

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2011-L-046
MICHAEL LLOYD HENDERSON,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 09 CR 000558.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Aaron T. Baker, 38109 Euclid Avenue, Willoughby, OH 44094 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Michael Lloyd Henderson, appeals the judgment of the Lake County Court of Common Pleas, finding him guilty of two counts of aggravated robbery and sentencing him to a prison term of eight years. At issue is whether the trial court erred in accepting appellant’s guilty plea and abused its discretion in sentencing him. For the reasons that follow, we affirm.

{¶2} On October 9, 2009, appellant was indicted for two counts of aggravated robbery, felonies of the first degree, in violation of R.C. 2911.01(A)(1), and one count of tampering with evidence, a felony of the third degree, in violation of R.C. 2921.12(A)(1).

{¶3} Appellant subsequently entered a plea bargain with the state, pursuant to which, on November 13, 2009, he pled guilty to two counts of aggravated robbery, and, on the state's motion, the court nolleed the tampering-with-evidence charge. The prosecutor said that, pursuant to the plea bargain, the state would recommend a total prison term of 12 years at the time of sentencing.

{¶4} On January 4, 2010, the trial court held a sentencing hearing at which the state recommended that the court sentence appellant to a prison term of 12 years. Instead, the court sentenced appellant to a total of eight years in prison.

{¶5} Appellant did not file a direct appeal. Instead, one year and three months later, on April 19, 2011, he filed a motion for leave to file a delayed appeal and a notice of appeal in which he stated that his sentence was excessive pursuant to R.C. 2929.11 and R.C. 2929.12. On that same date, he also filed a motion for the appointment of counsel. This court granted appellant leave to file a delayed appeal and appointed counsel to represent him.

{¶6} On February 21, 2011, appellate counsel filed a brief of appellant pursuant to *Anders v. California*, 386 U.S. 738 (1967), in which counsel stated that, after reviewing the trial court record and the transcript of proceedings, he could not find any prejudicial error committed by the trial court. As the sole potential assignment of error, counsel asked this court to review the issue of whether appellant's sentence was excessive under *State v. Bonness*, 8th Dist. No. 96557, 2012-Ohio-474. In his brief,

counsel also stated that the only concern he had regarding appellant's guilty plea was that, in response to the trial court's question to appellant as to whether he has any difficulty understanding what he reads in English, appellant said, "sometimes."

{¶7} In his brief, counsel requested permission to withdraw as appellate counsel on the ground that the appeal is frivolous. He also certified that he had sent a copy of his brief to appellant with the instruction that he may file his own brief with this court if he chose to do so.

{¶8} On March 5, 2012, this court entered judgment granting appellant leave to raise any additional arguments in support of his appeal within 30 days of the date of said entry, i.e., by April 4, 2012. Appellant has not filed a pro se brief, nor has he filed any requests for an extension of the due date.

{¶9} In *Anders, supra*, the United States Supreme Court held that if appellate counsel, after a conscientious examination of the case, finds it to be wholly frivolous, he should advise the court and request permission to withdraw. *Id.* at 744. This request to withdraw must be accompanied by a brief citing anything in the record that could arguably support an appeal. *Id.* Further, counsel must provide his client with a copy of the brief and request to withdraw and give the client an opportunity to raise any additional items. *Id.* After these requirements have been met, the appellate court must review the entire record to determine whether the appeal is wholly frivolous. *Id.* If the court finds the appeal is wholly frivolous, the court may grant counsel's motion to withdraw and proceed to a decision on the merits. *Id.* If, however, the court concludes the appeal is not frivolous, it must appoint new counsel for the client. *Id.*

{¶10} Appellate counsel has satisfied each of his duties under *Anders, supra*. We shall now proceed to conduct a full examination of the proceedings below to decide whether the appeal is wholly frivolous, pursuant to *Anders, supra*.

{¶11} Based on our review of appellate counsel's brief and the transcripts of all proceedings in this case, we identify two potential assignments of error. We characterize the first as follows:

{¶12} The trial court erred in accepting appellant's guilty plea, which was not entered knowingly, intelligently, and voluntarily.

{¶13} "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 (1996).

