[Cite as *State v. Spencer*, 2005-Ohio-2264.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2003-A-0067**
- vs -	:	
JOHN R. SPENCER,	:	May 6, 2005
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2002 CR 193.

Judgment: Affirmed

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

Michael A. Hiener, P.O. Box 1, Jefferson, OH 44047 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} This appeal, submitted on the record and briefs of the parties, comes to us from the Ashtabula County Court of Common Pleas wherein appellant, John R. Spencer, was found guilty on two counts of assault on a peace officer.

{¶2} The following facts were presented at trial: On June 27, 2002, at approximately 4:20 p.m., deputies from the Ashtabula County Sheriff's Department were

summoned to the Edgewood Trailer Park due to a report of ongoing domestic violence. The police were informed that an individual, later identified as appellant, was attempting to assault family members using his vehicle. When Deputy Michael Roach arrived at the scene, he spoke with Tessa Spencer ("Tessa"), the victim and appellant's estranged wife. Susan Gross ("Gross"), Tessa's neighbor was also present. Gross told Deputy Roach that she witnessed appellant attempting to hit Tessa and her eleven-year-old son with his car while they walked from their home to Gross' residence to call for help. Gross also stated that she overheard appellant threaten to kill Tessa.

{¶3} As Deputy Roach was taking statements from Tessa and Gross at the scene, appellant returned to the scene in his car. His brother was also in the vehicle. Deputy Roach approached appellant and asked him to exit to discuss the incident. Appellant refused to exit the car, claiming that he had done nothing wrong. Deputy William Martin, having recently arrived at the scene to assist, approached appellant's vehicle and attempted to reach into appellant's vehicle and unlock the door. Upon reaching into the vehicle, appellant punched his hand with a closed fist. Deputy Martin subsequently succeeded in unlocking the car door and attempted to place appellant into a "control hold." Appellant resisted and grabbed Deputy Martin around the neck. Deputy Roach administered pepper spray to appellant's face, which had little effect. Appellant then punched Deputy Roach in the chest. Deputy Roach administered a second blast of pepper spray. Appellant continued to resist, swinging at both deputies with closed fists.

{¶4} Deputy Martin struck appellant in his leg with his baton. Appellant attempted to punch Deputy Martin in the head. He missed and hit Martin's police radio, knocking it to the ground. The officers were eventually able to handcuff appellant and place him in the rear of Deputy Martin's cruiser.

{¶5} On August 9, 2002, appellant was indicted on two counts of assault of a peace officer, both felonies of the fourth degree. Appellant pled not guilty to the charges. A jury trial commenced February 4, 2003. The jury found appellant guilty on both counts. The trial court subsequently sentenced appellant to sixteen months imprisonment on both counts, to be served concurrently.

{¶6} Appellant presents a single assignment of error on appeal:

{¶7} "The trial court erred when it sentenced appellant to concurrent sentences of sixteen months each."

{¶8} In his assignment of error, appellant contends the trial court erred in sentencing him to sixteen-month terms of imprisonment on each count, to be served concurrently, as the evidence presented did not support more than a minimum sentence. Moreover, appellant contends the trial court failed to adhere to the statutory requirements for the imposition of a more-than-minimum sentence.

{¶9} Appellant was found guilty on two counts of assault on a peace officer, in violation of R.C. 2903.13(C)(3), which is a felony of the fourth degree. A felony of the fourth degree carries a potential prison term of six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen or eighteen months. R.C.

2929.14(A)(4). Appellant was sentenced to sixteen months on each count, or a more than minimum sentence.

{¶10} In adhering to the statutory requirements set forth in R.C. 2929.14(B), a sentencing court is required to impose the minimum sentence for first-time imprisonment unless it specifies on the record that the shortest prison term would demean the seriousness of the conduct or would not adequately protect the public from future crime by the offender. *State v. Jackson*, 11th Dist. No. 2003-A-0015, 2004-Ohio-5304, at ¶7.

