

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Court of Appeals No. WD-13-024

Appellee

Trial Court No. 2012CR419

v.

Zachary Cornett

DECISION AND JUDGMENT

Appellant

Decided: May 9, 2014

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney,
Aram M. Ohanian and David E. Romaker Jr., Assistant
Prosecuting Attorneys, for appellee.

Timothy Young, State Public Defender, and Stephen A.
Goldmeier, Assistant State Public Defender, for appellant.

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PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Zachary Cornett, appeals the March 11, 2013 judgment of the Wood County Court of Common Pleas which, following his no contest plea to

attempted failure to appear, sentenced him to six months of imprisonment. For the reasons that follow, we reverse and remand the matter for resentencing.

{¶ 2} The facts of this case are as follows. On August 2, 2012, appellant was indicted on one count of failure to appear, a fourth degree felony. The charge stemmed from appellant's failure to appear at a hearing on a pending felony theft charge. Appellant ultimately entered a no contest plea to the theft charge and, despite arguing that the amendments to R.C. 2913.02(A) reduced the penalty from a felony to a misdemeanor, was sentenced to a fifth degree felony. An appeal was filed.

{¶ 3} In our June 6, 2013 decision, this court found that the revisions in H.B. 86 applied to defendants who had not yet been sentenced. *See State v. Cornett*, 6th Dist. Wood No. WD-12-046, 2013-Ohio-2367, relying on *State v. Boltz*, 6th Dist. Wood No. WD-12-012, 2013-Ohio-1830. Thus, we found that under R.C. 2913.02(A), the theft crime at issue was properly categorized as a first degree misdemeanor. *Id.* at ¶ 18. We reversed the judgment and remanded the matter for resentencing. *Id.* at ¶ 21.

{¶ 4} On January 17, 2013, while the above appeal was pending, appellant entered a plea of no contest to one count of attempted failure to appear, a fifth degree felony. The plea was specifically entered with the understanding that the sentence was dependent on this court's decision in the underlying theft case. The court stated: "[T]hat is dependent upon what the Court of Appeals rules in your first case." The parties stipulated as to the facts underlying the charge and the state indicated that they were sufficient to support the

charge at “whatever level” of offense it might be. On March 11, 2013, appellant was sentenced to six months of imprisonment. This appeal followed.

{¶ 5} On appeal, appellant raises the following assignment of error:

The trial court erred when it sentenced Mr. Cornett to a felony failure to appear because his underlying offense was a misdemeanor. R.C. 2937.99.

{¶ 6} The relevant statute, R.C. 2937.99, provides, in part:

(B) If the release was in connection with a felony charge or pending appeal after conviction of a felony, failure to appear is a felony of the fourth degree.

(C) If the release was in connection with a misdemeanor charge or for appearance as a witness, failure to appear is a misdemeanor of the first degree.

Further, because the failure to appear charge was an attempt offense, the offense is of the next lesser degree. R.C. 2923.02(E)(1).

{¶ 7} The reasoning in our decision in *Cornett, supra*, was recently upheld by the Supreme Court of Ohio. *State v. Taylor*, 138 Ohio St.3d 194, 2014-Ohio-460, 5 N.E.3d 612. *Taylor*, a certified conflict case, held that “in accordance with R.C. 1.58(B) and the uncoded portion of Section 4 of H.B. 86, the determining factor on whether the provisions of H.B. 86 apply to an offender is not the date of the commission of the offense but rather whether the sentence has been imposed.” *Id.* at ¶ 19. *See In re Cases*

Held of the Decision on State v. Taylor, Slip Opinion No. 2014-Ohio-1174 (*Boltz*, 6th Dist. Wood No. WD-12-012, 2013-Ohio-1830, *aff'd*). Accordingly, because appellant's underlying conviction was for a first degree misdemeanor theft offense, the offense level of appellant's attempted failure to appear conviction is a second degree misdemeanor. R.C. 2923.02(E)(1). Appellant's assignment of error is well-taken.

{¶ 8} On consideration whereof, we find that appellant was prejudiced and prevented from having a fair proceeding and the judgment of the Wood County Court of Common Pleas is reversed and the matter is remanded for resentencing in accordance with this decision. Pursuant to App.R. 24, appellee is ordered to pay the costs of this appeal.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See also 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Stephen A. Yarbrough, P.J.

JUDGE

James D. Jensen, J.

CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
