[Cite as *State v. Torok*, 2005-Ohio-6423.]

**THE COURT OF APPEALS**

**ELEVENTH APPELLATE DISTRICT**

**ASHTABULA COUNTY, OHIO**

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| STATE OF OHIO, | : | **O P I N I O N** |
| Plaintiff-Appellee, | : | |
| - vs - | : | **CASE NOS. 2004-A-0082 and 2004-A-0083** |
| TIMOTHY TOROK, | : | |
| Defendant-Appellant. | : | |

Criminal Appeal from the Court of Common Pleas, Case Nos. 04 CR 050 and 04 CR 150.

Judgment: Affirmed.

*Thomas L. Sartini*, Ashtabula County Prosecutor, and *Angela M. Scott*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

*Kenneth J. Rexford*, Kenneth J. Rexford Co., L.L.C., 112 North West Street, Lima, OH 45801 (For Defendant-Appellant).

DONALD R. FORD, P.J.

**{¶1}** Appellant, Timothy Torok, appeals from the October 20, 2004 judgment entries of the Ashtabula County Court of Common Pleas, in which he was sentenced for illegal assembly or possession of chemicals for the manufacture of drugs.

**{¶2}** On April 19, 2004, in Case No. 2004-CR-050, appellant was indicted by the Ashtabula County Grand Jury on two counts: count one, felony drug possession, a felony of the fifth degree, in violation of R.C. 2925.11; and count two, illegal assembly or

possession of chemicals for the manufacture of drugs, a felony of the third degree, in violation of R.C. 2925.041. On April 23, 2004, appellant entered a not guilty plea at his arraignment.

**{¶3}** On May 24, 2004, in Case No. 2004-CR-150, appellant was indicted by the Ashtabula County Grand Jury on two counts: count one, illegal assembly or possession of chemicals for the manufacture of drugs, a felony of the third degree, in violation of R.C. 2925.041; and count two, failure to comply with order or signal of police officer, a felony of the third degree, in violation of R.C. 2921.331. On May 28, 2004, appellant entered not guilty pleas to the foregoing counts at his arraignment.

**{¶4}** On July 16, 2004, appellant withdrew his not guilty pleas in both Case Nos. 2004-CR-050 and 2004-CR-150. With respect to Case No. 2004-CR-050, appellant entered a plea of guilty to count two, illegal assembly or possession of chemicals for the manufacture of drugs. Count one, felony drug possession, was dismissed. With regard to Case No. 2004-CR-150, appellant entered a guilty plea to count one, illegal assembly or possession of chemicals for the manufacture of drugs. Count two, failure to comply with order or signal of police officer, was dismissed. On July 16, 2004, the trial court accepted appellant's guilty pleas in both Case Nos. 2004-CR-050 and 2004-CR-150.

**{¶5}** Pursuant to the trial court's October 20, 2004 judgment entries, appellant was sentenced to a term of two years in prison on each conviction, to be served concurrently with each other, and consecutively with a sentence previously imposed in

Lake County, Ohio, Case No. 2004-CR-033. It is from that judgment that appellant filed a timely notice of appeal and makes the following assignment of error:[1]

**{¶6}** "Sentencing in this case violated the *Apprendi* doctrine as explained in *Blakely v. Washington* and was therefore unconstitutional."

**{¶7}** In his sole assignment of error, appellant argues that his sentencing was unconstitutional based on *Apprendi v. New Jersey* (2000), 530 U.S. 466, and *Blakely v. Washington* (2004), 542 U.S. 296. Specifically, appellant alleges that his constitutional rights were violated when he received a sentence greater than the minimum based on findings under R.C. 2929.14(B) that were not made by a jury. Appellant further contends that R.C. 2929.14(E)(4) is unconstitutional in light of *Blakely*.

**{¶8}** R.C. 2929.14(B) provides in part that:

**{¶9}** "*** 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:

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

**{¶11}** "(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."

**{¶12}** R.C. 2929.14(E)(4) states in part that:

**{¶13}** "[i]f multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms

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1. Pursuant to this court's January 4, 2005 judgment entry, we sua sponte consolidated both cases for

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:

**{¶14}** "(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.

**{¶15}** "(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.

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

**{¶17}** When consecutive sentences are imposed under R.C. 2929.14(E), the trial court must also follow the requirements of R.C. 2929.19(B)(2)(c), which provides that the trial court justify the imposition of consecutive sentences by giving its reasons.

**{¶18}** In the case at bar, with respect to consecutive sentences, the trial court determined in its October 20, 2004 judgment entries and stated at the sentencing hearing that consecutive sentences are "necessary to protect the public from future crime and to punish the offender. *** The Court finds that the consecutive sentences

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purposes of briefing, oral argument, and disposition.

are not disproportionate to the seriousness of the offender's conduct or to the danger he poses to the public." In addition, the trial court indicated that appellant was under post-release control and that his "criminal history demonstrates that consecutive sentences are necessary to protect the public from future crime." The trial court said that appellant "had thousands of [pseudoephedrine] pills. *** [Appellant] had his driver's license suspended six or eight times, and part of it was due to using drugs and DUI's ***. So the Court finds these are serious matters. The Court also finds that *** [appellant] was under post-release control ***."

**{¶19}** Based on the foregoing, the trial court complied with R.C. 2929.14(E)(4) and R.C. 2929.19(B)(2)(c) by imposing consecutive sentences on appellant.

**{¶20}** 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.

**{¶21}** According to *Apprendi*, supra, at 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."

**{¶22}** "*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*, supra, at 2537.

**{¶23}** 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.

**{¶24}** *Blakely* and *Apprendi* are distinguishable from the instant case because they deal with sentencing for a single crime.

**{¶25}** We stated in *Rupert*, supra, at ¶47, that:

**{¶26}** "Ohio courts have consistently held *Apprendi* does not apply to consecutive sentences 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] ***. Accord, *State v. Gambrel* (Feb. 2, 2001), 2d Dist. No. 2000-CA-29, 2001 Ohio App. LEXIS 339, *** at 4; *State v. Brown*, 2d Dist. No. 18643, [2002-Ohio-277], *** at 5 ***; *State v. Wilson* (Oct. 25, 2002), 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), 76 Fed.Appx. 30, at 35; *United States v. Sauceda* (C.A.6, 2002), 46 Fed.Appx. 322, at 323. [See, also, *Booker*, supra.] Nothing in *Blakely* changes this rule." (Parallel citations omitted.)

**{¶27}** In the instant matter, the trial court stated at the sentencing hearing that: "*** the Court finds that the minimum sentence would also demean the seriousness of

[appellant's] conduct. This is the second and third convictions here, and I don't think the minimum sentences either would protect the public adequately." As such, the trial court complied with R.C. 2929.14(B) by imposing a nonminimum sentence on appellant.

**{¶28}** Here, appellant was not sentenced for a single crime, but rather was sentenced to a term of two years in prison on two convictions, to be served concurrently with each other, and consecutively with a previous sentence imposed in Lake County. The standard statutory range for third degree felonies is one to five years. R.C. 2929.14(A)(3). 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 third degree felonies. As such, *Blakely* is not applicable 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. Thus, with respect to the instant case, Ohio's sentencing scheme is not unconstitutional in light of *Apprendi*, *Blakely*, and *Booker*.

**{¶29}** For the foregoing reasons, appellant's sole assignment of error is not well-taken. The judgment of the Ashtabula County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.