**[Cite as *State v. Torres*, 2017-Ohio-938.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**No. 104905**

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## STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

## ANGELO TORRES

DEFENDANT-APPELLANT

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**JUDGMENT:**
AFFIRMED

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Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-16-605128-A

**BEFORE:** Kilbane, J., E.A. Gallagher, P.J., and S. Gallagher, J.

**RELEASED AND JOURNALIZED:** March 16, 2017

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MARY EILEEN KILBANE, J.:

**{¶1}** This accelerated appeal is brought pursuant to App.R. 11.1 and Loc.R. 11.1.

**{¶2}** Defendant-appellant Angelo Torres ("Torres"), appeals from the sentence imposed upon his guilty plea to one count of carrying a concealed weapon. For the reasons set forth below, we affirm.

**{¶3}** In April 2016, Torres was charged with carrying a concealed weapon and improperly handling firearms in a motor vehicle. Both counts carried a forfeiture of a weapon specification. The charges arise from a traffic stop conducted by a Cleveland Metroparks Ranger at Edgewater Park. The ranger pulled Torres over for failing to use his turn signal. The ranger smelled marijuana from Torres's car. The ranger then used a canine, and it alerted the ranger to marijuana in the ashtray. The ranger also found a loaded gun in the glove box.

**{¶4}** Pursuant to a plea agreement, Torres pled guilty to carrying concealed weapons, a felony of the fourth degree, with the accompanying specification.[1] The improperly handling firearms in a motor vehicle count was nolled. The matter proceeded to sentencing, where the trial court imposed a 12-month prison term for Torres's offense.

**{¶5}** Torres now appeals, assigning the following error for our review.

Assignment of Error

The trial court erred in imposing a prison sentence.

[1]Torres has no prior felony convictions.

**{¶6}** Within his single assignment of error, Torres asserts that the trial court erred in ordering him to serve a prison term without making an explicit finding under R.C. 2929.13(B)(1)(b). Torres also argues that the trial court erred in imposing a prison sentence based upon judicial fact-finding barred by *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

**{¶7}** In reviewing felony sentences, appellate courts must apply the standard of review set forth in R.C. 2953.08(G)(2). *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1. Under R.C. 2953.08(G)(2), an appellate court may increase, reduce, or modify a sentence, or it may vacate the sentence and remand for resentencing, only if it clearly and convincingly finds either (1) the record does not support certain specified findings or (2) the sentence imposed is contrary to law. An appellate court does not review a trial court's sentence for an abuse of discretion. *Marcum* at ¶ 9-10.

**{¶8}** As an initial matter, we recognize that ordinarily R.C. 2953.08(A)(2) bars appellate review of a prison term imposed upon a fourth- or fifth-degree felony pursuant to R.C. 2929.13(B) absent a motion for leave. *State v. Andrukat*, 5th Dist. Stark No. 2001CA00324, 2002 Ohio App. LEXIS 1863, *4-*5 (Apr. 15, 2002) (holding that an appellate court lacks jurisdiction to consider an appeal under R.C. 2953.08(A)(2) where an appellant failed to seek leave). However, both arguments presented by Torres in this case evade the bar of R.C. 2953.08(A)(2). First, Torres's argument that the trial court erred in failing to make an explicit finding under R.C. 2929.13(B)(1)(b) renders

R.C. 2953.08(A)(2) inapplicable because that statute only operates to block review of instances where the trial court "specifies" a finding under R.C. 2929.13(B)(1)(b). Torres's very argument is that the trial court did not specify a finding in this case. This view is consistent with how this court has previously treated similar R.C. 2929.13(B)(1) arguments. *See State v. Lopez*, 8th Dist. Cuyahoga No. 103032, 2015-Ohio-5269; *State v. Freeman*, 8th Dist Cuyahoga No. 103677, 2016-Ohio-3178. Second, Torres's *Apprendi* argument is based upon the Due Process Clause of the Fifth Amendment, which cannot be constrained by R.C. 2953.08. Therefore, we find R.C. 2953.08(A)(2) does not operate to bar the present appeal.

**{¶9}** Turning to Torres's arguments, Torres first argues that the trial court failed to explicitly make a finding under R.C. 2929.13(B)(1)(b)(i)-(xi) to facilitate the imposition of a prison sentence in this case. Torres's conviction was a fourth-degree felony. 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.

**{¶10}** Neither party disputes that the above factors are satisfied in this case. 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)(i), permits a court, in its discretion, to impose a term of imprisonment for a nonviolent, fourth-degree felony if "[t]he offender committed the offense while having a firearm on or about the offender's person or under the offender's control."

**{¶11}** Torres argues the trial court failed to explicitly make the above finding. However, we note that within the similar context of consecutive sentencing findings, the Ohio Supreme Court has held that a trial court need not give a "talismanic incantation of the words of the statute, in making a sentencing finding." *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37. We have held that "the trial court's failure to employ the exact wording of the statute does not mean that the appropriate analysis is not otherwise reflected in the transcript or that the necessary finding has not been satisfied." *State v. Thomas*, 8th Dist. Cuyahoga No. 102976, 2016-Ohio-1221, ¶ 16, citing *State v. Davis*, 8th Dist. Cuyahoga No. 102639, 2015-Ohio-4501; *State v. Hargrove*, 10th Dist. Franklin No. 15AP-102, 2015-Ohio-3125.

**{¶12}** A review of the record in the instant case demonstrates that the trial court approached sentencing with the apparent belief that an explicit firearm finding under R.C. 2929.13(B)(1)(b)(i) was unnecessary in light of Torres's plea to carrying conceal weapons. Nonetheless, the trial court repeatedly referenced Torres's possession of a loaded gun during sentencing:

> THE COURT: "And you have a loaded gun in a car with no permit. Why? Why did you have a loaded gun outside of your home?"
>
> [TORRES]: I wasn't thinking clearly and I was being selfish.
>
> THE COURT: Where were you taking the gun to? What were you doing with the gun outside of your home?
>
> [TORRES]: I was just being selfish, your Honor.
>
> THE COURT: That's not selfish. It's dangerous.
>
> * * *
>
> THE COURT: [Y]ou carry a gun in the community, and now you want me to say that it's okay[.]
>
> * * *
>
> THE COURT: [Y]ou carried an illegal weapon[.]

**{¶13}** In *State v. Gilbert*, 2d Dist. Clark No. 2014-CA-116, 2015-Ohio-4509, ¶ 7, the Second District Court of Appeals held that by pleading guilty to carrying concealed weapons, a defendant admits to having a firearm under his control at the time of the offense for the purposes of R.C. 2929.13(B)(1)(b). Here, Torres pled guilty to carrying concealed weapons in violation of R.C. 2923.12(A)(2) that states in relevant part that "no person shall knowingly carry or have, concealed on the person's person or concealed

ready at hand * * * [a] handgun other than a dangerous ordnance." The phrase "ready at hand" means so near as to be conveniently accessible and within immediate physical reach. *State v. Davis*, 115 Ohio St.3d 360, 2007-Ohio-5025, 875 N.E.2d 80, ¶ 29, citing *State v. Miller*, 2d Dist. Montgomery No. 19589, 2003-Ohio-6239. For the purposes of R.C. 2929.13(B)(1)(b)(i), an offender need only have a firearm under his "control" at the time of the offense. Because Torres's plea contained an admission that, at a minimum, he had a handgun "ready at hand," this admission, by itself, established that Torres had "control" of a firearm at the time of the offense. *See, e.g., State v. Teague*, 11th Dist. Trumbull No. 2011-T-0012, 2012-Ohio-983, ¶ 52 ("where the state presents evidence that the defendant was operating a motor vehicle in which firearms were found and those firearms were ready at hand or within the defendant's access, a rational jury may infer constructive possession, *i.e.*, that the defendant was able to exercise dominion and control over them."); *State v. Dorsey*, 10th Dist. Franklin No. 04AP-737, 2005-Ohio-2334, ¶ 32 (in order to have a firearm under R.C. 2923.12 and 2923.13, one must either actually or constructively possess the firearm. Constructive possession exists when an individual exercises dominion and control over an object, even though that object may not be within his immediate physical possession.)

**{¶14}** In light of the foregoing, we find Torres's argument that the trial court failed to make an explicit finding under R.C. 2929.13(B)(1)(b) unpersuasive.

**{¶15}** Torres's *Apprendi* challenge is unpersuasive for the same reason. Under *Apprendi*, 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*. at syllabus. "[T]he '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*." (Emphasis sic.) *Blakely v. Washington*, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). We need not consider the application of *Apprendi* to R.C. 2929.13(B)(1)(b) in this instance because no judicial fact-finding occurred here. As explained above, by the operation of his own guilty plea, Torres admitted to the facts necessary to establish R.C. 2929.13(B)(1)(b)(i). Thus, *Apprendi* is inapplicable.

**{¶16}** Accordingly, Torres's sole assignment of error is overruled.

**{¶17}** Judgment is affirmed.

It is ordered that appellee recover of 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.

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

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MARY EILEEN KILBANE, JUDGE

EILEEN A. GALLAGHER, P.J., and

SEAN C. GALLAGHER, J., CONCURS IN JUDGMENT ONLY