[Cite as *State v. Martin*, 2015-Ohio-697.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 2014-CA-69
	:	
v.	:	Trial Court Case No. 14-CR-80B
	:	
WHITNEY MARTIN	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 27th day of February, 2015.

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HALL, J.

{¶ 1} Whitney Martin appeals from her conviction and sentence following a guilty plea to one count of attempted robbery, a fourth-degree felony. At sentencing, the trial court imposed a statutory maximum eighteen-month prison sentence.

{¶ 2} On October 6, 2014, Martin's appointed appellate counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), asserting the absence of any non-frivolous issues for our review. We notified Martin of the *Anders* brief and invited her to submit a pro se brief. She did not respond, and the matter is now before us for disposition.

{¶ 3} Although counsel's *Anders* brief does not identify any issues for appeal, we have undertaken an independent review of the record, including the plea and sentencing hearing transcripts and a pre-sentence investigation report. Having performed that review, we agree that no non-frivolous issues exist.

{¶ 4} The record reflects that twenty-one-year-old Martin originally was charged with robbery for stealing purses valued at $386 from a department store. The charge was robbery rather than theft because she threatened to mace security personnel while a co-defendant struggled with security during the incident. Martin pled guilty to a reduced charge of attempted robbery, and the State agreed to recommend community control after the completion of a presentence investigation. The plea-hearing transcript reflects full compliance with Crim.R. 11(C)(2)(c) regarding the constitutional rights Martin was waiving. The trial court also complied with Crim.R. 11(C)(2)(a) and (b) except that it did not tell her it could proceed immediately with sentencing. In any event, the plea agreement called for a presentence investigation to be completed prior to sentencing. The trial court complied with that provision and deferred disposition until after its review of a presentence-investigation report. Under these circumstances, Martin could not possibly establish prejudice based on the trial court's failure to tell her it could proceed immediately

to sentencing. *State v. White*, 2d Dist. Clark Nos. 2014-CA-54, 2014-CA-55, 2014-CA-56, 2015-Ohio-28, ¶ 4.

{¶ 5} At sentencing, defense counsel argued for community control. Consistent with the plea agreement, the State also requested community control. The trial court rejected that request (which it had advised Martin during the plea hearing it could do) and imposed a statutory maximum eighteen-month prison term. In support, the trial court noted that Martin had five prior juvenile-delinquency adjudications for theft and had been convicted of four prior theft-related offenses as an adult (theft in 2012, receiving stolen property in 2012, unauthorized use of property in 2012, and theft in 2013). The trial court then addressed Martin and explained:

> As an adult, your first theft conviction you served five days in jail. For your receiving stolen property conviction you served nine days in jail. Your unauthorized use of property you served two days in jail.
>
> And then your theft in 2013 out of Lebanon, Ohio, it doesn't appear you served any time in jail, but you were placed on probation for a period of one year. That was on December 9, 2013.
>
> The offense that you're before the Court on today occurred on January 15, 2014, and you were on probation for theft when you committed this offense.
>
> And now your most recent theft offense for which you are before the Court today escalated into attempted robbery because you threatened to mace the loss prevention workers when they tried to stop you.

* * *

> In juvenile court your theft adjudications resulted in probation; and then your theft as an adult, your theft out of Bellbrook, Ohio resulted in probation. Unauthorized use of property in Miamisburg, Ohio resulted in probation. Theft out of Lebanon, Ohio resulted in probation. And as I indicated earlier, this offense you're before the Court on today was committed while you were on probation out of Lebanon, so probation doesn't seem to be effective.
>
> The Court is going to order that you be sentenced to eighteen months in the Ohio State Penitentiary.

(Sentencing Tr. at 5-6).

{¶ 6} In its subsequent judgment entry, the trial court noted that it had considered the statutory principles and purposes of sentencing as well as the statutory seriousness and recidivism factors. (Doc. #19).

