

[Cite as *State v. Abernathy*, 2015-Ohio-4769.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102716

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

EZEKIEL ABERNATHY

DEFENDANT-APPELLANT

JUDGMENT:
SENTENCE VACATED AND REMANDED
FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-589671-A

BEFORE: Kilbane, J., Celebrezze, A.J., and Keough, J.

RELEASED AND JOURNALIZED: November 19, 2015

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MARY EILEEN KILBANE, J.:

{¶1} Defendant-appellant, Ezekiel Abernathy (“Abernathy”), appeals the sentences imposed upon his guilty pleas to robbery and petty theft. Abernathy argues that the sentence the trial court imposed for robbery exceeds the limits set forth in R.C. 2929.16, and the trial court erred in failing to determine whether the offenses are allied and subject to merger. Having reviewed the record and the controlling case law, we conclude, and the state concedes, that the robbery sentence exceeds the terms set forth in R.C. 2929.16. Therefore, we vacate the sentence and remand for resentencing. We further conclude that the issue of allied offenses is moot.

{¶2} On October 6, 2014, Abernathy and codefendant, Dominic Rutherford (“Rutherford”), were indicted in a ten-count indictment that charged them with robbing two separate victims on September 22, 2014. Counts 1-5 charged each of them with aggravated robbery, two counts of robbery, kidnapping, and petty theft of a cell phone in connection with an alleged attack upon Robert Thomas, Jr. Counts 6-9 charged Abernathy and Rutherford with aggravated robbery, robbery, kidnapping, and petty theft of a cell phone in connection with an alleged attack upon D.W., a juvenile. Count 10 charged Rutherford with tampering with evidence.

{¶3} On December 17, 2014, Abernathy and Rutherford reached plea agreements with the state of Ohio. Their attorneys acknowledged that the charges stemmed from two separate incidents. Both defendants then pled guilty to Counts 2 and 5, second-degree felony robbery and petty theft charges pertaining to Thomas, and Counts 7

and 9, second-degree felony robbery and petty theft charges pertaining to D.W. The remaining charges were nolle. Thereafter, on January 13, 2015, the trial court held a sentencing hearing on both matters. The trial court sentenced Abernathy to one year of incarceration at the Cuyahoga county jail, less time served on Counts 2 and 7, followed by transfer to a community-based correctional facility on Counts 5 and 9. The court also sentenced Abernathy to two years of community control sanctions to be served after the jail term imposed on Counts 2 and 7. (Tr. 77.)¹

{¶4} Abernathy now appeals, assigning the following errors for our review:

Assignment of Error One

The trial court erred by ordering a jail sentence longer than six months, which is in direct violation of R.C. 2929.16.

Assignment of Error Two

The trial court erred by ordering convictions and a consecutive sentence for separate counts because the trial court failed to make a proper determination as to whether those offenses are allied offenses pursuant to R.C. 2941.25 and they are part of the same transaction under R.C. 2929.14.

Sentence Violates R.C. 2929.16(A)(2)

¹The trial court also sentenced Rutherford to one year of incarceration at the Cuyahoga county jail, less time served. The trial court ordered that Rutherford would then be transferred to a community-based correctional facility and be on community control sanctions for two years. A notice of appeal of Rutherford's sentence was filed on March 23, 2015, and his appeal is currently pending as *State v. Rutherford*, 8th Dist. Cuyahoga No. 102775.

{¶5} Within the first assignment of error, Abernathy argues that his sentence is contrary to the maximum limits set forth in R.C. 2929.16. The state concedes this error and observes that “[t]he statute requires that a defendant be only sentenced to up to six months in jail.”

{¶6} R.C. 2953.08 provides the grounds on which a defendant may appeal from a felony sentence. Under R.C. 2953.08(A)(4), a criminal defendant may appeal his sentence if it is contrary to law, and the statute provides two separate grounds for claiming that a sentence is contrary to law. *State v. Bonds*, 8th Dist. Cuyahoga No. 100481, 2014-Ohio-2766, ¶ 5. First, a sentence is contrary to law if it falls outside the statutory range for the particular degree of offense. *Id.* Second, a sentence is contrary to law if the trial court fails to comply with sentencing statutes. *Id.* at ¶ 6. *See also State v. Holmes*, 8th Dist. Cuyahoga No. 99783, 2014-Ohio-603, ¶ 10.

{¶7} R.C. 2929.16 sets forth community residential sanctions that may be imposed for a felony and provides:

(A) Except as provided in this division, the court imposing a sentence for a felony upon an offender who is not required to serve a mandatory prison term may impose any community residential sanction or combination of community residential sanctions under this section. * * *

(1) A term of up to six months at a community-based correctional facility that serves the county;

(2) Except as otherwise provided in division (A)(3) of this section and subject to division (D) of this section, [for felonies not applicable herein] a term of up to six months in a jail[.]

Accord R.C. 2929.15(A)(1) (“If in sentencing an offender for a felony the court * * * may directly impose a sentence that consists of one or more community control sanctions authorized pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code.”).

{¶8} Although a trial court is permitted to impose any combination of community residential sanctions for a felony under R.C. 2929.16(A), when imposing a sentence for multiple felonies, “R.C. 2929.16(A)(2) does not authorize a trial court to impose consecutive jail sentences.” *State v. Barnhouse*, 102 Ohio St.3d 221, 2004-Ohio-2492, 808 N.E.2d 874, syllabus. In reaching this conclusion, the *Barnhouse* court observed that R.C. 2929.41(A) sets forth the general rule that any sentence of imprisonment shall be served concurrently with any other sentence of imprisonment, subject to certain enumerated exceptions. The court went on to conclude that none of the exceptions to R.C. 2929.41 were applicable to consecutive jail sentences.

{¶9} The court further noted that R.C. 2929.16(A)(2) authorizes a six-month maximum jail sentence. Further, unlike R.C. 2929.14(C)(1), which governs consecutive prison terms if certain findings have been made, R.C. 2929.16 does not contain similar language authorizing consecutive sentences if certain findings are made. The *Barnhouse* court therefore concluded that, in light of these limitations in R.C. 2929.16, it would be inconsistent with the state’s overall sentencing scheme to permit the imposition of consecutive jail terms. The court explained:

[T]he state’s position is inconsistent with the policy underlying the sentencing scheme in R.C. 2929.14(E)(4) and 2929.19(B)(2)(c). Those sections require trial courts that impose consecutive sentences to make statutorily enumerated findings and to give reasons supporting those

findings for review on appeal. * * * R.C. 2929.16, however, contains no such requirement; thus, to hold that a trial court may impose consecutive sentences under that provision would be to treat similarly situated defendants differently and to provide appellate courts with no ability to review a trial court's findings or reasons for imposing consecutive sentences under R.C. 2929.16(A). We do not believe that the language in R.C. Chapter 2929 reflects an intention of the General Assembly to grant such unfettered discretion to the trial court.

Barnhouse at 225.

{¶10} Therefore, in this particular matter, the one-year county jail sentence imposed for Abernathy's felony convictions on Counts 2 and 7 exceeds the six-month maximum jail sentence as set forth in R.C. 2929.16(A). Moreover, a trial court may not order separate six-month jail terms to be served consecutively. *Barnhouse*.

{¶11} Accordingly, we vacate the sentence imposed herein.²

{¶12} The first assignment of error is well taken.

Allied Offenses

{¶13} Abernathy next argues that the court failed to undertake any analysis as to whether the robbery and petty theft offenses are allied offenses under R.C. 2941.25. In opposition, the state argues that this issue was not raised below and, pursuant to *State v. Torres*, 8th Dist. Cuyahoga No. 100106, 2014-Ohio-1622, the stipulation of "two separate instances," establishes that the offenses do not merge.

² We additionally note that a trial court may not impose an indefinite term at a community-based correctional facility; under R.C. 2929.16(A)(1), the court may impose a "term of up to six months at a community-based correctional facility." *State v. Moore*, 8th Dist. Cuyahoga No. 102242, 2015-Ohio-3233.

{¶14} In light of this court's determination that the sentence imposed in this matter must be vacated and the case remanded for resentencing, we overrule the second assignment of error as moot.

{¶15} The sentence is vacated and the matter is remanded for resentencing.

It is ordered that appellant recover of appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
KATHLEEN ANN KEOUGH, J., CONCUR