[Cite as *State v. DeWitt*, 2010-Ohio-1595.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

State of Ohio — Court of Appeals No. H-09-010

Appellee — Trial Court No. CRI-2008-1209

v.

Kurtis J. Dewitt — **DECISION AND JUDGMENT**

Appellant — Decided: April 9, 2010

* * * * *

Timothy H. Dempsey, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} Appellant, Kurtis J. DeWitt, appeals from a judgment of the Huron County Court of Common Pleas, wherein he pled guilty to one count of burglary, a violation of R.C. 2911.21(A)(1) and 2911.12(A)(3), a felony of the third degree.

{¶ 2} Appellant was originally arrested and indicted on one count of burglary in violation of R.C. 2911.12(A)(2), a felony of the second degree, one count of safecracking in violation of R.C. 2911.31(A), a felony of the fourth degree, one count of theft in

violation of R.C. 2913.02(A)(1), a felony of the fifth degree, and one count of tampering with evidence in violation of R.C. 2921.12(A), a felony of the third degree.

{¶ 3} The incident leading to these charges occurred when appellant, who claimed that his part in these offenses was as the "wheel man," drove a motor vehicle to a veteran's group home. When he and/or either one or two other individuals arrived at the home, he and/or the other individual(s) entered the residence, went into the office area, and broke into file cabinets, stealing approximately $1,682.

{¶ 4} After he was indicted on the offenses listed above, appellant entered into a plea agreement with appellee, the state of Ohio, under which he agreed to plead guilty to the one count of burglary. The court below, after holding a plea hearing, found appellant guilty of the violation of R.C. 2911.12(A)(1). After holding a sentencing hearing, the lower court sentenced DeWitt to five years in prison and ordered him to pay a fine of $1,000 and restitution. Appellant was then appointed counsel for the purposes of this appeal.

{¶ 5} Appellant's counsel, however, submitted a motion to withdraw pursuant to *Anders v. California* (1967), 386 U.S. 738. Under *Anders*, if counsel, after a conscientious examination of the case, determines it to be wholly frivolous, he or she must advise the court of the same and request permission to withdraw. Id. at 744. This request must be accompanied by a brief identifying anything in the record that could arguably support the appeal. Id. Counsel must also furnish his or her client with a copy of the brief and request to withdraw and allow the client sufficient time to raise any

matters that he chooses. Id. Once these requirements are satisfied, the appellate court is required to conduct a full examination of the proceedings held below to determine if the appeal is indeed frivolous. Id. If the appellate court determines that the appeal is frivolous, it may grant counsel's request to withdraw and dismiss the appeal without violating any constitutional requirements or may proceed to a decision on the merits if state law so requires. Id.

{¶ 6} In the case before us, appointed counsel for appellant satisfied the requirements set forth in *Anders*. Although notified, appellant never raised any matters for our consideration. Accordingly, we shall proceed with an examination of the arguable assignments of error set forth by counsel for appellant, and of the entire record below, in order to determine whether this appeal lacks merit and is, therefore, wholly frivolous.

{¶ 7} Counsel for appellant asserts, in compliance with the mandates of *Anders*, two potential assignments of error:

{¶ 8} "I. The trial court violated the purpose and principles of sentencing under ORC [sic] 2929.11 and 2929.19 (B)(2)(d) by sentencing appellant to the maximum sentence for a single offense."

{¶ 9} "II. The trial court violated the purpose and principles of sentencing under ORC [sic] 2929.13 (C) and 2929.14 (C) by sentencing appellant to the maximum sentence for a single offense."

{¶ 10} In his potential Assignment of Error No. I, appellant complains that the trial court erred because it failed to provide reasons for imposing a maximum sentence for a single offense as required by R.C. 2929.19(B)(2)(d). In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-0856, paragraph one of the syllabus, the Ohio Supreme Court found R.C. 2929.19(B)(2)(d) unconstitutional and severed this statute from the statutory scheme. See, also, *State v. Bell*, 6th Dist. No. -07-1127, 2008-Ohio-358, ¶ 5. Therefore, a trial court is no longer required to set forth reasons for imposing a maximum sentence. *Foster* at paragraph seven of the syllabus. As to R.C. 2929.11, the sentencing court "is merely required to 'consider' the principles and purposes of sentencing set forth in R.C. 2929.11 and the statutory guidelines and factors set forth in R.C. 2929.12." *State v Strong*, 6th Dist. No. WD-08-009, 2009-Ohio-1528, ¶ 49. Here the trial court expressly stated that it considered the principles and purposes of sentencing under R.C. 2929.11 and the seriousness and recidivism factors in R.C. 2929.12. Therefore, appellant's potential Assignment of Error No. I lacks merit.

{¶ 11} Appellant's possible Assignment of Error No. II claims that the trial court violated the principles and purposes of sentencing under R.C. 2929.13(C) and 2929.14(C) by imposing the maximum sentence for a single offense. He claims that because there is no presumption for prison time for a felony of a third degree, the common pleas court was required "to give him a lesser prison term or even probation."

{¶ 12} Under R.C. 2929.13(A)(3), the prison terms that can be imposed upon a defendant found guilty of a third degree felony are one, two, three, four, or five years.

R.C. 2929.13(C) provides, in material part, that in determining whether to impose a prison term as a sanction for a third degree felony, "the sentencing court shall comply with the purposes and principles of sentencing" set forth in R.C. 2929.11 and 2929.12. We have already noted that the trial court complied with R.C. 2929.11 and 2929.12 in sentencing appellant. Thus, the only issue to be resolved under this potential assignment of error is whether the trial court erred in by failing to comply with R.C. 2929.14(C).

{¶ 13} In *Foste*r, the Ohio Supreme Court also found R.C. 2929.14(C)[1] unconstitutional and excised it from the sentencing statute. Id. at ¶ 97. See, also, *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 26. Thus, after *Foster*, "trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing * * * maximum sentences." Id. at ¶ 100. Accordingly, appellant's Assignment of Error No. II is without merit.

{¶ 14} Moreover, our thorough review of the record indicates that there is no issue for appeal and said appeal is, therefore, wholly frivolous. The judgment of the Huron County Court of Common Pleas is affirmed. Appellant is ordered to pay the cost of this appeal pursuant to App.R. 24(A).

JUDGMENT AFFIRMED.

---

[1]This section authorized the imposition of the longest sentence set forth in R.C. 2929.14(A) only if the trial judge found that the offender committed the worst form of the offense, for offenders who posed the greatest likelihood of committing future crimes, or if certain major drug offenders, and upon certain repeat violent offenders.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE