[Cite as *State v. Iddings*, 2004-Ohio-7312.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon: W. Scott Gwin, P.J.
	:	Hon: William B. Hoffman, J.
Plaintiff-Appellee	:	Hon: John F. Boggins, J.
	:	
-vs-	:	
	:	Case No. 2004CAA06043
WILLIAM IDDINGS	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Delaware County Court of Common Pleas, Case No. 03-CR-I-11498
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 8, 2004
APPEARANCES:	
For Plaintiff-Appellee	For Defendant-Appellant
ELISA M. SKINNER Assistant Prosecuting Attorney 140 N. Sandusky St. Delaware, OH 43015	ANTHONY M. HEALD 125 North Sandusky St. Delaware, OH 43015

Gwin, P.J.

{¶1} Appellant William J. Iddings appeals the sentence imposed by the Delaware County Court of Common Pleas. The following facts give rise to the appeal.

{¶2} Defendant-appellant William J. Iddings was originally indicted on December 6, 2002, and charged with one count of sexual battery in violation of R.C. 2907.03, a felony of the third degree. On July 23, 2003, the indictment was dismissed pursuant to plea negotiations. On November 5, 2003, the appellant was again charged with sexual battery in violation of R.C. 2907.03 this time by a bill of information. On March 31, 2004, pursuant to a plea agreement, the appellant entered a guilty plea to the lesser included offense of attempted sexual battery, a felony of the fourth degree. The court ordered a pre-sentence investigation report and deferred sentencing.

{¶3} On May 7, 2004, counsel for the appellant submitted a sentencing memorandum, requesting that the appellant be placed on a period of Community Control Sanctions. On May 10, 2004, the trial court conducted a sentencing hearing at which time the court sentenced the appellant to a prison term of 15 months for the attempted sexual battery charge. The court further sentenced appellant to pay a fine of $5,000. Appellant timely filed a notice of appeal setting forth the following two assignments of error:

{¶4} "I. THE TRIAL COURT ERRED BY SENTENCING MR. IDDINGS TO A STATED PRISON TERM BASED ON FACTS NOT FOUND BY THE JURY OR ADMITTED BY MR. IDDINGS.

{¶5} "II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN SENTENCING THE DEFENDANT TO A PRISON TERM FOR A FOURTH DEGREE FELONY."

I.

{¶6} In his first assignment of error, appellant argues that a trial court cannot sentence an individual to a prison term for a fourth degree felony because the facts necessary to support imposition of a prison term must be presented to the jury. We disagree.

{¶7} R.C. 2953.08 concerns appeals based upon felony sentencing guidelines. Pursuant to R.C. 2953.08 (A) (2) a person who receives a prison sentence for a felony of the fourth or fifth degree may only appeal as of right the imposition of the prison sentence if the "trial court did not specify at sentencing that it found one or more factors specified in division (B) (1) (a) to (i) of Section 2929.13 of the Revised Code to apply relative to the defendant. If the court specifies that it found one or more of the factors to apply relative to the defendant, the defendant is not entitled under this division to appeal as a matter of right the sentence imposed upon the offender."

{¶8} Section 2929.13 (B) (1) (a) indicates the court shall consider whether "[i]n committing the offense, the offender caused physical harm to a person."

{¶9} In the case at bar, the trial court found that the appellant did cause physical harm to the victim. (T. at 9). The court based this finding on the pre-sentence investigation report. (Id. at 2).

{¶10} Accordingly pursuant to R.C. 2953.08 (A)(2) it would appear that appellant is precluded from appealing as a matter of right his sentence in the case at bar.

However, in the case at bar appellant argues that his sentence is contrary to the dictates of two recent decisions from the United States Supreme Court, to wit: *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348 and *Blakely v. Washington* (June 24, 2004), 124 S.Ct. 2531, 159 L.Ed.2d 403; 72 U.S. L.W. 4546.

{¶11} *Apprendi* and *Blakely* stand for the proposition that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime--and thus the domain of the jury--by those who framed the Bill of Rights. If the sentence is increased beyond the maximum range allowed for the offense, then the facts to support that increase must be presented to the jury under a beyond a reasonable doubt standard, regardless of whether the State labels such a fact as a "sentencing factor" or an "element" See, e.g. *Harris v. U.S.*(2002), 536 U.S. 545, 122 S.Ct.2406.

{¶12} *Apprendi* and *Blakely* do not obviate entirely judicial discretion in sentencing a criminal defendant. Rather, the trial courts maintain discretion to select a sentence within the range prescribed by the legislature. Once a defendant pleads guilty, or is found guilty of an offense by a jury, "*Apprendi* says that the defendant has been convicted of the crime; the Fifth and Sixth Amendments have been observed; and the Government has been authorized to impose any sentence below the maximum. That is why, as *Apprendi* noted, 'nothing in this history suggests that it is impermissible for judges to exercise discretion--taking into consideration various factors relating both to offense and offender--in imposing a judgment *within the range'* Id*.,* at 481, 120 S.Ct. 2348. That is also why, as *McMillan* noted, nothing in this history suggests that it is impermissible for judges to find facts that give rise to a mandatory minimum sentence

below 'the maximum penalty for the crime committed.' 477 U.S., at 87-88, 106 S.Ct. 2411. In both instances the judicial fact-finding does not 'expose a defendant to a punishment greater than that otherwise legally prescribed.' *Apprendi,* supra*,* at 483, n. 10, 120 S.Ct. 2348. Whether chosen by the judge or the legislature, the facts guiding judicial discretion below the statutory maximum need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt. When a judge sentences the defendant to a mandatory minimum, no less than when the judge chooses a sentence within the range, the grand and petit juries already have found all the facts necessary to authorize the Government to impose the sentence. The judge may impose the minimum, the maximum, or any other sentence within the range without seeking further authorization from those juries--and without contradicting *Apprendi.*" *Harris v. United States* (2002), 536 U.S. 545, 564, 122 S.Ct. 2406, 2418.

{¶13} The appellant has not identified with any specificity which facts he claims must be submitted to the jury before the court is authorized to impose a prison sentence for a fourth degree felony conviction.

{¶14} Generally, in order to sentence an offender to prison for a fourth or fifth degree felony, the court must: (1) find that at least one of the circumstances in R.C. 2929.13(B)(1) exists; (2) consider the factors set forth in R.C. 2929.12, including the factors affecting the seriousness of the offenses and the potential for recidivism found in R.C. 2929.12(B) through (E); (3) find that a prison term is consistent with the purposes and principles of sentencing set forth in R.C. 2929.11; and (4) find that the offender is not amenable to available community control sanctions. R.C. 2929.13(B) (2). If the offender has not previously served a prison term the court is directed to consider the

minimum prison term unless the court finds 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. R.C. 2929.14(B).

{¶15} The court based its decision to impose a non-minimum prison sentence in appellant's case in part on the pre-sentence investigation report prepared by the probation department. (T. at 2).

{¶16} In *Williams v. New York* (1949), 337 U.S. 241, 69 S.Ct. 1079, the Court noted: "[b]ut both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind the extent of punishment to be imposed within limits fixed by law." Id. at 246, 69 S.Ct. 1082. (Footnote omitted). The court further noted: "[p]robation workers making reports of their investigations have not been trained to prosecute but to aid offenders. Their reports have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guesswork and inadequate information. To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation. We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination. And the modern probation report draws on information concerning every aspect of a defendant's life." Id. at 249-50, 69 S.Ct. 1085. (Footnotes omitted).

{¶17} Neither *Apprendi* nor *Blakely* have changed this result. "If the grand jury has alleged, and the trial jury has found, all the facts necessary to impose the maximum, the barriers between government and defendant fall. The judge may select any sentence within the range, based on facts not alleged in the indictment or proved to the jury--even if those facts are specified by the legislature, and even if they persuade the judge to choose a much higher sentence than he or she otherwise would have imposed. That a fact affects the defendant's sentence, even dramatically so, does not by itself make it an element." *Harris v. United States, supra,* 536 U.S. at 566, 122 S.Ct. at 2416.

{¶18} The trial courts remain free to use their discretion, and to consider facts not presented to the jury in deciding the appropriate punishment from within the range prescribed by statute. "Judges, in turn, have always considered uncharged 'aggravating circumstances' that, while increasing the defendant's punishment, have not 'swell[ed] the penalty above what the law has provided for the acts charged.' *Harris v. United States, supra,* 536 U.S. at 562, 122 S.Ct. at 2416.

{¶19} A trial judge retains discretion to choose a punishment and may base his or her decision upon facts related to the commission of the crime and/or the circumstances of the offender. "Sentencing courts necessarily consider the circumstances of an offense in selecting the appropriate punishment, and we have consistently approved sentencing schemes that mandate consideration of facts related to the crime… without suggesting that those facts must be proved beyond a reasonable doubt." *McMillan v. Pennsylvania* (1986), 477 U.S. 79, 93, 106 S.Ct. 2411, 2419. (Citations omitted).

{¶20} None of the factors set forth in either 2929.13(B) or 2929.14(B) subject an offender to a prison term in excess of what the law provides as the maximum sentence for a felony of the fourth or fifth degree. The Legislature has simply codified factors that sentences courts have always considered when deciding to sentence a defendant within the range permitted by statute. The fact that the legislature has chosen certain of the traditional sentencing factors and dictated the precise weight to be given those factors does not evade the requirements of the Fifth and Sixth Amendments. *Harris v. United States,* supra*,* 536 U.S. at 568, 122 S.Ct. at 2420. (Citing *McMillan v. Pennsylvania* (1986), 477 U.S. 79, 106 S.Ct. 2411).

{¶21} Accordingly, a jury is not required to find the factors set forth in R.C. 2929.13(B) (2) or R.C. 2929.14(B) before a judge may impose a prison sentence for the conviction of a fourth or fifth degree felony.

{¶22} Appellant's first assignment of error is overruled.

II.

{¶23} In his second assignment of error appellant argues that the trial court did not make the findings necessary for the imposition of a prison sentence. We disagree.

{¶24} After the enactment of Senate Bill 2 in 1996, an appellate court's review of an appeal from a felony sentence was modified. Pursuant to present R.C. 2953.08(G) (2): "The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court. The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand

the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion.

{¶25} “The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

{¶26} "(a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (E) (4) of section 2929.14, or division (H) of section 2929.20 of the Revised Code, whichever, if any, is relevant;

{¶27} "(b) That the sentence is otherwise contrary to law."

{¶28} Clear and convincing evidence is that evidence "which will provide in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus.

{¶29} As noted in Assignment of Error I, supra, generally, in order to sentence an offender to prison for a fourth or fifth degree felony, the court must: (1) find that at least one of the circumstances in R.C. 2929.13(B)(1) exists; (2) consider the factors set forth in R.C. 2929.12, including the factors affecting the seriousness of the offenses and the potential for recidivism found in R.C. 2929.12(B) through (E); (3) find that a prison term is consistent with the purposes and principles of sentencing set forth in R.C. 2929.11; and (4) find that the offender is not amenable to available community control sanctions. R.C. 2929.13(B) (2). If the offender has not previously served a prison term the court is directed to consider the minimum prison term unless the court finds 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. R.C. 2929.14(B).

{¶30} Pursuant to R.C. 2929.14(B), when imposing a non-minimum sentence on a first offender, a trial court is required to make its statutorily sanctioned findings at the sentencing hearing. *State v. Comer* (2003), 99 Ohio St. 3d 463, paragraph two of the syllabus. In *State v. Edmonson* (1999), 86 Ohio St. 3d 324, which is cited in *Comer*, supra, at 469, the Ohio Supreme Court gave the following guidance: "By contrasting this statute [R.C. 2929.14(B)] with other related sentencing statutes, we deduce that the verb 'finds' as used in this statute means that the court must note that it engaged in the analysis and that it varied from the minimum for at least one of the two sanctioned reasons." Id. at 326. However, also citing *State v. Edmonson* (1999), 86 Ohio St.3d 324, 715 N.E.2d 131, syllabus, the *Comer* court concluded, however, that "R.C. 2929.14(B) does not require that the court give its reasons for finding that the seriousness of the offense will be demeaned or the public not adequately protected if a minimum sentence is imposed." Id. at ¶ 26, fn. 2, 793 N.E.2d 473.

{¶31} 2953.08 concerns appeals based upon felony sentencing guidelines. Pursuant to R.C. 2953.08 (A) (2) a person who receives a prison sentence for a felony of the fourth or fifth degree may only appeal as of right the imposition of the prison sentence if the “trial court did not specify at sentencing that it found one or more factors specified in division (B) (1) (a) to (i) of Section 2929.13 of the Revised Code to apply relative to the defendant. If the court specifies that it found one or more of the factors to apply relative to the defendant, the defendant is not entitled under this division to appeal as a matter of right the sentence imposed upon the offender.”

{¶32} Section 2929.13 (B) (1) (a) indicates the court shall consider whether “[i]n committing the offense, the offender caused physical harm to a person.”

{¶33} In the case at bar, the trial court found that the appellant did cause physical harm to the victim. (T. at 9). The court based this finding on the pre-sentence investigation report. (Id. at 2).

{¶34} However, appellant maintains that the trial court failed to make its statutorily sanctioned findings at the sentencing hearing. *State v. Comer* (2003), 99 Ohio St. 3d 463, paragraph two of the syllabus.

{¶35} We note that we do not know the specific contents of the pre-sentence investigation report as appellant did not make them a part of the record. In *State v. Untied* (Mar. 5, 1998), Muskingum App. No. CT97-0018, we addressed the issue of failure to include the pre-sentence investigation report and stated: "Appellate review contemplates that the entire record be presented. App.R. 9. When portions of the transcript necessary to resolve issues are not part of the record, we must presume regularity in the trial court proceedings and affirm. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 400 N.E.2d 384. The pre-sentence investigation report could have been submitted "under seal" for our review."

{¶36} Without the cited information and given the trial court's findings on the record, we cannot say the trial court's findings with respect to Section 2929.13 (B) (1) (a) are against the manifest weight of the evidence or contrary to law.

{¶37} The State concedes, as the record reflects, that the trial judge in the case at bar found that recidivism is unlikely. (T. at 9). The trial court found that none of the factors indicating appellant's conduct was less serious than conduct normally constituting the offense were present in the case at bar. (Id). Contrary to appellant's assertions the trial court did find that the victim suffered serious physical and

psychological harm. (Id. at 9). R.C. 2929.12(B) (2). The trial court additional considered the fact that the appellant had led a law-abiding life for a significant number of years prior to the offense. (Id.). R.C. 2929.12(E)(3).

{¶38} Accordingly, the court having found one of the Section 2929.13 (B)(1) factors, and the court having considered the factors set forth in R.C. 2929.12, including the factors affecting the seriousness of the offenses and the potential for recidivism found in R.C. 2929.12(B) through (E), appellant's argument is reduced to whether the trial court made the requisite findings that a prison term is consistent with the purposes and principles of sentencing set forth in R.C. 2929.11; and that the offender is not amenable to available community control sanctions.

{¶39} In *State v. Comer* (2003), 99 Ohio St.3d 463, 2003-Ohio-4165, 793 N.E.2d 473, the Ohio Supreme Court set forth the proper procedure for a trial court to utilize when imposing a felony sentence: "[w]hen imposing a felony sentence, the trial court must consider the overriding purposes of felony sentencing, which are to protect the public from future crime and to punish the offender. R.C. 2929.11(A). To achieve these purposes, a court 'shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.' Id.

{¶40} "Additionally, the law requires that a sentence imposed for a felony shall be reasonably calculated to achieve the purposes of felony sentencing, 'commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by

similar offenders.' R.C. 2929.11(B). Finally, a trial court shall not impose a sentence based on the race, ethnicity, gender, or religion of the offender. R.C. 2929.11(C).

{¶41} "The trial court must consider the factors found in R.C. 2929.12(B) and (C) to determine how to accomplish the purposes embraced in R.C. 2929.11." Id. at 466, 2003-Ohio-4165 at ¶ 11-13, 793 N.E.2d at 476.

{¶42} As previously noted, the trial court made the requisite findings pursuant to R.C. 2929.12(B) through (E). The trial court further gave its reasons for imposing a prison sentence: "[t]he court is imposing this sentence understanding that it exceeds the minimum because the shortest prison term would demean the seriousness of your conduct and wouldn't adequately protect the public from future crime by you and others. You took advantage of the victim here. She has no memory of the incident; you caused her to bleed from her vagina, which indicates the force used…" (T. at 9). Clearly the court considered the factors set forth in R.C. 2929.11 as delineated above.

{¶43} Appellant next argue that the trial court's finding that appellant was not amenable to community control sanctions was insufficient. Specifically, appellant argues that the court is required to give evidence that a community control sanction has been tried and failed before a court can impose a prison sentence for a fourth degree felony.

{¶44} A court is not required in every situation to determine that local sanctions have been tried and failed. As noted by the Court of Appeals for the First District: "[a]s noted by Judge Griffin and Professor Katz, such an analysis generally requires that the trial court 'have evidence that some of the available local sanctions have been tried and failed.' Griffin and Katz, supra, Section 6.16, 462. However, even if local sanctions are

available, the seriousness of the crime, even for a fifth-degree felony, may require a prison term. It is noteworthy in this regard that Condon's offenses do not conveniently fit into the normal template of a fifth-degree felony, which is generally nonviolent and does not involve moral turpitude. Gross abuse of a corpse is unusual for a fifth-degree felony as it involves both conduct with a potential for inflicting severe emotional harm and behavior that is so aberrant that it causes a sense of societal outrage." *State v. Condon* (2003), 152 Ohio App.3d 629, 662, 2003-Ohio-2335 at ¶ 106, 789 N.E.2d 696, 722. See, also, *State v. Beckman*, 12th Dist. No. CA2003-02-033, 2003-Ohio-5003 at ¶ 23; *State v. Brown* (2001), 146 Ohio App.3d 654, 659, 2001-Ohio-4266 at ¶ 19, 767 N.E.2d 1192, 1196.

{¶45} In this case, the court found the imposition of community control would be inconsistent with the purposes and principles of sentencing and discussed the seriousness of the offense and the factors weighing in favor of recidivism. Although there are factors that may weigh in favor of appellant being less likely to recidivate, it was the trial court's duty to weigh and balance these factors. *State v. Beckman,* 2003-Ohio-5003 at ¶ 23. Further, the trial court also made clear by its statements that it considered a sentence that did not include a prison term to demean the seriousness of the offenses, which it found had cause serious physical and psychological harm to the victim. *State v. Condon*, supra at ¶ 107.

{¶46} Concededly, another court might have found that appellant should have been given an opportunity to participate in some type of local community-control sanction. This trial court did not. The court was in the best position to observe appellant's demeanor and to judge his character so that it could determine whether he

was understanding of the nature of his crimes and would be rehabilitated through community control. The court was also in the best position to judge the seriousness of his crimes, involving sexual battery and causing serious physical and psychological harm to the victim, and whether community control would serve to demean them. *State v. Condom,* supra.

{¶47} Accordingly, we cannot say clearly and convincingly that the trial court erred by determining that a prison sentence was appropriate for appellant.

{¶48} Appellant's second assignment of error is overruled.

{¶49} For the foregoing reasons, the judgment of the Delaware County Court of Common Pleas, Ohio, is affirmed.

By Gwin, P.J., and

Boggins, J., concur

Hoffman, J., dissents

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JUDGES

WSG:clw 1027

Hoffman, J. dissenting

{¶50} R.C. 2929.13(B)(1) requires certain findings to be made before a trial court may impose a prison term for a fourth or fifth degree felony. If a prison term is authorized and selected, R.C. 2929.14(B) requires certain additional findings to be made before a trial court may impose more than the minimum prison term. Both statutes establish statutory maximum ranges of sentence of less than 18 months (the maximum sentence the judge can impose if the additional findings are made).

{¶51} The appellant's guilty plea did not admit any of these findings. Accordingly, I would reverse and remand this matter for resentencing pursuant to *Blakely*.

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JUDGE WILLIAM B. HOFFMAN

[Cite as *State v. Iddings*, 2004-Ohio-7312.]

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
WILLIAM IDDINGS	:	
Defendant-Appellant	:	CASE NO. 2004CAA06043

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Delaware County Court of Common Pleas, Ohio, is affirmed. Costs to appellant.

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JUDGES