[Cite as *State v. Wagoner*, 2017-Ohio-7997.]

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

State of Ohio | Court of Appeals No. L-17-1096

Appellee | Trial Court No. CR0201603141

v.

Naomi R. Wagoner | **DECISION AND JUDGMENT**

Appellant | Decided: September 29, 2017

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Mark T. Herr, Assistant Prosecuting Attorney, for appellee.

Karin L. Coble, for appellant.

* * * * *

JENSEN, P. J.

{¶ 1} Appellant, Naomi Wagoner, appeals the judgment of the Lucas County Court of Common Pleas, wherein she was sentenced to two years incarceration for

robbery in violation of R.C. 2911.02(A)(2) and (B), a felony of the second degree. Finding no error, we affirm.

Potential Assignments of Error

{¶ 2} Appellant sets forth the following potential assignments of error:

1. Appellant's plea was unknowing and involuntary.
2. The trial court, in imposing incarceration for the offense, failed to properly consider the relevant sentencing statutes and the sentence is not supported by the record.

Facts

{¶ 3} On November 16, 2016, appellant approached a teller at a bank within Kroger supermarket. Appellant handed the teller a note which stated, 'Be quiet. Only the money from the drawer. No bottom ones or I will shoot.'

{¶ 4} The teller handed appellant approximately $984.00 in response, and appellant fled the scene on foot. Appellant and the money were tracked within a mile from Kroger, and appellant was apprehended by the police.

{¶ 5} On November 23, 2016, an indictment was filed charging appellant with robbery in violation of R.C. 2911.02(A)(2) and (B).

{¶ 6} On December 5, 2016, appellant pled not guilty by reason of insanity but, on March 8, 2016, she withdrew the plea of not guilty and pled guilty to the robbery. At the plea hearing, the trial court engaged in an extensive colloquy to ensure appellant was intelligently, knowingly and voluntarily entering in the guilty plea.

{¶ 7} The court explained appellant's constitutional rights and the consequences of entering in her plea. After a thorough explanation, appellant was asked if she understood and would "freely and voluntarily" give up her rights in light of the nature of the charge, the maximum penalty involved and the effect of the plea. The court also asked if she felt it was in her best interest to do so, all to which she replied in the affirmative.

{¶ 8} Appellant then confessed to the facts as presented by the prosecution. More specifically, the record reflects she stated: "I went in. I was— gave her a note and she took the money out of the drawer, and I was so intoxicated it was like— I didn't even remember walking there." She followed with:

> I walked about seven or eight blocks. I just took it out of my pants and put it into my purse, and I just was walking, and I just really didn't care much at that time. I didn't even know where I was going or nothing. It was a bad situation.

{¶ 9} The court reviewed the plea form, which was signed by appellant, her counsel, the prosecutor, and eventually the judge. Review of the form reveals appellant was fully informed in writing of her rights and the consequences and effect of the guilty plea. The plea agreement pertinently states: "The Court finds the defendant was advised of all constitutional rights, understanding nature of charge, effect of plea, maximum penalty involved, and made a knowing, intelligent, and voluntary waiver of those rights pursuant to Crim.R. 11[.]"

{¶ 10} The court accepted the plea, and at the March 8, 2016 plea hearing the court stated:

THE COURT: Let the record reflect Ms. Wagoner was here in open court with her attorney where she was advised of her Constitutional rights. I find she made a knowing, intelligent, and voluntary waiver of those rights. I also find she understands the nature of the charge, the effect of the plea, and the maximum penalty which can be imposed.

Finding all this voluntary the Court accepts the plea and enters a finding of guilty to the charge of robbery 2911.02(A)(2) and (B), a felony of the second degree.

{¶ 11} The court then requested a presentence investigation and set sentencing for March 22, 2017. At sentencing, the court imposed upon appellant two years incarceration and three years mandatory postrelease control. The judgment was journalized March 27, 2017, and appellant now appeals.

Anders Brief

{¶ 12} On June 13, 2017, appellant's counsel filed a request to withdraw pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Counsel asserted, after thoroughly reviewing the transcript of proceedings in the trial court and the applicable case law, no meritorious assignments of error could be presented. Counsel did file a brief arguing two potential assignments of error. The state also filed an *Anders* brief, concurring with the conclusion of appellant's counsel that there was no arguable basis for a valid assignment of error and urging this court to permit counsel to withdraw.

{¶ 13} The procedure to be followed by appointed counsel who desires to withdraw for want of a meritorious, appealable issue is set forth in *Anders*, as well as

State v. Duncan, 57 Ohio App.2d 93, 385 N.E.2d 323 (8th Dist.1978). *See also* 6th Dist.Loc.App.R. 10(G).

