[Cite as *State v. Kelley*, 2015-Ohio-1165.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2014-CA-22
	:	
v.	:	T.C. NO. 12CR421, 13CR128, 13CR51
	:	
TYRONE KELLEY	:	(Criminal appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

. . . . . .

O P I N I O N

Rendered on the ___27th___ day of ____March_____, 2015.

. . . . . .

RYAN A. SAUNDERS, Atty, Reg. No. 0091678, Assistant Prosecuting Attorney, 50 E. Columbia Street, 4th Floor, Springfield, Ohio 45502
Attorney for Plaintiff-Appellee

MICHAEL R. PENTECOST, Atty. Reg. No. 0036803, 117 S. Main Street, Suite 400, Dayton, Ohio 45422
Attorney for Defendant-Appellant

TYRONE KELLEY, Inmate #697646, North Central Correctional Institute, 670 Marion Williamsport Road, P. O. Box 1812, Marion, Ohio 43301
Defendant-Appellant

. . . . . .

PER CURIAM:

{¶ 1} Appointed counsel for defendant-appellant Tyrone Kelley submitted an appellate brief under *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493

(1967), alleging that no arguably meritorious issues exist for appeal. After a thorough review of the record, this Court agrees that the trial court's proceedings were proper, and we affirm the trial court's judgment.

{¶ 2} On June 18, 2012, Kelley was indicted in Case No. 12-CR-421, for one count of burglary, in violation of 2911.12(A)(2), a felony of the second degree. On January 22, 2013, Kelley was indicted in Case No. 13-CR-51, for two counts of burglary, in violation of R.C. 2911.12(A)(2), and one count of escape, in violation of R.C. 2921.34(A)(1), all counts being felonies of the second degree. Finally, on February 25, 2013, Kelley was indicted in Case No. 13-CR-128, for one count of burglary, in violation of R.C. 2911.12(A)(2), a felony of the second degree, and one count of burglary, in violation of R.C. 2911.12(A)(3), a felony of the third degree.

{¶ 3} On January 22, 2014, the parties reached a plea agreement whereby Kelley pled guilty to one count of burglary in Case No. 12-CR-421, two counts of burglary in R.C. 13-CR-51, and one count of burglary in Case No. 13-CR-128, with all second degree felonies being amended to felonies of the third degree. All of the remaining counts were dismissed. Additionally, the parties agreed to an aggregate sentence of eight years to be imposed for the four counts of burglary. The trial court did not order a pre-sentence investigation report. After accepting Kelley's guilty pleas, the trial court immediately proceeded to disposition, sentencing him to two years on each burglary count to be served consecutively, for an aggregate sentence of eight years in prison. On January 23, 2014, the trial court issued three separate judgment entries of conviction in Case Nos. 12-CR-421, 13-CR-51, and 13-CR-128.

{¶ 4} Kelley filed a timely notice of appeal in each case with this Court on February

11, 2014. In an entry issued on March 5, 2014, we appointed counsel to represent Kelley on appeal. On December 8, 2014, appointed counsel representing Kelley submitted an *Anders* brief, alleging that no arguably meritorious issues exist for appeal. By magistrate's order of December 16, 2014, we informed Kelley that his counsel filed an *Anders* brief and informed him of the significance of an *Anders* brief. We invited Kelley to file a pro se brief assigning any error for our review within sixty days. Kelley has not filed anything with this Court.

{¶ 5} Appointed counsel advances one potential assignment of error for our review, to wit:

{¶ 6} "THE TRIAL COURT ABUSED ITS DISCRETION BY IMPOSING SENTENCES THAT WERE NOT SUPPORTED BY THE RECORD."

{¶ 7} In his sole potential assignment, Kelley contends that the trial court abused its discretion when it sentenced him to an aggregate sentence of eight years in prison. Specifically, Kelley argues that the sentence imposed by the trial court was not supported by the record. Kelley points out that the trial court imposed an aggregate sentence of eight years "with the only factual background on the record being a brief recitation of the facts by the prosecutor at the time of the pleas." Kelley points out that no PSI was ordered prior to sentencing, and there was no waiver of the PSI by appellant or defense counsel.

{¶ 8} Upon review, we find no merit to Kelley's potential assignment of error. As this Court has previously noted, "'[o]nce a defendant stipulates that a particular sentence is justified, the sentencing judge no longer needs to independently justify that sentence.' *State v. Haney*, 2d Dist. Greene App. No. 06CA105, 2007-Ohio-5174." *State v. Little*, 2d

Dist. Greene No. 2008-CA-76, 2009-Ohio-4328, ¶ 64. The record reflects that Kelley agreed to the eight-year sentence, and accordingly, "[n]o further justification was required." *Id*.

{¶ 9} Moreover, R.C. 2953.08 governs appeals based on felony sentencing guidelines. R.C. 2953.08(D)(1) provides an exception to a defendant's ability to appeal and provides: "A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge." "In other words, * * * an agreed-upon sentence may not be [appealable] if (1) both the defendant and the state agree to the sentence, (2) the trial court imposes the agreed sentence, and (3) the sentence is authorized by law. R.C. 2953.08(D)(1). If all three conditions are met, the defendant may not appeal the sentence." *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-278, 922 N.E.2d 923, ¶ 16. Kelley's "sentence is authorized by law only if it comports with all mandatory sentencing provisions," including R.C. 2941.25. *Underwood*, ¶ 23.

{¶ 10} In the instant case, both parties agreed to the eight-year sentence imposed by the trial court. Furthermore, the sentence imposed by the trial court is clearly within the statutory limits for the offenses to which Kelley pled guilty and less than the maximum sentence that could have been imposed. Most importantly, the aggregate sentence of eight years had been agreed to by both Kelley and the State as part of the plea agreement. We also note that the indictments and the statement of the prosecutor when setting forth the nature of Kelley's offenses make clear that he was charged with four offenses committed separately, on four separate dates, such that, pursuant to R.C.

2941.25(B), the offenses are not subject to merger. See *State v. Ayers*, 2d Dist. Montgomery No. 25208, 2012-Ohio-6038, ¶ 25. Accordingly, there is no suggestion of the possibility, due to the nature of the burglary offenses, that Kelley's offenses were committed by the same conduct. This is in fact an impossibility, as Kelley's conduct occurred on separate dates. Finally, we note that the record of the plea hearing establishes that the trial court made the necessary findings pursuant to R.C. 2929.14(C)(4) before imposing consecutive sentences. The trial court also included its findings regarding the imposition of consecutive sentences in the judgment entry of conviction. Thus, we can find no arguable merit to Kelley's sole potential assignment of error.

{¶ 11} Additionally, in the performance of our duty, under *Anders v. California,* to conduct an independent review of the record, we have found no potential assignments of error having arguable merit. We conclude that this appeal is wholly frivolous. Therefore, the judgment of the trial court is Affirmed.

. . . . . .

FAIN, J., DONOVAN, J., and WELBAUM, J., concur.

Copies mailed to:

Ryan A. Saunders
Michael R. Pentecost
Tyrone Kelley
Hon. Douglas M. Rastatter