[Cite as *State v. Brooks*, 2017-Ohio-7583.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 15 MA 0214
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
LaKEITH BROOKS	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio
Case No. 15 CR 13

JUDGMENT: Affirmed in part. Sentence Vacated in part. Remanded in part.

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
No Brief Filed

For Defendant-Appellant:

Atty. Rhys B. Cartwright-Jones
42 North Phelps
Youngstown, Ohio 44503-1130

JUDGES:
Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: September 7, 2017

[Cite as *State v. Brooks*, 2017-Ohio-7583.]
WAITE, J.

{¶1} Appellant LaKeith Brooks appeals a November 23, 2015 Mahoning County Common Pleas Court judgment finding him guilty of gross sexual imposition (GSI) and unlawful sexual conduct with a minor. Appellant's counsel filed a no merit brief requesting leave to withdraw. A complete review of the case reveals no potential meritorious issues concerning Appellant's convictions and these are affirmed. However, the record reveals that the trial court failed to make the requisite R.C. 2929.14(C) factors when it imposed consecutive sentences. Accordingly, his sentence is vacated in part and the matter is remanded for the limited purpose of imposing consecutive sentences.

Factual and Procedural History

{¶2} On January 8, 2015, Appellant was indicted on five counts of unlawful sexual conduct with a minor, a felony of the third degree in violation of R.C. 2907.04(A), (B)(3), and one count of GSI, a felony of the fourth degree in violation of R.C. 2907.05(A)(1), (C)(1). On November 12, 2015, Appellant entered into a written plea agreement with the state. The state agreed to dismiss four counts of unlawful sexual conduct. The state also agreed to reduce the remaining unlawful conduct count to a felony of the fourth degree. In return, Appellant agreed to plead guilty to one count of unlawful sexual conduct and one count of GSI.

{¶3} On the same day, the trial court held a plea hearing where the court entered into a Crim.R. 11 colloquy with Appellant. The judge accepted Appellant's plea and scheduled a sentencing hearing on November 16, 2015. At the hearing, Appellant was sentenced to twelve months of incarceration per count. The court

ordered the sentences to run consecutively, for an aggregate total of two years. Appellant was also required to register as a first-tier sex offender.

No Merit Brief

{¶4} Based on a review of this matter, appellate counsel seeks to withdraw after finding no potentially 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, it is referred to as a *Toney* brief. See *State v. Toney*, 23 Ohio App.2d 203, 262 N.E.2d 419 (7th Dist.1970). In this matter, counsel's brief was filed instanter.

{¶5} In *Toney*, this Court 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.
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> 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.
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> * * *
>
> 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.

{¶6} On August 19, 2016, appellate counsel filed a no merit brief in this matter. On August 31, 2016, we filed a judgment entry informing Appellant that his counsel had filed a no merit brief and giving him thirty days to file his own brief. Appellant failed to file a brief in this matter. Accordingly, we must independently examine the record to determine whether there are any potentially meritorious issues in this matter.

Plea Hearing

{¶7} A plea of guilty or no contest must be made knowingly, intelligently and voluntarily for it to be valid and enforceable. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 25. In order to ensure that a plea in a felony case is knowing, intelligent and voluntary, Crim.R. 11(C)(2) requires the trial judge to

address the defendant personally to review the rights that are being waived and to discuss the consequences of the plea.

{¶8} Crim.R. 11(C)(2)(c) requires the court to review five constitutional rights that are waived when entering a guilty or no contest plea in a felony case: the right to a jury trial, the right to confront one's accusers, the privilege against compulsory self-incrimination, the right to compulsory process to obtain witnesses, and the right to require the state to prove guilt beyond a reasonable doubt. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 19. A trial court must strictly comply with Crim.R. 11(C)(2)(c) when advising the defendant of the constitutional rights that are being waived in entering a felony plea. *Id*. at syllabus. Prejudice is presumed if the court fails to inform the defendant of any of the constitutional rights listed in Crim.R. 11(C)(2)(c). *Id*. at ¶ 29.

{¶9} A defendant must also be informed of his nonconstitutional rights prior to entering a guilty plea, which include an understanding of the nature of the charges with an explanation of the law in relation to the facts, the maximum penalty, and that after entering a guilty plea or a no contest plea the court may proceed to judgment and sentence. Crim.R. 11(C)(2)(a)(b). The nonconstitutional requirements of Crim.R. 11 are subject to review for substantial compliance rather than strict compliance. *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 11-12. "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." *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990). Further,

"failure to comply with nonconstitutional rights will not invalidate a plea unless the defendant thereby suffered prejudice." *Griggs*, *supra*, at ¶ 12.

{¶10} Here, the record demonstrates that the trial court strictly complied with Crim.R. 11 when it advised 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 witnesses against him, (3) the right to subpoena witnesses and require their attendance at trial, (4) the state's burden to prove each element of the offenses beyond a reasonable doubt at trial, and (5) the right against self-incrimination. (11/9/15 Plea Hrg. Tr., pp. 5-7.)

{¶11} Appellant signed his written plea agreement and stated on the record that he understood that each of these rights would be waived as a result of his plea. There is no evidence within the record to suggest that Appellant was impaired in any way from understanding the process.

{¶12} The trial court also at least substantially complied in advising Appellant of his nonconstitutional rights. The judge advised Appellant of the charges against him, which included unlawful sexual conduct and GSI. (11/9/15 Plea Hrg. Tr., pp. 5-6.) The judge informed him that he was subject to a maximum penalty of eighteen months of incarceration and a $5,000 fine per count. *Id*. at p. 7. The record reflects that Appellant was advised that the judge was not bound by the parties' recommendation and could immediately proceed to sentencing. *Id*. The judge explained that Appellant would receive a five-year mandatory postrelease control

sentence and explained the consequences of violating postrelease control. *Id*. at p. 8. Finally, Appellant was informed that he would be required to register as a tier one sex offender. *Id*. at pp. 10-11.

{¶13} Appellant acknowledged that he would be giving up these rights as a result of his plea. Again, there is nothing within the record to suggest Appellant was unable to understand any of this discussion. Accordingly, there are no appealable issues regarding Appellant's guilty plea.

Sentencing

{¶14} An appellate court is permitted to review a felony sentence to determine if it is contrary to law. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 23. Pursuant to *Marcum*, "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*.

{¶15} 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. 2929.12, and the proper statutory ranges set forth within R.C. 2929.14.

{¶16} At the sentencing hearing, the state recommended a two-year prison sentence while the defense recommended a term of eighteen months. The state argued that a two-year sentence was appropriate because Appellant was accused of having intercourse on five occasions with a thirteen-year-old girl who referred to him

as "uncle." The defense argued that an eighteen-month sentence was more appropriate because Appellant claimed that there was no penetration and he was only engaging in horseplay with the victim. The trial court accepted the state's recommendation and imposed a two-year term of incarceration. The court also imposed a mandatory five-year postrelease control period and assessed court costs. Appellant was also required to register as a tier one sex offender. Appellant indicated that he did not entirely understand the sex offender registry requirements, so the judge explained the process.

{¶17} Also at the sentencing hearing, the trial court judge stated: "I have considered the oral statements of defendant, the assistant prosecutor, as well as all of the circumstances of this case, and have considered the principles and purposes of sentencing under Revised Code 2929.12." (1/15/16 Sentencing Hrg. Tr., p. 10.) The judge did not expressly mention R.C. 2929.11, however, such an omission is not necessarily erroneous.

> [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.

{¶18} Accordingly, we begin with a presumption that the trial court considered R.C. 2929.11, even in the absence of specific language. Although there is no reference to R.C. 2929.11 within the sentencing hearing transcripts, there is nothing within the record to suggest that the court failed to consider this statute. At the sentencing hearing, the trial court emphasized that the victim was only thirteen years old at the time of the offense. (1/15/16 Sentencing Hrg. Tr., p. 11.) The court also noted that there were several alleged incidents which were a part of a course of conduct.

{¶19} The statutorily defined maximum penalty is eighteen months per count. R.C. 2929.14(A)(4). Hence, Appellant was subject to a maximum penalty of thirty-six months. Appellant was sentenced to an aggregate total of twenty-four months. As such, the trial court's sentence is well within the permissible statutory range. There is nothing within this record to provide clear and convincing evidence that the record does not support the sentence.

{¶20} Pursuant to R.C. 2929.14(C)(4), before a trial court can impose consecutive sentences on a defendant, the court must find:

> [T]hat the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences

> are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶21} A trial court judge must make the consecutive sentence findings at the sentencing hearing and must additionally incorporate the findings into the sentencing entry. *State v. Williams*, 2015-Ohio-4100, 43 N.E.3d 797, 806, ¶ 33-34, citing *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37. A court need not state reasons to support its finding, nor is it required to use any “magic” or

"talismanic" words, so long as it is apparent from the record that the court conducted the proper analysis. *Id*. citing *State v. Jones*, 7th Dist. No. 13 MA 101, 2014-Ohio-2248, ¶ 6; *State v. Verity*, 7th Dist. No. 12 MA 139, 2013-Ohio-1158, ¶ 28-29.

{¶22} At the sentencing hearing, the trial court found that consecutive sentences were necessary to punish the offender. (1/15/16 Sentencing Hrg. Tr., p. 11.) The court also found that the unlawful conduct and GSI offenses were committed as part of a course of conduct and that the harm caused was so great or unusual that a single prison term would not adequately reflect the seriousness of the offense. *Id*. However, the trial court did not enter a finding as to the second prong, whether a consecutive sentence would be disproportionate to the seriousness of the conduct and the danger the offender poses to the public.

{¶23} It is noted that appellate counsel asserts that the requisite factors were made by the court at the sentencing hearing. However, when counsel discusses the R.C. 2929.14(C) findings, his discussion is limited to one sentence where he declares that the trial court complied with all appropriate sentencing statutes, including R.C. 2929.14(C). Rather than specifically identifying that portion of the record where the findings were made, counsel cites to all nineteen pages of the sentencing transcript. However, our review reveals that the record clearly demonstrates the trial court failed to make all three R.C. 2929.14(C) findings.

{¶24} As to the sentencing entry, the trial court entered findings on all three prongs of R.C. 2929.14(C). The court found that consecutive sentences are necessary to protect the public and punish the offender, that a consecutive sentence

is not disproportionate to the seriousness of the conduct and danger posed to the public, and that the offenses were committed as part of a course of conduct and the harm caused was so great or unusual that a single prison term would not adequately reflect the seriousness of the offense. (11/23/15 J.E., p. 2.)

{¶25} However, it is not enough for the trial court to make the findings within the sentencing entry. The trial court must also make the findings at the sentencing hearing. Despite counsel's assertion to the contrary, the trial court clearly did not make all requisite R.C. 2929.14(C) findings at the sentencing hearing. Accordingly, we vacate the trial court's imposition of consecutive sentences and remand the matter for the limited purpose of imposing consecutive sentences.

Conclusion

{¶26} Appellate counsel seeks to withdraw as a review of the record did not reveal any potentially meritorious arguments. For the reasons provided, there are no appealable issues as to Appellant's plea. As such, his convictions are affirmed. However, the trial court failed to make the requisite R.C. 2929.14(C) findings when it imposed consecutive sentences. Accordingly, Appellant's sentence is vacated in part and the matter is remanded for the limited purpose of imposing consecutive sentences.

Donofrio, J., concurs.

DeGenaro, J., concurs.