[Cite as *State v. Richards*, 2004-Ohio-4633.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 83696

STATE OF OHIO	:	
Plaintiff-Appellee	:	
	:	JOURNAL ENTRY
vs.	:	and
	:	OPINION
DAVID RICHARDS	:	
Defendant-Appellant	:	

DATE OF ANNOUNCEMENT OF DECISION: September 2, 2004

CHARACTER OF PROCEEDING: Criminal appeal from Court of Common Pleas Case No. CR-436079

JUDGMENT: AFFIRMED

DATE OF JOURNALIZATION: _____

APPEARANCES:

For Plaintiff-Appellee: WILLIAM D. MASON
Cuyahoga County Prosecutor
BRENDAN SHEEHAN, Assistant
1200 Ontario Street
Cleveland, Ohio 44113

For Defendant-Appellant: DAVID L. DOUGHTEN
4403 St. Clair Avenue
Cleveland, Ohio 44103

COLLEEN CONWAY COONEY, J.:

{¶1} Defendant-appellant, David Richards ("Richards"), appeals his sentence. Finding no merit to the appeal, we affirm.

{¶2} Richards pled guilty to one count of sexual battery and attempted felonious assault, both third degree felonies. Richards was sentenced to three years in prison on each count, to run concurrently. The trial court also found Richards to be a sexually oriented offender in accordance with R.C. 2950.09(B).

{¶3} In his sole assignment of error, Richards argues that the trial court erred in sentencing him to more than the minimum sentence of one year. Specifically, he claims that either the trial court did not make adequate findings to deviate from the imposition of the minimum sentence, or that the record cannot support his sentence by clear and convincing evidence.

{¶4} 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; *State v. Rigo* (June 21, 2001), Cuyahoga App. No. 78761. Clear and convincing evidence is that "which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford* (1954), 161 Ohio St. 469, 120 N.E.2d 118, paragraph three of the syllabus.

{¶5} R.C. 2929.14(B) provides that the trial court must impose the minimum sentence on an offender who has not previously served a prison term, unless the court finds one of the following on the record:

"(1) The offender was serving a prison term at the time of the offense, or the offender previously had served a prison term.

(2) The court finds on the record 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."

{¶6} The Ohio Supreme Court has held that, "pursuant to R.C. 2929.14(B), when imposing a nonminimum sentence on a first offender, a trial court is required to make its statutorily sanctioned findings on the record at the sentencing hearing." *State v. Comer*, 99 Ohio St.3d 463, 469, 2003-Ohio-4165, 793 N.E.2d 473. However, the trial court is not required to give specific reasons for its findings pursuant to R.C. 2929.14(B)(2). Id., citing *State v. Edmonson*, 86 Ohio St.3d 324, 1999-Ohio-110, 715 N.E.2d 131.

{¶7} In the instant case, the sentencing hearing took place on two separate days. On September 29, 2003, the court, in sentencing Richards to three years on each count, found that the minimum sentence was not appropriate "given the facts and circumstances surrounding the offense in this case." The court stated:

"* * * having considered the statutory factors mandated under Senate Bill II, while admittedly the recidivism factors are not present, in terms of it being more serious factors, there are a number of those factors that, in fact, are present. The victim, the injury to the victim, was worse than seen by both the physical and mental condition of both the victim and the offender. There is no question that the victim suffered serious psychological harm, as well as the pictures that attest to the viscous [sic] and violent nature of the offense perpetrated on her."

{¶8} On October 1, the court reiterated the sentence imposed, acknowledging that Richards was a first offender and that the minimum sentence would demean the seriousness of the offense and that imposition of the sentence was necessary to protect the public. Reviewing the findings and rationale given on both days, the court made the requisite findings under R.C. 2929.14(B).

{¶9} Richards also asserts that his sentence is not consistent with R.C. 2929.11(A) and (B). R.C. 2929.11(A) provides that the purposes of felony sentencing are to protect the public and to punish the offender. In order to achieve those purposes, the court must consider a variety of factors, including the offender's need for incapacitation and rehabilitation, deterring the offender, and making restitution. R.C. 2929.11(B) directs the court to impose a sentence which is "commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders."

{¶10} Richards has failed to show that his sentence is inconsistent with sentences imposed for similar crimes by similar offenders. Unlike other provisions of the sentencing statutes, R.C. 2929.11(B) does not require that the court make express findings. *Edmonson*, supra. Thus, the lack of any express finding that Richards' sentence was consistent with the sentence imposed for similar crimes by similar offenders is not, by itself, erroneous.

{¶11} Accordingly, his sole assignment of error is overruled.

Judgment affirmed.

TIMOTHY E. McMONAGLE, J. CONCURS;

JAMES J. SWEENEY, P.J. DISSENTS (SEE SEPARATE DISSENTING OPINION)

JUDGE

COLLEEN CONWAY COONEY

JAMES J. SWEENEY, P.J., DISSENTING:

{¶15} I respectfully dissent. During the pendency of this appeal, the United States Supreme Court issued its decision in *Blakely v. Washington* (June 24, 2004), No. 02-1632, 72 U.S. L.W. 4546. In *Blakely*, the U.S. Supreme Court held that:

{¶16} "Our precedents make clear, however, that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. See *Ring*, supra at 602, 153 L.Ed.2d 556, 122 S.Ct. 2428 ("'the maximum he would receive if punished according to the facts reflected in the jury verdict alone'" [quoting *Apprendi*, supra at 483, 147 L.Ed.2d 435, 120 S.Ct. 2348]); *Harris v. United States*, 536 U.S. 545, 563, 153 L.Ed.2d 524, 122 S.Ct. 2406 (2002) (plurality opinion) (same); cf. *Apprendi*, supra at 488, 147 L.Ed.2d 435, 120 S.Ct. 2348 (facts admitted by the defendant). In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' *Bishop*, supra §87, at 55, and the judge exceeds his proper authority." Id.

{¶17} In this case, the court could only deviate from the minimum sentence by making judicial findings beyond those either

determined by a jury or stipulated to by the defendant. Defendant did not stipulate to the findings or otherwise waive his constitutional right to have these facts determined by a jury. Therefore, I would sustain defendant's assignment of error, vacate the sentence and remand to have the trial court consider the application of *Blakely* to defendant's sentence.