

[Cite as *State v. Costlow*, 2018-Ohio-3572.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106960

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RANDY COSTLOW

DEFENDANT-APPELLANT

**JUDGMENT:
DISMISSED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-16-605651-A and CR-17-616533-A

BEFORE: Boyle, J., Kilbane, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: September 6, 2018

ATTORNEY FOR APPELLANT

Mary Elaine Hall
245 Leader Building
526 Superior Avenue, East
Cleveland, Ohio 44114

Also Listed:

Randy Costlow
Inmate No. 0281675
Bedford Heights City Jail
5661 Perkins Road
Bedford Heights, Ohio 44146

ATTORNEY FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor
Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

MARY J. BOYLE, J.:

{¶1} Defendant-appellant, Randy Costlow, appeals from a judgment sentencing him to 18 months in prison. Costlow's counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), seeking leave to withdraw as counsel because there are no meritorious, nonfrivolous issues for this court to review. We agree. Therefore, we dismiss Costlow's appeal and grant appointed counsel's motion to withdraw.

I. *Anders* Standard and Potential Issues for Review

{¶2} In *Anders*, the United States Supreme Court held that if appointed counsel, after a conscientious examination of the case, determines the appeal to be wholly frivolous, he or she should advise the court of that fact 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.* Further, counsel must also furnish the client with a copy of the brief and allow the client sufficient time to file his or her own brief. *Id.* In this case, appointed counsel fully complied with the requirements of *Anders*.

{¶3} Once the appellant's counsel satisfies these requirements, this court must fully examine the proceedings below to determine if any arguably meritorious issues exist. *Id.*; Loc.App.R. 16(C). If we determine that the appeal is wholly frivolous, we may grant counsel's request to withdraw and dismiss the appeal without violating

constitutional requirements, or we may proceed to a decision on the merits if state law so requires. *Anders* at 744; Loc.App.R. 16(C).

{¶4} On June 5, 2018, this court ordered appointed counsel's motion be held in abeyance pending our independent review of the case. We further notified Costlow that he had until July 16, 2018, to file his own appellate brief, but he did not do so.

{¶5} Costlow's counsel has fully complied with the requirements of *Anders* and Loc.App.R. 16(C). Costlow's counsel states in her *Anders* brief that she thoroughly reviewed the record and concluded that there are no meritorious arguments that she could make on Costlow's behalf. Costlow's counsel has submitted the following potential assignment of error:

Whether the trial court imposed an 18-month sentence upon the defendant-appellant, Mr. Randy Costlow, contrary to law.

{¶6} After conducting an independent review of Costlow's case, we dismiss his appeal and grant appointed counsel's motion to withdraw.

II. Procedural and Factual Background

{¶7} In Cuyahoga C.P. No. CR-16-605651-A, Costlow pleaded guilty to two counts of fifth-degree felony deception to obtain a dangerous drug and one count of fourth-degree felony deception to obtain a dangerous drug. Both the fourth- and fifth-degree felonies were violations of R.C. 2925.22(A). The trial court sentenced him to two years of community control sanctions on each count and notified him that if he violated the terms of his sanctions, he would receive 18 months in prison on the

fourth-degree felony and one year on each of the fifth-degree felonies, to be served concurrent to each other for an aggregate prison sentence of 18 months in prison.

{¶8} Costlow failed to report to the probation department in January 2017. A capias was issued for his arrest.

{¶9} One month later, in February 2017, Costlow took his father's car without his father's permission. He was later charged by way of information in Cuyahoga C.P. No. CR-17-616533-A with grand theft in violation of R.C. 2913.02(A)(1).

{¶10} Costlow was placed on GPS monitoring on May 11, 2017, for both cases. On June 8, Costlow removed his GPS monitor and "absconded from the probation department during his report day." A capias was issued for his arrest.

{¶11} On September 9, 2017, Costlow was back in custody. On September 29, 2017, Costlow pleaded guilty in Case No. CR-17-616533-A to attempted grand theft auto in violation of R.C. 2923.02 and 2913.02(A)(1), a fifth-degree felony. The trial court held a hearing on both cases on October 25, 2017. The trial court found that Costlow violated the terms of his community control sanctions in Case No. CR-16-605651-A. In this case, the trial court extended his community control sanctions to June 18, 2019, with prior conditions.

{¶12} In Case No. CR-17-616533-A, the trial court sentenced Costlow to two years of community control sanctions for attempted grand theft and notified him that if he violated the terms of his sanctions, he would receive one year in prison.

{¶13} In November 2017, Costlow absconded from inpatient treatment at Harbor Light. A capias was issued for his arrest. After he was back in custody, a community control violations hearing was set for March 7, 2018, for both cases. Between November 2017 and the March 7 hearing, Costlow obtained three additional cases in Lakewood Municipal Court, one for possessing drugs and criminal tools and two cases for theft. On December 26, 2017, he was sentenced on all three cases to 180 days in jail.

{¶14} At the March 7 hearing, Costlow admitted to violating the terms of his community control sanctions in both common pleas court cases. The trial court terminated his community control sanctions in both cases. In Case No. CR-16-605651-A, the trial court sentenced Costlow to one year on each offense, and ordered the sentences to be served concurrent to each other but consecutive to the sentence in Case No. CR-17-616533-A.

{¶15} In CR-17-616533-A, the trial court sentenced Costlow to six months in prison and ordered that the sentence be served consecutive to the one year imposed in Case No. CR-16-605651-A, for an aggregate sentence in both cases of 18 months in prison.

III. Potential Assignment of Error

{¶16} In the potential assigned error, counsel argues that Costlow's 18-month sentence could be considered contrary to law. Although it is not entirely clear from counsel's brief, it appears that counsel is arguing that one could find the 18-month sentence contrary to law because the trial court failed to comply with Crim.R. 11 when

accepting Costlow's guilty pleas in both cases and failed to comply with R.C. 2929.15(B)(3) when sentencing Costlow.

{¶17} We have reviewed the plea and sentencing hearings from both cases and agree with Costlow's counsel that the trial court complied with Crim.R. 11 in both cases and that his 18-month sentence is not contrary to law.

A. Guilty Pleas

{¶18} When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution. *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996).

{¶19} To ensure that a plea to a felony charge is knowingly, intelligently, and voluntarily entered into, a trial court must follow the mandates of Crim.R. 11(C)(2). This provision provides that the court must address defendants personally and (1) determine that they understand the nature of the charges against them and of the maximum penalty involved, (2) inform them of and determine that they understand the effect of a plea of guilty or no contest and that the court may proceed with judgment and sentence, and (3) inform them of and determine that they understand the constitutional rights that they are giving up by entering into their plea. Crim.R. 11(C)(2)(a)-(c). The United States Supreme Court specified a defendant's constitutional rights as (1) the Fifth Amendment privilege against compulsory self-incrimination, (2) the right to trial by jury,

and (3) the right to confront one's accusers. *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

{¶20} Crim.R. 11(C)(2)(c) sets forth a defendant's constitutional right as follows:

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.

{¶21} In differentiating between constitutional rights and nonconstitutional rights under Crim.R. 11(C), courts have held that strict compliance with the rule is required if the appellant raises a constitutional right delineated in Crim.R. 11(C)(2)(c). *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 18. Substantial compliance, however, is all that is required for nonconstitutional rights outlined in Crim.R. 11(C)(2)(a) and (b). *State v. Drake*, 8th Dist. Cuyahoga No. 98640, 2013-Ohio-1984, ¶ 5, citing *State v. Stewart*, 51 Ohio St.2d 86, 364 N.E.2d 1163 (1977).

B. Sentence

{¶22} An appellate court must conduct a meaningful review of the trial court's sentencing decision. *State v. Hites*, 3d Dist. Hardin No. 6-11-07, 2012-Ohio-1892, ¶ 7. R.C. 2953.08(G)(2) states that when reviewing felony sentences, "[t]he appellate court's standard for review is not whether the sentencing court abused its discretion." Rather, the statute states that if we "clearly and convincingly" find that (1) "the record does not support the sentencing court's findings under [certain statutes that require findings, which are not relevant here]," or that (2) "the sentence is otherwise contrary to law," then we

“may increase, reduce, or otherwise modify a sentence * * * or [we] may vacate the sentence and remand the matter to the sentencing court for re-sentencing.” R.C. 2953.08(G)(2).

{¶23} The Ohio Supreme Court has further explained:

We note that some sentences do not require the findings that R.C. 2953.08(G) specifically addresses. Nevertheless, it is fully consistent for appellate courts to review those sentences that are imposed solely after consideration of the factors in R.C. 2929.11 and 2929.12 under a standard that is equally deferential to the sentencing court. That is, an appellate court may vacate or modify any sentence that is not clearly and convincingly contrary to law only if the appellate court finds by clear and convincing evidence that the record does not support the sentence.

{¶24} The trial court has the full discretion to impose any term of imprisonment within the statutory range, but it must consider the sentencing purposes in R.C. 2929.11 and the guidelines contained in R.C. 2929.12. *State v. Holmes*, 8th Dist. Cuyahoga No. 99783, 2014-Ohio-603, ¶ 8.

{¶25} Under R.C. 2929.11(A), a felony sentence shall be reasonably calculated to achieve two “overriding purposes”: (1) to protect the public from future crimes by the offender, and (2) to punish the offender using the minimum sanctions the court determines will achieve those purposes. Further, under R.C. 2929.11(B), the sentence imposed for a felony must be commensurate with the seriousness of the offender’s conduct and consistent with sentences imposed for similar crimes committed by similar offenders.

{¶26} Under R.C. 2929.12(A), a court sentencing a felony offender has discretion to determine the most effective way to comply with the purposes and principles of

sentencing outlined in the statute. In exercising its discretion, however, the sentencing court must consider the seriousness, recidivism, and other mitigating factors set forth in R.C. 2929.12. *Id.* Although the trial court must consider the purposes and principles of sentencing as well as the mitigating factors, the court is not required to use particular language or make specific findings on the record regarding its consideration of those factors. *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 31; *State v. Jones*, 8th Dist. Cuyahoga No. 99759, 2014-Ohio-29, ¶ 13.

{¶27} And, of course, the trial court must comply with all other relevant sentencing statutes. *State v. Roberts*, 8th Dist. Cuyahoga No. 89236, 2008-Ohio-1942, ¶

10. As relevant to this case, R.C. 2929.15(B) states:

(1) If the conditions of a community control sanction are violated or if the offender violates a law or leaves the state without the permission of the court or the offender's probation officer, the sentencing court may impose upon the violator one or more of the following penalties:

* * *

(3) The prison term, if any, imposed upon a violator pursuant to division (B)(1) of this section shall be within the range of prison terms available for the offense for which the sanction that was violated was imposed and shall not exceed the prison term specified in the notice provided to the offender at the sentencing hearing pursuant to division (B)(2) of section 2929.19 of the Revised Code. The court may reduce the longer period of time that the offender is required to spend under the longer sanction, the more restrictive sanction, or a prison term imposed pursuant to division (B)(1) of this section by the time the offender successfully spent under the sanction that was initially imposed.

C. Analysis

{¶28} After reviewing the transcript of the plea and sentencing hearings, we find that the record overwhelmingly demonstrates that the trial court properly complied with Crim.R. 11 when accepting Costlow's guilty pleas. The trial court informed Costlow of the constitutional rights he was waiving and made sure that he understood that he was waiving those rights, made sure that Costlow understood the maximum penalties involved and the effect of his guilty pleas, and made sure that he understood that it could proceed with judgment and sentence once he entered into his plea.

{¶29} When sentencing Costlow, the trial court considered the purposes and principles of felony sentencing and all of the relevant sentencing statutes when sentencing him, including R.C. 2929.15(B)(3). Specifically, the trial court informed Costlow at his original sentencing hearing in Case No. CR-16-605651-A that if he violated the terms of his community control sanctions, that it could sentence him to 18 months for his fourth-degree felony and one year on each of his fifth-degree felonies. In Case No. CR-17-616533-A, the trial court told Costlow that if he violated the terms of his probation, it would sentence him to one year in prison. The trial court ultimately sentenced Costlow to less on each case, which it was permitted to do under R.C. 2929.15(B)(3).

{¶30} Thus, we agree with Costlow's counsel that there are no meritorious, nonfrivolous issues for our review with respect to Costlow's plea or sentence. Accordingly, we conclude that this appeal is wholly frivolous and grant counsel's motion to withdraw.

{¶31} Appeal dismissed.

It is ordered that appellee recover from appellant the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

—
MARY J. BOYLE, JUDGE

MARY EILEEN KILBANE, P.J., and
MELODY J. STEWART, J., CONCUR