{¶11} Appellant contends the trial court erred in not specifically stating that the imposition of the minimum sentence would not adequately protect the public from future crime by the offender. Appellee contends that, although the trial court did not use that specific language, it made the following finding at sentencing:

{¶12} "Although he has been accepted in the NEOCAP program, it's recognized by NEOCAP he is a high risk candidate for supervision and he needs intensive intervention. The history of community conviction, true there are no felonies. There is a pattern I believe of violence, although this was, I believe, the only conviction was resulting in a ten-day jail sentence. Let me find the reference to that. And that was for an Attempted Resisting Arrest.

{¶13} "We have, I believe the victims in this case, Deputy Roach and Deputy Martin, though they made no claim for physical suffering harm. It's because they knew how to practice defensive measures to what was going on. And so I'm going to find that there was physical harm to the victims in this case, both Deputy Roach and Deputy

Martin. I don't believe you show any remorse concerning this offense. I believe that you're not eligible for community control.

{¶14} "We're a population of a good 123,000 in this county, and I suspect probably at any one time we have less than 100 law enforcement officers on duty, including the Highway Patrol, police, and sheriff's deputies. And the rule (sic) for law and order is something that is paramount in our society. And I certainly don't see that in you and how you conducted yourself that day and how you conducted yourself in the past. And it took two deputies to subdue you."

{¶15} Thus appellee contends that, although the trial court did not use the language of the statute verbatim, it made its findings on the record in favor of a more than minimum sentence. We agree.

{¶16} The trial court is not required to mimic the language of the statute verbatim in imposing sentence. *State v. Grissom*, 11th Dist. No. 2001-L-107, 2002-Ohio-5154, at ¶21. This court has concluded that a presumption exists that the trial court considered the statutory factors when it makes its findings on the record in support of those factors. *State v. Hawley* (Aug. 10, 2001), 11th Dist. No. 2000-L-114, 2001 Ohio App. LEXIS 3532, at 3.

{¶17} At the sentencing hearing, the court noted that appellant's past offenses, while not felonies, exhibited a pattern of violence. The court observed that, in the instant matter, appellant was physically aggressive toward the arresting officers. The court further concluded appellant's criminal history and his behavior towards the arresting officers under the current facts demonstrated a lack of respect for the law. In

emphasizing these facts, the court offered a sufficient justification as to why the shortest prison term would demean the seriousness of appellant's conduct or would not adequately protect the public from future crime by the offender. R.C. 2929.14(B). Appellant's sole assignment of error is overruled.

{¶18} For these reasons, the sentence of the Ashtabula County Court of Common Pleas is hereby affirmed.

DIANE V. GRENDELL, J., concurs,

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

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

{¶19} One who interrupts the activity of assaulting family members to begin assaulting police officers, by definition, needs more than a minimum sentence in jail. I agree with both the trial court and the majority that this particular defendant, by his actions, should receive more than a minimum sentence. However, the United States Supreme Court has significantly limited sentencing discretion for trial courts and we are bound, as a matter of law, by their ruling. There is no discretion in determining whether to follow precedent established by the United States Supreme Court.

{¶20} In enacting Senate Bill 2, with an effective date of July 1, 1996, the Ohio General Assembly radically altered its approach to criminal sentencing. The new law

essentially designated three classes of citizens who would have statutorily defined roles in determining the amount of time an individual would be incarcerated for a particular crime. The three classes defined were: (1) the Ohio General Assembly; (2) judges; and (3) jurors.

{¶21} Senate Bill 2 also provided three distinct areas of judicial limitations when it set about its task of providing "truth in sentencing." Those would be: (1) sentences imposed beyond the minimum; (2) sentences imposing the maximum; and (3) consecutive sentences. The objective was apparently to provide a degree of consistency and predictability in sentencing.

{¶22} It is clear that the legislature did not interfere with the role of juries to determine guilt. Thus, the first task in sentencing went to juries. In the second phase, the legislature reserved unto itself the role of establishing minimum sentences that would be imposed once the finding of guilt, either by trial or admission, was accomplished. And finally, the new law set forth the "findings" that were required before a judge would be permitted to depart from the minimum or impose consecutive sentences. Thus, everyone had a clearly defined role to play.

{¶23} The first major pronouncement by the Ohio Supreme Court concerned the "findings" necessary to support the imposition of a maximum sentence. In *Edmondson*, the Supreme Court of Ohio held that a trial court must "make a finding that gives its reasons" on the record for the imposition of a maximum sentence.[1]

1. *State v. Edmonson* (1999), 86 Ohio St.3d 324, 328-329.

{¶24} Following that pronouncement, the Supreme Court of Ohio, in *State v. Comer*, required the sentencing courts to make their "findings" and give reasons supporting those findings on the record "at the sentencing hearing."[2] Thus, it is clear that the courts, in applying Senate Bill 2, imposed duties upon judges to make specific findings to support their sentences whenever they went beyond the minimum; or imposed maximum sentences or consecutive sentences.

{¶25} In 2004, however, the United States Supreme Court issued its judgment in *Blakely v. Washington* and made it clear that judges making "findings" outside a jury's determinations in sentencing violated constitutional guarantees.[3] Specifically, the court held:

{¶26} "Our precedents make clear, however, 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*. *** In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' *** and the judge exceeds his proper authority."[4]

2. *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, paragraph one of the syllabus.
3. *Blakely v. Washington* (2004), 124 S.Ct. 2531.
4. (Emphasis in original and internal citations omitted.) Id. at 2537.

{¶27} Thus, it is clear that the statutory judicial "findings," which provide the framework for all sentencing in Ohio, are prohibited by the United States Supreme Court.

{¶28} Following the United States Supreme Court's release of *Blakely*, this court determined that a trial court's reliance on a previous conviction as evidenced in the record would still be permissible for the purpose of imposing a sentence greater than the minimum.[5] As stated by this court in *State v. Taylor*:

{¶29} "Under R.C. 2929.14(B)(1), the court is entitled to depart from the shortest authorized prison term if the 'offender had previously served a prison term.' Under *Apprendi*, the fact of a prior conviction may be used to enhance the penalty for a crime without being submitted to a jury and proven beyond a reasonable doubt.[6] According to Taylor's pre-sentence investigation report, Taylor had served at least one prior prison term. *** Therefore, the trial court's imposition of prison terms of three years, *** seventeen months *** and eleven months *** are all constitutionally permissible under *Apprendi* and, by extension, *Blakely*."[7]

{¶30} It is clear that, for *Blakely* purposes, a trial court is permitted to take judicial notice that a defendant has served a prior prison term, for that is not a "finding." It is a judicial acknowledgement of an indisputable fact. The trial court merely acknowledges the prior prison term and does not have to weigh conflicting evidence to

5. *State v. Taylor*, 158 Ohio App.3d 597, 2004-Ohio-5939.
6. *Apprendi v. New Jersey* (2000), 530 U.S. 466, 490, citing *Jones v. United States* (1999), 526 U.S. 227, 243, fn. 6.
7. *State v. Taylor*, at ¶25.

make a factual finding. As such, a defendant's Sixth Amendment rights are not compromised by the exercise.

{¶31} I believe that a distinction must be made between "findings," which courts make to justify maximum or consecutive sentences and "acknowledging" the existence of a prior sentence in a criminal matter, which would permit the court to exercise its discretion in departing from a minimum sentence. Clearly, *Blakely* no longer permits courts in Ohio to "find" that a defendant has committed the "worst form of the offense" or that his actions predict the "greatest likelihood of recidivism" without either an admission by the defendant or a finding by the trier of fact.

{¶32} As so eloquently stated by the United States Supreme Court in *Blakely*:

{¶33} "This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment."[8]

{¶34} The court went on to state that the Sixth Amendment was not a "limitation of judicial power, but a reservation of jury power."[9] In what I believe to be the true thrust of this landmark case, the United States Supreme Court finally held that "[t]he framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to the 'unanimous suffrage of twelve of his equals and neighbours,' *** rather than a lone employee of the state."[10]

8. *Blakely v. Washington*, 124 S.Ct. at 2540.
9. Id.
10. Id. at 2543.

{¶35} In conclusion, I believe the trial court erred in sentencing the defendant to more than the minimum in this matter; and, as a matter of law, I would hold that trial courts are only permitted to depart from the minimum sentence based upon facts admitted by the defendant or found by the trier of fact. The only exception I believe permissible, consistent with *Blakely*, is the indisputable fact of a prior conviction, which would then permit judges to do their statutory job. And that job is, and always has been, to sentence criminals within the determinate bracket established by the Ohio General Assembly.