[Cite as *State v. Widdershaim*, 2014-Ohio-4165.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 13 MA 141
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	OPINION
	)	
SHAIN WIDDERSHAIM,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Common Pleas Court, Case No. 13 CR 249A.
JUDGMENT:	Affirmed. Counsel's Motion to Withdraw Granted.
APPEARANCES:	
For Plaintiff-Appellee:	Attorney Paul J. Gains Prosecuting Attorney Attorney Ralph M. Rivera Assistant Prosecuting Attorney 21 W. Boardman St., 6th Floor Youngstown, OH 44503
For Defendant-Appellant:	Attorney Ryan Ingram 7330 Market Street Youngstown, OH 44512
JUDGES: Hon. Mary DeGenaro Hon. Gene Donofrio Hon. Joseph J. Vukovich	
	Dated: September 18, 2014

[Cite as *State v. Widdershaim*, 2014-Ohio-4165.]
DeGenaro, P.J.

{¶1} Defendant-Appellant, Shain Widdershaim, appeals the June 7, 2012 judgment of the Mahoning County Court of Common Pleas convicting her of several counts of child endangering, one count of obstructing justice and sentencing her accordingly. Appointed appellate counsel filed a no-merit brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.E.2d 493 (1967), and *State v. Toney*, 23 Ohio App.2d 203, 262 N.E.2d 419 (7th Dist.1970), and requested leave to withdraw from the case. Widdershaim failed to file a pro-se brief.

{¶2} A thorough review reveals that there are no meritorious errors. The plea colloquy complied with Crim.R. 11(C) and, as such, the plea was entered knowingly, voluntarily, and intelligently. The sentence was neither clearly and convincingly contrary to law nor an abuse of discretion. Accordingly, the judgment of the trial is affirmed and counsel's motion to withdraw is granted.

Facts and Procedural History

{¶3} On March 7, 2013, the Mahoning County Grand Jury indicted Widdershaim on four counts of endangering children: two counts concerning her minor child, T.F., one under R.C. 2919.22(B)(1)(E)(2)(d), a second-degree felony, and another under R.C. 2921.32(A)(4)(c)(4), a third-degree felony; one count of endangering children concerning her minor child Da.W., (R.C. 2919.22(A)(E)(2)(c)), a third-degree felony; and, one count concerning her minor child De.W. (R.C. 2919.22(A)(E)(2)(c)), a third-degree felony. In addition, the indictment charged her with one count of obstructing justice (R.C. 2921.32(A)(4)(c)(4)), a third-degree felony; and one count of involuntary manslaughter (R.C. 2903.04(A)), a first degree felony.

{¶4} That same indictment charged Widdershaim's boyfriend and co-defendant, Zaryl Bush, with multiple offenses including murder, involuntary manslaughter, felonious assault, endangering children, intimidation and tampering with evidence.

{¶5} Bush was alleged to have engaged in ongoing serious physical abuse of the children. T.F. died as a result of that abuse, having been severely beaten by Bush. Widdershaim allegedly failed to protect the children from Bush and/or participated in some of the abuse. She was also accused of lying to investigators to protect Bush. T.F.

was 14 years old at the time of his death, the two surviving children were 10-year-old twins.

{¶6} Widdershaim later entered into a Crim.R. 11 plea agreement with the State. She entered guilty pleas to one count of endangering children in violation of R.C. 2919.22(B)(1)(E)(2)(d) (Count 13 – T.F.), a second-degree felony; three counts of endangering children in violation of R.C. 2919.22(A)(E)(2)(c) (Count 14: T.F., Count 15: Da.W., and Count 16: De.W., respectively), third-degree felonies; and, one count of obstructing justice in violation of R.C. 2921.32(A)(4)(c)(4) (Count 17), a third-degree felony. In exchange, the State dismissed the manslaughter charge and agreed to the jointly-recommended sentence of 10 years imprisonment.

{¶7} A Criminal Rule 11 plea hearing was held during which time the trial court engaged in a colloquy with Widdershaim concerning the rights she would give up by pleading guilty. At the end of the hearing, the court accepted Widdershaim's plea as knowingly, voluntarily and intelligently made and continued sentencing so that a presentencing investigation could be prepared.

{¶8} A sentencing hearing was held on September 4, 2013. The State kept its promise to recommend a 10-year prison term. The prosecutor explained that part of the reason for the 10-year recommendation was to allow Widdershaim's two surviving children the opportunity to grow to become adults in a safe environment. Patty Amendolea, a Children's Services Bureau case worker spoke on behalf of the surviving minor children, who were 10 years old at the time of T.F.'s death and had been placed in CSB custody. She explained that while the children understood what their mother had done, they still perceived her going to prison as a loss to them. Amendolea emphasized that there was domestic violence in the home and that the entire family, including Widdershaim was being held under the control of Bush, a very violent man. Amendolea conceded that it was "hard to understand," why Widdershaim continued to protect Bush and lie for him even after T.F. was killed and both Bush and Widdershaim were jailed.

{¶9} A letter from Widdershaim's mother, Sara Foltz, was read to the court, explaining that Widdershaim decided to leave a secure home life to "drag the children into

a dangerous situation," with Bush. Foltz continued that in March 2010, when the children complained to their mother about Bush's abusive treatment, Widdershaim called them liars and then isolated them from extended family.

{¶10} Finally, Widdershaim herself spoke in mitigation of punishment, expressing remorse, but also explaining that she was a victim of domestic violence and abuse herself. Her attorney echoed these sentiments.

{¶11} After considering the principles and purpose of felony sentencing, balancing the seriousness and recidivism factors, and determining that Widdershaim was not amenable to community control, the trial court sentenced Widdershaim to eight years on Count 13, two years on Count 15, two years on Count 16 and three years on Count 17. The trial court ordered that the sentences be served consecutively, for an aggregate term of 15 years. Count 14 merged with Count 13. The trial court made findings relative to consecutive sentencing pursuant to R.C. 2929.14(C)(4). The trial court notified Widdershaim that upon her release from prison she would be subject to a mandatory three-year period of post-release control and explained the ramifications of violating post-release control. Widdershaim was given 220 days of jail-time credit.

Anders **No-Merit Brief**

{¶12} An attorney appointed to represent an indigent criminal defendant may seek permission to withdraw if the attorney can show that there is no merit to the appeal. *See generally Anders*, 386 U.S. 738. To support such a request, appellate counsel is required to undertake a conscientious examination of the case and accompany his or her request for withdrawal with a brief referring to anything in the record that might arguably support an appeal. *Toney*, 23 Ohio App.2d at 207. The reviewing court must then decide, after a full examination of the proceedings, whether the case is wholly frivolous. *Id*.

{¶13} In *Toney*, this Court established guidelines to be followed:

> 3. Where a court-appointed counsel, with long and extensive experience in criminal practice, concludes that the indigent's appeal is frivolous and that there is no assignment of error which could be arguably supported on

> appeal, he should so advise the appointing court by brief and request that he be permitted to withdraw as counsel of record.
>
> 4. Court-appointed counsel's conclusions and motion to withdraw as counsel of record should be transmitted forthwith to the indigent, and the indigent should be granted time to raise any points that he chooses, pro se.
>
> 5. It is the duty of the Court of Appeals to fully examine the proceedings in the trial court, the brief of appointed counsel, the arguments pro se of the indigent, and then determine whether or not the appeal is wholly frivolous.
>
> 6. Where the Court of Appeals makes such an examination and concludes that the appeal is wholly frivolous, the motion of an indigent appellant for the appointment of new counsel for the purposes of appeal should be denied.
>
> 7. Where the Court of Appeals determines that an indigent's appeal is wholly frivolous, the motion of court-appointed counsel to withdraw as counsel of record should be allowed, and the judgment of the trial court should be affirmed.

Id. at syllabus.

{¶14} Pursuant to *Anders* and *Toney*, this court must now review the proceedings and determine whether it agrees that this appeal wholly lacks merit. In the typical *Anders* case involving a guilty plea, the only issues that can be reviewed on appeal relate to the plea or the sentence. *See, e.g., State v. Verity*, 7th Dist. No. 12 MA 139, 2013-Ohio-1158, ¶11.

Plea

{¶15} A plea must be made knowingly, voluntarily and intelligently. *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, ¶7; *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). If it is not, 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, 23 L.Ed.2d 274 (1969). When determining the voluntariness of a plea, this court must consider all of the relevant circumstances surrounding it. *State v. Johnson*, 7th Dist. No. 07 MA 8, 2008-Ohio-1065, ¶ 8, citing *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970).

{¶16} In order for a trial court to ensure that a felony defendant's plea is knowing, voluntary and intelligent, it must engage the defendant in a colloquy pursuant to Crim.R. 11(C). *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶25–26. During the colloquy, the trial court is to provide specific information to the defendant, including constitutional and nonconstitutional rights being waived. Crim.R. 11(C)(2); *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, 820 N.E.2d 355.

