

[Cite as *State v. Woods*, 2017-Ohio-5734.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case No. 16CA3761
 :
 vs. :
 :
 ROBERT C. WOODS, JR., : DECISION AND JUDGMENT ENTRY
 :
 :
 Defendant-Appellant. :

APPEARANCES:

John A. Gambill, Portsmouth, Ohio, for Appellant.¹

Robert C. Woods, Jr., Caldwell, Ohio, Pro Se.

Mark E. Kuhn, Scioto County Prosecuting Attorney, and Jay Willis, Scioto County Assistant Prosecuting Attorney, Portsmouth, Ohio.

CRIMINAL CASE FROM COMMON PLEAS COURT

DATE JOURNALIZED:6-16-17

ABELE, J.

{¶ 1} Robert C. Woods Jr. appeals his Scioto County Common Pleas Court judgment of conviction and sentence after he entered a negotiated plea. However, appellant's counsel has advised the Court that he has reviewed the record and can find no meritorious claim for appeal. As a result, appellant's counsel has moved to withdraw under *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967).

¹Different counsel represented appellant during the trial court proceedings.

{¶ 2} Appellant Robert C. Woods, Jr. has also exercised his right to submit a pro se brief to support his argument that the trial court's judgment of conviction and sentence should be reversed.

In his pro se brief, appellant raises four assignments of error for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO CONSECUTIVE TERMS [WHEN] IN FACT THE OFFENSES CONSTITUTE ALLIED OFFENSES OF SIMILAR IMPORT UNDER THE DEFINITION OF SIMILAR IMPORT UNDER THE DEFINITION OF OHIO REVISED CODE 2941.25."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED WHEN IT DID NOT DETERMINE MR. APPELLANT'S PRESENT OR FUTURE ABILITY TO PAY COURT COST BEFORE THE COURT IMPOSED COURT COST."

THIRD ASSIGNMENT OF ERROR:

"APPELLANT'S GUILTY PLEAS WERE NOT ENTERED INTELLIGENTLY OR KNOWINGLY."

FOURTH ASSIGNMENT OF ERROR:

"APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DUE TO DEFENSE COUNSEL'S ERRONEOUS ADVICE THAT HE ENTER GUILTY PLEAS TO ENHANCED-DEGREE FELONIES FOR TRAFFICKING IN DRUGS (COCAINE) BASED ON GROSS WEIGHT THAT INCLUDED OTHER MATERIAL, INSTEAD OF THE WEIGHT OF ACTUAL COCAINE, IN VIOLATION OF HIS RIGHT TO DUE PROCESS."

{¶ 3} On December 23, 2013, the Scioto County Grand Jury returned a twenty-four count indictment that charged appellant with various drug-related offenses.²

²The counts of the indictment charged appellant with the following: (1) Engaging in a Pattern of Corrupt Activity (F1) in violation of R.C. 2923.32(A)(1); (2) Conspiracy to Engage in a Pattern of Corrupt Activities (F2) in violation of R.C. 2923.01; (3) Aggravated Trafficking in Drugs/Major Offender(F1) in violation of R.C. 2925.03(A)(2); (4)

{¶ 4} Subsequently, the parties reached an agreement that resulted in (1) the dismissal of several counts (Counts 9, 11, 13, 15, 17, 19, 21 and 23), and (2) the amendment of the indictment to Trafficking in Drugs from Aggravated Trafficking in Drugs for various counts (Counts 3, 4, 8, 10, 12, 14, 16, 18, 20 and 22).

{¶ 5} At the change of plea hearing, the trial court, after advising appellant of, inter alia, his constitutional guarantees, accepted appellant's negotiated guilty plea to four counts and proceeded to pronounce sentence.³

{¶ 6} In the case sub judice, appellate counsel filed an *Anders* brief and a motion for leave to withdraw. In *State v. Lester*, 4th Dist. Vinton No. 12CA689, 2013-Ohio-2485, ¶3, we discussed the pertinent *Anders* requirements:

Aggravated Possession of Drugs/Major Drug Offender (F1) in violation of R.C. 2925.11(A); (5) Conspiracy to Traffic in Heroin (F2) in violation of R.C. 2923.01; (6) Aggravated Trafficking in Drugs (F3) in violation of R.C. 2925.03(A)(2); (7) Aggravated Possession of Drugs (F3) in violation of R.C. 2925.11(A); (8) Aggravated Trafficking in Drugs/Major Drug Offender (F1) in violation of R.C. 2925.03(A)(2); (9) Aggravated Possession of Drugs/Major Drug Offender (F1) in violation of R.C. 2925.11(A); (10) Aggravated Trafficking in Drugs/Major Drug Offender (F1) in violation of R.C. 2925.03(A)(2); (11) Aggravated Possession of Drugs/Major Drug Offender (F1) in violation of R.C. 2925.11(A); (12) Aggravated Trafficking in Drugs/Major Drug Offender (F1) in violation of R.C. 2925.03(A)(2); (13) Aggravated Possession of Drugs/Major Drug Offender (F1) in violation of R.C. 2925.11(A); (14) Aggravated Trafficking in Drugs/Major Drug Offender (F1) in violation of R.C. 2903.(A)(2); (15) Aggravated Possession of Drugs/Major Drug Offender (F1) in violation of R.C. 2925.11(A); (16) Aggravated Trafficking in Drugs/Major Drug Offender (F1) in violation of R.C. 2925.03(A)(2); (17) Aggravated Possession of Drugs/Major Drug Offender (F1) in violation of R.C. 2925.11(A); (18) Aggravated Trafficking in Drugs/Major Drug Offender (F1) in violation of R.C. 2925.01(A)(2); (19) Aggravated Possession of Drugs/Major Drug Offender (F1) in violation of R.C. 2925.11(A); (20) Aggravated Trafficking in Drugs/Major Drug Offender (F1) in violation of R.C. 2925.03(A)(2); (21) Aggravated Possession of Drugs/Major Drug Offender (F1) in violation of R.C. 2925.11(A); (22) Aggravated Trafficking in Drugs/Major Drug Offender (F1) in violation of R.C. 2925.03(A)(2); (23) Aggravated Possession of Drugs/Major Drug Offender (F1) in violation of R.C. 2925.11(A) and (24) Weapon Under Disability (F3) in violation of R.C. 2923.13(A)(3).

³The trial court accepted appellant's guilty pleas for: (1) Count 1 - Engaging in a Pattern of Corrupt Activity (F1) in violation of R.C. 2923.32(A)(1); (2) Count 8 - Trafficking in Drugs (F4) in violation of R.C. 2925.03(A)(2); (3) Count 10 - Trafficking in Drugs (F5) in violation of R.C. 2925.03(A)(2); and Count 24 - Weapon Under a Disability (F3) in violation of R.C. 2923.13(A)(3). The court sentenced appellant as follows: (1) under Count 1 to serve mandatory three year term in prison; (2) under Count 8 to serve twelve months in prison, (3) under Count 10 to serve eleven months in prison, and (4) under Count 24 to serve a non-mandatory three year prison term, for an aggregate term of seven years and eleven months in prison with three years mandatory. The trial court also explicitly dismissed all remaining counts.

In *Anders*, the United States Supreme Court held that if counsel determines after a conscientious examination of the record that the case is wholly frivolous, counsel should so advise the court and request permission to withdraw. Counsel must accompany the request with a brief identifying anything in the record that could arguably support the appeal. *Anders* at 744. The client should be furnished with a copy of the brief and given time to raise any matters the client chooses. *Id.* Once these requirements are met, we must fully examine the proceedings below to determine if an arguably meritorious issue exists. *Id.* If so, we must appoint new counsel and decide the merits of the appeal. *Id.* If we find the appeal frivolous, we may grant the request to withdraw and dismiss the appeal without violating federal constitutional requirements or may proceed to a decision on the merits if state law so requires. *Id.*

Appellate counsel states that after his thorough review of the court file and the transcripts of the proceedings, we can find no potential error prejudicial to the appellant. Our review results in the same conclusion. In this case, appellant's trial counsel and the prosecution engaged in extensive negotiations that resulted in an agreement that appellant would plead guilty to four counts of the twenty-four count indictment.

{¶ 7} In his first pro se assignment of error, appellant asserts that the trial court should not have sentenced appellant to serve consecutive terms because his offenses constituted allied offenses of similar import. In particular, appellant argues that the offenses of trafficking in drugs (heroin) in violation of R.C. 2925.03(A)(2), a felony of the fourth degree, and trafficking in drugs (heroin) in violation of R.C. 2925.03(A)(2), a fifth degree felony, are allied offenses of similar import. Appellant contends that "both offenses are based upon the same type (heroin) and quantity of controlled narcotics."

{¶ 8} Appellee first points out that appellant was represented by counsel and that appellant entered a negotiated plea pursuant to the parties' plea agreement. See R.C. 2953.08. Second, appellee cites *State v. Pulliam*, 4th Dist. No. 14CA3609, 2015-Ohio-759, for the proposition that in

the context of an agreed sentence, consecutive sentence findings are unnecessary. Recently, the Ohio Supreme Court adopted this view. See *State v. Sergent*, 148 Ohio St.3d 94, 2016-Ohio-2696. Consequently, we do not find that either the record does not support the sentencing court's findings or that the sentence is otherwise contrary to law. See *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231.

{¶ 9} Accordingly, we overrule appellant's first pro se assignment of error.

{¶ 10} In his second pro se assignment of error, appellant asserts that the trial court erred "when it did not determine Mr. Appellant's present or future ability to pay court costs before the court imposed court costs."

{¶ 11} Appellee, however, notes that appellant's trial counsel did raise the issue of appellant's indigent status and that the trial court imposed no financial sanctions. Appellee contends that pursuant to R.C. 2947.23 and *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989 the trial court did properly require appellant to pay court costs. We agree with appellee. Consequently, we overrule appellant's second pro se assignment of error.

{¶ 12} In his third pro se assignment of error, appellant asserts that his "guilty pleas were not entered intelligently or knowingly." In particular, appellant contends that the trial court failed to inform him that his driver's license would be suspended and, had he known this information, he would have rejected the negotiated plea agreement and elected to proceed to trial.

{¶ 13} Appellee concedes that the negotiated plea agreement did not include a provision concerning the driver's license suspension, but that the license suspension is mandatory under R.C. 2925.11(E)(2). However, appellee points out that the trial court did, in fact, mention the license suspension requirement at the change of plea hearing and sentencing and that appellant raised no

concern about this point when he received the benefit of his plea agreement (7 year 11 month sentence and not eligible for judicial release consideration for three years) and avoided the possibility of convictions and sentencing for eleven first degree felonies, one second degree felony and one third degree felony.

{¶ 14} We agree with the appellee that appellant could have voiced his disagreement with the plea negotiations based upon his driver's license suspension, but that he failed to do so. Appellant appeared at the change of plea hearing and, after an extensive discussion with the court pursuant to Crim.R. 11, entered his guilty pleas.

{¶ 15} "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. Felts*, 4th Dist. Ross No. 13CA3407, 2014-Ohio-2378, ¶14, quoting *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶7, quoting *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). In determining whether a guilty or no contest plea was entered knowingly, intelligently, and voluntarily, an appellate court examines the totality of the circumstances through a de novo review of the record to ensure that the trial court complied with constitutional and procedural safeguards. *Felts, supra*; *State v. Cooper*, 4th Dist. Athens No. 11CA15, 2011-Ohio-6890, ¶35.

{¶ 16} In the case sub judice, the trial court accepted appellant's plea after it determined that the plea was knowing, intelligent and voluntary. Appellant stated he understood that his guilty plea would result in the waiver of various Constitutional rights, that his plea would

constitute a complete admission of guilt and that he had no complaint concerning trial counsel's representation.

{¶ 17} In his fourth pro se assignment of error, appellant asserts that he received "ineffective assistance of counsel due to defense counsel's erroneous advice that he enter guilty pleas to enhanced-degree felonies for trafficking in Drugs (Cocaine) based on gross weight that included other material, instead of the weight of actual cocaine, in violation of his right to due process." Appellant contends that the record contains no evidence that the "weight of the actual cocaine trafficking by Appellant met the statutory threshold for enhancement." (sic).

{¶ 18} In opposition to this argument, appellee contends that appellant's contention is frivolous because appellant's indictment contained no charges concerning cocaine, but rather included charges relating to heroin and oxycodone. We agree with appellee's argument. Moreover, the Ohio Supreme Court recently reversed its decision concerning the weight of actual cocaine relative to the gross weight of the substance. See *State v. Gonzales*, 2017-Ohio-777 overruling *State v. Gonzales*, 2016-Ohio-8319.

{¶ 19} Accordingly, we overrule appellant's pro se fourth assignment of error.

{¶ 20} Once again, after our independent review of the record, we agree with appellate counsel's assessment concerning the lack of meritorious claim for appeal.

{¶ 21} Therefore (1) because counsel raises no potential assignment of error; and (2) having independently discovered no arguably meritorious issues for appeal, and (3) having considered appellant's pro assignments of error, we conclude that appellant's appeal is wholly frivolous, grant counsel's motion to withdraw, and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment is affirmed and that appellant shall pay the costs. The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

stay will terminate as of the date of such dismissal.

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

Harsha, J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.