

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. John F. Boggins, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Sheila G. Farmer, J.
-VS-	:	
	:	Case No. 04CA79
SCOTT A. WAGNER	:	
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING:	Criminal Appeal from Licking County Common Pleas Court, Case Nos. 02CR428, 02CR443 and 03CR51
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JUDGMENT:	AFFIRMED
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DATE OF JUDGMENT ENTRY:	JULY 25, 2005
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APPEARANCES:

For Plaintiff-Appellee
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For Defendant-Appellant
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Boggins, J.

{¶1} This is an appeal of sentences imposed by the Common Pleas Court of Licking County after Appellant was convicted of twenty-seven counts of rape, thirty-five counts of gross sexual imposition, eight counts of unlawful sexual conduct with a minor with a special finding that Appellant was more than ten years older than the other person, fourteen counts of pandering sexually oriented material involving a minor, three counts of illegal use of a minor in nudity-oriented material or performances, and one count of corruption of a minor.

{¶2} This Court had on a previous appeal affirmed such convictions but remanded for resentencing.

{¶3} The following Assignment of Error is:

ASSIGNMENT OF ERROR

{¶4} “I. THE TRIAL COURT ERRED IN IMPOSING NON-MINIMUM, CONSECUTIVE SENTENCES ON APPELLANT WHERE THE FACTS NECESSARY TO IMPOSE SUCH A SENTENCE HAD NEITHER BEEN PROVEN TO A JURY NOR ADMITTED BY APPELLANT, THEREBY DEPRIVING APPELLANT OF HIS RIGHT TO A JURY TRIAL AND DUE PROCESS OF LAW AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND COMPARABLE PROVISIONS OF THE OHIO CONSTITUTION.

I.

{¶5} In his Assignment of Error, Appellant contends the trial court erred in sentencing him to the maximum prison term based upon facts not found by the jury or

admitted by Appellant, in contravention of *Blakely v. Washington* (2004), 542 U.S. ___, 159, L.E.2d 403, 124 SCt. 2531.

{¶6} As stated by Judge W. Scott Gwin of this Court in *State v. Cahill*, 04CAA07056, *Blakely*, the United States Supreme Court held: "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*. See *Ring*, supra, at 602, 122 S.Ct. 2428, (" 'the maximum he would receive if punished according to the facts reflected in the jury verdict alone '" (quoting *Apprendi*, supra, at 483, 120 S.Ct. 2348); *Harris v. United States*, 536 U.S. 545, 563, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002) (plurality opinion) (same); cf. *Apprendi*, supra, at 488, 120 S.Ct. 2348, (facts 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,' *Bishop*, supra, 87, at 55, and the judge exceeds his proper authority." *Id.* at 2537 (Emphasis in original).

{¶7} In *Blakely*, the petitioner pled guilty to kidnapping his estranged wife. Under the facts admitted during his plea, the petitioner was subject to a maximum sentence of 53 months imprisonment. At sentencing, however, "the trial judge imposed a 90-month sentence after finding that petitioner had acted with deliberate cruelty, a statutorily enumerated ground for departing from the standard range." *Id.* at 2533. The United States Supreme Court determined the State of Washington's sentencing scheme

violated the petitioner's Sixth Amendment right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence.

{¶8} This court has previously held a jury is not required to find the factors set forth in R.C. 2929.13(B)(2) or R.C. 2929.14(B) before a judge may impose a prison sentence for the conviction of a third, fourth or fifth degree felony. *State v. Iddings* (Nov. 8, 2004), Delaware App. No. 2004-CAA-06043, *State .Hughett* (Nov. 18, 2004), Delaware App. No. 2004-CAA-06051, 2004-Ohio-6207; *State v. O'Conner* (Dec. 3, 2004), Delaware App.No. 2004-CAA-028, 2004-Ohio-6752.

{¶9} Nor is a jury required to find the factors set forth in R.C. 2929.14(E) (4) before a judge may impose consecutive sentences. *State v. Small*(Jan. 14, 2005), Delaware App. No. 2004-CAA-04032; See *State v. Taylor*, Lake App. No. 2003-L-165, 2004-Ohio-5939, ¶ 25, citing *United States v. Wingo* (C.A.6, 2003), 76 Fed. Appx. 30, 35-36.

{¶10} Accordingly, appellant's assignment of error is overruled.

{¶11} The judgment of the Licking County Court of Common Pleas is affirmed.

By: Boggins, P.J. and

Farmer, J. concur.

Hoffman, J. dissents

JUDGES

Hoffman, J., dissenting

I respectfully dissent from the majority's analysis and disposition for the reasons set forth in my dissenting opinion in *State v. Hughett* (Nov. 18, 2004), Delaware App. No. 2004-CAA-06051.

JUDGE WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-VS-

SCOTT A. WAGNER

Defendant-Appellant

JUDGMENT ENTRY

CASE NO. 04CA79

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Licking, Ohio, is affirmed. Costs assessed to Appellant.

JUDGES