{¶17} The constitutional 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 have the state prove the defendant's guilt beyond a reasonable doubt. Crim.R. 11(C)(2)(c); *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶19-21. A trial court must strictly comply with these requirements. *Id*. at ¶31; *State v. Ballard*, 66 Ohio St.2d 473, 477, 423 N.E.2d 115 (1981). "Strict compliance" does not require a rote recitation of the exact language of the rule. Rather, a reviewing court should focus on whether the "record shows that the judge explained these rights in a manner reasonably intelligible to the defendant." *Id*. at paragraph two of the syllabus.

{¶18} The nonconstitutional rights include that the defendant must be informed of the effect of her plea, the nature of the charges, and the maximum penalty involved, which includes an advisement on post-release control if applicable. Further, a defendant must be notified, if applicable, that she is not eligible for probation or the imposition of

community control sanctions. Finally, this encompasses notifying the defendant that the court may proceed to judgment and sentence after accepting the guilty plea. Crim.R. 11(C)(2)(a)(b); *Veney*, 120 Ohio St.3d 176 at ¶10-13; *Sarkozy*, 117 Ohio St.3d 86, at ¶19-26. The trial court must substantially comply with these requirements. *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990). "Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving." *Id*. at 108. In addition, a defendant who challenges his guilty plea on the basis that the advisement for the nonconstitutional rights did not substantially comply with Crim.R. 11(C)(2)(a)(b) must also show a prejudicial effect, meaning the plea would not have otherwise been made. *Veney*, 120 Ohio St.3d 176 at ¶15 citing *Nero*, 56 Ohio St.3d at 108.

{¶19} The trial court's advisement of Widdershaim's constitutional rights strictly complied with Crim.R. 11(C)(2)(c). Widdershaim was informed that by pleading guilty she was waiving her right to a jury trial, her right to confront witnesses against her, her right to subpoena witnesses in her favor, her right to have the State prove at trial each and every element of the charged offenses beyond a reasonable doubt and her right to not testify at trial.

{¶20} The trial court substantially complied with Crim.R. 11(C) when advising Widdershaim of her nonconstitutional rights. The trial court explained to Widdershaim that the effect of pleading guilty was that she was admitting each and every element of the offenses; that in other words it was a complete admission of guilt on those charges. Widdershaim was advised of the nature of charges against her, four counts of child endangering and one count of obstructing justice. She was correctly advised of the maximum penalty involved, a possible 20 years imprisonment and 3 years of mandatory post-release control. R.C. 2967.28(B)(2); R.C. 2929.14(A)(2); (A)(3)(b). The trial court also informed her that she was eligible for community control, and that the court could proceed immediately to sentencing after accepting the guilty plea. Widdershaim indicated she understood she was giving up all of the above rights.

{¶21} Considering all of the above, the plea colloquy complied with Crim.R. 11(C) and, as such, the plea was knowingly, voluntarily, and intelligently entered. There are no appealable issues concerning the plea.

Sentencing

{¶22} When reviewing a felony sentence, an appellate court first examines the sentence to ensure that the sentencing court clearly and convincingly complied with the applicable laws. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶4. A trial court's sentence would be contrary to law if, for example, it were outside the statutory range, in contravention to a statute, or decided pursuant to an unconstitutional statute. *Id*. at ¶15. An appellate court then reviews the trial court's sentencing decision for abuse of discretion. *Kalish* at ¶17, 19-20. An abuse of discretion means more than an error in judgment; but rather implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). This court has continued to apply the two-part *Kalish* test following the effective date of H.B. 86. *See, e.g., State v. Hill*, 7th Dist. No. 13 MA 1, 2014-Ohio-919, ¶20.

{¶23} As to the first prong of the *Kalish* test, Widdershaim's sentence was not clearly and convincingly contrary to law. Widdershaim was afforded her allocution rights pursuant to Crim.R. 32(A)(1). The trial court asked Widdershaim if she had anything to say before the sentence was imposed, and Widdershaim gave a statement in mitigation. The trial court properly notified Widdershaim that upon her release from prison she would be subject to a mandatory three-year period of post-release control and explained the ramifications of violating post-release control. R.C. 2967.28(B)(2). In addition, the 15-year prison sentence Widdershaim received is within the 2 to 17 year statutory range for the charges. R.C. 2929.14(A)(2); (A)(3)(b). The trial court considered the purposes of felony sentencing and the sentencing factors. *See* R.C. 2929.11 and R.C. 2929.12.

