

COURT OF APPEALS
MORGAN COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

ROBERT T. MAXWELL

Defendant-Appellant

JUDGES:
:
:
: Hon. Patricia A. Delaney, P.J.
: Hon. John W. Wise, J.
: Hon. Andrew J. King, J.

: Case No. 23AP0006

: OPINION

CHARACTER OF PROCEEDING:

Appeal from the Morgan County Court
of Common Pleas, Case No. 22CR0029

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

June 21, 2024

APPEARANCES:

For Plaintiff-Appellee:

MORGAN COUNTY PROSECUTOR
19 E. Main Street
McConelsville, OH 43756-1125

For Defendant-Appellant:

BRIAN W. BENBOW
803 Taylor Street
Zanesville, OH 43701

Delaney, P.J.

{¶1} Defendant-Appellant Robert T. Maxwell appeals from the March 6, 2023 sentencing entry by the Morgan County Court of Common Pleas. Plaintiff-Appellee is the State of Ohio and did not appear in the instant appeal.

{¶2} Appellate counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.E.2d 493 (1967), asserting he found no potential assignments of error having arguable merit. We have performed our duty under *Anders* to review the record independently, and we also find no potential assignments of error having arguable merit. See *State v. Adair*, 2023-Ohio-1191, ¶ 20 (5th Dist.).

FACTS AND PROCEDURAL HISTORY

{¶3} On March 2, 2022, the Southeastern Ohio Human Trafficking Task Force began investigating an Internet Crimes Against Children Task Force Program (ICAC) case. Through a CyberTip reported by Kik Messenger, it reported that a Kik account used by and belonging to Defendant-Appellant Robert T. Maxwell had uploaded and shared six videos/images of child pornography in 2021. One of the videos was an adult male anally raping a female child under the age of ten. On April 6, 2022, a search warrant was executed on Maxwell's residence located in McConnelsville, Ohio, after which Maxwell was subsequently arrested.

{¶4} The Morgan County Grand Jury indicted Maxwell on April 20, 2022 on five counts of Pandering Obscenity Involving a Minor, a second-degree felony in violation of R.C. 2907.321(A)(1); one count of Illegal Use of Minor or Impaired Person in Nudity-Oriented Material or Performance, a second-degree felony in violation of R.C.

2907.323(A)(1); and one count of Possessing Criminal Tools, a fifth-degree felony in violation of R.C. 2923.24(A).

{¶5} Maxwell was arraigned on May 10, 2022, and he entered a plea of not guilty to the charges.

{¶6} On December 12, 2022, Maxwell appeared before the trial court for a change of plea hearing. Maxwell entered into a plea agreement with the State where Maxwell would plead guilty to the five counts of Pandering Obscenity Involving a Minor and at sentencing, the State would dismiss the remaining two counts. There was no agreement or joint recommendation for sentencing. The trial court conducted the plea colloquy and accepted Maxwell's guilty plea. The matter was then set for a later sentencing hearing after a pre-sentence investigation.

{¶7} The sentencing hearing was held on March 6, 2023. Via a sentencing entry filed on March 6, 2023, the trial court sentenced Maxwell to a minimum of seven years on each count of Pandering Obscenity Involving a Minor, to be served concurrently. Accordingly, Maxwell was to serve a minimum prison term of seven years to a maximum term of ten years and six months. The trial court imposed a Tier II sex offender status on Maxwell.

{¶8} It is from this sentencing entry that Maxwell files his *Anders* appeal.

ASSIGNMENTS OF ERROR

{¶9} In his *Anders* brief, Maxwell's appellate counsel argues two potential Assignments of Error may exist:

I. THE COURT ERRED IN IMPOSING A SENTENCE THAT WAS GROSSLY DISPROPORTIONATE TO APPELLANT'S CONDUCT AND

NOT IN ACCORDANCE WITH STATUTES GOVERNING FELONY SENTENCING AND WHICH DEMONSTRATES AN UNNECESSARY BURDEN ON STATE RESOURCES.

II. APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL PURSUANT TO *STRICKLAND V. WASHINGTON* (1984), 466 U.S. 668, 80 L.ED.2D 672, 104 S.CT. 2052.

ANALYSIS

Anders Standard of Review

{¶10} In *Anders*, the United States Supreme Court held that if, after a conscientious examination of the record, a defendant's counsel concludes the case is wholly frivolous, then he should so advise the court and request permission to withdraw. *Anders v. California*, 386 U.S. 738, 744, 87 S.Ct. 1396, 18 L.E.2d 493 (1967). Counsel must accompany his request with a brief identifying anything in the record that could arguably support his client's appeal. *Id.* Counsel also must: (1) furnish his client with a copy of the brief and request to withdraw and (2) allow his client sufficient time to raise any matters that the client chooses. *Id.* Once the defendant's counsel satisfies these requirements, the appellate court must fully examine the proceedings below to determine if any arguably meritorious issues exist. If the appellate court also determines that the appeal is wholly frivolous, it may grant counsel's request to withdraw and dismiss the appeal without violating constitutional requirements or may proceed to a decision on the merits if state law so requires. *Id.*

I.

{¶11} Appellate counsel for Maxwell raises his sentence as a potential Assignment of Error. A court reviewing a criminal sentence is required by R.C. 2953.08(F) to review the entire trial court record, including any oral or written statements and presentence investigation reports. R.C. 2953.08(F)(1) through (4). We review felony sentences using the standard of review set forth in R.C. 2953.08. *State v. Williams*, 2024-Ohio-2078, ¶ 17 (5th Dist.) citing *State v. Marcum*, 2016-Ohio-1002, ¶ 22. R.C. 2953.08(G)(2) provides we may either increase, reduce, modify, or vacate a sentence and remand for resentencing where we clearly and convincingly find that either 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 also *State v. Bonnell*, 2014-Ohio-3177, ¶ 28.

{¶12} “The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others, to punish the offender, and to promote the effective rehabilitation of the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources.” R.C. 2929.11(A). To achieve these purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both. *Id.* Further, the sentence imposed shall be “commensurate with and not demeaning to the seriousness of the offender's conduct and its impact on the victim, and consistent with sentences imposed for similar crimes by similar offenders.” R.C. 2929.11(B).

[Cite as *State v. Maxwell*, 2024-Ohio-2418.]

{¶13} R.C. 2929.12 lists general factors which must be considered by the trial court in determining the sentence to be imposed for a felony and gives detailed criteria which do not control the court's discretion, but which must be considered for or against severity or leniency in a particular case. The trial court retains discretion to determine the most effective way to comply with the purpose and principles of sentencing as set forth in R.C. 2929.11. R.C. 2929.12.

{¶14} Nothing in R.C. 2953.08(G)(2) permits this Court to independently weigh the evidence in the record and substitute our own judgment for that of the trial court to determine a sentence which best reflects compliance with R.C. 2929.11 and R.C. 2929.12. *State v. Jones*, 2020-Ohio-6729, ¶ 42. Instead, we may only determine if the sentence is contrary to law.

{¶15} A sentence is not clearly and convincingly contrary to law where the trial court “considers the principles and purposes of R.C. 2929.11, as well as the factors listed in R.C. 2929.12, properly imposes post release control, and sentences the defendant within the permissible statutory range.” *State v. Pettorini*, 2021-Ohio-1512, ¶¶ 14-16 (5th Dist.) quoting *State v. Dinka*, 2019-Ohio-4209, ¶ 36 (12th Dist.).

{¶16} In this case, the trial court imposed a sentence within the permissible statutory range for a second-degree felony. The trial court further considered both the purposes and principles of felony sentencing set forth in R.C. 2929.11 and the seriousness and recidivism factors set forth in R.C. 2929.12. This Court has consistently rejected the argument that a trial court must elevate conservation of state and local resources above the seriousness and recidivism factors. *State v. Smith*, 2024-Ohio-430,

¶ 26 (5th Dist.) citing *State v. Leasure*, 2012-Ohio-318, ¶ 29 (5th Dist.). Our independent review finds no error as to sentencing.

II.

{¶17} In appellate counsel’s second potential Assignment of Error, he contends that Maxwell was denied the effective assistance of trial counsel.

{¶18} To succeed on a claim of ineffectiveness, a defendant must satisfy a two-prong test. Initially, a defendant must show that trial counsel acted incompetently. See *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). In assessing such claims, “a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Id.* at 689, citing *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158 (1955).

{¶19} Even if a defendant shows that counsel was incompetent, the defendant must then satisfy the second prong of the *Strickland* test. Under this “actual prejudice” prong, the defendant must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694.

{¶20} In determining a claim of ineffective assistance of counsel, our review is limited to the record before us. *State v. McCauley*, 2017-Ohio-4373, ¶ 21 (5th Dist.), citing *State v. Prophet*, 2015-Ohio-4997, ¶ 32 (10th Dist.). Appellate counsel does not identify where in the record there is potential claim as to the ineffective assistance of trial counsel. Upon our own independent review, we find nothing in the record before this Court to

suggest that Maxwell was prejudiced by the trial counsel's representation. Accordingly, Maxwell cannot meet his burden to demonstrate that because of trial counsel's failures, the result of the proceedings would have been different.

No arguably meritorious claims for appeal

{¶21} Appellate counsel has followed the *Anders* procedures and we have reviewed the merits of Maxwell's potential Assignments of Error. Upon our independent review of the record, we find no meritorious claims exist upon which to base an appeal. We therefore concur with appellate counsel that Maxwell's appeal is without merit and wholly frivolous under *Anders*. An appeal is wholly frivolous if the record is devoid of any legal points arguable on the merits. *State v. Middaugh*, 5th Dist. Coshocton No. 02 CA 17, 2003-Ohio-91, ¶ 13.

{¶22} In this case, the requirements in *Anders* have been satisfied. Hence, we find the appeal to be wholly frivolous under *Anders*, grant counsel's request to withdraw, and affirm the judgment of the Morgan County Court of Common Pleas. See *State v. Hill*, 2016-Ohio-1214, ¶ 20 (5th Dist.), appeal not allowed, 2016-Ohio-7455.

[Cite as *State v. Maxwell*, 2024-Ohio-2418.]

CONCLUSION

{¶23} The judgment of the Morgan County Court of Common Pleas is affirmed.

By: Delaney, P.J.,

Wise, J. and

King, J., concur.