

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

State of Ohio

Court of Appeals No. L-13-1060

Appellee

Trial Court No. CR0201201455

v.

Aubree Kahl Moon

DECISION AND JUDGMENT

Appellant

Decided: December 13, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Claudia A. Ford, Assistant Prosecuting Attorney, for appellee.

Tim A. Dugan, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals a judgment of conviction for drug trafficking and receiving stolen property issued in the Lucas County Court of Common Pleas.

{¶ 2} In 2011, Toledo police received information that a drug dealer known as “Boochi” was operating out of an East Broadway apartment. Police vice-narcotics

officers then arranged for a confidential informant to attempt to make a controlled purchase from “Boochi.” In a first attempt, the informant returned with what proved to be counterfeit crack cocaine. A subsequent attempt resulted in the informant returning with a rock of genuine crack cocaine. On the basis of these buys and surveillance of the apartment, police obtained a search warrant.

{¶ 3} On December 9, 2011, police raided the apartment. Inside they found appellant, Aubree Moon, 50 oxycodone pills, baggies containing crack cocaine and heroin, and a scale. Police also found a previously reported stolen wallet containing the credit cards of a woman. Appellant admitted that he was sometimes called “Boochi.” Police determined that the East Broadway apartment was within 400 feet of two schools.

{¶ 4} On March 22, 2012, appellant was named in a seven count indictment charging two counts of aggravated drug possession, aggravated drug trafficking, possession of cocaine, trafficking in cocaine, possession of heroin and receiving stolen property. He was scheduled for an April 3, 2012 arraignment, but failed to appear. A capias was issued.

{¶ 5} On October 17, 2012, police executed a second search warrant at a Liberty Street address where appellant was alleged to have been dealing drugs. Police seized a number of firearms, 11.02 grams of cocaine, 8.6 grams of heroin and various other drugs. Appellant was not present during the second raid, but was subsequently arrested. As the result of the second search, appellant was charged in a 13 count indictment alleging

various counts of drug possession, trafficking in narcotics and possessing weapons under disability.

{¶ 6} Appellant was finally arraigned on December 4, 2012. He pled not guilty and counsel was assigned. Appellant filed a general motion to suppress evidence which was overruled without a hearing. On March 5, 2013, appellant appeared before the court, withdrew his not guilty plea and, pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), pled guilty to one count of aggravated drug trafficking, a third degree felony, one count of trafficking in cocaine, a fourth degree felony, and one count of receiving stolen property, a fifth degree felony. The state agreed to dismiss the remaining counts in the first indictment and all of the counts in the second indictment. Following a Crim.R. 11 plea colloquy, the court accepted the plea, found appellant guilty of the agreed charges and ordered a presentencing investigation. At a subsequent sentencing hearing, the court sentenced appellant to a 30 month term of incarceration for aggravated trafficking, 12 months for cocaine trafficking and six months for receiving stolen property. The court ordered that the sentences be served consecutively. This appeal followed.

{¶ 7} Appellant's counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), maintaining that he found no meritorious appealable issue. Appellate counsel requests leave to withdraw.

{¶ 8} The procedure to be followed by appointed counsel who desires to withdraw for want of a meritorious, appealable issue is set forth in *Anders, supra* and *State v.*

Duncan, 57 Ohio App.2d 93, 385 N.E.2d 323 (8th Dist.1978). In *Anders*, the United States Supreme Court held that if counsel, after a conscientious examination of the case, determines an appeal to be wholly frivolous he or she should so advise the court and request permission to withdraw. *Anders, supra*, at 744. This request, however, must be accompanied by a brief identifying anything in the record that could arguably support the appeal. *Id.* Counsel must also furnish his or her client with a copy of the brief and request to withdraw and allow the client sufficient time to raise any matters that the client 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 may proceed to a decision on the merits if state law so requires. *Id.*

{¶ 9} In this matter, appellate counsel has satisfied the *Anders* requirements. Appellant has not filed an independent brief.

{¶ 10} Appellate counsel has set forth two potential assignments of error:

1. The Trial Court abused its discretion by sentencing Appellant to a prison term of forty-eight months.
2. Appellant received ineffective assistance of counsel.

{¶ 11} We shall discuss appellate counsel's potential assignments of error in reverse order.

I. Ineffective Assistance of Counsel

{¶ 12} In an *Alford* plea, a defendant pleads guilty to an offense with a qualification of innocence. The purpose of entering an *Alford* plea “is to avoid the risk of a longer sentence by agreeing to plead guilty to a lesser offense or for fear of the consequences of a jury trial, or both.” *State v. Ware*, 6th Dist. Lucas No. L-08-1050, 2008-Ohio-6944, ¶ 11, quoting *State v. Bailey*, 1st Dist. Hamilton No. C-030916, 2004-Ohio-6427, ¶ 7. An *Alford* plea is treated no differently than any other guilty plea. The trial court accepts the plea after being satisfied that it is being voluntarily and intelligently offered. *Id.* at ¶ 12.

When a defendant pleads guilty, he or she waives all appealable errors which occurred prior to the plea, unless such errors precluded the defendant from entering a knowing and voluntary plea. A guilty plea waives even the right to claim that the defendant was prejudiced by ineffective assistance of counsel, except to the extent that the defects complained of caused the plea to be less than knowing and voluntary. (Citations omitted). *State v. Gonzalez*, 6th Dist. Lucas No. L-05-1061, 2005-Ohio-6845, ¶ 9.

{¶ 13} In open court and in a written plea agreement, appellant maintained that his *Alford* plea was knowingly and intelligently entered. There is nothing in the record to suggest otherwise. Indeed a plea in which 20 counts are reduced to three would be considered prudent in most circumstances. In any event, there is nothing in the record to

suggest that trial counsel performed in a deficient manner or that the plea was improperly entered. As a consequence, we concur with appellate counsel; an ineffective assistance of counsel claim is without merit.

II. Sentencing

{¶ 14} Appellate review of criminal sentencing is a two-step process. First, we must examine the sentencing court's adherence to the applicable rules and statutes to determine whether the sentence imposed is clearly and convincingly contrary to law. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 4. If the sentence is not contrary to law, the sentence is reviewed under an abuse of discretion standard. *Id.* An abuse of discretion is more than a mistake in law or an error in judgment, the term connotes that the court's attitude is arbitrary, unreasonable or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶ 15} R.C. 2929.14(A)(3)(b) sets the prison term applicable for a third degree felony at between 12 and 36 months. The sentence for a fourth degree felony is between 6 and 18 months. R.C. 2929.14(A)(4). A fifth degree felony sentence falls between 6 and 12 months. R.C. 2929.14(A)(5). Thus, the sentences imposed upon appellant fall within the range provided in the statutes.

{¶ 16} With respect to the imposition of consecutive sentences, the trial court expressly found that consecutive sentences were "necessary to fulfill the purposes of R.C. 2929.11, and not disproportionate to the seriousness of the offender's conduct or the danger the offender poses, the court further finds the defendant's criminal history

requires consecutive sentences.” This finding satisfies the requirements of R.C. 2929.14(C)(4).

{¶ 17} Appellant’s adult criminal history includes convictions for 6 felonies and 29 misdemeanors. This accompanied by a high probability of recidivism suggests that the sentence that the trial court fashioned was not arbitrary, unreasonable or unconscionable. Accordingly, we agree with appellate counsel that any challenge to the propriety of the sentence imposed is without merit.

{¶ 18} Upon this record, we concur with appellate counsel that appellant’s appeal is without merit. Moreover, upon our own 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.

{¶ 19} On consideration, 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.

{¶ 20} 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

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:
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