

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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|---------------------|---|---------------------------|
| STATE OF OHIO | : | JUDGES: |
| | : | Hon: W. Scott Gwin, P.J. |
| | : | Hon: Sheila G. Farmer, J. |
| Plaintiff-Appellee | : | Hon: Julie A. Edwards, J. |
| | : | |
| -vs- | : | |
| | : | Case No. 2005-COA-050 |
| DANIEL E. MOORE | : | |
| | : | |
| Defendant-Appellant | : | <u>OPINION</u> |

CHARACTER OF PROCEEDING: Criminal appeal from the Ashland County Court of Common Pleas, Case No. 05-CRI-063

JUDGMENT: Vacated in part and remanded

DATE OF JUDGMENT ENTRY: August 7, 2006

APPEARANCES:

For Plaintiff-Appellee

RAMONA FRANCESCONI ROGERS
Ashland County Prosecutor
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For Defendant-Appellant

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Gwin, P.J.

{¶1} Appellant Daniel E. Moore appeals his felony sentences in the Ashland County Court of Common Pleas. The relevant facts leading to this appeal are as follows.

{¶2} On October 3, 2005, appellant appeared before the trial court for sentencing, having previously pled guilty to one count of rape, a felony of the first degree and one count of gross sexual imposition, a felony of the third degree. The trial court sentenced appellant to maximum terms of ten years for the rape charge and five years for the gross sexual imposition charge. The court ordered the sentences to be served consecutively, for an aggregate sentence of fifteen years.

{¶3} Appellant filed a timely notice of appeal. He herein raises the following sole Assignment of Error:

{¶4} “I. THE IMPOSITION OF A PRISON SENTENCE LONGER THAN THE STATUTORY MAXIMUM SENTENCE IS UNCONSTITUTIONAL IN THIS CASE.

I.

{¶5} In his Sole Assignment of Error, appellant argues, in essence, that the trial court’s imposition of maximum and consecutive sentences is unconstitutional pursuant to *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, and *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531.

{¶6} In *State v. Foster*, 109 Ohio St.3d. 1, 2006-Ohio-856, 845 N.E.2d 470 the Court found, in relevant part, the provisions addressing “more than the minimum” sentence for offenders who have not previously served a prison term pursuant to R.C.

2929.14(B) required the sentencing court to make findings beyond those facts found by a jury or admitted by an accused. *Id.* at ¶61.

{¶7} The Court in *Foster* found the same infirmity with respect to the procedure employed by a trial court imposing consecutive sentences pursuant to R.C. 2929.14(E)(4) and 2929.41(A). *Id.* at paragraph 3 of the syllabus.

{¶8} The Court found both provisions to be unconstitutional under the United States Supreme Court decisions in *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct.2348, 147 L.Ed.2d 435, and *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403. However, the Ohio Supreme Court in *Foster* found that the offending provisions of the sentencing law are severable. The Court concluded that after severing those provisions judicial fact-finding is not required before a prison term can be imposed within the basic ranges of R.C. 2929.14(A) based upon a jury verdict or admission of the defendant, or before imposition of consecutive prison terms. *Id.* at paragraphs 2 and 4 of the syllabus.

{¶9} The Court in *Foster*, *supra*, provided the following instructions to the lower courts: “[t]hese cases and those pending on direct review must be remanded to trial courts for new sentencing hearings not inconsistent with this opinion. We do not order re-sentencing lightly. Although new sentencing hearings will impose significant time and resource demands on the trial courts within the counties, causing disruption while cases are pending on appeal, we must follow the dictates of the United States Supreme Court. Ohio’s felony sentencing code must protect Sixth Amendment principles as they have been articulated.

{¶10} “Under R.C. 2929.19 as it stands without (B) (2), the defendants are entitled to a new sentencing hearing although the parties may stipulate to the sentencing court acting on the record before it. Courts shall consider those portions of the sentencing code that are unaffected by today’s decision and impose any sentence within the appropriate felony range. If an offender is sentenced to multiple prison terms, the court is not barred from requiring those terms to be served consecutively. While the defendants may argue for reductions in their sentences, nothing prevents the state from seeking greater penalties. *United States v. DiFrancesco* (1980), 449 U.S. 117, 134-136, 101 S.Ct. 426, 66L.Ed.2d 328”. Id. at ¶104-105.

{¶11} Accordingly, this case is remanded to the trial court for resentencing in light of the remedial severance and interpretation of Ohio’s felony sentencing statutes as set forth in the *Foster* decision.

By Gwin, P.J.,
Farmer, J., and
Edwards, J., concur

JUDGE W. SCOTT GWIN

JUDGE SHEILA G. FARMER

JUDGE JULIE A. EDWARDS

