[Cite as *State v. Luciano*, 2015-Ohio-1264.]

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

State of Ohio — Court of Appeals No. WD-14-023

Appellee — Trial Court No. 2013CR0390

v.

William Luciano, Jr. — **DECISION AND JUDGMENT**

Appellant — Decided: March 31, 2015

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, Thomas A. Matuszak and David T. Harold, Assistant Prosecuting Attorneys, for appellee.

Chad D. Huber, for appellant.

* * * * *

JENSEN, J.

{¶ 1} Defendant-appellant, William Luciano, Jr., appeals the April 17, 2014 judgment of the Wood County Court of Common Pleas sentencing him to an eight-year prison term following his conviction of drug trafficking. His appointed counsel filed a

"no-merit brief" and requested leave to withdraw as counsel, pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). For the reasons that follow, we grant counsel's motion and affirm the trial court judgment.

I. Background

{¶ 2} The relevant facts underlying this appeal are not in dispute. Luciano was indicted on August 8, 2013, on four counts involving trafficking and possession of marijuana, possessing criminal tools, and money laundering. This followed the discovery of 907 pounds of marijuana in a motor home that Luciano and a number of accomplices planned to transport from Chicago, Illinois to Rochester, New York on July 17, 2013. Luciano entered a plea of guilty to one amended count of trafficking in marijuana, in violation of R.C. 2925.03(A)(2) and (C)(3)(g), a felony of the second degree. After a thorough Crim.R. 11(C) hearing, the court accepted the plea, finding that Luciano entered it knowingly, voluntarily, and intelligently.

{¶ 3} On March 21, 2014, Luciano was sentenced to a mandatory prison term of eight years, a $7,500 fine, a two-year suspension of his driver's license, costs of the trial proceeding, and a mandatory three-year term of postrelease control. Luciano appealed, and pursuant to *Anders*, his counsel offers the following potential assignments of error for our review:

> A. THE TRIAL COURT ERRED, IN PREJUDICE TO THE APPELLANT, BY MAKING FINDINGS THAT WERE CLEARLY AND CONVINCINGLY UNSUPPORTED BY THE RECORD, AND

IMPOSING A SENTENCE THAT IS CLEARLY AND CONVINCINGLY CONTRARY TO LAW.

B. THE TRIAL COURT ERRED, TO THE PREJUDICE OF THE APPELLANT, BY FAILING TO ORDER A PRESENTENCE INVESTIGATION REPORT AND/OR REVIEW THAT REPORT BEFORE SENTENCING.

C. THE TRIAL COURT ERRED IN APPLYING THE MANDATORY DRIVER'S LICENSE SUSPENSION UNDER R.C. 2925.03 BECAUSE THAT STATUTE VIOLATES APPELLANT'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.

D. APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, RESULTING IN APPELLANT ENTERING A GUILTY PLEA THAT WAS NOT KNOWING AND VOLUNTARY.

II. Law and Analysis

{¶ 4} *Anders* and *State v. Duncan*, 57 Ohio App.2d 93, 385 N.E.2d 323 (8th Dist.1978), set forth the procedure to be followed by appointed counsel who desires to withdraw for want of a meritorious, appealable issue. In *Anders*, the United States Supreme Court held that if counsel, after a conscientious examination of the case,

determines it to be wholly frivolous, he should so advise the court and request permission to withdraw. *Anders* at 744. This request, however, must be accompanied by a brief identifying anything in the record that could arguably support the appeal. *Id*. Furthermore, counsel must also furnish his client with a copy of the brief, request to withdraw from representation, and allow the client sufficient time to raise any matters that he chooses. *Id*.

{¶ 5} Once these requirements are satisfied, the appellate court must then conduct a full examination of the proceedings held below to determine if the appeal is indeed frivolous. If the appellate court determines that the appeal is frivolous, it may grant counsel's request to withdraw and dismiss the appeal without violating constitutional requirements, or it may proceed to a decision on the merits if state law so requires. *Id*. Should the appellate court find that the record supports any arguable claims, it should appoint new appellate counsel. *Penson v. Ohio*, 488 U.S. 75, 76, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988).

{¶ 6} Luciano appeals his conviction and sentence to this court through appointed counsel. Appellant's counsel has stated that following a thorough examination of the record, he finds no non-frivolous appealable issues and requests permission to withdraw. Counsel followed the requirements of *Anders* and provided a copy of his request to withdraw and a brief to his client which outlines potential assignments of error with sufficient time to raise his own arguments. Luciano did not file a pro se brief. Accordingly, this court will examine the potential assignments of error counsel identified

and review the entire record below to determine whether this appeal lacks merit and is, therefore, wholly frivolous.

A. First Potential Assignment of Error

{¶ 7} In appellant's first potential assignment of error, counsel suggests as error that the trial court made findings of fact that were unsupported by the record and imposed a sentence that is clearly and convincingly contrary to law.

{¶ 8} As an appellate court, we review felony sentences pursuant to R.C. 2953.08(G)(2). *State v. Goings*, 6th Dist. Lucas No. L-13-1103, 2014-Ohio-2322, ¶ 20. We may increase, modify, or vacate and remand a judgment only if we clearly and convincingly find that: (1) "the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant," or (2) "the sentence is otherwise contrary to law." R.C. 2953.08(G)(2).

{¶ 9} R.C. 2925.03(C)(3)(g) provides that:

> [I]f the amount of the drug involved equals or exceeds forty thousand grams, trafficking in marihuana is a felony of the second degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the second degree.

{¶ 10} Appellant's trafficking conviction arises from the discovery of 907 pounds of marijuana—well in excess of the 40,000-gram threshold contained in R.C. 2925.03(C)(3)(g). R.C. 2929.14(A)(2) provides for a maximum prison term of eight

years for a second degree felony. Due to the quantity of marijuana involved and the mandatory nature of the sentence, the trial court was not required to make any specific findings before imposing the maximum term. That aspect of the trial court's sentence is, therefore, not contrary to law.

{¶ 11} Appellant argues that the trial court did not properly consider the R.C. 2929.11 purposes and principles of sentencing or the R.C. 2929.12 seriousness and recidivism factors in crafting his sentence. R.C. 2929.13(D)(1) indicates that the considerations of public protection and offender punishment are presumed when imposing a mandatory sentence for a second degree felony. In any event, in the sentencing judgment entry, the court indicated that it had carefully reviewed "the record, all oral and written statements, the purposes and principles of sentencing, the seriousness and recidivism factors and any other factors that are relevant to achieving the purposes and principles of sentencing" in imposing Luciano's sentence. To the extent required, the court considered all necessary factors.

{¶ 12} Turning to the other sanctions imposed by the trial court, R.C. 2967.28(B) requires that a prison term for a second degree felony be followed by a term of postrelease control. A second degree felony that is not a sexual offense requires a term of three years. R.C. 2967.28(B)(2). The three-year term of postrelease control was, therefore, properly imposed and was not contrary to law.

{¶ 13} The financial sanctions of a $7,500 fine and court costs were also in accordance with Ohio law. R.C. 2925.03(D)(1) mandates that a fine be imposed upon a

second degree felony offender. R.C. 2929.18(A)(3) sets the maximum fine for a second degree felony at $15,000 and under R.C. 2929.18(B)(1), the trial court was required to impose a fine of at least one-half but no more than the maximum fine. The court's imposition of the mandatory $7,500 fine was well within the bounds of the law. In addition, the imposition of court costs is mandated by R.C. 2947.23(A)(1)(a) and the order that Luciano forfeit any claim to the property in Count 1 of the indictment was agreed upon by the parties.

{¶ 14} We find the first potential assignment of error not well-taken.

B. Second Potential Assignment of Error

{¶ 15} In his second potential assignment of error, counsel offers the argument that the trial court erred by not ordering a presentence investigation report and examining it before sentencing.

{¶ 16} Crim.R. 32.2 states: "In felony cases the court shall, and in misdemeanor cases the court may, order a presentence investigation report before imposing community control sanctions or granting probation." Both the Supreme Court of Ohio and this court have recognized that "a trial court need not order a presentence report * * * in a felony case when probation is not granted." *State v. Cyrus*, 63 Ohio St.3d 164, 166, 586 N.E.2d 94 (1992). *See also State v. Pheils*, 6th Dist. Wood No. WD-12-010, 2013-Ohio-2252, ¶ 21; *State v. Zimmerman*, 6th Dist. Sandusky No. S-11-007, 2012-Ohio-2813, ¶ 6.

{¶ 17} Here, the court was required by statute to order a prison term, thus probation or community control sanctions were unavailable. Therefore, the court was not

required to order a presentence investigation report. We find the second potential assignment of error not well-taken.

C. Third Potential Assignment of Error

{¶ 18} In his third potential assignment of error, counsel suggests that Luciano's Fourteenth Amendment Right to due process was violated by the trial court's two-year suspension of his driver's license.

{¶ 19} R.C. 2925.03(D)(2) provides that "[t]he court shall suspend the driver's or commercial driver's license or permit of the offender in accordance with division (G) of this section." R.C. 2925.03(G) states "the court shall suspend for not less than six months or more than five years the driver's or commercial driver's license or permit of any person who is convicted of or pleads guilty to any violation of this section * * *."

{¶ 20} In *State v. Fonseca*, 106 Ohio App.3d 115, 119, 665 N.E.2d 685 (6th Dist.1995), we rejected the appellant's argument that suspension of his driver's license violated his right to due process. We explained:

> The Ohio legislature may reasonably have intended R.C. 2925.03(M) [prior version of R.C. 2925.03(D)(2)] to impede the transportation and distribution of illegal drugs. Suspending the license of drug offenders is reasonably related to this proper legislative goal. Consequently, the requirements of due process are satisfied.

See also State v. Harper, 6th Dist. Lucas No. L-95-275, 1996 WL 283680, *1 (May 31, 1996); *State v. Gamble*, 107 Ohio App.3d 496, 500, 669 N.E.2d 57 (1st Dist.1995).

{¶ 21} We, therefore, find no error in the trial court's suspension of Luciano's driver's license. We find the third potential assignment of error not well-taken.

D. Fourth Potential Assignment of Error

{¶ 22} In his fourth and final potential assignment of error, counsel offers that Luciano did not receive effective assistance of counsel and therefore did not knowingly, voluntarily, and intelligently enter his guilty plea.

{¶ 23} The standard of review is laid out in *State v. Sutton*, 6th Dist. Lucas No. L-13-1061, 2013-Ohio-5629, ¶ 18:

> In order to prevail on a claim of ineffective assistance of counsel, an appellant must show that counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied on as having produced a just result. *State v. Shuttlesworth*, 104 Ohio App.3d 281, 287, 661 N.E.2d 817 (7th Dist.1995). To establish ineffective assistance of counsel, an appellant must show "(1) deficient performance of counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the proceeding's result would have been different." *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶ 204, citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80

L.Ed.2d 674 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Sanders*, 94 Ohio St.3d 150, 151, 761 N.E.2d 18 (2002).

{¶ 24} Where a conviction is based on guilty or no contest pleas, the prejudice element requires the defendant to show that there is a reasonable probability that, but for counsel's errors, he would not have entered a plea. (Citations omitted.) *State v. Trevino*, 6th Dist. Lucas No. L-08-1394, 2009-Ohio-6983, ¶ 16.

{¶ 25} After an extensive review of the record, we are unable to identify any indicia of ineffective assistance of counsel. At the plea hearing, the trial court asked Luciano (1) if his attorneys went over the plea papers with him; (2) whether his attorneys answered his questions regarding the plea agreement; and (3) if he was satisfied with his attorneys. To all three questions Luciano answered "yes." Further, there is nothing in record to suggest that Luciano's plea was involuntary or that he did not understand the consequences of the plea. Luciano indicated at all times that he was aware of the consequences of his plea, that he understood the rights he was waiving and the potential sentence, and that he still wished to enter the plea. The record shows that Crim.R. 11(C) was properly followed and Luciano made an intelligent, knowing, and voluntary acceptance of the plea agreement. There is nothing in the record to suggest that but for counsel's errors, Luciano would not have entered a guilty plea.

{¶ 26} We find the fourth potential assignment of error not well-taken.

E. Our Review of the Record

{¶ 27} Finally, as required under *Anders*, we have undertaken our own independent examination of the record to determine whether any issue of arguable merit is presented for appeal. We have found none. Accordingly, we find this appeal is without merit and wholly frivolous.

III. Conclusion

{¶ 28} Having found no error in the trial court, we affirm the April 17, 2014 judgment of the Wood County Court of Common Pleas and grant counsel's motion to withdraw. Pursuant to App.R. 24, Luciano is ordered to pay the costs of this appeal. The clerk is ordered to serve all parties 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.

Mark L. Pietrykowski, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE