

[Cite as *State v. Nieves-Melendez*, 2006-Ohio-3012.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 86993

STATE OF OHIO	:	
	:	JOURNAL ENTRY
Plaintiff-Appellee	:	
	:	AND
vs.	:	
	:	OPINION
JOSE NIEVES-MELENDEZ	:	
	:	
Defendant-Appellant	:	
	:	
	:	
DATE OF ANNOUNCEMENT	:	
OF DECISION	:	<u>June 15, 2006</u>
	:	
CHARACTER OF PROCEEDINGS	:	Criminal appeal from
	:	Common Pleas Court
	:	Case No. CR-465358
	:	
JUDGMENT	:	SENTENCE VACATED; REMANDED
	:	FOR RESENTENCING.
	:	
	:	
DATE OF JOURNALIZATION	:	

APPEARANCES:

For plaintiff-appellee	WILLIAM D. MASON, ESQ. Cuyahoga County Prosecutor By: ANNA M. FARAGLIA, ESQ. Assistant County Prosecutor Justice Center - 8th Floor 1200 Ontario Street Cleveland, Ohio 44113
For defendant-appellant	ROBERT L. TOBIK, ESQ. Cuyahoga County Public Defender By: ROBERT M. INGERSOLL, ESQ. Assistant Public Defender 1200 West Third Street 100 Lakeside Place Cleveland, Ohio 44113-1513

SEAN C. GALLAGHER, J.:

{¶ 1} Defendant-appellant Jose Nieves-Melendez appeals his sentence from the Cuyahoga County Court of Common Pleas. Finding error in the proceedings below, we vacate the sentence and remand for resentencing.

{¶ 2} The defendant was charged in a 58-count indictment alleging ongoing abuse involving his seven-week-old son and his twenty-month-old son. He pled guilty to one count of felonious assault, a felony of the second degree, and two counts of endangering children, felonies of the third degree. The trial court sentenced him to five years for the felonious assault and two years on each of the endangering children counts. The sentences were ordered to run concurrently. The defendant appeals, advancing one assignment of error for our review.

{¶ 3} "Jose Nieves-Melendez has been deprived of his liberty without due process of law and of his constitutional right to a trial by jury by the sentences which were more than the minimum for the reason that a jury did not find the facts which supported the imposition of the non-minimum sentences."

{¶ 4} In this case, the defendant pled guilty to one felony of the second degree and two felonies of the third degree and was sentenced to more than the minimum term in prison on each count. The trial court imposed more than the minimum sentence pursuant to R.C. 2929.14(B) and 2929.19(B)(2), which the Supreme Court of Ohio

has since declared unconstitutional and excised from the statutory scheme. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶¶ 1-4, applying *United States v. Booker* (2005), 543 U.S. 220; *Blakely v. Washington* (2004), 542 U.S. 296; and *Apprendi v. New Jersey* (2000), 530 U.S. 466. As a result, "trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *Foster*, at paragraph 7 of the syllabus, and *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, paragraph 3 of the syllabus. Nevertheless, defendants who were sentenced under unconstitutional and now void statutory provisions must be resentenced. *Foster*, supra, ¶¶ 103-106. Consequently, we sustain the defendant's assignment of error, vacate his sentence, and remand this matter to the trial court for resentencing.

Sentence vacated; cause remanded for resentencing.

This cause is vacated and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, ordered that said appellant recover of said appellee 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 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.

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

PATRICIA ANN BLACKMON, J., CONCUR.

SEAN C. GALLAGHER  
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).