[Cite as *State v. Stevens*, 2005-Ohio-6384.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 86101

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	JOURNAL ENTRY
	:	
vs.	:	and
	:	
	:	OPINION
MELVIN K. STEVENS	:	
	:	
Defendant-Appellant	:	

DATE OF ANNOUNCEMENT OF DECISION:	December 1, 2005
CHARACTER OF PROCEEDING:	Criminal appeal from Court of Common Pleas Case No. CR-459959
JUDGMENT:	SENTENCE VACATED; CASE REMANDED FOR RESENTENCING
DATE OF JOURNALIZATION:	_____

APPEARANCES:

For Plaintiff-Appellee:	WILLIAM D. MASON Cuyahoga County Prosecutor RALPH A. KOLASINSKI, Assistant 1200 Ontario Street Cleveland, Ohio 44113
For Defendant-Appellant:	BRIAN R. McGRAW McGraw & McGraw Co., LPA 1280 West Third Street Cleveland, Ohio 44113

COLLEEN CONWAY COONEY, P.J.:

{¶ 1} Defendant-appellant, Melvin Stevens ("Stevens") appeals his sentence. Finding plain error, we vacate the sentence and remand for resentencing.

{¶ 2} In 2004, Stevens was charged with aggravated robbery with a notice of prior conviction and domestic violence. Stevens pled guilty to all charges.

{¶ 3} The trial court sentenced Stevens to a concurrent term of seven years on the aggravated robbery and six months on the domestic violence.

{¶ 4} Stevens appeals his sentence, raising two assignments of error. In his first assignment of error, he argues that the trial court erred in sentencing him to seven years in prison.

{¶ 5} This court reviews a felony sentence de novo. R.C. 2953.08. A sentence will not be disturbed on appeal unless the reviewing court finds, by clear and convincing evidence, that the record does not support the sentence or that the sentence is contrary to law. R.C. 2953.08(G)(2); *State v. Hollander* (2001), 144 Ohio App.3d 565, 760 N.E.2d 929.

{¶ 6} An offender convicted of a first degree felony may be sentenced to a prison term of three to ten years, in yearly increments. R.C. 2929.14(A)(1).

{¶ 7} R.C. 2929.14(B) states in pertinent part:

"If the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the

offender and if the offender previously has not served a prison term, the court shall impose the shortest prison term authorized for the offense unless * * * the offender was serving a prison term at the time of the offense, or the offender previously had served a prison term. * * *"

{¶ 8} Although the trial court is not required to explain its reasoning for giving more than the minimum sentence, it must be clear from the record that it first considered the minimum sentence and then decided to impose a longer sentence based on one of the two statutorily sanctioned reasons under R.C. 2929.14(B). *State v. Edmonson*, 86 Ohio St.3d 324, 1999-Ohio-110, 715 N.E.2d 131; *State v. Mondry*, Cuyahoga App. No. 82040, 2003-Ohio-7055, ¶8. Further, the statutory findings the court is required to make must be clearly and convincingly supported by the record. R.C. 2953.08(G).

{¶ 9} In the instant case, the court noted:

"First of all there is mandatory prison time here. Secondly, the court finds that the defendant is quite obviously a recidivist, he's a likely recidivist, he has failed to respond to past attempts at rehabilitation, he committed these very serious offenses while on post-release control, and [he has] violated his community control and probation numerous times before, and has served time in penal institutions before.

So the court finds that the defendant is not amenable to community control sanctions. Prison term is consistent with protecting the public from future crime and punishing you, the defendant, that the shortest term would demean the seriousness

of the defendant's conduct and not adequately protect the public from future crime and punish the defendant."

{¶ 10} In sentencing Stevens to seven years, the court reviewed his lengthy criminal record, which included previous terms of incarceration. While there is no requirement to give specific reasons for its findings, the trial court gave clear reasons why Stevens deserved more than the minimum sentence. Therefore, we find that the court made the appropriate findings to sentence Stevens to more than the minimum sentence.

{¶ 11} In his second assignment of error, Stevens argues that *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, dictates that the only allowable sentence is the minimum sentence.

{¶ 12} Stevens' argument that his nonminimum sentence violates the United States Supreme Court's decision in *Blakely* has been addressed in this court's en banc decision of *State v. Atkins-Boozer*, Cuyahoga App. No. 84151, 2005-Ohio-2666, in which we held that R.C. 2929.14(B) does not implicate the Sixth Amendment as construed in *Blakely*. As we noted in *Atkins-Boozer*, the subjective determination of whether a minimum sentence would demean the seriousness of the offense is not a matter to be determined by a jury. Likewise, neither the Sixth Amendment nor *Blakely* requires the sentencing court to ensure that the defendant stipulates to the finding or consents to the trial court's compliance with R.C. 2929.14(B). Rather, the finding is a matter reserved for the sound

discretion of the trial court and necessary for its determination of the appropriate sentence within the statutory range. *State v. Yost*, Cuyahoga App. No. 85283, 2005-Ohio-3138. Accordingly, we reject Stevens' claim that the trial court was prohibited from making the required findings for imposing a nonminimum sentence absent his express consent or stipulation to the finding. Therefore, the second assignment of error is overruled.

{¶ 13} Additionally, although the issue is not raised as an assignment of error, this court is compelled to note the record demonstrates that plain error occurred during Stevens' sentencing.

{¶ 14} To constitute plain error, the error must be obvious on the record, palpable, and fundamental, so that it should have been apparent to the trial court without objection. See *State v. Tichon*, (1995), 102 Ohio App.3d 758, 767, 658 N.E.2d 16.

{¶ 15} "Accordingly, when a trial court fails to notify an offender about post-release control at the sentencing hearing but incorporates that notice into its journal entry imposing sentence, it fails to comply with the mandatory provisions of R.C. 2929.19(B)(3)(c) and (d), and, therefore, the sentence must be vacated and the matter remanded to the trial court for resentencing." *State v. Jordan*, 104 Ohio St.3d 21, 28, 2004-Ohio-6085, 817 N.E.2d 864. We further find that since *Jordan* mandates that the offender's sentence be vacated and he be resentenced, the trial court must conduct a full resentencing hearing. It is insufficient for the trial court to conduct a partial resentencing

to merely inform the defendant of post-release control without adhering to the other statutory requirements of a full sentencing hearing. Although this may seem burdensome, the court of appeals does not have the power to vacate just a portion of a sentence. *State v. Webb*, Cuyahoga App. No. 85318, 2005-Ohio-3839, citing, *State v. Bolton* (2001), 143 Ohio App.3d 185, 757 N.E.2d 841. Therefore, when a case is remanded for resentencing, the trial court must conduct a complete sentencing hearing and must approach the resentencing as an independent proceeding complete with all applicable procedures. Id.

{¶ 16} The transcript of the sentencing hearing demonstrates the trial court did not inform Stevens that he was subject to post-release control for the offense. Although the journal entry reflected that Stevens was subject to post-release control, this court has consistently held that the defendant must be personally advised of post-release control. "At sentencing" means "at the sentencing hearing," rather than "in the sentencing entry." *State v. Bryant*, Cuyahoga App. No. 79841, 2002-Ohio-2136. "This reversible error is plain and obvious and requires that this matter be remanded for resentencing." *State v. Lynch*, Cuyahoga App. No. 84637, 2005-Ohio-3392.

{¶ 17} Accordingly, Stevens' sentence is reversed and vacated. This case is remanded for further proceedings consistent with this opinion.

{¶ 18} The sentence is vacated, and this cause is remanded for resentencing.

It is ordered that appellant recover of appellee the costs herein taxed.

It is ordered that a special mandate issue from this court to the Cuyahoga County Court of Common Pleas 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.

MICHAEL J. CORRIGAN, J. and

JOYCE J. GEORGE, J.* CONCUR

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COLLEEN CONWAY COONEY
PRESIDING JUDGE

Sitting by assignment, Judge Joyce J. George, Retired, of the Ninth District Court of Appeals.