[Cite as *State v. Taylor*, 2004-Ohio-4468.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
No. 83551

STATE OF OHIO,	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
vs.	:	AND
GREGORY TAYLOR,	:	OPINION
Defendant-Appellant	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	AUGUST 26, 2004
	:	
CHARACTER OF PROCEEDING	:	Criminal appeal from Common Pleas Court
	:	Case No. CR-435893
JUDGMENT	:	JUDGMENT AFFIRMED IN PART AND VACATED IN PART AND
	:	REMANDED FOR RESENTENCING
DATE OF JOURNALIZATION	:	

APPEARANCES:

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ANNE L. KILBANE, J.

{¶1} Gregory Taylor appeals from a judgment of conviction entered by Judge David T. Matia after a jury found him guilty of possession of drugs.[1] He claims the judge erred in admitting identification testimony without allowing him to first conduct a voir dire examination of the witness, in excluding a traffic ticket as evidence, and in imposing the maximum prison term at sentencing. We affirm the judgment in part, but vacate the sentence and remand for resentencing.

{¶2} At approximately 11:45 p.m. on February 8, 2003, a 1995 Dodge Sprint struck a utility pole in the 700 block of Eddy Road in Cleveland. Neighborhood residents called 911 and, because fluids started leaking from the car, removed the unconscious driver and took him to the front porch of Anthony DeLarge's home. Police Officer Daniel Finn arrived and found that the injured man on the porch had a state-issued identification card in the name of then twenty-two-year-old Gregory Taylor. Paramedics transported Taylor to the hospital and Officer Finn conducted an inventory search of the Dodge. The search of the car revealed four objects later identified as 1.23 grams of crack cocaine, $290 in cash, and two

[1]R.C. 2925.11(C)(4)(b).

cell phones. At the hospital, police later took possession of $641 in cash that was found on Taylor's person.

{¶3} Taylor was indicted on one count of drug trafficking,[2] one count of drug possession, and one count of possessing criminal tools.[3] Before trial, the State filed a supplemental witness list that named three neighborhood residents and two police officers not previously listed in its discovery responses. Taylor moved to suppress any in-court identification testimony from witnesses on the supplemental list; he claimed the witnesses had not been shown a photo array to determine their ability to identify him, and that the in-court identification would be unfairly suggestive without a prior determination of the witnesses' ability to recognize him.

{¶4} At the hearing on the motion, Taylor stated that the prosecutor had informed him that none of the supplemental witnesses would be making an in-court identification, but he sought to voir dire them to ensure that they would not try to identify him. He also admitted that his motion did not contest any pretrial, out-of-court identification procedures. The judge stated the motion was moot, and did not allow Taylor to voir dire the witnesses.

{¶5} At trial, neighborhood resident DeLarge testified that he was present at the accident scene, and that the driver of the Dodge was taken to the front porch of his house before police and

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[2]R.C. 2925.03(C)(4)(c).

[3]R.C. 2923.24.

paramedics arrived. Officer Finn, who had been named in the State's original witness list, testified that he investigated the accident, and he identified Taylor as the injured man he found on DeLarge's front porch.

{¶6} Taylor objected to Officer Finn's in-court identification and moved for a mistrial, because he claimed the State violated discovery by failing to inform him that he would make such an identification. He claimed his discovery requests and his motion to suppress specifically asked for such information, that he was entitled to it, and that his defense was prejudiced because of the identification. His motion was denied.

{¶7} Taylor called no witnesses and did not testify, but he sought to admit as an exhibit, a certified copy of a traffic ticket issued to him at 10:30 p.m. the same evening. The ticket identified the vehicle he was driving as a green Hyundai, and the location near the intersection of Grovewood and East 167th Street in Cleveland. He contended the ticket was evidence that he was driving a different vehicle in a different part of town an hour prior to the accident and, therefore, cast doubt on any identification of him at the scene of the accident.

{¶8} The State stipulated to the ticket's authenticity, but objected to its admissibility, and the judge excluded it as irrelevant. He also stated that he believed Taylor would have to testify that he received the ticket before it could be admissible.

{¶9} The jury found Taylor guilty of drug possession, but it acquitted him of the trafficking and criminal tools counts. The judge denied his motion for a presentence report, imposed an eighteen-month prison term, a $500 fine, two-year operator's license suspension, costs, and post-release control. Taylor asserts four assignments of error, which are included in an appendix to this opinion.

IN-COURT IDENTIFICATION.

{¶10} Taylor, through two assignments, challenges the judge's failure to exclude Officer Finn's identification testimony, or to declare a mistrial because of the State's failure to disclose the content of his testimony. Taylor's brief implicates a number of issues concerning identification evidence, but he has failed to support his arguments with authority or detailed argument. He claims that the State was required, either by virtue of his discovery request[4] or his motion to suppress, to disclose the fact that the officer would identify him in court. He also apparently claims that he had a right to voir dire the officer about the reliability of his identification, even if no pretrial identification procedures were used. On the record and argument presented, these claims fail.

{¶11} The United States Supreme Court has recognized that a courtroom backdrop can be a very suggestive atmosphere for a

[4]Crim.R. 16(B).

witness's initial identification of a defendant,[5] but it has not stated constitutional rules concerning the suppression of identifications during trial when no pretrial identification procedures have been used. Some courts addressing the issue have determined that, while there is no constitutional right to suppress an in-court identification that is not tainted by improper pretrial identification procedures, the judge has discretion to employ safeguards to ensure a reliable identification at trial.[6] Other courts have determined that an in-court identification is subject to the same scrutiny as a pretrial identification, and suppression is allowed if the judge determines that the identification is unreliable and unnecessarily suggestive.[7]

{¶12} Although these are important issues that merit discussion in an appropriate case, we need not reach them here. Contrary to Taylor's argument, neither his discovery motion nor his motion to suppress requested notification of identification witnesses; the discovery motion sought information generally available under Crim.R. 16(B), and the motion to suppress challenged any identification that might have been made by witnesses on the

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[5]*Moore v. Illinois* (1977), 434 U.S. 220, 229-230, 98 S.Ct. 458, 54 L.Ed.2d 424.

[6]*United States v. Domina* (C.A.9, 1986), 784 F.2d 1361, 1368-1369; *State v. Smith* (1986), 200 Conn. 465, 469-470, 512 A.2d 189.

[7]*United States v. Hill* (C.A.6, 1992), 967 F.2d 226, 232.

supplemental list. Taylor's motion to suppress did not challenge Officer Finn, who was on the original list.

{¶13} Taylor contends the State had a duty to inform him that Officer Finn would make an in-court identification, but we disagree. Contrary to his claims, he did not request notice of those individuals that would make in-court identifications, and we do not consider it an unfair surprise to learn that an officer at the scene would make an in-court identification. Taylor had to be aware that police officers observed him at the scene and, if he wished to challenge their ability to identify him, he should have done so in a pretrial motion. Such a motion could have generally challenged identifications made by officers at the scene, even if he did not know their names.

{¶14} Moreover, the admission of Officer Finn's testimony did not violate constitutional standards because his identification was credible and reliable.[8] Taylor's defense relied on three pieces of evidence or suggested evidence, including: (1) the traffic ticket, which showed that he was driving a different car an hour earlier at a location four miles[9] from the scene of the accident; (2) a recording of a 911 call, which stated that the accident had apparently involved two cars; and (3) a suggestion made, during

[8]See Id. at 230-231 (suggestive procedures can be overlooked if identification is otherwise reliable).

[9]We can take judicial notice of street configurations. *State v. Mays* (1992), 83 Ohio App.3d 610, 613-614, 615 N.E.2d 641.

cross-examination of DeLarge, that another injured person might have been carried to another porch.

{¶15} Taylor did not give notice of an alibi defense under Crim.R. 12.1, and he has not disputed the fact that he was transported to the hospital from the accident scene. Instead, his defense appears to be that he was involved in a two-car accident on Eddy Road, and that somehow he was mistaken for the driver of the Dodge. If this were the case, however, there would have been a second driverless car and a second injured victim at the accident scene, neither of which were reported by police or any of the other witnesses.

{¶16} Two 911 calls were made, the first of which suggested that two cars were involved, but the second call mentioned only one car, and only one car was discovered at the scene. Therefore, even if a second car was involved in the accident, it was driven away before police arrived, and the only remaining car was the 1995 Dodge Spirit, and the only remaining accident victim was Taylor.

{¶17} DeLarge testified that the man removed from the car that hit the utility pole was taken to his front porch, and Patrolman Finn testified that the man on DeLarge's porch had Taylor's identification card and was, in fact, Taylor. Again, Taylor has not claimed that he was not at the scene; apparently he contends only that he was not the man removed from the Dodge, and that he was transported to the hospital from some other porch. However,

despite the suggestion of another accident victim made in cross-examination questions to DeLarge, there was no evidence that anyone other than Taylor was involved in the accident.

{¶18} Under these circumstances, the judge did not abuse his discretion in finding that Taylor was not entitled to prior notice of Officer Finn's testimony, and in finding that he was not unfairly surprised or prejudiced by the in-court identification. Taylor's defense claimed a mixup between him and the driver of another car, but there was no other car or driver present to allow such a mixup to occur. Therefore, if any prejudice resulted from the officer's identification testimony, it was caused not by surprise or unfairness, but by the sheer unlikelihood of Taylor's defense. The first and second assignments are overruled.

{¶19} EXCLUDED EVIDENCE.

{¶20} Taylor claims the judge erred in excluding evidence that he received a traffic ticket, while driving a different car, approximately an hour before the accident. The judge excluded the exhibit as irrelevant, but Taylor claims it was probative of the fact that he was not driving the Dodge.

{¶21} We again note that Taylor did not give notice of an alibi defense under Crim.R. 12.1 and, therefore, we do not view his defense as a claim that he was not present at the scene. The "second car" defense, then, must claim that Taylor was involved in a two-car accident on Eddy Road, that he was driving a car other

than the Dodge Spirit, and that his car was somehow removed from the accident scene or ignored by investigators while, at the same time, he was somehow mistaken for the driver of the Dodge, who also disappeared after the accident.

{¶22} Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[10] The judge has discretion to determine whether evidence is relevant[11] and, while Taylor correctly points out that the standard for relevancy is liberal,[12] we do not find the judge abused his discretion here.

{¶23} Taylor apparently attempted to establish that he was driving another car at the time of the accident and, therefore, that he was not driving the Dodge.[13] As noted, however, the difficulty with this argument is that no other car was found at the accident scene. Therefore, the fact that Taylor was driving a different car an hour earlier loses all probative value; without evidence that a second car was found at the scene, the fact that he was driving a different car an hour earlier is meaningless. As

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[10]Evid.R. 401.

[11]*State v. McGuire*, 80 Ohio St.3d 390, 400, 1997-Ohio-335, 686 N.E.2d 1112.

[12]Id.

[13]We note, yet again, that he did not assert an alibi defense.

with his challenge to Officer Finn's testimony, Taylor's problem here stems from the improbability of his own defense, and not from the judge's evidentiary rulings. The third assignment is overruled.

MAXIMUM SENTENCE

{¶24} Taylor also challenges the judge's sentence, which imposed the maximum prison term available for a fourth degree felony. He claims the judge's findings and reasons to support the maximum sentence, as required by R.C. 2929.14(C) and 2929.19(B)(2)(d), were inadequate or improper. We need not address whether the judge's determination was adequate, because we agree that it was improper.

{¶25} During the sentencing hearing, the following transpired:

{¶26} "THE COURT: Where did you get all the money in your pocket on the day of the accident?

{¶27} (Taylor's lawyer): Excuse me one second.

{¶28} Judge, Your Honor, I just instructed him not to answer that particular question in light of, you know, the self-incrimination aspects of the case, since the case has not been fully resolved.

{¶29} THE COURT: Well, we just tried the case to a verdict.

{¶30} (Taylor's lawyer): I understand that, Your Honor.

{¶31} THE COURT: He doesn't want to answer that, I find for the record he's not showing any remorse, he's served a prior prison term, and this is his fourth adult case. Mr.

Taylor, I guarantee that you will offend again and therefore I feel that a maximum prison term in this case is necessary to protect the public from future crimes."

{¶32} The State contends that the judge took into account Taylor's prior convictions to support the R.C.2929.14(C) finding that he posed the greatest likelihood of committing future crimes and, therefore, merited the maximum sentence. But this colloquy also shows that the judge's sentencing decision was influenced by Taylor's refusal to respond to questioning about the money found in the car and on his person after the accident. The judge rejected Taylor's assertion of his constitutional right against self-incrimination on the grounds that the verdict had already been reached, and he found, without explanation, that Taylor's refusal to answer showed a lack of "remorse."

{¶33} Regardless of whether the willingness or refusal to answer questions is evidence of a defendant's state of remorse, he retains the right against self-incrimination through sentencing,[14] and it is improper for a judge to punish a defendant for exercising a constitutional right.[15] Moreover, judges must avoid even the appearance that sentencing decisions are tied to a defendant's

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[14]*Mitchell v. United States* (1999), 526 U.S. 314, 321, 119 S.Ct. 1307, 143 L.Ed.2d 424.

[15]See, e.g., *State v. Scalf* (1998), 126 Ohio App.3d 614, 620-621, 710 N.E.2d 1206 (improper to punish defendant for exercising right to trial).

exercise of constitutional rights, because such an appearance deters defendants from asserting those rights.[16] Because the issue involves a constitutional right, we can uphold the finding only if we find, beyond a reasonable doubt, that the judge would have imposed the same sentence absent the error.[17]

{¶34} The colloquy shows an unavoidable juxtaposition between Taylor's refusal to answer and the judge's imposition of sentence. At the very least, a reasonable person could draw an inference, under *Scalf*, that the sentencing decision was related, at least in part, to Taylor's refusal to answer the question. One cannot say, beyond a reasonable doubt, that the sentencing decision was not affected by his exercise of a constitutional right. One might even say that the colloquy shows that the judge imposed a more severe sentence on Taylor because he refused to admit he committed offenses of which he had been acquitted, and that the judge intended to sentence him for the acquitted offenses.

{¶35} In either case, the imposition of sentence is tainted by the judge's apparent belief that Taylor had no constitutional right to assert, and his apparent umbrage at Taylor's assertion of that right. The judge erred when he determined that Taylor did not have a constitutional right to avoid self-incrimination at sentencing,

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[16]Id. at 621, citing *United States v. Medina-Cervantes* (C.A.9, 1982), 690 F.2d 715, 716-717.

[17]*State v. Johnson*, 71 Ohio St.3d 332, 339, 1994-Ohio-304, 643 N.E.2d 1098.

and in determining that the exercise of that constitutional right was an aggravating factor in sentencing. The fourth assignment of error is sustained.

{¶36} We also note the recent United States Supreme Court decision in *Blakely v. Washington* which states that the "statutory maximum" is not the longest term a defendant can receive under any circumstances, but is "the maximum sentence a judge may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant."[18] The jury did not make a finding that Taylor posed the greatest likelihood of recidivism, nor did he admit such a thing. Although we take no position at this time concerning whether the "deliberate cruelty" finding discussed in *Blakely* is comparable to findings under R.C. 2929.14 (C), such issues can be raised on remand.

{¶37} We affirm the judgment in part, but vacate the sentence and remand for resentencing.

APPENDIX – ASSIGNMENTS OF ERROR

{¶38} "I. THE TRIAL COURT ERRED WHEN IT PERMITTED THE STATE OF OHIO TO PRESENT IN-COURT IDENTIFICATION TESTIMONY OF OFFICER DANIEL FINN IN VIOLATION OF HIS FOURTH AMENDMENT AND DUE PROCESS RIGHTS, ALTHOUGH THE DEFENSE FILED A MOTION TO SUPPRESS IDENTIFICATION TESTIMONY PRIOR TO TRIAL AND HAD NO OPPORTUNITY TO CHALLENGE OR VOIR DIRE HIM.

{¶39} II. THE TRIAL COURT ERRED WHEN IT DENIED COUNSEL'S MOTION FOR MISTRIAL WHEN THE PROSECUTOR FAILED TO DISCLOSE TO

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[18](June 24, 2004), No. 02-1632, 72 U.S. L.W. 4546.

DEFENSE COUNSEL THAT OFFICER DANIEL FINN COULD MAKE AN IN-COURT IDENTIFICATION OF THE APPELLANT.

{¶40} THE TRIAL COURT ERRED WHEN IT PREVENTED THE APPELLANT FROM INTRODUCING INTO EVIDENCE A CERTIFIED COPY OF A TRAFFIC TICKET WHEN THE STATE STIPULATED TO ITS AUTHENTICITY.

{¶41} THE TRIAL COURT ERRED BY IMPOSING THE MAXIMUM SENTENCE ON APPELLANT WHEN EXPRESS STATUTORY FACTORS WERE NOT FOUND IN THE RECORD TO SUPPORT SUCH A SENTENCE."

It is ordered that appellant recover from appellee costs herein taxed.

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

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

JAMES J. SWEENEY, J., CONCURS (SEE SEPARATE CONCURRING OPINION)

MICHAEL J. CORRIGAN, A.J., CONCURS IN JUDGMENT ONLY IN PART AND DISSENTS IN PART (SEE SEPARATE OPINION)

JAMES J. SWEENEY, J., CONCURRING.

{¶42} I concur with the majority opinion but write separately to explain my position as to the resolution of the fourth assignment of error. I agree with the majority's decision to vacate the sentence and remand for resentencing in light of the United States Supreme Court's recent decision in *Blakely v. Washington* (June 24, 2004), NO. 02-1632, 72 U.S. L.W. 4546.

{¶43} In *Blakely*, the U.S. Supreme Court held that:

{¶44} "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, 153 L.Ed.2d 556, 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, 147 L.Ed.2d 435, 120 S.Ct.

2348]); *Harris v. United States*, 536 U.S. 545, 563, 153 L.Ed.2d 524, 122 S.Ct. 2406 (2002) (plurality opinion) (same); cf. *Apprendi*, supra at 488, 147 L.Ed.2d 435, 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.

{¶45} In this case, the court could only impose the maximum penalty by making specific judicial findings beyond those either determined by a jury or stipulated to by the defendant.[1] Ohio law simply does not allow the trial court to impose maximum sentences (or certain other aspects of sentencing) in its discretion.

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[1]The specific judicial findings being either that the offender committed the worst form of the offense or that he posed the greatest likelihood of committing future crimes. R.C. 2929.14(C). Although R.C. 2929.14(C) further allows for the imposition of maximum sentences "upon certain major drug offenders under division (D)(3) of this section, and upon certain repeat violent offenders in accordance with division (D)(2) of this section" that portion of the statute is not applicable in this case. See *State v. Comer*, 99 Ohio St.3d 463, 467-468, 2003-Ohio-4165. I do not believe that *Blakely* affects the trial court's ability to consider other facts relative to sentencing, including the offender's age and criminal record among other factors contained in R.C. 2929.12. Nonetheless, the law does not allow the court to impose the maximum sentence based upon such facts in the absence of the findings required by R.C. 2929.14(C).

Maximum sentences, consecutive sentences, and certain other sentences are reserved for offenders under certain and statutorily specified circumstances. Accordingly, we are required to review sentences de novo and not under the abuse of discretion standard. R.C. 2953.08. Thus, the maximum sentence is not within the "statutory range" of sentences that a trial court may impose in its sole discretion. Ibid. Consequently, I believe an argument can be made that Ohio's sentencing law, in some respects and applications, is susceptible to the same constitutional violations that the U.S. Supreme Court discussed in *Blakely*.

{¶46} I take no position on the balance of the majority's reasoning for vacating the sentence, which relates to such judicial findings or lack thereof, since the same may be moot.

MICHAEL J. CORRIGAN, A.J., CONCURRING IN JUDGMENT ONLY IN PART AND DISSENTING IN PART.

{¶47} I concur in judgment only as to the affirmance of assignments of error one, two and three. I respectfully dissent from the disposition of the fourth assignment of error as I would find that the court fully justified its decision to impose the maximum sentence.

I

{¶48} The court found that Taylor posed the greatest likelihood of reoffending, and it gave reasons in support of that finding based on Taylor's extensive criminal record, his

age (22 years-old), and lack of remorse. These findings and reasons fully complied with R.C. 2929.14(C). Hence, the court did not err by imposing the maximum sentence.[1]

{¶49} The majority commits its own error of appellate review by choosing to decide sua sponte the sentencing appeal on a constitutional issue that Taylor did not even raise to us. We can only decide a case on a constitutional issue "when absolutely necessary." See *State ex rel. Nationwide Mut. Ins. Co. v. Henson*, 96 Ohio St.3d 33, 2002-Ohio-2851, fn.2; *Mayer v. Bristow* (1999), 91 Ohio St.3d 3, 9. As judges, it is not our place to make arguments for appellants. The court articulated a fully independent and adequate basis for imposing the maximum sentence and that determination stands on its own. I would affirm the imposition of the maximum sentence.

II

{¶50} A response to the concurring opinion's citation to *Blakely v. Washington* (June 24, 2004), No. 02-1632, 72 U.S.L.W. 4546, is in order due to the judicial disarray following the opinion's release. The federal courts are struggling with its application of the federal sentencing guidelines and at least one Ohio appellate court has held that *Blakely* simply does not apply to those sentences that fall within the statutory range. See, e.g., *United States v. Penaranda* (C.A.2, 2004), Nos. 03-1055(L)& 03-1062(L); *United States v. Burrell* (W.D.Va. 2004), No. 2:03CR10095; *Patterson v. United States* (E.D.Mich. 2004), Nos. 03-CV-74948-DT & 96-CR-80160-DT-01; *Simpson v. United States* (C.A.7, 2004),

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[1] It bears noting that the sentencing factors set forth in R.C. 2929.14(B) need not be met in the conjunctive; that is, not all of them need be shown before the court can sentence. The statute is written in the disjunctive, so even if the court improperly used a lack of remorse as a factor in meting out a sentence, other available factors satisfied the requirements of the statute.

No. 04-2700; *United States v. Bahena* (C.A.7, 2004), No. 03-2901; *United States v. Traeger* (N.D.Ill. 2004), No. 04 C 2865; *State v. Bell*, Hamilton App. No. C-030726, 2004-Ohio-3621. While loathe to make broad pronouncements about *Blakely's* applicability to the Ohio sentencing statutes, the concurring opinion demonstrates that the issue is now joined; consequently, I weigh in with some initial thoughts.

{¶51} As the concurring opinion notes, *Blakely* holds that the maximum sentence is not that which is authorized by the statute for the particular degree of felony, but that which is permissible under the facts either admitted in a guilty plea or found by the trier of fact, even though that sentence might fall well-short of the statutory maximum.

{¶52} *Blakely* was decided under a state sentencing grid scheme like that employed by the federal courts. The state of Washington sentencing scheme creates grids which classify individual offenses within felony classes according to degrees of seriousness. For example, Blakely pleaded guilty to second-degree kidnapping with a firearm, an offense that is classified as a class B felony. Without more, the facts of the indictment which Blakely pleaded guilty to would only permit a prison sentence in the range of 49-53 months. The Supreme Court thus held that 53 months would the "maximum" sentence (despite the 10-year limit for class B felonies) because the only facts used to find Blakely guilty were those listed in the indictment. Once the trial court began to hear additional facts for purposes of increasing Blakely's sentence beyond that which would have been permissible under the facts pleaded to, the court violated Blakely's right to have a trial by jury.

{¶53} For the most part, *Blakely* has no applicability to Ohio sentencing statutes. This is because Ohio uses definite sentencing within minimum and maximum ranges for

particular classes of felonies as opposed to guidelines used in the state of Washington which set maximum ranges within particular types of offenses in a class of felonies. For example, in Ohio a first degree felony is punishable by three, four, five, six, seven, eight, nine or ten years in prison. Unlike Washington, Ohio's sentencing statutes do not prescribe a prison term based on a point system relating to the offender's conduct. The Ohio trial judge has the discretion to sentence anywhere within the range, subject to statutory findings for imposing the maximum sentence. In *Blakely*, the Supreme Court stated that:

{¶54} "First, the Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. Indeterminate sentencing does not do so. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal right to a lesser sentence -- and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is entitled to no more than a 10-year sentence -- and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury."

{¶55} To the extent that Ohio uses sentence enhancements, I tend to believe *Blakely* is not a problem. Nearly all sentence enhancements used in Ohio are charged in the indictment; for example, gun specifications, repeat violent offender or major drug offender specifications. That being the case, the offender would either plead guilty to the specification or the jury would make a factual finding on the specification. And it bears noting that sexual predator issues do not involve "punishment" for purposes of double jeopardy, so hearings on the predator classification would not be an issue. See *State v. Cook* (1998), 83 Ohio St.3d 404.

{¶56} Likewise, *Blakely* should not be an issue for consecutive sentencing. The federal courts have consistently held that the imposition of consecutive sentences does not raise issues under the Sixth Amendment as long as the individual sentence for each count does not exceed the maximum. See, e.g., *United States v. Feola* (C.A.2, 2001), 275 F.3d 216, 220 ("The aggregate sentence is imposed because appellant has committed two offenses, not because a statutory maximum for any one offense has been exceeded."). *Blakely* has not changed that precedent.

{¶57} As for the findings required to impose the maximum sentence in a given case, those findings do not entail additional fact-finding in the sense that would implicate *Blakely*. As previously noted, *Blakely* reaffirmed the sentencing judge's discretion to consider factors outside the evidence during sentencing: "Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal right to a lesser sentence -- and

that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." A finding that the offender committed the worst form of the offense would be based purely on the facts adduced at trial or pleaded to in the indictment. Recidivism factors like prior offenses need not be established by the jury, as the Supreme Court has specifically stated that prior convictions are not subject to the jury trial rule (there being obvious Fifth Amendment problems with the use of prior convictions when the accused does not testify).

{¶58} Consequently, I believe the concurring opinion's statement that "the court could only impose the maximum sentence by making judicial findings beyond those either determined or stipulated to by the defendant" to be only partially correct. As *Blakely* makes clear, the sentencing court may still rule on those facts that are deemed important to the exercise of sentencing discretion. Sometimes, those facts do not present themselves until sentencing; for example, the vindictive offender who verbally or physically assaults the court during sentencing may show a lack of remorse or that he is a danger to the public. Those are factors that may be considered when imposing the maximum sentence, and they do not have to be determined by a jury. Other admitted factors, like an offender's age, may be stipulated.

{¶59} The offender's age, extensive criminal record and lack of remorse as shown in this case are demonstrable facts that the judge could validly consider without violating *Blakely*. I would therefore find that the court did not err by imposing the maximum sentence.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc. App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E), unless a motion for reconsideration with supporting brief, per App.R. 26(A) is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).