[Cite as *State v. B.K.*, 2005-Ohio-6012.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
No. 85965

STATE OF OHIO,	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
vs.	:	AND
B.K.,	:	OPINION
Defendant-Appellant	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	NOVEMBER 10, 2005
	:	
CHARACTER OF PROCEEDING	:	Criminal appeal from Common Pleas Court Case No. CR-454287
	:	
JUDGMENT	:	AFFIRMED
DATE OF JOURNALIZATION	:	

APPEARANCES:

For Plaintiff-Appellee: WILLIAM D. MASON
Cuyahoga County Prosecutor
T. ALLAN REGAS
Assistant County Prosecutor
Justice Center - 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

For Defendant-Appellant: JOHN A. POWERS

Ian N. Friedman & Assoc., LLC
700 W. St. Clair Avenue
Suite 110
Cleveland, Ohio 44113

MARY EILEEN KILBANE, J.:

{¶ 1} Defendant, B.K., appeals his sentence imposed by the Cuyahoga County Common Pleas Court. Defendant argues that the trial court erred when it failed to impose community control sanctions, when it imposed more than the minimum sentence, that the trial court failed to make the required findings, and that his imposed sentence violates the U.S. Supreme Court's decision of *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531. For the following reasons, we affirm the judgment of the trial court.

{¶ 2} On July 14, 2004, the Cuyahoga County Grand Jury indicted Defendant with three counts of trafficking in drugs with juvenile specifications and one count of possession of drugs with juvenile specifications. After negotiating a plea agreement, Defendant pled guilty to one count of trafficking in drugs with a juvenile specification as charged in count one, a fourth degree felony; and one count of trafficking in drugs as amended in count four, a third degree felony. In exchange for his plea of guilty, the State agreed to drop the juvenile specification from count four, dismiss counts two and three, and agreed upon the recommendation of a two-year prison sentence.

{¶ 3} On September 30, 2004, the trial court sentenced Defendant to a four-year prison term, suspended two years, and ordered Defendant to serve five years of community control sanctions upon completion of his prison term.

{¶ 4} Defendant appealed his sentence, and this court issued a sua sponte order

dismissing the appeal after it found that the trial court had not sentenced Defendant on count one. This court then remanded the case to the trial court for sentencing on that count. At the resentencing hearing, the trial court conducted a full sentencing hearing and sentenced Defendant to a two-year prison term on count four, and five years of community control sanctions on count one, to be served after completion of the prison term. Defendant again appeals his sentence, raising the five assignments of error contained in the appendix to this opinion.

{¶ 5} Our standard of review on appeal is not whether the trial court abused its discretion; instead, this Appellate Court must find error by clear and convincing evidence. *State v. Lofton*, Montgomery App. No. 19852, 2004-Ohio-169. Pursuant to R.C. 2953.08, an appellate court may increase, reduce, or otherwise modify a sentence that is appealed, or an appellate court may vacate the sentence and remand the matter for resentencing only if it clearly and convincingly finds that the sentence is not supported by the record or is contrary to law. Clear and convincing evidence is more than a mere preponderance of the evidence; it is evidence that "will provide in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cincinnati Bar Assoc. v. Messengale* (1991), 58 Ohio St.3d 121, 122. See, also, *State v. Hubbard*, Cuyahoga App. No. 85387, 2005-Ohio-4977.

{¶ 6} In his first, second, and fourth assignments of error, Defendant argues that the trial court erred in sentencing him to a prison term because it did not adequately consider the statutory sentencing criteria of R.C. 2929.11, 2929.12, and 2929.13; the trial court did not make the required findings under R.C. 2929.14(B) to impose more than the minimum sentence; and, the trial court never found on the record that his sentence was consistent with similarly situated offenders as is required by R.C. 2929.11(B). Defendant's arguments are without merit.

{¶ 7} In these assigned errors, Defendant complains that the trial court did not fully explain all of the statutory sentencing factors cited above. However, as stated by defense counsel, the prosecution, and the trial court on numerous occasions, Defendant agreed to a two-year prison term in exchange for the dismissal of a juvenile specification and two counts of the indictment.

{¶ 8} By entering into a plea agreement that provided for a specific prison term, Defendant waived the right to contest any part of that sentence that conforms to the terms of the plea agreement. *State v. Gibson*, Cuyahoga App. No. 83069, 2004-Ohio-3112; *State v. Chaney*, Cuyahoga App. No. 80496, 2002-Ohio-4020. Moreover, Defendant does not allege that he did not knowingly and voluntarily enter into the agreement. Additionally, Defendant's trial counsel stated on the record that he believed his client knowingly, voluntarily, and intelligently entered into the plea agreement. Finally, we find sufficient consideration for entering into the guilty plea because the State dismissed a juvenile specification and two felony counts from the indictment. Accordingly, we find that the trial court did not commit reversible error in adopting the agreed sentence without applying the statutory factors, as these factors must be considered when the trial court determines a defendant's sentence. *Gibson*, supra.

{¶ 9} Defendant's first, second, and fourth assignments of error are overruled.

{¶ 10} In his third assignment of error, Defendant argues that the trial court's imposed sentence violates the United States Supreme Court decision of *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531. We disagree.

{¶ 11} Defendant's argument that his nonminimum sentence violates *Blakely* has been addressed in this court's en banc decision of *State v. Atkins-Boozer*, Cuyahoga App. No. 84151,

2005-Ohio-2666. In *Atkins-Boozer*, we held that R.C. 2929.14(B), which governs the imposition of nonminimum sentences, does not implicate the Sixth Amendment as construed in *Blakely*. Accordingly, in conformity with that opinion, we reject Defendant's contention and overrule his third assignment of error.

{¶ 12} In his fifth and final assignment of error, Defendant contends that the trial court erred by imposing consecutive sentences without making either the required statutory findings nor stating its reasons on the record. Specifically, Defendant argues that the trial court failed to comply with R.C. 2929.14(E)(4). We disagree.

{¶ 13} Defendant's argument lacks merit because the trial court did not sentence him to consecutive prison terms. Instead, the trial court sentenced Defendant to two years in prison for trafficking in drugs and five years of community control sanctions for trafficking in drugs with a juvenile specification. The requirement of making statutory findings and providing reasons for the findings on the record pertains only to the imposition of consecutive prison sentences. See R.C. 2929.14(E)(4) and R.C. 2929.19(B)(2)(c); *State v. Thompson*, Cuyahoga App. No. 83382, 2004-Ohio-2969. "Indeed, whenever a trial court imposes community controlled sanctions and a prison term for two different counts, the community controlled sanctions would not begin until after the defendant was released from prison." *Thompson*, at paragraph 22.

{¶ 14} Accordingly, Defendant's fifth and final assignment of error is overruled.

Judgment 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.

MARY EILEEN KILBANE
JUDGE

FRANK D. CELEBREZZE, JR., P.J., And

COLLEEN CONWAY COONEY, 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 A

Assignments of Error:

"I. The trial court erred in imposing a term of incarceration where community control sanctions would adequately punish appellant and protect the public from future harm by appellant and others.

II. The trial court erred in imposing a prison sentence in excess of the minimum term authorized for the offense for which the appellant was found guilty pursuant to O.R.C. 2929.14(B).

III. The trial court erred in imposing a prison sentence in excess of the minimum term authorized for the offense for which the appellant was found guilty since appellant did not admit to serving a prior term of incarceration and that fact was never found beyond a reasonable doubt to a jury.

IV. The trial court erred by failing to make a finding on the record that appellant's sentence was consistent with similarly situated offenders.

V. The trial court erred in imposing consecutive sentences on count 1 and count 4 without making the requisite findings on the record to justify the imposition of such a sentence."