[Cite as *State v. Osley*, 2013-Ohio-1267.]

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

State of Ohio	Court of Appeals No. L-11-1236
Appellee	Trial Court No. CR0201102460
v.	
Luis Silvera Osley	**DECISION AND JUDGMENT**
Appellant	Decided: March 29, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Andrew J. Lastra, Assistant Prosecuting Attorney, for appellee.

Stephen Long, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Luis Silvera Osley, appeals the September 26, 2011 judgment of the Lucas County Court of Common Pleas which, following appellant's plea

pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), sentenced him to a total of 23 years of imprisonment. For the reasons set forth herein, we affirm.

{¶ 2} On December 21, 2010, appellant was indicted on one count of aggravated murder and one count of aggravated robbery with firearm specifications. The charges stemmed from the December 11, 2010 robbery and shooting death of William Carswell while he was working at Main Street Exchange, in Toledo, Lucas County, Ohio. Appellant's cousin, Alexander Osley was also charged in the indictment.

{¶ 3} On September 19, 2011, appellant, by information, was charged with one count of involuntary manslaughter, with a firearm specification, and one count of aggravated robbery. On September 20, 2011, following extensive plea discussions and plea hearing, appellant entered an *Alford* plea to the charges in the information. Pursuant to the plea agreement, a nolle prosequi as to the charges in the December 21, 2010 indictment was entered.

{¶ 4} On September 26, 2011, appellant was sentenced to the maximum of ten years of imprisonment for involuntary manslaughter, ten years of imprisonment for aggravated robbery, and three years of imprisonment for the firearm specification. The sentences were ordered to be served consecutively. This appeal followed.

{¶ 5} Appellant has appealed the conviction and sentence to this court through appointed counsel. Appellant's counsel advises the court, however, under procedures announced in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967),

that he has thoroughly examined the record, discussed the case with appellant, and is unable to find meritorious grounds for appeal. Following *Anders* procedure, appellate counsel filed a brief setting forth potential grounds for appeal and also filed a motion to withdraw as counsel.

{¶ 6} Counsel notified appellant of his inability to find meritorious grounds for appeal and provided appellant with copies of both the *Anders* brief and his motion to withdraw. Counsel advised appellant of his right to file his own appellate brief. Appellant has filed an additional brief.

{¶ 7} In the *Anders* brief, counsel has asserted four potential assignments of error:

1. The trial court erred in sentencing appellant to maximum consecutive sentences.

2. The trial court committed plain error in sentencing appellant to consecutive sentences as they were allied offenses of similar import.

3. The trial court erred in failing to adequately determine whether appellant's guilty plea pursuant to North Carolina v. Alford was entered knowingly, intelligently and voluntarily.

4. Appellant was denied effective assistance of counsel.

{¶ 8} Appellant's pro se brief raises four assignments of error:

1. The trial court committed plain error in failing to determine whether appellant's offenses were allied offenses of similar import.

2. The trial court committed plain error in sentencing appellant to consecutive sentences as they were allied offenses of similar import.

3. The court erred in violation of appellant's constitutional guarantee to due process in failing to adequately determine whether appellant's guilty plea [pursuant to North Carolina v. Alford] was entered knowingly, intelligently and voluntarily.

4. Appellant was denied his constitutional guarantee to effective assistance of counsel.

{¶ 9} In appellant's counsel's first potential assignment of error he argues that the trial court erred when imposing appellant's maximum sentence. Appellant was convicted of one count of involuntary manslaughter, in violation of R.C. 2903.04(A) and (C), a first degree felony with a sentencing range of three to ten years. Appellant was convicted of aggravated robbery, R.C. 2911.01(A)(1) also a first degree felony. The manslaughter conviction included a firearm specification with a mandatory three-year imprisonment term, R.C. 2941.145.

{¶ 10} R.C. 2929.11 and 2929.12 sets forth factors to be considered by a court in determining the appropriate sentence for a felony. Where the court imposes a sentence within the maximum statutory limit, a reviewing court will presume the trial court followed the standards in determining sentence, absent evidence to the contrary. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. Here the sentence imposed was within the statutory limit. We have reviewed the record including transcript of the

sentencing hearing and the reports reviewed by the trial court. We find no evidence in the record to conclude that the trial court failed to consider the factors under R.C. 2929.11 and 2929.12 in selecting an appropriate sentence. We also find no basis in the record to conclude that the trial court abused its discretion as to the sentence. Appellant's counsel's first potential assignment of error is not well-taken.

{¶ 11} Counsel's second potential assignment of error and appellant's first and second potential assignments of error are related and will be jointly addressed. Appellant and his counsel contend that the trial court erred by sentencing appellant to consecutive sentences because the crimes of involuntary manslaughter and aggravated robbery, committed during a single course of conduct, were allied offenses. R.C. 2941.25(A) states that "[w]here the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one."

{¶ 12} The Supreme Court of Ohio has identified a two-step analysis to determine allied offenses under R.C. 2941.25(A). *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061. *Johnson* provides that "[w]hen determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." *Id.* at ¶ 44. The first question to be asked is whether "it is possible to commit one offense and commit the other with the same conduct * * *." *Id.* at ¶ 48. If so, then it must be determined whether the offenses were committed by a single act with a single state of mind. *Id.* at ¶ 49. If both of these

questions are answered affirmatively, then the offenses are allied offenses of similar import and will be merged. *Id.* at ¶ 50. "Conversely, if the court determines that the commission of one offense will never result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." *Id.* at ¶ 51.

{¶ 13} Appellant was convicted of involuntary manslaughter and aggravated robbery which, it is undisputed, can be committed with the same conduct. At the September 19, 2011 plea hearing, prior to accepting appellant's *Alford* plea, the prosecutor detailed the facts he expected to prove in the underlying indictment had the case proceeded to trial. On the day of the incident, appellant and cousin, Alexander Osley, entered Main Street Exchange under the pretext of purchasing a television set. Their actual intent was to rob the store of what they believed were narcotics in pill form. Following the shooting, an individual familiar with the store noticed that things had been knocked over and that there were signs of a struggle. Nothing had been taken from the store and it was surmised that once the shooting took place, appellant and his cousin quickly left the store before another individual, who had left the store to get batteries, could return.

{¶ 14} At sentencing, the court concluded that "under the circumstances of this case, independently committing the involuntary manslaughter in the commission of the felony felonious assault and the separate aggravated robbery," supported finding a separate animus and ordering consecutive sentences. Reviewing the record before us, we

cannot say that the trial court erred in failing to merge the offenses at sentencing. Counsel's potential second assignment of error and appellant's potential first and second assignments of error are not well-taken.

{¶ 15} Counsel's and appellant's third potential assignment of error argue that the court failed to determine whether appellant's *Alford* plea was knowingly and voluntarily entered. Before accepting a guilty 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.
>
> Crim.R. 11(C)(2).

{¶ 16} The underlying purpose of Crim.R. 11(C) is to insure that certain information is conveyed to the defendant which would allow him or her to make a voluntary and intelligent decision regarding whether to plead guilty. *State v. Ballard*, 66 Ohio St.2d 473, 479-480, 423 N.E.2d 115 (1981). With respect to constitutional rights, a trial court must strictly comply with the dictates of Crim.R. 11(C). *State v. Colbert*, 71 Ohio App.3d 734, 737, 595 N.E.2d 401 (11th Dist.1991). However, a trial court need not use the exact language found in that rule when informing a defendant of his constitutional rights. *Ballard, supra*, paragraph two of the syllabus. Rather, a trial court must explain those rights in a manner reasonably intelligible to the defendant. *Id.*

{¶ 17} For nonconstitutional rights, scrupulous adherence to Crim.R. 11(C) is not required; the trial court must substantially comply, provided no prejudicial effect occurs before a guilty plea is accepted. *State v. Stewart*, 51 Ohio St.2d 86, 364 N.E.2d 1163 (1977). "Substantial compliance means that under the totality of the circumstances the

defendant subjectively understands the implication of his plea and the rights he is waiving." *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990).

{¶ 18} We have carefully reviewed the transcript from the plea hearing below and conclude that the court strictly complied with the constitutional aspects of Crim.R. 11(C) and substantially complied with the nonconstitutional aspects of that rule in accepting appellant's guilty plea. As is apparent from the lengthy plea hearing transcript, the court took great pains to insure that appellant was fully apprised of the effect of his plea and that, in fact, he desired to enter the plea. As appellant entered his plea knowingly, intelligently and voluntarily, the court did not err in accepting the plea. Counsel's and appellant's third potential assignment of error is not well-taken.

{¶ 19} Counsel's and appellant's fourth potential assignment of error assert that appellant was denied the effective assistance of trial counsel. To prevail on a claim of ineffective assistance of counsel, a defendant must prove two elements: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. When considering a claim of ineffective assistance of counsel, the court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

{¶ 20} Appellant specifically argues that counsel was ineffective by failing to argue that the involuntary manslaughter and aggravated robbery counts were allied and should merge at sentencing. Based on disposition of appellant's first and second potential assignments of error we reject this argument. Further, reviewing the record we find that trial counsel was able to effectively negotiate a plea wherein, the state dismissed the aggravated murder charge and a life imprisonment sentence. Accordingly, we find that appellant was represented by competent counsel. Counsel's and appellant's fourth potential assignment of error is not well-taken.

{¶ 21} This court, as required under *Anders*, has undertaken its own independent examination of the record to determine whether any issue of arguable merit is presented for appeal. We have found none. Accordingly, we find this appeal is without merit and wholly frivolous. We grant the motion of appellant's counsel to withdraw as counsel in this appeal and affirm the judgment of the Lucas County Court of Common Pleas. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal. The clerk is ordered to serve all parties, including Luis Silvera Osley, with notice of this decision, if appellant notified the court of his address.

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

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE