[Cite as *State v. Jenkins*, 2005-Ohio-11.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C. A. No. 22008
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
ALICE M. JENKINS	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 03 05 1336(A)

DECISION AND JOURNAL ENTRY

Dated: January 5, 2005

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

SLABY, Judge.

{¶1} Defendant, Alice Jenkins, appeals from the judgment of the Summit County Court of Common Pleas which found her guilty of thirty separate criminal counts and sentenced her to an aggregate of thirty years in prison. This Court affirms.

{¶2} On May 23, 2003, the Summit County Grand Jury indicted Defendant with thirty separate criminal charges, the majority related to injurious acts done by Defendant and her co-defendant, Mary Rowles, to Defendant's six minor children.

The charges included five counts of kidnapping, in violation of R.C. 2905.01(A)(3), five counts of felonious assault, in violation of R.C. 2903.11(A)(1), six counts of endangering children, a felony of the second degree in violation of R.C. 2919.22(A), five counts of endangering children, a felony of the third degree, in violation of R.C. 2919.22(B)(2), five counts of permitting child abuse, in violation of R.C. 2903.15(A), three counts of corrupting another with drugs, in violation of R.C. 2925.02(A)(4), and one count of possession of marijuana, in violation of R.C. 2925.11(A). Defendant pleaded guilty to all thirty counts on October 20, 2003.

{¶3} Shortly after she entered her plea, Defendant discovered the existence of a medical condition which might provide some defense to the charges, and she filed a motion to withdraw her guilty plea in November 2003. On December 23, 2003, the morning of the hearing on her motion, Defendant's original medical expert called the court and refused to participate in the case in any manner. Defendant, therefore, presented no evidence at the hearing tending to show whether the alleged medical condition of rumination provided any defense to the charges, and the trial court gave Defendant one week, over the Christmas holiday, in which to gather and present evidence supporting the defense. When Defendant failed to do so, the trial court denied her motion to withdraw her plea, and sentenced her to an aggregate of thirty years in prison. Defendant timely appealed, raising two assignments of error for this Court's review.

ASSIGNMENT OF ERROR I

> "The trial court erred when it denied [Defendant's] pre-sentence motion to withdraw her guilty plea."

{¶4} In her first assignment of error, Defendant argues that the trial court erred by denying her pre-sentence motion to withdraw her guilty plea. She asserts that the ineffective assistance of her counsel led her to enter a guilty plea which was not made knowingly, intelligently, and voluntarily. She further alleges that the trial court acted in a "patently unfair" manner at the hearing on the motion to withdraw her plea because the court did not provide her an opportunity to subpoena either the original medical expert or a new expert who had recently evaluated the medical records in this case. This Court disagrees.

{¶5} Crim.R. 32.1 permits a defendant to file a presentence motion to withdraw her plea. Although "a presentence motion to withdraw a guilty plea should be freely and liberally granted," a defendant has no absolute right to withdraw a guilty plea before sentencing. *State v. Xie* (1992), 62 Ohio St.3d 521, 527-28. Instead, a defendant bears the burden of providing a reasonable and legitimate reason for withdrawing her guilty plea. *State v. Van Dyke*, 9th Dist. No. 02CA008204, 2003-Ohio-4788, at ¶10. This Court reviews the trial court's ruling on a motion to withdraw a guilty plea under an abuse of discretion standard. *Xie*, 62 Ohio St.3d at 528. An abuse of discretion implies more than a mere error of judgment or law, but instead demonstrates "perversity of will, passion, prejudice,

partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶6} A trial court does not abuse its discretion in denying a motion to withdraw a plea where three elements are met. *State v. Robinson*, 9th Dist. No. 21583, 2004-Ohio-963, at ¶30. First, the defendant must have been represented by competent counsel; second the court must provide the defendant a full Crim.R. 11 hearing prior to accepting the original guilty plea; and, finally, the court must provide a full hearing to the defendant, considering all the arguments in favor of withdrawal of his plea, before rendering a decision on the motion. Id. Defendant challenges all three elements, though we will consider the third element first.

{¶7} Defendant contends that the trial court failed to give her a full hearing on the merits of her motion to vacate and properly consider all arguments supporting that motion. She further argues that, given time, she could provide evidence tending to support the medical defense of rumination[1] based upon references existing in the medical records and expert testimony. More than a month elapsed between the time defense counsel first learned of the possible rumination defense and the hearing on Defendant's motion to withdraw her plea. Yet, even after having a month in which to gather evidence regarding the alleged

[1] Rumination is not technically a defense to the charges. It is only a possible manner in which to rebut the cause of harm suffered by the children in certain cases. This Court, however, will refer to it as a defense merely for ease of discussion.

defense, Defendant failed to offer even a scintilla of evidence supporting a finding that the children suffered from rumination. The defense expert refused to participate in the case, and defense counsel offered only his base assertion that an expert had, at one point in time, opined that the children suffered from rumination. Defense counsel's statement, however, is neither evidence nor a proper proffer of evidence under Evid.R. 103(A)(2). One simply cannot proffer statements as to testimony which will no longer be given. A proffer is only proper where the statements elucidate testimony that would actually be given by a specific individual. See Evid.R. 103(A)(2). Stripped of counsel's assertions as to the alleged defense of rumination, Defendant offered no evidence supporting her defense. In fact, the only testimony remaining in the record simply shows that the medical records recorded no diagnoses of rumination for any of the children.

{¶8} Given the last minute nature of the expert's refusal to participate in the case, and the extremely limited nature of other evidence regarding rumination before the court, the trial court granted Defendant an additional week, albeit over the Christmas holiday, in which to present to the court with "an affidavit or *** an opinion from a doctor based upon a reasonable degree of medical certainty[.]" The trial judge explained that she "want[ed] to be cognizant of the defense, and *** that [was] why [she] was giving the defense additional time to present this additional information[.]" Defendant provided neither the requested affidavit nor testimony, and failed to offer any other evidence to the trial court regarding

rumination either during that week or any time thereafter. Defendant's contention that the trial court failed to grant her a full hearing on her alleged defense and motion to withdraw her plea is simply untrue: the trial court held a full hearing and even extended the timeframe in which Defendant could continue to offer evidence. Defendant simply failed to offer any.

{¶9} Defendant's additional assertions related to the competency of her counsel and the propriety of the court's Crim.R. 11 hearing are intermingled: she claims that her counsel's failure to discover and explore the possible application of the defense of rumination rendered her counsel ineffective and her plea improper. As already noted, Defendant failed to offer any evidence supporting her alleged defense. As the record does not give any indication that the defense applies in this case, counsel's failure to consider an unsupportable, speculative defense cannot be ineffective assistance. See *State v. Stalnaker*, 9th Dist. No. 21731, 2004-Ohio-1236, at ¶8-9. Further, counsel's failure to notify Defendant of an unsupported and inapplicable defense, prior to the trial court's Crim.R. 11 hearing, does not render her plea improper. Consideration of an unsupported defense would not have opened another avenue of action to Defendant. As such, in entering her plea, she made a "voluntary and intelligent choice among the alternative courses of action open to [her]." *North Carolina v. Alford* (1970), 400 U.S. 25, 31, 27 L.Ed.2d 162.

{¶10} Defendant has failed to offer even a scintilla of evidence, beyond the speculation of her counsel, supporting her alleged defense. Regardless of the court's extension of time in which Defendant had to offer evidence, she failed to meet her burden of proof to show that she had a "reasonable and legitimate reason" to request withdrawal of her guilty plea. Further, her counsel could not be ineffective, nor her plea improper, based upon counsel's failure to discover and explore a demonstrably unsupportable defense. Accordingly, the trial court did not abuse its discretion in denying Defendant's motion to withdraw her guilty plea. We overrule Defendant's first assignment of error.

ASSIGNMENT OF ERROR II

> "The trial court erred in sentencing [Defendant] to more than the 'statutory maximum' sentence. The court improperly imposed consecutive prison time and more than the maximum time for [Defendant], a first time offender."

{¶11} In her second assignment of error, Defendant argues that the trial court erred by sentencing her to more-than-minimum, consecutive sentences in light of the mandates of *Blakely v. Washington* (2004), 124 S.Ct. 2531, 159 L.Ed.2d 403. She opines that the trial court made impermissible findings of fact which unconstitutionally elevated her sentence beyond the statutory maximum. We disagree.

{¶12} In *Blakely*, Ralph Howard Blakely, Jr., pleaded guilty to kidnapping his estranged wife and brandishing a gun during the kidnapping. Washington law dictated a presumptive sentencing range of 49-53 months based upon Blakely's

plea. The Washington State trial court made a statutory finding that Blakely acted with "deliberate cruelty" and enhanced the sentence to 90 months. Eventually, Blakely's appeal reached the United States Supreme Court which reversed based on a compound error by the trial court. First, the *Blakely* court held that the trial court violated Blakely's Sixth Amendment right to a jury trial by making the factual finding of "deliberate cruelty." "'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted *to a jury* and proved beyond a reasonable doubt.'" (Emphasis added.) *Blakely*, 124 S.Ct. at 2536, quoting *Apprendi v. New Jersey* (2000), 530 U.S. 466, 490, 147 L.Ed.2d 435. The *Blakely* Court further found that the trial court increased Blakely's sentence beyond the statutory maximum based on this factual finding of "deliberate cruelty."

> "[T]he '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. 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." (Emphasis and internal citations omitted.) *Blakely*, 124 S. Ct. at 2537.

As the trial court could not impose a sentence greater than 53 months in the absence of the "deliberate cruelty" factual finding, the finding was critical and Blakely's sentence violated the Sixth Amendment of the United States Constitution. Id.

{¶13} Under Ohio law, in order to impose a greater-than-minimum sentence on a first time offender a trial court must expressly find 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, in the case at bar, asserts that this requisite finding equates to an improper finding of fact under *Blakely*, which violates her Sixth Amendment right to a jury trial. We disagree.

{¶14} Foremost, the Washington State sentencing law and surrounding circumstances as considered in *Blakely* are distinguishable from those in the present case. *Blakely* is expressly inapplicable to indeterminate sentencing schemes. *Blakely*, 124 S.Ct. at 2540 (finding that indeterminate sentencing does not "infringe[] on the province of the jury" in violation of the Sixth Amendment). See, also, *State v. Berry*, 12th Dist. No. CA2003-02-053, 2004-Ohio-6027, at ¶38 ("[t]he majority in *Blakely* made it clear that their decision did not apply to states with indeterminate sentencing schemes").

{¶15} In addition, the determinate sentencing scheme in Washington is unlike Ohio's sentencing provisions. The Washington statutes at issue in *Blakely* set certain ceilings on sentencing based upon a defendant's proven conduct; Ohio law merely structures judicial discretion within an indeterminate sentencing scheme while permitting a judge to exercise discretion within that range. *Berry* at ¶40. Washington law permitted a sentence of between 49 and 53 months, based

upon Blakely's conduct. The trial court found an additional factor which it used to enhance Blakely's sentence beyond the prescribed range to 90 months. In the present case, however, the trial court sentenced Defendant within the statutory range for each enumerated felony: less than ten years for a first degree felony, eight years for a second degree felony, and five years for a third degree felony. See R.C. 2929.14(A). Unlike the circumstances of *Blakely*, the trial court did not sentence Defendant to a term of imprisonment beyond the statutory maximum.

{¶16} Next, the *Blakely* decision must be read in light of precedent and traditional sentencing practice. *Blakely* specifically explained that the Sixth Amendment limits judicial power and discretion in sentencing only to the extent that such power "infringes on the province of the jury." *Blakely*, 124 S.Ct. at 2540. During sentencing, judges have traditionally considered uncharged circumstances to increase a defendant's punishment. *Harris v. United States* (2002), 536 U.S. 545, 562, 153 L.Ed.2d 524. Sentencing determinations related to the unique facts of a crime or the impact of a sentence upon the protection of the public are decisions which have never been consigned to juries. *Berry* at ¶40, citing Griffin and Katz, Ohio Felony Sentencing Law, 482, Section 2.22. In fact, Ohio law actually prohibits a jury from making these types of sentencing determinations. *State ex rel. Mason v. Griffin*, __ Ohio St.3d __, 2004-Ohio-6384, at ¶15.

{¶17} The nature of a jury also suggests that determination of certain sentencing factors, such as the seriousness of an offense, should not be relegated to juries. Juries do not have the cumulative experience and knowledge necessary to make informed determinations related to the seriousness of an offense or the impact of a sentence on protection of the public from future crimes. A juror's experience is generally limited to a single case, which, given the lack of available comparative experience, may inevitably be the worst form of the offense in their mind. A judge, on the other hand, has vast knowledge stretching across a wide genre of cases and crimes, experiences typical recidivism rates by presiding over repeat offenders, and understands the extensive array of facts and circumstances which may relate to the seriousness of each offense.

{¶18} Recognizing the traditional power of judges in imposing sentence, the United States Supreme Court has "consistently approved sentencing schemes that mandate consideration of facts related to the crime *** without suggesting that those facts must be proved beyond a reasonable doubt." *McMillan v. Pennsylvania* (1986), 477 U.S. 79, 93, 91 L.Ed.2d 67. "[N]othing in [the Court's precedent] suggests that it is impermissible for judges to exercise discretion – taking into consideration various factors relating both to offense and offender – in imposing a judgment within the [statutory] range[.]" *Apprendi*, 530 U.S. at 481. See, also, *McMillan*, 477 U.S. at 87-88; *State v. Hughett*, 5th Dist. No. 04CAA06051, 2004-Ohio-6207, at ¶47. Instead, a judge:

> "may select any sentence within the range, based on facts not alleged in the indictment or proved to the jury – even if those facts are specified by the legislature, and even if they persuade the judge to choose a much higher sentence than he or she otherwise would have imposed." *Harris*, 536 U.S. at 566.

Consideration of the unique facts of each crime within an indeterminate sentencing scheme is permissible under the Sixth Amendment precisely because those facts, by themselves, do not "pertain to whether the defendant has a legal right to a lesser sentence[.]" (Emphasis omitted.) *Blakely*, 124 S.Ct. 2540.

{¶19} We conclude that *Blakely* does not bar an Ohio trial court judge from exercising his traditional sentencing discretion, in which the judge necessarily considers the facts of the underlying offense in making the determinations required under R.C. 2929.14(B). See *McMillan*, 477 U.S. at 87-88, 93; *Apprendi*, 530 U.S. at 481; *Harris*, 536 U.S. at 566; *Blakely*, 124 S.Ct. at 2540-42. Instead, the discretion reserved to trial judges in Ohio illustrates the exercise of discretion, within an indefinite sentencing scheme, as was contemplated by *Blakely*.

{¶20} When the State of Ohio charges a defendant with a felony, R.C. 2929.14(A) specifically provides for an indefinite term of imprisonment depending upon the degree of the felony. Prior to acceptance of a defendant's guilty plea, Crim.R. 12(C)(2)(a) requires a court to specifically inform the defendant of the maximum penalty with which that defendant may be punished, thus notifying the defendant that he will be subject to an indefinite term of imprisonment based entirely upon his guilty plea. The additional findings

necessary to impose a more than minimum sentence on a first time offender under R.C. 2929.14(B) are neither findings of fact nor the type of finding traditionally consigned to a jury such that the Sixth Amendment would encompass them within its grasp. Concurrently, an Ohio judge may not sentence a defendant to a penalty in excess of the statutory maximum regardless of his findings related to the underlying offense. See R.C. 2929.14(A). Therefore, this situation presented in the present case is distinguishable from both the application and reasoning provided in *Blakely*, where the trial court sentenced Blakely to 37 months in excess of the amount of imprisonment permitted by statute under which he was convicted.

{¶21} *Blakely* further does not apply to imposition of consecutive sentences. As long as each sentence does not exceed the statutory maximum, courts have consistently held that *Blakely* is not implicated. See *State v. Taylor*, 11th Dist. No. 2003-L0165, 2004-Ohio-5939, at ¶25 (stating that *Blakely* and *Apprendi* do not apply to consecutive sentences as long as each individual sentence does not exceed the statutory maximum); *State v. Wheeler*, 4th Dist. No. 04CA1, 2004-Ohio-6598, at ¶23; *State v. Madsen*, 8th Dist. No. 82399, 2004-Ohio-4895, at ¶17 ("*Apprendi* and *Blakely* concern the limitations for punishment for one crime committed. They do not discuss whether sentences for multiple, separate crimes should be served concurrently or consecutively.") A judge, therefore, may properly make

the findings under R.C. 2929.14(E)(4) necessary to impose consecutive sentences without submitting the underlying facts to a jury.

{¶22} The trial court in this case properly considered the facts of the underlying offenses and concluded that minimum sentences "would demean the seriousness of the offense[s] and not adequately protect the public *** from future criminal conduct by [Defendant]." The court also properly supported imposition of consecutive sentences, finding that:

> "consecutive sentences are necessary to protect the public and punish the offender, not disproportionate to the conduct and to the danger the offender poses, and the harm caused by the multiple offenses was so great or unusual that no single prison term for any of the offenses committed as part of a single course of conduct adequately reflects the seriousness of the offender's conduct[.]"

{¶23} *Blakely* does not prohibit a judge from making factual determinations related to the underlying offense when exercising discretion within Ohio's sentencing scheme. The court, therefore, properly made all findings requisite to imposition of more-than-minimum, consecutive sentences. Accordingly, we overrule Defendant's second assignment of error.

{¶24} We overrule Defendant's assignments of error and affirm the judgment of the Summit County Court of Common Plea.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

Exceptions.

LYNN C. SLABY
FOR THE COURT

CARR, P. J.
BOYLE, J.
CONCUR

APPEARANCES:

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