[Cite as *State v. Wheeler*, 2004-Ohio-6598.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 04CA1
vs.	:	
DAVID A. WHEELER,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: David H. Bodiker, Ohio Public Defender, and Stephen P. Hardwick, Assistant State Public Defender, 8 East Long Street, 11th Floor, Columbus, Ohio 43215

COUNSEL FOR APPELLEE: Alison L. Cauthorn, Assistant Prosecuting Attorney, 205 Putnam Street, Marietta, Ohio 45750

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 11-26-04

ABELE, J.

{¶ 1} This is an appeal from Washington County Common Pleas Court judgments of conviction and sentence. The trial court accepted guilty pleas from David A. Wheeler, the defendant below and appellant herein, and found him guilty of (1) burglary, in violation of R.C. 2911.12(A)(4), and (2) two counts of theft, in violation of R.C. 2913.02(A)(1).

{¶ 2} The following errors are assigned for review:

{¶ 3} FIRST ASSIGNMENT OF ERROR:

{¶ 4} "THE TRIAL COURT ERRED BY IMPOSING A MAXIMUM SENTENCE WITHOUT MAKING THE APPROPRIATE FINDINGS WITH REASONS FROM THE BENCH AT THE SENTENCING HEARING."

{¶ 5} SECOND ASSIGNMENT OF ERROR:

{¶ 6} "THE TRIAL COURT ERRED BY SENTENCING MR. WHEELER TO PRISON BASED ON FACTS NOT FOUND BY THE JURY OR ADMITTED BY MR. WHEELER."

{¶ 7} On April 11, 2002, the Washington County Grand Jury returned an indictment charging appellant with four counts of burglary and two counts of theft. Initially, the appellant pled not guilty to those offenses but later reached an agreement to plead guilty to three of the six counts (one of which was amended and made a lesser degree of felony offense) in exchange for the dismissal of the remaining counts. The trial court accepted his guilty pleas and ordered a pre-sentence investigation.

{¶ 8} At sentencing the trial court, noting the appellant's lengthy criminal background, sentenced him to eighteen months on count two (theft), eighteen months on count three (burglary) and twelve months on count five (theft). The court also ordered that the sentences be served consecutively to each other and consecutively to a West Virginia sentence that the appellant was serving at that time. This appeal followed.

I

{¶ 9} Appellant argues in his first assignment of error that the trial court did not follow the requisite procedures for imposing the maximum allowable prison sentences for his offense. We agree, albeit reluctantly.

{¶ 10} The trial court sentenced the appellant on two fourth degree felony counts that provide sentences ranging from six to eighteen months, R.C. 2929.14(A)(4), and one fifth degree

felony that provides a sentence from six to twelve months. Id. at (A)(5). Thus, the appellant is correct that he received the maximum sentences for these offenses.

{¶ 11} Generally, when a court imposes a prison sentence it must impose "the shortest prison term authorized for the offense" unless "[t]he court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender." Id. at (B)(2). The Ohio Supreme Court (in a departure from the longstanding view that a judgment entry is usually considered part of the record, see e.g. App.R. 9(A)) has decreed that the statute's required findings cannot be set out in a sentencing entry. Rather, a trial court "is required to make its statutorily sanctioned findings at the sentencing hearing." (Emphasis added.) See State v. Comer, 99 Ohio St.3d 464, 793 N.E.2d 473, 2003-Ohio-4165, at paragraph two of the syllabus. Obviously, this Court, as well as the trial court, is bound by that decision. See, generally, State v. Jonas (Mar. 6, 2001), Athens App. No. 99CA38; State v. Wolfe (Jun. 17, 1996), Gallia 99CA4.

{¶ 12} We now turn to the transcript of the sentencing hearing. After our review for a recitation of the talismanic statutory language, we must agree with the appellant. It does not appear that the trial court parroted the words – "the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender," either with respect to imposing the maximum sentences or at any other time during the hearing. We further note that the prosecution (in its own brief) does not cite to us any portion of the transcript in which that particular incantation can be located. Thus, pursuant to Comer, we agree that the trial court erred in imposing this sentence.[1]

[1] We voice no opinion, however, on the propriety of imposing maximum sentences in this case. We merely hold that the trial court did not jump through the requisite hoops to do so.

