[Cite as *State v. Patterson*, 2006-Ohio-7268.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	CASE NO. 03-MA-78
	)	
KATEO PATTERSON,	)	OPINION
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Common Pleas Court Case No. 00-CR-570A
JUDGMENT:	Reversed and Remanded
APPEARANCES:	
For Plaintiff-Appellee	Attorney Joseph R. Macejko, Assistant Prosecutor 21. W. Boardman Street, 6th Floor Youngstown, Ohio 44503
For Defendant-Appellant	Attorney Martin E. Yavorcik 3737 South Avenue Youngstown, Ohio 44502

JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

Dated: May 24, 2006

[Cite as *State v. Patterson*, 2006-Ohio-7268.]
DONOFRIO, J.

{¶1} Defendant-appellant, Kateo Patterson, appeals his sentence in the Mahoning County Common Pleas Court following a jury trial for aggravated murder, kidnapping, aggravated robbery, aggravated arson (all with firearm specifications), and conspiracy.

{¶2} On August 15, 2003, a jury found appellant guilty in connection with the death of Steve "Shorty" Skinner (Skinner). Appellant, along with Frank Sinkovich, Bobbie Beal, and Clemons Higgins, robbed Skinner at gunpoint, forced him into the trunk of his own vehicle, then drove him to another location where they set the car on fire. Skinner's body was discovered in the trunk of the car days later.

{¶3} Appellant was convicted on seven counts: Count one – complicity to commit aggravated murder (prior calculation and design), in violation of R.C. 2923.03(A) and 2903.01(A); Count two – complicity to commit aggravated murder (felony murder), in violation of R.C. 2923.03(A) and 2903.01(B); Count three – kidnapping, in violation of R.C. 2905.01(A)(2), a first-degree felony; Count four – kidnapping, in violation of R.C. 2905.01(A)(3), a first-degree felony; Count five – complicity to commit aggravated robbery, in violation of R.C. 2923.03(A) and 2911.01(A)(1), a first-degree felony; Count six – complicity to commit aggravated arson, in violation of R.C. 2923.03(A) and 2909.02(A)(1), a first-degree felony; Count seven – conspiracy, in violation of R.C. 2923.01(A)(1), a first-degree felony. Appellant was also convicted of firearm specifications on counts one through six.

{¶4} On April 21, 2003,[1] the trial court sentenced appellant as follows: Count one – twenty years to life; Count two – twenty years to life; Count three – ten years; Count four – ten years; Count five – ten years; Count six – ten years; Count seven – ten years. The court merged Counts one and two, and Counts three and four for purposes of sentencing and ordered those terms and the terms remaining for Counts five, six, and seven to be served consecutively. The court also merged all but two of the firearm specifications. Appellant's resulting aggregate sentence was sixty-six years to life. This appeal followed.

---

[1] The judgment entry of sentence, although dated April 21, 2003, is file-stamped April 23, 2003.

{¶5} Appellant's sole assignment of error states:

{¶6} "THE TRIAL COURT ERRED WHEN IT SENTENCED THE DEFENDANT TO MORE THAN THE RELEVANT STATUTORY MAXIMUM FOR A FIRST TIME OFFENDER"

{¶7} Appellant argues that Ohio's sentencing statutes which require the judge to make factual findings that are not submitted to the jury or admitted by the defendant that increase the defendant's sentence beyond the "relevant statutory maximum" violate the Sixth Amendment to the U.S. Constitution and the United State's Supreme Court decision of *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403. Appellant's argument also implicates the Supreme Court's decision in *Apprendi v. New Jersey*, (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435.

{¶8} In this case, appellant was convicted on counts three through seven, all first-degree felonies. For first-degree felonies, the sentencing court may impose a prison term of three, four, five, six, seven, eight, nine, or ten years. R.C. 2929.14(A). The trial court sentenced appellant to the maximum term, ten years, for each of those offenses.[2] The court also ordered that those terms be served consecutively.

{¶9} In its judgment entry of sentence, the trial court made the requisite findings to impose more than the minimum term of imprisonment for the offenses. The trial court found that the shortest terms of imprisonment would demean the seriousness of appellant's conduct and would not adequately protect the public from future crime by the appellant under R.C. 2929.14(B).

{¶10} The trial court also made the requisite findings to impose the maximum

---

[2] As mentioned earlier, appellant was also convicted on: count one – complicity to commit aggravated murder (prior calculation and design), in violation of R.C. 2923.03(A) and 2903.01(A); and count two – complicity to commit aggravated murder (felony murder), in violation of R.C. 2923.03(A) and 2903.01(B). The trial court sentenced appellant to a term of imprisonment of twenty years to life on both of those counts. Effective July 1, 1996, Am.Sub.S.B. No 2, 146 Ohio Laws, Part IV, 7136, amended Ohio's felony sentencing scheme. However, the General Assembly has consistently treated sentencing for aggravated murder differently from other felonies. Therefore, general felony sentencing requirements generally do not apply to aggravated murder cases. See *State v. Johnson* (Nov. 6, 2001), 7th Dist. No. 99 C.A. 49. Notably, appellant does not challenge his sentences on those convictions on *Blakely/Apprendi* grounds, or on any other grounds for that matter. Therefore, we will not address the sentences imposed for those offenses any further.

term of imprisonment for the offenses. The trial court found that maximum terms of imprisonment were appropriate because appellant had committed the worst forms of each offense and posed the greatest likelihood of committing future crimes under R.C. 2929.14(C).

{¶11} Lastly, the trial court made the requisite findings to impose consecutive sentences. The trial court found that consecutive sentences were necessary to protect the public and punish appellant, and that such sentences were not disproportionate to the seriousness of appellant's conduct and the danger appellant poses to the public under R.C. 2929.14(E)(4). The trial court added that the harm caused by appellant was so great and unusual that no single prison term would reflect the seriousness of appellant's conduct under R.C. 2929.14(E)(4)(b).

{¶12} While this appeal was pending, the Ohio Supreme Court held that the provisions of the Revised Code relating to more than minimum (R.C. 2929.14[B]), maximum (R.C. 2929.14[C]), and consecutive sentences (R.C. 2929.14[E][4]) are unconstitutional because they require a judicial finding of facts not proven to a jury beyond a reasonable doubt or admitted by the defendant before imposition of a sentence greater than the "statutory maximum." *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, paragraphs one and three of the syllabus. (*Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435; *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403; and *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621, followed.)

{¶13} The Court went on to hold that those unconstitutional provisions could be severed. Id., paragraphs two and four of the syllabus. Since the provisions could be severed, "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." Id., paragraph seven of the syllabus.

{¶14} Appellee argues that appellant waived his *Blakely/Apprendi* argument because he did not lodge that specific objection at the sentencing hearing. The Court

in *Foster* rejected a similar argument made by the state. The Court stated:

{¶15} "Waiver indicates an '"intentional relinquishment or abandonment of a known right."' *United States v. Olano* (1993), 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508, quoting *Johnson v. Zerbst* (1938), 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461. Foster could not have relinquished his sentencing objections as a known right when no one could have predicted that *Blakely* would extend the *Apprendi* doctrine to redefine "statutory maximum." *Smylie v. State* (Ind.2005), 823 N.E.2d 679, 687. In addition, we note that Blakely's guilty plea did not create an inference that he waived a jury's finding of the additional fact of "deliberate cruelty." See *Blakely*, 542 U.S. at 310, 124 S.Ct. 2531, 159 L.Ed.2d 403 ("When a defendant pleads guilty, the State is free to seek judicial sentence enhancements *so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding*" (emphasis added)). We have no such stipulations or consent to judicial factfinding in any of the cases before us.

{¶16} "Furthermore, *Blakely*'s Sixth Amendment holding has been applied retroactively to cases pending on direct appeal in states that have found it applicable to their statutes. See, e.g., *Lopez v. People* (Colo.2005), 113 P.3d 713, 716; *Smylie v. State*, 823 N.E.2d at 688 (Indiana); *State v. Natale* (2005), 184 N.J. 458, 494, 878 A.2d 724; *State v. Houston* (Minn.2005), 702 N.W.2d 268, 273."

{¶17} Likewise, in this case, appellant could not have relinquished his sentencing objections as a known right when no one could have predicted that *Blakely* would extend the *Apprendi* doctrine to redefine "statutory maximum." Additionally, a review of the record reveals no stipulations by appellant to the relevant facts or a consent to judicial factfinding. Consequently, appellee's argument regarding waiver is without merit.

{¶18} Here, since the trial court's imposition of maximum, consecutive, and more than minimum sentences was based on their respective provisions in the Revised Code (R.C. 2929.14[B], R.C. 2929.14[C], and R.C. 2929.14[E][4]), which have been found unconstitutional in *Foster*, appellant's argument is legitimate.

{¶19} After *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the trial court no longer needs to give reasons or findings prior to imposing maximum, consecutive and/or more than minimum sentences. The Court held that:

{¶20} "These cases and those pending on direct review must be remanded to trial courts for new sentencing hearings not inconsistent with this opinion. We do not order resentencing lightly. Although new sentencing hearings will impose significant time and resource demands on the trial courts within the counties, causing disruption while cases are pending on appeal, we must follow the dictates of the United States Supreme Court. Ohio's felony sentencing code must protect Sixth Amendment principles as they have been articulated.

{¶21} "Under R.C. 2929.19 as it stands without (B)(2), the defendants are entitled to a new sentencing hearing although the parties may stipulate to the sentencing court acting on the record before it. Courts shall consider those portions of the sentencing code that are unaffected by today's decision and impose any sentence within the appropriate felony range. If an offender is sentenced to multiple prison terms, the court is not barred from requiring those terms to be served consecutively. While the defendants may argue for reductions in their sentences, nothing prevents the state from seeking greater penalties. *United States v. DiFrancesco* (1980), 449 U.S. 117, 134-136, 101 S.Ct. 426, 66 L.Ed.2d 328."

{¶22} The same day *Foster* was decided, the Ohio Supreme Court decided a companion case. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1. In *Mathis*, the Court clarified *Foster* adding:

{¶23} "Although after *Foster,* the trial court is no longer compelled to make findings and give reasons at the sentencing hearing since R.C. 2929.19(B)(2) has been excised, nevertheless, in exercising its discretion the court must carefully consider the statutes that apply to every felony case. Those include R.C. 2929.11, which specifies the purposes of sentencing, and R.C. 2929.12, which provides guidance in considering factors relating to the seriousness of the offense and recidivism of the offender. In addition, the sentencing court must be guided by

statutes that are specific to the case itself."

{¶24} Accordingly, appellant's sole assignment of error has merit.

{¶25} The judgment entry of sentence of the trial court relating to counts three through seven, the first-degree felonies, is hereby reversed and vacated. This cause is remanded for resentencing according to law and consistent with this court's opinion.

Vukovich, J., concurs
Waite, J., concurs