

[Cite as *State v. Barrett*, 2008-Ohio-191.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
JERRY L. BARRETT	:	Case No. 07COA014
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,
Case No. 06CRI036

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: January 18, 2008

APPEARANCES:

For Plaintiff-Appellee

PAUL T. LANGE
301 Orange Street
Ashland, OH 44805

For Defendant-Appellant

LORI A. MCGINNIS
3183 Wally Road
Loudonville, OH 44842

Farmer, J.

{¶1} On February 24, 2006, the Ashland County Grand Jury indicted appellant, Jerry Barrett, on one count of operating a motor vehicle under the influence of alcohol and/or drugs in violation of R.C. 4511.19 and one count of possession of crack cocaine in violation of R.C. 2925.11.

{¶2} On February 5, 2007, appellant pled guilty to the under the influence count. By judgment entry filed same date, the trial court found appellant guilty, and permitted the state to dismiss the possession count. By judgment entry filed March 28, 2007, the trial court sentenced appellant to eight months in prison.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶4} "THE TRIAL COURT ERRED BY IMPOSING A SENTENCE GREATER THAN THE MINIMUM SENTENCE PROVIDED BY LAW IN VIOLATION OF APPELLANT'S DUE PROCESS RIGHTS AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATE (SIC) CONSTITUTION."

I

{¶5} Appellant claims the trial court erred in imposing more than the minimum sentence, and the directives of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, violate the ex post facto and due process clauses of the United States Constitution. We disagree.

{¶6} In *Foster*, the Supreme Court of Ohio held under *Apprendi v. New Jersey* (2000), 530 U.S. 466, and *Blakely v. Washington* (2004), 542 U.S. 296, portions of

Ohio's sentencing scheme were unconstitutional because they required judicial fact finding before a defendant could be sentenced to more than the minimum sentence, and/or consecutive sentences. As a remedy, the *Foster* court severed the offending sections from Ohio's sentencing code. Accordingly, judicial fact finding is no longer required before a court imposes non-minimum, maximum or consecutive prison terms. Thus, pursuant to *Foster*, trial courts have full discretion to impose a prison sentence within the statutory ranges. The *Foster* decision does, however, require trial courts to "consider" the general guidance factors contained in R.C. 2929.11 and R.C. 2929.12. *State v. Duff*, Licking App. No. 06-CA-81, 2007-Ohio-1294; See also, *State v. Diaz*, Lorain App. No. 05CA008795, 2006-Ohio-3282.

{¶7} Additionally, this court has held that in post-*Foster* cases, appellate review of sentences shall be pursuant to an abuse of discretion standard. *State v. Firouzmandi*, Licking App. No. 06-CA-41, 2006-Ohio-5823; *Duff*, supra. An abuse of discretion implies that the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983) 5 Ohio St.3d 217; *State v. Adams* (1980), 62 Ohio St.2d 151. When applying an abuse of discretion standard, an appellate court may not generally substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619.

{¶8} In this case, appellant was convicted of operating a motor vehicle under the influence of alcohol and/or drugs, a felony in the fourth degree. The sentencing range for a fourth degree felony is "six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months." R.C. 2929.14(A)(4). The

trial court's imposition of eight months is within the statutory sentencing range, and as such, is a proper sentence.

{¶9} As for appellant's argument that *Foster* violates the ex post facto and due process clauses of the United States Constitution, we disagree with this argument based upon the well-reasoned opinion in *State v. Rorie*, Stark App. No. 2006CA00181, 2007-Ohio-741, Assignment of Error I.

{¶10} Upon review, we find the trial court's sentence is not unreasonable, arbitrary or unconscionable.

{¶11} The sole assignment of error is denied.

{¶12} The judgment of the Court of Common Pleas of Ashland County, Ohio is hereby affirmed.

By Farmer, J.

Hoffman, P.J. and

Delaney, J. concur.

s/ Sheila G. Farmer

s/ William B. Hoffman

s/ Patricia A. Delaney

JUDGES

