[Cite as *State v. Spencer*, 2015-Ohio-521.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101317

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARCUS D. SPENCER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-580119-A

BEFORE: Keough, P.J., E.A. Gallagher, J., and Boyle, J.

RELEASED AND JOURNALIZED: February 12, 2015

ATTORNEY FOR APPELLANT

Mary Elaine Hall
645 Leader Building
526 Superior Avenue, East
Cleveland, Ohio 44114

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor
By: Aleksandra Chojnacki
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

KATHLEEN ANN KEOUGH, P.J.:

{¶1} Defendant-appellant, Marcus D. Spencer ("Spencer"), appeals from the trial court's judgment, entered after his guilty plea, finding him guilty of attempted abduction and assault, and sentencing him to 18 months in prison. For the reasons that follow, we affirm.

I. Background

{¶2} In November 2013, Spencer was indicted on one count of abduction in violation of R.C. 2905.02(A)(2), and one count of assault in violation of R.C. 2903.13(A)(1). As summarized in the presentence investigation report from the facts contained in the police report, the charges arose from an incident involving Spencer and his girlfriend. Spencer became upset with his girlfriend after she told him that he should make a police report that he had just been in an automobile accident. Spencer, who had been drinking, hit his girlfriend in the face, and then dragged her to a nearby apartment building. When she told him that she would call the police, he took out a gun and fired it in the air. Frightened, she walked with Spencer to the apartment building, where he entered an apartment while she waited in the hall. When he came out of the apartment, he kicked her in her leg and spit in her face. They went downstairs to the lobby, where they saw the police, who were responding to a report of a male firing a shot in the air with a handgun and dragging a female toward an apartment building. When Spencer's girlfriend attempted to walk toward the police, Spencer grabbed her and forced her in the elevator. The officers eventually found the couple in the hallway on the fourth floor of the apartment building. Spencer fled when he saw the police, who apprehended him outside the building.

{¶3} Pursuant to a plea arrangement, Spencer subsequently pled guilty to one count of attempted abduction in violation of R.C. 2905.02(A)(2)/R.C. 2923.02, a felony of the fourth degree, and one count of assault as indicted, a first-degree misdemeanor.

{¶4} At the sentencing hearing, the trial judge told the parties that he had read the presentence investigative report. Spencer's counsel requested that Spencer be sentenced to community control because he had admitted his guilt in this case, had no prior felony convictions, had a job, did not take drugs, and was expecting a baby with his girlfriend, the victim of the offenses to which he pled guilty. The prosecutor reminded the court of the facts of the incident, including that police had responded to a report of shots fired, and that the victim was upset and crying when the police arrived and told them that Spencer had assaulted her.

{¶5} The judge then remarked that there was a "note" in the presentence report that a gunshot residue test had been done and asked the prosecutor if it was determined that there was residue on Spencer's hands. The prosecutor told the judge, "I believe there was."

{¶6} The judge then summarized his reasons for sentencing Spencer to prison:

> [The][c]ourt's considered all this information, principles and purposes of felony sentencing, recidivism and serious factors. And, this is a very serious matter. Wrecked your father's car after drinking. You don't report it to the police. You abandon the car.
>
> Your girlfriend wants to do the right thing. You attack her. Fire a gun in the air. You hide the gun. Police see you pulling her. You hit her, strike her. And, you have a history of not showing up to court. You have a history of not stopping after accidents. Got a history of assault/domestic violence case in 2009. Capias issued twice in that case. You resisted arrest in this case. You have a warrant for you in Bratenahl.
>
> This adds up to a violent dangerous person.
>
> * * *
>
> And I don't know if I could trust you on probation. * * * So, I'm going to find you not amenable to community control sanctions.

{¶7} The judge sentenced Spencer to 18 months incarceration; this appeal followed.

