[Cite as *State v. Douglas*, 2009-Ohio-5673.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 08 MA 147
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
JOANNE DOUGLAS	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio
Case No. 08 CR 204 A

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Atty. Paul J. Gains
Mahoning County Prosecutor
Atty. Ralph M. Rivera
Assistant Prosecuting Attorney
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Youngstown, Ohio 44503

For Defendant-Appellant:

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JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: October 21, 2009

[Cite as *State v. Douglas*, 2009-Ohio-5673.]
WAITE, J.

{¶1} Appellant has filed an appeal of her burglary conviction and two-year prison sentence. Counsel for Appellant Joanne Douglas has filed a no merit brief and a request to withdraw as counsel pursuant to *State v. Toney* (1970), 23 Ohio App.2d 203, 52 O.O.2d 304, 262 N.Ed.2d 419. For the following reasons, counsel's motion to withdraw is sustained and the conviction and sentence are affirmed.

{¶2} Appellant was indicted in the Mahoning County Court of Common Pleas on March 6, 2008, on one count of burglary, R.C. 2912.01, a second degree felony. Appellant was accused of organizing a burglary of the home of Darlene DeChellis in Canfield. Appellant was Ms. DeChellis' cleaning woman. Two other accomplices were involved in the crime: John Douglas (Appellant's brother-in-law) and Richard Cummings. Both accomplices were convicted and sentenced for the crimes in separate proceedings.

{¶3} On April 14, 2008, Appellant entered into a Crim.R. 11 plea agreement. She agreed to plead guilty to the charge, and the state agreed to recommend community control sanctions at sentencing. A change of plea hearing was held on April 14, 2008. Appellant was represented by counsel at the hearing. The court reviewed the constitutional rights Appellant was waiving by pleading guilty, as well as the other rights and notices contained in Crim.R. 11(C). The prosecutor recommended that community control sanctions be imposed rather than a prison term. The court accepted the plea and set sentencing for June 13, 2008. The victim, Darlene DeChellis, delivered a statement at sentencing, recommending that a prison term be imposed. The prosecutor stated that Appellant had not followed through on

one of the conditions of the plea agreement. He told the court that the state was standing silent regarding any potential sentence rather than recommending community control. (6/13/08 Tr., pp. 2-3, 10.) The court disregarded the prosecutor's statement and accepted the prior recommendation of community control as the state's recommendation. (6/13/08 Tr., p. 11.)

{¶4} Appellant and her attorney both gave closing statements prior to sentencing. The court noted that Appellant had previously been charged with theft and forgery, and had been convicted of a number of traffic citations. The court also considered the sentences he imposed on the other two accomplices. The court considered the purposes and principles of sentencing under R.C. 2929.11-12, and mentioned the need for incapacitation, deterrence, rehabilitation and restitution. He considered a variety of factors regarding the seriousness of the crime, including the psychological harm suffered by the victims, as well as the economic harm and the personal relationship of Appellant to the victims.

{¶5} The judge imposed a two-year prison term on Appellant, and required her to pay the costs of prosecution. She was given two days of jail-time credit. The court filed its judgment on June 18, 2008, and sent notice of the judgment to the parties on July 10, 2008. Appellant filed this appeal on July 10, 2008.

{¶6} We appointed counsel to represent Appellant in this appeal. Transcripts of the plea and sentencing hearings were ordered. Counsel filed a brief on January 13, 2009, but did not allege any errors. Counsel filed a revised no-merit brief and motion to withdraw on February 5, 2009. On February 6, 2009, we issued

an order granting Appellant 30 days to file any additional pro se assignments of error. Nothing additional was filed.

{¶7} Counsel is asking to withdraw pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, and pursuant to our ruling in *Toney*, supra. " 'It is well settled that an attorney appointed to represent an indigent criminal defendant on his or her first appeal as of right may seek permission to withdraw upon a showing that the appellant's claims have no merit. To support such a request, appellate counsel must undertake a conscientious examination of the case and accompany his or her request for withdrawal with a brief referring to anything in the record that might arguably support the appeal. The reviewing court must then decide, after a full examination of the proceedings, whether the case is wholly frivolous.' " (Citations omitted.) *State v. Odorizzi* (1998), 126 Ohio App.3d 512, 515, 710 N.E.2d 1142.

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

{¶9} "3. Where a 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.

{¶10} "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*.

{¶11} "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.

{¶12} "6. Where the Court of Appeals makes such an examination and concludes that the appeal is wholly frivolous, the motion of an indigent appellant for the appointment of new counsel for the purposes of appeal should be denied.

{¶13} "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." *Toney*, supra, at syllabus.

{¶14} A plea of guilty or no contest must be made knowingly, intelligently and voluntarily for it to be valid and enforceable. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶25. In order to ensure that a plea in a felony case is knowingly, intelligently and voluntarily being made, Crim.R. 11(C)(2) requires the trial judge to address the defendant personally to review the rights that are being waived and to discuss the consequences of the plea. Crim.R. 11(C)(2)(c) requires the court to review five constitutional rights that are waived when entering a guilty or no contest plea in a felony case: the right to a jury trial, the right to confront one's accusers, the privilege against compulsory self-incrimination, the right to compulsory

process to obtain witnesses, and the right to require the state to prove guilt beyond a reasonable doubt. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶19. A trial court must strictly comply with Crim.R. 11(C)(2)(c) when advising the defendant of the constitutional rights that are being waived in entering a felony plea. Id. at syllabus. Prejudice is presumed if the court fails to inform the defendant of these constitutional rights. Id. at ¶29. A trial court's acceptance of a guilty or no contest plea will be affirmed only if the trial court engaged in meaningful dialogue with the defendant which, in substance, explained the pertinent constitutional rights, "in a manner reasonably intelligible to that defendant." *State v. Ballard* (1981), 66 Ohio St.2d 473, 423 N.E.2d 115, paragraph two of the syllabus; see also *Veney*, supra, at ¶27.

{¶15} The nonconstitutional requirements of Crim.R. 11 are subject to review for substantial compliance rather than strict compliance. *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶11-12. "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* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. Furthermore, "failure to comply with nonconstitutional rights will not invalidate a plea unless the defendant thereby suffered prejudice." *Griggs*, supra, at ¶12.

{¶16} In this case, the court conducted an extensive colloquy with Appellant, explaining all of her constitutional and nonconstitutional rights as set forth in Crim.R. 11(C). The court specifically reviewed the five constitutional rights being waived in

Crim.R. 11(C)(2)(c), and also explained the various nonconstitutional issues, including the effect of entering a guilty plea. We do note a slight irregularity in the procedure during sentencing when the prosecutor stated that he would be standing silent instead of recommending community control. The prosecutor claimed that Appellant failed to fully cooperate with the state in convicting her two accomplices, and that this cooperation was part of the plea agreement. Whether or not this was true, the judge decided to ignore this statement and accept the prosecutor's earlier recommendation that community control sanctions be imposed, and there is no indication that any prejudice resulted from the prosecutor's comments during sentencing. Furthermore, Appellant has not filed any pro se assignments of error and has given no indication that she, at any time, wished to withdraw her plea. Therefore, we find no appealable issue arising from the sentencing hearing.

{¶17} Because there are no meritorious issues for appeal, we find that this appeal is wholly frivolous. Counsel's motion to withdraw is granted and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

DeGenaro, J., concurs.