

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

State of Ohio

Court of Appeals No. E-12-066

Appellee

Trial Court No. 2011-CR-491

v.

Timothy J. Zell

DECISION AND JUDGMENT

Appellant

Decided: December 6, 2013

* * * * *

Loretta A. Riddle, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant, Timothy Zell, appeals from his convictions in the Erie County Court of Common Pleas, for one count of burglary and one count of attempted burglary.

We affirm in part, reverse in part, and remand for resentencing.

{¶ 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, which appellant has not done. Accordingly, this court shall proceed examining the potential assignments 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 June 26, 2012, appellant entered no contest pleas to one count of burglary, a third degree felony and one count of attempted burglary, a fifth degree felony. The court accepted his pleas and found him guilty.

{¶ 5} Appointed counsel has set forth two potential assignments of error:

I. The trial court erred in accepting defendant's plea.

II. The trial court abused its discretion when imposing sentence upon defendant.

{¶ 6} Before accepting a no contest plea, Crim.R. 11(C)(2) requires that the trial court inform a defendant of the constitutional rights he is waiving by entering the plea.

The rule provides:

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.

{¶ 7} Our review of the record of the plea hearing shows that the trial court made all of the necessary inquiries required by Crim.R. 11(C), completely explained to appellant the nature and effect of his plea, the maximum penalties involved and affirmed from appellant that he fully understood all of the rights that he was waiving and the consequences of entering his plea. Accordingly, appellant's first potential assignment of error is without merit.

{¶ 8} In the second potential assignment of error, counsel contends that the court abused its discretion in sentencing appellant.

{¶ 9} It is well-established that we cannot reverse a trial court's felony sentence unless we find an abuse of discretion. As the Supreme Court declared in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, appellate courts reviewing felony sentences apply a two-step approach. First, they must determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the disputed decision is then reviewed pursuant to the abuse of discretion standard. *Id.* at ¶ 4.

{¶ 10} In conjunction with the above, as established by *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, the trial court is vested with full discretion to

impose any sentence within the statutory range without a requirement that it issue specific reasons or findings prior to imposition of the sentence.

{¶ 11} Appellant was convicted of burglary, a violation of R.C. 2911.12 and a felony of the third degree. A felony of the third degree is punishable by a prison term of up to 36 months. R.C. 2929.14(A)(3)(b). He was also convicted of attempted burglary, a violation of R.C. 2911.12(B) and 2923.02(A), and a felony of the fifth degree. A felony of the fifth degree is punishable by a prison term of up to 12 months.

{¶ 12} Appellant was sentenced to serve 36 months in prison for burglary and 11 months for attempted burglary. As these sentences fall within the statutory range, they are not contrary to law.

{¶ 13} However, our independent review of the record shows that the transcript of the July 27, 2012 sentencing of appellant imposes these sentences consecutively, whereas the sentencing judgment entry filed on August 1, 2012, imposes these sentences concurrently. This court has recognized that where “there exists a variance between the sentence pronounced in open court and the sentence imposed by a court’s judgment entry, a remand for resentencing is required.” *State v. Robinson*, 6th Dist. Lucas No. L-10-1369, 2012-Ohio-6068, ¶ 79, quoting *State v. Pfeifer*, 6th Dist. Ottawa No. OT-10-013, 2011-Ohio-289, ¶ 8; *State v. Williams*, 987 N.E.2d 322, 2013-Ohio-726, ¶ 49 (6th Dist.); *State v. Hunter*, 6th Dist. Lucas No. L-12-1101, 2013-Ohio-4738. Accordingly, we find appellate counsel’s second potential assignment of error well-taken.

{¶ 14} Upon further independent review of the record, we find no other grounds for a meritorious appeal. Appellate counsel's motion to withdraw is found well-taken and is hereby granted. Having found appellate counsel's second potential assignment of error well-taken, we will proceed to a decision in this case on the merits. The judgment of the Erie County Court of Common Pleas is affirmed, in part, and reversed, in part. This matter is remanded to the trial court for the sole purpose of correcting the variance in the judgment entry and transcript regarding whether the sentences are to be served concurrently or consecutively. The trial court is instructed to appoint new counsel to represent appellant. Appellant and appellee are each ordered to pay one-half of the costs of this appeal pursuant to App.R. 24.

Judgment affirmed, in part,
and reversed, in part.

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

James D. Jensen, J.

CONCUR.

JUDGE

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