

[Cite as *State v. Warren*, 2017-Ohio-4389.]

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO)	
)	
PLAINTIFF-APPELLEE)	
)	CASE NO. 16 MA 0065
VS.)	
)	OPINION
WESLEY WARREN)	
)	
DEFENDANT-APPELLANT)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of
Common Pleas of Mahoning County,
Ohio
Case No. 2015 CR 1185 A

JUDGMENT: Affirmed. Motion granted.

APPEARANCES:
For Plaintiff-Appellee Attorney Paul Gains
Mahoning County Prosecutor
Attorney Ralph Rivera
Assistant Prosecutor
21 West Boardman Street, 6th Floor
Youngstown, Ohio 44503-1426

For Defendant-Appellant Attorney Thomas Lyden
367 Wildwood Drive
Boardman, Ohio 44512

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

Dated: May 31, 2017

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DeGENARO, J.

{¶1} Defendant–Appellant, Wesley Warren, appeals the trial court judgment convicting him of possession of heroin and sentencing him accordingly. Appointed appellate counsel for Warren has filed a no-merit brief and a request to withdraw as counsel pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.E.2d 493 (1967), and *State v. Toney*, 23 Ohio App.2d 203, 262 N.E.2d 419 (1970). For the following reasons, we grant counsel's motion to withdraw and affirm the judgment of the trial court.

{¶2} A grand jury indicted Warren on one count of having weapons under disability, R.C. 2923.13(A)(3)(B), a third-degree felony; and one count of possession of heroin, R.C. 2925.11(A)(C)(6)(a), a fifth-degree felony. He was arraigned, pled not guilty and counsel was appointed. Warren later entered into a Crim.R. 11 plea agreement with the State; Warren agreed to plead guilty to the heroin charge and in exchange the State agreed to dismiss the weapons charge and recommend community control on the heroin charge.

{¶3} During the plea hearing, the trial court engaged in a colloquy with Warren concerning the rights he would give up by pleading guilty, and ultimately accepted Warren's plea as knowingly, voluntarily and intelligently made and continued sentencing so that a presentence investigation could be prepared.

{¶4} During sentencing, the State stood by its promise to recommend community control. Defense counsel then argued in favor of a community control sanction, noting that Warren's prior criminal history consisted of mainly fourth and fifth degree felonies such as drug possession. Counsel emphasized that Warren had completed his GED while in a Community Corrections Association program. Counsel conceded that Warren was under a community control sanction when the instant offense was committed. However, he claimed that Warren was merely in the wrong place at the wrong time; he was in a house when a drug raid took place. Counsel said that Warren was employed and clean.

{¶5} The trial court asked Warren if he had anything to say regarding his sentence and Warren then made a brief statement on his own behalf.

{¶16} After considering the record, statements made at sentencing, the purposes and principles of sentencing under R.C. 2929.11 and the seriousness and recidivism factors under R.C. 2929.12, the trial court proceeded to sentence Warren as follows: ten months in prison, with jail-time credit for 130 days along with future days in custody while awaiting transportation, a mandatory six-month driver's license suspension, and a discretionary term of post-release control of up to three years.

Anders Review

{¶17} An attorney appointed to represent an indigent criminal defendant may seek permission to withdraw if the attorney can show that there is no merit to the appeal. See *generally Anders*, 386 U.S. 738. To support such a request, appellate counsel is required to undertake a conscientious examination of the case and accompany his or her request for withdrawal with a brief referring to anything in the record that might arguably support an appeal. *Toney*, 23 Ohio App.2d at 207. Counsel's motion must then be transmitted to the defendant in order to assert any error pro se. *Id.* at syllabus. The reviewing court must then decide, after a full examination of the proceedings and counsel's and the defendant's filings, whether the case is wholly frivolous. *Id.* If deemed frivolous, counsel's motion to withdraw is granted, new counsel is denied, and the trial court's judgment is affirmed. *Id.*

{¶18} Counsel filed a no-merit brief and we granted Warren 30 days to file a pro-se brief, which to date, he has failed to file. In the typical *Anders* case involving a guilty plea, the only issues that can be reviewed relate to the plea or the sentence. See, e.g., *State v. Verity*, 7th Dist. No. 12 MA 139, 2013–Ohio–1158, ¶ 11.

{¶19} A guilty plea must be made knowingly, voluntarily and intelligently. *State v. Sarkozy*, 117 Ohio St.3d 86, 2008–Ohio–509, 881 N.E.2d 1224, ¶ 7. If it is not, it has been obtained in violation of due process and is void. *State v. Martinez*, 7th Dist. No. 03 MA 196, 2004–Ohio–6806, ¶ 11, citing *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). When determining the voluntariness of a plea, this court must consider all of the relevant circumstances surrounding it. *State v. Johnson*, 7th Dist. No. 07 MA 8, 2008–Ohio–1065, ¶ 8, citing *Brady v. United*

States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970).

{¶10} The trial court must engage in a Crim.R. 11(C) colloquy with the defendant in order to ensure that a felony defendant's plea is knowing, voluntary and intelligent. *State v. Clark*, 119 Ohio St.3d 239, 2008–Ohio–3748, 893 N.E.2d 462, ¶ 25–26. During the colloquy, the trial court is to provide specific information to the defendant, including constitutional and nonconstitutional rights being waived. Crim.R. 11(C)(2); *State v. Francis*, 104 Ohio St.3d 490, 2004–Ohio–6894, 820 N.E.2d 355.

{¶11} The constitutional rights the defendant must be notified of are the right against self-incrimination, to a jury trial, to confront one's accusers, to compel witnesses to testify by compulsory process, and to have the state prove guilt beyond a reasonable doubt. Crim.R. 11(C)(2)(c); *State v. Veney*, 120 Ohio St.3d 176, 2008–Ohio–5200, 897 N.E.2d 621, ¶ 19–21. A trial court must strictly comply with these requirements. *Id.* at ¶ 31; *State v. Ballard*, 66 Ohio St.2d 473, 477, 423 N.E.2d 115 (1981). "Strict compliance" does not require a rote recitation of the exact language of the rule. Rather, a reviewing court should focus on whether the "record shows that the judge explained these rights in a manner reasonably intelligible to the defendant." *Id.* at paragraph two of the syllabus.

{¶12} The nonconstitutional rights the defendant must be informed of are the effect of his plea, the nature of the charges, and the maximum penalty, which includes an advisement on post-release control if applicable. Further, a defendant must be notified, if applicable, that he is not eligible for probation or the imposition of community control sanctions. Finally, this encompasses notifying the defendant that the court may proceed to judgment and sentence after accepting the guilty plea. Crim.R. 11(C)(2)(a)(b); *Veney*, 120 Ohio St.3d 176 at ¶ 10–13; *Sarkozy*, 117 Ohio St.3d 86, at ¶ 19–26. The trial court must substantially comply with these requirements. *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990). "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." *Id.* at 108. In addition to demonstrating the trial court did not substantially

comply with Crim. R. 11(C)(2)(a)(b) the defendant must also show a prejudicial effect, meaning the plea would not have otherwise been made. *Veney*, 120 Ohio St.3d 176 at ¶ 15 citing *Nero*, 56 Ohio St.3d at 108.

{¶13} The trial court's advisement of Warren's constitutional rights strictly complied with Crim.R. 11(C)(2)(c), and he indicated he understood he was giving up all of those rights. The trial court also substantially complied with Crim.R. 11(C) when advising Warren of his nonconstitutional rights. As the trial court's colloquy with Warren complied with Crim.R. 11(C), the plea was knowingly, voluntarily, and intelligently entered.

{¶14} Turning to sentencing, appellate courts review a felony sentence to determine whether the trial court's findings—or where findings are not required, the sentence itself—are clearly and convincingly unsupported by the record, or whether the sentence is otherwise contrary to law. R.C. 2953.08(G)(2); *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1; ¶ 23.

{¶15} Warren was afforded his allocution rights pursuant to Crim.R. 32(A)(1). The trial court asked him if he had anything to say before the sentence was pronounced and Warren made a brief statement. The fact that the trial court chose to deviate from the jointly-recommended sentence is not error because the trial court forewarned Warren during the plea hearing of the applicable penalties, including the possibility of imposing a greater sentence than that recommended by the prosecutor. See *State v. Vari*, 7th Dist. No. 07–MA–142, 2010–Ohio–1300, ¶ 24.

{¶16} The imposition of prison instead of a community control sanction for a fifth-degree felony was proper pursuant to R.C. 2929.13. Under R.C. 2929.13(B)(1)(a), except as provided in subsection (B)(1)(b), if an offender is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence or that is a qualifying assault offense the trial court shall sentence the offender to community control if all the criteria in R.C. 2929.13(B)(1)(a)(i)-(iv) apply. Among those criteria is that "[t]he offender previously has not been convicted of or pleaded guilty to a felony offense." R.C. 2929.13(B)(1)(a)(i). Because Warren

had been convicted of multiple prior felony offenses as an adult, the trial court was not required to sentence him to community control.

{¶17} In addition, R.C. 2929.13(B)(1)(b) gives trial courts discretion to impose a prison sentence if any of the criteria in R.C. 2929.13(B)(1)(b)(i)-(xi) apply. One such criterion is that "The offender committed the offense while under a community control sanction, while on probation, or while released from custody on a bond or personal recognizance." R.C. 2929.13(B)(1)(b)(xi). Warren was under a community control sanction when he committed the instant offense.

{¶18} The ten-month prison sentence Warren received is within the six to twelve-month range for the charge. See R.C. 2929.14(A)(5). The trial court considered the principles and purposes of felony sentencing and the sentencing factors. R.C. 2929.11 and R.C. 2929.12. The trial court properly imposed jail-time credit. The trial court properly notified Warren that upon his release from prison he would be subject to a discretionary period of post-release control of up to three years and explained the ramifications of violating post-release control. See R.C. 2967.28(C). Thus, there are no errors regarding Warren's sentence.

{¶19} In sum, because the record contains no apparent errors, counsel is permitted to withdraw and the judgment of the trial court is affirmed.

Waite, J., concurs.

Robb, P. J., concurs.