[Cite as *State v. Monroe*, 2020-Ohio-4541.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-19-1241

Appellee — Trial Court No. CR0201901994

v.

Joshua Monroe — **DECISION AND JUDGMENT**

Appellant — Decided: September 11, 2020

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Lauren Carpenter, Assistant Prosecuting Attorney, for appellee.

Laurel A. Kendall, for appellant.

* * * * *

ZMUDA, P.J.

I. Introduction

{¶ 1} This matter is before the court on appeal from the September 18, 2019 judgment of the Lucas County Court of Common Pleas, sentencing appellant to a prison term of 24 months. Finding no error, we affirm.

II. Facts and Procedural Background

{¶ 2} In the early morning hours of June 4, 2019, appellant, Joshua Monroe drove his girlfriend, P.W., home from a bar. Appellant indicated that he drove P.W.'s vehicle because P.W. was too intoxicated to drive. He and P.W. argued, ending with P.W. outside the vehicle and proceeding on foot. P.W.'s phone and wallet were still in the vehicle, but appellant did not follow P.W. to coax her back into the car or call for help. After about a half hour of walking, P.W. flagged down a passing patrol car for help. P.W. told the responding officers that appellant assaulted her by striking her in the face several times and knocking out a tooth. The officers noted that P.W. was distraught and had bruises on her face. P.W. was transported to Flower Hospital for treatment, and she repeated the accusations regarding appellant as she received medical treatment.

{¶ 3} On June 6, 2019, appellant was indicted on one count of felonious assault, in violation of R.C. 2903.11(A)(1) and (D), a felony of the second degree, and a warrant issued for his arrest. On July 4, 2019, police took appellant into custody at P.W.'s house. Appellant was arraigned with appointed counsel and entered a not guilty plea. The trial court set bond at $50,000, no ten percent. Appellant remained in custody.

{¶ 4} On July 31, 2019, appellant withdrew his not guilty plea and entered a guilty plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), to the amended count of attempted felonious assault, a violation of R.C. 2923.02(A) and 2903.11(A)(1) and (D), a felony of the third degree. In the days preceding appellant's change of plea, the state had filed a notice of intent to introduce

P.W.'s excited utterances as evidence at trial, noting P.W. had recanted her previous accusations and was no longer cooperating in the prosecution. The state noted recorded communications between appellant and P.W. that resulted in a plan for P.W. to claim her injuries were self-inflicted by way of an epileptic seizure. The state had also filed a motion to reconsider appellant's bond, and to revoke his phone and tablet privileges, noting the ongoing contact with P.W., and contact with third parties with requests to "stay on top of" P.W. and "keep track of her."

{¶ 5} As part of appellant's plea agreement, the state withdrew its pending motions, and withdrew any objection to a modification of appellant's bond, pending the sentencing hearing. The written plea agreement specified the maximum potential prison term of 36 months and maximum fine of $10,000, with neither the prison term nor the fine mandatory. As to a sentencing recommendation, the agreement provided the following:

> The Sate [sic.] of Ohio will decline to make a sentencing recommendation.

{¶ 6} The prosecutor recited the following facts into the record prior to the trial court's acceptance of the plea:

> Your Honor, had this matter proceeded to trial the state would have proven beyond a reasonable doubt that defendant, Joshua Monroe, on or about the 4th day of June, 2019, in Lucas County, Ohio, did knowingly engage in conduct that if successful would have resulted in the commission of the offense of felonious assault and 2903.11(A)(1) and (D).

Specifically, Your Honor. The state would have established that in the area near Alexis and Whiteford, Sylvania, Lucas County, Ohio, on June 4th, 2019, the victim in this case. [P.W.], and her boyfriend, the defendant, were returning home from a side job that they were working on in Monroe, Michigan when they began arguing in the car.

At which point the defendant struck her multiple times causing injuries to her face including knocking a tooth out which required hospitalization at Flower Hospital.

Officers would have testified – the Sylvania Township officers would have testified that while on routine patrol they were flagged down by a distraught female identified as [P.W.] yelling for help.

She was physically distraught, had serious injuries and bruises to her face, and reported in that distraught state that she had just been assaulted by her boyfriend, Joshua Monroe, while driving home from the location.

Moreover, she identified Mr. Monroe as the individual that assaulted her in his BMV photo.

The state would have also presented medical records showing the injuries, showing the manner that the injuries were sustained, and again, showing serious physical harm which would be the injuries to the face as well as the disfigurement injury, which is the loss of the tooth due to the assault.

{¶ 7} The trial court accepted the plea, found appellant guilty, and referred the matter for a presentence investigation and report. The trial court continued the sentencing hearing to August 28, 2019, and granted appellant's request for a bond modification, releasing him on a supervised own recognizance bond and ordering him to have no contact with P.W. In addition, the trial court placed appellant on notice that his prior, post-arrest contacts with P.W., while held in custody, were noted and must cease. The trial court stated:

> Mr. Monroe, I say that because I am aware of it. I'm letting you know I am aware of it. I am giving you this opportunity on the bond to let you – as your attorney asked and [the] state has conceded, along with the victim's consent to a certain extent – to show that you are appropriate for community control sanctions as opposed to a penitentiary sanction, but if you violate the terms and conditions of the contact then you're telling me a different message.
>
> And this is quite simply you are not trustworthy as far as community control, so I have to take into consideration how to handle that, whether it is penitentiary, whether other forms of incarceration – I don't know. But I am just putting you on fair warning.
>
> I am aware of the contact. Because the parties are accepting of the modification of the bond, I will give you the opportunity, but if you blow it[,] it is on you, all right?

{¶ 8} Appellant failed to appear for sentencing on August 28, and the trial court issued a capias warrant for his arrest. Contrary to the terms of his bond, and in defiance of the trial court's order, appellant maintained contact with P.W. Police took him into custody at P.W.'s house on September 14, 2019.

{¶ 9} On September 18, 2019, the trial court held the sentencing hearing. After noting its review of the presentence investigation report, the trial court commented that the report "was an interesting read to say the least." The trial court indicated conflicting facts in comparing the information in the report to the recitation of facts by the prosecutor at the plea hearing, and stated "I do need to hear a little bit more as we go on." The trial court requested clarification of the underlying facts from appellant,[1] P.W., and the prosecutor before proceeding to sentencing.

{¶ 10} Appellant told the trial court that he was driving home, as the sober driver, and the couple stopped at the side of the road to have sex. Afterward, as they continued driving, P.W. noticed text messages on appellant's phone from his ex, and the two argued. Appellant claimed he pulled over to the side of the road and let P.W. out of the car. At first, appellant stated, he felt bad and tried to find P.W. without success. He then went to P.W.'s house to wait for her, but she did not return home. Appellant claimed he

[1] It is unclear why the trial court inquired of appellant, as appellant entered an *Alford* guilty plea, waiving trial and consenting to conviction while still maintaining his innocence.

did not learn of any injury or P.W.'s accusations until the next day. Appellant maintained that P.W. must have fallen after having a seizure, claiming he had no marks on his hands.

{¶ 11} The trial court received appellant's version of events with skepticism, questioning whether appellant was as concerned for P.W. as he claimed, considering he gave up on finding her and did not call 911 to report an intoxicated P.W. "at risk for having seizures and * * * roaming the neighborhood" and in need of help. Although P.W. initially stated that she had nothing to say, P.W. told the court she believed the incident was "blown out of proportion" and that she did not think appellant "deserves strict punishment." P.W. told the trial court she lied in the beginning before attributing her injuries to her own intoxication and a seizure, but acknowledged "it's already on record everywhere up until then, so here we are."

{¶ 12} The trial court then turned to the prosecutor and asked for clarification of the underlying facts based on appellant's and P.W.'s statements that suggested a lack of evidence of guilt. The prosecutor refuted appellant's and P.W.'s version of events, citing the overwhelming evidence and recorded communications between appellant and P.W. in which appellant urged P.W. to change her story and claim she had a seizure. The prosecutor further indicated that, even without P.W.'s testimony, the state intended to proceed to trial on the offense as charged, prior to the plea. As to the severity of the injuries, largely downplayed by appellant and P.W., the prosecutor proffered photographs documenting extensive bruising to P.W.'s face and arms. Finally, the prosecutor noted appellant's failure to appear for the original sentencing hearing, first mentioned by

appellant's trial counsel, and indicated the state would pursue additional charges based on that conduct. The trial court marked the state's photographs as a court exhibit and proceeded with the sentencing.

{¶ 13} After proper consideration of the statutory factors, the trial court found appellant was not amenable to community control and sentenced him to 24 months in prison.

III. Assignment of Error

{¶ 14} Appellant now appeals the trial court's judgment, asserting a single assignment of error:

> The court abused its discretion when it allowed the state to make statements, and to introduce evidence, at the time of sentencing for the purpose of influencing the court's sentencing decision, after committing in writing to "decline to make a sentencing recommendation" at the time of the plea.

IV. Analysis

{¶ 15} In his sole assignment of error, appellant does not challenge the prison term imposed, but instead, argues the trial court erred in permitting the prosecutor to introduce evidence and make statements at the time of his sentencing. Appellant contends that the trial court abused its discretion in permitting the prosecutor to breach the plea agreement by commenting at sentencing. Based on the record before us, the prosecutor did not breach the plea agreement.

{¶ 16} A plea agreement is a contract between the state and a defendant, and therefore subject to principles of contract law. (Citations omitted.) *State v. Payton*, 6th Dist. Erie Nos. E-09-070, E-09-071, 2010-Ohio-5178, ¶ 11. Whether a plea agreement has been breached is a determination within the trial court's discretion. *Payton* at ¶ 11, citing *State v. Willis*, 6th Dist. Erie No. E-05-026, 2005-Ohio-7002, ¶ 9 (additional citations omitted.).

{¶ 17} An implied term in any plea agreement is the appearance of the defendant at a scheduled sentencing hearing. *State v. Snell*, 6th Dist. Wood No. 2019-Ohio-1033, ¶ 13 (citations omitted.); *see also Payne* at ¶ 12, citing *State v. Adkins*, 161 Ohio App.3d 144, 2005-Ohio-2577, 829 N.E.2d 729 (4th Dist.), ¶ 7-8. Accordingly, the "[f]ailure of appellant to appear at the sentencing hearing is generally held to be a breach of the plea agreement." *Payton* at ¶ 11, citing *State v. Milligan*, 3d Dist. Wyandot No. 16-08-04, 2008-Ohio-4509, ¶ 16, and *Adkins* at ¶ 7-8. "[W]hen a defendant fails to appear at sentencing, the state no longer is required to comply with the plea agreement." *State v. Love*, 6th Dist. Erie No. E-16-024, 2017-Ohio-5688, ¶ 22, citing *Payton* at ¶ 11.

{¶ 18} In this case, appellant failed to appear for his sentencing hearing, resulting in a warrant and his arrest. Appellant's trial counsel acknowledged appellant's failure to appear and offered no excuse. Instead, counsel indicated that appellant had used drugs and panicked the date of the originally scheduled sentencing hearing. There appears no dispute, therefore, concerning appellant's breach of the agreement by failing to appear for the scheduled sentencing hearing.

{¶ 19} Furthermore, even if appellant had not breached the plea agreement by failing to appear at sentencing, the prosecutor never agreed to remain silent at sentencing, but instead, agreed to make no recommendation regarding the sentence at the time of sentencing. Such an agreement does not prevent the prosecutor's participation in the sentencing hearing. *State v. Watkins*, 6th Dist. Lucas No. L- 15-1213, 2016-Ohio-5756, ¶ 15, citing *State v. Crump*, 3d Dist. Logan No. 8-0424, 2005-Ohio-4451, ¶ 11.

{¶ 20} In this case, appellant's and P.W.'s statements contradicted the prosecutor's statement of the evidence at the plea hearing. The trial court requested clarification of the facts. While the trial court asked appellant for his version of the incident despite the *Alford* plea, the trial court also inquired of the state regarding the factual evidence of guilt. Generally, inquiry of the defendant is limited to determining a constitutionally valid *Alford* plea, or one that is knowingly, intelligently, and voluntarily made despite protestations of innocence. (Citations omitted.) *State v. Dyer*, 6th Dist. Lucas No. L-17-1258, 2019-Ohio-1558, ¶ 8. The state bears the burden of demonstrating strong evidence of guilt. *Id.*

{¶ 21} Appellant does not challenge the trial court's inquiry as it pertained to himself or P.W. Instead, appellant argues that the plea agreement barred the prosecutor from offering evidence of guilt at his sentencing hearing. This argument ignores the fact that appellant breached the plea agreement, and the prosecutor agreed only to make no sentence recommendation at the hearing. A prosecutor may "provide relevant factual information [and] correct misstatements" without violating the plea agreement to make

no recommendation regarding the sentence. *See Watkins* at ¶ 15, citing *Crump* at ¶ 11. The prosecutor's statements at the hearing were limited to the factual evidence of guilt, provided at the trial court's request.

{¶ 22} Having carefully considered the record and the argument of the parties, we find appellant breached the plea agreement by failing to appear for his scheduled sentencing hearing without excuse. Statements by the prosecutor at the rescheduled sentencing hearing, moreover, were proffered in response to the trial court's request for factual clarification. Accordingly, we find appellant's sole assignment of error not well-taken.

V. Conclusion

{¶ 23} For the forgoing reasons, we affirm the judgment of the Lucas County Court of Common Pleas. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Gene A. Zmuda, P.J.
CONCUR.

JUDGE