

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

State of Ohio

Court of Appeals No. S-11-044

Appellee

Trial Court No. 10 CR 752

v.

Marianne T. Morrow

DECISION AND JUDGMENT

Appellant

Decided: March 8, 2013

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney,
and Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Nancy L. Jennings, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Sandusky County Court of Common Pleas. Appellant, Marianne Morrow, was indicted on one count of aggravated theft, in violation of R.C. 2913.02, a felony of the third degree. Appellant subsequently pled no contest to an amended count of theft, a felony of the fifth degree. Appellant was

sentenced to a one-year term of incarceration and ordered to pay restitution in the amount of \$133,767. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Counsel for appellant submitted a request to withdraw pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.E.2d 493 (1967). In support of her *Anders*' request to withdraw, counsel states that, after reviewing the record of the proceedings in the trial court, she is unable to find any arguable issues on appeal. In conjunction with *Anders*, counsel for appellant sets forth the following two proposed assignments of error:

I. THE TRIAL COURT ERRED IN ACCREPTING [SIC]

DEFENDANT'S PLEA

II. THE TRIAL COURT ABUSED ITS DISCRETION [SIC]

WHEN IMPOSING SENTENCE UPON DEFENDANT.

{¶ 3} *Anders, supra*, and *State v. Duncan*, 57 Ohio App.2d 93, 385 N.E.2d 296 (8th Dist.1978), set forth the procedure to be followed by appointed counsel who wishes to withdraw upon determining there is a lack of a meritorious, appealable issue. In *Anders*, the United States Supreme Court held that if counsel, after a conscientious examination of the case, believes any appeal to be wholly frivolous, counsel should so advise the court and request permission to withdraw. *Anders* at 744.

{¶ 4} This request to withdraw must be accompanied by a brief identifying anything in the record that could arguably support an appeal. *Id.* Counsel must furnish his client with a copy of the brief and request to withdraw. *Id.* Once these requirements

have been satisfied, the appellate court then conducts a full examination of the proceedings held below to determine if the appeal is frivolous. If the appeal is frivolous, the appellate court may grant counsel's request to withdraw and dismiss the appeal without violating constitutional requirements, or may proceed to a decision on the merits. *Id.*

{¶ 5} In the case before us, appointed counsel has satisfied the requirements set forth in *Anders*. Accordingly, we shall proceed with an examination of the potential assignments of error set forth by counsel for appellant, review the record from below, and determine if this appeal is meritorious.

{¶ 6} The following undisputed facts are relevant to the issue raised on appeal. Appellant was indicted on July 16, 2010, on one count of aggravated theft from her employer, Gries Seed Farms, in the amount of \$131,267.32. On July 13, 2011, pursuant to a voluntary plea agreement, appellant pled no contest to a reduced charge of theft, in violation of R.C. 2913.02(A)(3), amended to a felony of the fifth degree. Appellant was then sentenced on October 12, 2011 to a one-year term of incarceration and ordered to pay restitution in the amount of \$133,767.

{¶ 7} Appellant's first potential assignment of error asserts that the trial court erred by accepting appellant's no contest plea. Pursuant to Crim.R. 11(C), a trial judge must properly advise a defendant entering a plea of guilty or no contest about the defendant's constitutional rights at trial, and also about other non-constitutional matters.

State v. Nero, 56 Ohio St.3d 106, 107, 564 N.E.2d 474 (1990). Accordingly, before accepting a plea the trial court must first

(1) determine that the defendant is making the plea voluntarily, understanding the maximum penalty involved and, if applicable, ineligibility for probation or community control sanctions; (2) inform the defendant of, and determine defendant understands, the effect of the guilty [or no contest] plea, including the trial court's ability of accepting the plea to proceed with sentencing; and (3) inform the defendant of, and determine defendant understands, the rights that the defendant is waiving, including the right to a jury trial, the right to confront witnesses against him, the right to have compulsory process for obtaining witnesses, the right to require the state to prove the defendant's guilt beyond a reasonable doubt, and the right against self-incrimination had the case gone to trial. *Crim.R. 11(C)(2)(a), (b) and (c)*. *State v. Winfield*, 6th Dist. No. E-09-039, 2010-Ohio-4931.

{¶ 8} 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 her plea, and affirmed from appellant that she fully understood all of the rights that she was waiving and the consequences of entering her plea. Accordingly, appellant's first proposed assignment of error is not well-taken.

{¶ 9} Appellant's second proposed assignment of error asserts that her sentence is contrary to law. In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470,

the Ohio Supreme Court held that, “[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing *maximum*, consecutive, or more than the minimum sentences.” (Emphasis added) *Id.* at paragraph seven of the syllabus.

{¶ 10} In *State v. Kalish*, 120 Ohio St.3d 23, 896 N.E.2d 124, 2008-Ohio-4912, the Ohio Supreme Court determined that, in light of *Foster*, when reviewing a felony sentence, appellate courts must employ a “two-step” approach. In so doing, the appellate court first

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. If this first prong is satisfied, the trial court’s decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard. *Id.* at ¶ 14.

{¶ 11} As set forth above, appellant pled no contest to, and was found guilty of, one count of theft, in violation of R.C. 2913.02(A)(3), an amended felony of the fifth degree. Pursuant to R.C. 2929.14, in effect at the time of sentencing, the prison term for a fifth degree felony shall be “six, seven, eight, nine, ten, eleven or twelve months.” Appellant was sentenced to a one-year prison term. Accordingly, appellant’s sentence conforms with *Foster* and was not contrary to law.

{¶ 12} The record reflects that the trial court considered the principles and purposes of sentencing, as set forth in R.C. 2929.11. It balanced that with seriousness

and recidivism factors pursuant to R.C. 2929.12. The record also reflects that before sentencing, the trial court affirmed it had reviewed the presentence investigation report, which noted that appellant had been found guilty of similar felony theft offenses in the past. Further, the trial court expressed concerns that appellant was not accepting responsibility for her criminal actions. Given these facts and circumstances, the trial court imposed a one-year prison term.

{¶ 13} We find that the trial court did not abuse its discretion in sentencing appellant to serve a one-year prison term. Appellant's second proposed assignment of error is not well-taken.

{¶ 14} Finally, this court, as required under *Anders*, has undertaken our own examination of the record to determine whether any issue of arguable merit is presented for appeal. Upon our independent review of the record, we find no meritorious issues on appeal. This appeal is therefore determined to be wholly frivolous. Appointed counsel's request to withdraw is granted.

{¶ 15} 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(A).

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

Thomas J. Osowik, J.
CONCUR.

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