

[Cite as *State v. Miller*, 2005-Ohio-4583.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
No. 85564

STATE OF OHIO, :
 :
Plaintiff-Appellee : JOURNAL ENTRY
 :
vs. : AND
 :
CHRISTOPHER MILLER, : OPINION
 :
Defendant-Appellant :
 :

DATE OF ANNOUNCEMENT
OF DECISION : September 1, 2005

CHARACTER OF PROCEEDING : Criminal appeal from
 : Common Pleas Court
 : Case No. CR-408458

JUDGMENT : AFFIRMED

DATE OF JOURNALIZATION :

APPEARANCES:

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SEAN C. GALLAGHER, P.J.:

{¶1} Christopher Miller appeals the imposition of maximum, consecutive sentences following this court's remand for resentencing. He claims he was denied due process by an alleged punishment for lack of remorse, by the trial court's imposition of more than the minimum sentence and by the failure to properly apply *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531. We affirm.

{¶2} As a preliminary matter, we note that this is Miller's third appeal from his original conviction. This court summarized the facts of this case in Miller's direct appeal in Case No. 80999 and stated:

"Two men raped and beat Lisa Bower after forcing their way into her apartment. They robbed her of a cell phone, her car charger, and her purse. Cleveland Heights police charged Miller as a result of their investigation of records from Bower's stolen cell phone. The investigation led Detective Schmitt to Nicole Head, who had received several phone calls made from the stolen cell phone by Miller. From a photo array compiled by Detective Schmitt, Bower identified Miller as one of her attackers.

"Although the scientific evidence confirmed a presence of semen, the DNA did not match Miller's. Further, in his statements to police, Miller admitted to placing the cell phone in a sewer near his home when he learned the police were investigating him in connection with this incident."

{¶3} In June 2001, Miller was indicated on ten counts: count one charged intimidation, in violation of R.C. 2921.04, with a three-year firearm specification under R.C. 2941.145; count two charged possession of a weapon under disability, in violation of

R.C. 2923.13; count three charged aggravated burglary, in violation of R.C. 2911.11, with a three-year firearm specification; count four charged kidnapping, in violation of R.C. 2905.01, with a three-year firearm specification, a sexual motivation specification, and a sexually violent predator specification under R.C. 2971.01(I); count five charged aggravated robbery, in violation of R.C. 2911.01, with a three-year firearm specification; count six charged felonious assault, in violation of R.C. 2903.11, with a firearm specification; and counts seven, eight, nine and ten charged rape, in violation of R.C. 2907.02, and included three-year firearm specifications and sexually violent predator specifications.

{¶4} Following trial in January 2002, Miller was found guilty on count one, minus the firearm specification; guilty on counts three, four, five, six, nine and ten, all minus firearm specifications; and found not guilty on counts two, seven, and eight. He was sentenced to two years on count one, and ten years on count three, sentence to run consecutive to count one. He received ten years on count four, which was merged with counts nine and ten, and ten years on count five, which was merged with count three. He additionally received eight years on count six, sentence to run concurrent with counts three and one. He received ten years each on counts nine and ten, sentences to run consecutive with all other counts for an aggregate sentence of forty years.

{¶5} Miller appealed his conviction and sentence to this court

in fifteen assignments of error, in Case No. 80999. The court affirmed his conviction, but remanded for resentencing, finding error in the imposition of consecutive sentences without a specific finding regarding proportionality. Upon remand, Miller received the same forty-year sentence with additional findings by the trial court. He appeals the imposition of this sentence in the assignments of error set forth in the appendix to this opinion.¹

{¶6} In his first assignment of error, Miller claims his due process rights were violated when he was punished for not showing remorse or accepting responsibility. He relies on *Mitchell v. United States* (1999), 526 U.S. 314, 119 S.Ct. 1307, for the proposition that a trial court may not draw an adverse inference from a defendant's silence. He additionally cites *In re Amanda W.* (1997), 124 Ohio App.3d 136, where the court found error in requiring a father to admit that he abused his child in order to be reunited with that child. Both cases, however, involved guilty pleas and, therefore, the cases were not tried to a jury as was Miller's.

{¶7} Moreover, under R.C. 2929.12(D), a trial court shall consider the following factors as indicative of a defendant's likelihood of committing crimes in the future, and states in

¹Although we are aware that Miller continues to profess his innocence, this court is confined to a review of the sentence imposed and may not address the merits of the case. As Miller has filed a writ of habeas corpus in the Northern District of Ohio, being case number 04-cv-01965-AA, any appeal of the merits is properly brought before that court.

pertinent part:

"(D) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is likely to commit future crimes:"(1) At the time of committing the offense, the offender was under release from confinement before trial or sentencing, * * * or under post-release control * * * or any other provision of the Revised Code for an earlier offense or had been unfavorably terminated from post-release control for a prior offense * * *."(2) The offender previously was adjudicated a delinquent child * * * or the offender has a history of criminal convictions."(3) The offender has not been rehabilitated to a satisfactory degree after previously being adjudicated a delinquent child * * * or the offender has not responded favorably to sanctions previously imposed for criminal convictions."(4) The offender has demonstrated a pattern of drug or alcohol abuse that is related to the offense, and the offender refuses to acknowledge that the offender has demonstrated that pattern, or the offender refuses treatment for the drug or alcohol abuse."(5) The offender shows no genuine remorse for the offense."

{¶8} The statute clearly requires a court to consider a defendant's lack of remorse, and the court is permitted to consider any factor that is relevant to achieving the purposes and principles of felony sentencing. (Emphasis added.) See, *State v. Brown* (May 15, 2000), Jefferson App. No. 97-JE-36; R.C. 2929.12(A).

{¶9} While we recognize Miller maintains he is not guilty of the offense, that claim does not preclude the trial court from considering a lack of remorse in light of the jury verdict. The court therefore finds that the trial court did not err in considering any lack of remorse prior to imposing sentence. Miller's first assignment of error lacks merit.

{¶10} In his second and third assignments of error, Miller claims error first in the court's failure to apply the mandates of

Blakely v. Washington, supra, when applying consecutive, and on some charges, maximum, sentences. He additionally claims error in the overall imposition of such sentences.

{¶11} Miller's argument that his maximum sentence violates *Blakely* has been addressed in this court's en banc decision of *State v. Lett*, 161 Ohio App.3d 274, 2005-Ohio-2665. In *Lett*,² this court held that R.C. 2929.14(C) and (E), which govern the imposition of maximum and consecutive sentences, do not implicate the Sixth Amendment as construed in *Blakely*. Accordingly, in conformity with that opinion, we reject Miller's contentions and overrule his second assignment of error.

{¶12} In Miller's third assignment of error, he claims that his due process rights were violated when the trial court imposed more than the minimum sentence when there was no evidence that he had ever served a prior prison term. He additionally asserts that the trial court's mere recitation of the statutory language contained in R.C. 2929.14 was insufficient to impose more than the minimum sentence.³

²Although this writer dissented regarding the court's decision not to find *Blakely* and *United States v. Booker* (2005), 125 S.Ct. 738, applicable, I nevertheless am bound by the majority en banc decision. See my dissent in *State v. Lett* (2005), 161 Ohio App.3d 274, 2005-Ohio-2665.

³In Miller's original direct appeal, he also claimed error in the imposition of maximum, consecutive sentences. This court found that the trial court properly sentenced Miller to the maximum term of imprisonment, but we vacated the sentence and remanded the case due to the court's failure to state that the sentence was not disproportionate to the seriousness of the conduct. In his latest appeal, Miller again claims error in the imposition of maximum

{¶13} Although he erroneously claims to have never served a prison term, Miller has in fact served two prior terms. In CR-94-316782-A, Miller pleaded guilty to drug trafficking and served a one-year prison term. In CR-97-351327, Miller pleaded guilty to possession of drugs and again served a one-year prison term. Therefore, any suggestion that the lack of a prior prison record entitled him to the presumption of the minimum sentence is unfounded.

{¶14} With regard to the court's recitation of the factors contained in R.C. 2929.14(B), Miller is correct that mere recitation alone is insufficient as the trial court is required to cite its reasons on the record in accord with R.C. 2929.19(B)(2)(c). However, the record reflects that prior to imposing sentence, the trial court outlined its rationale for imposing its sentence. The court found that the sentence was necessary to protect the public, that the punishment was a necessary and appropriate punishment for Miller, and that the harm was so great and unusual that a single prison term did not adequately reflect the seriousness of the conduct. (Tr. at 11.) The court then noted the factors utilized in reaching this conclusion, which included the following: the planning and precalculation involved, the fact that Miller laid in wait for the victim, the coordination with another individual to bring about the

sentences.

crime, and the fact that Miller caused emotional and physical harm to the victim and showed no remorse. (Tr. at 11-12.) The court then found that the use of terror was unnecessary, that the crime was of a sexual and violent nature, that Miller committed the worst forms of the offenses of both kidnapping and rape, that his conduct was outrageous, and that he preyed on an innocent victim. (Tr. at 12.) Finally, and before pronouncing sentence, the court found that the sentence was not disproportionate to the crime. (Tr. at 12.)

{¶15} It is clear from the record and the court's recitation of both the statutory factors for imposing more than the minimum sentence and the supporting rationale, that Miller was not deprived of his due process rights when more than the minimum sentence was imposed.

{¶16} Therefore, finding no error in the imposition of the sentence, and finding *Blakely* inapplicable, we find that Miller's second and third assignments of error lack merit.

{¶17} The judgment of the trial court is affirmed.

It is ordered that appellee recover of appellant 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 Cuyahoga County Common Pleas Court 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.

SEAN C. GALLAGHER
PRESIDING JUDGE

ANTHONY O. CALABRESE JR., J., And

MICHAEL J. CORRIGAN, J., CONCUR

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).

APPENDIX

ASSIGNMENTS OF ERROR

"I. DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN HE WAS PUNISHED FOR NOT SHOWING REMORSE OR ACCEPTING RESPONSIBILITY. (TR. 9, 12.)

II. DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT FAILED TO APPLY THE PRONOUNCEMENT IN *BLAKELY V. WASHINGTON* 124 S.CT.2531 (2004) (TR 3-4, 10, 11).

III. DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN HE WAS SENTENCED TO MORE THAN A MINIMUM SENTENCE. (TR.5.)"

Keywords:

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