

[Cite as *State v. Bailey*, 2009-Ohio-4107.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23164
v.	:	T.C. NO. 2008 CR 2447
DARRYL J. BAILEY	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

OPINION

Rendered on the 14th day of August, 2009.

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DARRYL BAILEY, #A595-960, London Correctional Institute, P. O. Box 69, London, Ohio 43140
Defendant-Appellant

FROELICH, J.

{¶ 1} Darryl J. Bailey was indicted by the Montgomery County Grand Jury on August 12, 2008, for burglary, in that “. . . on or about May 24, 2008, in Montgomery County. . .[he] did by force, stealth or deception trespass in an occupied structure, to wit:

residence, located at 3457 Beech Grove Rd., Moraine, Ohio, . . .with purpose to commit in the structure. . .any criminal offense, to wit: theft. . . .” This is a felony of the third degree. R.C. 2911.12(A)(3).

{¶ 2} On November 24, the defendant entered a plea to the charge with the agreement that if he were sentenced to prison rather than community control, he would receive the minimum sentence for a third degree felony – one year. On December 12, 2008, he was sentenced to one year at the Corrections Reception Center and ordered to pay restitution in the amount of \$1,495.00.

{¶ 3} Bailey had appointed counsel in the trial and the same attorney filed a timely notice of appeal and was appointed as appellate counsel. Counsel filed a brief in accordance with *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, in which he represented that “after a diligent review of the record, [he] was unable to find any meritorious issues for appeal to overturn appellant’s knowing and voluntary plea in this matter and files this *Anders* brief accordingly at defendant’s request to file an appeal.” By Magistrate’s Order of April 28, 2009, we informed appellant that his counsel had filed an *Anders* brief, and of its significance, and we granted appellant sixty days in which to file a pro se brief assigning any errors for review by this court; nothing has been filed with the court by the appellant.

{¶ 4} Pursuant to our responsibilities under *Anders*, we have independently reviewed the record of this case, including the transcript of the sentencing and the video of the plea.

{¶ 5} Our review of the plea colloquy has not discovered any arguable violations of the defendant’s constitutional or non-constitutional rights. Similarly the sentencing complies with all constitutional and statutory requirements.

{¶ 6} Any possible argument that the indictment in this case did not state the necessary mens rea element pursuant to *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, is not well taken. First, a defendant waives any deficiency in the indictment by failing to object to the indictment and pleading guilty to the offense. *State v. Barton*, 108 Ohio St.3d 402, 2006-Ohio-1324, par. 73. Further, in this case, since the indictment tracked the language of the statute including the predicate offense, there is no violation even if the

defendant had made appropriate objections and not pled guilty.

{¶ 7} R.C. 2929.18(A)(1) authorizes a court that imposes a sentence on a felony offender to order a financial sanction in the form of restitution by the offender to the victim of his crimes “in an amount based on the victim’s economic loss.” That section further provides that if “the court imposes restitution, the court may base the amount of restitution it orders on an amount recommended by the victim, the offender, a pre-sentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information, provided that the amount the court orders as restitution shall not exceed the amount of economic loss suffered by the victim as a direct and proximate result of the commission of the offense.” An order of restitution must be supported by competent, credible evidence in the record. *State v. Warner* (1990), 55 Ohio St.3d 31, 69.

{¶ 8} The Defendant was referred for a pre-sentence investigation, but refused to be interviewed. Otherwise, the investigation reflects that the charge involves an incident in which the complainant’s residence had been ransacked and she was missing personal property, including jewelry, a CD player, speakers, and DVD’s; the police subsequently found some of the DVD’s had been sold by the defendant to a video shop and the defendant admitted taking the property. According to the pre-sentence investigation, the value of the total financial loss equaled the amount which the court ordered as restitution. Moreover, the defendant at no time requested a hearing regarding the amount of restitution or made any objection to the court’s order.

{¶ 9} In his brief, counsel suggests that “appellant’s conviction and sentencing is against the manifest weight of the evidence.” However, the defendant pled guilty, which waives his right to attack the conviction as against the manifest weight of the evidence on appeal. *State v. Pierre*, Montgomery App. No. 23245, 2009-Ohio-3125, par. 11, citing *State v. Jones*, Greene App. No. 08 CA 0008, 2009-Ohio-694, par. 13.

{¶ 10} Based on the record before us, we have concluded, as has appointed appellate counsel, that there are no arguably meritorious issues for appellate review and that this appeal is frivolous. The judgment will be affirmed.

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DONOVAN, P.J. and GRADY, J., concur.

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Darryl Bailey

Hon. Dennis J. Langer