

[Cite as *State v. Tyler*, 2010-Ohio-1134.]

IN THE COURT OF APPEALS OF CLARK COUNTY, OHIO

STATE OF OHIO :
 Plaintiff-Appellee : C.A. CASE NO. 09CA0025
 vs. : T.C. CASE NO. 03CR739
 MARK A. TYLER, JR. :
 Defendant-Appellant :

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O P I N I O N

Rendered on the 19th day of March, 2010.

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GRADY, J.:

{¶ 1} On January 16, 2004, Defendant Mark Tyler entered pleas of guilty to one count of robbery, a second degree felony, and one count of attempted murder, a first degree felony, in exchange for the State's dismissal of several other charges. The trial court sentenced Defendant to consecutive prison terms of eight

years for robbery and ten years for attempted murder, for a total sentence of eighteen years.

{¶2} On direct appeal we vacated Defendant's sentence and remanded the matter for re-sentencing because the trial court failed to follow the mandates of R.C. 2929.14(E)(4) and 2929.19(B)(2)(c) in imposing consecutive sentences. *State v. Tyler*, Clark App. No. 04CA0034, 2005-Ohio-2022. On or about February 8, 2006, the trial court resentenced Defendant, again imposing consecutive sentences of eight and ten years. Defendant again appealed, and this court held that the trial court erred in sentencing Defendant under R.C. 2929.14(E), because that provision had been declared unconstitutional in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. We again vacated Defendant's sentence and remanded the matter for re-sentencing. *State v. Tyler*, Clark App. No. 2006CA58, 2007-Ohio-4339. On or about January 21, 2009, the trial court resentenced Defendant, imposing the same consecutive eight and ten year sentences as before.

{¶3} Defendant timely appealed to this court from his latest re-sentencing. Defendant's appellate counsel filed an *Anders* brief, *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 19 L.Ed.2d 493, stating that he could find no meritorious issues for appellate review. We notified Defendant of his appellate counsel's representations and afforded him ample time to file a

pro se brief. None has been received. This case is now before us for our independent review of the record. *Penson v. Ohio* (1988), 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300.

{¶4} Defendant's appellate counsel has identified possible issues for appeal. Defendant's appellate counsel argues that the trial court abused its discretion in imposing maximum, consecutive sentences. In *State v. Jeffrey Barker*, Montgomery App. No. 22779, 2009-Ohio-3511, at ¶36-38, we wrote:

{¶5} "The trial court has full discretion to impose any sentence within the authorized statutory range, and the court is not required to make any findings or give its reasons for imposing maximum, consecutive, or more than minimum sentences. *State v. Foster*, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856, at paragraph 7 of the syllabus. Nevertheless, in exercising its discretion the trial court must consider the statutory policies that apply to every felony offense, including those set out in R.C. 2929.11 and 2929.12. *State v. Mathis*, 109 Ohio St.3d 54, 846 N.E.2d 1, 2006-Ohio-855, at ¶ 37.

{¶6} "When reviewing felony sentences, an appellate court must first determine whether the sentencing court complied with all applicable rules and statutes in imposing the sentence, including R.C. 2929.11 and 2929.12, in order to find whether the sentence is contrary to law. *State v. Kalish*, 120 Ohio St.3d 23,

896 N.E.2d 124, 2008-Ohio-4912. If the sentence is not clearly and convincingly contrary to law, the trial court's decision in imposing the term of imprisonment must be reviewed under an abuse of discretion standard. *Id.*

{¶ 7} “The term “abuse of discretion” connotes more than an error of law or judgment; it implies that the trial court's attitude is unreasonable, arbitrary, or unconscionable.’ *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.”

{¶ 8} The trial court considered a presentence investigation report at the time of the original sentencing hearing. The trial court's remarks at this latest resentencing hearing demonstrate that the court did consider the seriousness and recidivism factors in R.C. 2929.12. Before resentencing Defendant, the trial court gave both Defendant and his counsel an opportunity to speak. Furthermore, the eight and ten year sentences imposed by the trial court, while the maximum sentences allowed, are nevertheless clearly within the authorized range of available punishments for felonies of the first and second degree. R.C. 2929.14(A)(1) and (2). There is nothing in this record that suggests the court did not comply with all applicable rules and statutes in imposing its sentence. Accordingly, the court's sentence is not clearly and convincingly contrary to law. *Kalish*.

{¶ 9} In imposing consecutive eight and ten year prison terms

on Defendant, the trial court observed that this offense was more serious because the victim suffered serious and permanent physical harm. R.C. 2929.12(B). The court noted that Defendant savagely stabbed the victim, and but for intervention by a bystander, Defendant likely would have killed her. The court noted factors which indicate Defendant is likely to commit future crimes, including the fact that at the time of committing this offense Defendant was on parole, R.C. 2929.12(D)(1), and that Defendant has prior felony convictions for aggravated robbery and aggravated burglary. R.C. 2929.12(D)(2). The overriding purposes of felony sentencing are to protect the public from future crime by the offender and to punish the offender. R.C. 2929.11(A). This record reflects no abuse of discretion on the part of the trial court in imposing consecutive eight and ten year prison terms. This assignment of error lacks arguable merit.

{¶ 10} Defendant's appellate counsel also asserts Defendant's claim that he accepted the State's plea offer because he believed he would receive no more than a ten year sentence. The record refutes this claim. The plea form which Defendant acknowledged he read, understood and signed, indicates that the potential penalties are eight years for robbery, ten years for attempted murder, and that the sentences could be imposed consecutively by the court. At the plea hearing, the trial court specifically

informed Defendant that the maximum prison terms, if imposed consecutively, would total eighteen years in prison. Defendant said he understood that. There is nothing in this record that even remotely suggests that Defendant was promised no more than ten years in exchange for his plea. This assignment of error lacks arguable merit.

{¶ 11} In addition to reviewing the possible issues for appeal raised by Defendant's appellate counsel we have conducted an independent review of the trial court's proceedings and have found no error having arguable merit. Accordingly, Defendant's appeal is without merit and the judgment of the trial court will be affirmed.

BROGAN, J. And FROELICH, J., concur.

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Hon. Richard J. O'Neill