{¶24} Further, in imposing consecutive terms, the trial court made the required findings pursuant to R.C. 2929.14(C)(4), which was enacted pursuant to H.B. 86 and applies to defendants sentenced after its effective date of September 31, 2011. *State v.*

Stout, 7th Dist. No. 13 MA 30, 2014-Ohio-1094, ¶17. Widdershaim was sentenced on September 10, 2013.

{¶25} R.C. 2929.14(C)(4) provides:

> 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.

{¶26} Recently, in *State v. Bonnell,* - - - Ohio St.3d - - -, 2014-Ohio-3177, - - - N.E.3d - - -, the Supreme Court of Ohio clarified that:

> When imposing consecutive sentences, a trial court must state the required findings as part of the sentencing hearing[.] * * * [T]he court should also incorporate its statutory findings into the sentencing entry. However, a

word-for-word recitation of the language of the statute is not required, and as long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld.

(Internal citations omitted.) *Id*. at ¶29.

{¶27} Here, during the sentencing hearing, the trial court stated:

I don't believe that concurrent sentencing is appropriate. I think you committed crimes against these children, and if you were abused and you were the victim of domestic violence yourself, I suppose in some way that explains why you did nothing, but it does not, in any way, excuse your responsibility, your obligation, to protect your children.

* * *

All these sentences are to be served consecutively to one another. These are individual crimes committed against individual victims. And, again, the Court has to respond to the legislative pronouncement. I mean, anybody that looks at this ought to feel the same way that I do without a whole lot of explanation. But the Court is to impose concurrent terms, unless, with discretion, a consecutive term is imposed because it is necessary to protect the public and punish the offender, it is not disproportionate to the harm that has been cause, and that the harm is so great and unusual, that a single prison term does not adequately reflect the seriousness of the offender's conduct.

{¶28} In the sentencing entry, the trial court stated:

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 in Counts Thirteen, Fifteen, Sixteen, and Seventeen are Ordered to be served consecutively to one another in the Department of Rehabilitations and Corrections.

{¶29} This is sufficient to comply with R.C. 2929.14(C)(4); the trial court made the mandatory statutory findings at the sentencing hearing and incorporated them into the sentencing entry. *See Bonnell, supra*, at ¶29. Based on all of the above, Widdershaim's sentence was not clearly and convincingly contrary to law.

{¶30} Moving on to the second prong of the *Kalish* test, the sentence chosen was not an abuse of discretion. As an initial matter, the fact that the trial court chose to deviate from the jointly-recommended sentence was not error because the trial court forewarned Widdershaim during the plea hearing of the applicable penalties, including the possibility of imposing a greater sentence than that recommended by the prosecutor. *See State v. Vari*, 7th Dist. No. 07-MA-142, 2010-Ohio-1300, ¶24.

{¶31} Further, as the trial court stated during sentencing, which was supported by the record, although the recidivism factors were in Widdershaim's favor, the seriousness factors pointed toward the need for a more severe sentence. *See generally* R.C. 2929.12.

> The Court has to consider the seriousness factors. Obviously, the injury suffered by your sons, all three of them, are exacerbated by their physical [sic] and their mental condition and age. Your relationship with the

> victim facilitated the offense, and the victim suffered serious physical and/or psychological harm. There's absolutely nothing to indicate these crimes are less than serious.
>
> The Court also has to consider the recidivism factors. They speak in your favor, because you haven't had prior trouble. At least no prior convictions.

{¶32} Indeed, the record in this case reflects that Bush, Widdershaim's boyfriend and co-defendant, inflicted serious abuse on Widdershaim's children for a period of at least a year prior to the death of T.F., and that Widdershaim was aware of the abuse and did nothing to stop it, and later tried to protect Bush after T.F.'s death. On the night T.F. was beaten to death by Bush, Widdershaim left T.F. and the other two children alone with Bush, despite the fact that she knew Bush was very angry at T.F. The surviving children were forced by Bush to try to cover up the death of their brother. Based on all of the above, the trial court's sentencing decision was not an abuse of discretion.

{¶33} In conclusion, there are no meritorious errors. Accordingly, the judgment of the trial court is affirmed and counsel's motion to withdraw granted.

Donofrio, J., concurs.

Vukovich, J., concurs.