**[Cite as *State v. Hardie*, 2004-Ohio-7277.]**

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

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| STATE OF OHIO, | : | |
| Plaintiff-Appellee, | : | Case No. 04CA24 |
| vs. | : | |
| ROBERT V. HARDIE, JR., | : | DECISION AND JUDGMENT ENTRY |
| Defendant-Appellant. | : | |

APPEARANCES:

COUNSEL FOR APPELLANT: David H. Bodiker, Ohio Public Defender, and T. Kenneth Lee, 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: 12-27-04

ABELE, J.

**{¶ 1}** This is an appeal from a Washington County Common Pleas Court judgment of conviction and sentence. The trial court accepted a guilty plea from Robert V. Hardie, Jr., the defendant below and appellant herein, and found him guilty of rape in violation of R.C. 2907.02.

**{¶ 2}** The following error is assigned for review:

> "THE TRIAL COURT ERRED BY SENTENCING ROBERT HARDIE, JR., TO A NON-MINIMUM PRISON TERM BASED ON FACTS NOT FOUND BY THE JURY OR ADMITTED BY MR. HARDIE."

**{¶ 3}** In 2003, the Washington County Grand Jury returned indictments charging the appellant with eight counts of rape. After plea negotiations, the parties reached an agreement in which the appellant pled guilty to one count of rape in exchange for a dismissal of all of the remaining charges.

**{¶ 4}** Appellant notes that the parties stipulated to a statement of fact as follows:

> "[O]n November the 12th of 2003 *** [Mr. Hardie] engaged in sexual conduct - this is, penile penetration of the vagina of [] Andrea Cassidy ***. Andrea Cassidy, at the time, was approximately 23 months old.
>
> • * *
>
> While he was committing this penile penetration, he purposely compelled the victim to submit by force, and during the commission of the offense, he caused serious physical harm to the victim.
>
> *** [O]n that date, [] [Mr. Hardie] was at the residence of Paula Fleming ***. Paula Fleming is the mother of Andrea Cassidy, the victim in this case. There was another, Keith Alan Huff (phonetic), present. They'd been playing cards and talking. At approximately 11 o'clock, Ms. Fleming was hungry, so she went with Mr. Huff to McDonald's, leaving the child alone with Robert Hardie, Jr. They went to McDonald's. They were gone approximately 15 minutes.
>
> When they returned, they could hear the child crying. They went to the *** bathroom in [the] apartment, tried to get in the door. They couldn't get through the door.
>
> Eventually, the door opened. Mr. Hardie left. Ms. Fleming picked up the baby and carried her to another room, and discovered that the child was bleeding from the vaginal area, took her to Marietta Memorial Hospital.
>
> In the emergency room ***, they discovered that the child had tears to the vaginal wall,

> that were beyond the ability of Marietta Memorial Hospital to treat. They had her transferred to Southeastern Medical Center ***. There, she was examined by Dr. Michelle Dayton (phonetic)***. [Dr. Michelle] indicated that there was rip in the wall of the vagina, that it was ripped completely through, exposing the muscles of the rectum. Dr. Dayton stated - and would have testified - that the degree of the injuries constituted serious physical harm.
>
> ***
>
> The Defendant was later questioned about this offense, and admitted to having inserted his penis into her vagina. She was laying on the floor, and she - he indicated that she was trying to get away, and - [] because of her *** young age, she was unable to *** escape his attack."

**{¶ 5}** Appellant notes that the trial court accepted his guilty plea and then determined that he should serve the maximum sentence. In making that determination, the appellant contends that the trial court judge independently determined (i.e. facts not determined by a jury or admitted by the appellant) those facts that supported the maximum sentence as follows:

> "The Court finds that the injury in this case was made worse by the physical [condition] ***, mental condition, or age of the victim; specifically, this was a child, age 22 months. That this offender caused serious physical harm; in all probability has also caused severe psychological harm to that child. There is nothing here which would make this offense less serious than that contemplated by statue.
>
> In regards to making him more likely to recidivate, he has a juvenile conviction for rape in September of 2000. As an adult, his has convictions for theft and falsification.
>
> The Court has considered the record,the written reports, including the presentence investigation, the victim impact statement,

> *** statements made, and Ohio law as it relates to sentencing for a felony.
>
> ***
>
> The Court in this case has not imposed a minimum sentence. This is a first prison term for an adult. The Court has determined that imposing the minimum sentence would not be adequate to protect the public, nor to punish the offender. The Court makes its finding based on the following factors:
>
> In regards to the Court's obligation to protect the public, the Court notes that this offender was recently released from juvenile facilities for a serious sex offense, specifically rape. This offense demonstrates a callous disregard of excruciating pain inflicted on a very small child.
>
> In regards to punishment, the Court notes that this offense demonstrates a *** callous disregard of excruciating pain inflicted on a child who was seriously injured as a result of his actions.
>
> The Defendant had to be aware that the child involved was not physically capable of accommodating sexual - sex with an adult male. And in the course of the offense, the Defendant penetrated the vaginal wall of this child, exposing the bowel, which required immediate and emergency [sic.] corrective surgery.
>
> The Court has determined that imposing the maximum sentence is required to protect the public and adequately punish this offender. The Court finds that this offender has committed the worst form of this offense.
>
> The Court notes that he cause serious physical harm to a child in the course of committing this offense, and that he *** poses the greatest likelihood of *** recidivism, by virtue of the fact that he has a previous conviction for rape."

**{¶ 6}** The appellant contends, in his sole assignment of error, that the trial court's sentencing determination explicitly relied on factual findings that neither a jury had determined nor

had the appellant admitted. Consequently, the appellant asserts that under Blakely v. Washington (2004), 542 U.S. ____, 159 L.Ed.2d 403, 124 S.Ct. 2531, the appellant's sentence is unlawful and the trial court must, instead, impose the minimum available sentence. Appellant notes that Blakely 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 a greater than minimum sentence based on facts that were neither admitted by him nor determined by a jury. See R.C. 2929.14(B). We again take this opportunity to 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.

**{¶ 7}** Recently, in State v. Scheer, 158 Ohio App.3d 432, 816 N.E.2d 602, 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:

> **{¶ 8}** "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.

**{¶ 9}** 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. See, also, State v. Hardie (2004), Washington App. No. 04CA1. 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[1], as well as some of our colleagues in the Eighth District.[2] Thus, until such time as the United States Supreme Court or the Ohio Supreme Court addresses this issue, we will adhere to our ruling in Scheer.[3]

**{¶ 10}** Accordingly, based upon the foregoing reasons we hereby overrule the appellant's assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

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[1] 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.

[2] 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).

[3] Obviously, we would encourage the Ohio Supreme Court to provide Ohio courts with guidance in this area.

Harsha J., Concurring:

**{¶ 11}** Hardie argues that the trial court had to impose the minimum sentence because it could only exceed that term if it impermissibly based its decision on factors that the jury did not address. But as the principle decision indicates, Ohio's sentencing statute differs significantly from the State of Washington scheme that the United States Supreme Court struck down in Blakely. The Ohio General Assembly adopted a range of sentences for different felony classifications, but within each felony designation it specified a fixed maximum term. An upward departure from the fixed maximums only occurs when an indictment contains a specification that the offense involved the use of a firearm, see R.C. 2929.14(D)(1), etc., the defendant is a repeat violent offender, see R.C. 2929.14(D)(2)(a) and R.C. 2941.149, or the defendant is a major drug offender, see R.C. 2929.14(D)(3)(a) and R.C. 2941.1410. Because the enhancement is included in the indictment, the state must prove its existence to the fact finder by proof beyond a reasonable doubt.

**{¶ 12}** Under the Ohio scheme, R.C. 2929.14 sets a standard range of sentences for various degrees of felonies. A judge uses historical or traditional sentencing factors to determine where the specific offender falls within the standard range of prison terms. As the United States Supreme Court noted in Harris v. United States (2002), 536 U.S. 545, 122 S.Ct.2406, 153 L.Ed.2d 524, every fact a court uses to increase a defendant's punishment does not have to go to a jury for proof beyond a reasonable doubt. In reaffirming the court's earlier position in Jones v.

United States (1999), 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311, Justice Scalia (who authored Blakely) noted:

**{¶ 13}** "It is not, of course, that anyone today would claim that every fact with a bearing on sentencing must be found by a jury; we have resolved that general issue and have no intention of questioning its resolution. Judicial fact finding in the course of selecting a sentence within the authorized range does not implicate the * * * jury trial, and reasonable doubt components of the Fifth and Sixth Amendments."

**{¶ 14}** Harris, 536 U.S. at 558 (citation omitted.)

**{¶ 15}** Because the Ohio scheme allows judges to use "fact finding in the course of selecting a sentence within the authorized range", it does not violate the mandate of Blakely.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the 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 with Concurring 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.