II. Analysis

{¶8} R.C. 2929.13(B)(1)(a) provides that a trial court shall sentence an offender to a community control sanction if an offender pleads guilty to a felony of the fourth degree that is not an offense of violence and the factors in R.C. 2929.13(B)(1)(a)(i) through (iv) are satisfied. R.C. 2929.13(B)(1)(b) provides that a trial court has discretion to impose a prison term upon an offender who pleads guilty to a fourth-degree felony that is not an offense of violence if any of the factors set forth in R.C. 2929.13(B)(1)(b)(i) through (ix) apply. Among those factors is if "the offender committed the offense while having a firearm on or about the offender's person or under the offender's control." R.C. 2929.13(B)(1)(b)(i).

{¶9} In his first assignment of error, Spencer contends that he was eligible for the minimum sentence of community control under R.C. 2929.13(B)(1)(a), and that the trial court erred in sentencing him to prison. Specifically, Spencer contends that there was a note about the gunshot residue test that was attached to the presentence report and "suddenly presented at the sentencing hearing" but never made part of the record. He contends that the trial court impermissibly relied on this note and the prosecutor's comments at sentencing about the results of the gun residue test to find, pursuant to R.C. 2929.13(B)(1)(b)(i), that he had committed the offense while having a firearm on his person or under his control and then sentence him to prison. Spencer contends that this was improper judicial factfinding because only a jury can make a determination regarding any fact that would increase his sentence, and whether he had a firearm on his person or under his control was never determined by a jury at trial.

{¶10} In his second assignment of error, Spencer contends that the trial court violated his Sixth Amendment right to a jury trial when it sentenced him to more than the minimum sentence of community control as a result of judicial factfinding. Spencer again refers to the trial court's alleged reliance on the note about the gun residue test and the prosecutor's comments

about the results of the test as impermissible judicial fact-finding that increased his sentence from community control to prison. Spencer's first and second assignments of error are related; we therefore consider them together.

{¶11} In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the United States Supreme Court held that a jury must determine any fact, other than a prior conviction, that increases the maximum authorized penalty for a crime. Subsequently, in *Alleyne v. United States*, 570 U.S. __, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), the United States Supreme Court held that Sixth Amendment principles are violated where facts not found by a jury are used to enhance the mandatory minimum penalty for a crime. The Supreme Court stated that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." *Id.* at paragraph one of the syllabus. Indeed,

> juries must find any facts that increase either the statutory maximum or minimum because the Sixth Amendment applies where a finding of fact both alters the legally prescribed range and does so in a way that aggravates the penalty. When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury.

Alleyne at fn.1.

{¶12} To reiterate, Spencer contends that under R.C. 2929.13(B)(1)(a), he was entitled to the minimum penalty of community control, but the trial court impermissibly engaged in judicial fact-finding to sentence him to prison. Spencer's argument fails, however, because he was not entitled to community control under R.C. 2929.13(B)(1)(a), which provides that the trial court shall sentence an offender to community control "if an offender is convicted of or pleads

guilty to a felony of the fourth or fifth degree *that is not an offense of violence*" (emphasis added) and the factors set forth in R.C. 2929.13(B)(1)(a)(i) through (iv) apply.

{¶13} Spencer pled guilty to attempted abduction in violation of R.C. 2905.02(A)(2).[1] R.C. 2901.01(A)(9) defines an "offense of violence" as including a violation of R.C. 2905.02. Accordingly, because Spencer pleaded guilty to a fourth-degree offense of violence, he was not eligible for community control sanctions under R.C. 2929.13(B)(1)(a). *See also State v. Washington*, 10th Dist. Franklin No. 94APA11-1653, 1995 Ohio App LEXIS 2586, *1 (June 20, 1995) (attempted abduction is an offense of violence).

{¶14} Under R.C. 2929.13(B)(2), if R.C. 2929.13(B)(1) does not apply, the sentencing court shall comply with the purposes and principles of sentencing under R.C. 2929.11 and 2929.12 in determining whether to impose a prison term for a fourth-or fifth-degree felony. The purposes of felony sentencing are to protect the public from future crime by the offender and punish the offender. R.C. 2929.11(A). Under R.C. 2929.11(B), a felony sentence must be reasonably calculated to achieve the purposes set forth in R.C. 2929.11(A) "commensurate with and not demeaning to the seriousness of the crime and its impact on the victim, and consistent with sentences imposed for similar crimes committed by similar offenders."

{¶15} R.C. 2929.12 provides a nonexhaustive list of factors a court must consider when determining the seriousness of the offense and the likelihood that the offender will commit future offenses. The statute further provides that the court may consider any other factors relevant to achieving the purposes and principles of sentencing.

---

[1]"No person, without privilege to do so, shall knowingly * * * by force or threat, restrain the liberty of another person under circumstances that create a risk of physical harm to the victim or place the other person in fear."

{¶16} Here, the trial judge noted that he was sentencing Spencer to prison after considering the factors relevant to felony sentencing, the likelihood of recidivism, and the seriousness of Spencer's offenses, and determining that Spencer's actions and prior offenses indicated that he was a dangerous individual. Thus, Spencer's sentence complies with the applicable statutes.

{¶17} Moreover, there is no merit to Spencer's argument that the trial court sentenced him to prison solely because it determined on the basis of a note about a gun residue test attached to the presentence report that he had used a firearm in the offense. Rather, the trial court's conclusion that Spencer had a gun and fired it in the air was supported by information contained in the presentence report, which specifically stated that Spencer's girlfriend told the police that Spencer pulled out a gun and fired it in the air as he was dragging her to the apartment.

{¶18} Furthermore, contrary to Spencer's assertions, the "note" about the gun residue test was not *attached* to the presentence investigation report. Rather, the "note" the judge referred to was a statement in the report that "[t]he police officers were able to obtain a gunshot residue test off of the defendant's hands, but they were never able to locate the gun." Thus, the information about the gun residue test was not, as argued by Spencer, new information that was suddenly presented at the sentencing hearing. It was contained in the report, which defense counsel had an opportunity to review prior to sentencing. Indeed, at the sentencing hearing, when the judge asked defense counsel if he had any additions or deletions to the report, counsel responded that the report was "reasonably accurate."

{¶19} "When the defendant's convictions result from a plea bargain, the plea bargain 'does not preclude the trial court's consideration of the underlying facts' in determining the appropriate sentence to impose." *State v. Dari*, 8th Dist. Cuyahoga No. 99367,

2013-Ohio-4189, ¶ 17, quoting *State v. Frankos*, 8th Dist. Cuyahoga No. 78072, 2001 Ohio App. LEXIS 3712 (Aug. 23, 2001). Here, the trial court sentenced Spencer based upon information contained in the presentence report and Spencer's criminal history. There was no improper judicial factfinding and the sentence imposed was not contrary to law. R.C. 2953.08(G)(2). Therefore, the first and second assignments of error are overruled.

{¶20} In his third assignment of error, Spencer contends that he was denied his constitutional right to effective assistance of counsel because his trial counsel failed to object to the trial court's use of the hearsay contained in the "note" attached to the presentence report and the prosecutor's comments about the results of the gun residue test, and did not argue that by considering the gunshot residue test, the trial court was engaging in judicial fact-finding in violation of *Apprendi* and *Alleyne*.

{¶21} Having determined that there was no note attached to the presentence report, that the trial court could properly rely on the information contained in the presentence report, and that the court did not engage in any improper judicial fact-finding, we necessarily find no ineffective assistance of counsel. The third assignment of error is therefore overruled.

{¶22} Judgment affirmed.

It is ordered that appellee recover from appellant 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

KATHLEEN ANN KEOUGH, PRESIDING JUDGE

EILEEN A. GALLAGHER, J., and
MARY J. BOYLE, J., CONCUR