[Cite as *State v. Cooper*, 2012-Ohio-3298.]

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

State of Ohio — Court of Appeals No. OT-11-022

Appellee — Trial Court No. 10-CR-133

v.

Howard R. Cooper — **DECISION AND JUDGMENT**

Appellant — Decided: July 20, 2012

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney, and
Andrew M. Bigler, Assistant Prosecuting Attorney, for appellee.

Nancy L. Jennings, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} This is an *Anders* appeal. Appellant, Howard Cooper, appeals from the judgment of the Ottawa County Court of Common Pleas finding him guilty of attempted abduction in violation of R.C. 2923.02 and 2905.02(A)(2), a felony of the fourth degree,

and possession of criminal tools in violation of R.C. 2923.24, a felony of the fifth degree, and sentencing him to 30 months in prison. Because we hold that appellant's plea of guilty to the charges was knowing, intelligent, and voluntary, and because we hold that the sentence is not contrary to law nor an abuse of discretion, we affirm.

A. Facts and Procedural Background

{¶ 2} Appellant was indicted by the Ottawa County Grand Jury on counts of aggravated burglary in violation of R.C. 2911.11(A)(2), a felony of the first degree, kidnapping in violation of R.C. 2905.01(A)(3), a felony of the second degree, and possession of criminal tools in violation of R.C. 2923.24(A), a felony of the fifth degree. Appellant originally pleaded not guilty by reason of insanity.

{¶ 3} Later, appellant and the state entered into a plea agreement whereby appellant would change his plea, and plead guilty to the second count amended to attempted abduction in violation of R.C. 2923.02 and 2905.02(A)(2), a felony of the fourth degree, and the third count, possession of criminal tools in violation of R.C. 2923.24, a felony of the fifth degree. In exchange, the state agreed to dismiss the first-degree aggravated burglary count, and recommend that appellant receive a one-year prison sentence.

{¶ 4} The trial court accepted the plea, and referred the matter to the probation department for the completion of a presentence investigation report. Following completion of the report, a sentencing hearing was held, at which the trial court sentenced appellant to the maximum terms of 18 months in prison on the attempted abduction count

and 12 months in prison on the possession of criminal tools count. The trial court further ordered those terms to be served consecutively for a total prison term of 30 months.

{¶ 5} Appellant has timely appealed.

B. *Anders* Requirements

{¶ 6} 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 or she 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 the appellant with a copy of the brief and request to withdraw, and allow the 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.*

{¶ 7} In her brief, counsel asserts two potential assignments of error:

I. THE TRIAL COURT ERRED WHEN ACCEPTING DEFENDANT'S PLEA.

II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IMPOSING SENTENCE UPON DEFENDANT.

{¶ 8} Appellant has not filed a pro se brief in the matter. In addition, the state has not filed a brief.

II. Analysis

A. The Trial Court Complied with Crim.R. 11(C)(2) when Accepting Appellant's Guilty Plea

{¶ 9} In the first potential assignment of error, counsel raises the issue of whether appellant's plea was knowing, intelligent, and voluntary.

{¶ 10} "[U]nless a plea is knowingly, intelligently, and voluntarily made, it is invalid." *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 25. "To ensure that pleas conform to these high standards, the trial judge must engage the defendant in a colloquy before accepting his or her plea." *Id.* at ¶ 26. In this case, the trial judge was bound by the requirements of Crim.R. 11(C)(2). *See State v. Nero*, 56 Ohio St.3d 106, 564 N.E.2d 474 (1990).

{¶ 11} Crim.R. 11(C)(2) provides,

> 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.

{¶ 12} Upon our review of the transcript from the plea change hearing, we conclude that the trial court thoroughly addressed all of the requirements of Crim.R. 11(C)(2). Appellant assured the court that he was thinking clearly and that no one threatened him or made any promises regarding the plea. Appellant articulated the charges to which he was pleading and the possible penalties for each. In addition, the trial court, inter alia, informed appellant of the effect of pleading guilty, and ensured that appellant understood the rights he was waiving by his plea, including his rights to a jury trial at which he could not be compelled to testify and his declining to testify could not be held against him, to have the state prove the elements of the offenses beyond a reasonable doubt, to cross-examine witnesses, and to be able to subpoena witnesses on his behalf.

Therefore, based upon the detailed colloquy undertaken at the plea change hearing, we hold that appellant's plea was knowingly, intelligently, and voluntarily entered.

{¶ 13} Accordingly, the first potential assignment of error is not well-taken.

B. Appellant's Sentence Complied with the Law and was not an Abuse of Discretion

{¶ 14} In the second potential assignment of error, counsel raises the issue of whether the court's imposition of the maximum sentence was proper.

{¶ 15} In reviewing a felony sentence, we apply the two-step analysis set forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 4: "First, [we] 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. If this first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard." Abuse of discretion "implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 16} Here, appellant's sentence falls within the statutory range of penalties provided by R.C. 2929.14, and "the trial court now has the discretion and inherent authority to determine whether a prison sentence within the statutory range shall run consecutively or concurrently." *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983, 887 N.E.2d 328, ¶ 19. Further, the record indicates that the trial court considered the principles and purposes of sentencing in R.C. 2929.11, the sentencing factors in R.C.

2929.12, and the sentencing guidelines in R.C. 2929.13. Thus, the sentence is not clearly and convincingly contrary to law, thereby satisfying the first prong of *Kalish*.

{¶ 17} Turning to the second prong, we hold that the trial court did not abuse its discretion by sentencing appellant to serve a 30-month prison term. The court noted the "very, very serious set of circumstances that occurred," which included appellant going to his ex-girlfriend's house in the middle of the night, with a gun, to make her listen to him. The conversation lasted several hours, during which appellant openly brandished the gun at times, and would not allow her to leave. In addition to these circumstances, the court also noted appellant's mental health concerns, and that appellant stated during the presentence investigation that he did not like the way his medication made him feel, and that upon his release from prison he would discontinue taking the medication. Further, nothing else in the record suggests that the trial court's choice of this sentence was unreasonable, arbitrary, or unconscionable. Therefore, the second prong of *Kalish* is satisfied.

{¶ 18} Counsel additionally presents the argument that appellant is entitled to specific performance of the recommended sentence in his plea agreement. Here, however, the state fully performed its promises in the plea agreement by dismissing the aggravated burglary count, amending the kidnapping count to attempted abduction, and recommending a one-year prison sentence. Thus, the state did not breach the plea agreement even though the trial court sentenced appellant to 30 months in prison. *See State v. Walker*, 6th Dist. No. L-98-1210, 1999 WL 278120 (May 7, 1999) ("the trial

court [is] not required to accept the prosecutor's sentencing recommendation negotiated as part of the plea agreement"[1]).

{¶ 19} Accordingly, the second potential assignment of error is not well-taken.

III. Conclusion

{¶ 20} This court, as required under *Anders*, has undertaken our own examination of the record to determine whether any issue of arguable merit is presented for appeal. We have found none. Accordingly, we grant the motion of appellant's counsel to withdraw.

{¶ 21} The judgment of the Ottawa 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 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.

[1] We think it important to note that appellant was reminded of this on several occasions during the plea change hearing.

Arlene Singer, P.J. _______________________________
JUDGE

Thomas J. Osowik, J.
____
Stephen A. Yarbrough, J. JUDGE
CONCUR.
____
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.