[Cite as *State v. Thomas*, 2017-Ohio-5501.]

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

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 26907
	:	
v.	:	T.C. NO. 15-CR-1324
	:	
SHAWN THOMAS	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the ___23rd___ day of _____June_____, 2017.

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Defendant-Appellant

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FROELICH, J.

{¶ 1} After the trial court overruled his motion to suppress, Shawn Thomas pled no contest in the Montgomery County Court of Common Pleas to possession of cocaine, in

the amount of 20 grams or more, but less than 27 grams, in violation of R.C. 2925.11(A). The trial court sentenced him to a mandatory term of six years in prison, suspended his driver's license for five years, and ordered him to pay court costs.

{¶ 2} Thomas's appellate counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), indicating that, "[a]fter careful review of the proceedings in this case, counsel for Appellant concludes that there are no issues of merit upon which to base his Appeal." By entry, we informed Thomas that his attorney had filed an *Anders* brief on his behalf and granted him 60 days from that date to file a pro se brief. No pro se brief was filed.

{¶ 3} Upon an initial review, we noticed that certain proceedings had not been transcribed, and we ordered counsel to supplement the record with the transcripts of the plea and sentencing hearings. We provided counsel an opportunity to file a supplemental brief, addressing any additional issues he may find. Counsel filed a supplemental *Anders* brief, again indicating that he found no non-frivolous issues. We again informed Thomas that his attorney had filed an *Anders* brief and provided him an opportunity to file a pro se brief. Thomas filed a pro se brief on February 10, 2017, claiming that his trial attorney rendered ineffective assistance as to the motion to suppress.

{¶ 4} We have conducted our independent review of the record pursuant to *Penson v. Ohio*, 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988), and we agree with appellate counsel that there are no non-frivolous issues for review.

I. Factual and Procedural History

{¶ 5} The State's evidence at the suppression hearing established the following

facts.

{¶ 6} Between 5:00 and 5:30 p.m. on May 4, 2015, Dayton Police Officer Zachary Williams and his partner, Officer James Campolongo, were monitoring a house that had been the subject of multiple complaints through the drug hotline and neighborhood complaints from neighborhood association meetings. Williams stated that the house had been nuisance abated a few times,[1] and officers were aware that individuals were actively selling drugs from the house. Officer Williams had responded to the home several times before, and he knew the homeowner, Steven Shoemaker, on sight and by name.

{¶ 7} While monitoring the residence, Officers Williams and Campolongo had a "consensual encounter" with two women who left the house. One of the women told the officers that she had an outstanding warrant. After the officers confirmed the warrant, the woman asked the officers if her friend could retrieve a shirt from the house for her. The officers agreed, provided that Officer Williams came along to ensure that the friend did not also retrieve a gun.

{¶ 8} Officer Williams and the friend returned to the house, and the friend knocked on the front door. Shoemaker answered the door, and Williams asked if they could come in to retrieve a t-shirt for the woman who was under arrest. Shoemaker allowed them to enter. After Officer Williams stepped inside, he saw a man run upstairs and heard others

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[1] When asked what a nuisance abatement was, Officer Williams responded, "A nuisance abatement is when we find presence of felony drugs, i.e., the spoon with residue. At that time, we call our supervisor to fill out a nuisance abatement paperwork which goes to Housing and reflects the violations found. * * * Everyone who is in the house is filled out onto the nuisance abatement paperwork. We run them and check their history and then put them on the paperwork that says that they were inside of the house where felony drugs were found." (Tr. 13-14.)

run out a side door. Officer Williams went out the side door, saw two women walking down the alley behind the property, and radioed other officers for assistance.

{¶ 9} Williams then went back around to the front of the house. Although Williams did not expressly ask to be let back in, Shoemaker opened the door for him. Once inside, Officer Williams proceeded to a bathroom, where the shirt was located. Along the way, he observed a crack pipe in the living room and, in the kitchen, he saw a spoon with cooked-on drug residue and a cotton ball. Williams immediately recognized the items as drug paraphernalia. Williams decided to nuisance abate the home again. Williams stated that, when a nuisance abatement is conducted, everyone present in the home is listed on the paperwork. Williams called for additional backup for the nuisance abatement.

{¶ 10} Officer Joseph Setty and his partner, Officer Wes Gundelfinger, responded to Officer Williams's request for additional officers. Officer Setty was familiar with the residence, which he described as a "flop house, drug house." Setty had previously responded to the home three or four times, and the last time had been a few weeks before May 4, 2015. When Officer Setty arrived, he observed several people on the front porch and others inside the house.

{¶ 11} As part of the nuisance abatement, Officer Williams searched the home to locate and identify those present. Officers Campolongo and Gundelfinger assisted him. During the search, a woman informed an officer that the "dope boy" was in the basement. Despite having been in the home six or seven times, Officer Williams never knew there was a basement. The officers found a hatch that opened a trap door, which led to a basement/dungeon-like area.

{¶ 12} Before going into the basement, Officers Campolongo and Williams announced themselves and asked anyone present in the basement to make themselves known. When no one responded, Williams and Campolongo went down; Officer Setty stood watch at the top of the steps. The officers initially did not find anyone, but Officer Campolongo saw feet hanging out of a crawl space. The officers ordered the individual, who was Thomas, to show his hands and come out. Thomas emerged and was placed under arrest for obstructing official business. Officer Campolongo found a bag of marijuana near where Thomas had been lying in the crawl space.

{¶ 13} Officer Setty took custody of Thomas at the top of the basement stairs, escorted Thomas outside, and conducted a search incident to Thomas's arrest. During the search, Officer Setty found packs of money in the pockets of Thomas's jeans, and he felt a "hard, rocky substance," which Setty knew to be crack cocaine, in Thomas's buttocks. Thomas resisted and attempted to put his hands inside his pants; he was taken to the ground by several officers. Officer Setty then retrieved two rocks of crack cocaine from Thomas's buttocks.

{¶ 14} On May 13, 2015, Thomas was indicted for possession of cocaine, a second-degree felony. Thomas's counsel moved to suppress the drugs and any other evidence obtained as a result of an allegedly unlawful search of Thomas on May 4, 2015. He argued that (1) he was a social guest with standing to challenge the officers' entry into the home, (2) the officers exceeded the scope of consent to enter the premises to retrieve clothing, (3) the plain view doctrine did not authorize the officers to enter the basement and seize him, and (4) his arrest was unlawful and thus the items seized from him were not pursuant to a search incident to a lawful arrest.

{¶ 15} The trial court held a hearing on the motion to suppress on July 9, 2015. At that time, the State raised that Thomas lacked standing to challenge the police officer's entry into the home in which Thomas was found on May 4. The parties submitted post-hearing memoranda on that issue.

{¶ 16} On August 31, 2015, the trial court overruled the motion to suppress, holding that Thomas did not establish that he had an expectation of privacy in the property where he was found. The trial court further found that, even if Thomas had standing to file a motion to suppress, the search of the residence and Thomas's arrest were constitutional. The court reasoned that (1) Officer Williams lawfully entered the property, on both occasions, with the homeowner's consent, (2) drugs were located in plain view, (3) the officers lawfully conducted the nuisance abatement, had probable cause to arrest Thomas, and lawfully conducted a search incident to his arrest when he was located, and (4) the officers were justified in performing a protective sweep.

{¶ 17} On October 15, 2015, Thomas pled no contest to possession of cocaine, as charged. After a presentence investigation, the trial court sentenced him to a mandatory term of six years in prison, with jail time credit of 178 days. Thomas's driver's license was suspended for five years, and he was ordered to pay court costs.

