[Cite as *State v. Love*, 2017-Ohio-5688.]

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

State of Ohio — Court of Appeals No. E-16-024

Appellee — Trial Court No. 2011-CR-310

v.

Mendo Love — **DECISION AND JUDGMENT**

Appellant — Decided: June 30, 2017

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, Mary Ann Barylski and Aaron Lindsey, Assistant Prosecuting Attorneys, for appellee.

Timothy H. Dempsey, for appellant.

Mendo Love, pro se.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal brought by appellant from the judgment of the Erie County Court of Common Pleas. In this case, appellant was indicted on November 10, 2011, by the Erie County Grand Jury on six counts: Count 1, a violation of R.C. 2925.03(A)(2),

preparation of drugs for sale, Oxymorphone, a second-degree felony; Count 2, a violation of R.C. 2925.11(A), aggravated possession of drugs, Oxymorphone, a felony of the second degree; Count 3, a violation of R.C. 2925.03(A)(2), preparation of drugs for sale, Oxymorphone, a second-degree felony; Count 4, a violation of R.C. 2925.11(C)(1)(c), aggravated possession of drugs, Oxycodone, a felony of the second degree; Count 5, a violation of R.C. 2925.03(A)(2), preparation of drugs for sale, Oxycodone, a felony of the third degree; and Count 6, a violation of R.C. 2925.11(C)(1)(b), aggravated possession of drugs, Oxycodone, a third-degree felony.

{¶ 2} Pursuant to a negotiated plea agreement, on February 11, 2013, appellant pled guilty to Count 2, Count 4 and Count 6, each as amended, in violation of R.C. 2925.11(C)(1)(b), aggravated possession of drugs, each a felony of the third degree. As part of the plea agreement, the record reflects that all parties would agree to the imposition of a three-year prison term. The remaining three counts of the indictment were dismissed.

{¶ 3} Appellant was told in open court to return on February 25, 2013, at 10:00 a.m. for sentencing. No presentence report was ordered at appellant's request.

{¶ 4} Appellant failed to appear for sentencing. On February 25, 2013, there were representations made to the court that appellant had car trouble and would be late. Thereafter, sentencing was set in the afternoon. When the case was called at 2:47 p.m., counsel for appellant represented to the court that appellant would not appear. Thereafter, a warrant was issued for appellant's arrest.

{¶ 5} Appellant was ultimately apprehended in Pennsylvania on February 9, 2016. Thereafter, he was sentenced on February 25, 2016, fortuitously exactly three years to the day from the original sentencing date.

{¶ 6} At sentencing, the court inquired as to appellant's prior criminal convictions. The prosecution articulated that appellant had a 1992 misdemeanor conviction for a controlled substance, a 1994 conviction for unarmed robbery for which appellant served a two-year prison sentence and a 16-day sentence on a domestic violence conviction in 2008.

{¶ 7} Further, defendant admitted that he had no excuse for not appearing at sentencing other than that he "lost track of time" as a result of numerous personal issues.

{¶ 8} Thereafter, appellant was sentenced to 30 months on each count, a six-month license suspension and imposed a mandatory fine of $5,000 on each count. The court also found, pursuant to R.C. 2929.14(C)(4), that it was necessary to protect the public from future crimes and to punish appellant for his activity and further found that due to appellant's history of criminal conduct, that the imposition of consecutive sentences was not disproportionate to the seriousness of his conduct and the danger that he poses. The court then ordered that the sentences imposed in Counts 4 and 6 be served concurrently, but ordered Count 2 to be served consecutive to the other counts.

{¶ 9} Counsel was appointed to represent him in pursuing an appeal from this sentence.

{¶ 10} Appointed counsel has filed a 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). Under *Anders*, if, after a conscientious examination of the case, counsel concludes the appeal to be wholly frivolous, he should so advise the court 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.* In addition, counsel must provide appellant with a copy of the brief and request to withdraw, and allow appellant sufficient time to raise any additional matters. *Id*. Once these requirements are satisfied, the appellate court is required to conduct an independent examination of the proceedings below to determine if the appeal is indeed frivolous. *Id.* If it so finds, the appellate court may grant counsel's request to withdraw, and decide the appeal without violating any constitutional requirements. *Id.*

{¶ 11} In this case, appellant's appointed counsel has satisfied the requirements set forth in *Anders, supra*. This court further notes that appellant did file a pro se brief on his own behalf in this appeal. Appellee state of Ohio has filed a responsive brief.

{¶ 12} Accordingly, this court shall proceed with an examination of the potential assignments of error set forth by counsel as well as the arguments presented by appellant in his brief.

{¶ 13} We have reviewed and considered the entire record from below, including the transcript of all proceedings and journal entries and original papers from the Erie County Court of Common Pleas, as well as the briefs filed by counsel and appellant.

Upon this review we will determine if this appeal lacks merit and is, therefore, wholly frivolous.

{¶ 14} Counsel refers to several possible, but ultimately indefensible assignments of error:

> I. The trial court erred by violating the appellant's constitutional rights pursuant to Criminal Rule during the plea hearing.
>
> II. Appellant received ineffective assistance of counsel during the plea hearing and the sentencing hearing.

{¶ 15} When a defendant enters a guilty plea, his appellate issues are limited to attacking the voluntary, knowing, and intelligent nature of the plea and "may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *State v. Barnett*, 73 Ohio App.3d 244, 596 N.E.2d 1101 (2d Dist.1991). A guilty or no contest plea must be made knowingly, intelligently, and voluntarily to be valid under both the United States and Ohio Constitutions. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). Therefore, before accepting a plea of guilty or no contest to a felony offense, Crim.R. 11(C)(2) requires that a trial court conduct a hearing with a personal colloquy with the defendant, make specific determinations and give specific warnings required by Crim.R. 11(C)(2)(a) and (b), and notify the defendant of the constitutional rights listed in Crim.R. 11(C)(2)(c) that he would be waiving. *State v. Acosta*, 6th Dist. Wood No. WD-15-066, 2016-Ohio-5698.

{¶ 16} The transcript of the February 11, 2013 plea hearing establishes that the trial court engaged in a full and complete colloquy with appellant concerning his pleas as required by Crim.R. 11(C)(2).

{¶ 17} He further acknowledged that the court was not required to follow any recommended sentence. Appellant also acknowledged that he was aware of the possible sentences and fines associated with a third-degree felony. The court also informed appellant that the charges carried a presumption for prison under the sentencing statutes.

{¶ 18} Therefore, the first proposed assignment of error is found not well-taken.

{¶ 19} Counsel's next proposed assignment of error concerns ineffective assistance of counsel during the plea hearing and the sentencing hearing. It is well-established that claims of ineffective assistance of counsel are reviewed under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to establish ineffective assistance of counsel, an accused must show: (1) that his trial counsel's performance was so deficient that the attorney was not functioning as the counsel guaranteed by the Sixth Amendment of the United States Constitution, and (2) that counsel's deficient performance prejudiced the defense. *Id*. at 687. Prejudice is shown where there is a reasonable probability that a different result would have occurred in the case but for the counsel's unprofessional errors. *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus. The Supreme Court defines a reasonable probability as "a probability sufficient to undermine

confidence in the outcome." *Strickland* at 694. *State v. Chaney*, 6th Dist. Lucas No. L-14-1161, 2015-Ohio-3293.

{¶ 20} We have thoroughly reviewed the record of the proceedings below and can find nothing to establish any deficiency in the performance of appellant's trial counsel. Therefore, this proposed assignment of error is without merit.

{¶ 21} In appellant's own merit brief he presents five separate assignments of error. His first and second assignments of error are:

> I. The trial court breached the parties' plea agreement by imposing a prison term greater than the three years.
>
> II. The trial court abused its discretion by imposing a sentence contrary to law under R.C. 2953.08(D)(1).

We shall consider these assignments jointly as they are related.

{¶ 22} As we previously noted, the trial court is not bound by the terms of a plea agreement. Further, the court forewarned appellant at the plea hearing of February 11, 2013. Under these circumstances, a court does not abuse its discretion by failing to follow that recommendation. *State v. Warith*, 6th Dist. Lucas No. L-02-1240, 2003-Ohio-6367. This court has further held that when a defendant fails to appear at sentencing, the state no longer is required to comply with the plea agreement. *State v. Payton*, 6th Dist. Erie Nos. E-09-070, E-09-071, 2010-Ohio-5178. Furthermore, in this instance, there is nothing in the record to indicate that the state was requesting a greater

sentence than it had agreed to three years prior. Therefore, appellant's first and second assignments of error are found to be without merit.

{¶ 23} Appellant's third assignment of error states:

> III. The trial court abused its discretion and committed plain error in violation of Crim.R. 52(A) and (B) for failing to inform appellant that he could withdraw plea before sentencing.

{¶ 24} Appellant essentially presents the same arguments as his first two assignments, alleging prosecutorial misconduct and asserting that he should have been informed by the trial court that he could have withdrawn his plea before sentencing. While referencing Crim.R. 51(A) and (B), neither of these rules establish some right to be informed of the ability to seek leave to withdraw a plea. This assignment is meritless.

{¶ 25} Appellant's fourth assignment of error states:

> IV. Appellant was deprived of effective assistance of counsel in violation of his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution, at sentencing.

We have previously considered this argument as one of appellant's counsel's proposed assignments and found it to be without merit.

{¶ 26} Appellant's final assignment of error presented to the court is:

V. The trial court erred in ordering consecutive sentences in counts two, four, and six in this case as counts two, four, and six are allied offenses.

{¶ 27} We have recently held in *State v. Henderson*, 6th Dist. WD-16-012, 2017-Ohio-2900, ¶ 33-34:

Recently, the Supreme Court of Ohio expounded upon its holding in *Johnson*, stating:

As a practical matter, when determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must ask three questions when a defendant's conduct supports multiple offenses: (1) Were the offenses dissimilar in import or significance? (2) Were they committed separately? and (3) Were they committed with separate animus or motivation? An affirmative answer to any of the above will permit separate convictions. The conduct, the animus, and the import must all be considered. *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 31.

We review the trial court's merger determination under R.C. 2941.25 de novo. *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 28.

{¶ 28} In this case before the court, the record establishes that the controlled substances involved in Count 2 of the indictment was Oxymorphone. The controlled substances of Count 4 was Oxycodone packaged in a sealed Ziploc bag described as round blue tablets. In contrast, the substance of Count 6 was Oxycodone, found in a Ziploc bag but described as oblong white tablets.

{¶ 29} At sentencing, the court did not merge the counts of possession of Oxycodone under Counts 4 and 6 but did run the sentences concurrent to each other.

{¶ 30} However, since the substance involved with Count 2 was Oxymorphone, a different substance than either Counts 4 or 6, the trial court had discretion to impose the Count 2 sentence with the remaining counts.

{¶ 31} Therefore, this assignment of error presented by appellant is not found well-taken.

Conclusion

{¶ 32} We have accordingly conducted an independent examination of the record pursuant to *Anders* and have further considered counsel's proposed assignments of error and appellant's own assignments presented to the court in his own brief. The motion of appointed counsel to withdraw is granted, and this appeal is found to be wholly frivolous.

{¶ 33} The judgment of the Erie County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24. The clerk is ordered to serve all parties, including the defendant, 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.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, P.J. _____
CONCUR.
JUDGE