[Cite as *State v. Thompson*, 2013-Ohio-1594.]

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

State of Ohio	Court of Appeals No. S-11-052
Appellee	Trial Court No. 11 CR 444
v.	
Philip Thompson	**DECISION AND JUDGMENT**
Appellant	Decided: April 19, 2013

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney,
and Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Linda Fritz-Gasteier, for appellant.

Philip Thompson, pro se.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Philip Thompson appeals his conviction and sentence in the Sandusky County Court of Common Pleas on three counts of pandering sexually oriented matter involving a minor, violations of R.C. 2907.322(A)(6) and second degree felonies, and on

two counts of pandering sexually oriented matter involving a minor, violations of R.C. 2907.322(A)(5) and fourth degree felonies. Thompson pled guilty to the offenses on October 12, 2011.

{¶ 2} Thompson pled guilty to the charges under a plea agreement. A June 9, 2011 indictment originally charged him with 50 counts of pandering sexually oriented matter involving a minor (each count charging a violation of R.C. 2907.322(A)(1), a second degree felony).

{¶ 3} Before sentencing, on October 17, 2011, Thompson filed a Crim.R. 32.1 motion to withdraw his guilty plea. He filed the motion pro se and his court appointed attorney withdrew as counsel after he filed it. The trial court appointed new counsel. Thompson appeared for a hearing on the motion to withdraw his guilty plea on October 24, 2011, with counsel, but withdrew the motion. The trial court scheduled sentencing for December 5, 2011. A presentence investigative report was prepared.

{¶ 4} On December 5, 2011, Thompson filed another pro se motion to withdraw his guilty plea. The trial court conducted a hearing on the motion and announced its decision from the bench. The court denied the motion. (The court filed a judgment entry, with findings of fact and conclusions of law, denying the motion on December 6, 2012.) Immediately after denying the motion, the court conducted a sex offender classification hearing. It then proceeded with sentencing.

{¶ 5} The court sentenced appellant to serve an eight year prison term on each of the three second degree felony counts for violations of R.C. 2907.322(A)(6) and ordered

those sentences to run concurrent to each other. The trial court imposed a 12 month prison term on both fourth degree felony counts for violations of R.C. 2907.322(A)(5) and ordered the sentences to run consecutive to each other and consecutive to the prison terms imposed on the three second degree felony counts. This resulted in an aggregate prison sentence of ten years for the five offenses. The state dismissed the original counts of the indictment.

{¶ 6} Thompson appeals his convictions and sentences to this court. By affidavit, his appellate counsel states that he reviewed the record and is unable to find meritorious grounds for this appeal. Pursuant to procedures announced in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), counsel filed an appellate brief on appellant's behalf asserting potential assignments of error, accompanied with a motion to withdraw as counsel. Appellant also filed his own appellate brief.

{¶ 7} In the *Anders* brief, appellate counsel sets forth two potential assignments of error:

> I. The trial court abused its discretion when it sentenced defendant to a 10 year consecutive sentence on a first offense.
>
> II. The trial court abused its discretion when it denied defendant's motion to withdraw his plea.

{¶ 8} Appellant assigns four assignments of error in his brief:

> Assignment of Error No. 1. The trial court violated appellant's rights when it denied the appellant's withdraw of guilty plea prior to sentencing and caused an abuse of discretion and prejudice to the appellant.
>
> Assignment of Error No. 2. The trial court violated the appellant's rights when it denied the appellant's withdraw of guilty plea prior to sentencing and did not substantially comply with Crim.R. 11.
>
> Assignment of Error No. 3. The trial court created an abuse of discretion when it sentenced the appellant to the maximum terms and ran counts 4 and 5 consecutive to counts 1, 2, and 3, and also by using the indictment as a contributing factor.
>
> Assignment of Error No. 4. Trial counsel was ineffective for not advising the appellant of the registration requirements and the penalties for non compliance, for coercion towards a plea deal and for not advising the appellant on possible sentencing issues. Sixth Amendment of the United States Constitution.

{¶ 9} We consider challenges to appellant's convictions first. Under Assignment of Error No. 2, appellant contends that the court did not substantially comply with Crim.R. 11(C)(2)(a) and (b) when it accepted his guilty plea and that his Crim.R. 32.1 motion to withdraw his plea should have been granted on that basis.

