

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2003-A-0089
DALE LEE GREEN, JR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 01 CR 52.

Judgment: Reversed and remanded.

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).

Leo J. Talikka, Talidyne Building, Suite 100, 2603 Riverside Drive, Painesville, OH 44077 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Dale Lee Green, Jr. (“Green”), appeals the June 23, 2003 judgment entry of the Ashtabula County Court of Common Pleas sentencing Green to serve, consecutively, a ten-year prison term for aggravated burglary, a first degree felony, and an eighteen-month prison term for failure to appear, a fifth degree felony. For the following reasons, we reverse Green’s sentence and remand this cause for re-sentencing.

{¶2} On November 30, 2000, the Ashtabula County Sheriff's Department was summoned to the home of the victim, an eighty-five-year-old female, who resided on Austinburg Road in Ashtabula, Ohio. The victim stated that she had fallen asleep around 11:00 p.m. while watching television in her bedroom. She woke up when she heard a noise. The noise emanated from an exterior door which led into the kitchen. She approached the door to investigate and heard someone outside. She asked, "Who's there?" At that time, she was struck on the head with a hard object which "knocked her out." She awoke later on her kitchen floor with a large lump on the back of her head. She then called her daughter-in-law and told her what happened. Her daughter-in-law subsequently contacted emergency services.

{¶3} An investigation of the scene revealed two sets of footprints in the snow coming from the north to the side of the home. There was also evidence of damage to the door jam, which was split apart, indicating a forced entry. Inside the home, the deputies found that the victim's bedroom had been ransacked, including dresser drawers lying on the floor with their contents removed, as well as the mattress lifted off the box springs and lying against the wall. The bedroom was the only room which appeared to be ransacked.

{¶4} The victim's daughter arrived at the scene and spoke with the officers. She indicated that she suspected Anthony Vincenzo ("Vincenzo"), the son of a family friend, was involved. She indicated that Vincenzo had called the victim a few days earlier asking for money and that he was aware that the victim lived alone.

{¶5} Ashtabula County Detectives Hubbard and Van Robison commenced an investigation, looking for Vincenzo. During the course of their investigation they learned that Vincenzo had been associating with Green and that Green might have also been

involved. The officers went to Green's residence. Green's father indicated that he had not seen him or Vincenzo and that Green was "on the run" from his probation officer due to an outstanding warrant for his arrest. He confirmed that Green and Vincenzo had been "hanging out" together.

{¶6} On March 8, 2001, Green was indicted by the Ashtabula County Grand Jury on one count of aggravated burglary, a felony of the first degree; and one count of theft, a felony of the fifth degree. Prior to his indictment, Green, who was a juvenile at the time of the offense, was bound over from the Ashtabula County Juvenile Division.

{¶7} On February 8, 2001, Vincenzo, and the two other adult suspects, Brandon Nelson ("Nelson") and Eric Tressler ("Tressler") were charged on a seven-count indictment.

{¶8} A jury trial was set to commence June 13, 2001. It was subsequently continued to July 11, 2001. Green failed to appear, and the trial court issued a capias for his arrest. Green had absconded from the jurisdiction and was subsequently found and arrested on March 6, 2003. A jury trial was set to commence on May 5, 2003. Green withdrew his former plea and entered a plea of guilty to the count of aggravated burglary. The second count was dismissed by the state. As a result of Green's failure to appear for his initial trial date, Green was charge with one count of failure to appear, a felony of the fourth degree. Green was not formally arraigned on that charge but indicated at the plea hearing that he wished to resolve both charges at that time.

{¶9} On June 23, 2003, the trial court sentenced Green to ten years imprisonment on the aggravated burglary charge, and eighteen months on the charge of failure to appear, the maximum sentences on both offenses, to be served consecutively. Green filed the instant appeal, presenting a single assignment of error:

{¶10} “The trial court erred in failing to sentence defendant-appellant, Dale Lee Green, Jr., to a minimum sentence as a first time offender, and, instead, sentencing Mr. Green to a maximum sentence to be served consecutive with an additional charge of failure to appear.”

{¶11} Pursuant to R.C. 2953.08(G)(2), an appellate court reviews a felony sentence under a clear and convincing evidence standard of review. An appellate court may not disturb a sentence unless the court “clearly and convincingly finds” that “the record does not support the sentencing court’s findings,” or that “the sentence is otherwise contrary to law.” R.C. 2953.08(G)(2)(a) and (b). Clear and convincing evidence is that evidence “which will produce 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.

{¶12} When sentencing a felony offender, the trial court must impose a sentence that is reasonably calculated to achieve the overriding purposes of sentencing, which are to protect the public from future crimes by the offender and others and to punish the offender. R.C. 2929.11(A).

{¶13} In order to impose consecutive sentences for multiple offenses, the trial court must consider three factors enumerated in R.C. 2929.14(E)(4): (1) that consecutive sentences are necessary to protect the public from future crime or to punish the offender; (2) that consecutive sentences are not disproportionate to the seriousness of the offender’s conduct and the danger the offender poses to the public; and (3) that one of the factors within R.C. 2929.14(E)(4)(a) through (c) exists. *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, at ¶13.

{¶14} R.C. 2929.14(E)(4)(a) through (c) include that the offender committed one or more of the multiple offenses while the offender was under a sanction; at least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused was so great or unusual that no single prison term adequately reflects the seriousness of the offender's conduct or that the offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶15} The Supreme Court of Ohio has held that, in adhering to these statutory guidelines, a trial court must “make a finding that gives its reasons” on the record for the imposition of sentence. *State v. Edmonson*, 86 Ohio St.3d 324, 328-329, 1999-Ohio-110. Moreover, in *Comer*, the court required that sentencing courts make their “findings,” and reasons in support thereof, on the record “at the sentencing hearing.” 99 Ohio St.3d 463, paragraph one of the syllabus.

{¶16} In the instant case, the trial court conducted a joint sentencing hearing with Green and a co-defendant, Vincenzo. At the hearing, the trial court took statements from the state, defense counsel for both offenders, as well as the offenders themselves. Subsequent to these statements, the trial court proceeded to its sentencing, addressing both offenders simultaneously:

{¶17} “I don’t know that I need to reiterate everything that the prosecuting attorney has said but I guess by statute now I’m required to make some statements for the record that in this case I feel are so obvious that they probably don’t need to be stated.

{¶18} “It is hard for this Court to imagine a worse form of this offense. Any house burglary certainly is a very serious offense and, in and of itself, as (sic) among

what I believe is one of the worst crimes that can be committed. Assault and offenses of violence, of course, are more serious perhaps than a burglary but here we have everything.

{¶19} “You break into someone’s home at night when they’re there. You confront this person, serious physical harm is inflicted upon this person and it’s no excuse to say that I’m not the person that actually inflicted the harm. When you go down that road and you decide that you’re going to be a co-conspirator with someone in the commission of a crime, then you are every bit as responsible as they are for everything that happens.

{¶20} “***

{¶21} “You know, when people in this community can’t feel safe because young persons are going to get drunk or high and go out and commit serious and violent crimes, that is all the more, in my mind, an aggravating factor and worst form of the offense.

{¶22} “So, I agree that in order not to demean the seriousness of your conduct in this case, and in order to impose a sentence that is commensurate with its affect on the victim in this case that for each of you on the first degree felony charge, Mr. Green in the Aggravated Burglary, and Mr. Vincenzo in the Complicity to Aggravated Burglary, that you will be sentenced to the Lorain Correctional Institute at Grafton, Ohio, to serve a sentence of ten years imprisonment.”

{¶23} The court then addressed both offenders regarding the failure to appear charges:

{¶24} “Now, likewise, with the failure to appear, again, this is not uncommon for us to have these offenses where someone is on a personal bond and then they skip out

but, if there's a way to say that one form of failure to appear is a worse form than another, I agree with the prosecuting attorney.

{¶25} “This is the worst form of the offense. These were very serious offenses and the Court had made a determination that perhaps you could, at least, be trusted to stay here and to accept the consequences and, of course, not only did you both abscond but you managed to remain at large for like 20 months, left the State and I don't think you would have ever been seen again if you hadn't been located.”

{¶26} The court then imposed the maximum, consecutive sentences based upon the foregoing stated reasons. Since the evolution of the *Edmonson/Comer* line of cases, this court has consistently held that a verbatim recitation of the statutory language is not required by the trial court when it imposes sentence. *State v. Grissom*, 11th Dist. No. 2001-L-107, 2002-Ohio-5154, at ¶21. This court has also maintained that there must be adherence to the sentencing guidelines and the rationale espoused in *Comer* that the defendant must be informed of the reasons supporting the sentence imposed at the sentencing hearing. See R.C. 2929.19(B)(2)(c).

{¶27} In the instant case, the trial court, in addressing both defendants, did not specifically address either one in regards to their respective offenses. In addition, the court failed to provide reasons in support of its sentence. The generalized statements regarding elements of the crime for which they were charged will not suffice in determining that the offender should serve the maximum term authorized. Likewise, broad statements about the offense itself being the “worst crime” does not address the issue of whether that *particular* offender committed the worst form of that particular offense.

{¶28} For the foregoing reasons, the trial court erred in sentencing Green, as it failed to adhere to the statutory sentencing guidelines and the *Edmonson/Comer* rationale.

{¶29} Green's assignment of error is with merit.

{¶30} The sentencing ruling of the Ashtabula County Court of Common Pleas is reversed and the matter is remanded for resentencing.

CYNTHIA WESTCOTT RICE, J., concurs,

WILLIAM M. O'NEILL, J., concurs with a Concurring Opinion.

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

{¶31} This case represents yet another example of why Ohio's sentencing guidelines are clearly at odds with the pronouncements of the United States Supreme Court.

{¶32} In order to support the imposition of a maximum and consecutive sentence, the trial court was required to make specific findings, which included that this was "the worst form of the offense" and that the sentences were "necessary to protect the public from future crime." I agree with the majority that the record before us simply does not provide an adequate basis for meaningful appellate review. Further, I express no opinion as to whether the trial court was correct in its assessment of the seriousness of the offenses involved.

{¶33} However, I write separately because I believe our analysis must go further to pass constitutional muster. To do less would be to invite error on remand. I feel we

must address whether the imposition of maximum and consecutive sentences in the instant case implicates the Sixth Amendment as set forth by the United States Supreme Court in *Blakely v. Washington* and recently reinforced in *United States v. Booker*.¹ My opinion on the constitutionality of Ohio's criminal sentencing structure in light of the high court's recent Sixth Amendment analysis remains undeterred.² The instant case underscores the import of applying the Sixth Amendment implications of *Blakely* to Ohio's criminal sentencing structure. Moreover, the decision in *Booker* and the particular facts of the instant case cast continuing doubt over the constitutionality of criminal sentencing schemes in Ohio and nationwide.

{¶34} The First Appellate District recently addressed the *Blakely* issue in light of the *Booker* holding:

{¶35} "With our decision today, we note again that, under R.C. 2929.14(B), the legislature has mandated that the sentencing court impose the shortest prison term on a first-time offender unless it makes one of the R.C. 2929.14(B)(2) findings. *** While we understand that these 'findings' have historically been considered sentencing factors, the *Blakely* line of jurisprudence now makes them 'facts' that must be found by a jury or admitted by the defendant, because they affect the level of punishment an offender will receive. *** The minimum prison term for an offender who has not previously served a prison term is ordinarily the only sentence that is supported by the jury's verdict and the defendant's admissions."³

{¶36} Ohio is not alone in addressing whether its particular sentencing structure runs astray of the Sixth Amendment. Courts in other states have held that their

1. *Blakely v. Washington* (2004), 124 S.Ct. 2531; *United States v. Booker* (2005), 125 S.Ct. 738.

2. See, e.g., *State v. Murphy*, 11th Dist. No. 2003-L-049, 2005-Ohio-412 (O'Neill, J., dissenting.)

3. (Footnote omitted.) *State v. Montgomery*, 159 Ohio App.3d 752, 2005-Ohio-1018, at ¶10.

sentencing structures, which mirror that of Ohio, cannot be sustained given the *Blakely* and *Booker* holdings.⁴ Most notably, in *Smylie v. Indiana*, the Supreme Court of Indiana concluded that Indiana’s sentencing scheme is unconstitutional.⁵ In *Smylie*, the court noted:

{¶37} “Indiana’s sentencing scheme provides a ‘fixed term’ presumptive sentence for each class of felonies. *** These statutes also create upper and lower boundaries for each felony sentence. *** In deciding on whether to depart from the presumptive sentence, the trial judge must consider seven enumerated factors and may consider various other aggravating and mitigating factors. ***

{¶38} “From the time Indiana adopted its present sentencing arrangement in 1977, we have understood it as a regime that requires a given presumptive term for each class of crimes, except when the judge finds aggravating or mitigating circumstances deemed adequate to justify adding or subtracting years.”⁶

{¶39} The *Smylie* Court ultimately concluded that its “fixed term” arrangement within its sentencing structure was the “functional equivalent” of the “standard sentencing range” struck down in *Blakely*.⁷ Other jurisdictions have also concluded their criminal sentencing schemes are unconstitutional in light of *Blakely* and *Booker*.⁸ Similarly, Ohio’s sentencing structure is akin to those abrogated in Indiana and Washington. The presumptive nature of Ohio’s criminal sentencing, *requiring*

4. *Smylie v. Indiana* (2005), 823 N.E.2d 679; *State v. Natale* (2004), 861 A.2d 148 (New Jersey); *State v. Dilts* (2004), 103 P.3d 95 (Oregon); *State v. Shattuck* (2004), 689 N.W.2d 785 (Minnesota); *State v. Brown* (2004), 99 P.3d 15 (Arizona).

5. *Smylie*, *supra*.

6. (Internal citations omitted.) *Id.* at 683.

7. *Id.*

8. See *Smylie v. Indiana*; *State v. Dilts*; *State v. Shattuck*; *State v. Brown*, *supra*.

concurrent, minimum sentences unless other judicial factfinding occurs, runs directly contrary to the Sixth Amendment rights promulgated in both *Blakely* and *Booker*.

{¶40} Thus, based upon the foregoing, and in accordance with my previous dissents in this matter, I maintain that the United States Supreme Court's holdings in *Blakely* and *Booker* render Ohio's criminal sentencing structure unconstitutional.

{¶41} Therefore, in the instant matter, the trial court erred in sentencing appellant to maximum and consecutive sentences under the current sentencing structure, and I believe the matter should be remanded for resentencing in accordance with *Blakely* and *Booker*.