[Cite as *State v. Semala*, 2005-Ohio-2653.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
- vs -	:	**CASE NO. 2003-L-128**
CAROL D. SEMALA,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 01 CR 000022.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor and *Randi Ostry LeHoty*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

R. Paul LaPlante, Lake County Public Defender and *Vanessa R. Clapp,* Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Carol D. Semala appeals from the trial court's judgment entry of sentence. We affirm.

{¶2} Appellant was indicted on seven counts stemming from her attempts to murder her husband's mistress by firebombing her apartment, to wit: two counts of aggravated arson, first degree felonies, R.C. 2909.02(A)(1); two counts of aggravated

arson, second degree felonies, R.C. 2909.02(A)(2); two counts of attempted murder, first degree felonies, R.C. 2923.02; and one count of conspiracy to commit murder, a first degree felony, R.C. 2923.01(A)(1).

{¶3} Appellant subsequently pleaded guilty to two amended charges: one count of aggravated arson, R.C. 2909.02(A)(1); and one count of attempted murder, R.C. 2923.02 and 2903.02; both first degree felonies. The trial court entered a nolle prosequi on the remaining counts set forth in the indictment.

{¶4} Following a hearing, the trial court sentenced appellant to serve a prison term of nine years on each amended count, with the sentences to run consecutively. Appellant appealed her sentence and we reversed, finding the trial court failed to set forth its reasons for imposing consecutive sentences as required by R.C. 2929.19(B)(2)(c). *State v. Semala*, 11th Dist. No. 2001-L-163, 2002-Ohio-6579, at ¶12.

{¶5} On remand, the trial court amended its judgment entry of sentence, again sentencing appellant to consecutive nine-year terms and setting forth its reasons for imposing consecutive sentence. Appellant appeals from the amended judgment entry of sentence raising two assignments of error:

{¶6} "[1.] The trial court erred to the prejudice of the defendant-appellant when it ordered consecutive sentences.

{¶7} "[2.] The trial court erred when it sentenced the defendant-appellant to more than the minimum prison term and consecutive sentences based upon a finding of

factors not found by the jury or admitted by the defendant-appellant in violation of the defendant-appellant's state and federal constitutional rights to trial by jury."[1]

{¶8} In her first assignment of error appellant contends there was insufficient evidence to support the imposition of consecutive sentences. Appellant directs us to her pre-sentence report, which she claims presents evidence in mitigation of the imposition of consecutive sentences. She argues this report demonstrates she suffered from severe drug and alcohol addiction and various psychological disorders. Appellant also contends she does not have a history of violent crime.

{¶9} We review a felony sentence de novo. *State v. Bradford* (June 2, 2001), 11th Dist. No. 2000-L-103, 2001 Ohio App. LEXIS 2487, 3. 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.

{¶10} R.C. 2929.14(E)(4) provides in relevant part:

{¶11} "If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

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1. We granted appellant leave to supplement her brief with this assignment of error while this appeal was pending.

{¶12} "(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

{¶13} "(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

{¶14} "(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender."

{¶15} We first note the trial court did not find appellant had a history of committing violent crimes but only a history of criminal conduct. The record supports this finding as appellant had a prior conviction for theft.

{¶16} Appellant contends her history of drug and alcohol abuse serves to mitigate the seriousness of her conduct. We disagree. While the record establishes appellant has a history of drug and alcohol abuse as well as emotional disorders, these facts do not serve to mitigate the crimes at issue. Appellant caused another person and her minor son to firebomb two apartments. On appeal, she fails to explain how her drug and alcohol abuse mitigate the harm caused by her conduct, make her conduct less serious, or make her less likely to commit crimes in the future. Thus, we cannot say the

trial court erred by imposing consecutive sentences and appellant's first assignment of error is without merit.

{¶17} In her second assignment of error, appellant contends her sentences are constitutionally infirm based on the United States Supreme Court's decision in *Washington v. Blakely* (2004), 124 S.Ct. 2531. We disagree.

{¶18} In *Blakely,* the defendant pleaded guilty to kidnapping involving the use of a firearm, a class B felony. In the state of Washington, the statutory maximum for a class B felony was ten years; however, other provisions of Washington law limited the range of sentences a judge could impose. Consequently, the "standard" statutory range for the offense to which Blakely pleaded guilty was forty-nine to fifty-three months. Although the guidelines set forth the "standard" sentence, a court could augment the "standard" sentence if it found any of a non-exhaustive list of aggravating factors justifying the departure. In *Blakely,* the trial court determined the defendant acted with "deliberate cruelty" and imposed a sentence of ninety-months, a thirty-seven month upward departure from the "standard."

{¶19} The United States Supreme Court reversed the sentence, holding a trial court may not extend a defendant's sentence beyond the statutory maximum when the facts supporting the enhanced sentence are neither admitted by the defendant nor found by the jury. The court emphasized that the statutory maximum 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."* Id. at 2537. (Emphasis sic.)

{¶20} Here, appellant pleaded guilty to two first-degree felonies. The minimum statutory prison term for a first-degree felony is three years; the maximum term is ten years. The trial court imposed consecutive nine-year sentences.

{¶21} R.C. 2929.14(B) states:

{¶22} "(B) *** if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender, the court shall impose the shortest prison term authorized for the offense pursuant to division (A) of this section, unless one or more of the following applies:

{¶23} "(1) The offender was serving a prison term at the time of the offense, or the offender previously served a prison term.

{¶24} "(2) The court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others."

{¶25} Appellant had never served a prison term; thus, to support its upward departure from the statutorily required three-year sentence, the trial court had to find the shortest prison term would demean the seriousness of appellant's conduct or not adequately protect the public from future crime.

{¶26} Appellant contends the statute prescribes a three-year term of imprisonment so long as she was not serving a prison term at the time of the offense or had not previously served a prison term. To overcome this presumption, the court must engage in a fact-finding process. The facts permitting the upward departure, however, were neither admitted by appellant nor charged in the indictment; by implication, the R.C. 2929.14(B)(2) facts were not reflected in the jury's verdict. Appellant concludes

R.C. 2929.14(B) violates *Blakely* and therefore she was entitled to a three-year sentence.

{¶27} Appellant's argument suggests *Blakely* acts to eliminate sentencing discretion. On the contrary, *Blakely* indicates a sentencing judge may exercise his discretion precisely to the extent doing so does not impinge upon the "jury's traditional function of finding the facts essential to lawful imposition of the penalty." *Blakely*, supra at 2540. Due Process "requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." *Patterson v. New York* (1977), 432 U.S. 197, 210. As a criminal defendant has never enjoyed a Sixth Amendment right to jury sentencing, the penalty phase of a criminal trial does not implicate the full panoply of rights guaranteed by due process. Thus, "judicial fact-finding in the course of selecting a sentence within the authorized range does not implicate the indictment, jury-trial, and reasonable doubt components of the Fifth and Sixth Amendments." *Harris v. United States* (2002), 536 U.S. 545, 558.

{¶28} It bears noting, "legislative bodies do not have the unfettered discretion to lessen the government's burden of proof of a criminal charge simply by characterizing a factor as a penalty consideration rather than as an element of the offense." *United States v. Rigsby* (1991), 943 F.2d 631, 641. However, not every fact bearing on sentencing must be found by a jury. *Jones v. United States* (1999), 526, U.S. 227, 248. Since the inception of "sentencing ranges," judges have regularly considered uncharged factors, whether aggravating or mitigating, that, while increasing the defendant's punishment, have not transcended the limits of the specified punishment under the law. *Harris,* supra, at 562.

{¶29} Citing Bishop, Criminal Procedure, section 85, at 54, the United States Supreme Court stated:

{¶30} "'Where the law permits the heaviest punishment on a scale laid down, to be inflicted, and has merely committed to the judge the authority to interpose its mercy and inflict a punishment of a lighter grade, no rights of the accused are violated though in the indictment there is no mention of mitigating circumstances. The aggravating circumstances spoken of cannot swell the penalty above what the law has provided for the acts charged against the prisoner, and they are interposed merely to check the judicial discretion in the exercise of the permitted mercy. This is an entirely different thing from punishing one for what is not alleged against him.'" *Harris,* supra, 561-562

{¶31} Because the factors in question fit within this description, the general assembly's choice to entrust them to the judge does not improperly trespass on a defendant's Sixth Amendment right to a jury trial. Id.

{¶32} The General Assembly has made it clear the R.C. 2929.14(B)(2) findings are sentencing factors. Upon her plea, appellant was subject, by law, to a sentence between three and ten years on each count. Through the guidance of certain statutorily denoted "aggravating" circumstances, the court sentenced appellant to two nine-year terms. Because the R.C. 2929.14(B)(2) sentencing factors do not empower a court to "swell the penalty above what the law has provided," appellant is not entitled to have these facts charged, heard by a jury, and proved beyond a reasonable doubt. See, *State v. Morales*, 11th Dist. No. 2003-L-025, 2004-Ohio-7239, ¶77-83 (rejecting application of *Blakely* to sentence of greater than the minimum possible term.)

{¶33} Nor does the trial court's imposition of consecutive sentences violate the rule set forth in *Blakely*.

{¶34} In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the United States Supreme Court held that "[o]ther 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." *Blakely* refined the *Apprendi* rule when it held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in a jury verdict or admitted by the defendant*." (Emphasis sic.)

{¶35} Appellant argues her consecutive sentences went beyond the statutory maximum for *Apprendi* purposes because the trial court made factual findings under R.C. 2929.14(E)(4) to support the imposition of consecutive sentences. Appellant concludes that because she neither admitted these additional facts nor were they found by a jury, her constitutional right to trial by jury was violated.

{¶36} *Blakely* and *Apprendi* are distinguishable from the instant case, as they deal with sentencing for a *single crime*. Ohio courts have consistently held *Apprendi* does not apply to consecutive sentence as long as the sentence does not exceed the statutory maximum for each individual underlying offense. See, *State v. Carter*, 6th Dist. No. L-00-1082, 2002-Ohio-3433 at ¶25 (holding appellant's two eight-year consecutive sentences for rape did not violate *Apprendi* because each sentence was within the ten-year statutory range for a single offense. Accord, *State v. Gambrel* (Feb. 2, 2001), 2nd Dist. No. 2000-CA-29, 2001 Ohio App. LEXIS 339 at 14; *State v. Brown*, 2nd Dist. No. 18643, 2002-Ohio-277, 2002 Ohio App. LEXIS 211, at 15 (maximum

sentence); *State v. Wilson,* 6th Dist. No. L-01-1196, 2002-Ohio-5920. Federal courts have also held consecutive sentences do not conflict with *Apprendi*. See, *United States v. Wingo* (C.A.6, 2003), Case Nos. 01-1669 & 01-1961, 2003 U.S. App. LEXIS 18828, at 12; *United States v. Sauceda* (C.A. 6, 2002), Case No. 01-2340, 2002 U.S. App. LEXIS 19118, at 3-4. Nothing in *Blakely* changes this rule.

{¶37} In this case, appellant's individual sentences are each less than the statutory maximum. Thus, *Blakely* does not apply to appellant's sentence. *State v. Taylor*, 11th Dist. No. 2003-L-165, 2004-Ohio-5939.

{¶38} Appellant's second assignment of error is without merit.

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

JUDITH A. CHRISTLEY, J., Ret., Eleventh Appellate District, sitting by assignment, concurs, with Concurring Opinion,

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

JUDITH A. CHRISTLEY, J., Ret., concurs, with Concurring Opinion.

{¶40} I concur with the analysis with respect to appellant's first assignment of error and the ultimate judgment. I continue to disagree with the application of *Blakely* to a sentence beyond the statutory minimum under R.C. 2929.14(B). The United States Supreme Court was clear when it stated, in *Blakely*, that "the 'statutory maximum' for

Apprendi purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in a jury verdict or admitted by the defendant.*" (Emphasis sic.) Id. at 2537.

{¶41} That said, this court has held that Ohio's sentencing scheme is not unconstitutional under *Blakely* with respect to a sentence of more than the statutory minimum. *State v. Morales*, 11th Dist. No. 2003-L-025, 2004-Ohio-7239. It is fair to say that the panel in *Morales* clearly applied *Blakely* in the same manner as in the instant case. Thus, there is precedent established in this district on this issue.

{¶42} Because there is existing precedent, I concur in judgment only with respect to appellant's second assignment of error.

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

{¶43} I must respectfully dissent. I disagree with the majority's holding that *Blakely v. Washington* does not apply to this matter.

{¶44} 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.

{¶45} 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.

{¶46} 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.

{¶47} 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.[2]

{¶48} 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."[3] Thus, it is clear that the courts, in applying Senate Bill 2, imposed duties upon judges to make specific

2. *State v. Edmonson* (1999), 86 Ohio St.3d 324, 328-329.
3. *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, paragraph one of the syllabus.

findings to support their sentences whenever they went beyond the minimum; or imposed maximum sentences or consecutive sentences.

{¶49} 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.[4] Specifically, the court held:

{¶50} "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."[5]

{¶51} 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.

{¶52} 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.[6] As stated by this court in *State v. Taylor*:

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4. *Blakely v. Washington* (2004), 124 S.Ct. 2531.
5. (Emphasis in original and internal citations omitted.) Id. at 2537.
6. *State v. Taylor*, 158 Ohio App.3d 597, 2004-Ohio-5939.

{¶53} "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.[7] 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*."[8]

{¶54} 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.

{¶55} 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:

{¶56} "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

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7. *Apprendi v. New Jersey* (2000), 530 U.S. 466, 490, citing *Jones v. United States* (1999), 526 U.S. 227, 243, fn. 6.
8. *State v. Taylor*, at ¶25.

of facts reflected in the jury verdict or admitted by the defendant.'[9] 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*."[10]

{¶57} 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.

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

{¶59} "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."[11]

{¶60} The court went on to state that the Sixth Amendment was not a "limitation of judicial power, but a reservation of jury power."[12] 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

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

submitting its accusation to the 'unanimous suffrage of twelve of his equals and neighbours,' *** rather than a lone employee of the state."[13]

{¶61} 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.

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13. Id. at 2543.