{¶ 13} The prosecution asserts that the appellant failed to raise this issue in the trial court and thus waived the issue. The prosecution cites State v. Hornbeck, 155 Ohio App.3d 571, 802 N.E.2d 184, 2003-Ohio-6897, for the proposition that this issue should be reviewed under a plain error analysis. See Crim.R. 52(B). In Hornbeck, the trial court also did not specify its reasons on the record and the appellate court found that the lower court's failure to follow Comer was "problematic." Id. at ¶15. Nevertheless, the appellant did not raise the issue on appeal and the prosecution argued that the appellate court should not consider it sua sponte. The appellate court agreed and determined that no plain error occurred. The court noted that the trial court included the required findings in its sentencing entry and there was no reason to believe that the trial court would have reached a different conclusion, even in a "Comer compliant" sentencing proceeding. Id. at ¶17.

{¶ 14} In the instant case, the prosecution argues that this case is no different and that we, too, should apply a plain error analysis and reach the same conclusion. We disagree. These two cases are, in fact, very different. We note that the appellant in Hornbeck did not raise the issue on appeal. In the instant case, the appellant raised the issue and it is squarely before us.

{¶ 15} We believe that in the instant case it is unwise to apply a plain error analysis for several reasons. First, it appears that this issue was not raised in Comer, but was nevertheless considered by the Ohio Supreme Court. See 99 Ohio St.3d at 465. Second, in light of the gist of the Comer ruling (that the language must be recited directly into the transcript) we believe that it is impractical to require a specific objection at the sentencing hearing. Even the most diligent of defense counsel could easily miss some of the language, much of it lengthy and confusing, that a trial court judge must recite at a sentencing hearing. To determine whether a court recited the

correct language requires a sentence by sentence and a word by word review of the transcript. This is not feasible at the trial court sentencing hearing level.

{¶ 16} We also point out that, although Comer injects new requirements into criminal sentencing procedure, we are nevertheless bound by that decision and we cannot simply contrive reasons to avoid its application. Thus, we decline to apply Hornbeck in this instance.

{¶ 17} For all these reasons, we hereby sustain appellant's first assignment of error.[2]

II

{¶ 18} Appellant argues in his second assignment of error that the trial court erred in basing his sentence on facts to which he did not admit nor were determined by a jury. We disagree with the appellant.

{¶ 19} Appellant's argument is based on the recent decision of the United States Supreme Court in Blakely v. Washington (2004), ___ U.S. ___, 159 L.Ed.2d 403, 124 S.Ct. 2531, wherein the Court held that a sentence imposed above the maximum allowable sentence under Washington law, and based on factors that were neither admitted by the defendant nor determined by a jury, violated the defendant's Sixth Amendment right to jury trial. Appellant argues that Blakely applies here and that his sentence must be reversed because the trial court imposed maximum sentences, and ordered them to be served consecutively, based on facts that were neither admitted nor determined by a jury.

[2] Nothing in our decision today should be misconstrued in any manner as criticism of the trial court. To the contrary, much confusion has emerged from the revamped Ohio felony sentencing laws and the subtle nuances that arise when the Ohio Supreme Court or the General Assembly revisit them. Instead, we commend the trial court for the manner in which it attempted to comply with those complex and convoluted provisions.

{¶ 20} We recognize that Blakely is causing a great degree of confusion and speculation in both the federal and the state courts. While it appears that Ohio courts have not reached a clear consensus on the issue, the Eighth District appears to accept that Blakely applies to Ohio's sentencing scheme and that minimum sentences must be imposed unless a jury rather than a trial court judge determines the factors necessary to impose a greater than a minimum sentence. See e.g. State v. Glass, Cuyahoga App. No. 84035, 2004-Ohio-4912 at ¶7; State v. Taylor, Cuyahoga App. No. 83551, 2004-Ohio-4468 at ¶36; State v.Quinones, Cuyahoga App. No. 83720, 2004-Ohio-4485 at ¶30. Recently, in State v. Scheer, Highland App. No. 03CA21, 2004-Ohio-4792, we reached a different conclusion and held that Blakely does not apply in Ohio in light of the particular mechanics of our sentencing scheme. In Scheer we wrote:

> **{¶ 21}** "Blakely holds that a trial court cannot enhance a sentence beyond the statutory maximum based on factors other than those found by the jury or admitted to by the defendant. Here, Scheer was sentenced to twelve months imprisonment, a term within the standard sentencing range for his crimes. In fact, the Ohio sentencing scheme does not mirror Washington's provisions for enhancements. Therefore, Blakely is inapplicable." Id. at ¶15.

{¶ 22} In short, as long as a criminal defendant is sentenced to a prison term within the stated minimum and maximum terms permitted by law, criminal sentencing does not run afoul of Blakely and the Sixth Amendment. The First District has adopted a similar position, see e.g. State v. Bell, Hamilton App. No. C-030726, 2004-Ohio-3621 at ¶¶40-42[3], as well as some of our colleagues in the Eighth District.[4] Appellant does not, at this juncture, give us pause to

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[3] The Second District also appears to have questioned the applicability of Blakely to factors necessary to impose a non-minimum sentence in Ohio. See State v. Sour, Montgomery App. No. 19913, 2004-Ohio-4048 at ¶¶7-9.

[4] See e.g.State v. Taylor, Cuyahoga App. No. 88351, 2004-Ohio-4468 at ¶¶50-59 (Corrigan, J. Concurring in part and dissenting in part); State v. Glass, Cuyahoga App. No. 83950, 2004-Ohio-4495 at ¶21 (Rocco, J., Dissenting).

reconsider Scheer. Thus, until such time as the United States Supreme Court or the Ohio Supreme Court addresses this issue, we will adhere to that ruling.[5]

{¶ 23} As for appellant's contention that Blakely may also apply to limit the ability to order consecutive sentences, we find no support for that proposition. We note that even the Eighth District rejects the argument that Blakely applies to anything other than imposition of punishment for a crime. See State v. Madsen, Cuyahoga App. No. 82399, 2004-Ohio-4895 at ¶16. The Court noted that Blakely does not address the issue of whether multiple sentences for separate crimes should be served concurrently or consecutively. Id. We agree. For all these reasons, the second assignment of error is without merit and is hereby overruled.

{¶ 24} Having sustained the first assignment of error, we hereby reverse the trial court's judgment and remand the matter to the trial court for re-sentencing consistent with this opinion.

JUDGMENT REVERSED AND CASE EMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

Harsha, J., dissenting in part and concurring in part:

{¶ 25} I dissent from the majority's disposition of the first assignment of error because I conclude that a plain error analysis is appropriate and that appellant cannot prevail under that approach. Unlike the majority, I believe it is incumbent upon counsel to object at the sentencing hearing to errors or omissions in the sentencing procedure. As the opinion in *Comer* pointed out, "Thus, an in court explanation gives counsel the opportunity to correct obvious errors." *Comer* at ¶22. I see no reason to conclude that it is unfair to hold trial counsel to the same standards of

[5] Obviously, we would encourage the Ohio Supreme Court to

performance as the Supreme Court demands of trial judges. So I would apply a plain error analysis based upon counsel's failure to object at the sentencing hearing.

{¶ 26} Using that standard, I do not believe that "a *Comer*-compliant sentencing would have resulted in a different sentence", given the existence of adequate reasons in the court's sentencing entry. See *Hornbeck*, supra at ¶17. Thus, we cannot say that the outcome of the proceeding clearly would have been otherwise. Id. See, also *Long*, supra.

{¶ 27} Because I concur in the majority's rejection of appellant's second assignment of error, I would affirm his sentence.

JUDGMENT ENTRY

It is ordered that the judgment be reversed, that the case be remanded for further proceedings consistent with this opinion and that appellant recover of appellee costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Kline, P.J.: Concurs in Judgment & Opinion
Harsha, J.: Concurs in Part & Dissents in Part with Opinion

For the Court

BY:
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.