[Cite as *State v. Simmons*, 2013-Ohio-1712.]

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

State of Ohio — Court of Appeals No. L-12-1084

Appellee — Trial Court No. CR0201102168

v.

Dwayne Simmons — **DECISION AND JUDGMENT**

Appellant — Decided: April 26, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Lindsay D. Navarre, Assistant Prosecuting Attorney, for appellee.

Karin L. Coble, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal brought by appellant, Dwayne Simmons, from the judgment of the Lucas County Court of Common Pleas that sentenced him to serve a period of six years of incarceration on an aggravated burglary conviction and six years of incarceration on a kidnapping conviction, to be served consecutively.

{¶ 2} This sentence was imposed subsequent to appellant voluntarily entering pleas of no contest to one count of aggravated burglary, in violation of R.C. 2911.11(A)(1), and one count of kidnapping, in violation of R.C. 2905.01(A)(2) and (C).

Facts and Procedural History

{¶ 3} On August 2, 2011, appellant was indicted on one count of aggravated burglary, with a firearm specification, in violation of R.C. 2911.11(A)(1), two counts of aggravated robbery with a firearm specification, in violation of R.C. 2911.01(A)(1), and two counts of kidnapping, with a firearm specification, in violation of R.C. 2905.01(A)(2) and (C).

{¶ 4} On August 10, 2011, appellant appeared for arraignment with retained counsel before a magistrate. The magistrate had appointed herself as magistrate in the matter on that day. The record reflects that appellant acknowledged receipt of a copy of the indictment, waived any defects as to time, place or manner of service and waived its reading in open court. Appellant then entered a plea of not guilty. The case was set for pretrial on August 17, 2011. Bond was established at $125,000, with no percent allowed.

{¶ 5} On January 30, 2012, appellant withdrew his not guilty pleas and entered a plea of no contest to one count of aggravated burglary and one count of kidnapping, pursuant to a voluntary plea agreement. In exchange, the balance of the charges were dismissed. In conjunction with the negotiated plea agreement, appellant consented to jointly and several liability with the co-defendants for restitution in the amount of $6,373.45.

{¶ 6} On February 29, 2012, appellant was sentenced to serve a period of six years of incarceration on the aggravated burglary conviction and six years of incarceration on the kidnapping conviction, to be served consecutively.

{¶ 7} Timely notice of appeal was filed. Counsel was appointed to represent appellant on appeal.

Discussion

{¶ 8} Appointed appellate counsel has filed a brief summarizing the relevant facts and proceedings. Counsel presents no argument for reversal and has advised this court that she has reviewed the record and can discern no meritorious claim on appeal.

{¶ 9} Appointed counsel has filed a brief and requested leave to withdraw as counsel pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Under *Anders*, if, after a conscientious examination of the case, counsel concludes the appeal to be wholly frivolous, she should so advise the court and request permission to withdraw. *Id.* at 744. This request must be accompanied by a brief identifying anything in the record that could arguably support the appeal. *Id.* In addition, counsel must provide appellant with a copy of the brief and request to withdraw, and allow appellant sufficient time to raise any additional matters. *Id.* Once these requirements are satisfied, the appellate court is required to conduct an independent examination of the proceedings below to determine if the appeal is indeed frivolous. *Id.* If it so finds, the appellate court may grant counsel's request to withdraw, and decide the appeal without violating any constitutional requirements. *Id.*

{¶ 10} In this case, appellant's appointed counsel has satisfied the requirements set forth in *Anders, supra*. This court further notes that appellant did not file a pro se brief in this matter.

{¶ 11} Accordingly, this court shall proceed with an examination of the potential assignments of error set forth by counsel. We have reviewed the entire record from below to determine if this appeal lacks merit and is, therefore, wholly frivolous.

{¶ 12} Counsel refers to several possible, but ultimately untenable, issues: (1) the magistrate's decision in arraigning appellant and accepting his plea of not guilty was in violation of Crim.R. 19; (2) appellant's no contest plea was made involuntarily and in an unknowing manner and the trial court erred in finding appellant guilty; (3) the trial court erred in imposing the sentences to run consecutively, and (4) the trial court erred in imposing court costs.

{¶ 13} Crim.R. 19(A) states as follows:

> A court other than a mayor's court may appoint one or more magistrates who shall have been engaged in the practice of law for at least four years and be in good standing with the Supreme Court of Ohio at the time of appointment. A magistrate may serve in more than one county or in two or more courts of the same criminal jurisdiction within the same county.

{¶ 14} This court recognizes three concerns with the magistrate appointment in this case. First, the record reflects that a journal entry from the trial court dated August 10, 2011, and journalized on August 11, 2011, references a "Standing Order filed February 11, 2011." Interestingly, the entry of magistrate appointment is then signed by the same party named as the subject of the magistrate appointment. This court will note the peculiar language and action set forth in the entry—it appears to permit one to appoint oneself as magistrate. Second, because the record does not contain the referenced "Standing Order," we are unable to discern what specific powers were conferred upon the designated magistrate by the trial court. *See* Crim.R. 19(D)(1). Third, we note that the magistrate's decision at the arraignment to establish bond was not adopted by the trial court as required by Crim.R. 19(D)(4)(a).

{¶ 15} However, the record reflects that the magistrate only presided over the arraignment, which is a delegable authority under Crim.R. 19(C)(1). Further, counsel did not request the transcript of the August 10, 2011 arraignment. Consequently, we have no record that defendant objected to any of the above-described proceedings. Similarly, Crim.R. 19(D)(3)(b) permits an appeal from the decision of the magistrate within 14 days, and there is no indication in the record that such an appeal was filed in this case. Thus, any objections, meritorious or otherwise, were waived, and this argument is wholly without merit.

{¶ 16} With respect to counsel's argument that appellant's plea was made involuntarily and unknowingly, we have thoroughly reviewed the plea hearing of January 30, 2012, as well as documents executed by appellant on that date.

{¶ 17} Crim.R. 11(C)(1)(2) establishes the procedure to be followed by the trial court on pleas of 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.
>
> (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.

{¶ 18} The record of the proceedings clearly reflects that the trial court methodically asked appellant whether he understood each of the rights that he was forfeiting and whether he understood the nature of the plea, as well as the maximum penalty involved. Therefore, the argument that the plea was made involuntarily and unknowingly is wholly frivolous.

{¶ 19} Counsel also presents a possible argument on behalf of appellant that the trial court erred in the imposition of consecutive sentences. The law regarding consecutive sentences has recently changed with the enactment of R.C. 2929.14, effective September 30, 2011. R.C. 2929.14(C)(4) states:

> (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.

{¶ 20} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, the Ohio Supreme Court held that Ohio's sentencing statutes required a judge to make factual findings in order to increase a sentence beyond presumptive minimum or concurrent terms. The Ohio Supreme Court severed those sections and held that trial courts have full discretion to sentence within the applicable statutory range and, likewise, have discretion to order sentences to be served consecutively. *Foster* at ¶ 99-100.

{¶ 21} *Foster* eliminated the requirement that both findings and reasons were needed to support the imposition of consecutive sentences. The new sentencing code only requires the trial court to make findings to support consecutive sentences. It does not require the court to give reasons in support of those findings. *State v. Parsons*, 7th Dist. No. 12-BE-11, 2013-Ohio-1281.

{¶ 22} Under the present statute, a court may impose consecutive sentences under R.C. 2929.14(C)(4) if it makes the following findings: (1) consecutive sentences are necessary to protect the public from future crime or to punish the offender and (2) 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 (3) one 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 postrelease control for a prior offense, or (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, or (c) the offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶ 23} The record establishes that the court made the findings required by R.C. 2929.14(C)(4). In the sentencing entry of February 29, 2012, the court specifically found that "to fulfill the purposes of 2929.11, and not disproportionate to the seriousness of the offender's conduct or the danger the offender poses, the court further finds the harm caused was great or unusual, therefore, the sentences are ordered to be served consecutively." These findings fulfill the requirements of R.C. 2929.14(C)(4).

{¶ 24} Therefore, this potential assignment of error is without merit.

{¶ 25} Finally, counsel argues that the trial court erred in imposing the costs of prosecution, confinement and appointed counsel upon appellant as the notices mandated by R.C. 2947.23 were not given to appellant. Counsel contends that R.C. 2947.23 requires the court to notify the defendant of the imposition of such costs at the sentencing hearing and explain that, if the defendant fails to pay, community service may be imposed instead and the judgment reduced at a specified hourly rate. R.C. 2947.23(A)(1)(a)(i)(ii).

{¶ 26} This court has recently held that the omission of the explanation of community service alternatives required by R.C. 2947.23(A)(1)(b) does not negate or limit the authority of the court to order the defendant to perform community service if the defendant fails to pay the judgment described in that division or to timely make payments toward that judgment under an approved payment plan. *State v. King*, 6th Dist. No. L-12-1013, 2013-Ohio-1265.

{¶ 27} Regardless, the sentencing entry of February 29, 2012 states: "Notification pursuant to 2947.23 given." However, the transcript of the proceedings of both the plea date of January 30, 2012, and the sentencing date of February 29, 2012, is silent as to notification to appellant that community service could be performed. Determinative to this issue, we note that it is axiomatic that a court speaks through its journal, not by oral pronouncement. *Schenley v. Kauth*, 160 Ohio St. 109, 111, 113 N.E.2d 625 (1953). Therefore, this potential assignment of error is without merit.

Conclusion

{¶ 28} We have conducted an independent examination of the record pursuant to *Anders v. California* and have found no error prejudicial to appellant's rights in the proceedings in the trial court. The motion of counsel for appellant requesting to withdraw as counsel is granted, and this appeal is found to be wholly frivolous. It is dismissed.

{¶ 29} 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. The clerk is ordered to serve all parties with notice of this decision.

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.

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE