

[Cite as *State v. Thomas*, 2009-Ohio-4968.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)	
)	CASE NO. 09 MA 13
PLAINTIFF-APPELLEE,)	
)	
- VS -)	OPINION
)	
SHAWN THOMAS,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 08 CR 484.

JUDGMENT: Affirmed. Counsel's Motion to Withdraw is Granted.

APPEARANCES:
For Plaintiff-Appellee: Attorney Paul J. Gains
Prosecuting Attorney
Attorney Ralph M. Rivera
Assistant Prosecuting Attorney
21 W. Boardman St., 6th Floor
Youngstown, OH 44503

For Defendant-Appellant: Attorney J. Dean Carro
University of Akron, School of Law
Legal Clinic – Appellate Review Office
Akron, OH 44325-2901

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

Dated: September 14, 2009

[Cite as *State v. Thomas*, 2009-Ohio-4968.]
DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court, and defense counsel's no-merit brief and motion to withdraw. Defendant-Appellant, Shawn Thomas, appeals the decision of the Mahoning County Court of Common Pleas Court convicting him of two counts of rape of a child under thirteen, pursuant to R.C. 2907.02(A)(1)(b), and one count of kidnapping, pursuant to R.C. 2905.01(A)(4)(C), and sentencing him accordingly.

{¶2} Appointed appellate counsel filed a no-merit brief in accordance with *Anders v. California* (1967) 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, and *State v. Toney* (1970), 23 Ohio App.2d 203, 262 N.E.2d 419, and requested to withdraw. Thomas failed to file a pro-se brief. Thus, it is the duty of this court to examine the record and determine if the appeal is frivolous. A thorough review of the case file reveals there are no appealable issues, and that the appeal is in fact frivolous. Accordingly, the judgment of the trial court is affirmed and counsel's motion to withdraw is granted.

Facts

{¶3} Thomas was indicted in Mahoning County on April 24, 2008. The indictment charged Thomas with two counts of rape of a child under ten, pursuant to R.C. 2907.02(A)(1)(b)(B), a life-sentence felony, and one count of kidnapping pursuant to R.C. 2905.01(A)(4)(C), a first-degree felony. Thomas initially pled not guilty to those charges, and counsel was appointed. On May 22, 2008, a superceding indictment was filed, charging Thomas with nine counts of rape of a child under ten, pursuant to R.C. 2907.02(A)(1)(b)(B), and one count of kidnapping, pursuant to R.C. 2905.01(A)(4)(C). Thomas pled not guilty to the charges in the superceding indictment.

{¶4} On December 16, 2008, Thomas entered into a Crim.R. 11 plea agreement with the State. Pursuant to that agreement, Thomas agreed to plead guilty to one count of kidnapping, pursuant to R.C. 2905.01(A)(4)(C), and two amended counts of rape of a child under thirteen, pursuant to R.C. 2907.02(A)(1)(b). In addition to agreeing to amend the two rape counts, the State would move the court to dismiss the seven remaining rape charges. The State also agreed to recommend life in prison with parole eligibility after ten years for the two rape counts, and ten years imprisonment for the kidnapping count, with

the sentences to be served concurrently.

{¶15} At the plea hearing the trial court explained to Thomas the various constitutional and non-constitutional rights he would relinquish by pleading guilty. Following the hearing, the trial court sustained the State's motion to amend two of the rape counts to charge rape of a child under thirteen, and sustained the State's motion to dismiss the remaining rape charges. The court accepted Thomas's guilty plea to two counts of rape of a child under thirteen, and one count of kidnapping as knowingly, voluntarily and intelligently made. Thomas waived a pre-sentence investigation and the case proceeded immediately to sentencing. The victim's parents both gave a statement. Thomas and his trial counsel both gave brief statements in mitigation of sentencing. The trial court sentenced Thomas to the jointly recommended sentence of life imprisonment for each of the rape counts and ten years on the kidnapping count, with the sentences to run concurrently. The court also imposed five years of post-release control. In addition, the court found that Thomas was a Tier III Sex Offender or Child Victim Offender in accordance with R.C. 2950.03, and Thomas was notified of the corresponding requirements.

{¶16} On March 20, 2009, upon motion of appellate counsel, the trial court filed a Nunc Pro Tunc sentencing entry, which more specifically recited the terms of the negotiated plea agreement, namely, that Thomas would be eligible for parole after ten years. On March 27, 2009, Thomas's appointed appellate counsel filed a no-merit brief and requested to withdraw, in accordance with *Anders*, 386 U.S. 738; and *Toney*, 23 Ohio App.2d 203. We granted Thomas thirty days to file a pro-se brief listing any assignments of error and legal arguments of his choosing. To date, Thomas has failed to file such a brief.

Anders Brief

{¶17} An attorney appointed to represent an indigent criminal defendant on his first appeal as of right may seek permission to withdraw if the attorney can show that there is no merit to the appeal. See, generally, *Anders*, 386 U.S. 738. To support such a request, appellate counsel is required to 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 an appeal. *Toney*, 23 Ohio App.2d at 207. The reviewing court must then decide, after a full examination of the proceedings, whether the case is wholly frivolous. *Id.*

{¶8} In *Toney*, this Court established guidelines to be followed 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." *Id.* at syllabus.

{¶14} Thomas's counsel concluded that there are no issues present to support an appeal, but raised several potential issues for us to consider, namely (1) whether Thomas was afforded the proper procedure pursuant to Crim.R. 11; (2) whether trial counsel was ineffective; (3) whether Thomas entered the guilty plea knowingly and voluntarily; (4) whether the State upheld the plea agreement with Thomas; (5) whether the failure to merge any of the charges subjected Thomas to Double Jeopardy; (6) whether Thomas

pled guilty to an unconstitutional statute; and, (7) whether Thomas received an appropriate sentence. For ease of analysis, we will address these issues slightly out of order.

Guilty Plea

{¶15} The entrance of a guilty plea severely limits the issues that may be raised on appeal. In most cases, the appellant may only challenge the propriety of the guilty plea and the sentence. See, e.g., *State v. Anderson*, 7th Dist. No. 07-MA-184, 2009-Ohio-2093, at ¶11. With regard to the former issue, a guilty plea to a criminal charge must be made "knowingly, intelligently, and voluntarily." *State v. Engle* (1996), 74 Ohio St.3d 525, 527, 660 N.E.2d 450. Failure on any of these points "renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution." *Id.* A determination of whether a plea is knowing, intelligent, and voluntary is based upon a review of the record. *State v. Spates* (1992), 64 Ohio St.3d 269, 272, 595 N.E.2d 351.

{¶16} To help ensure that guilty pleas are knowingly, intelligently, and voluntarily made, Crim.R. 11(C)(2) sets forth certain procedures the trial court must follow before accepting guilty pleas in felony cases. Before the court can accept a guilty plea to a felony charge, it must conduct a colloquy with the defendant to determine that the defendant understands the plea and the rights he is waiving by entering that plea. Crim.R. 11(C)(2).

{¶17} Crim.R. 11(C)(2)(c) sets forth the constitutional rights that the defendant waives by entering the guilty plea. "A trial court must strictly comply with Crim.R. 11(C)(2)(c) and orally advise a defendant before accepting a felony plea that the plea waives (1) the right to a jury trial, (2) the right to confront one's accusers, (3) the right to compulsory process to obtain witnesses, (4) the right to require the state to prove guilt beyond a reasonable doubt, and (5) the privilege against compulsory self-incrimination. When a trial court fails to strictly comply with this duty, the defendant's plea is invalid. (Crim.R.11(C)(2)(c), applied.)" *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, syllabus.

{¶18} Crim.R. 11(C) also sets forth the nonconstitutional rights that the court must explain to the defendant prior to accepting the plea. These rights are as follows: (1) a defendant must be informed of the nature of the charges; (2) the defendant must be informed of the maximum penalty involved; (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); *State v. Philpott* (Dec. 14, 2000), 8th Dist. No. 74392, citing *McCarthy v. U.S.* (1969), 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418. For these nonconstitutional rights, the trial court must substantially comply with its mandates. *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. 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. *Id.* at 108.

{¶19} In this case, the transcript demonstrates that the trial court strictly complied with the constitutionally mandated provisions of Crim.R. 11(C)(2). The trial court explained to Thomas that by pleading guilty he would relinquish his constitutional rights to a jury trial; to have the State prove his guilt beyond a reasonable doubt; to confront adverse witnesses; and to compel the attendance of witnesses he might wish to present in his favor. The trial court also explained that Thomas could not be compelled to testify against himself at trial. The trial court specifically explained to Thomas that by pleading guilty, he would waive those rights. Thomas indicated his complete understanding.

{¶20} The trial court also substantially complied with the nonconstitutional provisions of Crim.R. 11(C)(2). The court informed Thomas of the nature of the charges against him; the maximum penalties involved; and, the fact that Thomas was not eligible for probation. Further, the trial court informed Thomas that upon acceptance of his plea the court could proceed immediately to judgment and sentencing. Thomas indicated that he understood the rights he would waive by pleading guilty, and that he wished to go forward with the plea.

{¶21} In addition, the court questioned Thomas about his mental condition and

whether he was under the influence of drugs or alcohol at the time of the plea hearing. Thomas indicated he was taking Trazadone, a sleeping medication and Prozac, a mood stabilizer. However, Thomas indicated there was nothing about those medications which would affect his ability to understand what he was doing. Thus, this factor did not influence Thomas's ability to make a knowing and voluntary plea. As such, there are no appealable issues with regard to Thomas's plea. The trial court fully complied with all provisions of Crim.R. 11(C)(2) and there are no other factors that would have caused Thomas's plea to be anything short of knowing, voluntary and intelligent.

Sentencing

{¶22} In this case, the parties entered into an agreed sentence, which was accepted by the trial court. "A jointly recommended sentence that is accepted by the court is not appealable." *State v. Lassiter*, 7th Dist. No. 08JE11, 2009-Ohio-1174, at ¶22, citing R.C. 2953.08(D)(1). The record indicates that Thomas faced a possible prison term of life without the possibility of parole, as he was originally charged with several counts of rape of a child under ten. See R.C. 2907.02(A)(1)(b)(B). However, through the benefit of the plea agreement, by amending the charge to the rape of a child under the age of thirteen, R.C. 2907.02(A)(1)(b), Thomas received a life sentence with the possibility of parole after ten years. Accordingly, there are no non-frivolous appealable issues with regard to Thomas's sentence.

Additional Issues Raised by Appellate Counsel

{¶23} In his no-merit brief, appellate counsel raised several other potential issues. First, counsel considered whether an ineffective assistance of counsel claim could have been raised, but ultimately concluded such an argument would be meritless. Counsel is correct. A defendant who enters a guilty plea "waives the right to claim that [he] was prejudiced by constitutionally ineffective assistance of counsel, except to the extent the defects complained of caused the plea to be less than knowing and voluntary." *State v. Barnett*, (1991), 73 Ohio App.3d 244, 249, 596 N.E.2d 1101; *State v. Scranton Buchanan*, 7th Dist. No. 05MA60, 2006-Ohio-5653, ¶17. There is nothing to indicate Thomas's trial counsel acted in such a manner to cause Thomas's plea to be less than

knowing and voluntary. To the contrary, as aforementioned, it appears clear that Thomas's plea was knowing, voluntary and intelligent. As such, any claim of ineffective assistance of trial counsel is waived. Even assuming arguendo it was not waived, there is no indication that trial counsel's performance was deficient. Rather, the record reflects that Thomas benefitted from the negotiated plea agreement.

{¶24} Second, counsel raised a potential double jeopardy issue, namely whether the two rape charges should have merged with one another, or whether the kidnapping charge should merged with the rape charges. Counsel ultimately decided that neither argument would be meritorious. However, in support of his conclusions, counsel discussed information that is not contained within the trial court record, specifically, a DVD of a police interview with the victim, and Ohio Bureau of Criminal Identification and Investigation (BCI) reports. Although counsel attached the BCI reports to his no-merit brief, those documents are not contained in the record below. Regardless, we are precluded from considering the merger issue. Because Thomas pled guilty and the court imposed the jointly recommended sentence, the only potential appealable issue in this case is whether his plea was knowing, voluntary and intelligent, and as indicated above, it was.

{¶25} Third, counsel discussed whether Thomas pled guilty to an unconstitutional statute, and found that he did not. Counsel is correct. "A statute enacted in Ohio is presumed to be constitutional." *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, 896 N.E.2d 110, at ¶12, citing *State ex rel. Jackman v. Cuyahoga Cty. Court of Common Pleas* (1967), 9 Ohio St.2d 159, 161, 38 O.O.2d 404, 224 N.E.2d 906. Here, Thomas pled guilty to rape of a child under thirteen, pursuant to R.C. 2907.02(A)(1)(b), and kidnapping, pursuant to R.C. 2905.01(A)(4)(C). Neither statute has been found unconstitutional. Finally, counsel discussed whether any potential appealable issues arise from Thomas's sex offender classification, and concluded there are none. Counsel is correct, as the Ohio Supreme Court has held that sex offender classifications pass constitutional muster. See, e.g., *Ferguson*, supra.

{¶26} There are no meritorious issues for appeal. Consequently, Thomas's

appeal is wholly frivolous. Counsel's motion to withdraw is granted and the judgment of the trial court is affirmed.

Vukovich, P.J., concurs.

Waite, J., concurs.