[Cite as *State v. Walters*, 2009-Ohio-3198.]

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

State of Ohio — Court of Appeals No. L-08-1238

Appellee — Trial Court No. CR200801394

v.

Kenneth D. Walters — **DECISION AND JUDGMENT**

Appellant — Decided: June 30, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Michael D. Bohner, Assistant Prosecuting Attorney, for appellee.

Judith A. Myers, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This matter is before the court on the judgment of the Lucas County Court of Common Pleas, wherein, following a plea of no contest, appellant, Kenneth D. Walters, was found guilty of various theft offenses against the elderly and disabled. As a

result of these convictions, appellant was sentenced to serve an aggregate term of 30 months in prison and was ordered to pay a total of $3,436 in restitution.

{¶ 2} Between February 8 and March 11, 2008, appellant was indicted in three separate cases, all involving charges for theft offenses against the elderly and disabled. Specifically, on February 8, 2008, appellant was indicted in case No. CR200801317 on one count of theft, in violation of R.C. 2913.02(A)(3) and (B)(2), a felony of the fifth degree. On February 19, 2008, appellant was indicted in case No. CR200801394 on one count of theft from an elderly person or disabled adult, in violation of R.C. 2913.02(A)(3) and (B)(3), a felony of the fourth degree. And on March 11, 2008, appellant was indicted in case No. CR200801551 on two counts of theft from an elderly person or disabled adult, in violation of R.C. 2913.02 (A)(3) and (B)(3), both felonies of the fifth degree.

{¶ 3} Appellant initially entered pleas of not guilty to the charges in all three cases. On May 9, 2008, appellant withdrew his previous pleas of not guilty and entered pleas of no contest to the following: (1) one count of theft, a felony of the fifth degree, in case No. 200801551 (with the second count being dismissed); (2) one count of theft, pursuant to the indictment, in case No. 200801317; and (3) one count of petty theft, a reduced charge and misdemeanor of the first degree, in case No. 200801394. In addition, appellant agreed to pay restitution in the following amounts: (1) $500 in case No. 200801551; (2) $2,186 in case No. 200801317; and (3) $750 in case No. 200801394.

{¶ 4} The trial court advised appellant of the consequences of entering the pleas to each charge in each case. After explaining the maximum sentence, the trial judge

commented on appellant's puzzled expression and proceeded to explain to appellant that due to a change in the law, the trial court could run sentences for misdemeanors consecutive to sentences for felonies. This was confirmed by appellant's counsel. Before the trial judge proceeded, appellant was granted an opportunity to speak with his attorney. Following the recess in the proceedings, appellant's counsel notified the court that she and her client were prepared to go forward with the plea.

{¶ 5} The trial judge confirmed appellant's willingness to proceed to enter the pleas of no contest. In addition, he confirmed appellant's understanding of the ramifications of entering the pleas. The sentencing options and repercussions of violating parole were explained to appellant, and appellant confirmed his understanding of the trial court's explanations.

{¶ 6} At the time appellant entered his pleas, he indicated to the court that he had previously been sentenced to 68 months in prison for a probation violation. The trial court explained to appellant that the sentence imposed by the court could run consecutive to the time he received for the probation violation. The trial court explained appellant's right to appeal and explained appellant's constitutional rights. Appellant confirmed his willingness to give up his rights. The prosecution recited the facts underlying each case as shown by the evidence that the state would have produced, had the case proceeded to trial.

{¶ 7} The plea of no contest forms were presented to appellant. The trial court instructed appellant that he should sign the forms if he wished to make knowing,

intelligent and voluntary pleas to the charges. Appellant signed the forms for all three cases and indicated that he signed them of his own free will after talking with his counsel. Thereafter, the trial court found appellant to have made all three pleas knowingly, voluntarily and with an understanding of the charges, maximum penalties and effects of the pleas. The trial court further found appellant guilty of all charges.

{¶ 8} The trial court referred appellant to the Lucas County Adult Probation Department for a presentence investigation and report. Appellant's counsel indicated appellant's willingness to waive the presentence investigation report and proceed to sentencing, but the trial court declined.

{¶ 9} Sentencing occurred on May 28, 2008. The trial court, after describing appellant's behavior as "despicable" and "the ultimate form of predatory behavior," imposed maximum sentences in each case. Specifically, appellant was sentenced to serve 12 months in prison in case No. 200801551; 12 months in prison in case No. 200801317; and 6 months in prison in case No. 200801394. All of the sentences were ordered to be served consecutively, both to one another and to the sentence that appellant was serving for the probation violation. Finally, appellant was ordered to pay restitution in each case in accordance with the terms of his plea agreement.

{¶ 10} Appellant's counsel has submitted a request to withdraw pursuant to *Anders v. California* (1967), 386 U.S. 738, which sets forth the procedure to be followed by appointed counsel who desires to withdraw for want of a meritorious, appealable issue. Pursuant to *Anders*, if counsel, after a conscientious examination of the case, determines

it to be wholly frivolous he should so advise the court and request permission to withdraw. Id. at 744. This request, however, must be accompanied by a brief identifying anything in the record that could arguably support the appeal. Id. In addition, counsel must furnish his client with a copy of the brief and request to withdraw and must allow the client sufficient time to raise any matters that he or she chooses. Id. Once these requirements have been satisfied, the appellate court must conduct a full examination of the proceedings held below in order to determine whether the appeal is, in fact, frivolous. Id. If the appellate court determines that the appeal is frivolous, it may grant counsel's request to withdraw and may dismiss the appeal without violating constitutional requirements, or it may proceed to a decision on the merits if state law so requires. Id.

{¶ 11} In the instant case, appellant's counsel represents that, after carefully reviewing the transcript consisting of the record on appeal, and after researching case law and statutes relating to potential issues, she was unable to find any meritorious appealable issues. She does, however, set forth the following potential assignments of error:

{¶ 12} I. "APPELLANT'S PLEA WAS NOT [* * *]KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY GIVEN IN ACCORDANCE WITH CRIMINAL RULE 11(C) AND (E)."

{¶ 13} II. "THE TRIAL COURT VIOLATED THE PURPOSES AND PRINCIPALS OF SENTENCING UNDER OHIO REV. CODE 2929.41."

{¶ 14} III. "THE TRIAL COURT VIOLATED THE PURPOSES AND PRINCIPALS OF SENTENCING UNDER OHIO REV. CODE 2929.11 AND 2929.12."

{¶ 15} IV. "APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL."

{¶ 16} Appellate counsel additionally represents that, concurrent with the filing of her motion to withdraw, she mailed a copy of her brief to appellant.

{¶ 17} We find that, in the case before us, appellate counsel has satisfied the requirements set forth in *Anders*, supra. Further, appellant has not filed a pro se brief or otherwise responded to counsel's request to withdraw. Accordingly, we shall proceed with an examination of the potential assignments of error set forth by appellate counsel and of the entire record below to determine whether this appeal lacks merit and is, therefore, wholly frivolous.

{¶ 18} The first potential assignment of error concerns whether appellant's guilty plea was made knowingly, intelligently, and voluntarily. To answer this question, we must determine whether the trial court adequately protected appellant's constitutional and nonconstitutional rights, as set forth in Crim.R. 11(C). *State v. Eckles*, 173 Ohio App.3d 606, 2007-Ohio-6220, ¶ 7, citing *State v. Nero* (1990), 56 Ohio St.3d 106.

{¶ 19} Crim.R. 11(C) relevantly provides:

{¶ 20} "(2) 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:

{¶ 21} "(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.

{¶ 22} "(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.

{¶ 23} "(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).

{¶ 24} The requirements listed in Crim.R. 11(C)(2)(c) are constitutional, and require strict compliance. *State v. Eckles*, supra, at ¶ 7. The requirements listed in Crim.R. 11(C)(2)(a) and (b) are nonconstitutional, and require only substantial compliance. Id. at ¶ 43. As stated by the Supreme Court of Ohio in *State v. Nero* (1990), 56 Ohio St.3d 106, "Substantial compliance means that under the totality of the circumstances the defendant substantially understands the implications of his plea and the rights he is waiving." Id. at 108.

{¶ 25} "In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such pleas without first

informing the defendant of the effect of the plea of guilty, no contest, and not guilty." Crim.R. 11(E).

{¶ 26} In the instant case, the record reflects that the trial court addressed appellant personally, ensured that he had no difficulties understanding the language used by the trial court, inquired of his age, educational background and his understanding of the proceedings and the effects of his plea. In addition, the court explained the nature of the charge, the maximum penalty, the effects of a guilty plea, including fines and payment of restitution and the sentencing options, and each of the constitutional rights being waived. At all times, appellant indicated orally his understanding of the proceedings, what was being explained to him, and the rights he waived by entering a plea of guilty.

{¶ 27} When the trial court asked appellant whether anybody had threatened him to get him to enter the guilty plea, appellant answered, "No."

{¶ 28} Counsel was present with appellant when his rights were being explained to him in open court, and counsel was present when the plea form was executed.

{¶ 29} Upon our review of the record, we find that appellant was adequately advised of all of his rights, both constitutional and nonconstitutional, pursuant to Crim.R. 11(C)(2) and (E), and that he knowingly, intelligently, and voluntarily entered his guilty plea. Accordingly, we find that counsel for appellant correctly determined that there was no meritorious appealable issue present with respect to the first potential assignment of error.

{¶ 30} The second potential assignment of error concerns whether the trial court violated the purposes and principals of sentencing under R.C. 2929.41(A), which prior to the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, relevantly provided that "a jail term or sentence of imprisonment shall be served concurrently with a prison term or sentence of imprisonment for a felony served in a state or federal correctional institution." As indicated above, the trial court ordered appellant's sentences, including the sentence on the misdemeanor charge, to be served consecutively. In *Foster*, however, the court found that "[b]ecause * * * [R.C.] 2929.41(A) require[s] judicial finding of facts not proven to a jury beyond a reasonable doubt or admitted by the defendant before imposition of consecutive sentences, [it is] unconstitutional." Id. at paragraph three of the syllabus.

{¶ 31} Now, under *Foster*, "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." Id. at paragraph seven of the syllabus. Thus, there is no basis upon which to find error in the imposition of consecutive cases in this case.

{¶ 32} Based on the foregoing, we find that counsel for appellant correctly determined that there was no meritorious appealable issue present with respect to the second assignment of error.

{¶ 33} The third potential assignment of error concerns whether the trial court violated the purposes and principals of sentencing under R.C. 2929.11 and 2929.12.

When reviewing felony sentences, an appellate court must apply a two-step approach. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 4. First, it must 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. If this prong is satisfied, the trial court's decision is reviewed under an abuse of discretion standard. Id. An abuse of discretion involves more than an error of law or judgment; instead, it implies that the court's attitude is unreasonable, arbitrary or unconscionable. Id. at ¶ 19, quoting *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 34} Although *Foster*, supra, eliminated mandatory judicial fact-finding for upward departures from the minimum, it left intact R.C. 2929.11 and 2929.12. *State v. Kalish*, supra, at ¶ 13. Thus, the trial court must still consider these statutes. See id., citing *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 38. R.C. 2929.11 and 2929.12 are not fact-finding statutes; rather, they serve as an overarching guide for trial judges to consider in fashioning an appropriate sentence. Id. at ¶ 17.

{¶ 35} In the instant case, the trial judge specifically stated prior to sentencing appellant that he considered the victim impact statements, the presentence investigation report, the statements of appellant's counsel and the statement by appellant. This was following his verbal opinion of appellant's behavior, which he described as "despicable" and "the ultimate form of predatory behavior." He acknowledged appellant's history of

theft from elderly and disabled people and the fact that he violated community control for those offenses "a couple of times."

{¶ 36} The trial court sentenced appellant to serve the maximum sentences, consecutively, for each offense. Such was in the permissible range and not clearly and convincingly contrary to law. It is apparent from the record that the court gave careful and substantial consideration to the relevant statutory factors. Specifically, the court considered the nature of the offenses, the fact that appellant was a repeat offender and violated the terms of his community control on more than one occasion. A presentence investigation report was ordered and considered by the trial court, despite appellant's attempt to waive it and proceed directly to sentencing after entering his plea. Both appellant and his attorney were afforded the opportunity to provide statements in mitigation following the victim impact statement. There is nothing in the record to suggest that the trial court's decision was unreasonable, arbitrary, or unconscionable.

{¶ 37} As the record presents no basis to support a meritorious argument that the trial court failed to consider statutory factors under R.C. 2929.11 and 2929.12 in imposing its sentence, we find that appellant's counsel correctly determined that there was no meritorious appealable issue present with respect to the third assignment of error.

{¶ 38} Lastly, we consider the fourth potential assignment of error, which concerns whether appellant was denied the effective assistance of counsel. To establish a violation of the Sixth Amendment right to effective assistance of counsel, an accused must show: (1) that counsel's performance was deficient; and (2) that counsel's deficient

performance resulted in prejudice. *Strickland v. Washington* (1984), 466 U.S. 668, 687; *State v. Bradley* (1989), 42 Ohio St.3d 136, at paragraph two of syllabus. Prejudice exists when there is a reasonable probability that but for counsel's deficient performance, the outcome of the trial would have been different. *Strickland*, supra, at 694; *Bradley*, supra, at paragraph three of the syllabus. A "reasonable probability" is a probability that is sufficient to undermine confidence in the outcome of the proceedings. *Strickland*, supra; *Bradley*, supra, at 142. The burden of proving ineffective assistance of counsel is on the accused, who must overcome a strong presumption of trial counsel's adequate performance. *Strickland*, supra, at 687; *Bradley*, supra, at 142.

{¶ 39} "The focus of an ineffective assistance of counsel inquiry is whether defense counsel's performance was such as to undermine the integrity of the adversarial process." *State v. Reker* (May 6, 1994), 2d Dist. No. CA 14124.

{¶ 40} Appellant's attorney, Patricia Horner, was appointed to represent appellant in the underlying criminal proceedings. The record reflects that she appeared on behalf of her client at all court events following her appointment. In addition, she engaged in plea negotiations and was able to reach an agreement with the state, which was approved by appellant.

{¶ 41} Prior to appellant entering pleas of no contest to the offenses, counsel discussed the merits of going to trial on each case and the ramifications of entering pleas to the charges. In addition, she reviewed the content of the plea forms with appellant.

{¶ 42} And prior to appellant's sentencing, counsel reviewed with appellant the presentence investigation report, the notice of postrelease control (pursuant to R.C. 2929.19(B)(3)), and the acknowledgment (pursuant to R.C. 2947.23). In addition, she answered appellant's questions regarding those matters. Further, she explained to appellant that she suspected he would serve consecutive terms of imprisonment.

{¶ 43} Counsel made a statement on behalf of appellant in mitigation, and requested that appellant receive minimum terms of imprisonment and concurrent sentences.

{¶ 44} Appellant points out on appeal that his counsel did not object to the sentence that was ultimately imposed. As previously discussed, however, appellant's sentence was not unlawful. Accordingly, appellant's counsel did not provide ineffective assistance by failing to challenge it.

{¶ 45} We find that the record presents no basis to support a meritorious argument with respect to the fourth assignment of error.

{¶ 46} Upon our own independent review of the record, we find no other grounds for a meritorious appeal. This appeal is, therefore, found to be without merit and wholly frivolous. Appellate counsel's motion to withdraw is found well-taken and is hereby granted.

{¶ 47} The judgment of the trial court is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

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.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE