[Cite as *State v. Poole*, 2024-Ohio-4892.]

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. Patricia A. Delaney, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellee	:	Hon. Craig R.. Baldwin, J.
	:	
-vs-	:	
	:	Case No. 24CA000009
RICHARD POOLE	:	
	:	
Defendant-Appellant	:	OPINION

CHARACTER OF PROCEEDING:	Appeal from the Knox County Court of Common Pleas, Case No. 24 CR01-0007
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 8, 2024

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
CHARLES C. MCCONVILLE 117 East High Street Mount Vernon, OH 43050	TODD W. BARSTOW 261 West Johnstown Road Suite 204 Columbus, OH 43230

Gwin, J.

{¶1} Appellant Richard Poole appeals his conviction and sentence from the Knox County Court of Common Pleas. Appellee is the State of Ohio.

Facts & Procedural History

{¶2} On January 16, 2024, the Knox County Grand Jury indicted appellant with one count of aggravated robbery, in violation of R.C. 2911.01(A)(1), a felony of the first degree. Appellant was arraigned on January 17, 2024, and entered a plea of not guilty on the charge.

{¶3} The charge stemmed from an incident on January 4, 2024. On that day, appellant entered the First Federal Savings and Loan in Centerburg. He asked a bank teller for help counting some currency, and then told her it was a robbery. Appellant showed the teller what appeared to be a firearm tucked in his belt. Appellant left the bank with $4,499.15.

{¶4} Appellant, his trial counsel, and counsel for appellee each signed a "plea of guilty" form on February 8, 2024. The plea form specifically states the maximum prison term, the fine, and the post-release control for the charge. Additionally, the form states appellant's counsel and the court both informed him of all of his constitutional rights, and that appellant wished to enter a plea of guilty. Further, that no promises or threats were made to appellant to secure his plea of guilty. Appellant confirmed on the form that his plea was freely, voluntarily, knowingly, and intelligently made.

{¶5} Appellant also signed a detailed "Plea Agreement Disclosure and Acknowledgment" form on February 8, 2024. The form asks if appellant understands each one of the constitutional rights he is giving up, and asks if appellant understands the

specific maximum penalty for the charge. On the form, appellant checked "yes" when asked if his attorney reviewed the written plea agreement with him and answered all of his questions. In bold letters, the form asks whether appellant understands that the court is not bound by any agreement or recommendation as to sentencing, and that the sentencing is entirely up to the judge. Appellant responded, "yes." The form also details the post-release control obligations appellant would have after his release from prison. Appellant stated he understood. When asked if he admitted to the facts stated by prosecutor, appellant checked "yes."

{¶6} The trial court held a plea hearing on February 8, 2024. At the plea hearing, the trial court informed appellant of the maximum penalty for the charge, and also told appellant there was a presumption of prison for the offense. Appellant stated he understood.

{¶7} The trial court specifically asked appellant, "do you understand, Mr. Poole, that the Court is not bound by any recommendation as to your sentencing. Your sentencing is entirely up to me, as the judge. Do you understand that?" Appellant responded, "yes, sir."

{¶8} Appellant confirmed his plea was voluntary, he was not under the influence of drugs or alcohol, and no one threatened or coerced him to enter the plea. Appellant stated he reviewed the written plea agreement with his attorney, and stated he was satisfied with his attorney. Appellant also acknowledged his signature on the written plea form at the hearing.

{¶9} The trial court informed appellant of his constitutional rights, including the right to have the prosecutor prove his guilt beyond a reasonable doubt, the right to

subpoena witnesses in this defense, the right to cross-examine witnesses, and the right to not testify at trial. Appellant confirmed he was voluntarily waiving each constitutional right. After appellee gave a recitation of the facts, appellant admitted to the facts as provided by appellee.

{¶10} The parties presented the trial court with a joint sentencing recommendation of a prison term of six to nine years. The trial court accepted appellant's guilty plea, and ordered a pre-sentence investigation.

{¶11} The trial court held a sentencing hearing on March 14, 2024. Appellant apologized for his actions.

{¶12} The trial court stated it considered the purposes and principles found in R.C. 2929.11 and the factors contained in R.C. 2929.12, and determined appellant was not amenable to community control. The trial court sentenced appellant to an indefinite prison term of ten to fifteen years, with an order to pay restitution. The trial court informed appellant he would be subject to a mandatory period of post-release control of up to five years, but not less than two years.

{¶13} The trial court issued a sentencing entry on March 15, 2024. In the judgment entry, the trial court: stated it considered the purposes of felony sentencing contained in R.C. 2929.11; stated it considered the seriousness and recidivism factors in R.C. 2929.12; found appellant's conduct is more serious than conduct normally constituting the offense appellant is convicted of; determined a prison sentence is consistent with the purpose of felony sentencing in R.C. 292911; imposed an indefinite prison term of a minimum of ten (10) years to a maximum term of fifteen (15) years in prison; ordered appellant to pay restitution; and advised appellant of post-release control.

{¶14} Appellate counsel for appellant has filed a motion to withdraw and a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), rehearing den., 388 U.S. 924 (1967), indicating that the within appeal was wholly frivolous and setting forth one proposed assignment of error:

{¶15} "I. THE TRIAL COURT ERRED IN ACCEPTING POOLE'S GUILTY PLEA UNDER CRIMINAL RULE 11 AND ERRED IN SENTENCING POOLE."

{¶16} This Court issued a judgment entry notifying appellant that his counsel filed an *Anders* brief, and allowing appellant file a pro se brief within sixty days of the entry. Appellant has not filed a pro se brief.

Anders Law

{¶17} In *Anders*, the United States Supreme Court held, if after a conscientious examination of the record, a defendant's counsel concludes the case is wholly frivolous, he should so advise the court and request permission to withdraw. *Id.* Counsel may accompany his or her request with a brief identifying anything in the record that could arguably support the client's appeal. *Id.* Counsel also must: (1) furnish the client with a copy of the brief and request to withdraw; and, (2) allow the client sufficient time to raise any matters that the client chooses. *Id.*

{¶18} 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.

{¶19} In the proposed assignment of error, counsel suggests appellant's plea was not knowingly, intelligently, and voluntarily made. Counsel further suggests appellant's sentence was contrary to law pursuant to R.C. 2953.08(G)(2). We disagree.

Plea

{¶20} When reviewing a plea's compliance with Criminal Rule 11(C), we apply a de novo standard of review. *State v. Nero*, 56 Ohio St.3d 106 (1990); *State v. Groves*, 2019-Ohio-5025 (5th Dist.).

{¶21} Criminal Rule 11 requires guilty pleas to be made knowingly, intelligently, and voluntarily. Although literal compliance with Criminal Rule 11 is preferred, the trial court need only "substantially comply" with the rule when dealing with the non-constitutional elements of Criminal Rule 11(C), and strictly comply with the constitutional notifications. *State v. Ballard*, 66 Ohio St.2d 473 (1981); *State v. Veney*, 2008-Ohio-5200.

{¶22} As to the constitutional notifications, before accepting a plea, a trial court must inform a defendant that by entering his plea, he waives important constitutional rights, specifically: (1) the right to a jury trial; (2) the right to confront witnesses against him; (3) compulsory process for obtaining witnesses in his favor; (4) the right to require the state to prove the defendant's guilt beyond a reasonable doubt at trial; and (5) that the defendant cannot be compelled to testify against himself. *State v. Veney*, 2008-Ohio-5200. If the trial court fails to strictly comply with these requirements, the defendant's plea is invalid. *Id.*

{¶23} As to the non-constitutional rights, a trial court must notify a defendant of: (1) the nature of the charges; (2) the maximum penalty involved, which includes, if

applicable, an advisement on post-release control; (3) if applicable, that the defendant is not eligible for probation or the imposition of community control sanctions; and (4) that after entering a guilty plea or a no contest plea, the court may proceed directly to judgment and sentencing. Criminal Rule 11(C)(2). For these non-constitutional rights, the trial court must substantially comply with the mandates of Criminal Rule 11. *State v. Nero*, 56 Ohio St.3d 106 (1990). "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. Veney*, 2008-Ohio-5200.

{¶24} In this case, the trial court advised appellant of the constitutional rights he was giving up, and the court informed appellant as to the maximum penalty for the charge. Further, the trial court informed appellant the jointly recommended sentence was not binding, and then explained appellant's post-release control obligations. At both the plea hearing and in the written plea agreement, appellant stated he understood what rights he was giving up, and what the potential penalties were, by pleading guilty.

{¶25} Although the trial court decided to reject the jointly-recommended sentence and impose a prison sentence greater than the sentence recommended by the parties, appellant was informed of the potential prison sentence range. Further, both at the plea hearing and in the written plea disclosure form, appellant was apprised of the fact that the trial court was not bound to accept the jointly-recommended sentence. At both the plea hearing and the plea form, appellant stated he understood the trial court was not bound by the jointly-recommended sentence. The fact that the trial court deviated from the recommended sentence does not make appellant's plea unknowing, unintelligent, or involuntary. See *State v. Parks*, 2016-Ohio-5745 (5th Dist.).

{¶26} We have reviewed the record in this case, including the transcript of appellant's plea, and find it reflects the trial court's strict compliance with each constitutional notification, and its substantial compliance with each non-constitutional notification.

Sentence

{¶27} We review felony sentences using the standard of review set forth in R.C. 2953.08. *State v. Marcum*, 2016-Ohio-1002. R.C. 2953.08(G)(2) provides an "appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing * * * if [the appellate court] clearly and convincingly finds * * * 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 contrary to law."

{¶28} "Clear and convincing evidence is that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford*, 161 Ohio St. 469 (1954).

{¶29} "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. Dinka*, 2019-Ohio-4209 (12th Dist.).

{¶30} After a proper Criminal 11 colloquy, appellant pled guilty to one count of aggravated robbery, a felony of the first degree. Appellant received a prison term of ten

to fifteen years in prison. This was not the maximum sentence, and was within the statutory range for a qualifying first-degree felony. R.C. 2929.14(A)(1)(a); R.C. 2929.144. The trial court noted its consideration of the appropriate sentencing factors in the sentencing entry. The trial court also properly imposed post-release control.

{¶31} The trial court's failure to follow the jointly-recommended sentence does not make the sentence invalid. It is well-established that a trial court is not bound by a prosecutor's recommendation at sentencing. *State v. Rink*, 2003-Ohio-4097 (6th Dist.). When a trial court imposes a greater sentence than recommended in the plea agreement, and when the defendant is forewarned of the applicable maximum penalties, there is no error on behalf of the trial court if it imposes a more severe sentence than was recommended by the prosecutor. *State v. Parks*, 2016-Ohio-5745 (5th Dist.).

{¶32} Upon review of the record, we find the trial court properly informed appellant of the consequences of his plea, properly considered the factors set forth in R.C. 2929.11 and R.C. 2929.12, imposed a sentence within the permissible statutory range, and properly imposed post-release control. Therefore, appellant's sentence is therefore not clearly and convincingly contrary to law.

{¶33} After independently reviewing the record, we agree with counsel's conclusion that no arguably meritorious claims exist upon which to base an appeal.

{¶34} Thus, we find the appeal to be wholly frivolous under *Anders*, grant counsel's request to withdraw, and affirm the judgment of the Knox County Court of Common Pleas.

By Gwin, J.,

Delaney, P.J., and

Baldwin, J., concur