[Cite as *State v. Fisher*, 2005-Ohio-6899.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2004-L-188**
- vs -	:	
SHAWN W. FISHER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 01 CR 000351.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Brian S. Schick, 1516 Sunview Road, Lyndhurst, OH 44124 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Shawn W. Fisher, appeals from the judgment entry of the Lake County Court of Common Pleas sentencing him to the maximum sentence of ten years for voluntary manslaughter, a felony of the first degree.

{¶2} On August 9, 2001, the Lake County Grand Jury returned an eight count indictment against appellant charging him with: two counts of aggravated murder; three counts of felony-murder; one count of kidnapping; one count of robbery; and one count of felonious assault. During plea negotiations, the state offered to dismiss the original

charges and permit appellant to plea to voluntary manslaughter, a lesser included offense of felony murder (Count 3 as charged in the indictment), in exchange for his full cooperation in the prosecutions of his co-defendants. On December 5, 2001, appellant pleaded guilty to voluntary manslaughter which the trial court accepted. On January 4, 2002, appellant was sentenced to the maximum term of ten years imprisonment.

{¶3} Appellant appealed his sentence and on June 30, 2003, this court reversed and remanded the matter for re-sentencing. See, *State v. Fisher,* 11th Dist. No. 2002-L-020, 2003-Ohio-3499 ("*Fisher I").*

{¶4} On September 25, 2003, the trial court convened for appellant's remanded sentencing hearing. The trial court complied with the requisite sentencing procedures: It weighed the seriousness and recidivism factors and considered the principles and purposes of sentencing under R.C. 2929.11. The court also recited the applicable factors and how they pertained to the instant matter. The court then determined the "maximum imprisonment is consistent with the purposes and principles of sentencing. And the court finds that this offense was a worst form, if not the worst form of the offense, pursuant to Section 2929.14(C)." Notwithstanding our holding in *Fisher I,* the court again supported its finding with its "knowledge" that appellant was actually guilty of murder.

{¶5} The court then supplemented its justification for imposing the maximum sentence by underscoring how specific facts which occurred during the commission of the crime(s) rendered appellant's conduct the "worst form of the offense." The court ultimately sentenced appellant to the maximum term of ten years incarceration. Appellant now appeals his sentence and asserts two assignments of error for our review:

{¶6} "[1.] The trial court erred by re-sentencing defendant-appellant to the maximum term of incarceration.

{¶7} "[2.] The trial court erred by sentencing defendant-appellant Shawn W. Fisher on the basis of fact [sic] neither reflected in a jury verdict nor admitted by him, in violation of his rights under the Sixth Amendment to the U.S. Constitution, as interpreted by the U.S. Supreme Court in *Blakely v. Washington* (2004), 124 S.Ct. 2531, Reh'g Den. (August 23, 2004), 125 S.Ct. 21 and its progeny."

{¶8} An appellate court reviewing a felony sentence utilizes a de novo standard. *State v. Langlois*, 11th Dist. No. 2003-A-0080, 2005-Ohio-2795, @ ¶9. Unless the record demonstrates, by clear and convincing evidence, the sentence is contrary to law, it shall remain undisturbed. Id. "Clear and convincing evidence is that evidence which will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." Id., quoting *State v. Bradford* (June 2, 2001), 11th Dist. No. 2000-L-103, 2001 Ohio App. LEXIS 2487, at 3.

{¶9} In *State v. Edmonson,* 86 Ohio St.3d 324, 329, 1999 Ohio 110, the Supreme Court of Ohio held: "[I]n order to lawfully impose the maximum term for a single offense, the record must reflect that the trial court imposed the maximum sentence based on the offender satisfying one of the listed criteria in R.C. 2929.14(C)." Further, R.C. 2929.19(B)(2)(d) requires a trial court to make a finding that sets forth its *"'reasons for imposing the maximum prison term.'" Edmonson,* supra, at 328. (Emphasis original). The R.C. 2929.14(C) findings and their justifications must be made on the record at the sentencing hearing. *State v. Mitchell,* 11th Dist. No. 2004-L-071, 2005-Ohio-3896, ¶40 (holding the requirements of *State v. Comer*, 99 Ohio St.3d 463,

2003-Ohio-4165, have been extended to include situations in which a court sentences a defendant to the maximum sentence).

{¶10} R.C. 2929.14(C) permits a trial court to impose the maximum sentence for a felony where it finds one of the following: (1) the offender committed the worst form of the offense, (2) the offender poses the greatest likelihood of committing future crimes; (3) the offender is a major drug offender as set forth in the statute, and (4) the offender is a repeat violent offender as set forth in the statute. In the instant matter, the court "found" appellant committed the worst form of the offense. Pursuant to R.C. 2929.19(B)(2)(d), the trial court then set forth its justification for making this finding.

{¶11} We acknowledge, as the trial court did that sometimes, as here, the facts do not correspond to the technical elements of a lesser charge to which a defendant has pleaded. Under these circumstances, as in any case, a court may *consider* the dismissed charges.[1] See, *State v. Wiles* (1991), 59 Ohio St.3d 71, 78 (holding a sentencing judge may consider facts introduced at trial relating to other charges). However, to satisfy the R.C. 2929.14(C) "worst form of the offense" analytic, a court must align its findings with the facts of the particular case. The trial court did eventually make findings justifying its imposition of the maximum sentence which had nothing to do with its beliefs regarding appellant's actual guilt on the indicted murder charge or its position that murder is the worst form of the offense of manslaughter. The court stated:

{¶12} "I can also give [other] reasons for the worst form of the offense, such as the violent and brutal way in which you and your co-defendants caused Mr. Beres'

1. The trial court, as well as the state, evidently took our holding in *Fisher I* to mean that a sentencing court may not consider dismissed charges when sentencing a defendant. On the contrary, our holding in *Fisher I* neither states nor implies that a court is precluded from considering dismissed charges when sentencing a defendant. In fact, we explicitly indicated a court is free to consider such matters because

death. You were part of a drug-dealing organization enforcing your territory and your business. Your actions contributed to the proliferation of the drug-induced, violence-ridden low quality of life in that certain set of neighborhoods in the City of Painesville."

{¶13} Such was sufficient to meet the mandates of R.C. 2929.14(C) and R.C. 2929.19(B)(2)(d). While we believe the court erred in referencing its belief that appellant was guilty of murder and subsequently finding murder the worst form of voluntary manslaughter, we hold these errors harmless. That is, the court supported its conclusion that the instant offense was the "worst form of the offense" with reasons derived from the facts of the case. These facts were separate and independent of its belief that appellant was guilty of murder and, taken by themselves, were adequate to meet the statutory requirements. Furthermore, at the re-sentencing, the trial court specifically referenced appellant's testimony from the previous cases in which his co-defendant's were tried and the state moved to have these transcripts admitted. These facts clearly outlined appellant's role and participation in felony murder. Appellant's first assignment of error is without merit.

{¶14} In his second assignment of error, appellant challenges the constitutionality of R.C. 2929.14(C), the statutory provision governing the court's authority to impose the "longest possible prison term authorized" under Ohio's felony sentencing laws. Appellant contends the statutory findings required to impose the maximum sentence violate the United States Supreme Court's decision in *Blakely v. Washington* (2004), 124 S.Ct. 2531. In appellant's view, the factors set forth in R.C. 2929.14(C) allow a court to impermissibly swell a defendant's punishment beyond that

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"a court's consideration of past dismissed charges does not necessarily imply the court relied upon those past charges in announcing its sentence." Id. at ¶24.

authorized by statute by relying upon facts neither stipulated by defense counsel nor found by a jury.

{¶15} In *Blakely*, the United States Supreme Court held a trial court may not extend a defendant's sentence beyond the statutory maximum when the facts supporting the enhanced sentence are neither admitted by the defendant nor found by the jury. The statutory maximum, for purposes of this inquiry, 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.*" Id. at 2537. (Emphasis sic.)

{¶16} As set forth supra, R.C. 2929.14(C) permits a trial court to impose the maximum sentence for a felony where it finds one of the following: (1) the offender committed the worst form of the offense, (2) the offender poses the greatest likelihood of committing future crimes; (3) the offender is a major drug offender as set forth in the statute, and (4) the offender is a repeat violent offender as set forth in the statute. In the instant matter, the court "found" appellant committed the worst form of the offense *and* posed the greatest likelihood of recidivism. While appellant's trial counsel neither stipulated to these findings nor were they found by a jury, we have previously held R.C. 2929.14(C) does not violate *Blakely.* See *State v. Fatica,* 11th Dist. No. 2004-L-078, 2005-Ohio-4209, ¶38; *State v. Murphy*, 11th Dist. No. 2003-L-049, 2005-Ohio-412, ¶¶56-60; *Langlois*, supra at ¶32-40.

{¶17} In each of the foregoing cases, this court has held *Blakely* does not eliminate judicial discretion in sentencing. Rather, the holding in *Blakely* serves to underscore the long recognized principle of Sixth Amendment jurisprudence that judicial discretion may be exercised precisely to the extent it does not infringe upon the jury's traditional role of finding the facts necessary to lawful imposition of a penalty. *Langlois*,

supra, at ¶36. Because a defendant has never enjoyed a right to jury sentencing, judicial fact-finding in the course of selecting a sentence within a scaled range does not implicate the Sixth Amendment. Id; *Murphy*, supra, at ¶56. By implication, where a statute allows for the imposition of a graded scale of punishments and simply permits a judge, after consideration of aggravating factors, to inflict a punishment of a lighter or heavier grade, the offender's rights are not compromised. Id. at ¶58; see also, *Harris v. United States* (2002), 536 U.S. 545, 561-562. R.C. 2929.14(C) fits squarely within this description: The statue sets forth several "aggravating circumstances" which merely act as a trigger for the imposition of the statutory maximum. Under no circumstances, however, could these aggravating factors swell the penalty above that provided by law. For these reasons, appellant's second assignment of error is overruled.

{¶18} For the foregoing reasons, appellant's two assignments of error are overruled and the judgment of the Lake County Court of Common Pleas is hereby affirmed.

DIANE V. GRENDELL, J., concurs,

DONALD R. FORD, P.J., dissents with Dissenting Opinion.

DONALD R. FORD, J., dissents with Dissenting Opinion.

{¶19} As the trial court completely ignored our ruling and supportive reasoning set forth in *Fisher I,* I now dissent.

{¶20} On June 30, 2003, this court reversed and remanded the instant matter for re-sentencing. The basis for our reversal in *Fisher I* was the trial court's reliance upon its belief that appellant was guilty of the crime of murder and its use of this belief as justification for imposing the maximum sentence for voluntary manslaughter. We held that a court should avoid such determinations for two specific reasons:

{¶21} "First, no evidence was expressly presented for the murder charge against appellant and therefore the court was making an unwarranted inferential leap in drawing [this] conclusion. This is so notwithstanding the court's collective incorporation of the testimony from the two prior trials in which appellant testified as the state's witness. That is, the testimony in the previous trials provided evidence of certain facts linking appellant to the crime(s). However, because appellant was not a defendant in the previous trials, no evidence was put forth to prove appellant was guilty of murder or kidnapping. Thus, the trial court's conclusion was tenuous because it requires recourse to separate trials where no evidence was put forth against appellant.

{¶22} "Second, the court's comments suggest it participated in a fact finding exercise for charges that were dismissed and drew its own legal conclusions therefrom. This is problematic because it indicates the court harbored a bias toward appellant when it announced its sentence. That is, the court's belief as to appellant's guilt on the higher charge of murder reflected its own value-laden perspective. Although this perspective was based on what the court heard in two previous trials, the fact remains that the murder charges were dismissed. By commenting on appellant's guilt as to the murder charge, the court demonstrated a belief that appellant was legally accountable for a higher crime. As such, the court's decision to impose the maximum sentence was,

at least in part, a function of its belief that appellant was guilty of the dismissed murder charge." Id. at ¶¶19-20.

{¶23} We then held that, while the trial court mechanically complied with the statutory sentencing factors, it erred when it justified its imposition of a maximum sentence on its belief regarding appellant's guilt on a higher charge. In doing so, we determined the court "erroneously considered unsubstantiated, prejudicial facts in arriving at its sentence." Id. at ¶26.

{¶24} On September 25, 2003, the trial court convened for appellant's remanded sentencing hearing. Notwithstanding our holding in *Fisher I,* the court again supported its finding with its "knowledge" that appellant was actually guilty of murder. The court stated:

{¶25} "Now, I agree with the Court of Appeals that a judge should not use dismissed charges to give a heavier sentence. That would allow a prosecutor to dismiss possibly over-indicted or unsupportable offenses, and still have the judge use those offenses, as if they were proven, to punish the defendant for crimes for which there is inadequate evidence. However, a judge can use the admitted conduct of the defendant to form the basis: (1) for finding that he did commit the worst form of the offense, and (2) the reasons for that finding which would support a maximum sentence. That is what I did in this case. My reasons for imposing the maximum sentence in this case are as follows. Murder, which you were originally charged with, is a life sentence with parole eligibility after fifteen years. Voluntary manslaughter, to which I allowed you to plead guilty, is less than murder. It's a felony of the first degree with a maximum ten year sentence. Therefore, murder is a much worse form of manslaughter because its penalty, degree, and elements show more culpability and seriousness than

manslaughter. *** I said it last time – and I say it again – I know you're guilty of murder ***."

{¶26} The court continued at great length and with great exasperation in an attempt to clarify the above position for purposes of review. With respect to this revisited issue, the court concluded:

{¶27} "What I'm saying is – murder is a worst form of voluntary manslaughter. The only reason I'm bringing up the crime of murder is in the context of the worst form of the offense and for no other reason. ***"

{¶28} In *Fisher I,* we unequivocally stated that such reasoning was inappropriate because (1) "guilt" is a procedural conclusion which presupposes a defendant's admission to a specific charge or a conviction after a trial in which the state proves a charge beyond a reasonable doubt (neither of which occurred here); and, (2) the court's recognition of its belief that a defendant is guilty of a higher, dismissed charge and its reliance on this belief to sentence the defendant to a maximum sentence suggested an inherent bias. Irrespective of this guidance, the trial court still used its conclusion that appellant was guilty of murder as a basis for imposing the maximum term.

{¶29} Our holding in *Fisher I* was clear and unambiguous. As a matter of course, the trial court had neither the discretion nor the judicial wherewithal to re-examine our analysis of the legal issues on which our reversal and remand was premised. Our consideration of this issue is controlled by the "law of the case" doctrine, which provides:

{¶30} "that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels. ***

{¶31} "The doctrine is considered to be a rule of practice rather than a binding rule of substantive law and will not be applied so as to achieve unjust results. *** However, the rule is necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution. ***

{¶32} "In pursuit of these goals, the doctrine functions to compel trial courts to follow the mandates of reviewing courts. *** Thus, where at a rehearing following remand a trial court is confronted with substantially the same facts and issues as were involved in the prior appeal, the court is bound to adhere to the appellate court's determination of the applicable law. ***" *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3-4. (Internal citations omitted.)

{¶33} Pursuant to the "law of the case" doctrine, the lower court does not have the authority to review a prior holding of an appellate court because such a power would be inconsistent with the structure of Ohio's judiciary as set forth in the Ohio Constitution. *State v. Barnes,* 11th Dist. No. 2002-P-0079, 2003-Ohio-6674, at ¶17, citing, *State ex rel. Potain v. Mathews* (1979), 59 Ohio St.2d 29, 32. Accordingly, when a reviewing court reverses the judgment of a lower court and remands a matter, it does not do so to facilitate a critical dialogue between itself and the lower court. Rather, on remand, a trial court must proceed in light of the appellate court's holding without countermanding its guidance.

{¶34} Here, the lower court acknowledged our holding. However, rather than heed the concerns announced in *Fisher I*, the lower court attempted to demonstrate how our analysis in *Fisher I* misunderstood its original position. During the sentencing hearing, the trial court pointed out that appellant's testimony in his co-defendants' trials

indicated he assisted in the kidnapping of the victim which led to the victim's ultimate murder. From this, the court concluded: "I know you committed felony murder from *your* testimony, and that's a worse form of voluntary manslaughter." (Emphasis sic.) The trial court underscored this conclusion on several separate occasions during the sentencing hearing. Because the court revisited an issue we addressed in *Fisher I,* it was reviewing a prior holding of a superior court in violation of the "law of the case" doctrine.

{¶35} Further, the court's substantive analysis on this issue was unsound. The theme of the court's "worst form of the offense" analysis was based upon its assumption that the higher crime of murder is the worst form of the lower crime of manslaughter. The court stressed:

{¶36} "It's as easily recognizable an analogy as basic mathematics – two is more than one, therefore, two is a worst form of one. Murder is a more heinous crime than manslaughter, therefore, murder is a worst form of manslaughter."

{¶37} I believe the trial court's analogy off-point but, more importantly, disagree with its reasoning: while murder is statutorily a greater crime than voluntary manslaughter, it does not follow that murder is the worst form of the offense of voluntary manslaughter. Murder and voluntary manslaughter are separate offenses, and the former cannot logically be the worst form of the latter. The trial court's mathematical analogy equivocates the legal meaning of the phrases "higher offense" and "worst form of the offense." To be sure, manslaughter is a lesser included offense of murder but it is not a lesser form of murder. By implication, murder is a greater offense than manslaughter, but it is not the worst form of manslaughter. In my view, the "worst form of the offense" analysis of R.C. 2929.14(C) is accomplished by considering the specific

facts of the case and applying them to the criminal charge(s) of which a defendant is convicted (or to which he has pleaded guilty). As a matter of form, the sentencing court confused this analysis by asserting a defendant has committed the worst form of one offense by committing a separate, albeit more punitively severe, offense. Nothing in Senate Bill 2 or its many varied interpretations suggests such an untenable conclusion.

{¶38} The trial court ignored our earlier exhortations with respect to using an uncharged, higher offense to substantiate its "worst form of the offense" discussion. It further confused the R.C. 2929.14(C) analysis by concluding the higher offense of murder is the worst form of the offense of manslaughter. Thus, in this writer's view, the trial court erred both procedurally and substantively in re-sentencing appellant.

{¶39} Although the majority contends that the trial court otherwise complied with the statutory sentencing provisions in R.C. 2929.14(C) and R.C. 2929.19(B)(2)(d) in re-invoking a maximum sentence against appellant while justifying the sentence on the bedrock of harmless error, its conclusion sends what I consider an inappropriate pragmatic message – "why go through this exercise again when the trial court otherwise said the right things." My response to that syllogism is you cannot always cleanse the cancerous portion of such an exercise by a euphemistic injection of harmless error in the face of an unequivocal declaration of the law of the case. Such side stepping equates to reducing this doctrine to gelding status.

{¶40} I would therefore reverse this matter and remand it for proceedings consistent with the foregoing analysis.