

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

State of Ohio

Court of Appeals No. L-12-1150

Appellee

Trial Court No. CR0201201055

v.

Henry Wynne

**DECISION AND JUDGMENT**

Appellant

Decided: March 1, 2013

\* \* \* \* \*

Julia R. Bates, Lucas County Prosecuting Attorney, and  
Ian English, Assistant Prosecuting Attorney, for appellee.

Laurel A. Kendall, for appellant.

\* \* \* \* \*

**JENSEN, J.**

{¶ 1} Henry Wynne appeals from a judgment of conviction and sentence following a guilty plea. For the following reasons, we affirm the judgment of the Lucas County Court of Common Pleas.

{¶ 2} On January 4, 2012, the victim was filling his tank and cashing a check at a gas station on West Sylvania Avenue. Wynne was standing in line behind him. When the victim went back to his vehicle, Wynne approached with a firearm displayed, demanding money. The victim handed Wynne \$40. Wynne demanded more, put his hands in the victim's pocket, and took the victim's keys and \$130. Wynne then drove away in the victim's vehicle.

{¶ 3} Wynne was arrested and charged with one count of aggravated burglary with a firearm specification in violation of R.C. 2911.11 and 2941.145.

{¶ 4} On April 19, 2012, Wynne appeared in court with counsel. The parties indicated that a plea had been negotiated under the following terms: Wynne would enter an *Alford* plea (pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)) to the charge in the indictment, the firearm specification would be dismissed at sentencing, and the state would recommend a cap of eight years in prison.

{¶ 5} During the plea hearing, the trial court engaged in a full and thorough recitation of the rights Wynne was waiving by pleading guilty, including his right against self-incrimination, the right to trial by jury, the right to confront witnesses against him, the right to compulsory appearance of witnesses, and the right to place the burden upon the state of proving his guilt beyond a reasonable doubt. The trial court informed Wynne of his limited right to appeal, the nature of the charges, and the potential sentence. The

trial court accepted the *Alford* plea after holding that Wynne was entering his plea knowingly, voluntarily and intelligently.

{¶ 6} Sentencing was held on May 7, 2012. After reviewing the Presentence Investigation Report and listening to statements by Wynne and trial counsel, the court sentenced Wynne to a nine-year term of imprisonment and a mandatory five-year term of postrelease control. The court also ordered that Wynne pay restitution in the amount of \$170.

{¶ 7} Wynne timely appealed his sentence and conviction. Wynne's appointed counsel has filed a brief and requests leave of court to withdraw under the procedure set forth in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

{¶ 8} *Anders, supra*, 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 deems an appeal wholly frivolous. Under *Anders*, counsel must undertake a "conscientious examination" of the case and, if she determines an appeal would be "wholly frivolous," advise the court and seek permission to withdraw. 386 U.S. at 744.

{¶ 9} Appointed counsel has fully satisfied the requirements set forth in *Anders*. Wynne was properly notified of his right to file an appellate brief on his own behalf, but has neither filed a pro se brief nor otherwise responded to counsel's request to withdraw. *See Duncan*, 57 Ohio App.2d at 94. Thus, this court will now proceed with an

examination of the proposed assignment of error and the entire record of the proceedings below to determine if this appeal lacks merit and is, therefore, wholly frivolous. *Id.*

{¶ 10} Assigned counsel raises one potential assignment of error for our consideration: “The trial court abused its discretion in imposing the sentence of nine (9) years in this case, which was Appellant’s first adult felony.”

{¶ 11} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the Supreme Court of Ohio sets forth a two-step analysis for reviewing felony sentences on appeal. First, the reviewing court is required to “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. If the first inquiry is satisfied, the appellate court reviews the decision imposing sentence under an abuse of discretion standard. *Id.*

{¶ 12} Here, the trial court stated in its judgment entry that it “considered the record, oral statements, any victim impact statement and presentence report prepared, as well as the principles and purposes of sentencing under R.C. 2929.11, and has balanced the seriousness and recidivism factors under R.C. 2929.12.” The trial court’s sentence is within the statutory range of 3 to 11 years. The trial court properly imposed post release control and restitution. Accordingly, the sentence is not clearly and convincingly contrary to law.

{¶ 13} As to the second inquiry – abuse of discretion – the appellate court must determine whether the trial court’s attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). Appointed counsel argues that the trial court abused its discretion by imposing a nine-year sentence on this case, Wynne’s first felony conviction as an adult.

{¶ 14} R.C. 2929.11 and 2929.12 “serve as an overarching guide for trial judges to consider in fashioning an appropriate sentence.” *Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, at ¶ 17. Where the court imposes a sentence within the permissible statutory range, a reviewing court will presume the trial court followed the standards in determining sentence, absent evidence to the contrary. *Id.* at fn. 4. Here, the sentence imposed was within the permissible range of 3 to 11 years. We have reviewed the record including transcript of the sentencing hearing and the 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. The trial court’s decision is supported by the record. It is not unreasonable, arbitrary or unconscionable.

{¶ 15} In the performance of our duty, under *Anders, supra*, to conduct an independent review of the record, we have found no potential assignment of error having arguable merit. We conclude that this appeal is wholly frivolous. We grant the motion of counsel to withdraw.

{¶ 16} The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant Wynne is ordered to pay the costs of this appeal pursuant to App.R. 24. 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.

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JUDGE

Thomas J. Osowik, J.

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JUDGE

James D. Jensen, J.  
CONCUR.

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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>.