SLIP OPINION NO. 2020-OHIO-5167

THE STATE OF OHIO, APPELLANT, *v.* BOWERS, APPELLEE.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State v. Bowers*, Slip Opinion No. 2020-Ohio-5167.]

Criminal law—Sixth Amendment—R.C. 2971.03(B)(1)(c)—The imposition of a sentence under R.C. 2971.03(B)(1)(c) without a jury finding one of the predicate facts violates the Sixth Amendment to the United States Constitution—Court of appeals' judgment affirmed.

(No. 2019-1282—Submitted July 7, 2020—Decided November 10, 2020.)

APPEAL from the Court of Appeals for Hamilton County,
No. C-180317, 2019-Ohio-3207.

O'CONNOR, C.J.

{¶ 1} This appeal concerns the trial court's decision to sentence appellee, Adam Bowers, to 25 years to life in prison for rape under R.C. 2971.03(B)(1)(c) based on its finding that Bowers had compelled the victim to submit by force. We hold that the Sixth Amendment to the United States Constitution requires that such

a finding be made by a jury. We therefore affirm the judgment of the First District Court of Appeals reversing Bowers's sentence.

Relevant Background

{¶ 2} Bowers was convicted of rape of a child under the age of 13 under R.C. 2907.02(A)(1)(b).[1] The victim was Bowers's stepniece, who was approximately five to six years old at the time of the events leading to Bowers's conviction. Based on the victim's age, the jury also found Bowers guilty of a specification that the victim was under the age of ten. No other specification was set out in the indictment or contained in the verdict form submitted to the jury. That includes the specification relevant to this case—that the victim was compelled to submit by force or the threat of force—as we explain below.

{¶ 3} The trial court had the option of sentencing Bowers to either a definite sentence of life in prison without parole under R.C. 2907.02(B) or a sentence under R.C. 2971.03. It imposed an indefinite sentence of 25 years to life in prison under R.C. 2971.03(A). *See State v. Bowers*, 1st Dist. Hamilton No. C-150024, 2016-Ohio-904, ¶ 39.

{¶ 4} On appeal, the First District reversed in part, holding that the trial court had erred by imposing a sentence under R.C. 2971.03(A), because that provision applies only to certain crimes with sexually-violent-predator specifications and no such specification was found in this case. *Id.* at ¶ 41-42. The court of appeals therefore remanded the case for resentencing under the correct provision, R.C. 2907.02(B).

{¶ 5} When a trial court does not sentence a defendant convicted under R.C. 2907.02(A)(1)(b) to life without parole under R.C. 2907.02(B), R.C. 2971.03(B) provides three possible indefinite sentences that may be imposed instead: 10 years to life, 15 years to life, or 25 years to life. R.C. 2971.03(B)(1) provides:

1. Bowers was also convicted of gross sexual imposition under R.C. 2907.05(A)(4). That conviction is not relevant to this appeal.

> [I]f the court does not impose a sentence of life without parole [under R.C. 2907.02(B)], the court shall impose upon the person an indefinite prison term consisting of one of the following:
>
> (a) Except as otherwise required in division (B)(1)(b) or (c) of this section, a minimum term of ten years and a maximum term of life imprisonment.
>
> (b) If the victim was less than ten years of age, a minimum term of fifteen years and a maximum of life imprisonment.
>
> (c) If the offender purposely compels the victim to submit by force or threat of force, or if the offender previously has been convicted of or pleaded guilty to violating division (A)(1)(b) of section 2907.02 of the Revised Code or to violating an existing or former law of this state, another state, or the United States that is substantially similar to division (A)(1)(b) of that section, or if the offender during or immediately after the commission of the offense caused serious physical harm to the victim, a minimum term of twenty-five years and a maximum of life imprisonment.

{¶ 6} On remand, the trial court again sentenced Bowers to 25 years to life in prison. At the sentencing hearing, it did not make any factual findings, including any findings concerning the factors set out in R.C. 2971.03(B)(1)(c). It indicated that it believed that a sentence of 25 years to life was its only option if it declined to sentence Bowers to life in prison without parole.

{¶ 7} On appeal, a new panel of the First District reversed, holding that a sentence of 15 years to life under R.C. 2971.03(B)(1)(b) was also an option. *State v. Bowers*, 2018-Ohio-30, 102 N.E.3d 1218, ¶ 5, 14 (1st Dist.) ("*Bowers II*"). It therefore reversed Bowers's sentence and remanded the case to the trial court for it

to impose a new sentence, this time with the correct understanding of its sentencing options.

{¶ 8} In reaching this holding, however, the First District also considered whether a sentence of 25 years to life under R.C. 2971.03(B)(1)(c) was permissible. First, it stated that such a sentence was permissible because "there was ample evidence that Bowers compelled his victim to submit by force," *Bowers II* at ¶ 11. It also indicated that it believed that the trial court had expressly found that Bowers had used force in the commission of the rape, stating that "[i]n this case, the judicial finding of 'force' under R.C. 2971.03(B)(1)(c) altered neither the mandatory minimum or available maximum sentence." *Id.* at ¶ 17. It further concluded that the fact that the trial court, rather than the jury, had made that finding did not violate Bowers's Sixth Amendment rights. *Id.* at ¶ 17-19, 20.

{¶ 9} At the second resentencing, the trial court again did not make any express factual findings concerning R.C. 2971.03(B)(1)(c). Instead, it proceeded on the understanding that in accordance with the First District's decision in *Bowers II*, its options in sentencing Bowers were life in prison without parole under R.C. 2907.02(B), 15 years to life under R.C. 2971.03(B)(1)(b), and 25 years to life under R.C. 2971.03(B)(1)(c). The trial court stated that it believed that the last of these was appropriate and therefore sentenced Bowers to 25 years to life under R.C. 2971.03(B)(1)(c). It did not otherwise explain why it was declining to impose a sentence of 15 years to life or life in prison without parole.

{¶ 10} On appeal for the third time, a new panel of the First District reversed. It held that Bowers's sentence was not authorized, because none of the prerequisites for such a sentence under R.C. 2971.03(B)(1)(c)—the use of force or the threat of force in the commission of the offense, a prior conviction for rape of a child under 13, or serious physical harm caused to the victim of the offense—was present. The First District stated that its conclusion in *Bowers II* that the trial court had found that Bowers used force was incorrect; no such finding had been made.

It also stated that its related statements in *Bowers II* that the Sixth Amendment permits such a finding to be made by the trial court rather than the jury were nonbinding dicta. Finally, it concluded that permitting a trial court to make a finding of force for the purpose of imposing a sentence under R.C. 2971.03(B)(1)(c) would violate the Sixth Amendment based on the United States Supreme Court's decision in *Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). Specifically, the court of appeals noted that the verdict form submitted to the jury did not ask it to determine whether any of the factors under R.C. 2971.03(B)(1)(c) had been proved beyond a reasonable doubt. Instead, the only specification contained on the verdict form asked whether Bowers was guilty of raping a child under the age of ten. The jury found that he was, and the court of appeals held that that finding made a sentence of 15 years to life under R.C. 2971.03(B)(1)(b) an option. But because the jury had not found that any of the R.C. 2971.03(B)(1)(c) factors had been proved, the court of appeals concluded that a sentence of 25 years to life was not an option.

{¶ 11} The state appealed to this court. We accepted jurisdiction over the state's second and third propositions of law:

> Proposition of Law No. 2: A court does not engage in an unconstitutional factfinding when it finds that force was used during the rape of a child under the age of ten and imposes a sentence of 25 years to life because the finding of force does not raise the statutory minimum sentence.
>
> Proposition of Law No. 3: A court that sentences an offender convicted of raping a child under the age of ten to a term of 25 years to life need not make an express finding of force when the record contains evidence of force.

See 157 Ohio St.3d 1510, 2019-Ohio-5193, 136 N.E.3d 499.

Analysis

{¶ 12} The interpretation of a statute is a question of law. *State v. Straley*, 139 Ohio St.3d 339, 2014-Ohio-2139, 11 N.E.3d 1175, ¶ 9. We therefore review the First District's decision de novo. *Id.*

{¶ 13} Both of the state's propositions of law implicate the holdings of the United States Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Alleyne*, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314. In *Apprendi*, the court held that the Sixth Amendment requires that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum," except for the fact of a prior conviction, "must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi* at 490. In *Alleyne*, the court held that this principle applies equally to facts increasing mandatory minimums: "Facts that increase the mandatory minimum sentence are * * * elements and must be submitted to the jury and found beyond a reasonable doubt." *Alleyne* at 108; *see also United States v. Haymond*, ___ U.S. ___, 139 S.Ct. 2369, 2379, 204 L.Ed.2d 897 (2019), quoting *Ring v. Arizona*, 536 U.S. 584, 602, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) ("As this Court has repeatedly explained, any 'increase in a defendant's authorized punishment contingent on the finding of a fact' requires a jury and proof beyond a reasonable doubt 'no matter' what the government chooses to call the exercise"). But both *Apprendi* and *Alleyne* noted that judicial factfinding is still permitted when a trial court is selecting a sentence within an authorized range. *See Apprendi* at 481 (stating that trial courts may "exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute" [emphasis sic]); *Alleyne* at 116 ("Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad

sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment").

{¶ 14} Here, the state argues that a sentence under R.C. 2971.03(B)(1)(c) was warranted only if Bowers had "purposely compel[led] the victim to submit by force." As noted above, the use of force was not alleged in the indictment nor was the jury asked to determine whether force had been used. And the trial court never expressly found that force had been used. Nonetheless, it appears to have believed that it could impose a sentence of 25 years to life under R.C. 2971.03(B)(1)(c) because the First District's decision in *Bowers II* stated that the factual predicate for such a sentence had been met. Therefore, the state's second proposition of law is ripe for our review.

{¶ 15} The state argues that a sentence of 25 years to life under R.C. 2971.03(B)(1)(c) based on a trial court's finding that force was used in the commission of a rape is constitutional because it involves the type of discretionary judicial factfinding permitted under *Apprendi* and *Alleyne*. Specifically, it argues that the jury's finding that the victim in this case was under the age of ten authorized sentences of 15 years to life under R.C. 2971.03(B)(1)(b) and life without parole under R.C. 2907.02(B), so the relevant minimum and maximum for Bowers's crime are 15 years and life in prison without parole, respectively. The state further asserts that under R.C. 2971.03(B)(1)(b) and (c), a finding that force was used does not *require* the trial court to impose a sentence of 25 years to life under subsection (B)(1)(c); even after such a finding, the trial court is still permitted to impose a sentence of 15 years to life under subsection (B)(1)(b). As a result, the state argues, a sentence of 25 years to life does not represent an increase in the mandatory minimum from 15 to 25 years. It is simply a "middle ground" between the minimum of 15 years and the maximum of life in prison without parole that the court may select in its discretion without violating the Sixth Amendment.

{¶ 16} Bowers responds that a sentence of 25 years to life becomes an option only when one of the factors set out in R.C. 2971.03(B)(1)(c) is found to be present and that such a finding removes a sentence of 15 years to life under R.C. 2971.03(B)(1)(b) as an option. Bowers argues that a factual finding under subsection (B)(1)(c) therefore necessarily raises the mandatory minimum sentence to be served by the defendant from 15 to 25 years in prison, meaning the Sixth Amendment requires the finding to be made by the jury. Because the jury here did not find that Bowers "purposely compel[led] the victim to submit by force," R.C. 2971.03(B)(1)(c), a sentence of 25 years to life was not constitutionally permissible.

{¶ 17} We agree with Bowers that a sentence of 25 years to life under R.C. 2971.03(B)(1)(c) was not an option in the absence of a finding that the victim was compelled to submit by force or that one of the other factors under that provision was present. Furthermore, under the plain text of R.C. 2971.03(B)(1) and *Alleyne*, the imposition of a sentence of 25 years to life based on such a finding by the trial court raises the mandatory minimum sentence to 25 years and, therefore, the finding must be made by the jury.

{¶ 18} In *Alleyne*, the Supreme Court considered 18 U.S.C. 924(c)(1)(A), which provides that anyone who "uses or carries a firearm" in relation to a "crime of violence" shall

> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

Subsections (i), (ii), and (iii) each contain a separate mandatory minimum, and "the maximum of life marks the outer boundary of the range," *Alleyne*, 570 U.S. at 112, 133 S.Ct. 2151, 186 L.E.d.2d 435. The court observed that "the sentencing range supported by the jury's verdict was five years' imprisonment to life" but that the trial court had "imposed the 7-year mandatory minimum sentence based on its finding" that a firearm had been "brandished." *Id.* at 117. It held that the Sixth Amendment required that finding to be made by a jury because it increased the mandatory minimum from five years to seven. *Id.*

{¶ 19} R.C. 2971.03(B)(1)(b) and (c) are materially similar to the federal statute at issue in *Alleyne*. R.C. 2971.03(B)(1)(b) and (c) set out separate sentences with separate mandatory minimums, and each sentence may be applied only after a predicate fact is found. Related statutes confirm this. For example, R.C. 2929.01(X) defines "[m]andatory prison term" to include a sentence imposed "pursuant to division (B)(1)(a), (b), or (c) * * * of section 2971.03 of the Revised Code." R.C. 2971.04(A) provides that once a sentence under one of these subsections is imposed, the parole board shall review whether to terminate its control over the defendant every two years, starting "upon the completion of the offender's service of the *minimum* term under the sentence." (Emphasis added.) These provisions support the conclusions that a sentence imposed under subsection (B)(1)(b) requires a minimum of 15 years in prison and a sentence imposed under subsection (B)(1)(c) requires a minimum of 25 years in prison.

{¶ 20} We also observe that, rather than allow for the trial court to select a definite sentence within a range like the federal statute in *Alleyne*, R.C. 2971.03(B)(1)(b) and (c) each provide the trial court with a single option—an indefinite life sentence with a mandatory minimum term of either 15 or 25 years. But this difference is immaterial. After a defendant sentenced under R.C. 2971.03(B)(1)(b) or (c) has served the minimum term, the exact number of years the defendant will ultimately serve will be determined by the parole board.

Importantly, for purposes of applying *Alleyne*, each subsection in both 18 U.S.C. 924(c)(1)(A)(i) through (iii) and R.C. 2971.03(B)(1)(b) and (c) exposes the defendant to separate prison terms that are only available based on a finding of predicate facts and each term contains a different mandatory minimum.

{¶ 21} Therefore, a finding that the victim was compelled to submit by force or that one of the other factors under subsection (B)(1)(c) is present increases the mandatory minimum sentence that the defendant is required to serve from 15 to 25 years in prison. *Alleyne* requires that such a finding be made by a jury. The imposition of a sentence under subsection (B)(1)(c) without a jury finding one of the predicate facts violates the Sixth Amendment.

{¶ 22} The state's argument incorrectly relies on the notion that the present case involves the type of judicial factfinding permitted in *Apprendi* and *Alleyne*. It does not. As noted above, *Apprendi* observed that trial courts may still "exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute." (Emphasis sic.) *Apprendi*, 530 U.S. at 481, 120 S.Ct. 2348, 147 L.Ed.2d 435. Similarly, in *Alleyne*, the court emphasized that "broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment." 570 U.S. at 116, 133 S.Ct. 2151, 186 L.E.d.2d 435. In these statements, the court made clear that a trial court may engage in factfinding to select a sentence among several options already otherwise permitted by law. As the court said in *Alleyne*, there is a difference between " 'establishing what punishment is available by law,' " which must be based on facts found by a jury, and " 'setting a specific punishment within the bounds that the law has prescribed,' " which may be based on judicial factfinding. *Id.* at 117, quoting *Apprendi* at 519 (Thomas, J., concurring).

{¶ 23} The present case does not involve a trial court exercising its discretion to select a sentence among several permitted by law. The findings made by the jury in this case authorized only two discrete sentences: 15 years to life under

R.C. 2971.03(B)(1)(b) and life without parole under R.C. 2907.02(B). Neither of these statutes permitted the trial court to sentence Bowers to 25 years to life under R.C. 2971.03(B)(1)(c) without a jury finding of force. As a result, a trial court's imposition of a sentence of 25 years to life based on its finding that force was used cannot be described as " 'setting a specific punishment within the bounds that the law has prescribed,' " *Alleyne* at 117, quoting *Apprendi* at 519 (Thomas, J., concurring), or otherwise selecting a sentence within an authorized range, as the state has suggested. Instead, such a finding increases the minimum sentence from 15 to 25 years in prison. As a result, the Sixth Amendment requires a finding that force was used to be made by the jury in order for a sentence of 25 years to life under R.C. 2971.03(B)(1)(c) to be imposed. We therefore reject the state's second proposition of law.

{¶ 24} This reasoning also requires us to reject the state's third proposition of law. The state argues that the text of R.C. 2971.03(B)(1)(c) does not require any express findings to be made. In the state's view, either evidence that the victim was compelled to submit by force or evidence of one of the other factors in the statute must simply be present in the record. We reject this argument. The factors in R.C. 2971.03(B)(1)(b) and (c) are "[f]acts that increase the mandatory minimum sentence," meaning that they are "elements [of the charged offense] and must be submitted to the jury and found beyond a reasonable doubt," *Alleyne* at 108. *See also United States v. Haymond*, ___ U.S. at ___, 139 S.Ct. at 2379, 204 L.Ed.2d 897.

Conclusion

{¶ 25} For these reasons, we affirm the judgment of the First District Court of Appeals.

Judgment affirmed.

KENNEDY, FRENCH, NELSON, DEWINE, DONNELLY, and STEWART, JJ., concur.

FREDERICK D. NELSON, J., of the Tenth District Court of Appeals, sitting for FISCHER, J.

Joseph T. Deters, Hamilton County Prosecuting Attorney, and Judith Anton Lapp, Assistant Prosecuting Attorney, for appellant.

Stagnaro, Hannigan, Koop, Co., L.P.A., and Michaela M. Stagnaro, for appellee.

Timothy Young, Ohio Public Defender, and Craig M. Jaquith, Assistant State Public Defender, urging affirmance for amicus curiae, Office of the Ohio Public Defender.
