[Cite as *State v. Reen*, 2005-Ohio-2067.]

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-0077**
- vs -	:	
BILLY L. REEN, a.k.a. BILLY CARROLL,	:	April 29, 2005
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2002 CR 315.

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 A. Humpolick, Ashtabula County Public Defender, Inc., 4817 State Road, #202, Ashtabula, OH 44004 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Billy L. Reen ("Reen") appeals from the Ashtabula County Common Pleas Court's judgment entry of sentence. We affirm.

{¶2} Reen was indicted on one count of burglary, R.C. 2911.12(A)(2), a second degree felony, and one count of theft, R.C. 2913.02(A), a fifth degree felony. Reen subsequently pleaded guilty to one count of burglary, R.C. 2911.12(A)(4), a fourth degree felony. The trial court dismissed the theft charge.

{¶3} The matter proceeded to a sentencing hearing. The trial court sentenced Reen to eighteen months; the maximum possible term. Reen appeals from the judgment entry of sentence raising one assignment of error, "Judge Gary Leo Yost abused his discretion when he gave appellant an eighteen month prison sentence."

{¶4} We review a felony sentence de novo. *State v. Bradford* (June 2, 2001), 11th Dist. No. 2000-L-103, Ohio App. LEXIS 2487. We will not disturb a sentence unless we find by clear and convincing evidence that the record does not support the sentence or that the sentence is contrary to law. Id. "Clear and convincing evidence is that evidence which will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." Id.

{¶5} R.C. 2929.14(C) provides in relevant part:

{¶6} "*** the court imposing a sentence upon an offender for a felony may impose the longest prison term authorized for the offense *** only upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing future crimes, upon certain major drug offenders ***, and upon certain repeat violent offenders ***."

{¶7} The trial court must give its reasons for imposing a maximum sentence on the record at the sentencing hearing. *State v. Newman*, 100 Ohio St.3d 24, 2003-Ohio-4754. In the instant case appellant argues the trial court failed to find one of the factors enumerated in R.C. 2929.14(C). We disagree.

{¶8} In support of the imposition of the maximum sentence, the trial court noted Reen's extensive criminal record as detailed in the pre-sentence report. The trial court also discussed the fact that Reen had previously served a term of imprisonment. The trial court then concluded Reen was at a high risk to re-offend. These findings

demonstrate the trial court properly found Reen posed the greatest likelihood to commit future crimes as required by R.C. 2929.14(C). Thus, the trial court properly imposed the maximum sentence.

{¶9} The dissent, citing *Blakely v. Washington* (2004), 124 S.Ct. 2531, argues Reen's sentence is unconstitutional.

{¶10} Reen failed to raise the issue of the constitutionality of Ohio's sentencing scheme either before the trial court or in this appeal. However, the dissent, sua sponte, raises the issue. While unnecessary to the resolution of this appeal, we respond to the dissent's argument.

{¶11} We first note Reen has waived his *Blakely* argument by failing to raise the issue before the trial court. *State v. 1981 Dodge Ram Van* (1988), 36 Ohio St.3d 168, 170, ("The general rule is that an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court. Likewise, constitutional rights may be lost as finally as any others by a failure to assert them at the proper time.") (Internal quotations and citations omitted.)

{¶12} App.R. 12(A) sets forth our power of review. While this rule grants us the discretionary power to decide issues not raised by the parties, the Ohio Supreme Court has held that a court of appeals abuses this discretion by addressing constitutional issues not raised or briefed by the parties. *1981 Dodge Ram Van*, at 169-170, 171. If the court of appeals wishes to decide such an issue, the better practice is to permit the parties to brief it. Id. at 170.

{¶13} We have freely granted parties leave to raise *Blakely* challenges in pending appeals. See, e.g., *State v. Taylor*, 158 Ohio App.3d 597, 2004-Ohio-5939, *State v. Morales*, 11th Dist. No. 2003-L-025, 2004-Ohio-7239. In the instant case, Reen did not seek leave to raise this issue nor did we give the parties an opportunity to brief it, therefore, we would abuse our discretion were we to decide this appeal based on *Blakely*.

{¶14} As to the substantive issue raised in the dissent, the dissent argues *Blakely* prevented the trial court from imposing more than the minimum sentence. We have previously rejected this argument. See, *Taylor, Morales*, supra.

{¶15} Finally, in imposing the maximum sentence the trial court relied, in substantial part, on the fact that Reen had a record of prior convictions. This fact led the trial court to conclude Reen posed the greatest likelihood of recidivism. R.C. 2929.14(C).

{¶16} *Blakely* did not alter the rule announced in *Apprendi v. New Jersey* (2000), 530 U.S. 466, 490, that a trial court can impose a sentence of more than the statutory maximum based on the fact of a prior conviction.[1] Under Ohio's sentencing scheme the trial court may consider a defendant's record of prior convictions in determining the defendant poses the greatest likelihood of recidivism. R.C. 2929.12(D)(2). If the trial court determines the defendant poses the greatest likelihood of recidivism, the court may then impose the maximum sentence. Thus, under Ohio's sentencing scheme and in accord with *Apprendi* and *Blakely*, the trial court may impose the maximum sentence on a defendant based on his record of prior convictions. The fact that Ohio's sentencing

1. The *Apprendi* Court held, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490.

scheme requires the trial court to take the extra step of concluding the defendant's history of prior convictions means the defendant poses the greatest likelihood of recidivism does not violate the rule announced in *Blakely*, the determination is still based on the fact of a prior conviction.

{¶17} Here, the trial court based its decision to impose the maximum sentence on Reen's history of prior convictions. Therefore, *Blakely* does not apply.

{¶18} For the foregoing reasons the judgment of the Ashtabula County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J., concurs,

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

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

{¶19} I must respectfully dissent for I believe the maximum sentence imposed in this matter is contrary to law. Although not raised by the parties, the Sixth Amendment implications raised in *Blakely*, and their effect on Ohio's sentencing of defendants, particularly those upon whom a maximum sentence has been imposed, requires an examination by this court. App.R. 12 provides an appellate court with the discretion to examine errors that were neither briefed nor raised by the parties on appeal. Ohio appellate courts may, at their discretion, choose to examine or not examine errors when

they have not been raised by the parties.[2] Moreover, briefing by the parties is not warranted in this instance, as this court would not be given any additional guidance in its *Blakely* analysis by requiring the parties to brief an already vastly explored issue.

{¶20} 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.

{¶21} 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.

{¶22} 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.

{¶23} The first major pronouncement by the Ohio Supreme Court concerned the "findings" necessary to support the imposition of a maximum sentence. In *Edmondson*,

2. *State v. 1981 Dodge Ram Van* (1988), 36 Ohio St.3d 168, 170.

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.[3]

{¶24} 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."[4] 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.

{¶25} 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.[5] Specifically, the court held:

{¶26} "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."[6]

3. *State v. Edmonson* (1999), 86 Ohio St.3d 324, 328-329.
4. *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, paragraph one of the syllabus.
5. *Blakely v. Washington* (2004), 124 S.Ct. 2531.
6. (Emphasis in original and internal citations omitted.) Id. at 2537.

{¶27} 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.

{¶28} 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.[7] As stated by this court in *State v. Taylor*:

{¶29} "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.[8] 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*."[9]

{¶30} 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.

---

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

{¶31} 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:

{¶32} "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.'[10] 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*."[11]

{¶33} 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. In the instant matter, the trial court found that "the defendant's history and failure to respond to either community or penal sanctions demonstrates a very strong [likelihood] that he will commit future offenses." The court very well may be right. However, that is not the issue.

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

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

{¶35} "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."[12]

{¶36} The court went on to state that the Sixth Amendment was not a "limitation of judicial power, but a reservation of jury power."[13] 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."[14]

{¶37} In conclusion, I believe the trial court erred in sentencing the defendant to more than the minimum in this matter; and, as a matter of law, I would hold that trial courts are only permitted to depart from the minimum sentence based upon facts admitted by the defendant or found by the trier of fact. The only exception I believe permissible, consistent with *Blakely*, is the indisputable fact of a prior conviction, which would then permit judges to do their statutory job. And that job is, and always has been, to sentence criminals within the determinate bracket established by the Ohio General Assembly.

12. *Blakely v. Washington*, 124 S.Ct. at 2540.
13. Id.
14. Id. at 2543.