[Cite as *State v. Newsome*, 2005-Ohio-1104.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2003-A-0069**
- vs -	:	
RUSSELL L. NEWSOME,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 03 CR 23.

Judgment: Affirmed.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Angela M. Scott*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047 (For Plaintiff-Appellee).

Joseph P. Szeman, Baker & Hackenberg Co., L.P.A., 100 Society National Bank Building, 77 North St. Clair Street, Painesville, OH 44077 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Russell Newsome ("Newsome") appeals from the decision of the Ashtabula County Court of Common Pleas, sentencing him to consecutive terms of imprisonment. We affirm the decision of the trial court.

{¶2} On January 23, 3003, the Ashtabula County Grand Jury charged Newsome with six felony counts, including attempted murder, felonious assault, burglary, vandalism, escape, and breaking and entering. The charges arose from a January 12, 2003 incident wherein Newsome forced his way into the home of Hargis

Hall ("Hall") and stabbed Hall during a subsequent altercation. After his arrest, Newsome broke free from his holding cell at Ashtabula City Jail. Upon arraignment, Newsome pled not guilty to the charges.

{¶3} On March 23, 2003, pursuant to a negotiated plea agreement, Newsome pled guilty to Felonious Assault, a second-degree felony under R.C. 2903.11(A)(1), and Escape, a third-degree felony, in violation of R.C. 2921.34. The State of Ohio dismissed all of the remaining counts related to this incident.

{¶4} On May 16, 2003, Newsome appeared for his sentencing hearing. The trial court proceeded to sentence Newsome to eight years in prison under the felonious assault charge and two years under the escape charge, to be served consecutively. The court ordered that these sentences be served consecutively to two consecutive 12-month sentences imposed as the result of a trial held the previous day in Case Number 2002-CR-332, wherein Newsome was charged, under R.C. 2903.13(C)(4), with two counts of assault on a peace officer, a fourth-degree felony, for a total sentence of twelve years. Case Number 2002-CR-332 arose from an earlier incident unrelated to the felonious assault and escape charges against Newsome. Charges arising from both incidents were tried before the same judge. This court does not have any details on the record about the underlying incident resulting in these charges.

{¶5} Newsome timely appealed, asserting a single assignment of error:

{¶6} "The trial court erred in ordering appellant's sentences be served consecutively."

{¶7} Newsome does not challenge the trial court's imposition of consecutive sentences for the felonious assault and escape charges, since R.C. 2929.14(E)(2), by its terms, requires that, "[i]f an offender who is an inmate in a jail *** violates section***

2921.34 *** any prison term imposed *** shall be served by the offender consecutively *** to any other prison term previously or subsequently imposed on the offender." Rather, Newsome argues that the imposition of consecutive sentences for the felonious assault charge, with the sentences previously imposed for his conviction on two counts of assault on a peace officer, is contrary to law.

{¶8} An appellate court reviews a felony sentence under a clear and convincing evidence standard of review. R.C. 2953.08(G)(2). In doing so, we conduct a meaningful review of the imposition of sentence. *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, at ¶10. "'Meaningful review' means that an appellate court hearing an appeal of a felony sentence may modify or vacate the sentence and remand the matter to the trial court for resentencing if the court clearly and convincingly finds that the record does not support the sentence or that the sentence is contrary to law." Id., citing R.C. 2953.08. Clear and convincing evidence is that quantum of proof which will produce in the mind of the trier of fact a firm belief regarding the facts sought to be established. *State v. Bradford* (Jun. 1, 2001), 11th Dist. No. 2000-L-103, 2001 Ohio App. LEXIS 2487, at *3.

{¶9} To impose consecutive sentences on a defendant, R.C. 2929.14(E)(4) requires that the trial court make three findings: (1) consecutive sentences are "necessary to protect the public from future crime or to punish the offender[,] *** [(2)] consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public[,] *** [and (3)] the court must *find* the existence of one of the enumerated circumstances in R.C. 2929.14(E)(4)(a) through (c)." *Comer*, 99 Ohio St.3d 463, at ¶13 (emphasis sic). These circumstances include: "(a) the offender was awaiting trial or sentencing or was under community

control sanction; (b) the harm caused by the offenses was so great or unusual that a single prison term would not adequately reflect the seriousness of the offender's conduct, or (c) the offender's history of criminal conduct proves consecutive sentences are necessary to protect the public from future crime." *State v. Thompson,* 11th Dist. No. 2003-L-052, 2004-Ohio-2925, at ¶22, quoting *State v. Earle*, 11th Dist. No. 2001-L-159, 2002-Ohio-4510, at ¶6.; R.C. 2929.14(E)(4)(a)-(c).

{¶10} In addition, this court has stated that "R.C. 2929.14(E)(4) must be read in conjunction with R.C. 2929.19(B)(2)(c), which requires a trial court to state 'its reasons for imposing the consecutive sentences.' The reasons required by R.C. 2929.19(B)(2)(c) are separate and distinct from the finding required by R.C.2929.14(E)(4)." *State v. King*, 11th Dist. Nos. 2000-L-143, 2000-L-144, 2001-Ohio-8758, 2001 Ohio App. LEXIS 5431, at *6 (citation omitted); accord *Thompson*, 2004-Ohio-2925, at ¶23. In imposing consecutive sentences, the trial court "must support its decision with specific findings at the sentencing hearing as to all three requirements of R.C. 2929.14(E)(4)." *Comer*, 99 Ohio St.3d 463, at ¶20.

{¶11} When a trial court makes its findings under the sentencing statutes, only *substantial compliance* with the language of the sentencing statutes is required, as long as adequate reasons are given to support the court's findings. See, *State v. Wilson,* 11th Dist. No. 2002-L-023, 2003-Ohio-4599, at ¶14 ("R.C.2929.14 does not require the trial court to ritualistically recite the exact words of the statute before imposing consecutive sentences *** [h]owever, *** the trial court is required to state sufficient supporting reasons for imposing such sentences.") (citations omitted).

{¶12} Newsome concedes the court found and adequately supported, under R.C. 2929.14(E)(4), that consecutive sentences were warranted to punish the offender

and protect the public from future crime. Newsome also concedes, under R.C. 2929.14(E)(4)(c), that the court properly found "the offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender."

{¶13} However, Newsome believes that the court failed to give reasons in support of its finding that consecutive sentences are not disproportionate to the seriousness of the offender's conduct *and* the danger the offender poses to the public. He argues that while the court adequately supported its findings in terms of the punishment being proportional to the seriousness of his crime, it failed to support its finding that the punishment was not disproportionate to the danger he presents to the public.

{¶14} This court has stated, "[u]nder the second finding, the court must address both the seriousness of the immediate conduct and danger the offender poses to the public. The proportionality inquiry is *conjunctive* and thus a lack of 'disproportionality' must be found with respect to both seriousness and danger to the public." *Wilson,* 2003-Ohio-4599, at ¶12 (citations omitted) (emphasis added).

{¶15} Upon careful review of the record, we find that in relation to consecutive sentences being proportional to the seriousness of the crime, the court found specifically that there was serious harm to the victim, the attack occurred in his home, and that the attack was unprovoked. The court also found that there was evidence that Newsome had taken some drug prior to the incident, and "that's an aggravating factor." The court also stated that "in a certain sense, [Newsome] was lucky that Mr. Hall didn't die or it would have been a murder case and you have received the benefit of the plea negotiation to make this a second degree felony, Felonious assault." Looking at these

facts as a whole, the court concluded that any other means of sentencing would "not be commensurate with the seriousness of [Newsome's] conduct."

{¶16} With respect to the necessity of imposing consecutive sentences being commensurate with the danger Newsome posed to the public, the court found specifically that, the serious harm caused to the victim, along with the fact that Newsome had "a number of prior assault convictions and other offenses of violence," it would "not be sufficient to protect to protect the public if I ran these sentences in any other way." These findings clearly and convincingly address the proportionality requirement of 2929.14(E)(4) as to both the seriousness of Newsome's crimes and the danger he poses to the public.

{¶17} For the foregoing reasons, Newsome's assignment of error is without merit. The judgment of the Ashtabula Court of Common Pleas imposing consecutive sentences is affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,

WILLIAM M. O'NEILL, J., dissents with a Dissenting Opinion.

WILLIAM M. O'NEILL, J., dissenting.

{¶18} I must respectfully dissent. I believe the trial court's imposition of a sentence running consecutive to the sentence imposed the prior day violated appellant's Sixth Amendment rights pursuant the United States Supreme Court's holding in *Blakely v. Washington*.

{¶19} In enacting Senate Bill 2, with an effective date of July 1, 1996, the Ohio General Assembly radically altered its approach to criminal sentencing. The new law essentially designated three classes of citizens who would have statutorily defined roles in determining the amount of time an individual would be incarcerated for a particular crime. The three classes defined were: (1) the Ohio General Assembly; (2) judges; and (3) jurors.

{¶20} Senate Bill 2 also provided three distinct areas of judicial limitations when it set about its task of providing "truth in sentencing." Those would be: (1) sentences imposed beyond the minimum; (2) sentences imposing the maximum; and (3) consecutive sentences. The objective was apparently to provide a degree of consistency and predictability in sentencing.

{¶21} It is clear that the legislature did not interfere with the role of juries to determine guilt. Thus, the first task in sentencing went to juries. In the second phase, the legislature reserved unto itself the role of establishing minimum sentences that would be imposed once the finding of guilt, either by trial or admission, was accomplished. And finally, the new law set forth the "findings" that were required before a judge would be permitted to depart from the minimum or impose consecutive sentences. Thus, everyone had a clearly defined role to play.

{¶22} The first major pronouncement by the Ohio Supreme Court concerned the "findings" necessary to support the imposition of a maximum sentence. In *Edmondson*, the Supreme Court of Ohio held that a trial court must "make a finding that gives its reasons" on the record for the imposition of a maximum sentence.[1]

1. *State v. Edmonson* (1999), 86 Ohio St.3d 324, 328-329.

{¶23} Following that pronouncement, the Supreme Court of Ohio, in *State v. Comer*, required the sentencing courts to make their "findings" and give reasons supporting those findings on the record "at the sentencing hearing."[2] Thus, it is clear that the courts, in applying Senate Bill 2, imposed duties upon judges to make specific findings to support their sentences whenever they went beyond the minimum; or imposed maximum sentences or consecutive sentences.

{¶24} In 2004, however, the United States Supreme Court issued its judgment in *Blakely v. Washington* and made it clear that judges making "findings" outside a jury's determinations in sentencing violated constitutional guarantees.[3] Specifically, the court held:

{¶25} "Our precedents make clear, however, that the '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*. *** 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. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' *** and the judge exceeds his proper authority."[4]

{¶26} Thus, it is clear that the statutory judicial "findings," which provide the framework for all sentencing in Ohio, are prohibited by the United States Supreme Court.

2. *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, paragraph one of the syllabus.
3. *Blakely v. Washington* (2004), 124 S.Ct. 2531.
4. (Emphasis in original and internal citations omitted.) Id. at 2537.

{¶27} Following the United States Supreme Court's release of *Blakely*, this court determined that a trial court's reliance on a previous conviction as evidenced in the record would still be permissible for the purpose of imposing a sentence greater than the minimum.[5] As stated by this court in *State v. Taylor*:

{¶28} "Under R.C. 2929.14(B)(1), the court is entitled to depart from the shortest authorized prison term if the 'offender had previously served a prison term.' Under *Apprendi*, the fact of a prior conviction may be used to enhance the penalty for a crime without being submitted to a jury and proven beyond a reasonable doubt.[6] According to Taylor's pre-sentence investigation report, Taylor had served at least one prior prison term. *** Therefore, the trial court's imposition of prison terms of three years, *** seventeen months *** and eleven months *** are all constitutionally permissible under *Apprendi* and, by extension, *Blakely*."[7]

{¶29} It is clear that, for *Blakely* purposes, a trial court is permitted to take judicial notice that a defendant has served a prior prison term, for that is not a "finding." It is a judicial acknowledgement of an indisputable fact. The trial court merely acknowledges the prior prison term and does not have to weigh conflicting evidence to make a factual finding. As such, a defendant's Sixth Amendment rights are not compromised by the exercise.

{¶30} Other courts have taken a more literal approach to this question, particularly in the area of maximum and consecutive sentences. I believe the Eighth District Court of Appeals properly applied the *Blakely* standard when it held:

---

5. *State v. Taylor*, 158 Ohio App.3d 597, 2004-Ohio-5939.
6. *Apprendi v. New Jersey* (2000), 530 U.S. 466, 490, citing *Jones v. United States* (1999), 526 U.S. 227, 243, fn. 6.
7. *State v. Taylor*, at ¶25.

{¶31} "This standard, however, must now be assessed in light of the United States Supreme Court ruling in *Blakely v. Washington*, *** 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.'[8] The jury did not make a finding that Quinones had committed a worst form of the offense or that he posed the greatest likelihood of recidivism, nor did he admit to either. *** Therefore, the sentences *** must be vacated and remanded for resentencing in light of *Blakely*."[9]

{¶32} I believe that a distinction must be made between "findings," which courts make to justify maximum or consecutive sentences and "acknowledging" the existence of a prior sentence in a criminal matter, which would permit the court to exercise its discretion in departing from a minimum sentence. Clearly, *Blakely* no longer permits courts in Ohio to "find" that a defendant has committed the "worst form of the offense" or that his actions predict the "greatest likelihood of recidivism" without either an admission by the defendant or a finding by the trier of fact.

{¶33} As so eloquently stated by the United States Supreme Court in *Blakely*:

{¶34} "This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment."[10]

8. *Blakely v. Washington*, 124 S.Ct. at 2537.
9. *State v. Quinones*, 8th Dist. No. 83720, 2004-Ohio-4485, at ¶30.
10. *Blakely v. Washington*, 124 S.Ct. at 2540.

{¶35} The court went on to state that the Sixth Amendment was not a "limitation of judicial power, but a reservation of jury power."[11] In what I believe to be the true thrust of this landmark case, the United States Supreme Court finally held that "[t]he framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to the 'unanimous suffrage of twelve of his equals and neighbours,' *** rather than a lone employee of the state."[12]

{¶36} This case is unique in that the consecutive sentences for the crimes charged, felonious assault and escape, are clearly mandatory by virtue of R.C. 2921.34 and do not permit any discretion by the trial court. If you escape from jail in Ohio, any sentence imposed for that separate crime will automatically be served after you have served your original sentence. However, that is not true with consecutive sentences for crimes other than escape.

{¶37} In conclusion, I believe the trial court erred in sentencing the defendant to consecutive sentences for the felonious assault charge and the earlier-imposed, consecutive twelve-month sentences for the convictions of assault on a peace officer. In order to impose these sentences consecutively, the court was required to make "findings" concerning the "seriousness" of the crimes. That is the precise exercise I believe is prohibited by the United States Supreme Court. I would hold that trial courts are only permitted to impose consecutive sentences based upon facts admitted by the defendant or found by the trier of fact.

11. Id.
12. Id. at 2543.