[Cite as *State v. Freeman*, 2016-Ohio-3178.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103677

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

NAUTICA T. FREEMAN

DEFENDANT-APPELLANT

JUDGMENT:
VACATED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-596919-A

BEFORE: E.T. Gallagher, J., Kilbane, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: May 26, 2016

ATTORNEYS FOR APPELLANT

Robert L. Tobik
Cuyahoga County Public Defender

BY: Cullen Sweeney
Assistant Public Defender
310 Lakeside Avenue
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor

BY: Melissa A. Riley, 8th Floor
Mary McGrath, 9th Floor
Assistant Prosecuting Attorneys
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

EILEEN T. GALLAGHER, J.:

{¶1} Defendant-appellant, Nautica T. Freeman ("Freeman"), appeals from her sentence following a guilty plea. She raises one assignment of error for our review:

> 1. The trial court erred when it sentenced Freeman contrary to law, imposing a one-year term of imprisonment rather than community control sanctions as required by R.C. 2929.13.

{¶2} After careful review of the record and relevant case law, we vacate Freeman's sentence and remand for proceedings consistent with this opinion.

I. Procedural History

{¶3} In July 2015, Freeman was named in a two-count indictment charging her with burglary in violation of R.C. 2911.12(A)(1), and assault in violation of R.C. 2903.13(A). The indictment stemmed from an incident where appellant, who was 19 years old at the time, accompanied her juvenile codefendants, A.O., M.S., and M.K., to a house party in order to confront the victim, who was "having sex with [A.O.'s] boyfriend." The state alleged that Freeman accompanied the juvenile codefendants into a bedroom where the victim was discovered in bed with A.O.'s boyfriend. At that time, A.O. punched the victim in the head and face, causing the victim a black eye and bruising to her face.

{¶4} In August 2015, Freeman pleaded guilty to amended Count 1, burglary/trespass in habitation in violation of R.C. 2911.12(B), a felony of the fourth degree. The remaining charge was nolled.

{¶5} In September 2015, the trial court sentenced Freeman to 12 months in prison, concluding that this case involved "a violent crime and [was] not proper for community control sanctions."

{¶6} Freeman now appeals from her sentence.

II. Law and Analysis

A. R.C. 2929.13(B)

{¶7} In her sole assignment of error, Freeman argues the trial court erred when it imposed a one-year term of imprisonment rather than community control sanctions. We agree.

{¶8} When reviewing a felony sentence, this court follows the standard of review set forth in R.C. 2953.08(G)(2), which provides in relevant part:

> The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.
>
> The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:
>
> (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
>
> (b) That the sentence is otherwise contrary to law.

{¶9} In this case, Freeman pleaded guilty to burglary/trespass in habitation in violation of R.C. 2911.12(B), which states "[n]o person, by force, stealth, or deception, shall trespass in a permanent or

temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present."

{¶10} As stated, Freeman's conviction was a felony of the fourth degree. R.C. 2929.13(B)(1)(a) provides that, except as provided in division (B)(1)(b), 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 all of the following factors are satisfied:

> (i) The offender previously has not been convicted of or pleaded guilty to a felony offense.
>
> (ii) The most serious charge against the offender at the time of sentencing is a felony of the fourth or fifth degree.
>
> (iii) If the court made a request of the department of rehabilitation and correction pursuant to division (B)(1)(c) of this section, the department, within the forty-five-day period specified in that division, provided the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court.
>
> (iv) The offender previously has not been convicted of or pleaded guilty to a misdemeanor offense of violence that the offender committed within two years prior to the offense for which sentence is being imposed.

R.C. 2929.13(B)(1)(a)(i)-(iv). *See also State v. Jones*, 1st Dist. Hamilton No. C-130625, 2014-Ohio-3345, ¶ 8.

{¶11} At sentencing, the trial court avoided the application of R.C. 2929.13(B)(1)(a) by finding that the facts of this case warranted a conclusion that Freeman's offense was "a violent crime" that "was not proper for community control sanctions."[1] Freeman disputes the trial court's conclusion.

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[1] R.C. 2929.13(B)(2), provides:

> If division (B)(1) of this section does not apply, except as provided in division (E), (F), or (G) of

She argues that she did not enter a guilty plea admitting that her conduct involved physical harm to persons or a risk of serious physical harm to persons, and therefore, the trial court erred in engaging in judicial fact-finding to conclude that her crime constituted an offense of violence.

{¶12} In determining whether a crime is an offense of violence, courts are guided by R.C. 2901.01(A)(9)(a), which states, in pertinent part:

> "Offense of violence" means any of the following:
>
> > (a) A violation of section 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2903.12, 2903.13, 2903.15, 2903.21, 2903.211, 2903.22, 2905.01, 2905.02, 2905.11, 2905.32, 2907.02, 2907.03, 2907.05, 2909.02, 2909.03, 2909.24, 2911.01, 2911.02, 2911.11, 2917.01, 2917.02, 2917.03, 2917.31, 2919.25, 2921.03, 2921.04, 2921.34, or 2923.161, of division (A)(1), (2), or (3) of section 2911.12, or of division (B)(1), (2), (3), or (4) of section 2919.22 of the Revised Code or felonious sexual penetration in violation of former section 2907.12 of the Revised Code;
> >
> > (b) A violation of an existing * * * law of this or any other state or the United States, substantially equivalent to any section, division, or offense listed in division (A)(9)(a) of this section;
> >
> > (c) An offense, * * * under an existing * * * law of this or any other state or the United States, committed purposely or knowingly, and involving physical harm to persons or a risk of serious physical harm to persons;
> >
> > (d) A conspiracy or attempt to commit, or complicity in committing, any offense under division (A)(9)(a), (b), or (c) of this section.

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this section, in determining whether to impose a prison term as a sanction for a felony of the fourth or fifth degree, the sentencing court shall comply with the purposes and principles of sentencing under section 2929.11 of the Revised Code and with section 2929.12 of the Revised Code.

{¶13} As Freeman's conviction is not an offense that the legislature has categorically deemed an offense of violence in all instances by way of R.C. 2901.01(A)(9)(a), her conviction may only be treated as an offense of violence if R.C. 2901.01(A)(9)(c) applies.

{¶14} In *State v. Cargill*, 8th Dist. Cuyahoga No. 98705, 2013-Ohio-2689, this court reviewed R.C. 2901.01(A)(9)(c) and determined that "the application of the statute is clear," stating:

> [i]f the defendant pleads guilty to an offense that contains an element of physical harm or a risk of serious physical harm, then the crime is an offense of violence. However, if the offense does not include such elements, the crime may still qualify as an offense of violence if the defendant admits or stipulates to the relevant facts in an attached furthermore clause.

Id. at ¶ 20.

{¶15} Applying *Cargill* to the facts of this case, we find Freeman's burglary/trespass in habitation offense does not contain an element of physical harm or risk of serious physical harm. Moreover, there is nothing in the record to suggest Freeman admitted or stipulated to an attached furthermore clause that the offense involved "physical harm to persons or a risk of serious physical harm to persons." As stated in *Cargill*, whether a crime could be considered an offense of violence under the facts of the case, "is not a factual finding that a trial court is free to make at sentencing." *Id*. at ¶ 21. This is because, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Id*., citing *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). "The 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely* at 303.

{¶16} Accordingly, we find the trial court was barred from engaging in judicial fact-finding to determine that Freeman's violation of R.C. 2911.12(B) in this instance qualified as an offense of violence.

{¶17} Having determined the trial court improperly treated Freeman's offense as an offense of violence, we turn to the remaining factors set forth in R.C. 2929.13(B)(1)(a)(i)-(iv). Here, the record reflects that Freeman has no prior criminal history and that her fourth-degree felony burglary charge was the only count before the trial court at the time of sentencing. Moreover, it is not demonstrated in the record that the trial court made a request to the department of rehabilitation and correction regarding the availability of community-control sanctions, as contemplated by the third provision of R.C. 2929.13(B)(1)(a). Thus, we find the factors set forth in R.C. 2929.13(B)(1)(a)(i)-(iv) are satisfied.

{¶18} However, the applicability of R.C. 2929.13(B)(1)(a) is subject to the exceptions listed in R.C. 2929.13(B)(1)(b), under which a trial court regains the discretion to impose a prison term on a defendant who otherwise would be subject to mandatory community control. Relevant to this case, R.C. 2929.13(B)(1)(b)(ii), permits a court, in its discretion, to impose a term of imprisonment for a non-violent, fourth-degree felony if "the offender caused physical harm to the victim while committing the offense." *See State v. Barnes*, 11th Dist. Trumbull No. 2012-T-0049, 2013-Ohio-1298, ¶ 16; *see also State v. Hamilton*, 1st Dist. Hamilton No. C-140290, 2015-Ohio-334, ¶ 10-11.

{¶19} Upon review, we find the trial court did not explicitly make any of the R.C. 2929.13(B)(1)(b)(i)-(xi) findings to overcome the presumption of community control sanctions on the record. Instead, the trial court's basis for imposing a term of imprisonment was based on the mistaken belief that Freeman's burglary conviction was a crime of violence. *State v. Lopez*, 8th Dist. Cuyahoga No. 103032, 2015-Ohio-5269, ¶ 54.

{¶20} Moreover, we find the record does not clearly and convincingly support a finding that Freeman caused the victim physical harm while Freeman, by force, stealth, or deception, trespassed in a permanent or temporary habitation of a person when a person other than an accomplice was present or likely to be present. *See* R.C. 2911.12(B). We recognize that the victim in this case was assaulted by Freeman's juvenile codefendant. However, Freeman's assault charge, as originally indicted in Count 2 was dismissed, and Freeman only admitted guilt to the fourth-degree burglary count as amended by the plea agreement. Pursuant to R.C. 2911.12(B), the commission of Freeman's burglary/trespass in habitation crime was completed once she unlawfully entered the victim's residence while persons were likely to be present. *See State v. Woods*, 6th Dist. Lucas No. L-13-1181, 2014-Ohio-3960, ¶ 32. Thus, the commission of the offense to which Freeman admitted guilt, was completed before the victim was assaulted by the juvenile codefendant. Significantly, there is nothing in the record to suggest a person was caused physical harm while Freeman unlawfully entered the habitation. Under these

circumstances, we are unable to conclude that a victim was caused physical harm "*during the commission of the offense*." (Emphasis added.)

{¶21} Based on the foregoing, we find the trial court improperly found Freeman's crime to be an offense of violence. In addition, the record does not support a finding that Freeman caused a victim harm during the commission of her burglary/trespass in habitation offense. Without these factual findings, the maximum sentence the trial court could have imposed solely on the basis of the facts admitted by Freeman was community control sanctions pursuant to R.C. 2929.13(B)(1)(a). *See Lopez* at ¶ 55.

III. Conclusion

{¶22} Accordingly, Freeman's sole assignment of error is sustained. Under R.C. 2929.13(B)(1)(a), the trial court's 12-month prison sentence was contrary to law. The circumstances surrounding Freeman's offense — a nonviolent felony of the fourth degree — meet all of the requirements listed in R.C. 2929.13(B)(1)(a). Furthermore, the trial court did not make any of the R.C. 2929.13(B)(1)(b) findings to overcome the presumption of community control sanctions. Accordingly, we reverse the trial court's sentence and remand the matter to the trial court for resentencing consistent with this opinion.

{¶23} Freeman's sole assignment of error is sustained. Accordingly, we vacate Freeman's sentence and remand the matter to the trial court for resentencing consistent with this opinion.

It is ordered that appellant recover of said 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.

EILEEN T. GALLAGHER, JUDGE

MARY EILEEN KILBANE, P.J., and
MELODY J. STEWART, J., CONCUR