[Cite as *State v. Wright*, 2009-Ohio-4636.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 09 MA 1
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
BRUCE WRIGHT,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 07CR1241.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Attorney Paul Gains
Prosecuting Attorney
Attorney Ralph Rivera
Assistant Prosecuting Attorney
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For Defendant-Appellant:

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JUDGES:

Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: September 1, 2009

VUKOVICH, P.J.

¶{1} Defendant-appellant Bruce Wright appeals from his conviction and sentence in the Mahoning County Common Pleas Court of possession of crack cocaine, a violation of R.C. 2925.11(A)(C)(4)(a), a fifth degree felony. Appointed appellate counsel filed a no merit brief and requested leave to withdraw. A review of the case file reveals that there are no appealable issues. Therefore, the judgment of the trial court is affirmed and counsel is permitted to withdraw.

STATEMENT OF CASE

¶{2} On October 25, 2007, Wright was indicted for possession of crack cocaine, a violation of R.C. 2925.11(A)(C)(4)(a). Originally he entered a not guilty plea to the charge. However, on October 14, 2008, at a Crim.R. 11 plea hearing, he withdrew his not guilty plea and pled guilty to the charge. At the hearing the state indicated that at sentencing it would recommend community control instead of a jail term. The trial court accepted the plea and found him guilty. A sentencing hearing was held on December 22, 2008; Wright was sentenced to two years of community control with monthly reporting and random alcohol and drug testing. 12/22/08 J.E. He was also ordered to successfully complete the "Day Reporting Program" at the Community Corrections Association (CCA). 12/22/08 J.E. Wright timely appealed and appellate counsel filed a no merit brief and sought leave to withdraw.

ANALYSIS

¶{3} When appellate counsel seeks to withdraw and discloses that there are no meritorious arguments for appeal, the filing is known as a no merit or an *Anders* brief. See *Anders v. California* (1967), 386 U.S. 738. In this district, it has also been called a *Toney* brief. See *State v. Toney* (1970), 23 Ohio App.2d 203.

¶{4} In *Toney,* this court set forth the procedure to be used when counsel of record determines that an indigent's appeal is frivolous:

¶{5} "3. Where court-appointed counsel, with long and extensive experience in criminal practice, concludes that the indigent's appeal is frivolous and that there is no assignment of error which could be arguably supported on appeal, he should so

advise the appointing court by brief and request that he be permitted to withdraw as counsel of record.

¶{6} "4. Court-appointed counsel's conclusions and motion to withdraw as counsel of record should be transmitted forthwith to the indigent, and the indigent should be granted time to raise any points that he chooses, pro se.

¶{7} "5. It is the duty of the Court of Appeals to fully examine the proceedings in the trial court, the brief of appointed counsel, the arguments pro se of the indigent, and then determine whether or not the appeal is wholly frivolous.

¶{8} "* * *

¶{9} "7. Where the Court of Appeals determines that an indigent's appeal is wholly frivolous, the motion of court-appointed counsel to withdraw as counsel of record should be allowed, and the judgment of the trial court should be affirmed." Id. at syllabus.

¶{10} The *Toney* brief was filed by counsel on May 15, 2009. On May 26, 2009, this court informed Wright of counsel's *Toney* brief and granted him 30 days (until June 25, 2009) to file a written brief. 05/26/09 J.E. Wright did not file a pro se brief. Thus, we will proceed to independently examine the record to determine if the appeal is frivolous.

¶{11} Since Wright pled guilty he is only permitted to attack the voluntary, knowing, and intelligent nature of his 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. Spates,* 64 Ohio St.3d 269, 272, 1992-Ohio-130.

¶{12} Appellate counsel, in the *Toney* brief, raised the potential assignment of error: "The trial court failed to comply with the Crim.R. 11 colloquy." Counsel determined that there was no merit with the argument. However, in accordance with *Toney*, we must independently determine whether there is any merit with the argument; we must determine whether the plea was entered into voluntarily, knowingly and intelligently in accordance with Crim.R. 11.

¶{13} Crim.R. 11(C) provides that a trial court must make certain advisements prior to accepting a defendant's guilty plea to ensure that the plea is entered into knowingly, intelligently and voluntarily. These advisements are typically divided into

constitutional rights and nonconstitutional rights. The constitutional rights are: 1) a jury trial; 2) confrontation of witnesses against him; 3) the compulsory process for obtaining witnesses in his favor; 4) that the state must prove the defendant's guilt beyond a reasonable doubt at trial, and 5) that the defendant cannot be compelled to testify against himself. Crim.R. 11(C)(2)(c); *State v. Veney,* 120 Ohio St.3d 176, 2008-Ohio-5200, ¶19-21. The trial court must strictly comply with these requirements; if it fails to strictly comply, the defendant's plea is invalid. *Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, at ¶31; *State v. Ballard* (1981), 66 Ohio St.2d 473, 477. See, generally, *Boykin v. Alabama* (1969), 395 U.S. 238. See, also, *State v. Singh* (2000), 141 Ohio App.3d 137.

¶{14} The nonconstitutional rights are that: 1) the defendant must be informed of the nature of the charges; 2) the defendant must be informed of the maximum penalty involved, which includes an advisement on post-release control, if it is applicable; 3) the defendant must be informed, if applicable, that he is not eligible for probation or the imposition of community control sanctions, and 4) the defendant must be informed that after entering a guilty plea or a no contest plea, the court may proceed to judgment and sentence. Crim.R. 11(C)(2)(a)(b); *Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, at ¶10-13; *State v. Sarkozy*, 117 Ohio St.3dd 86, 2008-Ohio-509, ¶19-26 (indicating that post-release control is a nonconstitutional advisement); *State v. Aleshire*, 5th Dist. No. 2007-CA-1, 2008-Ohio-5688, ¶8 (stating that post-release control is a part of the maximum penalty). For the nonconstitutional rights, the trial court must substantially comply with Crim.R. 11's mandates. *State v. Nero* (1990), 56 Ohio St.3d 106, 108. "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." *Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, at ¶15 quoting *Nero*, 56 Ohio St.3d at 108. Furthermore, a defendant who challenges his guilty plea on the basis that the advisement for the nonconstitutional rights did not substantially comply with Crim.R. 11(C)(2)(a)(b) must also show a prejudicial effect, meaning the plea would not have been otherwise entered. *Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, at ¶15 citing *Nero*, 56 Ohio St.3d at 108.

¶{15} The trial court's advisement on the constitutional rights strictly complied with Crim.R. 11(C)(2)(c). Wright was informed that by pleading guilty he was waiving his right to a jury trial, to confront witnesses against him, to subpoena witnesses in his favor and to have the state prove at trial each and every element of the offense of possession of cocaine by proof beyond a reasonable doubt. 10/10/08 Plea Tr. 5-6. Lastly, as to the constitutional rights, he was informed that if he went to trial he could not be compelled to testify against himself and that by pleading guilty he was giving up that right. 10/10/08 Tr. 6. Wright indicated after the explanation of every right that he understood the right. 10/10/08 Tr. 5-6.

¶{16} Likewise, the trial court substantially complied with Crim.R. 11(C) in its advisement on the nonconstitutional rights. Wright was advised of the charge against him, possession of cocaine. 10/10/08 Plea Tr. 4. He was also correctly advised of the maximum penalty involved, twelve months in jail, three years of post-release control following the jail term, and a maximum fine of $2,500. 10/10/08 Plea Tr. 4, 7. See, also, R.C. 2929.14(A)(5) (stating the maximum term for a fifth degree felony is twelve months); R.C. 2929.18(A)(3)(e) (stating the maximum fine for a fifth degree felony is $2,500); R.C. 2967.28(C) (indicating that a fifth degree felony is subject to a three year term of post-release control). The trial court then told him that after accepting the plea it was permitted to proceed directly to sentencing. 10/10/08 Plea Tr. 4-5. Lastly, the trial court informed Wright that he was eligible for community control. 10/10/08 Plea Tr. 7.

¶{17} Furthermore, in addition to complying with all the Crim.R. 11 requisite constitutional and nonconstitutional mandates, the trial court asked whether anyone had threatened him into pleading guilty or if anyone had promised him anything to induce him into entering a guilty plea. Wright responded that no one had done either. The trial court also questioned Wright as to whether he was under the influence of drugs or alcohol. He responded that he was not. 10/10/08 Plea Tr. 6.

¶{18} Thus, considering all the above, we find that the plea colloquy complied with Crim.R. 11(C) and as such, the plea was intelligently, voluntarily, and knowingly entered.

¶{19} Our review now turns to sentencing. In Ohio, neither the defendant nor the prosecutor may appeal from the trial court's imposition of a sentence recommended by both parties that falls within the applicable statutory range. R.C. 2953.08(G); *State v. Baird*, 7th Dist. No. 06CO4, 2007-Ohio-3400, ¶13, citing *State v. Gray*, 7th Dist. No. 02BA26, 2003-Ohio-805, ¶10.

¶{20} We have previously held that when the same sentence is recommended by each party, even though it is not specified to be a jointly recommended sentence, it is a jointly recommended sentence. *Baird*, 7th Dist. No. 06CO4, 2007-Ohio-3400, at ¶15. At the sentencing hearing the state specifically indicated that in accordance with the plea agreement it was recommending a period of community control. 12/10/08 Sentencing Tr. 2. Wright's counsel then asked the court to impose a period of "community control with some order of treatment to help Mr. Wright from reoffending." 12/10/08 Sentencing Tr. 2-3. Here, although neither party nor the trial court uses the words "jointly recommended sentence" at either the sentencing hearing or in the written plea, given the statements made at the sentencing hearing, we find that the community control sentence that was imposed by the trial court was a jointly recommended sentence.

¶{21} Consequently, considering the above espoused law, if the sentence was authorized by law, i.e. if it was within the applicable statutory range, no error regarding the sentence can be argued on appeal.

¶{22} In the sentencing judgment entry the trial court imposed two years of community control and indicated that it would impose a twelve month term of incarceration if Wright violated community control. This sentence fell within the applicable statutory range. R.C. 2925.11(C)(4)(a), the possession of drug statute that Wright pled guilty to, does not carry a presumption of a prison term. Cf. R.C. 2925.11(C)(4)(b) (specifically stating "presumption for a prison term for the offense"). Instead, the statute requires the court to consider R.C. 2929.13(B) in determining whether to impose a prison term or to impose community control. Thus, the imposition of community control is authorized by law. Furthermore, the trial court's indication that it would impose a twelve month term of incarceration if he violated community control

was also permitted by law. R.C. 2929.14(A)(5) specifies that for a fifth degree felony, which is what Wright pled guilty to, the term of incarceration is six to twelve months.

¶{23} Accordingly, since the imposed sentence was a jointly recommended sentence and was within the applicable statutory range, there is no appealable sentencing issue. After reviewing the file, we conclude that there are no arguable issues for appeal.

¶{24} For the foregoing reasons, the judgment of the trial court is hereby affirmed and counsel's motion to withdraw is granted.

Donofrio, J., concurs.
Waite, J., concurs.