[Cite as *State v. Shannon,* 2017-Ohio-9344.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2017-T-0012**
- vs -	:	
MARQUES JAMES SHANNON,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 2015 CR 000863.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, *Ashleigh Musick,* Assistant Prosecutor, and *Gabriel M. Wildman,* Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481 (For Plaintiff-Appellee).

Desirae D. DiPiero Chieffo, 7330 Market Street, Youngstown, OH 44512 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Marques James Shannon, appeals from the judgment of the Trumbull County Court of Common Pleas, resentencing him and denying his Motion to Withdraw Plea. The issue before this court is whether an appeal is wholly frivolous where a defendant claims his guilty plea was involuntary when he had expressed concerns about entering the plea and the court advised him of his rights and

options surrounding entry of that plea. For the following reasons, we affirm the decision of the court below.

{¶2} On November 24, 2015, Shannon was indicted by the Trumbull County Grand Jury for the following: Felonious Assault (Count One), a felony of the second degree, in violation of R.C. 2903.11(A)(2) and (D)(1)(a), with a pregnant victim specification pursuant to R.C. 2941.1423; two counts of Domestic Violence (Counts Two and Three), felonies of the third degree, in violation of R.C. 2919.25(A) and (D)(4); Domestic Violence (Count Four), a felony of the fifth degree, in violation of R.C. 2919.25(A) and (D)(5); and Resisting Arrest (Count Five), a misdemeanor of the second degree, in violation of R.C. 2921.33(A) and (D).

{¶3} On March 3, 2016, a Finding on Guilty Plea to the Amended-Indictment was filed. At the plea hearing, the State moved to dismiss the pregnant victim specification, as well as Count Three, in exchange for a plea of guilty to the remaining counts and an agreed sentence of three years in prison. The court reviewed the rights Shannon would be waiving by pleading guilty, which Shannon indicated he understood. When asked if he was satisfied with counsel, Shannon stated "not fully," citing arguments with counsel.

{¶4} The following exchange took place:

> Shannon: I don't want to go to trial because [counsel] said it was a 90 percent chance he'd lose. So I'm forced to take three years. I got four children to get out here to. I'm getting ready to go to school.
>
> The Court: If you don't want to take this plea, we'll go to trial on Monday.
>
> Shannon: I've got to take three years. I don't want to go to trial and get up to 15 years. That's what I'm facing, right? That's what you said?

The Court: I think it's 14.

Shannon: 14. I don't want to do that.

{¶5} The court indicated that it wanted Shannon to understand his rights and that no one was threatening him. Shannon said, "I don't want to go to trial" and stated he understood his counsel's advice. When asked if he was threatened or promised anything to enter the plea, he responded "No. Other than the threat of 14 years." The trial court explained: "That's hanging out there, though, because that's the maximum sentence." The court then reviewed the elements of the crimes and the potential maximum penalties.

{¶6} Shannon indicated that he voluntarily signed the plea agreement, explaining "I had to sign it" and "take the three years." The court found Shannon guilty of Counts One, Two, Four, and Five, the presentence investigation was waived, and the matter proceeded to sentencing. When asked if he wanted to speak prior to the entry of his sentence, Shannon indicated "I'm innocent." The court twice asked if he would like to withdraw his plea and go to trial, to which Shannon responded negatively, reiterating counsel's advice that he would lose at trial. The court sentenced him to three years in prison on Count One, three years for Count Two, one year for Count Four, and 60 days for Count Five, all to run concurrent for a three-year sentence. This verdict was memorialized in a March 3, 2016 Entry on Sentence. A subsequent untimely request to appeal that judgment was denied by this court on June 27, 2016. *State v. Shannon*, 11th Dist. Trumbull No. 2016-T-0039, 2016-Ohio-4602.

{¶7} On August 11, 2016, Shannon filed a Motion to Withdraw Plea Pursuant to Criminal Rule 32.1, in which he argued various grounds to withdraw his plea and that certain offenses should have been merged.

{¶8} The trial court issued an Amended Entry on Sentence on November 7, 2016. It noted that a resentencing hearing had been held on October 4, 2016 to correct a merger issue. It found Counts One, Two and Four "shall merge for the purposes of sentencing," the State elected to proceed on Count One, and the court sentenced Shannon to three years in prison for that count, to be served concurrently with a 90-day sentence for Count Five. The court also denied the Motion to Withdraw.

{¶9} Shannon appealed from that Entry. Appellate counsel filed Shannon's appellate brief, pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Counsel represented that she had found "no prejudicial errors," and requested permission to withdraw on the basis that the appeal is frivolous. Pursuant to *Anders*, "if counsel finds his client's case to be wholly frivolous, counsel should advise the court and request permission to withdraw; * * * the request to withdraw must be accompanied by a brief referring to anything in the record that might arguably support the appeal; [and] * * * time must be allowed for the client to raise any points he chooses." *State v. Spears*, 11th Dist. Ashtabula No. 2013-A-0027, 2014-Ohio-2695, ¶ 5, citing *Anders* at 744. The appellate court must then conduct "a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Anders* at 744.

{¶10} On August 9, 2016, this court granted Shannon 30 days to file a submission in support of his appeal, "if he so chooses." Appellate counsel's request to withdraw was held in abeyance.

{¶11} In her brief, appellate counsel raises one alleged error: "Pursuant to *Anders v. California*, and after conscientious examination of the record, appellate counsel concludes that there is not an appealable issue in the case at bar and Appellant's appeal should be dismissed." Counsel concludes that there were no prejudicial errors committed.

{¶12} Shannon raises several errors in a brief he filed on his own behalf:

{¶13} "[1.] The trial court committed prejudicial error by involving itself in the plea bargaining process and threatening appellant with the maximum sentence if he exercised his right to trial by jury.

{¶14} "[2.] Trial court erred by accepting an invalid guilty plea, therefore, defendant[']s plea is invalid and was not entered voluntarily, knowingly and intelligently and trial court abused [its] discretion when it sentenced defendant contrary to law according to R.C. 2941.25(a) resulting in an invalid guilty plea. (sic)

{¶15} "[3.] Trial court made plain error by coercing defendant to plead guilty to a sentence that was contrary to law according to R.C. 2941.25(a) violating procedural rights under Ohio law, state and federal constitutions. (sic)

{¶16} "[4.] Defendant appellant received ineffective trial counsel in violation of his due process and constitutional rights, therefore defendant[']s convictions, guilty plea and sentence should be void, vacated and set aside. This case should be dismissed as well due to failure of meeting speedy trial date with a legal and valid conviction and sentence."

{¶17} To conduct a review of this matter, we will focus primarily on Shannon's alleged errors, as they overlap the areas reviewed by appellate counsel.

{¶18} In his first assignment of error, Shannon contends that the trial court improperly coerced him into entering a plea, rendering it involuntary.

{¶19} "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea." Crim.R. 32.1. The phrase "manifest injustice" has been "variously defined," however, "it is clear that under such standard, a postsentence withdrawal motion is allowable only in extraordinary cases." *State v. Smith*, 49 Ohio St.2d 261, 264, 361 N.E.2d 1324 (1977). "A motion made pursuant to Crim.R. 32.1 is addressed to the sound discretion of the trial court, and the good faith, credibility and weight of the movant's assertions in support of the motion are matters to be resolved by that court." *Id.* at paragraph two of the syllabus.

{¶20} "When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution." (Citation omitted.) *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 7. We find no evidence that Shannon's plea was entered involuntarily, by "coercion" from the judge or otherwise.

{¶21} There is no question that Shannon was advised of the consequences of entering a plea, the rights he was waiving by entering such a plea, and that the court explained the charges and the potential maximum penalties, as required by Crim.R. 11(C)(2). Shannon signed the plea agreement indicating his satisfaction and acceptance of the deal reached with the State. The main question that arises is based

on Shannon's equivocation entering the plea and his argument that the trial court improperly convinced him to enter an involuntary plea.

{¶22} In support of his contention that he was coerced or forced into pleading guilty, Shannon points to his various statements at the plea hearing that he felt he "had" to take the deal. A review of the entire hearing and the testimony outlined above, viewed in context, reveals that Shannon agreed to accept the deal because he was aware he faced a greater penalty if he went to trial. His various statements that he "had" to sign the plea agreement were nothing more than acknowledgements that he was choosing what he believed to be the better of two possible negative outcomes he faced. When a defendant is "faced with the stark reality of either pleading guilty pursuant to the plea bargain the state offered, or going to trial," the fact that he has been "openly presented with unpleasant alternatives" does not render his guilty plea involuntary. *State v. Gibbs*, 4th Dist. Washington No. 96CA44, 1997 WL 341908, *3 (June 16, 1997), citing *Bordenkircher v. Hayes*, 434 U.S. 357, 365, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978); *State v. Cruse*, 10th Dist. Franklin Nos. 01AP-1074 and 01AP-1075, 2002-Ohio-3259, ¶ 50. Shannon's statements indicated he believed the plea benefited him and he only later decided otherwise. A defendant is not entitled to withdraw his plea because he has a change of heart. *State v. Montgomery*, 11th Dist. Ashtabula Nos. 2016-A-0057 and 2016-A-0058, 2017-Ohio-1414, ¶ 16.

{¶23} While Shannon contends that the court influenced his decision or interjected itself into the proceedings, this is incorrect. Again, a review of the hearing reveals that the court merely asked questions to ensure that the plea was entered voluntarily. On multiple occasions where Shannon indicated reservations with accepting the plea, the court informed him that, if he did not want to enter a plea, he

could go to trial. The court allowed Shannon to confer with counsel as necessary at the plea hearing. The court asked if Shannon had been coerced into entering the plea, to which he answered "No. Other than the threat of 14 years." The court again explained that this was a potential maximum sentence, a duty it held under Crim.R. 11. This was not coercive behavior. *U.S. ex rel. Elksnis v. Gilligan*, 256 F.Supp. 244 (S.D.N.Y.1966), which Shannon cites for the proposition that a judge should not wield his influence to convince a defendant to enter a plea, is irrelevant, given that it involved a judge interjecting himself into a plea bargaining process. Here, the court did not participate in the plea bargaining, but merely did its duty by ensuring that Shannon understood the possible penalties and by repeatedly emphasizing his right to reject the plea deal and go to trial.

{¶24} The first assignment of error is without merit.

{¶25} In his second assignment of error, Shannon argues that his amended sentence was improperly ordered eight months after the speedy trial deadline had expired.

{¶26} Shannon was first sentenced on March 3, 2016, and was resentenced on November 7, 2016, due to an error relating to merger. Shannon fails to explain how the date of sentencing implicates his speedy trial rights. Ohio speedy trial law dictates the time within a defendant must be brought to trial. R.C. 2945.71 and 2941.401. Shannon entered a valid plea of guilty before the speedy trial deadline, which was extended via his consent, expired. The court entered a finding of guilt on that date. His conviction was never vacated and the resentencing is unrelated to his speedy trial rights.

{¶27} Shannon argues in both his second and third assignments of error that the trial court erred when it imposed separate convictions and sentences for offenses that

should have merged. However, he provides no argument in favor of this contention. The offenses were merged at the resentencing hearing and Shannon was ultimately only sentenced for Count One and Count Five (to which merger did not apply), receiving the exact three-year sentence agreed to in the plea bargain. Thus, his argument that it was plain error to fail to merge these convictions at the initial sentencing is moot.

{¶28} To the extent that Shannon may imply within these assignments of error that the court's failure to apply the merger doctrine impacted his plea, he provides no specific argument or case law to support this position. Crim.R. 11(C) does not require the defendant to be advised of possible merger of the offenses at sentencing. The argument that a failure to advise a defendant of merger renders his plea involuntary has been rejected by other courts. *See State v. Wozniak*, 10th Dist. Franklin No. 95APA03-345, 1993 WL 835051, *6-7 (May 23, 1993). Further, Shannon still faced a large potential prison sentence even if the offenses did merge and he does not demonstrate that he would have rejected the plea if the court had advised him about the merger doctrine.

{¶29} Within his third assignment of error, Shannon also raises various factual allegations, many outside of the record, in support of his contention that he did not commit the offenses. This is irrelevant given that he entered a guilty plea and he also did not dispute the explanation of the crime as presented by the State at the plea hearing.

{¶30} The second and third assignments of error are without merit.

{¶31} In his fourth assignment of error, Shannon argues that trial counsel was ineffective for various reasons that related to the plea deal and this justified allowing him to withdraw his plea.

{¶32} To demonstrate ineffective assistance of counsel, a defendant must prove "(1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding." *State v. Madrigal*, 87 Ohio St.3d 378, 388-389, 721 N.E.2d 52 (2000), citing *Strickland v. Washington*, 466 U.S. 668, 687-688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In the context of a guilty plea, prejudice is demonstrated by a showing that "there is a reasonable probability that, but for counsel's error, the defendant would not have pled guilty." *State v. DelManzo*, 11th Dist. Lake No. 2009-L-167, 2010-Ohio-3555, ¶ 33.

{¶33} Shannon first argues that counsel failed to visit him in jail to review his case and also describes how they "urged" him to sign the deal on several occasions. To the extent that these arguments relate to matters outside of the record, they cannot be considered in the present proceedings. *State v. Coleman,* 85 Ohio St.3d 129, 134, 707 N.E.2d 476 (1999). Similarly, Shannon's criticisms about appellate counsel's performance are also not properly before the court at this stage.

{¶34} Relating to Shannon's contentions that counsel was ineffective for encouraging him to take a plea deal, and, thus, the trial court should have allowed him to withdraw his plea, there is no evidence in the record that they acted inappropriately. As noted above, they helped him secure a favorable deal which avoided a potentially greater prison sentence. It has been held that "an attorney's advice to take a plea deal is not ineffective assistance of counsel." (Citation omitted.) *State v. Sturgill*, 12th Dist. Clermont No. CA2014-09-066, 2015-Ohio-1933, ¶ 20. This court has rejected arguments that a plea was involuntary in similar cases when a defendant was "urged"

by counsel to take a plea but no evidence of coercion was present in the record. *State v. Pough*, 11th Dist. Trumbull No. 2010-T-0117, 2011-Ohio-3630, ¶ 36-37.

{¶35} Shannon also argues that trial counsel was ineffective for failing to raise the merger and speedy trial arguments outlined above. Since these arguments are either meritless or did not result in a prejudicial outcome for Shannon, they do not provide grounds for reversal.

{¶36} The fourth assignment of error is without merit.

{¶37} Based on the foregoing review, we conclude the instant appeal is wholly frivolous. The judgment of the Trumbull County Court of Common Pleas is affirmed and counsel's motion to withdraw is granted. Costs to be taxed against appellant.

THOMAS R. WRIGHT, J., concurs in judgment only with Concurring Opinion,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

THOMAS R. WRIGHT, J., concurs in judgment only with Concurring Opinion.

{¶38} Generally, to meet the requirements of Crim.R. 11(C)(2)(a), a trial court is required to inform a defendant of the maximum prison term for each count to which he pleads guilty, but not the aggregate maximum should those sentences run consecutively. *State v. Johnson*, 40 Ohio St.3d 130, 133-134, 532 N.E.2d 1295 (1988). Here, the trial court misinformed Shannon he was facing a maximum aggregate prison term of 12 years, when, due to merger, Shannon faced 8 years. When a trial court addresses an issue at a plea, not required under the rule, the plea is invalid when the

addressed information is incorrect and prejudicial. *State v. Oliver*, 6th Dist. Sandusky No. S-10-040, 2011-Ohio-5305, ¶12.

{¶39} Nevertheless, I affirm without further briefing because the merger issue is barred under res judicata as Shannon could have challenged this issue on direct appeal from his conviction. *State v. Lacking*, 10th Dist. Franklin Nos. 14AP-691 & 14AP-692, 2015-Ohio-1715, ¶13; *State v. Lusane*, 11th Dist. Portage No. 2016-P-0036, 2017-Ohio-1513, ¶12. I concur in judgment only.

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

{¶40} The majority finds this appeal is wholly frivolous based on *Anders v. California*, 386 U.S. 738 (1967). For the reasons stated, I respectfully dissent.

{¶41} It is this writer's position that this court should no longer accept motions to withdraw under *Anders.* The statutory right to appeal is set forth in R.C. 2953.08(A). I have argued, although in the minority, that a defendant has a right to appeal as a matter of right under the Ohio Constitution. *See e.g. State v. Christian*, 11th Dist. Trumbull No. 2013-T-0055, 2014-Ohio-4882, ¶22-24 (O'Toole, J., dissenting); *State v. Talley*, 11th Dist. Trumbull No. 2014-T-0098, 2015-Ohio-2816, ¶24 (O'Toole, J., dissenting). This writer's position regarding *Anders* has recently been adopted. *State v. Wilson*, 4th Dist. Lawrence No. 16CA12, 2017-Ohio-5772, ¶19, citing *Christian, supra*, at ¶22-24 (O'Toole, J., dissenting); *Talley, supra,* at ¶24 (O'Toole, J., dissenting).

{¶42} Our sister court, the Fourth District, aptly points out the criticisms of *Anders* by numerous courts throughout the country: (1) "Prejudice to client" (an *Anders* withdrawal prejudices the appellant, compromises the appeal, flags the case as without merit, and invites a perfunctory review) *Smith v. Robbins*, 528 U.S. 259, 281 (2000); *Mosley v. State*, 908 N.E. 2d 599, 608 (Ind.2009); *State v. Cigic*, 138 N.H. 313, 315 (1994); *Commonwealth v. Moffett*, 383 Mass. 201, 206 (1981); *State v. McKenney*, 98 Idaho 551, 552 (1977); *Gale v. United States*, 429 A.2d 177, 182 (D.C.1981); (2) "Counsel's Conflict" (the *Anders* procedure creates tension between counsel's duty to the client and to the court – counsel files a motion to withdraw arguing the appeal is frivolous as well as an *Anders* brief essentially arguing that it may not be) *Robbins, supra,* at 281-282; *Moffett, supra,* at 205-206; *McKenney, supra,* at 552-553; *Cigic, supra,* at 315; *State v. Korth*, 650 N.W.2d 528, 535 (S.D.2002); *Ramos v. State*, 113 Nev. 1081, 1083 (1997); *Lindsey v. State*, 939 So.2d 743, 747 (Miss.2005); *People v. Wende*, 25 Cal.3d 436, 441-442 (1979); *State v. Balfour*, 311 Or. 434 (1991); (3) "Role Reversal" (the *Anders* procedure forces the court to assume the role of counsel for the appellant, i.e., to scour the entire record looking for arguably meritorious issues on the client's behalf) *Huguley v. State*, 253 Ga. 709 (1985); *Cigic, supra,* at 315; *Gale, supra,* at 182; *Mosley, supra,* at 608; (4) "Burden on Judiciary" (overall *Anders* is cumbersome and inefficient – any saving of time and effort by counsel in preparing an *Anders* brief is offset by increased demands on the judiciary, which is placed in the precarious role of advocate) *Murrell v. People of the Virgin Islands*, 53 V.I. 534, 543 (2010); *McKenney, supra,* at 552; *Cigic, supra,* at 316; *Moffett, supra,* at 590-591; *Huguley, supra,* at 731; *State v. Gates*, 466 S.W.2d 681, 684 (Mo.1971); *Dixon v. State*, 152 Ind.App. 430 at 438 (1972), *Cline v. State*, 253 Ind. 264, 269-70; *Mosley, supra,* at 607-608; *U.S. v.*

Wagner, 103 F.3d 551, 552-553 (7th Cir.1996); *U.S. v. Youla*, 241 F.3d 296, 301 (3rd Cir.2001); *Wilson v. State*, 40 S.W.3d 192, 198 (Tex. App.2001); *State v. Lewis*, 291 N.W.2d 735, 737 (N.D.1980); *Gale, supra,* at 182; *State v. Trent*, 6th Dist. Erie No. E-07-039, 2009-Ohio-508, ¶16; *State v. Butts*, 112 Ohio App.3d 683, 686 (8th Dist.1996); *Christian, supra,* at ¶22-24 (O'Toole, J., dissenting); *Talley, supra,* at ¶24 (O'Toole, J., dissenting); and (5) "Lack of Uniformity" (there are concerns with the lack of nationwide uniform guidelines among the courts that follow the *Anders* procedure and Ohio appellate courts lack uniformity in the degree of scrutiny used in reviewing the record) *State v. Korth*, 650 N.W.2d 528, 533-536 (S.D.2002); *State v. Wright*, 4th Dist. Scioto Nos. 15CA3705, 15CA3706, 2016-Ohio-7795, ¶18; *State v. Lester*, 4th Dist. Vinton No. 12CA684, 2013-Ohio-2485, ¶3; *State v. Taylor*, 8th Dist. Cuyahoga No. 101368, 2015-Ohio-420, ¶15-20; *United States v. Wagner*, 103 F.3d 551, 552 (7th Cir.1996). *Wilson, supra,* at ¶10-22.

{¶43} Upon consideration, this court should take the following approach, as recently set forth by the Fourth District, adopting the Idaho rule: after counsel is appointed to represent a criminal defendant during appeal, we will not permit counsel to submit an *Anders* brief and withdraw solely on the basis that the appeal is frivolous but rather counsel will file a brief on the merits. *Wilson, supra,* at ¶23, citing *McKenney*, *supra*, 1214.

{¶44} Regarding this approach, the Fourth District further held:

{¶45} "We believe that the Idaho rule clearly satisfies the constitutional requirement of substantial equality and fair process referred to in *Anders* at 744. It also preserves the integrity of the attorney-client relationship and better serves the appellate court. The *Anders* procedure is inefficient, unduly burdensome on the court, and

potentially prejudicial to the defendant." (Parallel citations omitted.) *Wilson, supra,* at ¶24; *see also* ¶25-35 (regarding procedure, counsel's ethical concerns, and better approach.)

{¶46} Based on my prior dissenting opinions regarding *Anders* as well as the Fourth District's recent decision in *Wilson*, I respectfully dissent.