

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 86179

STATE OF OHIO	:	
	:	JOURNAL ENTRY
Plaintiff-Appellee	:	
	:	and
-vs-	:	
	:	OPINION
VERNEST L. PAGE	:	
	:	
Defendant-Appellant	:	
	:	

DATE OF ANNOUNCEMENT	JANUARY 26, 2006
OF DECISION:	

CHARACTER OF PROCEEDING:	Criminal appeal from Common Pleas Court Case No. CR-460461
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JUDGMENT:	Conviction Affirmed in Part, Sentence Vacated and Remanded For Re-sentencing.
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DATE OF JOURNALIZATION:

APPEARANCE:

For Plaintiff-Appellee:	WILLIAM D. MASON Cuyahoga County Prosecutor NICK GIEGERICH Assistant County Prosecutor 9 th Floor Justice Center 1200 Ontario Street Cleveland, Ohio 44113
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For Defendant-Appellant:	ROBERT TOBIK Cuyahoga County Public Defender NOELLE A. POWELL Assistant County Public Defender 1200 West Third Street, N.W. 100 Lakeside Place Cleveland, Ohio 44113
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PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Vernest Page appeals the sentence he received in conjunction with his guilty plea to domestic violence. Page assigns the following errors for our review:

"I. The sentence imposed against Mr. Page, which involved sentencing enhancements, not found by a jury, is unconstitutional, under the holding of the United States Supreme Court in *Blakely v. Washington*, (2004), 124 S.Ct. 2531."

"II. The trial court erred when it imposed more than the minimum term of imprisonment on Mr. Page without making the necessary findings required by R.C. 2929.14(B)."

{¶ 2} Having reviewed the record and pertinent law, we affirm in part the conviction, but vacate the sentence and remand for resentencing. The apposite facts follow.

{¶ 3} Page was indicted on one count of attempted felonious assault and one count of domestic violence. Page pled guilty to one count of domestic violence. In exchange, the attempted felonious assault count was nolle. The trial court sentenced Page to twelve months in prison. This sentence was less than the maximum of eighteen months and more than the minimum of six months.

BLAKELY

{¶ 4} In his first assigned error, Page contends the trial court's sentencing him to a non minimum sentence violated the United State's Supreme Court's decision of *Blakely v. Washington*.¹ We disagree.

¹(2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403.

{¶ 5} As Page concedes, this court has decided this issue in our en banc decision of *State v. Atkins-Boozer*.² In *Atkins-Boozer*, we held that R.C. 2929.14(B), which governs the imposition of non minimum sentences, does not implicate the Sixth Amendment as construed in *Blakely*. Until the Ohio Supreme Court holds otherwise, we will follow this court's precedent. Accordingly, in conformity with *Atkins-Boozer*, we reject Page's contention and overrule his first assigned error.

NON MINIMUM SENTENCE

{¶ 6} In his second assigned error, Page, who had never served a prison term before, argues the trial court erred by imposing more than the minimum sentence without making the requisite findings pursuant to R.C. 2929.14(B).

{¶ 7} R.C. 2929.14(B) states:

"(B) Except as provided in division (C), (D) (2), (D) (3), or (G) of this section, in section 2907.02 of the Revised Code, or in Chapter 2925. of the Revised Code, 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 pursuant to division (A) of this section, unless the court finds on the record

²(May 31, 2005), Cuyahoga App. No. 84151, 2005-Ohio-2666.

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."

{¶ 8} In the instant case, the trial court stated as follows when sentencing Page:

"Based upon your prior record on domestic violence, Mr. Page, the Court finds that you are not eligible for supervision at this time. You are going to serve twelve months in LCI."³

{¶ 9} The State concedes, and we conclude, this finding is insufficient to meet the findings required by R.C. 2929.14(B). Although Page had prior offenses, including a prior offense for domestic violence, he was never sentenced to serve time in prison. He did previously serve time in "jail." However, time spent in "jail" is not equivalent to serving a prison term.⁴ Therefore, it was mandatory that the trial court make the findings required by R.C. 2929.14(B). Because the trial court failed to make the requisite findings, we vacate Page's sentence and remand the matter for resentencing. Accordingly, Page's second assigned error is sustained.

³Tr. at 20.

⁴See R.C. 2929.01(V) and 2929.01(CC); see, also, *State v. Edmonson* (1999), 86 Ohio St.3d 324, 328, fn. 1; *State v. Edel*, Cuyahoga App. No. 79343, 2002-Ohio-651; *State v. Lyons*, Cuyahoga App. No. 80220, 2002-Ohio-342; *State v. Cook* (Dec. 7, 2000), Cuyahoga App. No. 77101.

{¶ 10} Judgment conviction affirmed, sentence vacated and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share the 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 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.

ANN DYKE, A.J., and

KENNETH A. ROCCO, J., CONCUR.

PATRICIA ANN BLACKMON
JUDGE

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).