

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

State of Ohio

Court of Appeals Nos. S-11-046
S-11-056

Appellee

Trial Court Nos. 11CR420
11CR467

v.

Juan S. Aguilar

DECISION AND JUDGMENT

Appellant

Decided: January 4, 2013

* * * * *

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

Nancy L. Jennings, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Juan S. Aguilar, appeals the August 5, 2011 judgment of the Sandusky County Court of Common Pleas which, following guilty pleas to one count of rape and one count of failure to register, sentenced appellant to a ten-year imprisonment term. For the reasons set forth below, we affirm.

{¶ 2} On May 6, 2011, appellant was separately indicted on one count of rape, in violation of R.C. 2907.02(A)(1)(b), a first degree felony with a life imprisonment specification under R.C. 2971.03, and one count of failure to register, in violation of R.C. 2950.05(A), a fourth degree felony. Appellant entered not guilty pleas to the charges.

{¶ 3} On June 22, 2011, appellant withdrew his not guilty pleas and, pursuant to an agreement with the state, entered a guilty plea to an amended rape charge, which removed the life imprisonment specification, and the failure to register charge. Pursuant to Crim.R. 11, appellant was notified of the effect of his guilty pleas including the waiver of various constitutional rights and the maximum penalties he faced. The court further determined that appellant was making the pleas without threat or promise, and the court then accepted appellant's pleas.

{¶ 4} On June 29, 2011, appellant, pro se, wrote a letter to the court indicating that he did not understand the effect of his guilty pleas. Thereafter, on July 8, 2011 appellant, again pro se, filed a motion to withdraw his guilty pleas. Appellant also requested that the court appoint a new attorney to represent him. The state filed a memorandum stating that it did not oppose the motion.

{¶ 5} On July 18, 2011, a hearing was held on appellant's motion to withdraw. Appellant's counsel explained that his client was frustrated and did not understand a few points regarding his pleas; instead of conferring with counsel, he filed a motion with the court. Counsel stated that he had conversed with appellant and answered his questions and that appellant's motion to withdraw his plea would be withdrawn.

{¶ 6} The court then addressed appellant and confirmed that he, in fact, wished to withdraw the motion. The court explained that the case would then proceed to sentencing based on his pleas. Appellant indicated that he understood and agreed.

{¶ 7} On August 5, 2011, appellant was sentenced to nine years of imprisonment for rape and 12 months of imprisonment for failure to register. The sentences were ordered to be served consecutively. This appeal followed.

{¶ 8} 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 she 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.

{¶ 9} Counsel notified appellant of her inability to find meritorious grounds for appeal and provided appellant with copies of both the *Anders* brief and her motion to withdraw. Counsel advised appellant of his right to file his own appellate brief. Appellant has not filed an additional brief.

{¶ 10} In the *Anders* brief, counsel has asserted three 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.

III. The trial court erred in allowing appellant to withdraw his motion to withdraw his plea.

{¶ 11} Appellant's counsel's first potential assignment of error challenges the court's acceptance of appellant's guilty pleas. 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).

{¶ 12} 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.*

{¶ 13} 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).

{¶ 14} We have thoroughly 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 appellant entered his plea knowingly, intelligently and voluntarily, the court did not err in accepting the plea. Appellant’s counsel’s first potential assignment of error is not well-taken.

{¶ 15} In appellant’s counsel’s second potential assignment of error she argues that the trial court abused its discretion when imposing appellant’s sentence. An abuse of discretion implies that the trial court’s attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 16} Appellant was convicted of one count of rape, in violation of R.C. 2907.02(A)(1)(a), a first degree felony with a sentencing range of three to ten years. Appellant was also convicted of failure to register, R.C. 2950.05(A), a fourth degree felony, and faced a maximum of 18 months in prison.

{¶ 17} 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 appellant's presentence investigation report. 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 second potential assignment of error is not well-taken.

{¶ 18} In appellant's counsel's third potential assignment of error, she contends that the trial court erred when it permitted appellant to withdraw his pro se motion to withdraw his guilty plea. A July 18, 2011 hearing was set for the motion. On that date, in open court, appellant's attorney requested that the motion be withdrawn. Counsel explained that appellant filed the motion due to "frustration" as he was confused about some aspects of his plea. Counsel stated that he and appellant talked and that counsel was satisfied that appellant's plea was knowingly, voluntarily, and freely given. The court then addressed appellant and ascertained that he understood the impact of the plea. The court then granted the motion to withdraw.

{¶ 19} Upon review we further note that although motions to withdraw are to be liberally granted, even a cursory review of the factors enumerated in *State v. Fish*, 104 Ohio App.3d 236, 661 N.E.2d 788 (1st Dist.1995) demonstrate that appellant's motion may have reasonably been denied. Appellant was represented by competent counsel during the proceedings, he was given a full Crim.R. 11 hearing, and appellant admitted

his guilt. As stated above, the motion was filed due to some confusion regarding the plea; in open court, appellant indicated that his questions had been satisfactorily answered. Appellant's counsel's third potential assignment of error is not well-taken.

{¶ 20} 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 Sandusky 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 Juan Aguilar, 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

Thomas J. Osowik, 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>.