

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

State of Ohio

Court of Appeals No. S-11-053

Appellee

Trial Court No. 11 CR 333

v.

Thomas J. Barker

**DECISION AND JUDGMENT**

Appellant

Decided: July 15, 2013

\* \* \* \* \*

Karin L. Coble, for appellant.

\* \* \* \* \*

**SINGER, P.J.**

{¶1} Appellant appeals a judgment of conviction for attempted rape entered on a finding of guilty after a no contest plea in the Sandusky County Court of Common Pleas.

{¶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). Appellee has not filed a brief.

{¶3} 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.*

{¶4} 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. Appellant has not filed an additional brief. Accordingly, this court shall proceed to examine the potential assignments of error set forth by counsel and the entire record below to determine whether this appeal lacks merit, deeming it wholly frivolous.

{¶5} Appellant and another man were named in indictments by a Sandusky County grand jury on April 6, 2011. Appellant was charged with four counts of rape.

The charges came from allegations that the two men forcibly engaged in sexual conduct with a 16 year-old girl at a March 20, 2011 party in Genoa, Ohio.

{¶6} After their arrest, both men were interviewed by a Sandusky County Sheriff's deputy. Appellant initially denied having sex with the victim, but later in the interview admitted having sexual intercourse with the girl, but claimed it was consensual.

{¶7} Appellant pled not guilty to the indictment and moved to suppress the recording of his interview with the deputy. When, after a hearing, the court denied appellant's motion to suppress, he agreed to plead no contest to one count of attempted rape. The state agreed to dismiss the remaining charges and recommend a five-year term of incarceration.

{¶8} The trial court accepted the plea, found appellant guilty of attempted rape and, following a presentence investigation, sentenced appellant to a five-year term of incarceration. The court also adjudicated him a Tier III sex offender. This appeal followed.

{¶9} Pursuant to *Anders*, appointed appellate counsel sets forth the following five proposed assignments of error which she represents she has considered and found without merit:

I. The trial court erred in denying appellant's motion to suppress his statements, in violation of U.S. Const. Art. V and *Miranda v. Arizona* [384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)].

II. The trial court erred in finding appellant guilty upon his plea of no contest and his plea was unknowing and involuntary.

III. The trial court, in imposing incarceration for the offense, abused its discretion when it failed to properly consider the relevant sentencing statutes.

IV. The trial court erred in classifying appellant a Tier III sex offender.

V. The trial court erred in imposing the costs of prosecution and court-appointed counsel.

### **I. Interview**

{¶10} Appellate counsel puts forth three areas concerning appellant's custodial interrogation. First, counsel questions whether the audio-only recording of the interrogation satisfies the R.C. 2933.81 directive that custodial interrogations of individuals accused of rape are to be electronically recorded. Counsel properly concludes that, while an audio-only recording of the interrogation is insufficient to satisfy R.C. 2933.81(A)(3), such deviation does not affect the admissibility of the defendant's statement. R.C. 2933.81(C).

{¶11} Next appellate counsel questions the validity of appellant's waiver of his *Miranda* rights prior to the interrogation. Counsel notes that the *Miranda* warnings were

properly administered prior to interrogation and that appellant signed a written waiver of these rights. Counsel properly concludes there was no evidence of a *Miranda* violation.

{¶12} Finally, counsel questions whether the interrogation was conducted in a coercive environment and concludes that it was not. We agree. Accordingly, appellant's first proposed assignment of error is without merit.

## **II. Plea**

{¶13} In appellate counsel's second proposed assignment of error, counsel questions whether appellant's plea was knowingly and intelligently entered. Counsel notes that the trial court complied with Crim.R. 11 during the plea colloquy and there was nothing in the record to suggest that appellant did not understand the proceeding or entered his plea involuntarily. Appellant's counsel properly concludes that any attack on the validity of the plea is without merit.

## **III. Sentencing**

{¶14} In her third proposed assignment of error, appellate counsel asks whether appellant's sentence was properly imposed. Counsel notes that R.C. 2953.08(D)(1) prohibits review of a sentence that is authorized by law and has been jointly recommended by the prosecution and the defendant. Such was the sentence imposed here, consequently it is beyond review and any challenge is without merit.

#### **IV. Sex Offender Classification**

{¶15} Counsel, in her fourth proposed assignment of error, questions whether appellant was properly classified as a Tier III sex offender. As counsel notes, classification as a Tier III sex offender is automatic with a conviction for attempted rape. R.C. 2950.10(G)(1)(a)(i). Moreover, we concur with appellate counsel that the trial court also properly notified appellant of his classification and the duties arising from that classification. Accordingly, appellant's fourth proposed assignment of error is without merit.

#### **V. Imposition of Costs**

{¶16} In her remaining proposed assignment of error, appellate counsel asks whether the trial court gave proper notice that it was assessing prosecution and appointed counsel costs. Upon examination of the record, counsel concluded that the court had complied with the R.C. 2947.23 notification requirements and had made a proper determination that appellant has an ability to pay such costs. We concur. Accordingly, appellant's remaining proposed assignment of error is without merit.

{¶17} Upon this record, we concur with appellate counsel that appellant's appeal is without merit. Moreover, upon our independent review of the record, we find no other grounds for meritorious appeal. Accordingly, this appeal is found to be without merit, and wholly frivolous. Counsel's motion to withdraw is found well-taken and is, hereby, granted.

{¶18} On consideration whereof, the judgment of the Sandusky County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

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.

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JUDGE

Arlene Singer, P.J.

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JUDGE

James D. Jensen, J  
CONCUR.

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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: <a href="http://www.sconet.state.oh.us/rod/newpdf/?source=6">http://www.sconet.state.oh.us/rod/newpdf/?source=6</a>.</p>
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