[Cite as *State v. Mendenhall*, 2005-Ohio-2525.]

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-0116**
- vs -	:	
BRYANT MENDENHALL,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 03 CR 107.

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).

Virginia K. Smith, Smith & Miller, 36 West Jefferson Street, Jefferson, OH 44047 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Bryant Mendenhall ("Mendenhall"), appeals the October 10, 2003 judgment entry of the Ashtabula County Court of Common Pleas sentencing him to serve a prison term of ten years. For the following reasons, we affirm the lower court's judgment entry of sentence.

{¶2} The charges against Mendenhall stemmed from his involvement in the March 21, 2003 murder of Willie Smith ("Smith") at a home, 4012 Station Avenue, Ashtabula, Ohio. Smith, a drug dealer, was involved in a dispute with Mendenhall and

his co-defendant regarding the selling of drugs of Station Avenue. The previous evening, Mendenhall and his co-defendants had assaulted Smith and Smith, in turn, had made threats of retaliation. At about 6:20 p.m. on March 21, 2003, Mendenhall and his co-defendants went to the house where Smith was staying, and confronted Smith on the front porch of the house. During the confrontation, co-defendant Richard Thomas Corpening shot Smith six times. Thereafter, Mendenhall fled the scene before turning himself into the police.

{¶3} Mendenhall was indicted by the Ashtabula County Grand Jury on one count of Complicity to Aggravated Murder, with a gun specification, in violation of R.C. 2923.03 and 2903.01(A), and one count of Complicity to Murder, with a gun specification, in violation of R.C. 2923.03 and 2903.02(A). On August 21, 2003, Mendenhall entered Alford pleas of guilty to Complicity to Voluntary Manslaughter, a first degree felony in violation of R.C. 2923.03 and 2903.03(A), and to Participating in a Criminal Gang, in violation of R.C. 2923.42(A), a felony of the second degree. See *North Carolina v. Alford* (1970), 400 U.S. 25.

{¶4} The trial court sentenced Mendenhall to the maximum prison term of ten years for Complicity to Voluntary Manslaughter and to a prison term of five years for Participating in a Criminal Gang, to be served concurrently. Mendenhall timely appeals and raises the following assignment of error: "The lower court erred to the prejudice of defendant-appellant when it imposed a maximum sentence."

{¶5} An appellate court reviews a felony sentence under a clear and convincing evidence standard of review. R.C. 2953.08(G)(2). 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.

{¶6} Pursuant to R.C. 2929.14(C), a "court imposing a sentence upon an offender for a felony may impose the longest prison term authorized for the offense *** only upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing future crimes, upon certain major drug offenders ***, and upon certain repeat violent offenders in accordance with division (D)(2) of this section." As interpreted by the Ohio Supreme Court, "[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)." *State v. Edmonson*, 86 Ohio St.3d 324, 329, 1999-Ohio-110.

{¶7} In addition to stating its reasons for imposing the maximum sentence under R.C. 2929.14(C), "the trial court must also comply with R.C. 2929.19(B)(2)(d), which requires the trial court to give its reasons for imposing the maximum prison term." *State v. Chike*, 11th Dist. No. 2001-L-120, 2002-Ohio-6912, at ¶8; *State v. Edmonson* (Sept. 25, 1998), 11th Dist. No. 97-P-0067, 1998 Ohio App. LEXIS 4541, at *21 ("the court must submit findings of the operative facts and the reasoning as to why the court considered this to be one of the 'worst forms of the offense'"), aff'd 86 Ohio St.3d 324, 1999-Ohio-110.

{¶8} In the present case, the trial court found on the record that "[t]his is the worst form of *** Complicity to Commit Voluntary Manslaughter." In support of this

finding, the court stated: "A life was lost here. It was planned. These people [Mendenhall and his co-defendants] met on two days previously. They had met the day of the actual killing. They went in force. They prepared themselves. There were threats made to kill this Smith if he didn't get off of their street and do what they wanted. And this was not a spontaneous act that occurred at the house. Smith didn't back down. They killed him. And it's pretty clear that that was the plan."

{¶9} Mendenhall contends that his complicity in Smith's killing was minimal: he "did not discharge the gun that killed the victim" and he "was just there." We disagree.

{¶10} This court has previously considered and rejected this argument. We have held that "[t]he argument that appellant is less culpable because he was convicted as an accomplice ignores R.C. 2923.03(F), which provides: 'Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and *punished as if he were a principal offender*. A charge of complicity may be stated in terms of this section, or in terms of the principal offense. [Emphasis added]." *State v. Whittenberger* (Dec. 3, 1999), 11th Dist. No. 98-P-0047, 1999 Ohio App. LEXIS 5770, at *9. Therefore, as long as the gangland-style killing of Willie Smith constitutes one of the worst forms of voluntary manslaughter, it is within the court's discretion whether to impose the maximum sentence regardless of the fact that Mendenhall did not fire the fatal bullets.

{¶11} The trial court also found "that Mr. Mendenhall poses the greatest likelihood of committing future crimes, and that's based on his serious Juvenile Court record and the record that he's accomplished already at the age of 21 as an adult."

Based on the court's recitation of Mendenhall's record at the sentencing hearing, we agree that the maximum sentence for complicity was justified in the case.[1]

{¶12} The First District Court of Appeals has recently held that the "fact" of previous juvenile-delinquency adjudications cannot be used to justify a finding regarding the likelihood of future crime under the "prior conviction" exception in *Blakely v. Washington* (2004), --- U.S. ---. *State v. Montgomery*, 1st App. No. C-040190, 2005-Ohio-1018, at ¶13. The First District relies on case law for the proposition that "in Ohio *** an adjudication that a juvenile is delinquent is not the same as a criminal conviction." Id. (citations omitted).

{¶13} We note that, for the purpose of determining an offender's likelihood of committing future crimes, a court must consider an offender's delinquency adjudications as well as his history of criminal convictions. R.C. 2929.12(D)(2). In practice, trial

1. The trial court stated: "At age 12 you first appeared before the Juvenile Court. Twenty-one I believe now. You were charged with Assault *** in June of '94. In October of '94, you were adjudicated a delinquent based on a charge of Robbery. *** Then again in October of '94, about three weeks later, you're back before Juvenile Court on a Theft charge. In November of '94, you're in there on another Robbery charge. On February 6th, 1995, a Probation Violation. You were in there in June of '95, and it says unknown code. I don't even know why you were there, but you got a ten-day commitment to DYS. Two months after that in August of '95 you were charged *** with Delinquency on the basis of committing an Abduction. September, '95, the next month, you're back in there on a robbery based-delinquency charge. And all of these you were found guilty. And September ['97], it's Criminal Damaging and Endangering. Then in '97 in November, Parole Violation. July of '98, No Operator's license. *** July of '98, Possession of Drugs, Tampering with Evidence, Carrying a Concealed Weapon. *** October of '98, Attempted Rape, Menacing -- or Aggravated Menacing. That was dismissed in accepting a plea on a different case. *** October of the '98 [sic], you're back in Juvenile Court on an assault-based charge. July of '99, it's Fleeing and Eluding, Obstructing Justice. Truancy, Unauthorized Use of a Motor Vehicle. These charges apparently were dismissed because of a plea in another case. Same month, Violation of Parole. January of 2000, Felonious Assault - Serious Physical Harm, and you were committed again to DYS until you reached the age 21. *** So I didn't even mention *** the adult criminal record here. *** [I]n June of '02, Aggravated Menacing charge was dismissed. *** There was another charge on June 18th of Criminal Trespassing and Possession. I think you got a fine. And Possession of Drugs. I think the Criminal Trespassing was dismissed. You had another charge in July of '02, Possession of Marijuana. Disposition is unknown. Then you had in July of '02, you had charges of Assault, Riot, Aggravated Disorderly Conduct. The Riot charge, I believe, you were convicted of. The other two were dismissed. You had a Criminal Trespass conviction in August of '02. *** August of '02, also Obstruction of Justice, Possession of Drugs [you] were convicted on. January, '03, Criminal Trespass Conviction. March 28th, '03, Assault charge that was dismissed in Eastern County Court. And then you've got the instant charges."

courts routinely rely on juvenile records to impose non-minimum, maximum, and consecutive sentences. See, e.g. *State v. Lamberson* (March 19, 2001), 12th App. No. CA2000-04-012, 2001 Ohio App. LEXIS 1255, at *48.

{¶14} Although juvenile proceedings have been characterized as "civil" rather than "criminal" proceedings, the Ohio Supreme Court has made clear that this distinction is of limited significance. "Whatever their label, juvenile delinquency laws feature inherently criminal aspects that we cannot ignore. *** For this reason, numerous constitutional safeguards normally reserved for criminal prosecutions are equally applicable to juvenile delinquency proceedings. *** Just as we cannot ignore the criminal aspects inherent in juvenile proceedings for purposes of affording certain constitutional protections, we also cannot ignore the criminality inherent in juvenile conduct that violates criminal statutes. *** Whether the state prosecutes a criminal action or a juvenile delinquency matter, its goal is the same: to vindicate a vital interest in the enforcement of *criminal* laws." *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, at ¶26 (emphasis sic) (internal citations omitted).

{¶15} Therefore, a trial judge may consider an offender's juvenile record for the purposes of sentencing.

{¶16} In *Blakely*, and earlier in *Apprendi v. New Jersey* (2000), 530 U.S. 466, the United States Supreme Court held that "[other] than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 124 S.Ct. at 2536, citing *Apprendi*, 530 U.S. at 490.

{¶17} The Supreme Court has recently shed light upon the nature of the "prior conviction" exception in *Shepard v. United States* (2005), 125 S.Ct. 1254. In *Shepard*,

the court reconsidered what sort of evidence a sentencing judge may consider to establish the existence of prior "generic" convictions under the Armed Career Criminal Act ("ACCA"). Under prior case law, the factual basis of a prior conviction could be established "only by referring to charging documents filed in the court of conviction, or to recorded judicial acts of that court ***, as in giving instruction to the jury." Id. at 1259, citing *Taylor v. United States* (1990), 495 U.S. 575. The *Shepard* court reaffirmed this prior case law, noting that it "anticipated the very rule later imposed [in *Apprendi* and its progeny] for the sake of preserving the *Sixth Amendment* right, that any fact other than a prior conviction sufficient to raise the limit of the possible federal sentence must be found by a jury ***." Id. at 1262, citing *Jones v. United States*, 526 U.S. 227, 243 n. 6, and *Apprendi*, 530 U.S. at 490. In *Shepard*, the Supreme Court characterized the sort of evidence that may be considered to establish the facts of a prior conviction to include evidence that bears "the conclusive significance of a prior judicial record," such as "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." Id. at 1262-1263.

{¶18} In light of the foregoing, we hold that delinquency adjudications bear "the conclusive significance of a prior judicial record" and, therefore, may be considered by a sentencing court under the "prior conviction" exception to the rule of *Apprendi* and *Blakely*.

{¶19} Mendenhall's sole assignment of error is without merit. The ten-year sentence imposed by the Ashtabula County Court of Common Pleas is affirmed.

CYNTHIA WESCOTT RICE, J., concurs,

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

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

{¶20} The tragedy in this matter clearly demonstrates the inadequacy of Ohio's current sentencing guidelines. The trial court imposed a maximum sentence "for the reason that the Court finds that the offender committed one of the worst forms of the Voluntary Manslaughter offense, or complicity to commit that offense in that that—this was a death case." The court went on to find that "Mr. Mendenhall poses the greatest likelihood of committing future crimes, and that's based on his serious Juvenile Court record and the record that he's accomplished already at the age of 21 as an adult." Thus, the trial court made two critical findings to support the imposition of a maximum sentence. While I do not disagree with the sentence imposed, I find fault with the procedure employed to arrive at that result.

{¶21} The trial court may very well be right in all its findings. However, it is those very findings that the Supreme Court of the United States has specifically prohibited.

{¶22} 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.

{¶23} 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.

{¶24} 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.

{¶25} 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.[2]

{¶26} 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."[3] 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.

2. *State v. Edmonson* (1999), 86 Ohio St.3d 324, 328-329.
3. *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, paragraph one of the syllabus.

{¶27} 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.[4] Specifically, the court held:

{¶28} "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."[5]

{¶29} 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.

{¶30} 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.[6] As stated by this court in *State v. Taylor*:

{¶31} "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

4. *Blakely v. Washington* (2004), 124 S.Ct. 2531.
5. (Emphasis in original and internal citations omitted.) Id. at 2537.
6. *State v. Taylor*, 158 Ohio App.3d 597, 2004-Ohio-5939.

without being submitted to a jury and proven beyond a reasonable doubt.[7] 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*."[8]

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

{¶33} 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.

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

{¶35} "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."[9]

---

7. *Apprendi v. New Jersey* (2000), 530 U.S. 466, 490, citing *Jones v. United States* (1999), 526 U.S. 227, 243, fn. 6.
8. *State v. Taylor*, at ¶25.
9. *Blakely v. Washington*, 124 S.Ct. at 2540.

{¶36} The court went on to state that the Sixth Amendment was not a "limitation of judicial power, but a reservation of jury power."[10] 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."[11]

{¶37} Recently, in *State v. Montgomery*, the First District Court of Appeals held that "[a] plain reading of this statute indicates that R.C. 2929.14(B) entitles an offender who has not previously served a prison term to a presumption that the imposition of the minimum term is sufficient.[12] Thus, before imposing a term greater than the minimum, the sentencing court must make an additional finding under R.C. 2929.14(B)(2)."[13] The court then went on to "hold that the statutory maximum for an offender who has not previously served a prison term is the minimum prison term allowed by law for the offense."[14]

{¶38} In addition to my firm belief that trial courts are no longer permitted to make findings such as those made herein, I do not agree with the majority's conclusions regarding juvenile adjudications. Rather, I agree with the First District's analysis of this issue as set forth in *State v. Montgomery*:

{¶39} "[T]he court based its R.C. 2929.14(B)(2) finding on [the defendant's] previous juvenile-delinquency adjudications and confinement in juvenile detention

10. Id.
11. Id. at 2543.
12. *State v. Edmonson*, 86 Ohio St.3d at 326.
13. *State v. Montgomery*, 159 Ohio App.3d 752, 2005-Ohio-1018, at ¶8.
14. Id. at ¶9.

facilities. It is well established in Ohio that an adjudication that a juvenile is delinquent is not the same as a criminal conviction.[15] Accordingly, the fact of [the defendant's] previous juvenile-delinquency adjudications could not be used to justify a finding that the shortest prison term would not adequately protect the public from future crime by the offender or would demean the seriousness of the crime under *Blakely's* prior-conviction exception."[16]

{¶40} In conclusion, I believe the trial court erred in sentencing the defendant to more than the minimum sentence 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 adult prison term, 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.

15. *In re Agler* (1969), 19 Ohio St.2d 70, 80 ("'The very purpose of the Juvenile Code is to avoid treatment of youngsters as criminals and insulate them from the reputation and answerability of criminals'"); *In re Good* (1997), 118 Ohio App.3d 371, 375; *In re Rayner* (Nov. 8, 2001), 7th Dist. No. 00-BA-7, 2001 WL 1468530 ("'A juvenile court delinquency adjudication is not a criminal conviction *** unless specifically established by the legislature'").
16. *State v. Montgomery*, at ¶13.