[Cite as *State v. Ybarra*, 2014-Ohio-3485.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Appellee -vs- JOSE A. YBARRA Appellant	JUDGES: Hon. William B. Hoffman, P.J. Hon. John W. Wise, J. Hon. Craig R. Baldwin, J. Case No. 14-CA-8 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Court of Common Pleas, Case No. 13CR594
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	August 6, 2014

APPEARANCES:

For Appellee	For Appellant
KENNETH OSWALT Licking County Prosecutor 20 S. Second St. Newark, OH 43055	MARCUS M. VAN WEY Wolfe Van Wey & Associates LLC 1350 West Fifth Ave., Suite 119 Columbus, OH 43212 JOSE A. YBARRA, PRO SE P.O. Box 209 Orient , OH 43146

Hoffman, P.J.

{¶1} Appellant, Jose A. Ybarra, plead guilty to one count of domestic violence, a felony of the fourth degree, in violation of R.C. 2919.25(A) and (D)(3). Appellant was subsequently sentenced to a term of twelve months in prison.

{¶2} Counsel for Appellant has filed a Motion to Withdraw and a brief pursuant to *Anders v. California* (1967), 386 U.S. 738, rehearing den. (1967), 388 U.S. 924, indicating that the within appeal was wholly frivolous. Counsel for Appellant has raised two potential assignments of error asking this Court to determine whether Appellant's plea was entered knowingly, intelligently, and voluntarily and whether Appellant's sentence was valid.

I.

{¶3} "INEFFECTIVE ASSISTANCE OF COUNSEL RENDERED APPELLANT'S PLEA OF GUILTY UNINTELLIGENT AND INVOLUNTARY."

II.

{¶4} "VALIDITY OF SENTENCE."

{¶5} In *Anders,* the United States Supreme Court held if, after a conscientious examination of the record, a defendant's counsel concludes the case is wholly frivolous, then he should so advise the court and request permission to withdraw. Id*.* at 744. Counsel must accompany his request with a brief identifying anything in the record that could arguably support his client's appeal*.* Id*.* Counsel also must: (1) furnish his client with a copy of the brief and request to withdraw; and, (2) allow his client sufficient time to raise any matters that the client chooses. Id*.* Once the defendant's counsel satisfies these requirements, the appellate court must fully examine the proceedings below to

determine if any arguably meritorious issues exist. If the appellate court also determines that the appeal is wholly frivolous, it may grant counsel's request to withdraw and dismiss the appeal without violating constitutional requirements, or may proceed to a decision on the merits if state law so requires. Id.

{¶6} Counsel in this matter has followed the procedure in *Anders v. California* (1967), 386 U.S. 738. Appellant has filed a pro se brief essentially raising the same issues as counsel as well as a claim for ineffective assistance of counsel based upon different grounds than those raised by appellate counsel.

{¶7} We now will address the merits of Appellant's potential Assignments of Error.

I.

{¶8} In his first potential Assignment of Error, Appellant suggests his plea was not entered knowingly, intelligently, and voluntarily. A review of the plea hearing demonstrates the trial court complied with the mandate of Crim. R. 11 in accepting Appellant's guilty plea. The trial court explained to Appellant all of his rights, the potential penalties and the effect of entering the guilty plea.

{¶9} As we outlined in *State v. Sullivan*, 2007 WL 2410108, 2 -3 (Ohio App. 5 Dist.,2007), a determination of whether a plea is knowing, intelligent, and voluntary is based upon a review of the record. *State v. Spates* (1992), 64 Ohio St.3d 269, 272. If a criminal defendant claims that his plea was not knowingly, voluntarily, and intelligently made, the reviewing court must review the totality of the circumstances in order to determine whether or not the defendant's claim has merit. *State v. Nero* (1990), 56 Ohio St.3d 106, 108.

{¶10} To ensure that a plea is made knowingly and intelligently, a trial court must engage in oral dialogue with the defendant in accordance with Crim.R. 11(C)(2). *Engle,* 74 Ohio St.3d at 527.

{¶11} Counsel for Appellant reached an agreement with the State of Ohio where the State would recommend a sentence of community control with participation in a CBCF for Appellant if he pled guilty to the pending charge. Appellant acknowledges in his brief that his attorney explained that the trial court judge was not required to accept the recommended sentence. During the plea hearing, the trial court also explained to Appellant that the trial court was not bound by the plea agreement between the State and Appellant. The trial court specifically asked Appellant if he wanted to reconsider entering a guilty plea knowing the trial court could impose a prison sentence. Appellant decided he wanted to continue with the plea of guilty.

{¶12} Ultimately the trial court decided to impose a prison sentence. We find Appellant was completely aware of the possibility that a prison sentence would be imposed. The fact that the trial court deviated from the recommended sentence does not make Appellant's plea unknowing, unintelligent or involuntary.

{¶13} The trial court orally went over all of the required information to comply with Crim.R. 11. There is absolutely no evidence Appellant's plea was not entered knowingly, intelligently, and voluntarily.

{¶14} To the extent this assignment of error also incorporates a suggestion that Appellant was denied effective assistance of counsel, we also find this argument lacking merit.

To prevail on this claim, appellant must meet the test for ineffective assistance of counsel established in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; see, also, *State v. Xie* (1992), 62 Ohio St.3d 521, 524, 584 N.E.2d 715. When the *Strickland* test is applied to guilty pleas, the defendant must first show that counsel's performance was deficient. *Xie,* 62 Ohio St.3d at 524, 584 N.E.2d 715; *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. Next, the defendant must show that there is a reasonable probability that but for counsel's errors, he would not have pleaded guilty. *Xie,* 62 Ohio St.3d at 524, 584 N.E.2d 715, quoting *Hill v. Lockhart* (1985), 474 U.S. 52, 59 106 S.Ct. 366, 88 L.Ed.2d 203. " '[T]he mere fact that, if not for the alleged ineffective assistance, the defendant would not have entered the guilty plea, is not sufficient to establish the necessary connection between the ineffective assistance and the plea; instead, the ineffective assistance will only be found to have affected the validity of the plea when it precluded the defendant from entering the plea knowingly and voluntarily.' " *State v. Doak,* 7th Dist. Nos. 03 CO 15 and 03 CO 31, 2004-Ohio-1548, 2004 WL 614851, at ¶ 55, quoting *State v. Whiteman,* 11th Dist. No. 2001–P–0096, 2003-Ohio-2229, 2003 WL 21000988, at ¶ 24.

The *Doak* court further explained that " 'a guilty plea represents a break in the chain of events that preceded it in the criminal process; thus, a ***121** defendant, who admits his guilt, waives the right to challenge the propriety of any action taken by a trial court or trial counsel prior to that

> point in the proceedings unless it affected the knowing and voluntary character of the plea.' " *Doak,* 2004-Ohio-1548, 2004 WL 614851, at ¶ 55, quoting *State v. Madeline* (Mar. 22, 2002), 11th Dist. No.2000–T–0156, 2002-Ohio-1332, 2002 WL 445036; see, also, *State v. Wotring,* 11th Dist. No. L–99–114, 2003-Ohio-326, 2003 WL 168225, at ¶ 22, appeal denied (2003), 99 Ohio St.3d 1452, 790 N.E.2d 1217 (holding that "[a] claim for ineffective assistance of counsel is waived by a guilty plea, unless the ineffective assistance caused the guilty plea to be involuntary"). This court has also previously held that "[a] guilty plea is not voluntary if it is the result of ineffective assistance of counsel." *State v. Banks,* 9th Dist. No. 01CA007958, 2002-Ohio-4858, 2002 WL 31059911, at ¶ 16, appeal ****680** denied (2003), 98 Ohio St.3d 1413, 781 N.E.2d 1020.

{¶15} *State v. Gegia*, 2004-Ohio-2124, 157 Ohio App. 3d 112, 120-21, 809 N.E.2d 673, 679-80.

{¶16} In this case, Appellant complains his trial counsel failed to conduct pretrial investigation, falsely portrayed Appellant as an "Abusive Drunk Wife Beating Mexican," violated Appellant's constitutional rights, and left out important facts in his case including Appellant's psychiatric diagnosis, traumatic brain injury diagnosis, vertigo diagnosis, and the fact that Appellant's drinking and harming his wife were atypical behaviors for Appellant. He also states counsel assured Appellant the CBCF was a "sure thing."

{¶17} The Court finds the allegations presented by Appellant in his pro se brief are not supported by the record. Counsel for Appellant did explain to the court

Appellant's medical and psychiatric history. Further, a presentence investigation was prepared alerting the trial court to much of the information Appellant sought to have brought to the trial court's attention. The trial court very clearly advised Appellant CBCF was not guaranteed and allowed Appellant the opportunity to withdraw his plea. Appellant testified at his plea hearing he was satisfied with his attorney and no one had made any promises to him in exchange for his plea. He further testified his attorney went over the discovery with him and answered all of his questions.

{¶18} We do not find Appellant has demonstrated any deficiency in trial counsel's representation which would make the plea Appellant entered involuntary.

{¶19} Appellant's first Assignment of Error is overruled.

II.

{¶20} In his second potential assignment of error, Appellant's sentence is invalid. Again, Appellant challenges the trial court's failure to impose the sentence recommended by the State.

{¶21} Appellant was convicted of a felony of the fourth degree. The twelve month sentence Appellant received is within the sentencing range provided by R.C. 2929.14.

{¶22} The trial court's failure to follow the sentence recommended by the State does not make the sentence invalid. It is well-established a trial court is not bound by a prosecutor's recommendations at sentencing. *State v. Rink,* 6th Dist. No. L-02-1307, 2003-Ohio-4097, at ¶ 5. When a trial court imposes a greater sentence than recommended in the plea agreement, and when the defendant is forewarned of the applicable maximum penalties, there is no error on behalf of the trial court if it imposes a

more severe sentence than was recommended by the prosecutor. *State v. Darmour* (1987), 38 Ohio App.3d 160, 160-161, 529 N.E.2d 208.

{¶23} Appellant's second proposed assignment of error is overruled.

{¶24} For these reasons, after independently reviewing the record, we agree with counsel's conclusion that no arguably meritorious claims exist upon which to base an appeal. Hence, we find the appeal to be wholly frivolous under *Anders,* grant counsel's request to withdraw, and affirm the judgment of the Licking County Court of Common Pleas.

By: Hoffman, P.J.

Wise, J. and

Baldwin, J. concur