

[Cite as *State v. Bush*, 2014-Ohio-4434.]
DONOFRIO, J.

{¶1} Defendant-appellant Zaryl Bush appeals from his conviction and sentence entered in the Mahoning County Court of Common Pleas following his guilty pleas for murder, child endangering, intimidation of witness, and tampering with evidence. Appointed appellate counsel has filed a no-merit brief and requested leave to withdraw.

{¶2} Forty-three-year-old Bush was in a relationship with Shain Widdershaim, who had three sons, fourteen-year-old T.F. and ten-year-old twins. From a period beginning in December 2011 through Bush's arrest in January 2013, Bush inflicted serious physical and emotional abuse upon all three children.

{¶3} The abuse reached lethal proportions on January 21, 2013. While the children were at Bush's residence, he punched T.F. in the face. (Sentencing Tr. 24-25.) T.F. was knocked unconscious. (Sentencing Tr. 25). As T.F. lay on the ground, Bush kicked him in the head, then picked him up and slammed his head into a wall. (Sentencing Tr. 25). One of the twins was present in the room and witnessed Bush's assault on his older brother (Sentencing Tr. 8). He attempted to intervene but was pushed away by Bush. (Sentencing Tr. 8). Bush wiped up T.F.'s blood, and took the bloody rags to Widdershaim's residence nearby to fake a crime scene to make it look like T.F. slipped in the shower and had a seizure. (Sentencing Tr. 8-9). Further, T.F.'s other twin brother witnessed Bush as he washed his hands with bleach and took the bloody rags from his residence to Widdershaim's residence to stage the crime as an accident. (Sentencing Tr. 9.)

{¶4} The attack resulted in T.F. suffering blunt force injuries of the head, contusion to the eyelids, contusion within the mouth, abrasions of the scalp, subdural hemorrhages, subdural and subarachnoid hemorrhages and brain contusions. (Sentencing Tr. 23-24). A few days later, T.F. died as a result of blunt force injuries to the head. (Sentencing Tr. 24). In the two years leading up to T.F.'s murder, Bush's abuse of T.F. included but was not limited to, forcing him to walk on hot coals and run outside in extreme weather. (Bill of Particulars.) In addition, Bush's abuse of the twin boys included but was not limited to forcing one of them to take cold showers and

stand nude in front of a fan, slamming their head into a wall, hitting one of them with a pool stick and belt, and kicking another down the stairs, and forcing one of them to stand outside in extreme weather conditions. (Bill of Particulars.)

{¶15} On March 7, 2013, a Mahoning County grand jury issued an eighteen-count indictment against Bush and Widdershaim. Bush was named in thirteen of those counts.

{¶16} Of the thirteen counts with which Bush was charged, eight of those counts stemmed from Bush's abuse and murder of T.F.. The first four counts and the eighteenth count addressed the offenses surrounding Bush's January 21, 2013 murder of T.F.: count 1 – murder for purposely causing the death of T.F. in violation of R.C. 2903.02(A)(D), a fifteen-years-to-life felony; count 2 – felony murder for causing the death of T.F. (as a proximate result of child endangering or felonious assault) in violation of R.C. 2903.02(B)(D), a fifteen-years-to-life felony; count 3 – felonious assault of T.F. in violation of R.C. 2903.11(A)(1)(D), a second-degree felony; count 4 – endangering children as to T.F. in violation of R.C. 2919.22(B)(1)(E)(2)(D), a second-degree felony; and count 18 – involuntary manslaughter of T.F. in violation of R.C. 2903.04(A), a first-degree felony.

{¶17} The fifth, sixth, and seventh counts concerned Bush's abuse of T.F. from December 2011 leading up to the murder: count 5 – endangering children as to T.F. in violation of R.C. 2919.22 (A)(E)(2)(C), a third-degree felony; count 6 – endangering children as to T.F. in violation of R.C. 2919.22(A)(E)(2)(C), a third-degree felony; and count 7 – endangering children in violation of R.C. 2919.22(B)(4)(E)(3), a third-degree felony.

{¶18} The remaining counts with which Bush was charged (the eighth, ninth, tenth, and twelfth counts) stemmed from Bush's abuse of the ten-year-old twin boys, his threats to them in the wake of his assault and murder of their older brother, and his attempt to stage the murder as an accident at Widdershaim's residence: count 8 – endangering children as to one of the twin boys, in violation of R.C. 2919.22(A)(E)(2)(C), a third-degree felony; count 9 – endangering children as to the

other twin boy, in violation of R.C. 2919.22(A)(E)(2)(C), a third-degree felony; count 10 – intimidation of one of the twin boys in violation of R.C. 2921.04(B)(D), a third-degree felony; count 11 – intimidation of the other twin boy in violation of R.C. 2921.04(B)(D), a third-degree felony; and count 12 – tampering with evidence in violation of R.C. 2921.12(A)(1)(B), a third-degree felony.

{¶9} Bush pleaded not guilty, the trial court appointed him counsel, and the matter proceeded to discovery and other pretrial matters.

{¶10} On June 19, 2013, the parties reached a Crim.R. 11 plea agreement. Bush pleaded guilty to count 1 (murder), count 4 (second-degree felony endangering children), counts 7, 8, and 9 (third-degree-felony endangering children), counts 10 and 11 (intimidation), and count 12 (tampering with evidence). The state moved to dismiss count 2 (felony murder), count 3 (felonious assault), counts 5 and 6 (third-degree-felony endangering children), and count 18 (involuntary manslaughter). In addition, the state agreed to recommend a term of imprisonment of twenty-two years to life.

{¶11} The trial court conducted a sentencing hearing on June 28, 2013. The court sentenced Bush to fifteen-years to life in prison for count 1 (murder) and found that Bush's conviction on count 4 (second-degree-felony endangering children) merged with his conviction in count 1 (murder) for purposes of sentencing. (Sentencing Tr. 27.) For the remaining counts to which Bush pleaded guilty, the court sentenced Bush to terms of imprisonment as follows: three years each for counts 7, 8, and 9 (third-degree-felony endangering children); three years each for counts 10 and 11 (intimidation); and three years for count 12 (tampering with evidence). Further, the court ordered that all of the sentences be served consecutively, for an aggregate sentence of thirty-three years to life in prison. This appeal followed.

{¶12} Bush's appointed appellate counsel filed a no-merit brief on March 25, 2014. On April 10, 2014, this court informed Bush of counsel's no-merit brief and granted him thirty days to file his own written brief. Bush has not filed his own brief.

{¶13} The no-merit brief review identifies two potential issues for appeal: (1)

whether the plea colloquy complied with Crim. R. 11, and (2) whether the sentence was an abuse of discretion. In reviewing these possible appellant arguments, counsel concludes that they have no merit and the appeal is frivolous.

{¶14} When appellate counsel seeks to withdraw and identifies that there are no meritorious arguments for appeal, the filing is known as a no-merit brief. *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed2d 493 (1967). This district refers to the no-merit brief as a *Toney* brief. *State v. Toney*, 23 Ohio App.2d 203, 262 N.E.2d 419 (7th Dist.1970).

{¶15} In *Toney*, this Court has recognized an indigent defendant's constitutional right to court-appointed counsel for direct appeal of their conviction. *Id.*, paragraph one of the syllabus. After a conscientious examination of the record, counsel should present any assignments of error which could arguably support the appeal. *Id.*, paragraph two of the syllabus. If instead counsel determines that the defendant's appeal is frivolous and that there is no assignment of error which could be arguably supported on appeal, then counsel should inform the appellate court and the defendant of that by brief and ask to withdraw as counsel of record. *Id.*, paragraph three and four of the syllabus. The defendant is then given the opportunity to raise on his own behalf any assignments of error he chooses. *Id.*, paragraph four of the syllabus. The appellate court's duty is to examine the record, counsel's brief, and any arguments raised by the defendant on his own behalf, and determine if the appeal is wholly frivolous. *Id.*, paragraph five of the syllabus. If after determining that the appeal is wholly frivolous, then the appellate court should permit counsel to withdraw and affirm the judgment of conviction and sentence. *Id.*, paragraph seven of the syllabus.

{¶16} Because Bush entered a guilty plea, our review is limited to examining the same two potential issues identified by his appointed appellate counsel – the plea and the sentence. The first issue we examine is whether Bush entered his plea knowingly, voluntarily, and intelligently within the framework set forth in Crim.R. 11.

{¶17} When determining the voluntariness of a plea, this court must consider

all of the relevant circumstances surrounding it. *State v. Trubee*, 3d Dist. No. 9-03-65, 2005-Ohio-552, ¶ 8, citing *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463 (1970). Pursuant to Crim.R. 11(C)(2), the trial court must follow a certain procedure for accepting guilty pleas in felony cases. Before the court can accept a guilty plea to a felony charge, it must conduct a colloquy with the defendant to determine that he understands the plea he is entering and the rights he is voluntarily waiving. Crim.R. 11(C)(2). If the plea is not knowing and voluntary, it has been obtained in violation of due process and is void. *State v. Martinez*, 7th Dist. No. 03-MA-196, 2004-Ohio-6806, ¶ 11, citing *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709 (1969).

{¶18} A trial court must strictly comply with Crim.R. 11(C)(2) pertaining to the waiver of federal constitutional rights. *Martinez* at ¶ 12. These rights include the right against self-incrimination, the right to a jury trial, the right to confront one's accusers, the right to compel witnesses to testify by compulsory process, and the right to proof of guilt beyond a reasonable doubt. Crim.R. 11(C)(2)(c).

{¶19} In the present case, the trial court strictly complied with Crim.R. 11(C)(2) by informing Bush of the constitutional rights he was waiving by entering a guilty plea. Before accepting Bush's plea, the trial court informed him that by pleading guilty he was waiving his right to have the state prove its case beyond a reasonable doubt, his right to a jury trial, his right to subpoena witnesses to assist him, his right to cross-examine witnesses against him, and his right to remain silent at trial. (Plea Tr. 9-10). Moreover, Bush indicated to the court that he understood he was waiving these constitutional rights by answering in the affirmative. (*Id.*)

{¶20} A trial court need only substantially comply with Crim.R. 11(C)(2) pertaining to non-constitutional rights such as informing the defendant of "the nature of the charges with an understanding of the law in relation to the facts, the maximum penalty, and that after entering a guilty plea or a no contest plea, the court may proceed to judgment and sentence." *Martinez* at ¶12, citing Crim.R. 11(C)(2)(a)(b).

{¶21} In the present case, the trial court substantially complied with Crim.R. 11(C)(2) by informing Bush of his non-constitutional rights. The court informed Bush

of the nature of the charges against him. Bush told the court that he understood the charges. (Plea Tr. 8). The court informed Bush that it could proceed immediately to sentencing. (Plea Tr. 8). However, the court stated that it was not going to do so and would instead proceed to sentencing at a later date. (Plea Tr. 19). The court went on to inform Bush that when he came back to court for sentencing, he faced a maximum sentence of forty-one years to life imprisonment and up to \$90,000 in fines. (Plea Tr. 12). Moreover, while the trial court initially advised Bush that he would be subject to a five-year period of post-release control at the June 19, 2013 plea hearing, the court later informed Bush of the correct three-year term and advisements at a July 8, 2013 hearing. (July 8, 2013 Hearing Tr. 2-5.)

{¶22} Therefore, because the trial court complied with Crim.R. 11(C)(2) in addressing Bush and accepting his guilty pleas, there are no meritorious appealable issues concerning Bush's plea.

{¶23} Next, we consider Bush's sentence of thirty-three years to life in prison. Our review of felony sentences is now a limited, two-fold approach, as outlined in the plurality opinion in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶26. First, we must examine the sentence to determine if it is "clearly and convincingly contrary to law." *Id.* (O'Connor, J., plurality opinion). In examining "all applicable rules and statutes," the sentencing court must consider R.C. 2929.11 and R.C. 2929.12. *Id.* at ¶¶ 13-14 (O'Connor, J., plurality opinion). If the sentence is clearly and convincingly not contrary to law, the court's discretion in selecting a sentence within the permissible statutory range is subject to review for abuse of discretion. *Id.* at ¶ 17 (O'Connor, J., plurality opinion). Thus, we apply an abuse of discretion standard to determine whether the sentence satisfies R.C. 2929.11 and R.C. 2929.12. *Id.* at ¶ 17 (O'Connor, J., plurality opinion).

{¶24} A sentencing court must consider the principles and purposes of sentencing espoused in R.C. 2929.11 and the seriousness and recidivism factors in R.C. 2929.12. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, ¶ 38. The Ohio Revised Code does not mandate that the sentencing judge use specific

language or make specific findings on the record when considering these statutes. *State v. Arnett*, 88 Ohio St.3d 208, 215, 724 N.E.2d 793 (2000); R.C. 2929.12.

{¶25} Here, the trial court expressly stated that it considered the purposes and principles of sentencing under R.C. 2929.11, as well as the recidivism factors in R.C. 2929.12. (Sentencing Tr. 13.) Moreover, the court stated in its sentencing entry filed July 8, 2014 that it considered “the record, the statements and recommendations of counsel and of Defendant, as well as the purposes and principles of sentencing under O.R.C. 2929.11. The Court has balanced the seriousness and recidivism factors under O.R.C. 2929.12 and has followed the guidance by degree of felony in O.R.C. 2929.13.”

{¶26} Bush was convicted of murder pursuant to R.C. 2903.02(A)(D). Absent an applicable specification, as was the case here, R.C. 2929.02(B) requires that “whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life.” Here, the trial court sentenced Bush accordingly. The remaining counts for which Bush was convicted, counts 7, 8, and 9 (endangering children), counts 10 and 11 (intimidation), and count 12 (tampering with evidence), were each third-degree felonies. R.C. 2929.14(A)(3)(b) requires that the prison term for those offenses “shall be nine, twelve, eighteen, twenty-four, thirty, or thirty-six months.” Here, the trial court sentenced Bush to three-year terms for each of those offenses. Thus, those sentences were within the applicable range. Likewise, the trial court properly informed Bush that he was subject to a three-year term of post release control. (July 8, 2013 Hearing Tr. 2-5.)

{¶27} Next, we must evaluate whether the propriety of the trial court’s ordering of those sentences to be served consecutively. Pursuant to 2011 H.B. 86, effective September 20, 2011, a court imposing consecutive sentencing must make certain findings. This legislation was enacted in response to the Ohio Supreme Court’s statement that its *Foster* decision was incorrect in striking down statutory consecutive sentence provisions and that the legislature would need to enact a new

statute to revive any requirement of findings for consecutive sentences. *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768, paragraph three of the syllabus.

{¶128} R.C. 2929.14(C)(4) sets forth the findings required for imposition of consecutive sentences:

(4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶129} Thus, the sentencing court must find that (1) consecutive sentences are necessary to protect the public from future crime or to punish the offender, (2) that

consecutive sentences are not disproportionate to the seriousness of the defendant's conduct and to the danger he poses to the public, and (3) one of the findings described in subsections (a), (b) or (c). R.C. 2929.14(C)(4).” See *State v. Bellard*, 7th Dist. No. 12 MA 97, 2013-Ohio-2956, ¶ 17. See also *State v. Power*, 7th Dist. No. 12 CO 14, 2013-Ohio-4254, ¶ 37. In analyzing whether a sentencing court complied with R.C. 2929.14(C)(4), this court had held that a trial court was not required to recite any magic or talismanic words when imposing consecutive sentences but that it must be clear from the record that the trial court had engaged in the appropriate analysis. *Power* at ¶ 40; *Bellard* at ¶ 17.

{¶30} Appellate case law had been in flux concerning the extent to which a sentencing court was required to make these findings, particularly as it regarded the extent to which the court needed to make those findings at the sentencing hearing and in the subsequent sentencing entry. During the pendency of this appeal, the Ohio Supreme Court in *State v. Bonnell*, ___ Ohio St.3d ___, 2014-Ohio-3177, ___ N.E.2d ___ provided clarification holding that the findings required by R.C. 2929.14(C)(4) must be made at the sentencing hearing *and* included in the sentencing entry. *Id.* at the syllabus. The Court confirmed that a sentencing court is not required to recite “a talismanic incantation of the words” of the consecutive sentences provision of the felony sentencing statute, so long as the required findings can be gleaned from the record. *Id.* at ¶¶ 36-37. Additionally, the Court also held that the sentencing court “has no obligation to state reasons to support its findings.” *Id.*

{¶31} In this case, the trial court explicitly made all the findings required for imposition of consecutive sentences. At the sentencing hearing, the trial court made it a point to specifically and separately address consecutive sentences and R.C. 2929.14(C):

THE COURT: * * * The Court also has to make a determination about consecutive sentences. The State has recommended consecutive sentences, and the law is that there is a presumption in favor of concurrent terms of incarceration with the Court's discretion to

impose consecutive sentences, if necessary, to protect the public and punish the offender, and not disproportionate to the harm caused, and the Court would additionally have to find that the harm in this case is so great or so unusual that a single prison term does not adequately reflect the seriousness of the offender's conduct.

* * *

THE COURT: The Court does find that consecutive sentences are necessary in this case because the harm was so great or unusual that a single term would not adequately reflect the seriousness of the offender's conduct. Consecutive sentences are necessary to protect the public and to punish the offender and not disproportionate to the harm that has been caused.

(Sentencing Tr. 14-15, 26).

{¶32} The July 8, 2013 sentencing entry also contains the required findings:

Pursuant to O.R.C. 2929.14(C)(4), the Court finds "that consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public." The Court further finds that pursuant to O.R.C. 2929.14(C)(4)(b), that at least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct. Therefore, the sentences imposed on the charges of Counts Seven, Eight, Nine, Ten, Eleven, and Twelve are Ordered to be served consecutively to one another in the Department of Rehabilitation and Corrections and

consecutively to the sentence imposed on the charge of Murder in Count One.

{¶33} Thus, the trial court expressly made all of the required findings before imposing consecutive sentences under R.C. 2929.14(C)(4). It found that (1) consecutive sentences are necessary to protect the public from future crime or to punish the offender, (2) consecutive sentences are not disproportionate to the seriousness of the defendant's conduct and to the danger he poses to the public, and (3) the finding described in subsection (b).

{¶34} In sum, the record discloses that the trial court did consider and comply with all applicable statutes in issuing the sentence. The sentence is not clearly and convincingly contrary to law.

{¶35} Our analysis next turns to whether the trial court erred in determining that a thirty-three-years-to-life sentence was appropriate. Here, we note that the state had recommended a sentence of twenty-two years to life in prison. One of the considerations that the state made in recommending that sentence was that Bush's guilty pleas spared the twin boys from having to testify at trial. (Sentencing Tr. 10.) Bush's trial counsel also argued extensively in support of the weight that should be given to Bush for having accepted responsibility for the crimes and sparing the twin boys to have to testify at trial. (Sentencing Tr. 16-20.)

{¶36} Despite both parties' arguments and the joint sentencing recommendation, the trial court did not follow that recommendation. Instead, it ordered an aggregate thirty-three-years-to-life sentence. The act of not following the state's recommendation and ordering a stiffer penalty does not, in and of itself, render the sentence clearly and convincingly contrary to law or show that the trial court abused its discretion. Trial courts generally are not a party to the plea negotiations and the contract itself. *State v. Vari*, 7th Dist. No. 07-MA-142, 2010-Ohio-1300, ¶ 24. Thus, "the court is free to impose a sentence greater than that forming the inducement for the defendant to plead guilty so long as the court forewarns the defendant of the applicable penalties, including the possibility of

imposing a greater sentence than that recommended by the prosecutor.” *Id.*, citing *State v. Martinez*, 7th Dist. No. 03 MA 196, 2004-Ohio-6806, ¶ 8. That said, we have explained that once the trial court enters into the plea agreement by making a promise, it becomes a party to the agreement and is bound by the agreement. *Vari* at ¶ 24.

{¶37} Here, Bush was advised of the maximum penalties involved and was advised multiple times that the trial court was not required to follow the recommendation. The June 24, 2013 Plea Agreement set forth the maximum penalties for the offenses to which Bush had pleaded guilty and following the twenty-two-years-to-life recommendation stated, “THE COURT IS NOT BOUND BY THIS RECOMMENDATION.” At the beginning of the June 19, 2013 plea hearing the trial court noted, “The only discretion in the court, then, is whether or not I adopt the recommendation of the parties regarding sentencing, and that’s something I will not commit to.” (Plea Tr. 7.) The court went on to orally advise Bush of the maximum penalties involved and when asked, “Do you understand the state is recommending a 22-to-life sentence and that I am not bound by that?” Bush responded, “Yes, Your Honor.” (Plea Tr. 11-12, 15) Furthermore, the record does not indicate that the trial court was a party to the plea agreement. Thus, there is nothing in the record to suggest that the trial court was bound, for any reason, by the recommendation.

{¶38} The record also indicates that the trial court’s decision to deviate from the recommendation and order a thirty-three-years-to-life sentence was not an abuse of discretion or contrary to law. The trial court considered and weighed all factors when it was determining the appropriate sentence. The court considered the fact that the injury suffered by the victim of the offenses due to Bush’s conduct was exacerbated because of the age of the victim, R.C. 2929.12(B)(1). The court also noted the serious physical harm suffered by the victim, R.C. 2929.12(B)(2), that his relationship with the victim facilitated the offenses, R.C. 2929.12(B)(6), and that the offenses were carried out in the vicinity of one or more children who were not the victim, R.C. 2929.12(B)(9).

{¶39} The trial court's reasoning taken in conjunction with the record indicates that the trial court did not abuse its discretion or order a sentence that was clearly and convincingly contrary to law.

{¶40} In conclusion, for all the foregoing reasons, the potential assignments of error are without merit and an independent review of the case file reveals there are no appealable issues. The conviction and sentence is affirmed and appointed appellate counsel's motion to withdraw is granted.

Vukovich, J., concurs.

DeGenaro, P.J., concurs.