[Cite as *State v. Moore*, 2005-Ohio-4164.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84911

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
	:	and
vs.	:	OPINION
	:	
RICHARD MOORE,	:	
	:	
Defendant-Appellant	:	
DATE OF ANNOUNCEMENT OF DECISION	:	AUGUST 11, 2005
CHARACTER OF PROCEEDING:	:	Criminal appeal from
	:	Common Pleas Court
	:	Case No. CR-444947
JUDGMENT	:	AFFIRMED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

For plaintiff-appellee:

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MICHAEL J. CORRIGAN, J.:

{¶ 1} The sole issue in this appeal is whether the court erred by imposing consecutive sentences upon defendant Richard Moore. The facts showed that Moore brutally and repeatedly raped his live-in girlfriend, threatening to kill her if she called for help. The court imposed a felonious assault sentence consecutive to the rape sentence, finding that "to do otherwise would demean the seriousness of these offenses and not adequately protect the public, particularly in view of the prior conduct in this defendant's life."

{¶ 2} The court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public and, as applicable in this case, the offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender. R.C. 2929.14(E)(4).

{¶ 3} The court stated:

{¶ 4} "The kidnapping and rape sentences will run concurrent with each other. The felonious assault conviction will run consecutive. To do otherwise would demean the seriousness of these offenses and not adequately protect the public, particularly in view of the prior conduct in this defendant's life."

{¶ 5} The court made a finding that consecutive sentences were necessary to protect the public from future crime and it clearly went through Moore's lengthy criminal history. So two of the three necessary elements were established on the record.

{¶ 6} The court did not, however, make an express finding that consecutive sentences were not disproportionate to the seriousness of Moore's conduct. Nevertheless, we believe that finding was implicit as the court noted it was "well aware of the testimony in this case, including the period of prolonged and relentless beating of the victim with a broom handle and later an ice bucket, an evening of repeated violent sexual conduct with the victim." The court went on to note that Moore caused "serious physical, emotional, and psychological harm to the victim."

{¶ 7} We do not require the court to use "magic words" for imposing consecutive sentences, but it must be clear from the context that the court's statements were intended to encompass the relevant provisions of the sentencing statutes. *State v. White* (1999), 135 Ohio App.3d 481, 486. Certainly, the court's statement referring to the severity and length of the beating administered in this case, along with the impact those offenses had on the victim, could be construed as a statement of the court's belief that the sentence imposed was proportionate to the harm caused to the victim.

{¶ 8} In reaching this conclusion, we believe it important that the sentencing judge presided over a trial on the matter and was

fully versed on the facts of the offense. Unlike a plea proceeding where the defendant simply admits to the bare facts contained in an indictment, a trial exposes the facts in greater detail, and the court's ability to see the witnesses, particularly the victim, gives it a more fully formed basis for making sentencing decisions. Thus, we have no difficulty finding that the court's reference to the specific facts of the case could be applied as a finding relating to proportionality.

{¶ 9} This is not to say that the rule on the use of "magic" words does not extend to plea proceedings. Under appropriate circumstances, the court may base its sentencing decisions on facts divulged in presentence investigation reports that have been specifically made a part of the record. In such a case, a similar reference to facts contained in a presentence report (or facts properly brought out in any other light) could be sufficient to establish a required factor for sentencing. The exact parameters will, of course, depend on the unique circumstances of the case.

{¶ 10} We therefore conclude that the court's findings satisfied the requirements of R.C. 2929.14(E)(4). The assigned error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its 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 Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

MICHAEL J. CORRIGAN
JUDGE

CHRISTINE T. McMONAGLE, J., CONCURS.

DIANE KARPINSKI, P.J., CONCURS WITH SEPARATE 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. II, Section 2(A)(1).

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 84911

STATE OF OHIO	:	
	:	
	:	
Plaintiff-appellee	:	CONCURRING OPINION
	:	
v.	:	
	:	
RICHARD MOORE	:	
	:	
Defendant-appellant	:	

DATE: AUGUST 11, 2005

KARPINSKI, P.J., CONCURRING:

{¶ 11} I concur with the majority opinion. I write separately, however, to address an issue arising from *Blakely v. Washington* (2004), _____ U.S. _____, 124 S.Ct. 2531, 159 L.Ed.3d 403. Even though defendant did not raise *Blakely* in the court below, I believe this court should, sua sponte, apply it to the sentencing issues raised herein. The U.S. Supreme Court "has established precedent that when a decision of its court results in a new rule, that rule applies to all criminal cases, both state and federal, still pending on direct review." *State v. Duffield*, Cuyahoga App. No. 84205, 2005-Ohio-96, at ¶36, citing *Schriro v. Summerlin*, 159 L.Ed.2d 442, 124 S.Ct. 2519, 2004 U.S. LEXIS 4574.

{¶ 12} Under *Blakely*, defendant could argue that in running his sentences consecutive to one another, the trial court violated his Sixth Amendment rights.

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

> 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,* [*v. Arizona*, 536 U.S. 584,] 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* [*v. New Jersey*, 530 U.S. 466,] 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," (citation omitted) and the judge exceeds his proper authority.

(Emphasis in original.) *Blakely,* supra, at 2537.

{¶ 14} Consecutive sentences are governed by R.C. 2929.14(E)(4), which, in relevant part, provides:

> The court must find that consecutive sentences are: (1) necessary to protect the public from future crime or to punish the offender; (2) not disproportionate to the seriousness of the defendant's conduct; and (3) not disproportionate to the danger the defendant poses to the public. In addition to these three findings, the trial court must also find one of the following: (1) the defendant committed the offenses while awaiting trial or sentencing on another charge; (2) the harm caused was so great that no single sentence would suffice to reflect the seriousness of defendant's conduct; or (3) the defendant's criminal history is so egregious that

consecutive sentences are needed to protect the public. R.C. 2929.14(E)(4)(a)-(c).

{¶ 15} Under *Blakely*, such judicial findings, arguably, violate defendant's Sixth Amendment right to trial by jury.

{¶ 16} This court, however, recently addressed this argument in its en banc decision of *State v. Lett* (May 31, 2005), Cuyahoga App. Nos. 84707 and 84729, and held that imposing consecutive sentences under R.C. 2929.14(E) does not implicate the Sixth Amendment as construed in *Blakely*.

{¶ 17} In conformity with this court's en banc decision in *Lett*, I would acknowledge that its application in the case at bar would result in finding that defendant's consecutive prison terms do not violate *Blakely*. I therefore would proceed to the analysis the majority has provided, but I do so reluctantly because I believe the en banc procedure this court used in *Lett* is unconstitutional and dissented for that reason, as well as on the merits. With that reservation, I thus concur with the majority opinion in its decision to affirm the trial court.