IN THE SUPREME COURT OF OHIO

07-1254

STATE OF OHIO	)	Case No.:
	)	
Appellee	)	On Appeal from the Geauga
	)	County Court of Appeals,
vs.	)	Eleventh Appellate District
	)	
WILLIAM J. SILSBY	)	
	)	
Appellant	)	Court of Appeals
	)	Case No.: 2006-G-2725
	)	

NOTICE OF CERTIFICATION OF CONFLICT
OF APPELLANT WILLIM J. SILSBY

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COUNSEL FOR APPELLEE STATE OF OHIO

FILED
JUL 13 2007
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF CERTIFIED CONFLICT

Now comes the Appellant William J. Silsby, by and through counsel, and hereby gives notice that the Court of Appeals for the Eleventh Appellate District certified its decision in the within case of *State v. Silsby*, Geauga App. No. 2006-G-2725, 2007-Ohio-2308 to be in conflict with the decisions of the Second Appellate District in *State v. Jenkins*, Clark App. No. 2006 CA 37, 2007-Ohio-1742 and the Third Appellate District in *State v. Corbin*, Allen App. No. 1-06-23, 2006-Ohio-6092.

The Court of Appeals certified the following questions:

1. Whether a delayed appeal under Ohio Rule of Appellate Procedure 5(A) is identical to a direct appeal under Ohio Rule of Appellate Procedure 4(A) for purposes of appellate review as to whether a defendant was sentenced upon the basis of an unconstitutional statute under the guidelines of *State v. Foster*?

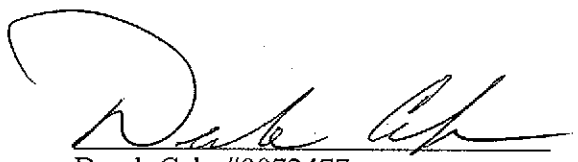
2. Whether a defendant's sentence must be reversed on the basis of *State v. Foster* when: a) the defendant was sentenced prior to the announcement of *State v. Foster*; b) the defendant was sentenced under the statutes found to be unconstitutional in *State v. Foster*; c) the defendant does not pursue a direct appeal but rather files a delayed appeal; d) and raises the issues of unconstitutional sentencing on the basis of *Foster* for the first time on delayed appeal?

On June 27, 2007, Appellant filed a notice of appeal and memorandum in support of jurisdiction arguing that a delayed appeal is the same as a direct appeal for application of the right to trial by jury in sentencing (as explained in *State v. Foster)*. Appellant also argued that a court of appeals may not differentiate among defendants in its application of the constitutional

sentencing principles of *Foster* based upon how a defendant institutes his appeal without violating the equal protection clauses of the United States and Ohio Constitutions.

Therefore, Appellant asks this Court to determine that a conflict exists and to consolidate this case with Case No. 2007-1158 , State v. Silsby, Geauga Appeal No. 2006-G-2725.

Respectfully Submitted,



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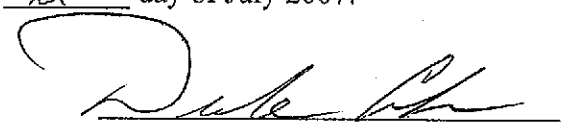
PROOF OF SERVICE

I hereby certify that a copy of this Notice of Certification of Conflict was sent by regular U.S. Mail postage prepaid to Ms. Susan T. Wieland, Attorney for the Appellee, 231 Main St., Suite 3A, Chardon, Ohio 44024, this 12th day of July 2007.



Derek Cek #0072477
Counsel for the Appellant

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	)	Case No.:
	)	
Appellee	)	On Appeal from the Geauga
	)	County Court of Appeals,
vs.	)	Eleventh Appellate District
	)	
WILLIAM J. SILSBY	)	
	)	
Appellant	)	Court of Appeals
	)	Case No.: 2006-G-2725
	)	

APPENDIX TO NOTICE OF CERTIFICATION OF CONFLICT OF APPELLANT WILLIAM J. SILSBY

FILED
IN COURT OF APPEALS
JUL 06 2007
DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

STATE OF OHIO) SS. THE COURT OF APPEALS

COUNTY OF GEAUGA) ELEVENTH DISTRICT

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

WILLIAM J. SILSBY,

Defendant-Appellant.

JUDGMENT ENTRY

CASE NO. 2006-G-2725

On May 21, 2007, appellant, William J. Silsby, filed a motion pursuant to App.R. 25 to certify this case to the Supreme Court of Ohio on the basis of a conflict. Appellant asserts that this court's decision in *State v. Silsby*, 11th Dist. No. 2006-G-2725, 2007-Ohio-2308, is in conflict with decisions of the Second and Third District Courts of Appeal. *State v. Jenkins*, 2d Dist. No. 2006 CA 37, 2007-Ohio-1742; and *State v. Corbin*, 3d Dist. No. 1-06-23, 2006-Ohio-6092.

