[Cite as *State v. Taylor*, 2016-Ohio-4816.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 15 MA 0025
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
PAUL TAYLOR	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio
Case No. 13 CR 721

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Atty. Paul J. Gains
Mahoning County Prosecutor
Atty. Ralph M. Rivera
Assistant Prosecuting Attorney
21 West Boardman Street, 6th Floor
Youngstown, Ohio 44503

For Defendant-Appellant:

Atty. John A. Ams
134 Westchester Drive
Youngstown, Ohio 44515

JUDGES:

Hon. Cheryl L. Waite
Hon. Mary DeGenaro
Hon. Carol Ann Robb

Dated: June 29, 2016

[Cite as *State v. Taylor*, 2016-Ohio-4816.]
WAITE, J.

{¶1} Appellant Paul Taylor appeals from his convictions and sentences pursuant to a Crim.R. 11 plea agreement entered into the Mahoning County Common Pleas Court. Appellant's counsel filed a no merit brief requesting leave to withdraw. A complete review of the case reveals no appealable issues. Accordingly, appointed counsel's motion to withdraw is granted and Appellant's convictions and sentences are affirmed.

Factual and Procedural History

{¶2} On July 18, 2013, Appellant was indicted on one count of felony life rape, a felony of the first degree in violation of R.C. 2907.02(A)(1)(b), (B); four counts of rape, a felony of the first degree in violation of R.C. 2907.02(A)(2), (B); and two counts of gross sexual imposition ("GSI"), a felony of the fourth degree in violation of R.C. 2907.02(A)(1), (C).

{¶3} On October 16, 2014, Appellant and the state entered into a Crim.R. 11 plea agreement. According to the terms of the agreement, Appellant agreed to plead guilty to amended charges of rape (without the force language) in violation of R.C. 2907.02(A)(1)(b), (B) and rape in violation of R.C. 2907.02(A)(2), (B). The two GSI counts were dropped. Appellant and the state agreed to a jointly recommended four-year sentence.

{¶4} On October 16, 2014, the trial court held a plea hearing and the trial court accepted Appellant's plea. Although the plea agreement was signed on October 14, 2014, the document was not filed until October 21, 2014. On November 13, 2014, the trial court held a sentencing hearing. The trial court accepted the jointly

recommended sentence of four years of incarceration per count. The trial court ordered the sentences to run concurrently for an aggregate term of four years in prison. The court credited Appellant with 479 days of jail-time credit. The court informed Appellant he would be subject to five years of mandatory postrelease control and that he would have to register as a Tier III sex offender after his release. Appellant has timely appealed.

No Merit Brief

{¶5} Appellant's counsel seeks to withdraw from the appeal after finding no meritorious arguments for appeal. This filing is known as a no merit brief or an *Anders* brief. See *Anders v. California,* 386 U.S. 738, 87 S.Ct. 1396, 18 L.E.2d 493 (1967). In our district, this filing is also referred to as a *Toney* brief. See *State v. Toney,* 23 Ohio App.2d 203, 262 N.E. 2d 419 (7th Dist.1970).

{¶6} In *Toney,* we established the procedure to be used when appellate counsel wishes to withdraw from a case deemed a frivolous appeal.

> 3. Where a court-appointed counsel, with long and extensive experience in criminal practice, concludes that the indigent's appeal is frivolous and that there is no assignment of error which could be arguably supported on appeal, he should so advise the appointing court by brief and request that he be permitted to withdraw as counsel of record.
>
> 4. Court-appointed counsel's conclusions and motion to withdraw as counsel of record should be transmitted forthwith to the indigent, and

> the indigent should be granted time to raise any points that he chooses, *pro se*.
>
> 5. It is the duty of the Court of Appeals to fully examine the proceedings in the trial court, the brief of appointed counsel, the arguments *pro se* of the indigent, and then determine whether or not the appeal is wholly frivolous.
>
> * * *
>
> 7. Where the Court of Appeals determines that an indigent's appeal is wholly frivolous, the motion of court-appointed counsel to withdraw as counsel of record should be allowed, and the judgment of the trial court should be affirmed.

Id. at syllabus.

{¶7} On May 19, 2015, Appellate counsel filed a no merit brief in this matter. On July 6, 2015, we entered a judgment entry informing Appellant that his counsel had filed a no merit brief and gave him thirty days to file his own brief. Appellant failed to file his own brief. Accordingly, we must independently examine the record to determine whether there are any potentially meritorious issues in this matter. As this case involves a plea agreement, we must review to determine whether the plea was entered knowingly, intelligently, and voluntarily and whether the sentence complies with the law. As appellate counsel also considered ineffective assistance of counsel

as a prospective issue on appeal, we will also review the performance of trial counsel.

Plea

{¶8} Pursuant to Crim.R. 11(C), a trial court must advise a defendant of certain rights before the court can accept the defendant's plea. These rights are divided into constitutional rights and nonconstitutional rights. Beginning with a defendant's constitutional rights, a trial court must advise a defendant of the following: (1) right to a jury trial; (2) right to confront witnesses against him; (3) right to compulsory process to obtain witnesses in his favor; (4) the state's burden to prove his guilt beyond a reasonable doubt at a trial; and (5) that a defendant cannot be compelled to testify at trial. *State v. Bell,* 7th Dist. No. 14 MA 0017, 2016-Ohio-1440, ¶ 9, citing Crim.R 11(C)(2); *State v. Veney,* 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 19-21. In order for the defendant's plea to be valid, the trial court must strictly comply with these requirements. *Veney* at ¶ 31.

{¶9} The trial court must also advise a defendant of his nonconstitutional rights, which include: (1) the nature of the charges; (2) the maximum penalty the defendant is subject to, including postrelease control, if applicable; (3) whether the defendant is eligible for probation or community control sanctions; and (4) that a trial court may immediately proceed to sentencing after the plea is accepted. *Veney* at ¶ 10-13. Unlike the discussion a court must have regarding constitutional rights, a trial court need only substantially comply with these requirements. "Substantial compliance means that under the totality of the circumstances the defendant

subjectively understands the implications of his plea and the rights he is waiving." *Bell, supra,* citing *Veney* at ¶ 15. If the advisement of a defendant's nonconstitutional rights is not substantially complied with, the defendant must show a prejudicial effect. *Bell* at ¶ 10, citing *Veney,* at ¶ 15.

{¶10} Here, the trial court strictly complied when advising Appellant of his constitutional rights. In his written plea agreement and at the plea hearing, Appellant was advised that he would be giving up his right to appeal the following rights: (1) the right to a jury trial; (2) the right to confront the witnesses against him; (3) the right to obtain witnesses in his favor; (4) the state's burden to prove the case against him beyond a reasonable doubt at trial; and (5) the right against self-incrimination. Appellant indicated on the record that he understood each of these rights and that he would waive these as a result of his plea. The record is devoid of any evidence that Appellant was impaired in any way from understanding the process.

{¶11} Similarly, the record demonstrates that the trial court at least substantially complied in advising Appellant of his nonconstitutional rights. He was advised of the charges against him, which included five counts of rape. He was informed that he would be subject to a maximum penalty of eleven years in prison per count and a fine of $20,000 per count. The trial court explained that he was ineligible for community control, probation, and judicial release. The court further explained that, upon release from prison, he would be subject to a mandatory five-year period of postrelease control and that he would have to register as a Tier III sex offender. The court explained the consequences of violating postrelease control.

Finally, he was informed that the court could proceed directly to sentencing after accepting his plea. Again, there is nothing within the record to suggest Appellant was unable to understand any of this discussion.

{¶12} This record demonstrates that the trial court advised Appellant of his constitutional and nonconstitutional rights. Thus, we find that Appellant entered his plea intelligently, voluntarily, and knowingly and there are no appealable issues concerning his plea.

Sentencing

{¶13} An appellate court is permitted to review a felony sentence to determine if it is contrary to law. *State v. Marcum,* Slip Opinion No. 2016-Ohio-1002. Further, "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." *Id.* at ¶ 23.

{¶14} When determining a sentence, a trial court must consider the purposes and principles of sentencing in accordance with R.C. 2929.11, the seriousness and recidivism factors within R.C. 2929.14, and the proper statutory ranges set forth within R.C. 2929.14. Here, while the trial court indicated that it had considered the principles of R.C. 2929.11 and R.C. 2929.12 within its judgment entry, the court did not do so at the sentencing hearing. We have previously held that:

> [R]eversal is not automatic where the sentencing court fails to provide reasons for its sentence or fails to state at sentencing or in a form judgment entry, "after considering R.C. 2929.11 and 2929.12". We

> return to the *Adams* rule that a silent record raises the rebuttable presumption that the sentencing court considered the proper factors. We hereby adopt the Second District's statement that where the trial court's sentence falls within the statutory limits, "it will be presumed that the trial court considered the relevant factors in the absence of an affirmative showing that it failed to do so" unless the sentence is "strikingly inconsistent" with the applicable factors. (Emphasis deleted.)

State v. Grillon, 7th Dist. No. 10 CO 30, 2012-Ohio-893, ¶ 131 citing *State v. James*, 7th Dist. No. 07-CO-47, 2009-Ohio-4392, ¶ 50.

{¶15} Accordingly, we begin with a presumption that the trial court considered R.C. 2929.11 and R.C. 2929.12, even in the absence of specific language. Although there is no reference to any factor found in either R.C. 2929.11 or R.C. 2929.12 within the sentencing hearing transcripts, there is nothing within the record to suggest that the court failed to consider either statute. As such, we find that the record demonstrates the trial court's consideration of R.C. 2929.11 and R.C. 2929.12.

{¶16} As to the statutory guidelines, the maximum penalty for a first-degree felony is eleven years in prison. As Appellant was sentenced to four years per count, the trial court's sentence is well within the permissible range. Also, the trial court accepted the jointly recommended sentence and Appellant was given the opportunity to speak at sentencing. There is nothing within this record to provide clear and convincing evidence that the record does not support the sentence. The court did

not impose consecutive sentences, thus there was no need to discuss the relevant law. This record reveals no appealable issues concerning Appellant's sentence.

Ineffective Assistance of Counsel

{¶17} Appellate counsel indicates that it also considered ineffective assistance of counsel as a prospective issue. Appellate counsel does note that trial counsel negotiated an aggregate sentence of four years, significantly less than the fifty-five years he could have received if given the maximum sentence.

{¶18} In order to prevail on an ineffective assistance of counsel claim, Appellant must first show that counsel's performance was deficient. *State v. Ludt*, 7th Dist. No. 09 MA 107, 2009-Ohio-2214, ¶ 3, citing S*trickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Deficient performance occurs when counsel's performance falls below an objective standard of reasonable representation. *Id*. In other words, there is "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Lyons v. Schandel*, 7th Dist. No. 14 CA 898, 2015-Ohio-3960, ¶ 13, citing *Strickland*. Once this hurdle is met, Appellant must also show resulting prejudice. *Ludt, supra,* at ¶ 3.

{¶19} Importantly, there was no trial in this case, thus we can only review the actions of trial counsel at the plea and sentencing hearings. As stated by appellate counsel, there is no evidence in this case that Appellant's trial counsel was deficient. Additionally, the respective proceedings demonstrate that counsel was able to secure a four-year sentence where Appellant faced a maximum of fifty-five years of

incarceration. Thus, Appellant cannot meet the first *Strickland* prong and there are no appealable issues concerning the performance of Appellant's trial counsel.

Conclusion

{¶20} For the reasons provided, there are no potentially meritorious issues within this appeal. Accordingly, counsel's motion to withdraw is granted and the judgment of the trial court is affirmed.

DeGenaro, J., concurs.

Robb, J., concurs.