[Cite as *State v. Bryant*, 2013-Ohio-2595.]

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

State of Ohio	Court of Appeals No. S-12-002
Appellee	Trial Court No. 11 CR 334
v.	
Shane J. Bryant	**DECISION AND JUDGMENT**
Appellant	Decided: June 21, 2013

* * * * *

Richard E. Garand, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} This matter is an appeal from the judgment of the Sandusky County Court of Common Pleas. Following a denial of appellant's motion to suppress and a subsequent plea of no contest, appellant, Shane J. Bryant, was found guilty of one count of attempted rape, a felony in the second degree. He was sentenced to five years incarceration.

{¶ 2} Appellant's appointed counsel has requested leave to withdraw in accordance with the procedure set forth in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). In *Anders*, the United States Supreme Court held that if counsel, after a conscientious examination of the appeal, determines it to be wholly frivolous he should so advise the court and request permission to withdraw. *Id*. at 744. The request shall include a brief identifying anything in the record that could arguably support an appeal. *Id*. Counsel shall also furnish his client with a copy of the request to withdraw and its accompanying brief, and allow the client sufficient time to raise any matters that he chooses. *Id*. 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*.

{¶ 3} Here, appointed counsel has met the requirements set forth in *Anders*. Counsel also informed appellant of his right to file his own, additional assignments of error and appellate brief. The court notes that appellant has not filed a pro se brief or otherwise responded to counsel's request to withdraw. Accordingly, this court shall proceed examining the potential assignment of error set forth by counsel, as well as the entire record below to determine whether this appeal lacks merit deeming it wholly frivolous.

{¶ 4} On April 5, 2011, appellant was charged with four counts of rape. Appellant filed a motion to suppress his statements to the detective about engaging in sexual intercourse with the victim at the party. However, the trial court found this claim without merit and denied the motion. Appellant then pleaded no contest to a single count of the lesser included charge of attempted rape, a violation of R.C. 2907.02(A)(2) and R.C. 2923.03 and was found guilty by the trial court. In exchange, the state agreed to dismiss the remaining charges and entered into a joint recommendation for a five-year term of incarceration.

{¶ 5} Prior to accepting the change in plea, the court explained to appellant his rights. Once satisfied that appellant was cognizant of his rights and had waived them properly, the court accepted the change in plea. On September 26, 2011, appellant was sentenced to five years incarceration. Appellant's counsel now appeals pursuant to *Anders*.

{¶ 6} In his *Anders* brief appellant's counsel raises the following potential assignments of error:

> I. WHETHER THE TRIAL COURT ERRED IN ACCEPTING DEFENDANT/APPELLANT'S KNOWING, INTELLIGENT AND VOLUNTARY PLEA.
>
> II. WHETHER THE TRIAL COURT ERRED WHEN IT SENTENCED THE DEFENDANT/APPELLANT TO A TERM OF INCARCERATION ALLOWABLE BY LAW.

III. WHETHER DEFENDANT/APPELLANT IS ENTITLED TO SPECIFIC PERFORMANCE OF THE JOINT RECOMMENDATION OF THE PROSECUTOR AND DEFENSE ATTORNEY.

IV. WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS.

{¶ 7} In his first potential assignment of error, appellant questions whether the record reflects his plea of no contest was made knowingly, intelligently and voluntarily.

{¶ 8} Before a court can accept a plea of no contest, the trial court must first ensure that it is in compliance with Crim.R. 11(C), which sets forth the procedure for accepting a felony plea. While absolute compliance with the rule is preferred, it is not required. A trial court's substantial compliance with Crim.R. 11(C) is sufficient to ensure a plea is adequate. *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990), citing *State v. Stewart*, 51 Ohio St.2d 86, 364 N.E.2d 1163 (1977) ("Substantial compliance [with the rule] means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving.")

{¶ 9} A review of the record provides both oral and documentary evidence of the appellant specifically identifying and waiving his rights related to the no contest plea. This is sufficient to show appellant knowingly, intelligently, and voluntarily entered into the plea. *State v. Turner*, 6th Dist. No. L-03-1271, 2004-Ohio-5758 ("After reviewing the record and especially [appellant's] own words affirming that he was entering the plea

knowingly and voluntarily, we find no evidence of an uninformed plea.") As such, there is ample evidence of substantial compliance by the court with Crim.R. 11(C).

{¶ 10} Appellate counsel's first potential assignment of error is not well-taken.

{¶ 11} Appellate counsel's second potential assignment of error challenges that the sentence imposed by the trial court was contrary to law.

{¶ 12} When examining whether a particular sentence is contrary to the law, a two-prong test is applied to the appellate review of a felony sentence. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. Under the *Kalish* test, a valid sentence must both (1) comply with all applicable rules and statutes and (2) not be an abuse of the trial court's discretion. *Id.*

{¶ 13} As to the first prong of the *Kalish* test, that the sentence must be in compliance with all relevant rules and statutes, appellant's sentence must conform to R.C. 2929. The initial indication that the sentence is valid is that it falls within the statutory range set forth in R.C. 2929.14 ("For a felony of the second degree, the prison term shall be two, three, four, five, six, seven, or eight years"). Following that, a felony sentence must also abide by the purposes and factors of sentencing laid out in R.C. 2929.11 and 2929.12.

{¶ 14} Here, the five-year term of imprisonment imposed fell within the statutory range of R.C. 2929.14. The court also stated on the record that it had considered and weighed the risk of recidivism by appellant, the seriousness of appellant's conduct, and

the need for consistency in sentencing. This demonstrates that the court took notice of the relevant statutes and levied the sentence accordingly.

{¶ 15} The second prong requires that the sentence not be an abuse of discretion by the trial court. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, 1142 (1983). When applying an abuse of discretion standard, an appellate court may not generally substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 614 N.E.2d 748 (1993).

{¶ 16} The trial court in the instant case noted appellant's criminal history and the repeated failure of previous rehabilitative efforts. The sentencing court is required only to "consider the statutory factors, not explain how it considered them or assigned them weight." *State v. Barnhart*, 6th Dist. No. OT-10-032, 2011-Ohio-5685. Moreover, the possibility of leniency does not equate a greater sentence to an arbitrary or unreasonable abuse of discretion where the court has properly weighed the R.C. 2929.11 and 2929.12 factors. *Id*.

{¶ 17} As appellant's sentence satisfies both prongs of the *Kalish* test, it is accordingly not an abuse of the trial court's discretion. Appellate counsel's second potential assignment of error is not well-taken.

{¶ 18} Appellate counsel's third potential assignment of error alleges that appellant should be provided specific performance of the terms of the plea bargain, to

include the sentence recommendation, entered into by the prosecutor and appellant's counsel.

{¶ 19} By statute, appellant's sentence is not subject to appellate review where such sentence "has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge." R.C. 2953.08(D)(1). In addition, a sentence proposed by the prosecutor or requested by the defense is not binding on the court, even as part of a negotiated plea. *State ex rel. Duran v. Kelsey*, 106 Ohio St.3d 58, 2005-Ohio-3674, 831 N.E.2d 430 ("A trial court does not err by * * * imposing a greater sentence than that recommended by the prosecutor.")

{¶ 20} In any event, the court imposed the five-year sentence to which the record indicates both the prosecutor and defense jointly agreed. As appellant received precisely what he bargained for, appellate counsel's third potential assignment of error is not well-taken.

{¶ 21} Appellate counsel's fourth potential assignment of error contends the trial court erred in denying appellant's motion to suppress his admission made to police, and that the statements should be held inadmissible under the exclusionary rule because the police did not advise him of his *Miranda* rights.

{¶ 22} On March 21, 2011, Detective Captain James Consolo arrived at the home of appellant to discuss the rape of a minor victim that had allegedly occurred at a party the prior night. The record shows the officer testified that appellant was advised that he was not under arrest, not obligated to speak with the officer, and if appellant wished, the

officer would leave the premises. Even with these words of warning, appellant chose to speak with the officer regarding the events at the party.

{¶ 23} When the officer questioned appellant directly about the rape, appellant repeatedly and adamantly denied having sex with the victim. During the continued questioning, the officer presented appellant with a fabricated claim of DNA evidence obtained from a rape kit. At this point, the appellant changed his statement, asserting repeated consensual sex with the victim at the party.

{¶ 24} An appellate review of a ruling on a motion to suppress evidence presents mixed questions of law and fact. *United States v. Martinez*, 949 F.2d 1117, 1119 (11th Cir.1992); *State v. Long*, 127 Ohio App.3d 328, 332, 713 N.E.2d 1 (4th Dist.1998). During a suppression hearing, the trial court assumes the role of the trier of fact and is, therefore, in the best position to resolve questions of fact and evaluate witness credibility. *State v. Mills*, 62 Ohio St.3d 357, 366, 582 N.E.2d 972 (1992); *State v. Hopfer*, 112 Ohio App.3d 521, 548, 679 N.E.2d 321 (2d Dist.1996). As a result, an appellate court must accept a trial court's factual findings if they are supported by competent and credible evidence. *State v. Guysinger*, 86 Ohio App.3d 592, 594, 621 N.E.2d 726 (4th Dist.1993). The reviewing court must then review the trial court's application of the law de novo. *State v. Russell*, 127 Ohio App.3d 414, 416, 713 N.E.2d 56 (9th Dist.1998).

{¶ 25} It is well-settled that *Miranda* prevents the state from introducing statements made by a defendant "stemming from custodial interrogation * * * unless it demonstrates the use of procedural safeguards effective to secure the privilege against

self-incrimination." *State v. Perry*, 14 Ohio St.2d 256, 259, 237 N.E.2d 891 (1968). In defining "custodial interrogation," the United States Supreme Court stated "we mean questioning initiated by the law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). That is, once a person has been restrained by police officers, the officers are not authorized to initiate questioning prior to the person being accorded an explanation of his constitutional rights.

{¶ 26} In the case at bar, there is nothing in the record to indicate that the trial court incorrectly determined that appellant was not in "custodial interrogation" at the time of the statements in question. *See Oregon v. Mathiason*, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977) ("requirement of warnings [is not] to be imposed simply because * * * the questioned person is one whom the police suspect").

{¶ 27} The record does not support countermanding the trial court on this issue. Appellate counsel's fourth potential assignment of error is not well-taken.

{¶ 28} This court finds that counsel for appellant correctly determined that there was no meritorious appealable issue present in this case. Upon our own independent review of the record, this court finds no other grounds for a meritorious appeal. This appeal is found to be without merit and wholly frivolous.

{¶ 29} Appellant's counsel's motion to withdraw is found well-taken and is hereby granted. The judgment of the Sandusky County Court of Common Pleas is

affirmed. Pursuant to App.R. 24, court costs of this appeal are assessed to appellant.

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. _____

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE

_____
JUDGE