{¶14} Crim.R. 11(C)(2) provides that the court shall not accept a guilty plea without first addressing the defendant personally and: (a) determining that he is making the plea voluntarily, with an understanding of the nature of the charges and of the maximum penalty involved; (b) informing the defendant of and determining that he understands the effect of the guilty plea, i.e., that upon acceptance of the plea, the court may proceed with judgment and sentence; (c) informing the defendant and determining that he understands that by the plea, he is waiving the rights to jury trial, to confront witnesses against him, to have compulsory process for obtaining witnesses, and to require the state to prove his guilt beyond a reasonable doubt at a trial at which he cannot be compelled to testify against himself.

{¶15} A review of the change-of-plea-hearing transcript and appellant's written guilty plea demonstrates that the trial court adhered scrupulously to the provisions of Crim. R. 11(C)(2). The court addressed appellant personally. The court asked him if he had reviewed the indictment, and he said he had. The court then read each charge in the indictment to which appellant agreed to plead guilty, including the elements of each offense, and appellant said he understood the charges. The court advised appellant of the rights he was waiving by pleading guilty, including the right to a trial by jury or to the court at which he would be presumed innocent, and the state would have the burden to prove him guilty beyond a reasonable doubt, the right to confront the state's witnesses, the right to subpoena witnesses, and the right not to be compelled to testify against himself. After the court explained each of these rights, appellant said he understood them and still wanted to plead guilty.

{¶16} The court then explained the effect of appellant's guilty plea. The court advised him that, as a result of his guilty plea, he would be found guilty by the court of the offenses to which he pled guilty and then sentenced upon completion of the pre-sentence report. The court also advised appellant regarding the potential penalties for aggravated robbery, i.e., 3, 4, 5, 6, 7, 8, 9, or 10 years in prison for each count. The court stated that he could impose the sentence concurrently or consecutively and that the potential maximum sentence was 20 years. Appellant said he understood this explanation. The court also advised appellant that at sentencing, the prosecutor would recommend that appellant be sentenced to 12 years in prison, and appellant said he understood. The court also advised him that the court would not be bound by any

recommendation made by the prosecutor or defense counsel. Appellant said that he understood the possible sentences he faced and still wanted to plead guilty.

{¶17} In response to the court's questions, appellant said he had had enough time to discuss his case with his attorney and that he was satisfied with the representation he had received.

{¶18} Appellant said there had been no promises by his attorney or the prosecutor regarding his sentencing that had induced him to plead guilty. Appellant said that no one had promised him anything as to the sentence the trial court would impose. He said he had not been coerced or threatened in any way to plead guilty. Appellant said he was entering his plea freely and voluntarily.

{¶19} The prosecutor then presented the factual basis for the plea, outlining that on two separate occasions, two days apart, appellant robbed two different victims of cash while pointing a BB gun at each victim. Appellant admitted these facts were true and entered his guilty plea.

{¶20} Appellant's trial counsel then said he had reviewed the written guilty plea form with appellant and that appellant said he understood it and wanted to plead guilty. Appellant and his attorney then signed the guilty plea form. The court found that appellant understood the nature of the charges, the effect of the plea, and the potential maximum penalties. The court found that appellant made a knowing, intelligent, and voluntary waiver of his rights; accepted appellant's guilty plea; found him guilty of two counts of aggravated robbery; and referred the matter to the probation department for a pre-sentence report.

{¶21} The only concern appellate counsel identified in his brief regarding appellant's guilty plea involved the following colloquy at the plea hearing:

{¶22} THE COURT: Are you able to read and write the English language?

{¶23} THE DEFENDANT: Yes.

{¶24} THE COURT: Do you have any difficulty understanding what you read in the English language?

{¶25} THE DEFENDANT: Sometimes.

{¶26} The court then followed up on this response, as follows:

{¶27} THE COURT: There's going to be some paperwork you'll need to review a little bit later on. Can you assure the Court that if you have any difficulty understanding what you read in this document [the Written Plea of Guilty and Judgment Entry] that you will ask your attorney, ask me for help? Ask questions if you don't understand? It's very important that you understand everything in that document.

{¶28} THE DEFENDANT: Yes, Your honor.

{¶29} Based on our review of the record, we hold that, despite appellant's isolated comment that he sometimes has difficulty understanding what he reads in English, appellant understood the proceedings. The trial court explained to him the seriousness of the matter, and obtained from him a commitment that if he had any difficulty understanding the written guilty plea, he would bring it to his counsel's and the court's attention so that they could help him understand it. Moreover, appellant stated that he is "able to read and write the English language." Further, the record reveals that

appellant responded appropriately to the court's questions throughout the guilty plea hearing.

{¶30} Based on our review of the record, we hold that appellant's guilty plea was entered knowingly, intelligently, and voluntarily. As a result, there are no potential legal issues on the merits of this issue.

{¶31} The first potential assignment of error is wholly frivolous and without merit.

{¶32} Appellate counsel states for appellant's second potential assignment of error:

{¶33} "The sentence of the trial court was excessive under *State v. Bonness*, 2012-Ohio-474."

{¶34} At the sentencing hearing, the trial court stated that, in deciding appellant's sentence, the court considered the purposes and principles of felony sentencing in R.C. 2929.11 and the seriousness and recidivism factors in R.C. 2929.12. As to the seriousness factors, the court noted the current aggravated robbery offenses were committed randomly against two strangers within two days of each other, and appellant committed them while armed with a deadly weapon that appeared to the victims to be an operable firearm. With respect to the recidivism factors, the court noted that, although appellant is only 19 years old, he was previously convicted as a juvenile in separate cases in which he was found guilty of rape, burglary, felony escape, and another burglary. He also had 12 probation violations. He was committed to DYS twice. In addition, he had two parole violations. The court noted that appellant has not responded favorably to previously-imposed sanctions. The court noted there are no

factors that would indicate appellant is not likely to continue committing crimes, and that based on his past pattern, appellant will likely continue to commit crimes in the future.

{¶35} The prosecutor recommended that appellant be sentenced to six years in prison on each of the aggravated robbery charges and that the terms be served consecutively to each other for a total of 12 years. However, the court did not follow this recommendation, and, instead, sentenced appellant to four years on each offense, the two terms to be served consecutively to each other, for a total of eight years in prison. The court also properly advised appellant regarding post-release control.

{¶36} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court of Ohio held that “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 minimum sentences.” *Id.* at ¶100. “Although *Foster* eliminated mandatory judicial fact-finding for upward departures from the minimum, it left intact R.C. 2929.11 and 2929.12. The trial court must still consider these statutes.” *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶13.

{¶37} In *Kalish*, the Supreme Court established a two-step procedure for reviewing a felony sentence. Under the first step, the reviewing court 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.* at ¶4. “If this first step is satisfied, the second step requires that the trial court’s decision be reviewed under an abuse-of-discretion standard.” *Id.*

{¶38} In *Kalish*, the Supreme Court held that the defendant’s sentence was not contrary to law, where the trial court: (1) stated it had considered the purposes and

principles of R.C. 2929.11 and the factors listed in R.C. 2929.12; (2) properly advised the defendant regarding post-release control; and (3) imposed a sentence that was within the statutory range. *Id.* at ¶18. The court further held that there was no abuse of discretion inasmuch as the trial court had given careful deliberation to the relevant statutory considerations, and there was nothing in the record to suggest that the court's decision was unreasonable. *Id.* at ¶20.

{¶39} With respect to the first step of the *Kalish* test, we note that appellant's sentences were within the statutory range for the offenses to which he pled guilty. In addition, the record reflects that the trial court considered the purposes and principles of felony sentencing and the seriousness and recidivism factors in R.C. 2929.11 and 2929.12. Further, the court properly advised appellant regarding post-release control. Based on the foregoing, we find that the trial court complied with all applicable rules and statutes and, as a result, appellant's sentence is not clearly and convincingly contrary to law.

{¶40} Having determined that the first step of the *Kalish* test was satisfied, we proceed to the second step, pursuant to which we must review appellant's sentence under an abuse-of-discretion standard. This court has recently stated that the term "abuse of discretion" is one of art, connoting judgment exercised by a court, which does not comport with reason or the record. *State v. Hendrex*, 11th Dist. No. 2010-T-0103, 2011-Ohio-1588, ¶28.

{¶41} The trial court considered the R.C. 2929.11 and 2929.12 guidelines and factors, the presentence report and investigation as well as the psychological evaluation, appellant's criminal record, his statement to the court, and the comments of

appellant's family members. Moreover, we find nothing in this record to demonstrate that the court abused its discretion in selecting appellant's sentence.

{¶42} Finally, appellate counsel's reference to *Bonness, supra*, is unavailing. In *Bonness*, the Eighth District held that the defendant's consecutive 40-year sentence for eight child pornography counts was inconsistent with sentences imposed for similar crimes committed by similar offenders. *Id.* at ¶29. Appellate counsel thus suggests that appellant's sentence was disproportionate. We do not agree. This court has repeatedly held that the "consistency" requirement of R.C. 2929.11(B) is not met by comparing the case under consideration with prior sentences imposed upon similar offenders who have committed similar offenses. *State v. Delmanzo*, 11th Dist. No. 2007-L-218, 2008-Ohio-5856, ¶32; *State v. Spellman*, 160 Ohio App.3d 718, 2005-Ohio-2065, ¶12 (11th Dist.). Rather, consistency in sentencing is achieved by a trial court's proper application of the statutory sentencing guidelines and factors. *Delmanzo, supra*. Thus, in order to show a sentence is inconsistent, a defendant must show the trial court failed to properly consider the statutory requirements.

{¶43} Here, the trial court followed the proper statutory procedure in arriving at its sentence. As the court met its statutory obligations, appellant's rights to due process and equal protection under the law were not violated. As this court has previously held, the mere fact that an "* * *" appellant's sentence was not identical to sentences in other cases does not imply that his sentence was inconsistent with sentences of other similarly situated offenders." *Id.* at ¶33.

{¶44} Based on our review of the record, we hold that appellant's sentence was neither excessive nor disproportionate.

{¶45} The second potential assignment of error is wholly frivolous and without merit.

{¶46} After a thorough and independent review of the record, including the transcript of proceedings, the presentence investigation report, and other submissions, we hold the trial court did not err in accepting appellant's guilty plea and did not abuse its discretion in sentencing him. Thus, there are no arguable legal points on the merits of this matter. Appellant's appeal is without merit and is wholly frivolous. The request to withdraw filed by appellate counsel is well-taken and is hereby granted. The judgment of the Lake County Court of Common Pleas is hereby affirmed.

MARY JANE TRAPP, J., concurs,

DIANE V. GRENDALL, J., concurs with a Concurring Opinion.

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{¶47} I concur in the judgment of the majority, affirming the decision of the trial court and finding Henderson's appeal to be frivolous. I write separately, however, to emphasize that this appeal should not have been initially allowed to proceed for review, due to Henderson's delay in filing his notice of appeal, and to note the unnecessary expenditure of public resources that resulted from considering this frivolous appeal.

{¶48} A review of the procedural history of this appeal is enlightening. Initially, on April 19, 2011, Henderson filed a motion for leave to file a delayed appeal with this court. The motion was filed approximately fourteen months after the trial court's judgment entry in this case was issued.

{¶49} Henderson's motion was granted by the majority on October 13, 2011. As explained in my dissent from that judgment, the motion should have been denied, since granting Henderson leave to file a delayed appeal was inconsistent with this court's previous approach to ruling on applications for delayed appeals. Over the past few years, this court has frequently denied similar applications, which were late by over a year and where the delay in filing was due to an appellant's lack of knowledge of the law. See *State v. Latimore*, 11th Dist. No. 2010-A-0041, 2010-Ohio-5184, ¶ 9-10; *State v. Gaston*, 11th Dist. No. 2010-L-094, 2010-Ohio-5055, ¶ 9-10.

{¶50} Subsequently, various filings occurred in this court, which resulted in extensions of time in favor of Henderson. One month after leave was granted, on November 18, 2011, this court appointed appellate counsel. Thereafter, on January 9, 2012, counsel was granted a thirty day extension to file his brief. A second, twenty day extension was granted on February 9, 2012.

{¶51} On February 21, 2012, Henderson's counsel filed an *Anders* brief, maintaining that the appeal was frivolous and asserting a sole potential assignment of error. This court then issued a Judgment Entry, on March 5, 2012, granting Henderson an additional thirty days to file his own brief, which he failed to do.

{¶52} The effect of accepting the present appeal, considering the various filings, and formulating additional errors was to prolong the appeal and expend considerable time and public taxpayers' resources in reviewing an appeal on which Henderson could not prevail. For these reasons, I concur in the decision affirming the lower court's judgment, but reiterate my prior dissent with respect to the previous decision of the majority, granting Henderson leave to file a delayed appeal.