

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

State of Ohio

Court of Appeals No. WM-10-018

Appellee

Trial Court No. 10 CR 111

v.

Dawn D. Robbins

DECISION AND JUDGMENT

Appellant

Decided: August 19, 2011

* * * * *

Mark S. Tipton, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This appeal is from the September 27, 2010 judgment of the Williams County Court of Common Pleas, which sentenced appellant, Dawn Robbins, who was convicted by the court after acceptance of her guilty plea, to a charge of illegal assembly or possession of chemicals for the manufacture of drugs, a third degree felony in violation of R.C. 2925.041(A). Appellant's court-appointed counsel now requests leave

of court to withdraw as counsel under the procedures set forth in *Anders v. California* (1967), 386 U.S. 738.

{¶ 2} Pursuant to the guidelines set forth in *Anders v. California*, supra, appellant's court-appointed counsel has filed an appellate brief and motion to withdraw as counsel. He mailed a copy of the brief and motion to appellant and informed her that she had a right to file her own brief, but she did not do so.

{¶ 3} Appellant's counsel states in his motion that he thoroughly reviewed the record in this case and concluded that the trial court did not commit any error prejudicial to appellant. However, in compliance with the *Anders* requirements, appellant's counsel has submitted a brief setting forth the following potential assignment of error and his conclusion that the assignment of error would be frivolous:

{¶ 4} "The Court of Common Pleas abused its discretion in sentencing Defendant to more than the minimum mandatory term of two years for violation of Ohio Revised Code Section 2925.041."

{¶ 5} Appellant was indicted on seven counts of violating R.C. 2925.041(A) on seven separate days within a period of time from March to December 2009. She entered a guilty plea to the first count, and the prosecutor entered a nolle prosequi as to the remaining counts. Pursuant to R.C. 2929.14(A)(3), appellant could have been sentenced to one, two, three, four, or five years. Furthermore, because the offense was illegal assembly or possession of chemicals for the manufacture of methamphetamine, R.C. 2925.041(C)(1) mandated a prison term of no less than two years for a first-time

offender. At the sentencing hearing, the court stated that it had " * * * considered the principles and purposes of sentencing under [R.C.] 2929.11 and ha[d] balanced the seriousness and recidivism factors, as provided in [R.C.] 2929.12." Appellant also pointed out to the court that this was her first felony offense. The court then sentenced appellant to three years of imprisonment without indicating a reason for imposing more than the minimum sentence.

{¶ 6} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 26, the Ohio Supreme Court set forth the standard for reviewing trial court sentencing decisions after *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. Appellate courts "must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law." *Id.* at 4. Once the " * * * first prong of the standard is satisfied, the trial court's decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard." *Id.* Thus, the trial court's sentence will not be overturned absent a finding that it was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. It appears that the Ohio Supreme Court intended to implicitly overrule its prior holding in *City of Toledo v. Reasonover* (1965), 5 Ohio St.2d 22, paragraph one of the syllabus, followed in *State v. Hill* (1994), 70 Ohio St.3d 25, 29, that the appellate court will generally not consider whether the trial court abused its discretion in sentencing " * * * when the sentence is authorized by statute and is within the statutory limits."

{¶ 7} In this case, we agree with appellant's counsel that there is no arguable merit to a claim that appellant's sentence is clearly and convincingly contrary to law. The trial court expressly stated that it did consider the principles and purposes of sentencing under R.C. 2929.11, balanced the seriousness and recidivism factors, as required by R.C. 2929.12, and imposed a sentence with the statutory range. Following *State v. Kalish*, supra, we must next consider whether the trial court abused its discretion by imposing more than the minimum sentence upon a first-time offender. *State v. Rossback*, 6th Dist. No. L-09-1300, 2011-Ohio-281, ¶ 86.

{¶ 8} The provisions of R.C. 2929.14(B), which required that the minimum sentence be imposed unless the court found certain factors existed to support a harsher sentence, was extracted from the statute by *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶ 99. Therefore, there no longer is a preference for imposing the minimum sentence for first-time offenders. *State v. Weatherspoon*, 6th Dist. No. OT-09-008, 2009-Ohio-6671, ¶ 14¹ and *State v. Shugart*, 7th Dist. No. 08 MA 238, 2009-Ohio-6807, ¶ 24. Cf. *State v. Bowshier*, 2d Dist. No. 08-CA-58, 2009-Ohio-3429, ¶ 11. We consider only whether there were facts in the record upon which the trial court could have based its decision to impose more than the minimum sentence.

{¶ 9} No express reasons for the sentence were set forth by the trial court. However, the facts of the case justified a harsher sentence. Appellant had been charged

¹Although this decision used the language "less than the minimum," this was a typographical error and should have read "more than the minimum."

with seven counts of illegal assembly or possession of chemicals for the manufacture of drugs over a nine-month period. Even though a plea bargain was reached between the parties dismissing six of those counts, the court was free to consider appellant's entire record of arrests even if the charges did not result in conviction. *State v. Hutton* (1990), 53 Ohio St.3d 36, 43; *State v. Cooley* (1989), 46 Ohio St.3d 20, 35; *State v. Burton* (1977), 52 Ohio St.2d 21, 23, superseded on other grounds by state constitutional amendment as stated in *State v. Smith* (1997), 80 Ohio St.3d 89, 103; and *State v. Mayor*, 7th Dist. No. 07 MA 177, 2008-Ohio-7011, ¶ 16. The fact that appellant was charged with seven counts of the same crime was sufficient to justify a harsher sentence.

Furthermore, appellant failed to point to anything else in the record to indicate that the trial court acted unreasonably, arbitrarily, or unconscionably by imposing the sentence.

{¶ 10} Finally, we have fully examined the record in this case and determined that an appeal would be wholly frivolous. *Anders*, supra, at 744. Our review of the record does not disclose any errors by the trial court which would justify a reversal of the judgment. Therefore, we find this appeal to be wholly frivolous. Counsel's request to withdraw as appellate counsel is found well-taken and is hereby granted. Having found that the trial court did not commit error prejudicial to appellant, the judgment of the Williams County Court of Common Pleas is hereby affirmed. Pursuant to App.R. 24, appellant is hereby ordered to pay the court costs incurred on appeal. The clerk is

ordered to serve all parties, including the defendant if he or she has filed a brief, with notice of this decision.

JUDGMENT AFFIRMED.

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.

Thomas J. Osowik, P.J.

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

JUDGE

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.