[Cite as *State v. Neal*, 2006-Ohio-283.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
No. 86063

STATE OF OHIO,	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
vs.	:	AND
TERRY NEAL,	:	OPINION
Defendant-Appellant	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION		JANUARY 26, 2006
	:	
	:	
CHARACTER OF PROCEEDING	:	Criminal appeal from Common Pleas Court
	:	Case No. CR-457486
JUDGMENT	:	AFFIRMED
DATE OF JOURNALIZATION	:	

APPEARANCES:

For Plaintiff-Appellee:

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Assistant County Prosecutor
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For Defendant-Appellant:

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MARY EILEEN KILBANE, J.:

{¶ 1} Terry Neal ("Neal") appeals the sentence imposed by the trial court. Neal argues that his three-year sentence violates the United States Supreme Court decision of *Blakely v. Washington* and is otherwise contrary to law. For the following reasons, we affirm.

{¶ 2} On October 8, 2004, the Cuyahoga County grand jury indicted Neal with rape and kidnapping with a sexual motivation specification. On January 1, 2005, Neal pleaded guilty to the amended charge of sexual battery, a third degree felony. The State of Ohio dismissed the kidnapping charge. On February 7, 2005, the trial court sentenced Neal to a three-year prison term. Neal appeals the trial court's sentence.

{¶ 3} In his sole assignment of error, Neal argues that his sentence violates *Blakely v. Washington* and is otherwise contrary to law.

{¶ 4} On appeal, our standard of review is not whether the trial court abused its discretion. *State v. Lofton*, Montgomery App. No. 19852, 2004-Ohio-169. In accordance with 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. Massengale* (1991), 58 Ohio St.3d 121, 122. See, also, *State v. Hubbard,* Cuyahoga App. No. 85387, 2005-Ohio-4977.

{¶ 5} Pursuant to R.C. 2929.14(B), if a trial court elects to impose a prison term, the court shall impose the shortest prison term authorized for the offense, unless it finds, on the record, either that the offender was serving a prison term at the time of the offense or had previously served a prison term, or that the shortest prison term would demean the seriousness of the offender's conduct or would not adequately protect the public from future crimes by the offender or others. R.C. 2929.14(B)(2) does not require the trial court to give specific reasons for its findings. *State v. Comer,* 99 Ohio St.3d 463, 2003-Ohio-4165; *State v. Edmonson*, 86 Ohio St.3d 324, 1999-Ohio-110.

{¶ 6} In the present case, the trial court found on the record that community control sanctions would not be available to Neal because of the seriousness of the offense. The trial court also found that "the shortest prison term of one year will not adequately protect this young lady from future crime by you or others by you." Accordingly, the trial court complied with R.C. 2929.14(B) when it sentenced Neal to more than the minimum sentence.

{¶ 7} However, Neal's appeal does not focus on an alleged failure to comply with R.C. 2929.14(B). The majority of Neal's appeal addresses his argument that the trial court's findings of fact violate *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531. This argument 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 minimum sentences, does not implicate the Sixth Amendment as construed in *Blakely*. Accordingly, even though Neal does not agree with the majority opinion of *Atkins-Boozer*, we reject his contentions in conformity with that opinion.

{¶ 8} In this same assignment of error, Neal further argues that the trial court violated Cannon 3(B)(4) and (5) of the Code of Judicial Conduct when it questioned Neal about the cost of his drinking habit. Cannon 3(B)(4) provides:

> **"A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials, and others subject to the judge's direction and control."**

Cannon 3(B)(5) provides:

> **"A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit staff, court officials, and**

others subject to the judge's direction and control to do so."

{¶ 9} This Court is aware of the judicial cannons as well as a judge's responsibility to conduct a sentencing hearing with dignity and common courtesy. However, Neal failed to separately brief this issue in violation of App.R. 16(A)(7) and App.R. 12(A)(2). Accordingly, we decline to further address this argument.

{¶ 10} Because we affirm the sentence imposed by the trial court, we do not need to address Neal's request for resentencing before a different trial court.

{¶ 11} Neal's first 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

ANTHONY O. CALABRESE JR., J., CONCURS

DIANE KARPINSKI, P.J., CONCURS (SEE SEPARATE CONCURRING OPINION ATTACHED.)

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. 86063

STATE OF OHIO	:	
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Plaintiff-Appellee	:	
	:	CONCURRING
v.	:	
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TERRY NEAL	:	
	:	
	:	
Defendant-Appellant	:	

DATE: JANUARY 26, 2006

KARPINSKI, J., CONCURRING:

{¶ 12} I concur with the majority opinion but write primarily to discuss an argument ignored in that opinion.

{¶ 13} In its sole assignment of error, appellant makes two arguments: that the sentence in this case violates the Sixth Amendment, as interpreted recently by the U.S. Supreme Court in *Blakely*, ante. I agree with the majority opinion that this court's recent decision in *Atkins-Boozer* rejected the general argument and therefore concur in overruling this part of the assigned error. I separately note, however, that I follow this court's earlier decision only reluctantly because I believe the en banc procedure this court used is unconstitutional and dissented for that reason, as well as on the merits of the case.[1] Appellant has also articulated a second argument as an assigned error: that "appellant's sentence *** is otherwise contrary to law." The majority correctly observes that the trial court explained that its sentence of more than the minimum was based, in part, on "the seriousness of the offense." Appellant argues that, although the court mentions numerous details when it explained the basis for the sentence, the court never provided any details relevant to this specific finding. The majority properly responded to this argument when it observed that the trial court is not required to provide such details.

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[1]See *State v. Weber*, 2005 Ohio 4854, for the First District's comprehensive analysis of this question.

{¶ 14} However, appellant further argues that the record does not support such a finding. In *State v. Washatka*, Cuyahoga App. No. 83679, 2004-Ohio-5384, discretionary appeal allowed, reserved by *State v. Washatka*, 105 Ohio St.3d 1451, 2005-Ohio-763, 823 N.E.2d 456, which appellant cites, this court held that, pursuant to R.C. 2953.08(G) although "the trial court need not give its reasons for imposing more than the minimum authorized sentence," "the statutory findings the court is required to make must be clearly and convincingly supported by the record." At ¶¶ 12-15.

{¶ 15} I agree that the record does not support the specific finding that more than the minimum is needed because of the seriousness of the offense. The trial court digresses at length on defendant's statement, contained in his Pre-sentence Report, that he drank a gallon of Jack Daniels and 12 beers daily. The trial court then speculated that defendant must have engaged in theft to fund such consumption. Because this discussion is solely speculative and rhetorical, it is never made clearly relevant to the required findings, nor have I been able to divine its relevance.

{¶ 16} The trial court also mentions, moreover, that the victim stated she feared for her life because defendant had threatened her. This threat, however, is the subject of another case. To give more than the minimum requires clear and convincing evidence that "the shortest prison term will demean the seriousness of the

offender's conduct." R.C. 2929.14 (B)(2). This finding is limited to the offender's conduct in the case for which defendant is being sentenced. Presumably, defendant will be sufficiently punished for any conduct of which he is found guilty in any other cases. Judge Brogan provided a list of reasons that "have absolutely nothing to do with the relative seriousness of [defendant's] conduct" in a case of child endangerment: "prior convictions, parole violations, lack of remorse, general danger to society, relatively short period of time out of prison, failure to follow prior court orders, and failure to lead a law-abiding life as an adult." *State v. Simons*, C.A. Case No. 2003-CA-29, 2004-Ohio-6061, 2004 Ohio App. LEXIS 5512, appeal denied.

{¶ 17} To justify more than the minimum, the sentencing statute permits, however, an alternative finding: "that the shortest prison term will *** not adequately protect the public from future crime by the offender or others." The trial court made this finding and pointed to defendant's record in support: specifically, his conviction of menacing another girlfriend. This detail, along with the claim in the Pre-Sentence Report that he "stalked" his victim and his statement, if believed, of substantial alcohol consumption daily–an amount that would muddle any mind, suggests the likelihood of future crime. Thus the record does support the findings necessary for a sentence above the minimum.

{¶ 18} I note, however, that sentencing hearings would be more

effective if trial judges would follow the precise language of the statute and not engage in sarcastic digressions.