[Cite as *State v. Washatka*, 2004-Ohio-5384.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 83679

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
	:	
-VS-	:	AND
	:	
GRAHAM WASHATKA	:	OPINION
	:	
Defendant-Appellant	:	

Date of Announcement of Decision: OCTOBER 7, 2004

Character of Proceeding: Criminal appeal from Court of Common Pleas Case No. CR-434592

Judgment: Sentence vacated; case remanded for resentencing.

Date of Journalization:

Appearances:

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JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant Graham Washatka ("defendant") appeals from the sentence imposed by the trial court on August 27, 2003. For the reasons that follow, we vacate defendant's sentence and remand for resentencing.

{¶ 2} Defendant and two others were indicted in a seven count indictment. Defendant was charged with possession of drugs, three counts of drug trafficking, possession of criminal tools, and vanadalism. Defendant pled guilty to one count of drug trafficking, a felony of the first degree, on July 14, 2003. On August 27, 2003, defendant appeared for sentencing. Defendant, aged 21 years, had no previous criminal record. The court imposed a five-year prison term with a term of post-release control. Defendant assigns one error for our review, which states:

{¶ 3} "I. The trial court erred in sentencing the defendant-appellant to more than the minimum prison sentence when he had not previously served a prison term."

{¶ 4} R.C. 2929.14(B) provides, in relevant part, as follows:

{¶ 5} "(B) Except as provided in division (C), (D)(1), (D)(2), (D)(3), or (G) of this section, in section 2907.02 of the Revised Code, or in Chapter 2925. of the Revised Code, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender, the court shall impose the shortest prison term authorized for the offense pursuant to division (A) of this section, unless one or more of the following applies:

{¶ 6} "(1) The offender was serving a prison term at the time of the offense, or the offender previously had served a prison term.

{¶ 7} "(2) The 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 or others."

{¶ 8} During the pendency of this appeal, the United States Supreme Court issued its decision in *Blakely v. Washington* (June 24, 2004), No. 02-1632, 72 U.S. L.W. 4546. Since defendant has challenged his sentence claiming that it is contrary to law, we believe it is necessary to consider the effect of *Blakely* on defendant's sentence in this case.

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

{¶ 10} "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.

{¶ 11} Under *Blakely*, the maximum sentence that the law allows the court to impose on offenders who have not served prison time is the shortest term. Ibid. In order to deviate from the shortest term, the court would have to make findings of fact that were neither determined by a

jury nor agreed to by the defendant, namely 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 or others. R.C. 2929.14(B)(2). Defendant did not stipulate to the findings or otherwise waive his constitutional right to have these facts determined by a jury. Therefore, defendant's sole assignment of error is sustained.

{¶ 12} Even if the trial court should determine that *Blakely* has no effect on Ohio's sentencing law, we find that the record does not clearly and convincingly support the sentence the court imposed.

{¶ 13} The trial court need not give its reasons for imposing more than the minimum authorized sentence. *State v. Comer*, 99 Ohio St.3d 464, 2003-Ohio-4165. However, the statutory findings the court is required to make must be clearly and convincingly supported by the record. R.C. 2953.08(G).

{¶ 14} The trial court stated its belief that the minimum sentence would demean the seriousness of the offense. The trial court felt defendant displayed a "pattern of drug abuse that's related to this offense" and that he "failed to respond favorably to *** a Court sanction which allowed him to participate with the cooperation of the police department." The facts of the instant offense do not in and of themselves display a pattern of drug abuse. Nor was the defendant's agreement to cooperate with police in between his plea and sentence a "court imposed sanction." In any case, the record shows that defendant did cooperate with police even though the information he provided did not result in any arrests.

{¶ 15} The trial court found it hard to believe that defendant has not had any criminal involvement in the past. Nonetheless, the record shows that defendant has no criminal history whatsoever. Further, the trial court said it considered the "sophisticated manner in which

[defendant] operated" when it considered the lack of a criminal history. Defendant was attending a concert in Cleveland when he was arrested in a hotel room from which chocolates containing "psychedelic mushrooms" were seized. This is not indicative of a sophisticated drug trafficking operation that would justify deviating from the minimum sentence. Lastly, the trial court found that defendant lacked remorse despite defendant's expression of remorse on the record. Defendant said he realized he made a "big mistake"; that he had led a law-abiding life previously and has turned around his life since his arrest. Defendant's family traveled to Cleveland to attend sentencing and defendant claims he has learned a hard lesson from this experience. The record does not clearly and convincingly support the trial court's findings and, therefore, the trial court should not have imposed more than the minimum sentence.

{¶ 16} Defendant's sole assignment of error is sustained.

{¶ 17} Sentence vacated; case remanded for resentencing.

It is ordered that appellant recover of appellee his 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 Court of Common Pleas to carry this judgment into execution. Case remanded to the trial court for resentencing.

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

KENNETH A. ROCCO, J., CONCURS
(See attached concurring opinion)

MICHAEL J. CORRIGAN, A.J., DISSENTS

(See attached dissenting opinion)

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. 112, Section 2(A)(1).

KENNETH A. ROCCO, J., CONCURRING:

{¶ 18} Based upon some of the statements made in the dissenting opinion, I write separately in order to emphasize the facts which are pertinent to my decision to join the majority opinion's disposition of this case.

{¶ 19} The dissent notes that appellant "acknowledged" the prison term he could receive. This deserves further elucidation. During the trial court's Crim.R. 11(C) colloquy with appellant, it informed him that the offense was "possibly punishable from three to ten years***," with "no reduction" for "post-release control." However, the trial court subsequently equivocated on the foregoing. It went on also to comment on the portion of the plea agreement that provided appellant would cooperate with law enforcement; the trial court stated to appellant that "if he [did]n't cooperate, that was fine with [her], but [he would] be going to jail if he [did]n't." (Emphasis added.)

{¶ 20} From this, appellant could have received a mistaken impression at his plea hearing, viz., that the imposition of a term of imprisonment was discretionary with the court. Pursuant to R.C. 2925.03(C)(1)(e), however, appellant's offense involved a mandatory prison term.

{¶ 21} Appellant does not seek to invalidate his plea; nevertheless, the trial court's comments at appellant's plea hearing trouble me, because they may have led him to believe he might not be "going to prison" if he cooperated with the police. Such an impression would have been reinforced when the trial court indicated appellant's sentencing would be continued pending a police report on his cooperation and the probation department's preparation of a pre-sentence report.

{¶ 22} In light of the seriousness of the charge, without the qualification given by the trial court, appellant might have declined to enter the plea in the first place. The transcript of the plea hearing suggests appellant's plea is invalid based upon the analysis set forth in *State v. Corbin* (2001), 141 Ohio App.3d 381. Indeed, I would be inclined to vacate his plea if one of my colleagues would join me.

{¶ 23} My decision to join the majority's disposition of this appeal further, and similarly, is influenced by what occurred at appellant's sentencing hearing, which was held a little over a month later. The trial court was provided with a copy of a letter received by the prosecutor's office that indicated although appellant had attempted to arrange drug purchases, none had been completed. Appellant did not seem to be responsible for the failures; nevertheless, the trial court decided to overlook those indications. Instead, the trial court chose to view the poor results as due to appellant's lack of cooperation and his "own choosing."

{¶ 24} Based upon this narrow view, and as the majority opinion recounts, the trial court proceeded to read numerous additional facts into the circumstances that surrounded the incident: the amount of drugs found in the two rooms showed appellant's "sophistication" in trafficking and his luck in avoiding the justice system. This led to the conclusion appellant's offense was "one of the worst offenses of its kind."

{¶ 25} In turn, considering the "amount of drugs that were involved," together with the potential "impact" of those drugs on "the community," the court could not decide to grant "a community control sanction, which would allow him to continue to be involved in the drug community;" indeed, appellant had "no remorse" and, thus, "incarceration is the appropriate sanction." (Emphasis added.) Not satisfied with the foregoing, the court continued in this vein, stating again its opinion appellant demonstrated a "sophisticated manner" in committing the offense.

{¶ 26} Only after stacking, one on top of the other, these suppositions which have no factual basis in the record did the trial court "find" the minimum sentence under the circumstances "would demean the seriousness of the offense that was involved here," so "a more stringent sentence is warranted."

{¶ 27} Clearly, R.C. 2929.14(B) did not require the trial court to impose the minimum term upon appellant if it made a finding one of the two factors applied. *State v. Edmonson* (1999), 86 Ohio St.3d 324. However, the trial court must also consider the other applicable sentencing statutes as well. See, R.C. 2929.11, 2929.12. The transcript indicates the trial court failed in its statutory duties when it determined appellant's offense deserved the penalty imposed. *State v. Huntley*, Hocking App. No. 02CA15, 2002-Ohio-6806.

{¶ 28} All the record contains is some indication appellant and his co-defendants were "partying" and in the process may have been providing drugs to friends and/or their acquaintances. Without proof that appellant actually either was selling or preparing to sell the quantity of drugs he and his co-defendants had in their motel rooms to the general public, the trial court's finding that appellant committed the "worst form" of the offense totally is unsupported.

{¶ 29} Therefore, especially for the foregoing reasons, I join the majority opinion in its disposition of this appeal.

MICHAEL J. CORRIGAN, A.J., DISSENTING:

{¶ 30} I respectfully dissent from the majority's decision to vacate Washatka's sentence on grounds that the record does not adequately justify the court's findings for imposing more than the minimum. When choosing to impose more than the minimum sentence, the court must find 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 or others. The court does not have to state reasons for making the finding, but need only state the finding. See *State v. Edmonson* (1999), 86 Ohio St.3d 324, 1999-Ohio-110, syllabus.

{¶ 31} As the majority concedes, the court stated its belief that a minimum sentence would demean the seriousness of the offense. Having made that finding, the court did not need to go further and state reasons. The majority's discussion of "reasons" supporting that finding is irrelevant and suggests to me that it is merely substituting its judgment for that of the court. To underscore this point, the majority concludes that the record is "not indicative of a sophisticated drug trafficking operation that would justify deviating from the minimum sentence." However, the majority omits that Washatka pleaded guilty to trafficking in an amount between 50 and 100 times the bulk amount. It also fails to mention the court's finding that Washatka rented two hotel rooms in which he "stashed" his drugs. Even though the court had no obligation to state reasons in support of its findings, the majority's disregard of these facts is troubling since those facts suggest that Washatka was more than just a casual drug dealer.

{¶ 32} I also believe that the majority makes an improvident citation to *Blakely v. Washington* (2004), 159 L.Ed.2d 403, 124 S.Ct. 2531. Its statement that "even if the trial court should determine that *Blakely* has no effect on Ohio's sentencing law" implies that the court, not the court of appeals, has to make the determination of applicability. Regardless, I believe that by pleading guilty to a first degree felony, Washatka knew that he would be subject to a sentence in the range of three to ten years, even if he was a first time offender. *Blakely* clearly states that:

{¶ 33} "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." 124 S.Ct. at 2540.

{¶ 34} When pleading guilty, Washatka acknowledged that he could receive a prison term of "3 to 10 years in yearly increments." In other words, Washatka knew that by pleading guilty, he could receive up to 10 years in prison. Given these facts, *Blakely* is wholly inapplicable.