[Cite as *State v. DeWitt*, 2010-Ohio-2119.]

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

State of Ohio	Court of Appeals No. H-09-026
Appellee	Trial Court No. CRI-2009-0379
v.	
Kurtis J. DeWitt	**DECISION AND JUDGMENT**
Appellant	Decided: May 14, 2010

* * * * *

Timothy H. Dempsey, for appellant.

* * * * *

COSME, J.

{¶1} Appellant, Kurtis J. DeWitt, pled guilty to aggravated robbery, possession of oxycodone, conveyance of contraband into a detention facility, and tampering with evidence. The trial court sentenced appellant to the aggregate of 15 years of incarceration. On appeal, appellant's counsel advised the court that he had reviewed the record and could discern no meritorious claims for appeal. Appellant's counsel moved to

withdraw pursuant to *Anders v. California* (1967), 386 U.S. 738, 104 S.Ct. 2052, 80 L.Ed.2d 674. After independently reviewing the record, we agree the record does not contain meritorious claims upon which appellant could prevail on appeal. Therefore, we grant the motion of appellant's counsel to withdraw and affirm the decision of the trial court.

I. BACKGROUND

{¶2} On April 15, 2009, appellant robbed a local pharmacy at knife point, while wearing a hockey mask. During the robbery, appellant demanded, and received, oxycodone from store employees. At that time, appellant was on bail for robbing a veteran's home. As a condition of bail in that case, he was wearing a GPS tracking device. The GPS tracking data indicated that appellant had cased the pharmacy before robbing it.

{¶3} After robbing the pharmacy, appellant went to a friend's residence where he gave away some of the oxycodone. But when appellant realized that he was about to be arrested, he and his girlfriend attempted to hide the rest of the oxycodone by placing them in a Kool Aid container and then sticking it up appellant's rectum. The drugs were discovered while appellant was at the Huron County Jail, but not until after he had shared some that had fallen out with the other inmates. The remaining drugs had to be removed from appellant's rectum.

{¶4} On July 31, 2009, appellant pled guilty to aggravated robbery, possession of oxycodone, conveyance of contraband into a detention facility, and tampering with

evidence, in exchange for the state dropping the remaining charges for robbery and theft of drugs, limiting its sentencing request to no more than 15 years, and abandoning prosecution for other crimes committed by appellant prior to the date he was indicted for these crimes.

{¶5} Prior to accepting appellant's plea, the trial court confirmed that appellant's plea was knowingly, voluntarily, and intelligently made by engaging in a dialogue with appellant as required by Crim.R. 11. The trial court ordered a victim impact statement and a presentence investigation report. Once the report was filed, the court held a sentencing hearing.

{¶6} At the September 15, 2009 sentencing hearing, appellant's counsel spoke on his behalf. Appellant also made a statement to the court apologizing for his actions. The trial court made the following findings prior to sentencing appellant: (1) consecutive sentences were necessary to protect the public from future crime and to punish the offender; (2) consecutive sentences were not disproportionate to the seriousness of the offender's conduct and danger the offender poses to the public; (3) the offender committed these multiple offenses while the offender was on bail for a separate offense.

{¶7} The trial court sentenced appellant to eight years on the aggravated robbery charge and seven years on the possession of oxycodone charge. The trial court further ordered that these two sentences be served consecutively for an aggregate of 15 years. The trial court also sentenced appellant to four years on the charge of conveying contraband into a detention facility and four years on the charge of tampering with

evidence. These two remaining charges were to be served concurrently with each other and the 15 year term. The trial court further ordered that the term for aggravated robbery and possession of oxycodone be served consecutively to a five year burglary sentence appellant was already serving at the time he was sentenced in this case.

{¶8} The trial court appointed counsel for purposes of appeal. Appellant's counsel filed an *Anders* brief and asked that he be permitted to withdraw. Appellant has not filed a supplemental brief although a copy of counsel's *Anders* brief was served upon him. The state has not filed a response to counsel's *Anders* brief.

II. ANALYSIS

{¶9} Upon receiving an *Anders* brief, we must "conduct 'a full examination of all the proceedings to decide whether the case is wholly frivolous.'" *Penson v. Ohio* (1988), 488 U.S. 75, 80, 109 S.Ct. 346, 102 L.Ed.2d 300, quoting *Anders*, 386 U.S. at 744. After fully examining the proceedings below, if we find only frivolous issues on appeal, we then may proceed to address the case on its merits without affording appellant the assistance of counsel. Id.; see, also, *State v. Kent* (Mar. 4, 1998), 4th Dist. No. 96CA794; *State v. Hart* (Dec. 23, 1997), 4th Dist. No. 97CA18. If we find, however, that meritorious issues for appeal exist, we must afford appellant the assistance of counsel in order that counsel may address the issues. *Anders*, 386 U.S. at 744; *Penson*, 488 U.S. at 80; see, e.g., *State v. Alexander* (Aug. 10, 1999), 4th Dist. No. 98CA29. With the foregoing principles in mind, we turn our attention to the potential assignments of error counsel posited in the appellate brief and then to the record before us.

{¶10} Appellate counsel presents the following "potential assignments of error" for our review:

{¶11} "I. The trial court's sentence is contrary to law under ORC 2953.08(A)(4) and ORC 2953.08(C)(1) regarding the consecutive sentences imposed.

{¶12} "II. The trial court's sentence is contrary to law because the trial court failed to make the required findings under ORC 2953.08(G) in order to sentence appellant to consecutive prison terms.

{¶13} "III. The trial court erred or misinformed appellant regarding his eligibility for judicial release."

{¶14} We consider appellate counsel's first and second potential assignments of error together because they both assert that the imposition of consecutive sentences is contrary to law.

III. CONSECUTIVE SENTENCES

{¶15} Appellate counsel's first and second potential assignments of error assert that the trial court's imposition of consecutive sentences is contrary to law because the trial court failed to make the required findings. We disagree.

{¶16} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court of Ohio severed and excised R.C. 2929.14(C) and (E), which required judicial fact-finding for an imposition of maximum and consecutive sentences, respectively. Accordingly, post-*Foster*, trial 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." *Foster* at paragraph seven of the syllabus. Thus, judicial fact finding is no longer required before the imposition of consecutive sentences. Id. at ¶ 99. Further, "[t]he appellate statute R.C. 2953.08(G), insofar as it refers to the severed sections, no longer applies." Id.

{¶17} In reviewing a felony sentence, we employ a two-step analysis set forth by the Supreme Court of Ohio in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 26. Appellate courts are now 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." *Kalish* at ¶ 26.

{¶18} The applicable statutes to be applied by a trial court include the felony sentencing statutes R.C. 2929.11 and 2929.12, which are not fact-finding statutes, but rather "serve as an overarching guide for trial judges to consider in fashioning an appropriate sentence." *Kalish* at ¶ 17.

{¶19} Although "a record after *Foster* may be silent as to the judicial findings that appellate courts were to review under R.C. 2953.08(G)(2)," the trial court must still consider R.C. 2929.11 and 2929.12. *Kalish* at ¶ 12. "In addition, the sentencing court must be guided by statutes that are specific to the case itself." Id., citing *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 38.

{¶20} R.C. 2929.11(A) states that:

{¶21} "[A] court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing

are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both."

{¶22} R.C. 2929.12 sets forth a non-exhaustive list of factors that the trial court is required to consider when determining whether the defendant's conduct is more or less serious than conduct normally constituting the offense. In addition, the trial court must consider the likelihood that the offender will commit future crimes.

{¶23} In this case, before pronouncing its sentence, the trial court stated that it had reviewed the statements of defense counsel, appellant and the prosecutor, as well as the victim impact statements and appellant's presentence investigative report. In addition, the trial court stated that it had considered the principles and purposes of sentencing as set forth in R.C. 2929.11, and all "other applicable statutory laws as well as the applicable case law." Additionally, the judgment entry of sentencing states that the trial court considered the factors set forth in R.C. 2929.11 and 2929.12.

{¶24} The transcript and the sentencing entry show the trial court noted several factors under R.C. 2929.12 indicating his conduct is "more serious" than conduct normally constituting the offense. The trial court pointed out the victims had all suffered serious psychological harm and the offender has a substantial history of criminal convictions which included the armed robbery of a veteran's home. The trial court noted

at least seven different felony offenses, including multiple assault and burglary charges. Finally, the trial court noted a history of substance abuse and that appellant has not responded favorably to sentences previously imposed. Nor did the GPS tracking device deter appellant's conduct.

{¶25} Applying the first prong of the *Kalish* analysis, we do not find the trial court's sentence to be contrary to law. We are satisfied that the trial court gave careful and substantial deliberation to the relevant statutory considerations.

{¶26} The second prong of the *Kalish* analysis requires that we determine if the trial court abused its discretion in selecting a sentence within the permissible statutory range. *Kalish* at ¶ 17. *Foster* accords the trial court full discretion to determine whether the sentence satisfies the overriding purpose of Ohio's sentencing structure. The court in *Kalish* held:

{¶27} "R.C. 2929.12 explicitly permits trial courts to exercise their discretion in considering whether its sentence complies with the purposes of sentencing. It naturally follows, then, to review the actual term of imprisonment for an abuse of discretion." Id.

{¶28} Here, each of appellant's individual prison terms is within the range authorized by the General Assembly. Trial courts have discretion to impose a prison sentence within the statutory range for the offense. *Foster,* 2006-Ohio-856, paragraph seven of the syllabus. Thus we are bound to give substantial deference to the General Assembly, which has established a specific range of punishment for every offense and

authorized consecutive sentences for multiple offenses. *State v. Weitbrecht* (1999), 86 Ohio St.3d 368, 373-374.

{¶29} Because the individual sentences imposed by the court are within the range of penalties authorized by the legislature, they are not grossly disproportionate or shocking to a reasonable person or to the community's sense of justice and do not constitute cruel and unusual punishment. Accordingly, appellant's aggregate prison term of 15 years, which resulted from the consecutive imposition of the individual sentences, is not contrary to law.

{¶30} Appellant's first and second possible assignments of error are without merit. Nothing in the record suggests that the court's imposition of consecutive sentences was unreasonable, arbitrary, or unconscionable and therefore we find no abuse of discretion.

VI. JUDICIAL RELEASE

{¶31} Appellate counsel's third potential assignment of error asserts that appellant was misinformed about the potential for judicial release. Appellant insists that had he not so been misinformed, he would not have entered a guilty plea. We disagree.

{¶32} The record shows that the trial court properly advised appellant of the effect of the length of sentence upon appellant's eligibility for judicial release at the plea change and the sentencing hearing. The record specifically reflects that that the trial court informed appellant if he received more than ten years, he would not be eligible for judicial release.

{¶33} Certainly, appellant did not know what his sentence would be at the time he entered his plea. But appellant clearly understood that he was looking at a maximum sentence of 28 years. The state was advocating a sentence of 15 years. Appellant complained that his offense was not "as serious" as other offenses such as murder or manslaughter. As such, he obviously believed that he would not be sentenced to the maximum on any single count, and would, therefore, be eligible for judicial release. He neglected to consider the fact that the maximum of 28 years could only be achieved by imposing the maximum sentences for each count consecutively.

{¶34} Nevertheless, appellant understood the risks and chose to rely on the court to fashion a sentence commensurate with the statutory guidelines. The trial court's statement during the sentencing that "it would be in the court's interest to give you some hope of judicial release, so that you have some incentive to use the programs in prison to better yourself," cannot be construed as misleading because the court clarified that although it would have been its desire to structure the sentence so that appellant would be eligible for judicial release, it could not do so and adequately protect the public. The trial court's comment at this stage of the proceedings was not a misstatement of the law, nor was it made at a time when appellant might have been mislead or relied on it to his detriment in deciding whether to accept the plea. Appellant had already accepted the plea.

{¶35} R.C. 2929.20(B), which provides for judicial release under certain circumstances, states: "On the motion of an eligible offender or upon its own motion, the

sentencing court may reduce the offender's stated prison term through a judicial release under this section * * *." Further, R.C. 2929.20(A) states: "As used in this section, * * * 'eligible offender' means any person serving a stated prison term of ten years or less * * *". The statute defines "stated prison term" as: " * * * the prison term, mandatory prison term, or combination of all prison terms and mandatory prison terms imposed by the sentencing court * * *." R.C. 2929.01(FF). Thus, as both parties acknowledged in court, appellant clearly is not be eligible for judicial release after receiving a 15-year sentence.

{¶36} Crim.R. 52(A) states, "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." In *State v. Barnett* (Mar. 31, 1998), 6th Dist. No. H-97-020, this court addressed the issue of misstatements or harmless errors during sentencing. In *Barnett*, the defendant was sentenced to eight years imprisonment. The trial court misstated his eligibility for judicial release by indicating he would be eligible after only 180 days. Defendant's release was clearly barred by R.C. 2929.20(B)(3). In addressing the misstatement, this court said, "* * * [I]t is true that the trial court misstated the time period when appellant will be eligible to apply for judicial release[.] * * * Since appellant's conviction in no way depended upon this statement, he has failed to establish that the misstatement prejudiced him or otherwise affected the outcome of his case. Therefore, even though the trial court erred in its comments as to appellant's eligibility for judicial release, such error was harmless." *Barnett*, supra.

{¶37} Unlike *Barnett*, the trial court in this case did not misstate appellant's eligibility for judicial release. The trial court correctly noted that eligibility for judicial release would not extend to appellant if the trial court were to sentence appellant to ten years or more in prison. But like *Barnett*, appellant's agreement to the plea was not conditional on eligibility for judicial release. Thus, the perceived misstatement by the trial court was a harmless error because it was not prejudicial and did not affect appellant's substantial rights.

{¶38} In this case, although the plea change document does not make reference to judicial release, the trial court did discuss judicial release during the plea change hearing and the sentencing hearing.

{¶39} During the plea change hearing, the judge stated: "Now, there is a possibility of judicial release with regard to this case. It's going to depend on what the sentencing would end up being in this case. Judicial release will be based on your stated prison term * * * If your sentence is more than ten years, then you're not eligible to apply for judicial release." The trial court also advised appellant that if the prison term was two to five years, or five to ten years, he would still have to wait until he had served two years, plus 180 days before he could apply for judicial release.

{¶40} Similarly, during the sentencing hearing, the trial court advised appellant, "In reading the terms of judicial release under the newly revised statute, * * * there would not be eligibility for judicial release, as that is in excess of ten years as a total." The trial

court emphasized, "As far as judicial release is then, I indicated there would be no eligibility at this time."

{¶41} Appellant's response to the court clearly demonstrates his understanding of the concept of judicial release and that his eligibility depended on the length of the sentence the trial court imposed upon him. Appellant acknowledged, "If I'm already doing five years, [the judge] sentences me to mandatory two, I have to wait until 7 before I - - right, the seven before I can file plus 180."

{¶42} Although the trial court had to impose a minimum mandatory term of two years, appellant would not have been eligible to seek judicial release earlier than seven years and 180 days from the date of sentencing. See R.C. 2929.20(A)(1)(ii) and (B)(2). What changed was the court's decision to impose a sentence in excess of ten years. Moreover, it is clear appellant and appellant's counsel knew of these statutory variations.

{¶43} Appellant maintains that had he been properly informed that he would not be eligible for judicial release, he would not have entered into the plea agreement. He suggests that his trial counsel was ineffective for failing to inform him of this. Appellant sets forth no grounds to support his assertion that he would not have entered into a plea but for length of the sentence he received.

{¶44} The real question here is whether trial counsel's performance was deficient and appellant was prejudiced as a result. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. In this instance, it appears that counsel was informed of the statutory sentencing variations and it does not appear that appellant exhibited any

surprise at the discussion at sentencing of the effect of a sentence greater than ten years. Appellant was surprised that the sentences for the aggravated robbery and possession of oxycodone were to be served consecutively. Appellant and appellant's counsel made clear at the sentencing hearing that they believed the imposition of consecutive sentences was disproportionate to the crime. Appellant believed his crime did not warrant such a lengthy detention.

{¶45} Thus, appellant has failed to bring to our attention any facts tending to show that his trial counsel was not acting as the "counsel" guaranteed by the Sixth Amendment. Indeed, it appears that the information provided to appellant was accurate in its context.

{¶46} To prevail on a claim of ineffective assistance of counsel, appellant must satisfy the two-prong test enunciated in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; accord *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus. Initially, appellant must show that counsel's performance was deficient. To meet that requirement, appellant must show counsel's error was so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Once the first prong is established, appellant must show that the error was prejudicial. "[F]ailure to satisfy one prong of the Strickland test negates a court's need to consider the other." *State v. Beavers*, 10th Dist. No. 08AP-1070, 2009-Ohio-4214, ¶ 8, citing *Strickland*, 466 U.S. at 697.

{¶47} Under the first prong, there is a strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. Appellant must overcome the presumption that his trial counsel communicated to him the sentencing structure and eligibility requirements for judicial release. We find that appellant cannot show any evidence that the sentencing structure and eligibility requirements for judicial release were not communicated to him. Even assuming that he could, the evidence demonstrates that appellant would have accepted the plea. In fact, he accepted the state's plea offer because it was dismissing two counts of the indictment, was willing to forgo prosecution on other crimes committed prior to appellant being taken into custody, and to limit its sentencing request to 15 years rather than seek the maximum of 28 years. Appellant's participation in the discussion of the eligibility requirements for judicial release demonstrates that he understood the ramifications of the plea.

{¶48} Thus, we find the third potential assignment of error not well-taken.

V. CONCLUSION

{¶49} Appellant's convictions were not contrary to law and this appeal is wholly frivolous. Consecutive sentences could be imposed and the trial court made the required findings before imposing appellant to consecutive sentences. The individual sentences imposed by the trial court were within the range of penalties authorized by the legislature. Finally, the trial court did not err or misinform appellant of judicial release. There is no evidence that appellant would not have otherwise entered his plea.

{¶50} On consideration whereof, the motion of appellate counsel to withdraw is granted and the judgment of the Huron County Court of Common Pleas 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

Thomas J. Osowik, P.J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE