[Cite as *State v. Deleon*, 2013-Ohio-2029.]

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

State of Ohio	Court of Appeals No. S-12-020
Appellee	Trial Court No. 11-CR-778
v.	
Jose A. Deleon	**DECISION AND JUDGMENT**
Appellant	Decided: May 17, 2013

* * * * *

Richard E. Garand, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} This is an *Anders* appeal. Appellant, Jose Deleon, appeals the judgment of the Sandusky County Court of Common Pleas, sentencing him to 60 months in prison following his plea of no contest to one count of gross sexual imposition.

A. Facts and Procedural Background

{¶ 2} The pertinent facts underlying this appeal are not in dispute. On December 30, 2010, Deleon traveled to M.V.'s house in Sandusky County, Ohio, and picked up her

five-year-old daughter, L.N, so that she could play with a neighbor girl. At the time, M.V. was away at work. On her way home from work, M.V. stopped at Deleon's house to pick up L.N.

{¶ 3} After leaving Deleon's house, M.V. noticed that L.N. was acting strange and was less "chatty" than normal. Upon questioning, M.V. determined that L.N. was sexually assaulted by Deleon while at his house. L.N. told M.V. that Deleon instructed her to watch a movie in his girlfriend's son's second-story bedroom. While watching the movie, L.N. was approached by Deleon, who began to kiss her and get on top of her. Deleon proceeded to pull down her pants and sexually assault her orally and with his finger.

{¶ 4} Deleon was subsequently arrested and charged with rape in violation of R.C. 2907.02(A)(1)(b), a felony of the first degree. Deleon initially entered a plea of not guilty. On May 7, 2011, a hearing was conducted pursuant to Evid.R. 807 in order to determine whether the hearsay statements made by L.N. to M.V. would be admissible at trial. Over Deleon's objection, the trial court ruled that the statements would be admissible at trial.

{¶ 5} A week later, Deleon reached a plea agreement with the state and entered a plea of no contest to the lesser charge of gross sexual imposition in violation of R.C. 2907.05(A)(4), a felony of the third degree. The court then immediately proceeded to sentence Deleon to an agreed upon prison term of 60 months. Deleon's timely appeal followed.

{¶ 6} Based upon his belief that no prejudicial error occurred below, Deleon's counsel has filed a motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

{¶ 7} *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 should so advise the court and request permission to withdraw. *Anders* at 744. This request, however, must be accompanied by a brief identifying anything in the record that could arguably support the appeal. *Id.*

{¶ 8} Counsel must also furnish his client with a copy of the brief and 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 it may proceed to a decision on the merits if state law so requires. *Id.*

{¶ 9} In this case, Deleon's counsel has satisfied the requirements set forth in *Anders*. Accordingly, this court shall proceed with an examination of the potential assignments of error set forth by Deleon's counsel and the entire record below to determine if this appeal lacks merit and is, therefore, wholly frivolous.

B. Potential Assignments of Error

{¶ 10} In his *Anders* brief, Deleon's counsel assigns the following possible errors:

I. THE TRIAL COURT ERRED IN ACCEPTING APPELLANT'S PLEA.

II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN SENTENCING APPELLANT.

III. THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT WHEN IT RULED TO ALLOW HEARSAY EVIDENCE TO BE PRESENTED AT TRIAL IN A 807 HEARING.

{¶ 11} Deleon has not filed a pro se brief.

II. Analysis

A. Deleon's no-contest plea was knowingly, intelligently, and voluntarily given.

{¶ 12} In Deleon's first potential assignment of error, his counsel argues that the trial court erred in accepting Deleon's no-contest plea. More specifically, Deleon's counsel argues that the plea should not have been accepted because it was not knowingly, intelligently, and voluntarily entered into.

{¶ 13} Crim.R. 11(C) delineates the requirements for a proper, voluntary plea. *State v. Gonzalez*, 193 Ohio App.3d 385, 2011-Ohio-1542, 952 N.E.2d 502 (6th Dist.). Crim.R. 11(C)(2)(a) states, in pertinent part, that the trial court shall not accept a plea without first "[d]etermining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved." Upon

our review of the record, it is clear the trial court explained each of Deleon's Crim.R. 11 rights at the plea hearing. The trial court also fully advised Deleon of the consequences of accepting the plea agreement. Lastly, the trial court asked Deleon whether his plea of no contest was being given of his own free will. He responded in the affirmative. Thus, the record shows Crim.R. 11(C) was adhered to in this case.

{¶ 14} Accordingly, Deleon's first potential assignment of error is not well-taken.

B. The trial court's sentence is not contrary to law.

{¶ 15} In his second potential assignment of error, Deleon argues that the trial court erred in imposing a sentence that is contrary to law.

{¶ 16} The Ohio Supreme Court's decision in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, sets forth a two-step analysis to be employed in reviewing felony sentences 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.*

{¶ 17} Here, Deleon's counsel acknowledges that the sentence falls within the range allowed by statute. Indeed, a felony of the third degree is punishable by a prison term of up to 60 months. R.C. 2929.14(A)(3)(a). A choice of sentence from within the permissible statutory range cannot, by definition, be contrary to law. *Id.* at ¶ 15. Thus, the first prong under *Kalish* is satisfied.

{¶ 18} Next, we determine whether the trial court abused its discretion. An 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).

{¶ 19} Prior to imposing its sentence, the trial court stated:

> [T]his sentence shall be reasonably calculated to achieve the overriding purposes of felony sentencing, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact on the victim; and, consistent with sentences imposed for similar crimes committed by similar offenders. Of all these things in mind, and in accordance with the principals and purposes of sentencing to protect the public and punish the defendant, I'll sentence you as follows: I will follow the agreed sentence of 60 months in prison.

{¶ 20} Upon reviewing the record before us, we find that the trial court's sentence is supported by the record, and is not a product of an unreasonable, arbitrary, or unconscionable attitude. Thus, the trial court did not abuse its discretion when it sentenced Williams to 60 months in prison.[1]

[1] In addition, we note that counsel's second potential assignment of error fails as a matter of law under R.C. 2953.08(D)(1), which precludes appellate review of a sentence that is the product of a joint recommendation between the state and the defendant. Since the sentence in this case was agreed upon as part of the plea agreement, Deleon cannot challenge the sentence as being contrary to law.

{¶ 21} Accordingly, counsel's second potential assignment of error is not well-taken.

C. The trial court did not err by ruling in the state's favor following the Evid.R. 807 hearing.

{¶ 22} In his third potential assignment of error, Deleon argues that the trial court's decision to permit the use of hearsay evidence at trial was erroneous.

{¶ 23} "The admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage*, 31 Ohio St.3d 173, 180, 510 N.E.2d 343 (1987). Thus, we apply an abuse of discretion standard. *See id.*

{¶ 24} In general, hearsay evidence is not admissible at trial. Evid.R. 802. However, hearsay evidence may be admissible if it falls into one of the enumerated exceptions found in the Rules of Evidence. One such exception is Evid.R. 807, which allows out-of-court statements made by a child under the age of twelve to be admitted where those statements describe a sexual act performed by, with, or on the child. In order to present the hearsay statements, the movant must meet Evid.R. 807's "high threshold." *State v. Silverman*, 121 Ohio St.3d 581, 2009-Ohio-1576, 906 N.E.2d 427, ¶ 26.

{¶ 25} First, the court must find that the statement is trustworthy and reliable, considering a number of factors, including "spontaneity, the internal consistency of the statement, the mental state of the child, the child's motive or lack of motive to fabricate, the child's use of terminology unexpected of a child of similar age, the means by which the statement was elicited, and the lapse of time between the act and the statement."

Evid.R. 807(A)(1). Next, the court must determine that the child's testimony cannot be reasonably obtained. Evid.R. 807(A)(2). Finally, there must be independent proof of the sexual act. Evid.R. 807(A)(3).

{¶ 26} Here, the trial court conducted a hearing in order to determine the applicability of Evid.R. 807 to the statements L.N. made to M.V. At the hearing, M.V. and a Fremont Police Department detective, Jason Kiddey, each testified. Following the testimony, the court concluded that the state's evidence satisfied the requirements of Evid.R. 807 and decided to allow M.V. to recite the statements at trial. In support of its decision, the court cited specific findings of fact relevant to each element of Evid.R. 807.

{¶ 27} As to the first element, the reliability of the statement, the court concluded that L.N.'s lack of hesitation in responding to M.V. when she asked whether Deleon touched her showed that the statement was spontaneous. Further, the court noted that the statement was given within a couple hours of the event. In addition, the statement contained no internal inconsistencies. As to a motive to fabricate, the court found that L.N. was generally honest and was likely telling the truth in this case in light of her prior relationship with Deleon. Ultimately, the court found that the statement was trustworthy and reliable.

{¶ 28} As to the second element, the ability to obtain the child's testimony, the court conducted an in-camera review in which L.N. was found to be unable to speak or relate anything to the court. Based on the in-camera review, the court concluded L.N.'s testimony could not be obtained through any means.

{¶ 29} Regarding the third element, the independent proof of the sexual act, the court pointed to the fact that Deleon's DNA was found on L.N.'s underwear.

{¶ 30} We have thoroughly reviewed the record. Based on our review, we conclude that the court's specific, detailed findings of fact are supported by the record. Thus, the trial court's decision to admit L.N.'s statements under Evid.R. 807 was not an abuse of discretion.

{¶ 31} Accordingly, Deleon's third potential assignment of error is not well-taken.

III. Conclusion

{¶ 32} This court, as required under *Anders*, has undertaken our own examination of the record to determine whether any issue of arguable merit is presented for appeal. We have found none. Accordingly, we grant counsel's motion to withdraw.

{¶ 33} The judgment of the Sandusky County Court of Common Pleas is affirmed. Costs are assessed to Deleon 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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE