[Cite as *State v. Sutton*, 2013-Ohio-5629.]

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

State of Ohio — Court of Appeals No. L-13-1061

Appellee — Trial Court No. CR0201201783

v.

James Sutton — **DECISION AND JUDGMENT**

Appellant — Decided: December 20, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Tim A. Dugan, for appellant.

* * * * *

JENSEN, J.

{¶ 1} This is an appeal under *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Defendant-appellant, James Sutton, appeals the March 11, 2013 judgment of the Lucas County Court of Common Pleas sentencing him to a total prison term of 30 years. For the reasons that follow, we affirm.

I. Facts and Procedural Background

{¶ 2} The relevant facts underlying this appeal are not in dispute. On May 17, 2012, appellant was indicted on three counts of felonious assault in violation of R.C. 2903.11(A)(2), all felonies of the second degree, and one count of murder in violation of R.C. 2903.02(B), an unclassified felony. All four counts contained a firearm specification under R.C. 2941.145, as well as a criminal gang specification under R.C. 2941.142. The charges against appellant stemmed from two separate incidents: the first, from the February 19, 2012 shootings of Brent Cook and Dennis Garrett at the Zodiac Bar in Toledo, Lucas County, Ohio; and the second, from the April 15, 2013 shooting death of Torrian Tall at the Valero gas station in Toledo, Lucas County, Ohio.

{¶ 3} Appellant initially entered a plea of not guilty by reason of insanity to the charges in the indictment. On December 12, 2012, the trial court found that appellant was competent to stand trial, and that he did not suffer from any mental defect or illness at the time of the alleged criminal acts. Thereafter, appellant reached a plea agreement with the state. On March 4, 2013, he entered a guilty plea under *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.E.3d 162 (1970), to (1) two counts of felonious assault, (2) an amended count of voluntary manslaughter in violation of R.C. 2903.03(A) and (B), a felony of the first degree, and (3) the attached firearm specification. In return, the state agreed to dismiss the remaining count of felonious assault, the three gun specifications attached to each count of felonious assault, and the criminal gang specifications.

{¶ 4} The state and appellant, through counsel, jointly recommended to the trial court that it impose a 30-year prison sentence. The court accepted appellant's plea, made a finding of guilt, and sentenced appellant to the maximum of eight years' imprisonment for each count of felonious assault, eleven years for voluntary manslaughter, and three years for the firearm specification. The sentences were ordered to be served consecutively, for a total prison term of 30 years.

{¶ 5} *Anders* 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*, 386 U.S. at 744, 87 S.Ct. 1396, 18 L.Ed.2d 493. This request, however, must be accompanied by a brief identifying anything in the record that could arguably support the appeal. *Id.* Furthermore, counsel must also furnish his client with a copy of the brief, request to withdraw from representation, and allow the client sufficient time to raise any matters that he chooses. *Id.*

{¶ 6} Once these requirements are 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.*

{¶ 7} Appellant appeals his conviction and sentence to this court through appointed counsel. Appellant's counsel advises, however, that under the procedures announced in *Anders*, he has thoroughly examined the record, discussed the case with appellant, and is unable to find any meritorious ground for appeal. Thus, following the *Anders* procedure, appellant's counsel filed a brief setting forth potential grounds for appeal, along with a motion to withdraw as appellant's counsel. In addition to notifying appellant of his inability to find meritorious grounds for appeal, counsel provided appellant with copies of both the *Anders* brief and counsel's motion to withdraw. Counsel advised appellant of his right to file his own appellate brief. Appellant has not filed any additional brief.

{¶ 8} In the instant case, appellant's counsel has satisfied the *Anders* requirements. Accordingly, this court will examine the potential assignments of error counsel identified and review the entire record below to determine whether this appeal lacks merit and is, therefore, wholly frivolous. Appellant's potential assignments of error are as follows:

> I. The trial court abused its discretion by sentencing Appellant to maximum, consecutive prison terms.
>
> II. The trial court erred in accepting Appellant's plea as intelligently, knowingly, and voluntarily given.
>
> III. Appellant received ineffective assistance of counsel.

II. Law and Analysis

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

{¶ 9} In appellant's first potential assignment of error, counsel suggests as error that the trial court abused its discretion in sentencing appellant to a maximum, consecutive term of 30 years in prison contrary to applicable law.

{¶ 10} 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 for a court to employ when reviewing felony sentences on appeal. First, appellate courts must "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.* An abuse of discretion is "more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Id.* at ¶ 19, quoting *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 11} Here, appellant's counsel properly acknowledges that the sentence falls within the range allowed by statute. Indeed, a felony of the first degree is punishable by a prison term of three to eleven years under R.C. 2929.14(A)(1); a felony of the second degree is punishable by a prison term of two to eight years under R.C. 2929.14(A)(2); and a firearm specification carries a mandatory three-year prison term under R.C. 2941.145. The trial court expressly considered the purposes of sentencing under R.C.

2929.11 and balanced the seriousness and recidivism factors under R.C. 2929.12. The trial court examined the facts, the record, oral statements, and the victim impact statement before imposing consecutive sentences under R.C. 2929.14(C)(4). We find no abuse of discretion in the trial court's decision. There were sufficient facts contained in the record to support the court's finding as to the seriousness of appellant's conduct, the danger appellant posed to the public, and the great or unusual harm appellant caused.

{¶ 12} In addition to the propriety of the consecutive sentences under the preceding authority, R.C. 2953.08(D)(1) dictates that a sentence imposed upon a defendant is not subject to review "if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge." Here, appellant's sentence was authorized by law, it was recommended by the prosecutor and defendant, through his counsel, and the trial court properly accepted the agreed-upon sentence.

{¶ 13} Appellant's first potential assignment of error is not well-taken.

B. Appellant's *Alford* plea was intelligently, knowingly, and voluntarily given.

{¶ 14} In his second potential assignment of error, appellant's counsel suggests error in the trial court's acceptance of appellant's *Alford* plea because it was not given intelligently, knowingly, and voluntarily.

{¶ 15} 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, ¶ 40 (6th Dist.). Crim.R. 11(C)(2)(a) states, in relevant 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."

{¶ 16} Upon our review of the record, it is clear the trial court explained each of appellant's Crim.R. 11 rights during the plea hearing. In response to questions by the trial court, appellant told the court that he was clear-headed, knew what was going on, understood what was happening, and that he was making his plea knowingly and voluntarily. The trial court fully advised appellant of the consequences and potential maximum sentence he faced in accepting the plea agreement. And the trial court specifically asked appellant whether his *Alford* plea was being given on his own free will, to which appellant responded, "Yes, sir." Thus, the record shows that Crim.R. 11(C) was properly followed in this case and appellant made an intelligent, knowing, and voluntary acceptance of the plea agreement.

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

C. Appellant did not suffer from any ineffective assistance of counsel.

{¶ 18} Finally, appellant's counsel offers ineffective assistance of counsel as a potential assignment of error. In order to prevail on a claim of ineffective assistance of counsel, an appellant must show that counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied on as having produced a just result. *State v. Shuttlesworth*, 104 Ohio App.3d 281, 287, 661 N.E.2d 817 (7th Dist.1995). To establish ineffective assistance of counsel, an appellant must

show "(1) deficient performance of counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the proceeding's result would have been different." *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶ 204, citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Sanders*, 94 Ohio St.3d 150, 151, 761 N.E.2d 18 (2002).

{¶ 19} As recognized in *Strickland*, there are "countless ways to provide effective assistance in any given case." *Strickland* at 689. "Judicial scrutiny of counsel's performance must be highly deferential." *State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989), quoting *Strickland* at 689.

{¶ 20} In this case, we have extensively reviewed the record from below and are unable to find any indicia of ineffective assistance of counsel. The facts contained in the record reveal that appellant was charged with three felonies of the second degree, one count of murder, and a variety of gang and firearm specifications before counsel negotiated the agreement to which appellant entered his *Alford* plea. Although appellant could have faced a much lengthier incarceration, the court accepted the parties' agreed-upon sentence of 30 years. There is simply nothing in the record to suggest that counsel's representation of appellant was ineffective. Moreover, at the time of his sentencing, the trial court and appellant engaged in the following exchange:

Court: Have you had a chance to meet with Mr. Konop? Has he explained everything to you, answered your questions, and are you satisfied with his advice, counsel, and competence?

Appellant: Yes.

{¶ 21} Nothing in the record supports a claim of ineffective assistance of counsel. Appellant's third potential assignment of error is not well-taken.

III. Conclusion

{¶ 22} After independently examining the record as required by *Anders*, we find no error prejudicial to appellant's rights in the proceedings before the trial court. We conclude that this appeal is wholly frivolous and we grant counsel's motion to withdraw. We also affirm the March 11, 2013 judgment of the Lucas County Court of Common Pleas. The costs of this appeal are assessed to appellant under App.R. 24.

{¶ 23} 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

James D. Jensen, J.
CONCUR.

JUDGE