

[Cite as *State v. Wallace*, 2016-Ohio-3469.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103983

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LUVE D. WALLACE

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-599906-A

BEFORE: Boyle, J., Keough, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: June 16, 2016

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MARY J. BOYLE, J.:

{¶1} Defendant-appellant, Luvé D. Wallace, appeals his sentence. He raises two assignments of error for our review:

1. The trial court denied Mr. Wallace due process when it sentenced him for a fourth-degree felony under the mistaken belief that he had committed a fourth-degree felony.
2. The trial court erroneously journalized Mr. Wallace's offense as a fourth-degree felony [when] it was a fifth-degree felony.

{¶2} The state concedes the error. After review, we agree. Accordingly, we vacate Wallace's sentence, and reverse and remand the judgment of the trial court for resentencing.

I. Procedural History and Factual Background

{¶3} In October 2015, Wallace was indicted on four drug-related counts. He pleaded guilty to an amended indictment of one count of drug trafficking in violation of R.C. 2925.03(A)(2) with forfeiture specifications. The remaining counts were nolle.

{¶4} At the plea hearing, the state specifically asked the trial court to "delete the school yard specification, which reduces Count 1 from a felony of the fourth degree to a felony of the fifth degree, trafficking, in violation of 2925.03(A)(2)." When discussing the plea agreement with Wallace, the trial court asked Wallace, inter alia, if he understood that he was pleading guilty to a fifth-degree felony. Wallace indicated that he did. Wallace then pleaded guilty to a fifth-degree felony drug trafficking charge. But the trial

court's entry journalizing the plea erroneously stated that Wallace pleaded guilty to a fourth-degree felony drug trafficking charge.

{¶5} At the sentencing hearing, the trial court imposed a sentence of eight months in prison for a fourth-degree felony conviction. The sentencing entry also indicates that the trial court erroneously sentenced Wallace to eight months in prison for a fourth-degree drug trafficking offense. It is from this judgment that Wallace appeals.

II. Standard of Review

{¶6} “[A]n appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court’s findings under relevant statutes or that the sentence is otherwise contrary to law.” *State v. Marcum*, Slip Opinion No. 2016-Ohio-1002, citing R.C. 2953.08(G)(2).

III. Analysis

{¶7} We will address Wallace’s assignments of error together because his second assignment of error is dependent upon our disposition of his first assignment of error.

{¶8} In this case, Wallace pleaded guilty to a fifth-degree felony drug trafficking charge. But the trial court erroneously sentenced Wallace to eight months in prison for a fourth-degree felony drug trafficking. As both Wallace and the state agree, the trial court violated Wallace’s due process rights by doing so. *See State v. Chandler*, 8th Dist. Cuyahoga No. 81922, 2003-Ohio-3529, ¶ 10 (this court reversed and vacated defendant’s sentence and remanded for resentencing when defendant pleaded guilty to a fifth-degree felony, but was erroneously sentenced to a fourth-degree felony).

{¶9} Generally, for many fourth- and fifth-degree felonies, a trial court shall impose community control sanctions under R.C. 2929.13(B)(1)(a)(i) - (iv). But a trial court may impose prison for some fourth- and fifth-degree felonies if certain factors are present. *See* R.C. 2929.13(B)(1)(b)(i) - (xi). Wallace does not contend that the trial court erred in sentencing him to prison rather than community control, and thus, we need not address these provisions.

{¶10} But if a trial court does sentence an offender to prison for a fourth- or fifth-degree felony, the ranges for each of them are set forth in R.C. 2929.14. Under R.C. 2929.14(A)(4), the range for a fourth-degree felony “shall be six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months.” Under R.C. 2929.14(A)(5), the range for a fifth-degree felony “shall be six, seven, eight, nine, ten, eleven, or twelve months.”

{¶11} In this case, despite the fact that a prison term of eight months falls within the proper range for a fifth-degree felony, Wallace’s due process rights were still violated. *See Chandler*, 8th Dist. Cuyahoga No. 81922, 2003-Ohio-3529, at ¶ 7-12 (defendant’s due process rights were violated even though the sentence imposed fell within the range of the correct felony).

{¶12} Although Wallace did not object to the trial court’s improper sentence in this case, we find, as it is within our discretion to do so, that the trial court’s actions amount to plain error. Crim.R. 52 (“Plain errors or defects affecting substantial rights

may be noticed although they were not brought to the attention of the court.”).
(Emphasis added.)

{¶13} Accordingly, we sustain Wallace’s first assignment of error. His second assignment of error is, therefore, rendered moot because the trial court must resentence Wallace and issue a new sentencing entry.

{¶14} Judgment reversed, sentence vacated, and the case is remanded for resentencing.

It is ordered that appellant recover from appellee the 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 J. BOYLE, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR