any matters for our consideration. Accordingly, we will address the two potential arguments presented by appellate counsel, in order to determine whether this appeal lacks merit and is, therefore, wholly frivolous.

{¶ 5} Appellant's first potential assignment of error asserts that the trial court erred by accepting appellant's no contest plea. Pursuant to Crim.R. 11(C), a trial judge is required personally to tell a defendant entering a plea of guilty or no contest about his constitutional rights at trial, and also about other non-constitutional matters. *State v. Nero*, 56 Ohio St.3d 106, 107, 564 N.E.2d 474 (1990). Accordingly, before accepting a plea the trial court must first

(1) determine that the defendant is making the plea voluntarily, understanding the maximum penalty involved and, if applicable, ineligibility for probation or community control sanctions; (2) inform the defendant of, and determine defendant understands, the effect of the guilty [or no contest] plea, including the trial court's ability of accepting the plea to proceed with sentencing; and (3) inform the defendant of, and determine defendant understands, the rights that the defendant is waiving, including the right to a jury trial, the right to confront witnesses against him, the right

to have compulsory process for obtaining witnesses, the right to require the state to prove the defendant's guilt beyond a reasonable doubt, and the right against self-incrimination had the case gone to trial. Crim.R.

11(C)(2)(a),(b) and (c). *State v. Winfield*, 6th Dist. No. E-09-039, 2010-Ohio-4931, ¶ 12.

{¶ 6} Our review of the record of the plea hearing shows that the trial court made all of the necessary inquiries required by Crim.R. 11(C), completely explained to appellant the nature and effect of his plea, and ascertained that appellant fully understood all of the rights that he was waiving and the consequences of entering his plea. Accordingly, appellant's first proposed assignment of error is without merit.

{¶ 7} Appellant's second proposed assignment of error asserts that his sentence is contrary to law. In *State v. Foster*, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856, the Ohio Supreme Court held that, "[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 the syllabus.

{¶ 8} In *State v. Kalish*, 120 Ohio St.3d 23, 896 N.E.2d 124, 2008-Ohio-4912, the Ohio Supreme Court determined that, in light of *Foster*, when reviewing a felony sentence, appellate courts must employ a "two-step" approach. In so doing, the appellate court first

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.* at ¶ 26.

{¶ 9} As set forth above, appellant pled no contest to, and was found guilty of, one count of robbery, in violation of R.C. 2911.02(A)(3), a third degree felony. Pursuant to R.C. 2929.14, in effect at the time of sentencing, the prison term for a fourth degree felony shall be "one, two, three, four, or five years." Appellant was sentenced to a four-year prison term. Accordingly, appellant's sentence was not contrary to law.

{¶ 10} The record also reflects that, before sentencing appellant to a less-than-maximum prison term, the trial court stated that it had reviewed the presentence investigation report, which detailed appellant's lengthy criminal history, had considered the principles and purposes of sentencing set forth in R.C. 2929.13(B)(2)(b), and had balanced the seriousness and recidivism factors pursuant to R.C. 2929.12. The trial court further found that appellant is not amenable to community control, and that prison is consistent with the principles and purposes of sentencing set forth in R.C. 2929.11. The trial court further found, pursuant to R.C. 2929.14(B), that the shortest prison term would demean the seriousness of the offense and not adequately protect the public.

{¶ 11} On consideration of the foregoing, we find that the trial court did not abuse its discretion by sentencing appellant to serve a four-year prison term. Appellant's second proposed assignment of error is without merit.

{¶ 12} After engaging in a further independent review of the record, we find no meritorious issues to be raised on appeal. This appeal is therefore determined to be wholly frivolous. Appointed appellate counsel's request to withdraw is granted.

{¶ 13} The judgment of the Fulton County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24(A).

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.

Thomas J. Osowik, J.

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

JUDGE

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