{¶ 7} In order for Martin to successfully challenge her sentence she must demonstrate under R.C. 2953.08(G)(2), by clear and convincing evidence, that either (1) the record does not support certain specified findings or (2) the sentence is contrary to law. *State v. Rodeffer*, 2013–Ohio–5759, 5 N.E.3d 1069 (2d Dist.).[1] The record does not

[1] Subsequent opinions from this court have expressed reservations as to whether our decision in *Rodeffer* is correct. *See*, e.*g*., *State v. Garcia*, 2d Dist. Greene No. 2013-CA-51, 2014-Ohio-1538, ¶ 9, fn. 1; *State v. Johnson*, 2d Dist. Clark No. 2013-CA-85, 2014-Ohio-2308, ¶ 9, fn. 1. However, even if we were to analyze this case pursuant to an abuse of discretion standard, we do not find an arguable assignment of error that the sentence constituted an abuse of discretion.

support a reasonable argument for either conclusion. Most of the findings specified in R.C. 2953.08(G)(2) are not applicable here. We note, however, that R.C. 2953.08(G)(2) does reference findings under R.C. 2929.13(B), which addresses the imposition of a prison term for fourth and fifth-degree felonies. Here the trial court was not restricted from imposing a prison sentence for Martin's fourth-degree felony attempted robbery conviction for at least two independent reasons: (1) it was an offense of violence under R.C. 2901.01(A)(9)(a) and (d),[2] making the mandatory community control language in R.C. 2929.13(B)(1)(a) inapplicable and (2) she was on probation when she committed it, also making mandatory community control inapplicable pursuant to R.C. 2929.13(B)(1)(b)(xi).

{¶ 8} Finally, we note that a maximum sentence is not contrary to law when it is within the statutory range and the trial court considered the statutory principles and purposes of sentencing as well as the statutory seriousness and recidivism factors. *State*

[2] Robbery, a violation of R.C. 2911.02, is specifically listed by statute as an "offense of violence" under R.C. 2901.01(A)(9)(a). Pursuant to R.C. 2901.01(A)(9)(d), an "offense of violence" expressly includes an attempt to commit any of the enumerated offenses of violence. Therefore, Martin's attempt to commit robbery was an offense of violence. In reaching this conclusion, we recognize the Eighth District's holding in *State v. V.M.D*., 8th Dist. Cuyahoga No. 100522, 2014-Ohio-1844, that attempted robbery is not clearly a disqualifying "offense of violence" for purposes of expungement. In *V.M.D*., the Eighth District looked beyond the plain language of R.C. 2901.01(A)(9) and noted the absence of a definition of "offense of violence" in the pertinent expungement statute, R.C. 2953.36. *Id*. at ¶ 10. The Eighth District then construed the expungement statute liberally to fulfill its remedial purpose and held that the record did not clearly reveal that the defendant's attempted robbery conviction was an offense of violence for expungement purposes. *Id*. at ¶ 14-15. *V.M.D.* is distinguishable from the present case, which does not involve the expungement statute. We note too that the Ohio Supreme Court has granted the State's request for a discretionary appeal in *V.M.D.* Whether or not this "offense of violence" question presents a non-frivolous argument, mandatory community control was still inapplicable for the separate undisputed reason that the appellant was on community control at the time of the offense.

v. Walker, 2d Dist. Montgomery No. 25741, 2014-Ohio-1287, ¶ 17-19; *State v. Hayes*, 2d Dist. Clark No. 2014-CA-27, 2014-Ohio-5362, ¶ 15. These requirements were met here. Accordingly, we see no non-frivolous issue she can raise under R.C. 2953.08(G)(2) to challenge her sentence.

{¶ 9} Having conducted our independent review, we agree with appointed appellate counsel's assessment that no non-frivolous issues exist for appeal. Accordingly, the judgment of the Clark County Common Pleas Court is affirmed.

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FROELICH, P.J., and DONOVAN, J., concur.

Copies mailed to:

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