{¶ 14} In *Anders*, the U.S. Supreme Court found if counsel, after a conscientious examination of the case, determines it to be wholly frivolous, counsel should so advise the court and request permission to withdraw. *Anders* 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 furnish the client with a copy of the brief and request to withdraw and allow the client sufficient time to raise any matters the client so chooses. *Id*. Once the requirements are fulfilled, the appellate court must conduct a full examination of the proceedings and decide if the appeal is indeed frivolous. *Id*. If the appellate court determines the argument is frivolous, it may grant counsel's request to withdraw and dismiss the appeal or it may proceed to a decision on the merits. *Id*.

{¶ 15} Here, appellant's counsel satisfied the requirements set forth in *Anders*. Appellant has not filed a *pro se* brief or otherwise responded to counsel's request to withdraw. Accordingly, we shall proceed with review of the possible errors set forth by appellant's counsel as well as the entire record below to determine if this appeal lacks merit and is, therefore, wholly frivolous.

Appellant's Charge and Conviction

{¶ 16} Appellant was charged and convicted under R.C. 2911.02(A)(2) and (B), which in relevant part state:

(A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall* * * (2) Inflict, attempt to inflict, or threaten to inflict physical harm on another[.]

(B) Whoever violates this section is guilty of robbery. A violation of division (A)(1) or (2) of this section is a felony of the second degree.

Review of Appellant's Plea

{¶ 17} Initially we address whether appellant entered in her guilty plea intelligently, knowingly and voluntarily.

{¶ 18} Crim.R. 11 states in pertinent part:

(A) Pleas. A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no contest.* * *

(B) Effect of guilty or no contest pleas. With reference to the offense or offenses to which the plea is entered: (1) The plea of guilty is a complete admission of the defendant's guilt.* * *

(3) When a plea of guilty or no contest is accepted pursuant to this rule, the court, * * * shall proceed with sentencing under Crim.R. 32.

(C) Pleas of guilty and no contest in felony cases.* * * (2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum

penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

See Crim.R. 11(A)-(C).

{¶ 19} The underlying purpose of Crim.R. 11(C)(2) is to ensure the offender has the information needed to make a voluntary and intelligent decision regarding whether to plead guilty. *See State v. Contrearus*, 6th Dist. Lucas No. L-12-1114, 2014-Ohio-996, ¶ 6, citing *State v. Ballard*, 66 Ohio St.2d 473, 479-480, 423 N.E.2d 115 (1981). With respect to constitutional rights enunciated in Crim.R. 11(C)(2)(c), a trial court must strictly comply with the dictates of that rule. *State v. Colbert*, 71 Ohio App.3d 734, 737, 595 N.E.2d 401 (11th Dist.1991). A trial court, however, need not use the exact language found in that rule when informing a defendant of his constitutional rights. *Ballard*,

supra, paragraph two of the syllabus. Rather, a trial court must explain those rights in a manner reasonably intelligible to the offender. *Id*.

{¶ 20} For nonconstitutional rights, scrupulous adherence to Crim.R. 11(C) is not required. *Contrearus* at ¶ 7. Rather, the trial court must substantially comply, provided no prejudicial effect occurs before a guilty plea is accepted. *State v. Stewart*, 51 Ohio St.2d 86, 93, 364 N.E.2d 1163 (1977). "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." *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990).

{¶ 21} Here, and based on our review of the plea form and transcript of the plea hearing, we find the trial court complied with Crim.R. 11(C) in accepting appellant's guilty plea. The record supports that the court explained appellant's constitutional rights in a reasonably intelligible manner. Appellant was explicitly informed of and waived her right to jury trial, to confront witnesses, to have compulsory process, against self-incrimination, and to require proof of the crime beyond a reasonable doubt. *See* Crim.R. 11(C)(2)(b) and (c).

{¶ 22} Furthermore, review of the plea form and transcript of the plea hearing supports that the court substantially complied with Crim.R. 11(C) with regard to appellant's nonconstitutional rights. Specifically, appellant was questioned regarding her understanding of the nature of the charge, informed with regard to the maximum penalty of eight years for the charge, and was informed on how she would be subject to three years mandatory community control once the plea was accepted.

{¶ 23} We therefore find that an extensive colloquy occurred and, under the totality of the circumstances, appellant subjectively understood the implications of her plea and the rights she was waiving. The trial court accepted appellant's plea and properly proceeded to sentencing. Accordingly, the first potential assignment of error is meritless.

Review of the Imposed Sentence

{¶ 24} We next address whether the sentence was supported by the record and whether the court failed to properly consider sentencing statutes.

