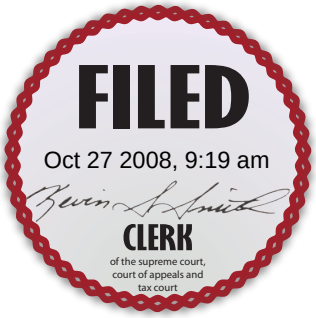

ATTORNEY FOR APPELLANT:

P. STEPHEN MILLER
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE:

STEPHEN R. CARTER
Attorney General of Indiana
Indianapolis, Indiana

GARY DAMON SECREST
Deputy Attorney General

IN THE
COURT OF APPEALS OF INDIANA

RYAN C. GARCIA,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A05-0806-CR-312
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Robert J. Schmoll, Judge
Cause No. 02D04-0306-FD-370

OCTOBER 27, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Senior Judge

Ryan C. Garcia (Garcia) appeals his sentence of two years following his guilty plea to Battery as a Class D felony. The offense took place in 2003. Garcia, who was free on surety bond, failed to appear at his sentencing hearing set for January 7, 2004. The record does not reflect the reason for Garcia's failure to appear. A warrant was issued for his arrest. Sentencing took place March 7, 2008. At that time, Garcia stated that he had reviewed his Pre-Sentence Report with counsel and that the Report was accurate. In addition, counsel represented to the court that Garcia "faces extensive jail time in Arizona and Florida . . . .and is facing a 10 year probation revocation in Florida." (Tr. 4). The court enhanced the basic sentence of one and one-half years by an additional six months. The court also ordered restitution in the amount of $6,845.90[1]

In doing so, the court found Garcia's criminal history to be an aggravating circumstance in that he had "four misdemeanor convictions, three prior felony convictions . . . that he's violated probation [and] absconded from community control." (Tr. 5). The court noted that after failing to appear for sentencing, "he committed two new offenses in the State of Arizona and it would also appear a new offense in the State

[1] The record does not reflect upon what evidence the court ordered restitution nor does the pre-sentence report contain a recommendation for restitution. We would note, however, that the restitution order does not direct to whom that restitution is payable. Garcia points out that the officer who was bitten did not respond to efforts from the probation officer to obtain the officer's statement but that he was no longer with the Fort Wayne Police Department. Furthermore the pre-sentence report states specifically that "the City of Fort Wayne, General Fund, Police Budget is not requesting restitution." Appellant's Appendix at 80.

of Oklahoma."[2] (Tr. 6). The court considered Garcia's guilty plea as a mitigating circumstance but concluded that the aggravators outweighed the mitigators.

Upon appeal, Garcia contends that although his sentencing took place in 2007 after the General Assembly altered the sentencing scheme from one of a "presumptive" sentence to that of an "advisory" sentence, the "presumptive" scheme in place at the time of the offense is applicable to his case. We agree. See Gutermuth v. State, 868 N.E.2d 427, 431 n.4 (Ind. 2007). However, Garcia's principal argument in this regard is that he is entitled to application of the principles set forth in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). This argument presupposes that Blakely applies even though that decision was rendered after Garcia's conviction upon his guilty plea. The argument is premised upon the fact that Garcia had not yet been sentenced at the time of the Blakely decision and that, therefore, the trial court conviction was not yet "final."

It is true that Garcia's right to pursue a timely appeal had not yet lapsed and that unlike the situation in Gutermuth, Garcia was not seeking application of Blakely in a belated appeal pursuant to Ind. Post-Conviction Rule 2. Nevertheless, we find Blakely to be inapplicable to the facts before us.

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[2] Garcia's initial pre-sentence investigation report completed January 2, 2004, indicated that there was an outstanding warrant for Garcia in Oklahoma for Obtaining Money by False Pretenses and Public Intoxication. Appellant's Appendix at 71. The subsequent pre-sentence investigation report submitted just prior to his 2008 sentencing reflected that in 2000 he was placed on probation in Florida for several offenses and that in 2001, also in Florida, he was convicted of Grand Theft and was placed in "community control" for 2 years with 10 years probation. The report notes that Garcia had an active 2001 warrant in Florida for "absconding from community control." Appellant's Appendix at 78-79. The report also indicates that, after his Indiana conviction, he was convicted in Arizona of two felonies drawing concurrent sentences of eight years.

That Garcia's conviction was not yet final is attributable solely to the fact that he had not yet been sentenced upon that conviction. This circumstance existed for one reason only. Garcia was to be sentenced on or about January 7, 2004, but Garcia who was free on bond, absconded and did not appear in court. That he was not sentenced on that date was solely the result of Garcia's own conduct.[3] We will not permit him to take advantage of that voluntary and purposeful act in order to benefit from a later-decided constitutional holding.[4] See Koons v. State, 545 N.E.2d 826, 827 (Ind. 1989) (holding that if defendant voluntarily absents himself from jurisdiction of court during period for filing of appeal, he waives his right to such appeal).

As an alternative argument, Garcia requests that we exercise our discretion under Appellate Rule 7(B) to modify the sentence as inappropriate under the circumstances. He challenges that portion of the judgment ordering restitution. See Footnote 1, supra. In this respect and in light of the fact that the State does not respond to the challenge, we find merit in Garcia's position. Accordingly, we direct the sentencing court to vacate the order of restitution.

As to the two-year sentence however, we find that despite Garcia's statement that he was diagnosed in 2006 in Arizona as paranoid schizophrenic, Appellant's Appendix at 81, such claim of mental illness does not mandate a sentence of less than two years.

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[3] It is more than reasonable to deduce that Garcia rather than appearing for his sentencing took his on-bond status as opportunity to flee to Arizona.

[4] Garcia argues that it was improper for the sentencing court to consider the criminal record for matters occurring after his Indiana conviction on grounds that they were not "prior" offenses. This position also is premised upon application of Blakely principles. For the reason contained within our holding that Blakely is unavailing to Garcia because of his failure to appear for sentencing, we decline to address his argument in this respect.

Given the recitation of aggravating circumstances, particularly Garcia's criminal history, and his concession as to the accuracy of the representations made in the pre-sentence investigation, and even in light of the mitigating circumstance of his guilty plea, we conclude that the one and one-half year sentence enhanced by six months is not inappropriate.

With the exception of the restitution order, the judgment is affirmed.

Affirmed in part and reversed in part.

FRIEDLANDER, J., and CRONE, J., concur.