{¶ 18} On appeal, appellate counsel identifies three potential assignments of error, namely that the trial court erred in denying Thomas's motion to suppress, that Thomas's plea was not knowing, intelligent, and voluntary, and that the six-year prison sentence was unduly harsh and contrary to law.

II. Motion to Suppress

{¶ 19} The Fourth Amendment to the United States Constitution and Section 14,

Article I of the Ohio Constitution protect individuals from unreasonable searches and seizures. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Pressley*, 2d Dist. Montgomery No. 24852, 2012-Ohio-4083, ¶ 18. "[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment was directed." (Citation omitted.) *Payton v. New York*, 445 U.S. 573, 585, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable, subject only to a few specifically established and well delineated exceptions. *Id*. at 586.

{¶ 20} One exception to the warrant requirement is a search conducted with the resident's voluntary consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 249, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *State v. Posey*, 40 Ohio St.3d 420, 427, 534 N.E.2d 61 (1988). It is also well recognized that police may enter a home without a warrant "where they have probable cause to search and exigent circumstances exist justifying the entry." *State v. Carr*, 2d Dist. Montgomery No. 19121, 2002-Ohio-4201, ¶ 15, citing *Minnesota v. Olson*, 495 U.S. 91, 100, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990).

{¶ 21} Fourth Amendment rights are personal in nature, and they may not be asserted vicariously by third parties. *Rakas v. Illinois*, 439 U.S. 128, 133-34, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). "A person aggrieved by the introduction of evidence secured by an illegal search of a third person's premises or property has not suffered any infringement upon his Fourth Amendment rights." *State v. Henderson*, 2d Dist. Montgomery No. 22062, 2008-Ohio-1160, ¶ 9, citing *Rakas* at 134. Consequently, the person challenging the legality of a search bears the burden of proving that he has a legitimate expectation of privacy in the place searched that society is prepared to

recognize as reasonable. *See, e.g., Minnesota v. Carter*, 525 U.S. 83, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998) (appellant lacked standing to bring Fourth Amendment challenge based on search of another person's home because he had no reasonable expectation of privacy therein); *Rakas*, 439 U.S. at 143; *State v. Williams*, 73 Ohio St.3d 153, 166, 652 N.E.2d 721 (1995). The individual must have a subjective expectation of privacy in the place searched, and that expectation must be objectively reasonable and justifiable. *Rakas*, 439 U.S. at 143; *State v. Buzzard*, 112 Ohio St.3d 451, 2007-Ohio-373, 860 N.E.2d 1006, ¶ 14.

{¶ 22} "A premises need not be one's home in order for one to have a legitimate expectation of privacy in that place. *Minnesota v. Olson*, 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85(1990). In *Olson*, the United States Supreme Court held that an overnight guest may have a legitimate expectation of privacy in another's home even when his occupation of the premises is not exclusive. While the expectation generally attaches to one's home or residence, the fact that it does is not a bar to a reasonable expectation of privacy in other places that a person utilizes for residential purposes." *State v. Dooley*, 2d Dist. Montgomery No. 22100, 2008-Ohio-1748, ¶ 15.

{¶ 23} However, a person does not have reasonable expectation of privacy in another's home if he or she "is merely present with the consent of the householder." *Carter*, 525 U.S. at 90. In *Carter*, the United States Supreme Court held that two men who, with the consent of the householder, used an apartment for approximately two hours solely for the purpose of packing cocaine had no legitimate expectation of privacy in the apartment.

{¶ 24} In this case before us, Officer Williams testified that he was familiar with the

residence, that he had been there six or seven times, and that it was known for drug activity. Officer Williams knew Shoemaker, the homeowner, and indicated that Shoemaker was always there. Williams testified that Shoemaker and another woman were residents of the home. Williams had never seen Thomas at the home prior to May 4, and he testified Thomas was not a resident there. On May 4, a woman told the officers that the "dope boy" was in the basement; that individual was Thomas.

{¶ 25} Thomas did not testify or present any witnesses, and there is no evidence indicating that Thomas had any association with the property, except as a location from which he sold drugs on May 4, 2015. Thomas did not own the home, and he was not a resident there. There is no evidence that he had been to the home before or that he was an overnight guest (or even a social guest) of Shoemaker. Officer Williams's testimony indicates that Thomas was simply in the home on May 4 as a drug dealer. Given the evidence at the suppression hearing, the trial court did not err in concluding that Thomas lacked a reasonable expectation of privacy in the residence, and we agree with appellate counsel that any argument to the contrary would be frivolous.

{¶ 26} Because Thomas lacked a reasonable expectation of privacy in the residence, he had no standing to argue that the officers exceeded the scope of the homeowner's consent to enter the residence or to argue that the officers unlawfully entered the basement area of the residence.

{¶ 27} In his pro se brief, Thomas claims that he had been "staying at the residence for approximately a month as a welcomed guest of the homeowner and had full entitlement of the home and it's [sic] amenities, as well as, storage space for clothes and other sundries and was free to come and go as he desired." Thomas states that his trial

attorney was informed of these facts, failed to investigate them, and failed to present evidence at the suppression hearing relating to Thomas's standing.

{¶ 28} The record does not reflect what information was relayed by Thomas to his attorney regarding his residency at the house at issue. A claim of ineffective assistance of counsel cannot be asserted on direct appeal if it relies on matters outside the record. *See, e.g., State v. Qualls*, 2d Dist. Montgomery No. 26423, 2015-Ohio-2182, ¶ 15; *State v. Curtis*, 2d Dist. Greene No. 2011-CA-56, 2013-Ohio-1690, ¶ 12. Thomas's claim on direct appeal that his counsel rendered ineffective assistance regarding the suppression hearing has no arguable merit.

{¶ 29} We note that Thomas's lack of standing did not preclude arguments that his arrest was not based on probable cause and that the items found on his person were not the result of a search incident to a lawful arrest.

{¶ 30} A search incident to a lawful arrest is one exception to the general prohibition against warrantless searches. *Chimel v. California*, 395 U.S. 752, 762-63, 89 S.Ct. 2034, 23 L .Ed.2d 685 (1969). Upon an individual's lawful custodial arrest, police officers are entitled to conduct a warrantless search of the person and the immediately surrounding area incident to that arrest. *Id.*; *State v. Williams*, 2d Dist. Montgomery No. 22924, 2009-Ohio-1627, ¶ 13. "When conducting a search incident to arrest, police are not limited to a *Terry* pat-down for weapons, but may conduct a full search of the arrestee's person for contraband or evidence of a crime." *State v. Todd*, 2d Dist. Montgomery No. 23921, 2011-Ohio-1740, ¶ 31, citing *State v. Gagaris*, 12th Dist. Butler No. CA2007-06-142, 2008-Ohio-5418, ¶ 16. "The justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect

in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial." *Id*., citing *United States v. Robinson*, 414 U.S. 218, 234, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973).

{¶ 31} The suppression hearing evidence reflects that the officers observed numerous items of drugs and drug paraphernalia inside the residence, which led Officer Williams to decide to nuisance abate the home again. As part of that process, he needed to identify all of the individuals inside the home. After being informed that the "dope boy" was in the basement, officers found the trap door to the basement. Before going into the basement, Officers Campolongo and Williams announced themselves and asked anyone present in the basement to make themselves known. Thomas did not respond, and when Officers Williams and Campolongo went down, they initially did not find anyone. Officer Campolongo then saw feet hanging out of a crawl space, and the officers ordered Thomas to show his hands and come out.

{¶ 32} Based on this evidence, the officers could have reasonably believed that Thomas was purposefully hiding from them to prevent them from finding him as part of their nuisance abatement and protective sweep. The evidence further indicated that Thomas's failure to comply with the officers' instructions delayed the completion of those tasks. Accordingly, the officers had probable cause to place Thomas under arrest for obstructing official business. *See, e.g., State v. Bailey*, 4th Dist. Hocking No. 09CA9, 2010-Ohio-213, ¶ 36 (defendant's hiding from the police in a bathroom supported his conviction for obstructing official business). It is inconsequential whether Thomas was ultimately charged with or convicted of obstructing official business.

{¶ 33} Because Thomas's arrest was lawful, the officers were entitled to conduct

a search incident to his arrest after removing him from the basement. During the search, Officer Setty found packs of money in the pockets of Thomas's jeans. After feeling a "hard, rocky substance" in Thomas's buttocks, Officer Setty retrieved two rocks of crack cocaine from Thomas's buttocks. Officer Setty's search of Thomas's person and the retrieval of the money and crack cocaine were permitted as part of a search incident to a lawful arrest.

{¶ 34} We find no non-frivolous claim relating to the trial court's ruling on Thomas's motion to suppress.

III. Plea Hearing

{¶ 35} On October 14, 2015, Thomas pled no contest to the indicted possession of cocaine charge, a second-degree felony.

{¶ 36} Crim.R. 11(C)(2) requires the court to address the defendant personally and (a) determine that the defendant is making the plea voluntarily, with an understanding of the nature of the charges and the maximum penalty, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions; (b) inform the defendant of and determine that the defendant understands the effect of the plea of guilty and that the court, upon acceptance of the plea, may proceed with judgment and sentencing; and (c) inform the defendant and determine that he or she understands that, by entering the plea, the defendant is waiving the rights to a jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses, and to require the State to prove guilt beyond a reasonable doubt at a trial at which he or she cannot be compelled to testify against himself or herself. *State v. Brown*, 2d Dist. Montgomery No. 21896, 2007-Ohio-6675, ¶ 3.

{¶ 37} The Supreme Court of Ohio has urged trial courts to literally comply with Crim.R. 11. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 29. However, because Crim.R. 11(C)(2)(a) and (b) involve non-constitutional rights, the trial court need only substantially comply with those requirements. *E.g., State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (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." *Id*. In contrast, the trial court must strictly comply with Crim.R. 11(C)(2)(c), as it pertains to the waiver of federal constitutional rights. *Clark* at ¶ 31.

{¶ 38} Furthermore, when non-constitutional rights are at issue, a defendant who challenges his plea on the basis that it was not knowingly, intelligently, and voluntarily made generally must show a prejudicial effect. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 17. Prejudice in this context means that the plea would otherwise not have been entered. *Id*. at ¶ 15.

{¶ 39} At the plea hearing, Thomas indicated that he was a United States citizen, 34 years old, and that he could read and write. The court informed Thomas that he faced a mandatory sentence of between two years and eight years in prison, and that it could impose financial sanctions, including a mandatory fine (unless Thomas were indigent) and restitution, as well as court costs. Thomas was informed that he would not be eligible for community control sanctions. Thomas stated that he was on post-release control; the trial court informed Thomas that it could impose an additional sanction or sentence him up to a year in prison for violating post-release control, but that it would not impose any sanction. The court informed Thomas that he would be required to serve a

three-year period of post-release control and of the consequences of violating post-release control. The court further stated that it was required to suspend Thomas's driver's license for a minimum of six months up to a maximum of five years.

{¶ 40} The trial court told Thomas that a no contest plea was not an admission of guilt, but an admission of the truth of the facts contained in the indictment. The court stated that the plea itself could not be used against him in any other civil or criminal proceeding, but the court was going to enter a judgment of guilty against him based upon the facts. The court also informed Thomas of the constitutional rights that he had and that he was waiving as a result of his plea.

{¶ 41} The prosecutor read the charge against Thomas, and Thomas indicated that he understood the charge and that the facts were true. Thomas stated that he had the opportunity to discuss the case with his attorney and that he was entering his plea voluntarily. Thomas signed the plea form and stated that he was pleading no contest to possession of cocaine, as second-degree felony. The trial court accepted his plea and found him guilty.

{¶ 42} Upon review of the transcript of the plea hearing, we find no non-frivolous issue related to Thomas's plea. The trial court strictly complied with the waiver of Thomas's constitutional rights and substantially complied with the requirements under Crim.R. 11(C)(2)(a) and (b). The trial court did not state in precise terms the possible prison sentence that could be imposed for Thomas's post-release control violation. *See* R.C. 2929.141(A)(1). However, the trial court indicated that it would not impose any sanction for the post-release control violation, and we find no possible prejudice from the trial court's summary of R.C. 2929.141.

IV. Sentencing

{¶ 43} As stated above, Thomas was sentenced to a mandatory term of six years in prison, and his driver's license was suspended for five years; he was also ordered to pay court costs. Thomas was informed of these sanctions at his sentencing hearing and in the court's written judgment entry. The trial court did not impose a fine due to his indigence.

{¶ 44} In reviewing felony sentences, appellate courts must apply the standard of review set forth in R.C. 2953.08(G)(2), rather than an abuse of discretion standard. *See State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 9. Under R.C. 2953.08(G)(2), an appellate court may increase, reduce, or modify a sentence, or it may vacate the sentence and remand for resentencing, only if it "clearly and convincingly" finds either (1) that the record does not support certain specified findings or (2) that the sentence imposed is contrary to law.

{¶ 45} At the beginning of the sentencing hearing, the trial court indicated that it had reviewed the presentence investigation report, that it had spoken with counsel, and that it had reviewed several letters that had been submitted by Thomas and Thomas's grandmother. The trial court afforded Thomas his right of allocution prior to sentencing, during which Thomas expressed that he wanted to "do better and try to get treatment so I can help myself and help other people." Defense counsel also spoke on Thomas's behalf at the hearing.

{¶ 46} After imposing sentence, the court told Thomas that he would be required to serve three-years of post-release control upon his release from prison and the consequences if he violated post-release control. The trial court explained Thomas's

appellate rights after imposing sentence. The court included these notifications in its written judgment entry.

{¶ 47} In imposing the six-year sentence, the trial court stated:

> Mr. Thomas, in reading your history, I find that you've been through more than most individuals can bear. Reading your family history and what you've been through and I've got a lot of empathy for you.
>
> But there are people who do have awful childhoods and can still change if they want to. You have -- say you want help for your problems. In looking at the history, that was afforded to you on several different occasions in the past, but you never took any effort, at least I can tell, to change your ways.
>
> You came [sic] involved in the criminal justice system at a very young age, as you know, and looking back, even before you were an adult, you had 17 convictions. And then when you became an adult, there was 13 misdemeanors. Many of those were drug and alcohol related that you could've gotten help along the way and you did not do that. You have eight prior felony convictions. You've been to prison it looks like three different times.
>
> And you committed this offense while you were on PRC and part of PRC, you could've gotten the treatment, too; but you failed to do that and you were failing to report to your officer as you were supposed to do.
>
> So I hear your words, but I haven't seen a pattern; and hopefully there will be a change in you, but at this point in time I have to look at what's

in front of me.

I have considered the purposes and principles of sentencing in 2929.11 and 2929.12 and specifically Ohio Revised Code 2929.13, which requires a mandatory prison term in this case. I am going to sentence you in this case to a term of six years to the Correction Reception Center. That sentence is to be mandatory served.

{¶ 48} Upon review of Thomas's presentence investigation report and the sentencing hearing transcript, we find no arguably meritorious claim based on his sentence. The trial court's sentence was not contrary to law, and it was amply supported by the record.

V. Conclusion

{¶ 49} Having conducted an independent review of the entire record, we find no non-frivolous issues for appeal. The trial court's judgment will be affirmed.

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

Copies mailed to:

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Hon. Dennis J. Adkins