{¶ 25} R.C. 2953.08(G)(2) provides that an appellate court may increase, reduce, modify, or vacate a sentence and remand for resentencing where there is clear and convincing evidence the record does not support the sentencing court's findings under R.C. 2929.13(B) or (D), 2929.14(B)(2)(e) or (C)(4), or 2929.20(I), or the sentence is otherwise contrary to law. *See State v. Ahlers*, 6th Dist. Erie No. E-14-005, 2015-Ohio-131, ¶ 18.

{¶ 26} A sentence is not clearly and convincingly contrary to law where the trial court considered the purposes and principles of sentencing under R.C. 2929.11, along with the seriousness and recidivism factors under R.C. 2929.12, and imposed a sentence within the statutory range. *State v. Craig*, 6th Dist. Wood No. WD-14-061, 2015-Ohio-1479, ¶ 9.

{¶ 27} R.C. 2929.14(A)(2) provides that the statutory sentencing range for a second-degree felony is two to eight years incarceration.

{¶ 28} Here, appellant confessed to and pled guilty to robbery under R.C. 2911.02(A)(2). Based on the facts as articulated by the prosecution and appellant, we are satisfied the plea and confession amounted to a complete admission of appellant's guilt.

{¶ 29} As a result, the court sentenced appellant to two years incarceration. This imposed jail term was within the statutory range for a second-degree felony. *See* R.C. 2911.02(B); *see also* R.C. 2929.14(A)(2). We note that the minimum sentence was imposed upon appellant despite her extensive criminal record which, at the time of sentencing, included 7 felonies and over 90 misdemeanors. Therefore, we conclude the court imposed a fair sentence that was amply supported by the record and not contrary to law.

{¶ 30} Further, and with respect to sentencing criteria, R.C. 2929.11(A) provides that "[t]he overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes[.]"

{¶ 31} In order to comply with the mandates of R.C. 2929.11, a trial court must impose a sentence that is "reasonably calculated to achieve the two overriding purposes of felony sentencing * * * commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders." *See* R.C. 2929.11(B).

{¶ 32} In carrying out its obligations to impose a sentence consistent with the purposes and principles of sentencing, the trial court must weigh the factors indicating that the offender's conduct is more serious than conduct normally constituting the offense

under R.C. 2929.12(B) against those factors indicating that the offender's conduct is less serious than conduct normally constituting the offense under R.C. 2929.12(C). Further, the court must weigh the factors contained in R.C. 2929.12(D) indicating the likelihood that the offender will commit future crimes against the factors contained in R.C. 2929.12(E) indicating that the offender is not likely to commit future crimes.

{¶ 33} A sentencing court is not required to use any specific language or make specific findings to demonstrate that it considered the applicable sentencing criteria. *See State v. Arnett*, 88 Ohio St.3d 208, 215, 724 N.E.2d 793 (2000); *State v. Thebeau*, 6th Dist. Ottawa No. OT-14-017, 2014-Ohio-5598, ¶ 16.

{¶ 34} Here, the court expressly stated in open court that it considered the sentencing criteria under R.C. 2929.11 and 2929.12, as follows: "The court has considered the record, oral statements, victim statements, pre-sentence investigation report, and the principles and purposes of sentencing under 2929.11. I have also balanced the seriousness and recidivism factors under 2929.12."

{¶ 35} The sentencing entry also reflects as such, stating: "The Court has considered the record, oral statements, any victim impact statement and presentence report prepared, as well as the principles and purposes of sentencing under R.C. 2929.11, and has balanced the seriousness, recidivism and other relevant factors under R.C. 2929.12."

{¶ 36} Based on the trial court's statements at sentencing, the language contained in the sentencing entry, appellant's extensive criminal record, the seriousness of the crime, as well as our finding that the sentence imposed was amply supported by the facts

in the record, we conclude the court complied with its obligations under R.C. 2929.11 and 2929.12. The second potential assignment of error is meritless.

Frivolousness of Appeal

{¶ 37} Last is our examination of the record to determine whether this appeal is wholly frivolous. *Anders*, 386 U.S. at 744, 87 S.Ct. 1396, 18 L.Ed.2d 493. Review of the record reveals no error by the court which would justify our reversal of the judgment. We find this appeal to be frivolous, and counsel's request to withdraw is found well-taken and is granted.

Conclusion

{¶ 38} The judgment of the Lucas County Court of Common Pleas is hereby affirmed. Appellant is ordered to pay costs of this appeal pursuant to App.R. 24. 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.

Thomas J. Osowik, J. ____________________ JUDGE

James D. Jensen, P.J.

Christine E. Mayle, J. ____________________ JUDGE
CONCUR.

____________________ JUDGE