{¶ 10} Crim.R. 11(C)(2)(a) and (b) provide:

> (C) Pleas of guilty and no contest in felony cases
>
> * * *
>
> (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.

{¶ 11} Appellant contends that the trial court failed to notify him of the maximum penalties involved upon conviction of the five felonies and failed to provide notice that upon conviction he would be required to register as a sex offender.

Crim.R. 11(C)(2)(a) and (b)

{¶ 12} Substantial compliance is the standard for a sentencing court's nonconstitutional notifications and determinations required under Crim.R. 11(C)(2)(a)

and (b). *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 18, *limited on other grounds by State v. Barker*, 119 Ohio St.3d 472, 2011-Ohio-4130, 953 N.E.2d 826, ¶ 25; *State v. Aguilar*, 6th Dist. Nos. S-11-046 and S-11-056, 2013-Ohio-6, ¶ 13. "Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving." *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990).

The record discloses that at the October 12, 2011 plea hearing, the trial court addressed appellant directly. The court informed appellant that the change of plea resulted in three second degree felony and two fourth degree felony convictions. The court informed appellant that he could be imprisoned for up to eight years and fined up to $15,000 on each felony two count and imprisoned up to 18 months and fined up to $5,000 on each felony four count. The court told appellant he would be required to register as a sexual offender. The court also provided appellant notice of postrelease control.

{¶ 13} In our view, the record demonstrates that the trial court substantially complied with the requirements of Crim.R. 11(C)(2)(a) and (b) before accepting appellant's guilty plea. We find appellant's Assignment of Error No. 2 not well-taken.

Ineffective Assistance of Counsel

{¶ 14} Under Assignment of Error No. 4, appellant argues that he was provided ineffective assistance of counsel in violation of his rights under the Sixth Amendment to the United States Constitution.

{¶ 15} 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*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Proof of prejudice requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus.

{¶ 16} In the context of convictions based upon guilty pleas, the prejudice element generally requires a showing "that there is a reasonable probability that, but for counsel's errors * * * [the defendant] * * * would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *State v. Xie*, 62 Ohio St.3d 521, 524, 584 N.E.2d 715 (1992). This case does not involve a claimed failure of counsel to communicate a plea offer that involves a different analysis. *See Missouri v. Frye*, ___ U.S. ___, 132 S.Ct. 1399, 1409-1410, 182 L.Ed.2d 379 (2012).

{¶ 17} Appellant argues that defense counsel was deficient because he failed to advise appellant that he would be required to register as a sex offender upon conviction. Appellant also contends that counsel was deficient for failure to advise him of penalties

that could be imposed for violation of sex offender registration requirements and because counsel failed to act against coercion by the prosecution for him to plead guilty. He claims that defense counsel failed to advise him on sentencing issues.

{¶ 18} The record demonstrates that, at least through the trial court's notifications under Crim.R. 11(C)(2)(a) and (b), appellant received actual notice of the maximum penalties upon conviction of the five felonies, including length of imprisonment, amount of fines, and the existence of a requirement to register as a sex offender. All were communicated before the trial court accepted his guilty plea.

{¶ 19} As we discuss in our consideration of Assignment of Error No. 1 and Potential Assignment of Error No. 2, the trial court complied with the requirements of Crim.R. 11 before accepting appellant's guilty plea and its determination that the appellant knowingly, voluntarily, and intelligently waived both his constitutional and nonconstitutional rights when making the plea is supported by competent credible evidence in the record.

{¶ 20} As part of his ineffective assistance of counsel argument, appellant argues that his counsel was deficient in dealing with coercion by the prosecutor to enter a guilty plea. Appellant claims he was coerced into making the plea under threat of federal criminal prosecution.

{¶ 21} The issue was addressed at the hearing on the motion to withdraw appellant's plea. We agree with the trial court that there was no threat or coercion by the prosecutor to induce a change of plea. At the hearing, the prosecutor stated that appellant

was informed of a risk of federal charges under the facts presented in the case. The existence of such a risk at the time of the statement is not disputed. The prosecutor also explained that the state does not control whether federal authorities institute criminal charges.

{¶ 22} We conclude that appellant failed to demonstrate that he would not have pled guilty to the charges but for the claimed deficiency of trial counsel.

{¶ 23} We find appellant's Assignment of Error No. 4 not well-taken.

Denial of Crim.R. 32.1 Motion to Withdraw Guilty Plea

{¶ 24} Generally, a Crim.R. 32.1 presentence motion to withdraw a guilty plea is to be freely and liberally granted. *Xie*, 62 Ohio St.3d at 526, 584 N.E.2d 715; *State v. Spivey*, 81 Ohio St.3d 405, 415, 692 N.E.2d 151 (1998). The Supreme Court of Ohio directed in *Xie* that the trial court conduct a hearing on such motions "to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea." *Xie*, 62 Ohio St.3d at paragraph one of the syllabus, 584 N.E.2d 715. A trial court's denial of a presentence motion to withdraw a plea will not be reversed on appeal absent an abuse of discretion. *Id.*, at paragraph two of syllabus; *Spivey* at 415. The term "abuse of discretion" implies that the trial court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). There is no absolute right to withdraw a plea prior to sentencing. *Xie*, 62 Ohio St.3d at paragraph one of syllabus, 584 N.E.2d 715.

{¶ 25} A reviewing court weighs a list of factors to determine whether a trial court abused its discretion in denying a presentence motion to withdraw a plea, including:

> (1) whether the prosecution would be prejudiced if the pleas was vacated; (2) whether the accused was represented by highly competent counsel; (3) whether the accused was given a full Crim.R. 11 hearing; (4) whether a full hearing was held on the motion; (5) whether the trial court gave full and fair consideration to the motion; (6) whether the motion was made within a reasonable time; (7) whether the motion set forth specific reasons for the withdrawal; (8) whether the accused understood the nature of the charges and possible penalties; and (9) whether the accused was perhaps not guilty or had a complete defense to the crime. *State v. Eversole*, 6th Dist. Nos. E-05-073, E-05-074, E-05-075, and E-05-076, 2006-Ohio-3988, ¶ 13, citing *State v. Fish,* 104 Ohio App.3d 236, 240, 661 N.E.2d 788 (1st Dist.1995).

{¶ 26} At the hearing, the prosecution did not claim it would be prejudiced by the granting of appellant's motion to withdraw his guilty plea. The trial court found, in its judgment, the attorney representing appellant in the change of plea was very experienced and well known by the court to be competent.

{¶ 27} The trial court conducted a full Crim.R. 11 hearing. As discussed under Assignment of Error No. 2, the court substantially complied with the requirements of

Crim.R. 11(C)(2)(a) and (b), governing nonconstitutional rights and determinations. The trial court also strictly complied with Crim.R. 11(C)(2)(c) requirements with respect to constitutional rights.

{¶ 28} The court conducted a hearing on the Crim.R. 32.1 motion and included findings of fact and conclusions of law in its judgment denying it. In our view, the trial court gave a full hearing on the motion.

{¶ 29} Central to the trial court's judgment was its finding, both at the hearing and in its judgment, that appellant had knowingly, voluntarily and intelligently waived his constitutional and nonconstitutional rights at the time he changed his plea to guilty.

{¶ 30} Appellant has not argued either in the trial court or on appeal that he has defenses to the charges or that he is not guilty of the crimes of which he now stands convicted. At the hearing on his motion he objected to statutory provisions concerning the severity of the offenses (second and fourth degree felonies) and the range of sentences imposed upon conviction.

{¶ 31} We addressed earlier the lack of substance to appellant's claim that he was coerced into entering his guilty plea.

{¶ 32} The record does not support any claim that appellant did not understand the nature of the charges and possible penalties. We find competent, credible evidence in the record supporting the trial court's determination that appellant knowingly, voluntarily, and intelligently waived both his constitutional and nonconstitutional rights when making his guilty plea.

{¶ 33} In our view appellant failed to present a reasonable and legitimate basis for withdrawal of his guilty plea. A change of heart alone is not a basis to withdraw a guilty plea under Crim.R. 32.1. *State v. Kutnyak*, 6th Dist. No. WD-11-038, 2012-Ohio-3410, ¶ 6; *State v. Lawhorn*, 6th Dist. No. L-08-1153, 2009-Ohio-3216, ¶ 23.

{¶ 34} We find no abuse of discretion by the trial court in its decision to deny the Crim.R. 32.1 motion to withdraw appellant's guilty plea. We find appellant's Assignment of Error No. 1 and Potential Assignment of Error No. 2 of the *Anders* brief not well-taken.

Sentence

{¶ 35} Both appellant's Assignment of Error No. 3 and Potential Assignment of Error No. 1 argue that the trial court abused its discretion as to sentence. Both argue that the trial court erred in ordering that the sentences for the felony four counts (Counts 4 and 5) be served consecutive to each other and consecutive to the sentences on the felony two counts (Counts 1, 2, and 3). Under Assignment of Error No. 3, appellant also argues that the trial court abused its discretion in sentencing appellant to maximum terms of imprisonment on the felony two counts.

Standard of Review of Felony Sentencing

{¶ 36} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the Ohio Supreme Court set forth a two-step analysis for review of felony sentencing on appeal. First, appellate courts are required to "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." *Id.* at ¶ 26. Second, if the first prong is satisfied, the appellate court reviews the decision imposing sentence under an abuse of discretion standard. *Id.*

Statutory Requirements

{¶ 37} 2011 Am.Sub.H.B. No. 86 took effect on September 30, 2011, and reinstated the requirement of judicial fact-finding before a court imposes consecutive sentences in a felony case. R.C. 2929.14(C)(4). Sentencing in this case proceeded after the effective date of the statutory change.

{¶ 38} The version of R.C. 2929.14 in effect at the time of sentencing provided that a sentencing court may require sentences on multiple offenses to be served consecutively if it makes specified findings under R.C. 2929.14(C)(4):

> (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*:
>
> (a) 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.

(b) *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*.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender. (Emphasis added.)

{¶ 39} The trial court made the necessary findings under R.C. 2929.14(C)(4) to order that sentences for the felony four counts run consecutive to each other and consecutive to the sentences for the felony two counts. Under R.C. 2929.14(C)(4), the court found that consecutive sentences were necessary to protect the public from future crimes and to punish appellant and, second, that consecutive sentences were not disproportionate to the seriousness of appellant's conduct and to the danger appellant poses to the public. The court also made findings under R.C. 2929.14(C)(4)(b) that the multiple offenses were committed as a part of one or more courses of conduct and the harm caused by two or more of the multiple offenses was so great that no single prison term for any of the offenses committed adequately reflects the seriousness of appellant's conduct.

{¶ 40} The sentences are also within the statutory range of sentences for second and fourth degree felonies. Eight years is the maximum sentence of imprisonment for a second degree felony. R.C. 2929.14(A)(2). The maximum sentence for a fourth degree felony is 18 months. R.C. 2929.14(A)(4).

{¶ 41} We conclude the sentences are not contrary to law.

Abuse of Discretion

{¶ 42} Included in appellant's contentions as to abuse of discretion as to sentence is a claim that the trial court erred in considering the 50 count indictment when determining sentence. We find no error in the trial court's consideration of the charges in the indictment that were dismissed under appellant's plea agreement. The Ohio Supreme Court has recognized that sentencing courts are "to acquire a thorough grasp of the character and history of the defendant before it." *State v. Burton*, 52 Ohio St.2d 21, 23, 368 N.E.2d 297 (1977). Although charges in the indictment were dismissed under appellant's plea agreement, Ohio courts have recognized that a court may consider at sentencing charges that were reduced or dismissed under a plea agreement. *State v. Degens*, 6th Dist. No. L-11-1112, 2012-Ohio-2421, ¶ 19; *State v. Robbins*, 6th Dist. No. WM-10-018, 2011-Ohio-4141, ¶ 9; *State v. Banks,* 10th Dist. Nos. AP-1065, 10AP-1066, and 10AP-1067, 2011-Ohio-2749, ¶ 24; *State v. Johnson*, 7th Dist. No. 10 MA 32, 2010-Ohio-6387, ¶ 26.

{¶ 43} Under both Potential Assignment of Error No. 1 and Assignment of Error No. 3, appellant argues that the trial court erred in imposing consecutive sentences.

Appellant disputes the court's findings as to the seriousness of the offenses. Appellant argues that the court should have imposed community control on the fourth degree felony counts.

{¶ 44} At sentencing, the trial court stated that it had reviewed appellant's presentence investigative report ("PSI") prior to imposing sentence. The court acknowledged that appellant did not have a significant prior criminal record, but the court expressed its concern with protection of the public and punishment of appellant in determining sentence.

{¶ 45} According to the PSI report, appellant first came to the attention of Perrysburg Township Police when they discovered his use of a peer to peer file sharing computer network to download 15 child pornography images in March 2011. Appellant's computer IP address was traced to his residence in Fremont.

{¶ 46} On April 15, 2011, Fremont police executed a search warrant at appellant's residence in Fremont. A partial listing of items seized in the search includes an HP Pavilion 807 computer, 14 external storage devices, an external hard drive, one external DVD writer, 62 CD/DVD discs containing child pornography and an MP3 player showing a young child performing a sexual act on an adult. Hanging on the wall of the living room of the residence at the time of the search were photographs of naked children in sexual positions. Similar photographs were hanging on the bathroom wall.

{¶ 47} The PSI report indicated that appellant downloaded child pornography over the internet onto his computer and stored some of the material on DVDs. At sentencing,

the trial court considered that appellant was originally indicted on 50 counts covering a period of years.

{¶ 48} The court ordered the 12 month sentences for the two convictions for violation of R.C. 2907.322(5) be served consecutive to each other and consecutive to the three concurrent eight year sentences imposed for violations of R.C. 2907.322(6). The ruling resulted in a two year increase to the total aggregate sentence imposed in this case.

{¶ 49} We find no abuse of discretion by the trial court in that judgment. The volume of the material itself and the volume transferred to external, portable CD/DVD discs support the court's findings under R.C. 2929.14(C)(4) and (C)(4)(b).

{¶ 50} Under Potential Assignment of Error No. 1, appellant contends that the trial court abused its discretion by failing to impose a sentence of community control for the R.C. 2907.322(5) convictions. Appellant argues the convictions are for a felony four offense and R.C. 2929.13 establishes mandatory community control sanctions of at least one year's duration for nonviolent, first-time offenders.

{¶ 51} R.C. 2929.13(B)(1) lists nine exceptions to mandatory community control for a felony of the fourth or fifth degree. *See State v. Massien*, 125 Ohio St.3d 204, 2010-Ohio-1864, 926 N.E.2d 1282, ¶ 8. One exception, provided in R.C. 2929.13(B)(1)(a)(ii), states that mandatory community control does not apply unless "[t]he most serious charge against the offender at the time of sentencing is a felony of the fourth or fifth degree." The existence of the three felony two counts for violations of R.C. 2907.322(6) made appellant ineligible for mandatory community control.

{¶ 52} The trial court found appellant was not amenable to community control. We find no abuse of discretion by the trial court in its decision under R.C. 2929.13(B)(3)(a) to impose a prison sentence on the fourth degree felony counts.

{¶ 53} Appellant argues that the trial court abused its discretion for ordering an eight year prison term, the maximum sentence for a violation of R.C. 2907.322(6), because appellant was a first time, non-violent offender. The sentences were within the statutory range of sentences for second degree felonies. This court has held that where a trial court imposes a sentence within the range of sentences authorized by statute, "the trial court's sentence cannot be considered an abuse of discretion, absent some extraordinary circumstances." *State v. Rehard*, 6th Dist. No. L-08-1194, 2010-Ohio-470, ¶ 11; *State v. Clark*, 6th Dist. No. L-10-1092, 2011-Ohio-4681, ¶ 14-15. We find no extraordinary circumstances presented in this case.

{¶ 54} We find Assignment of Error No. 3 and Potential Assignment of Error No. 1 not well-taken.

{¶ 55} This court, as required under *Anders*, has undertaken its own independent examination of the record to determine whether any issue of arguable merit is presented for appeal. We have found none. Accordingly, we find this appeal is without merit. We grant the motion of appellant's counsel to withdraw as counsel and affirm the judgment of the Sandusky County Court of Common Pleas. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24. The clerk is ordered to serve all parties, including

Philip Thompson, with notice of this decision, if appellant notified the court of his address.

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

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE