

**IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO**

STATE OF OHIO)	CASE NO. 03CR000393
)	
Plaintiff)	JUDGE EUGENE A. LUCCI
)	
vs.)	<u>ORDER OVERRULING</u>
)	<u>DEFENDANT'S CONSTITUTIONAL</u>
JAMES A. CROSS)	<u>CHALLENGE TO OHIO'S</u>
)	<u>SENTENCING SCHEME BASED UPON</u>
Defendant)	<u>APPENDI AND BLAKELY</u>

{¶1} The court has considered: (1) the state's objections to trial court's nonstatutory sentencing procedure, filed September 27, 2004; (2) defendant's sentencing memorandum, filed October 12, 2004; and (3) the oral arguments of counsel on September 27, 2004.

ISSUES

{¶2} The issue involved in this case is what effect, if any, *Apprendi*¹ and *Blakely*² have on Ohio's sentencing scheme.

FACTS

{¶3} The defendant was found guilty by a jury on September 22, 2004, of two counts of aggravated vehicular assault (which carry a mandatory prison term), felonies of the third degree, two counts of vehicular assault, felonies of the fourth degree, and one count of driving under the influence of alcohol and/or drugs, a misdemeanor of the first degree. The court deferred the matter to September 27, 2004, without discharging the jury, to allow the defendant to present any evidence to the jury on sentencing factors and to hear the arguments of counsel regarding the impact of *Blakely* on Ohio's sentencing scheme. The defendant did not stipulate to any sentencing factors, but he did waive any prerogative to have these factors determined by this jury. The court then deferred sentencing to November 5, 2004, after referring the defendant for pre-sentence investigation.

¹ *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 5348.

² *Blakely v. Washington* (2004), 124 S.Ct. 2531, 2540.

LAW

Ohio Sentencing Law

{¶4} Under Ohio’s sentencing scheme, certain crimes have prescribed mandatory prison terms, within the statutorily established ranges.³ For optional prison terms, the judge may choose a prison term or community control sanctions.⁴ For felonies of the first degree, the range of prison terms is three, four, five, six, seven, eight, nine or ten years. For felonies of the second degree, the range of prison terms is two, three, four, five, six, seven, or eight years. For felonies of the third degree, the range of prison terms is one, two, three, four, or five years. For felonies of the fourth degree, the range of prison terms is six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months. For felonies of the fifth degree, the range of prison terms is six, seven, eight, nine, ten, eleven, or twelve months.⁵ Unless there is a mandatory prison term, *i.e.* where prison is optional, the minimum sentence is *no time in prison and no incarceration*.

{¶5} In Ohio, there is a presumption in favor of a prison term in some instances, mainly felonies of the first or second degree, and certain drug offenses.⁶ If the judge decides not to impose a prison term, the judge must give reasons that will satisfy the court of appeals in the event that the state exercises its right to appeal that decision. There is a presumption against prison for felonies of the fourth or fifth degree, and certain drug offenses, unless any of nine enumerated factors are found.⁷ If none of the nine enumerated factors are found, then community control sanctions must be imposed unless the judge gives reasons (that will satisfy the court of appeals), since the defendant can appeal

³ R.C. §2929.13(F).

⁴ R.C. §2929.13(A), 2929.15(A), etc.

⁵ R.C. §2929.14(A).

⁶ R.C. §2929.13(D).

⁷ R.C. §2929.13(B)(1), (B)(2)(a).

as of right.⁸ For felonies of the third degree, there is no guidance on an optional prison term other than the general purposes and principles of sentencing.⁹

{¶6} The shortest prison term must be imposed if the defendant has never been to prison before, unless to do so would demean the seriousness of the offense (after evaluating the offense) or not adequately protect the public (after evaluating the offender).¹⁰ The longest term in prison may not be imposed unless the offender committed the worst form of the offense or poses the greatest likelihood of committing future crimes, supported by reasons (that will satisfy the court of appeals), since the defendant can appeal as of right.¹¹

{¶7} Under the Ohio scheme, the judge *evaluates* the offense and the offender to determine the appropriate sentence in the case, regardless of whether prison is mandatory, optional, presumed, or not presumed.

{¶8} In evaluating the offense, the Ohio judge considers various factors that would make the offense relatively more or less serious.¹² These factors are unlimited by law, and include: the physical or mental injury suffered by the victim of the offense and whether it was exacerbated because of the physical or mental condition or age of the victim; whether the victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense; whether the offender held a public office or position of trust in the community, and whether the offense was related to that office or position; whether the offender's occupation, elected office, or profession obliged the offender to prevent the offense or bring others committing it to justice; whether the offender's professional reputation or occupation, elected office, or profession was used to facilitate the offense or is likely to influence the future conduct of others; whether the offender's relationship with the victim facilitated the offense; whether the offender committed the offense for hire or as a part of an organized criminal activity; whether, in committing the offense, the offender was

⁸ R.C. §2929.13(B)(2)(b).

⁹ R.C. §2929.13(C).

¹⁰ R.C. §2929.14(B).

¹¹ R.C. §2929.14(C).

¹² R.C. §2929.12(B),(C).

motivated by prejudice based on race, ethnic background, gender, sexual orientation, or religion; whether the offense is a domestic violence or assault involving a person who was a family or household member at the time of the violation, whether the offender committed the offense in the vicinity of one or more children who are not victims of the offense, and the offender or the victim of the offense is a parent, guardian, custodian, or person in *loco parentis* of one or more of those children; whether the victim induced or facilitated the offense; whether, in committing the offense, the offender acted under strong provocation; whether, in committing the offense, the offender did not cause or expect to cause physical harm to any person or property; and whether there are substantial grounds to mitigate the offender's conduct, although the grounds are insufficient to constitute a defense.

{¶9} In evaluating the offender, the judge considers various factors that would make recidivism by this offender more or less likely.¹³ These factors are unlimited by law, and include: whether, at the time of committing the offense, the offender was under release from confinement before trial or sentencing, under a community control sanction, or under post-release control for an earlier offense; whether the offender was previously adjudicated a delinquent child or had a history of criminal convictions; whether the offender has been rehabilitated to a satisfactory degree after previously being adjudicated a delinquent child, or has not responded favorably to sanctions previously imposed for criminal convictions; whether the offender demonstrated a pattern of drug or alcohol abuse that is related to the offense, and the offender refused to acknowledge that he has demonstrated that pattern, or the offender refuses treatment for the drug or alcohol abuse; whether the offender shows genuine remorse for the offense; whether, prior to committing the offense, the offender had ever been adjudicated a delinquent child or convicted of or pleaded guilty to a criminal offense; and whether, prior to committing the offense, the offender led a law-abiding life for a significant number of years; and whether the offense was committed under circumstances not likely to recur.

{¶10} The court considers 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. The judge imposes a sentence that will be reasonably calculated to

¹³ R.C. §2929.12(D),(E).

achieve the two overriding purposes of felony sentencing (protecting the public from future crime by the offender and others and to punish the offender), that will be commensurate with and not demeaning to the seriousness of the conduct and its impact upon the victim, and that will be consistent with sentences imposed for similar crimes committed by similar offenders; and whether a particular sentence imposes an unnecessary burden on state or local government resources.¹⁴

Apprendi

{¶11} The United States Supreme Court, in *Apprendi v. New Jersey*,¹⁵ held that other than the fact of prior conviction, any fact which increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. Apprendi pleaded guilty to possession of a firearm for an unlawful purpose, a second degree offense, and unlawful possession of a prohibited weapon, a third degree offense. Under New Jersey law, a second degree offense was subject to a sentencing range of five to ten years. A third degree offense was subject to a three to five year sentencing range. The trial court sentenced Apprendi to 12 years in prison based on a New Jersey statute which permitted the court to enhance a defendant's penalty to between ten and 20 years upon a finding that the defendant acted with the purpose to intimidate an individual or group of individuals on the basis of race, color, gender, handicap, religion, sexual orientation, or ethnicity. Effectively, the finding of purpose to intimidate elevated a second degree offense to a first degree offense. The court found that the defendant's sentence was invalid under the Sixth Amendment because the defendant's sentence was increased beyond the statutory maximum based upon a finding of fact not submitted to a jury and proved beyond a reasonable doubt. However, the court further stated that "[w]e should be clear that 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* prescribed by statute."¹⁶

¹⁴ R.C. §2929.11.

¹⁵ *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 5348.

¹⁶ *Apprendi v. New Jersey* (2000), 533 U.S. 466, 481, 120 S.Ct. 5348 (emphasis in original).

Blakely

{¶12} In *Blakely v. Washington*,¹⁷ the defendant pleaded guilty to second degree kidnapping. Under Washington law, second degree kidnapping was a class B felony. Class B felonies were subject to a maximum sentence of ten years. However, second degree kidnapping had a standard sentencing range of 49 to 53 months. In order to exceed the standard range, a judge had to find additional factors justifying the exceptional sentence. In *Blakely*, the judge found that the defendant had acted with “deliberate cruelty” to justify a sentence of 90 months. Although the 90 month sentence was below the statutory maximum for class B felonies, the court found that for *Apprendi* purposes, the statutory maximum is the maximum sentence a court may impose based solely on the facts reflected in the jury verdict or admitted by the defendant. The Supreme Court of the United States held, based on *Apprendi*, that the imposition of a sentence beyond the statutory standard range maximum violated the defendant’s Sixth Amendment right to trial by jury because it was based on a finding of fact (deliberate cruelty) that was neither admitted by the defendant nor found by a jury. The court noted that:

the Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury.... Of course indeterminate sentencing schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence – and that makes all the difference insofar as judicial impingement upon the traditional rule of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is entitled to no more than a 10-year sentence – and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.¹⁸

{¶13} 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.”¹⁹

¹⁷ *Blakely v. Washington* (2004), 124 S.Ct. 2531, 2540.

¹⁸ *Blakely v. Washington* (2004), 124 S.Ct. 2531, 2540.

¹⁹ *Blakely v. Washington* (2004), 124 S.Ct. 2531, 2537.

Blakely holds that the maximum sentence is not that which is authorized by the statute for the particular degree of felony, but that which is permissible under the facts either admitted in a guilty plea or found by the trier of fact, even though that sentence might fall well-short of the statutory maximum.

{¶14} *Apprendi* and *Blakely* concern the limitations for punishment for one crime committed. They do not discuss whether the sentences for multiple, separate crimes should be served concurrently or consecutively. Additionally, the decision to sentence concurrently or consecutively has been within the judge’s power or within the “prescribed statutory maximum.” The legislature’s refinement, regulation or limitation of that power further protects the individual and arguably does not implicate the Sixth Amendment protections. The federal courts have consistently held that the imposition of consecutive sentences does not raise issues under the Sixth Amendment as long as the individual sentence for each count does not exceed the maximum.²⁰ *Blakely* has not changed that precedent.

{¶15} To the extent that Ohio uses sentence enhancements, *Blakely* is not a problem. Nearly all sentence enhancements used in Ohio are charged in the indictment; for example, gun specifications, repeat violent offender or major drug offender specifications. That being the case, the offender would either plead guilty to the specification or the jury would make a factual finding on the specification. And it bears noting that sexual predator issues do not involve “punishment” for purposes of double jeopardy, so hearings on the predator classification would not be an issue.²¹

ANALYSIS

{¶16} *Apprendi* and *Blakely* are violated only when the imposition of a sentence beyond the statutory maximum requires a judge to make a finding, other than the existence of a prior conviction, that has not been proven to a jury beyond a reasonable doubt or admitted by the defendant.

{¶17} R.C. §2929.14(B) provides that the court shall impose the shortest prison term authorized for the offense unless the court finds that the defendant has previously served a prison term, or that the shortest prison term will demean the seriousness of the offense or will not adequately protect the

²⁰ See, e.g., *United States v. Feola* (C.A.2, 2001), 275 F.3d 216, 220 (“The aggregate sentence is imposed because appellant has committed two offenses, not because a statutory maximum for any one offense has been exceeded.”).

²¹ See *State v. Cook* (1998), 83 Ohio St.3d 404, 1998-Ohio-291.

public. The defendant argues that pursuant to *Blakely* the statutory maximum in Ohio is the minimum sentence (in this case, a mandatory one-year prison term) because the minimum is the only sentence a judge can impose without making any further findings.²²

{¶18} For purposes of *Apprendi* and *Blakely*, the statutory maximum is the maximum sentence a judge can impose based on the facts reflected in the jury verdict or admitted by the defendant. A jury's verdict finding a defendant guilty of a particular crime authorizes a penalty anywhere within the range established by statute for that offense.²³ The essence of the Supreme Court's holdings in *Apprendi* and *Blakely* is not the limitation of judicial power, but the protection of jury power.²⁴ The problem arises when a finding made by the judge elevates the penalty of the offense beyond the maximum, so that the defendant is essentially being punished for a higher crime without having been convicted by a jury of that higher crime.²⁵ However, when a judge's discretion is limited within the range established by statute by requiring the judge to make a finding before imposing a sentence beyond the minimum, that limitation infringes on judicial power, it does not infringe upon the province of the jury.

{¶19} *Blakely* was decided under a state sentencing grid scheme like that employed by the federal courts. The State of Washington sentencing scheme creates grids which classify individual offenses within felony classes according to degrees of seriousness. For example, *Blakely* pleaded guilty to second degree kidnapping with a firearm, an offense that is classified as a class B felony. Without more, the facts of the indictment which *Blakely* pleaded guilty to would only permit a prison sentence in the range of 49-53 months. The Supreme Court thus held that 53 months would be the

²² As stated previously, unless there is a mandatory prison sentence, the minimum sentence is no incarceration, even for a felony of the first degree.

²³ *Apprendi v. New Jersey* (2000), 533 U.S. 466, 481, 120 S.Ct. 5348.

²⁴ *Blakely v. Washington* (2004), 124 S.Ct. 2531, 2540.

²⁵ The courts have previously held that a court may consider a defendant's uncharged yet undisputed conduct when determining an appropriate sentence. *State v. Steward*, Washington App. No. 02CA43, 2003-Ohio-4082. See, also, *State v. Shahan*, Washington App. No. 02CA63, 2003-Ohio-6945 (as in sentencing hearings, the Rules of Evidence do not apply to sexual predator determination hearings, so the trial court may consider reliable hearsay contained in a pre-sentence investigation report).

“maximum” sentence (despite the ten-year limit for class B felonies) because the only facts used to find Blakely guilty were those listed in the indictment. Once the trial court began to hear additional facts for purposes of increasing Blakely’s sentence beyond that which would have been permissible under the facts pleaded to, the court violated Blakely’s right to have a trial by jury.

{¶20} The sentencing scheme in Ohio is not like the scheme involved in *Blakely*, and for the most part, *Blakely* has no applicability to Ohio sentencing statutes. The Ohio legislature has established a definite sentencing scheme with minimum and maximum ranges for particular classes of felonies. It does not further sub-classify within those classes of felonies. The sentencing judge has discretion to impose a sentence anywhere within that range, subject to certain statutory limitations. In Ohio a first degree felony is punishable by three, four, five, six, seven, eight, nine or ten years in prison. Unlike Washington, Ohio’s sentencing statutes do not prescribe a prison term based on a point system relating to the offender’s conduct. In certain circumstances, in Ohio, a judge is required to make specific findings in order to impose a sentence within the statutorily established range for that class of felony. For example, in order to impose a maximum prison sentence, the judge must find that the defendant committed the worst form of the offense or that the defendant poses the greatest likelihood of committing future crimes, or that the defendant is a major drug offender or a repeat violent offender, which are specified in the indictment.²⁶

{¶21} In Ohio, the statutory maximum is not the minimum sentence, but is the maximum of the range applicable to the convicted offense. For example, aggravated vehicular assault is a felony of the third degree. R.C. §2929.14(A)(3) provides that a felony of the third degree is subject to a mandatory prison term of one, two, three, four, or five years. Thus, the maximum sentence a judge can impose based on the facts reflected in the jury verdict finding a defendant guilty of aggravated vehicular assault is five years. The fact that the legislature has decided to further limit the judge’s discretion within that range does not impinge on the role of the jury and does not give the defendant the legal right to the minimum sentence.

{¶22} Further, the “findings” a judge must make in order to impose certain sentences within the statutorily established range are not the same kind of “findings” a jury makes, and, therefore, do not infringe on the role of the jury.

²⁶ R.C. §2929.14(C).

{¶23} In a jury trial, the jury’s function is to determine whether the state has proved beyond a reasonable doubt the facts necessary to show that the defendant committed the offense charged. In applying Ohio’s sentencing guidelines, the judge’s function is to evaluate the defendant and the evidence in order to determine the appropriate sentence. Thus, the “findings” made by the sentencing judge are really *evaluations* of the factual “findings” made by the jury or admitted by the defendant. For example, suppose the legislature makes it a felony to purposefully break a window. If the jury finds that the evidence shows beyond a reasonable doubt that Defendant A purposefully broke a window by shooting a pinhole through it with a BB gun, then Defendant A has committed the offense of purposefully breaking a window. If the jury finds that the evidence shows beyond a reasonable doubt that Defendant B purposefully broke a window by hurling a bowling ball through it, then Defendant B has committed the offense of purposefully breaking a window. However, based on these facts found by the jury, a judge imposing sentence on Defendant A and Defendant B may properly determine that Defendant B should receive the maximum sentence because Defendant B has committed the worst form of the offense of purposefully breaking a window. The judge sentencing Defendant B is not making an additional “finding” for purposes of *Apprendi* and *Blakely*, he is simply evaluating the factual findings made by the jury.

{¶24} As for the findings required to impose the maximum sentence in a given case, those findings do not entail additional fact-finding in the sense that would implicate *Blakely*. As previously noted, *Blakely* reaffirmed the sentencing judge’s discretion to consider factors outside the evidence during sentencing: “Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal right to a lesser sentence – and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.” A finding that the offender committed the worst form of the offense would be based purely on the facts adduced at trial or pleaded to in the indictment. Recidivism factors like prior offenses need not be established by the jury, as the Supreme Court has specifically stated that prior convictions are not subject to the jury trial rule (there being obvious Fifth Amendment problems with the use of prior convictions when the accused does not testify).

{¶25} Consequently, this court believes that defendant’s argument that “the court could only impose the maximum sentence by making judicial findings beyond those either determined or stipulated to by the defendant” is only partially correct. As *Blakely* makes clear, the sentencing court may still rule on those facts that are deemed important to the exercise of sentencing discretion. Sometimes, those facts do not present themselves until sentencing; for example, the vindictive offender who verbally or physically assaults the court during sentencing may show a lack of remorse or that he is a danger to the public. Those are factors that may be considered when imposing the maximum sentence, and they do not have to be determined by a jury. Other admitted factors, like an offender’s age, may be stipulated.

{¶26} In this case, this court can find that Cross committed the worst form of the offense by running the two victims down, and then backing up his truck, and running them down again and dragging their bodies another 25 to 40 feet, leaving them severely and permanently injured, and shattering their family – a charge that was made in the indictment and to which Cross was found guilty by the jury. This court can also find that Cross showed the greatest likelihood of committing future crimes because of his past criminal history, which included multiple prior convictions for alcohol-related offenses, not responding favorably to previously imposed sanctions, denying an alcohol problem and refusing to seek treatment, and showing no genuine remorse. As reiterated in *Blakely*, it is entirely proper for the trial court to consider prior convictions in imposing sentences. Because this court can make the appropriate evaluative findings pursuant to R.C. 2929.14(C) in imposing maximum sentences and need not make additional fact-finding, this court would not be violating *Blakely*.

{¶27} Finally, this court could impose consecutive sentences, if it makes the appropriate findings and gives its reasons pursuant to R.C. 2929.14(E)(4). *Blakely* does not apply to such consecutive sentences, as federal courts have consistently held that the imposition of consecutive sentences does not raise issues under the Sixth Amendment as long as the individual sentence for each count does not exceed the maximum.²⁷

²⁷ See *United States v. Feola* (C.A.2, 2001), 275 F.3d 216, 220 (“The aggregate sentence is imposed because appellant has committed two offenses, not because a statutory maximum for any one offense has been exceeded.”).

CONCLUSION

{¶28} Ohio’s sentencing scheme does not violate *Apprendi* and *Blakely*. The limitation of the judge’s discretion within the prescribed sentencing range does not invade the province of the jury and, therefore, does not implicate *Apprendi* and *Blakely*. Further, the “findings” made by the sentencing judge are not the same kind of “findings” made by the jury, and, therefore, do not invade the province of the jury. Further, the provisions providing for the imposition of additional sentences based upon certain findings do not violate *Apprendi* and *Blakely* because those findings are either submitted to the jury and proved beyond a reasonable doubt, or fall within the prior conviction exception to *Apprendi* and *Blakely*.

{¶29} But this court does not need to determine what effect, if any, *Blakely* has on Cross’s sentence.

The *Blakely* decision states that a trial court cannot enhance a penalty beyond the statutory maximum based on any factors other than those on which the jury found the defendant guilty. Cross was convicted of aggravated vehicular assault, a third degree felony, which carries a penalty of one to five years’ imprisonment. This court can sentence Cross to five years’ imprisonment on each count, consecutively, a penalty that falls within the standard statutory range. Such a sentence by this court would not be unconstitutional under *Blakely*.

ORDER

{¶30} Consequently, the defendant’s constitutional challenge to Ohio’s sentencing scheme, based upon *Apprendi* and *Blakely* is overruled.

{¶31} **IT IS SO ORDERED.**

EUGENE A. LUCCI, JUDGE

c: Paul E. Kaplan, Esq., Karen Sheppert, Esq. & Randi Ostry Lehoty, Esq.
Assistant Prosecuting Attorneys
Richard Perez, Esq. & Albert L. Purola, Esq.
Attorneys for Defendant