[Cite as *State v. Bolling*, 2005-Ohio-6418.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2004-L-161**
- vs -	:	
DEREK V. BOLLING,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 01 CR 000304.

Judgment: Affirmed.

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

Margaret E. Amer Robey, Robey & Robey, 14402 Granger Road, Cleveland, OH 44137 (For Defendant-Appellant).

DONALD R. FORD, P.J.

{¶1} Appellant, Derek V. Bolling, appeals from the September 9, 2004 judgment entry of the Lake County Court of Common Pleas, in which he was sentenced for robbery.

{¶2} On July 2, 2001, appellant was indicted by the Lake County Grand Jury on two counts of robbery, felonies of the second degree, in violation of R.C. 2911.02(A)(2).

On July 6, 2001, appellant filed a waiver of his right to be present at the arraignment, and the trial court entered a not guilty plea on his behalf.

{¶3} On August 22, 2001, appellant appeared in court and entered written and oral pleas of guilty to both counts. Pursuant to its August 24, 2001 judgment entry, the trial court accepted the guilty pleas and referred the matter for a presentence investigation.

{¶4} The record reveals that on June 3, 2001, appellant entered a Dairy Mart in Painesville, Ohio, carrying a screwdriver covered with a cloth to appear as though he had a weapon. Once inside, he demanded money from the clerk, who complied. Appellant then exited the store.

{¶5} On June 5, 2001, appellant entered a bar in Painesville, Ohio, again armed with a concealed screwdriver. Inside the bar, he demanded money from two women behind the counter. They fulfilled the request, and appellant left the establishment.

{¶6} The record also demonstrates that appellant had been smoking crack cocaine for over a week before the two robberies occurred. At the plea hearing, appellant claimed that he ran out of money and was desperate to get high. He stated that the offenses committed were out of character and performed out of desperation because he allowed himself to get hooked on drugs.

{¶7} A sentencing hearing was held on September 19, 2001. Pursuant to its September 24, 2001 judgment entry, the trial court sentenced appellant to serve a term of six years in prison on both counts. The sentences were to be served concurrently with each other. Appellant was given one hundred-five days of credit for time already served. The court further notified appellant that post-release control was mandatory up

to a maximum of three years, pursuant to the statement contained in the written plea and its judgment entry, but did not include any reference to it in its sentencing colloquy.

{¶8} On October 9, 2002, appellant filed a motion for leave to file a delayed appeal pursuant to App.R. 5(A), which was granted by this court. In *State v. Bolling*, 11th Dist. No. 2002-L-154, 2004-Ohio-2785, we determined that the trial court did not notify appellant regarding post-release control at the plea or sentencing hearing as required by R.C. 2929.19. Thus, this court reversed and remanded the case to the trial court for resentencing.

{¶9} A resentencing hearing was held on August 25, 2004. Pursuant to its September 9, 2004 judgment entry, the trial court sentenced appellant to serve a prison term of six years on count one and six years on count two, to be served concurrently with each other, with one thousand eighty-five days of credit for time already served. At the resentencing hearing and in its judgment entry, the trial court notified appellant that post-release control was mandatory up to a maximum of three years. It is from that judgment that appellant filed a timely notice of appeal and makes the following assignments of error:

{¶10} "[1.] The court erred by failing to consider and weigh the evidence presented at the new sentencing hearing.

{¶11} "[2.] The court's independent findings of fact and resulting increase in sentence violated [appellant's] Sixth Amendment right to have any disputed fact that would increase his penalty submitted to a jury."

{¶12} In his first assignment of error, appellant argues that the trial court erred by failing to consider and weigh the evidence presented at the new sentencing hearing. Appellant contends that the trial court erred by refusing to consider any part of the

mitigation evidence presented by him at the resentencing. Appellant stresses that because his prior sentence was remanded for resentencing, he was entitled to an entirely new, independent, and complete sentencing hearing pursuant to R.C. 2929.19.

{¶13} R.C. 2929.19(A)(1) provides in part that: "[t]he court shall hold a sentencing hearing before imposing a sentence under this chapter upon an offender who was convicted of or pleaded guilty to a felony and before resentencing an offender who was convicted of or pleaded guilty to a felony and whose case was remanded pursuant to section 2953.07 or 2953.08 of the Revised Code. ***"

{¶14} R.C. 2953.07 states in part that: "[t]he appellate court may remand the accused for the sole purpose of correcting a sentence imposed contrary to law ***."

{¶15} Pursuant to R.C. 2929.19(A)(1), when an appellate court vacates a sentence and remands for resentencing, the trial court is required to hold a complete sentencing hearing. *State v. Bolton* (2001), 143 Ohio App.3d 185, 188-189; *State v. Douse*, 8th Dist. No. 82008, 2003-Ohio-5238, at ¶59.

{¶16} The Supreme Court of Ohio, in *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, at ¶27, held that: "*** when a trial court fails to notify an offender about post[-]release control at the sentencing hearing but incorporates that notice into its [judgment] entry imposing sentence, it fails to comply with the mandatory provisions of [R.C. 2929.19], and, therefore, the sentence must be vacated and the matter remanded to the trial court for resentencing."

{¶17} In the case at bar, because the trial court did not notify appellant regarding post-release control at the plea or sentencing hearing as required by R.C. 2929.19, we reversed and remanded the case to the trial court for resentencing. Again, a resentencing hearing was held on August 25, 2004. The trial judge heard testimony

from appellant as well as from ten different witnesses in his behalf. Although the trial judge indicated that the resentencing hearing was not an opportunity to reconsider the sentence, the record does not establish that it did not consider the new evidence presented upon remand. The transcript demonstrates that the trial court held a complete resentencing hearing pursuant to *Bolton*, supra. The trial judge properly exercised his discretion by imposing the previous sentence. We also note that there is no mandate which requires a trial court to consider post-sentence behavior upon remand. See *State v. Hudak*, 8th Dist. No. 82108, 2003-Ohio-3805, at ¶32.

{¶18} In addition to stating the R.C. 2929.12 and R.C. 2929.13 factors, the trial court pronounced in its September 9, 2004 judgment entry, and specifically indicated at the resentencing hearing that:

{¶19} "[t]he Court advises you that you are subject to post-release control upon release from prison for up to three years with any violations of that post-release control can result in incarceration on each violation of up to nine months and that you can suffer the remainder of this sentence for 12 months or the actual time that you are responsible that has not been served."

{¶20} Based on the foregoing, appellant's first assignment of error is without merit.

{¶21} In his second assignment of error, appellant alleges that the trial court's independent findings of fact and resulting increase in sentence violated his Sixth Amendment right to have any disputed fact that would increase his penalty submitted to a jury.

{¶22} R.C. 2929.14 provides in part that:

{¶23} "(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:

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

{¶25} "(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."

{¶26} The Supreme Court in *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, paragraph two of the syllabus, stated that: "[p]ursuant to R.C. 2929.14(B), when imposing a nonminimum sentence on a first offender, a trial court is required to make its statutorily sanctioned findings at the sentencing hearing." "Thus, there is a cogent basis to conclude that the same rationale applies to the imposition of a nonminimum sentence involving a defendant who has previously served a prison term. R.C. 2929.14(B)(1)." *State v. Ross*, 11th Dist. No. 2002-A-0077, 2004-Ohio-2304, at ¶35.

{¶27} According to *Apprendi v. New Jersey* (2000), 530 U.S. 466, 490, "[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."

{¶28} "*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 the jury verdict or admitted by the defendant*.'

(Emphasis sic.)" *State v. Rupert*, 11th Dist. No. 2003-L-154, 2005-Ohio-1098, at ¶45, quoting *Blakely v. Washington* (2004), 542 U.S. 296, 303.

{¶29} As a general rule, sentences that fall within the statutory range do not violate the constitutional provision regarding excessive punishments. *State v. Gladding* (1990), 66 Ohio App.3d 502, 513, citing *McDougle v. Maxwell* (1964), 1 Ohio St.2d 68, 69. "'When a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.'" *State v. Allen*, 11th Dist. No. 2004-L-038, 2005-Ohio-1415, at ¶33, quoting *United States v. Booker* (2005), 125 S.Ct. 738, 750.

{¶30} In the instant matter, the trial court stated at the resentencing hearing that:

{¶31} "*** the Court finds under [R.C.] 2929.12(B) that the victims suffered serious physical, psychological and economic harm in this case. That other relevant factors is that this was an intentional act, there was multiple offenses in that there were two, [appellant] cased the store that he robbed or attempted to rob prior to commission of the offense.

{¶32} "***

{¶33} "Under [R.C. 2929.]12(D) the Court finds [appellant] has a history of criminal convictions or delinquency adjudication ***. That he has not responded favorably in the past to previously imposed sanctions. That he has an alcohol or drug abuse problem related to this offense and though he claims now to be rehabilitated and to not using drugs at the time he was sentenced he had not done anything about his drug problem and that is what led to the charges in this case. That therefore he has no genuine remorse. That there is a presumption for prison in this case.

{¶34} "***

{¶35} "Under [R.C. 2929.]13(B)(1) the Court finds that this was an attempt to cause or an actual threat of physical harm during the commission of the robbery though a weapon was not involved.

{¶36} "The Court finds further ******* that after weighing the seriousness and recidivism factors prison is consistent with the purposes and principles of sentencing and that [appellant] is not amenable to any available community sanction.

{¶37} "The Court finds that the minimum sentence in this case would demean the seriousness of the offense and would not adequately protect the public from future crime by [appellant] or others and that [appellant] committed the worst form of the offense."

{¶38} In addition to the foregoing, the trial court made a similar pronouncement in its September 9, 2004 judgment entry.

{¶39} Here, the trial court sentenced appellant to six year prison terms on each of the two robbery counts, to be served concurrently. Therefore, appellant was sentenced to a total of six years imprisonment. The standard statutory range for second degree felonies is two to eight years. R.C. 2929.14(A)(2). Thus, the trial court did not impose the maximum sentence, let alone sentence appellant to a term beyond the maximum. Rather, the trial court sentenced appellant within the statutory range for second degree felonies. As such, *Blakely* does not apply to appellant's sentence. *State v. Morales*, 11th Dist. No. 2003-L-025, 2004-Ohio-7239, at ¶88, citing *State v. Taylor*, 158 Ohio App.3d 597, 2004-Ohio-5939. Appellant's Sixth Amendment rights were not violated. Pursuant to R.C. 2929.14(B)(2), the trial court made the requisite findings at the resentencing hearing, as well as in its judgment entry, by imposing a sentence

beyond the minimum. See *Comer*, supra, paragraph two of the syllabus. Appellant's second assignment of error is without merit.

{¶40} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Lake County Court of Common Pleas is affirmed.

COLLEEN MARY O'TOOLE, J., concurs,

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

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

{¶41} I respectfully dissent. While I do not disagree with the sentence imposed by the trial court, I believe the process utilized is constitutionally infirm in light of the United States Supreme Court's decision in *Blakely v. Washington*.[1]

{¶42} For the reasons stated in my prior concurring and dissenting opinions, the trial court's sentence violated appellant's Sixth Amendment right to a jury trial, as explained in *Blakely v. Washington*.[2]

{¶43} This matter should be remanded for resentencing consistent with *Blakely v. Washington*.

1. *Blakely v. Washington* (2004), 542 U.S. 296.
2. See *State v. McAdams*, 162 Ohio App.3d 318, 2005-Ohio-3895 (O'Neill, J., concurring); *State v. Green*, 11th Dist. No. 2003-A-0089, 2005-Ohio-3268 (O'Neill, J., concurring); *State v. Semala*, 11th Dist. No. 2003-L-128, 2005-Ohio-2653 (O'Neill, J., dissenting).