[Cite as *84305*, 2004-Ohio-4912.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
No. 84035

STATE OF OHIO,	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
vs.	:	AND
RAYSHUN GLASS,	:	OPINION
Defendant-Appellant	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION		SEPTEMBER 16, 2004
	:	
	:	
CHARACTER OF PROCEEDING	:	Criminal appeal from Common Pleas Court
	:	Case No. CR-441489
JUDGMENT	:	SENTENCE VACATED AND REMANDED
DATE OF JOURNALIZATION	:	

APPEARANCES:

For Plaintiff-Appellee:

WILLIAM D. MASON
Cuyahoga County Prosecutor
ANNA M. FARAGLIA
Assistant County Prosecutor
Justice Center - 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

For Defendant-Appellant:

NANCY SCARCELLA
Superior Building
Suite 2025
815 Superior Avenue

Cleveland, Ohio 44114

ANNE L. KILBANE, J.:

{¶ 1} Rayshun Glass appeals from a sentence imposed by Judge Kathleen A. Sutula after he pleaded guilty to attempted felonious assault.[1] He claims the judge erred in imposing more than the minimum prison term presumed applicable under R.C. 2929.14(B). We vacate the sentence and remand for consideration of *Blakely v. Washington*.[2]

{¶ 2} On June 30, 2003, then twenty-two-year-old Glass was involved in a fight that broke out between members of his family and the residents and guests of a house in the 4100 block of East 102nd Street in Cleveland. During the fracas, he bit Marzella White in the chest, leaving a substantial bruise or scar.[3] The feud later climaxed when DeShon Baker, the boyfriend of Glass's sister, went to the residence wielding a gun. Bobby Davis, an off-duty East Cleveland police officer, saw this fight and attempted to break it up. Baker shot him five times and he died from his wounds.

{¶ 3} Initially Glass was indicted for the attack on Davis on

---

[1]R.C. 2903.11, 2923.02.

[2](June 24, 2004), No. 02-1632, 72 U.S.L.W. 4546.

[3]A photograph of the injury admitted as an exhibit during sentencing showed a bruise and a bite mark that did not appear to break the skin, but the judge referred to the bite as causing a scar.

charges of attempted aggravated murder and felonious assault, as a co-defendant with his sister and Baker. It does not appear that there was any evidence that he was involved in the shooting, and he was later separately indicted in this case on a charge of felonious assault for the attack on White. He reached an agreement in which he pleaded guilty to attempted felonious assault, a third degree felony, and the charges against him in Baker's case were dismissed.

{¶ 4} At sentencing, the judge stated that she was unimpressed with Glass's claims of self-defense because the presentence investigation report indicated that, after his brother had been involved in a fight with the Whites, instead of calling the police, he went to confront them. She noted that the bite wound was severe, and that the victim had suffered both serious physical harm and serious psychological harm. She also noted that, although he had no adult criminal record, Glass had "a prior juvenile delinquency."[4] Finally, she stated that Glass showed "absolutely no remorse for the offense." Although Glass had not previously served a prison term, she found that "the shortest prison term will demean the seriousness of this offense, and * * * will not protect the public from you and your associates adequately."

{¶ 5} Glass was then sentenced to three years in prison, and

[4]There is some question whether Glass was adjudicated delinquent, because the presentence investigation report stated that he had a juvenile assault charge in 1995, but the report listed the disposition only as "[c]ommitted to supervision of parent."

advised that he was subject to an undisclosed term of discretionary post-release control.[5] He states a single assignment of error, which is included in an appendix to this opinion.

{¶ 6} Although he does not dispute that the judge made proper findings under R.C. 2929.14(B), he contends the findings are not supported by the record. Among other things, he argues that there was no evidence that the victim suffered psychological harm, that his juvenile record was so remote that it did not show a likelihood of recidivism, and that there was mitigating evidence showing that the victim might have been the aggressor or that Glass acted under provocation. We note that, under R.C. 2953.08(G), an appellate court is not authorized to weigh the evidence to determine whether the record supports a judge's findings under R.C. 2929.14(B). The only time such review is appropriate is when the judge imposes consecutive sentences under R.C. 2929.14(E)(4), imposes a prison term or community control for an offense which carries a contrary presumption under R.C. 2929.13(B) or (D), or grants judicial release despite a presumption to the contrary under R.C. 2929.20(H).[6] In all other cases, we can overturn the judge's

[5]Although a three-year term of post-release control was mandated under R.C. 2967.28(B)(3), and the journal entry states that a three-year term of post-release control is a part of this prison sentence, this entry is inconsistent with the imposition of discretionary post-release control at the sentencing hearing.

[6]R.C. 2953.08(G)(2)(a).

findings only if we find them "contrary to law,"[7] a standard which requires that we examine the sufficiency, rather than the weight, of the evidence.[8]

{¶ 7} We cannot conduct this review, however, because the standard of proof required for a finding under R.C. 2929.14(B), as well as the methods for receiving evidence and making that finding, may have been altered by the recent United States Supreme Court decision in *Blakely v. Washington*,[9] which states that the "statutory maximum" is not the longest term the defendant can receive under any circumstances, but is "the maximum sentence a judge may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant."[10] No jury made a finding that the minimum term would demean the seriousness of Glass's conduct or would not adequately protect the public from future crime, nor did he admit to either finding. Although we take no position at this time concerning whether *Blakely* applies to the departure from minimum sentencing in R.C. 2929.14(B), or whether the findings required in that statute are comparable to the

---

[7]R.C. 2953.08(G)(2)(b).

[8]See, e.g., *State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 1997-Ohio-52, 678 N.E.2d 541 (sufficiency challenge presents a question of law, while manifest weight review allows credibility assessments).

[9](June 24, 2004), 124 S.Ct. 2531, 159 L.Ed.2d 403.

[10]Id., 159 L.Ed.2d at 413.

"deliberate cruelty" finding discussed in *Blakely*, such issues can be raised on remand.

{¶ 8} Appellant's assignment is sustained pending the application of *Blakely*.

{¶ 9} The sentence is vacated and remanded for resentencing.

APPENDIX – ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED BY FAILING TO MAKE FINDINGS SUPPORTED BY EVIDENCE THAT A LESSER SENTENCE WOULD DEMEAN THE SERIOUSNESS OF DEFENDANT'S CONDUCT OR FAIL TO ADEQUATELY PROTECT THE PUBLIC FROM FURTHER CRIME."

It is ordered that the appellant recover from appellee costs herein taxed.

The Court finds that there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas 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.

ANN DYKE, J., CONCURS IN JUDGMENT ONLY

MICHAEL J. CORRIGAN, A.J., DISSENTS (SEE DISSENTING OPINION ATTACHED.

i. ANNE L. KILBANE
ii. JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc. App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E), unless a motion for reconsideration with supporting brief, per App.R. 26(A) is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

MICHAEL J. CORRIGAN, A.J., DISSENTING:

{¶ 10} I respectfully dissent from the lead opinion and would affirm the trial court's imposition of the three-year prison sentence. It should be noted that the lead opinion has not commanded a majority of this court and, for that reason, any statements made in the lead opinion's analysis of the case are purely dicta and not the law of this court.

{¶ 11} Had the lead opinion received a majority of this court, its reliance upon *Blakely v. Washington* (2004), ___ U.S. ___, 124 S. Ct. 2531, 159 L.Ed.2d 403 for the purposes of vacating Glass' sentence and remanding this matter to the trial court for resentencing is misplaced. *Blakely* held that the maximum sentence may be imposed only on the "facts reflected in the jury verdict or admitted by the defendant." ___U.S.___, 124 S.Ct. at 2537. As explained by *Blakely*:

{¶ 12} "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." Id.

{¶ 13} Here, the lead opinion suggests that because the trial court based its imposition of the three-year prison term on Glass' lack of remorse and juvenile delinquency - facts not admitted by Glass nor before the jury - Glass' sentence must be vacated and remanded for resentencing in light of *Blakely*. *Blakely*, however, was decided under a sentencing grid that virtually mirrored that of the federal sentencing guidelines. Unlike the sentencing grid in *Blakely*, Ohio uses definite sentencing within minimum and maximum ranges for particular classes of felonies and offenders know going into trial what range of sentence they might face for a particular degree of offense. Although Ohio presumes that an offender receive the minimum sentence for a first offense, the range of penalties for a particular class of felony are definitively stated. Glass was aware that he could face a prison sentence for pleading guilty to attempted felonious assault, a felony of the third degree, of one, two, three, four, or five years. R.C. 2929.14(A)(3).

{¶ 14} Despite not having served time before, the trial court found, pursuant to R.C. 2929.12 and 2929.14, that Glass' lack of remorse and his juvenile delinquency rebutted the presumption that he receive the minimum one-year sentence. It is an absurd application of *Blakely* to suggest, as the lead opinion does, that the trial court should empanel a jury to determine Glass' lack of remorse and juvenile delinquency during sentencing. Because such factors are among those traditionally found by the trial court, the trial court need not resentence Glass in light of *Blakely* as its sentence does not implicate *Blakely*. I would thus affirm the trial court's imposition of the three-year prison term.