

[Cite as *State v. McHale*, 2006-Ohio-4159.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 21198
v.	:	T.C. NO. 2000 CR 02311
	:	
MICHAEL T. MCHALE	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 11th day of August, 2006.

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Defendant-Appellant

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GLASSER, J. (by assignment)

{¶ 1} Defendant-Appellant Michael McHale appeals his non-minimum sentence for his convictions on two counts of rape of a child under the age of thirteen and four counts of

pandering sexually oriented matter involving a minor. In 2001 McHale was sentenced to twenty years in prison. We affirmed McHale's convictions and sentence on appeal. *State v. McHale*, Montgomery App. No. 18963, 2002-Ohio-2373. A summary of the facts and procedural history of the case may be found therein.

{¶ 2} McHale's assignment of error:

{¶ 3} "The trial court erred when imposing non-minimum sentence's (sic) on a person whom has not previously served a prison term, in violation of the Sixth Amendment, according to *Apprendi v. New Jersey*, and re-affirmed in *Blakely v. Washington*, and *United States v. Booker & Fan Fan*."

{¶ 4} McHale insists that the United States Supreme Court's holding in *Blakely v. Washington* (2004), 542 U.S. 961, 124 S.Ct. 2531 required the trial court to order only a minimum sentence because he was a first-time offender who had never before served a prison term. However, the court also has limited *Blakely's* holding to cases already on direct appeal or pending before a trial court. *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738. Because the holding is not retroactive, it cannot be applied in this case.

{¶ 5} Furthermore, McHale did not object in the trial court to the imposition of the twenty-year sentence for his crimes. To the contrary, the sentence was agreed upon as part of a plea agreement whereby numerous additional charges were dropped and the force element of the rape charges were dismissed. Failure to raise this issue in the trial court before sentencing waives the issue for appellate review. *State v. Cressel*, Montgomery App. Nos. 20337 & 20348, 2005-Ohio-2013, citation omitted.

{¶ 6} Accordingly, McHale's sole assignment of error is overruled, and the judgment of the trial court is affirmed.

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WOLFF, J. and FAIN, J., concur.

(Hon. George M. Glasser retired from the Sixth District Court of Appeals sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

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