

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-180373
	:	TRIAL NO. B-1604935
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
TIMOTHY FULLBECK,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

In response to a grand jury indictment charging him with ten counts of pandering sexually oriented material involving a minor, defendant Timothy Fullbeck entered into a plea agreement, pleading no contest to two counts of pandering in exchange for the state dismissing the remaining eight. The plea agreement also included an aggregate prison sentence of three years. In turn, the trial court accepted his no contest plea and accordingly sentenced Mr. Fullbeck to 18 months on each count, to run consecutively, thereby equaling the recommended three year sentence. Mr. Fullbeck now appeals, advancing three assignments of error, challenging in his first and second assignments aspects of his sentence, and asserting a claim of ineffective assistance of counsel in his third.

Turning to his first assignment of error, Mr. Fullbeck contends that the trial court erred because it failed to merge the two counts of pandering into a single conviction, as required under R.C. 2941.25 for allied offenses of similar import. However, R.C. 2953.08(D)(1) bars our review of Mr. Fullbeck's sentence, specifically prohibiting

appellate review of a sentence 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.” *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 16.

As Mr. Fullbeck concedes, the first two prongs are met, and thus we turn our attention to the third—whether Mr. Fullbeck’s sentence is authorized by law. There is no doubt that when a court imposes a sentence on multiple counts that are allied offenses of similar import, the sentence violates R.C. 2941.25(A), and thus is contrary to law. *See id.* at ¶ 26 (“[W]hen a sentence is imposed on multiple counts that are allied offenses of similar import in violation of R.C. 2941.25(A), R.C. 2953.08(D) does not bar appellate review of that sentence even though it was jointly recommended by the parties and imposed by the court.”). However, if the defendant concedes or stipulates that the offenses are separate, then he or she waives the right to appeal the allied offenses issue. *See id.* at ¶ 29 (“[N]othing in this decision precludes the state and a defendant from stipulating in the plea agreement that the offenses were committed with separate animus, thus subjecting the defendant to more than one conviction and sentence.”); *State v. Word*, 8th Dist. Cuyahoga No. 107235, 2019-Ohio-795, ¶ 10 (“[D]efendant’s concession or stipulation that the offenses are separate waives the right to appeal the allied offense issue.”).

While here Mr. Fullbeck did not specifically stipulate that he committed the offenses with separate animus, he did plead no contest to two counts of pandering and agreed to an aggregate three year sentence (18 months for each count) in exchange for the state dismissing eight counts (and avoiding a possible 15 year sentence). By agreeing to this, Mr. Fullbeck conceded that the offenses were separate, and thus waived the right to appeal the allied offenses issue. *See Word* at ¶ 10 (“[Defendant’s] agreement to serve consecutive sentences necessarily included the affirmative concession that the offenses were committed separately, with a separate animus or against separate victims because consecutive sentences cannot be imposed for allied offenses.”). Consequently, Mr.

Fullbeck's sentence is authorized by law thereby satisfying the third prong, leaving us without jurisdiction to review his sentence under R.C. 2953.08(D)(1).

Similarly, R.C. 2953.08(D)(1) also precludes our review of Mr. Fullbeck's second assignment of error challenging the trial court's failure to find the factors within R.C. 2929.14(C)(4). As established by the Ohio Supreme Court, when a trial court fails to make the consecutive-sentence findings pursuant to R.C. 2929.14, but the jointly recommended sentence includes nonmandatory consecutive sentences, "the sentence is nevertheless 'authorized by law,' and therefore is not appealable pursuant to R.C. 2953.08(D)(1)." *State v. Sergent*, 148 Ohio St.3d 94, 2016-Ohio-2696, 69 N.E.3d 627, ¶ 30. Accordingly, since Mr. Fullbeck jointly agreed to the recommended sentence and his sentence was not mandatory, we need not address whether the trial court faulted in its findings because his sentence is authorized by law, and thus barred by R.C. 2953.08(D)(1).

Turning to Mr. Fullbeck's ineffective assistance of counsel claim, Mr. Fullbeck asserts his trial counsel's performance was deficient because the attorney failed to object to the trial court's aggregate sentence for two consecutive counts of pandering and failed to file a motion to suppress concerning the items found in his bookbag and cellphone. To prevail on an ineffective assistance of counsel claim, Mr. Fullbeck must demonstrate that counsel's performance fell below an objective standard of reasonableness, and he suffered prejudice as a result. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Yet here, Mr. Fullbeck fails to provide any evidence in the record that counsel's actions were not sound trial strategy, or even suggest how he suffered prejudice. *See State v. Daniels*, 2018-Ohio-1701, 111 N.E.3d 708, ¶ 23 (1st Dist.), quoting *Strickland* at 689. (" '[T]he defendant must overcome the presumption that, under the circumstances, the challenged action[s] might be considered sound trial strategy.' "). Hence, we must overrule Mr. Fullbeck's third assignment of error based on the present record.

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For the foregoing reasons, we lack authority to review Mr. Fullbeck's first and second assignments of error, and we overrule his third. Accordingly, we affirm the trial court's judgment.

Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

ZAYAS, P.J., BERGERON and WINKLER, JJ.

To the clerk:

Enter upon the journal of the court on _____,
per order of the court _____.

Presiding Judge