Appellee, the state of Ohio, filed a response on May 31, 2007, specifically indicating that it "is not taking a position on [a]ppellant's [m]otion to [c]ertify a [c]onflict."

In *Jenkins*, supra, the appellant was sentenced on September 28, 2005. Id. at ¶1. He did not file a timely notice of appeal. Id. Rather, the appellant filed a delayed appeal after *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, was

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decided. Id. at ¶4. The court granted the delayed appeal on May 3, 2006. Id. at ¶1. The appellant, relying upon the *Foster* decision, asserted that the trial court erred in sentencing him to more than the minimum sentence based upon an unconstitutional statute. Id. at ¶2. The Second District reversed the appellant's sentence and remanded the matter for a new sentencing hearing. Id. at ¶10. Specifically, the trial court held that the appellant's delayed appeal, filed after *Foster*, was considered to be on direct appeal within the meaning of *Foster*. Id. at ¶4.

Likewise, in *Corbin*, supra, the appellant was sentenced on January 23, 2006. Id. at ¶3. The appellant filed a direct appeal, which was dismissed because it was untimely. Id. at ¶4. He then filed a delayed appeal, which was granted on May 30, 2006. Id. The appellant asserted that the trial court erred in sentencing him under a statute found unconstitutional pursuant to *Foster*. Id. at ¶5. The Third District reversed the appellant's sentence on the basis of *Foster*. Id. at ¶14. By its action, the Third District equated delayed appeal with direct appeal.

In the instant matter, appellant was sentenced on October 19, 2005. *Silsby*, supra, at ¶4. He filed a motion for a delayed appeal on August 2, 2006, which was granted on November 2, 2006. Id. at ¶4, fn. 2. Thus, appellant was sentenced before *Foster* and filed a delayed appeal after the *Foster* decision. In affirming the decision of the trial court, this court held, at ¶14:

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"Here, appellant's case was not pending on direct review at the time of the *Foster* decision, which was decided on February 27, 2006. Appellant's August 2, 2006 filing of his delayed appeal, does not change the fact that the conviction and sentence had become final long before *Foster* was announced. 'Delayed appeal is not the same as direct appeal.' *State v. Lewis*, 10th Dist. No. 06AP-327, 2006-Ohio-2752, at ¶10, citing *State v. Bird* (2000), 138 Ohio App.3d 400 ***. 'Because appellant's case was final before *Foster* was decided, *Foster* cannot be a basis to vacate the judgment of the trial court.' *Lewis* at ¶10." (Parallel citation omitted.)

Based upon the foregoing conflict, we certify the following issues for review by the Supreme Court of Ohio:

"1. Whether a delayed appeal under Ohio Rule of Appellate Procedure 5(A) is identical to a direct appeal under Ohio Rule of Appellate Procedure 4(A) for purposes of appellate review as to whether a defendant was sentenced upon the basis of an unconstitutional statute under the guidelines of *State v. Foster.*

"2. Whether a defendant's sentence must be reversed on the basis of *State v. Foster* when: a) the defendant was sentenced prior to the announcement of *State v. Foster*; b) the defendant was sentenced under the statutes found to be unconstitutional in *State v. Foster*; c) the defendant does not pursue a direct appeal but rather files a delayed appeal; d) and raises the issues of unconstitutional sentencing on the basis of *Foster* for the first time on delayed appeal."

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Appellant's motion to certify a conflict is granted.

JUDGE COLLEEN MARY O'TOOLE

CYNTHIA WESTCOTT RICE, P.J.,

MARY JANE TRAPP, J.,

concur.

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FILED
IN COURT OF APPEALS
MAY 14 2007
DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

STATE OF OHIO
)SS.
COUNTY OF GEAUGA

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

WILLIAM J. SILSBY,

Defendant-Appellant.

JUDGMENT ENTRY

CASE NO. 2006-G-2725

For the reasons stated in the opinion of this court, the assignments of error are not well-taken. It is the judgment and order of this court that the judgment of the Geauga County Court of Common Pleas is affirmed.

Colleen Mary O'Toole

JUDGE COLLEEN MARY O'TOOLE

FOR THE COURT

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FILED
IN COURT OF APPEALS
MAY 14 2007
DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

STATE OF OHIO,	:	**OPINION**
Plaintiff-Appellee,	:	
		CASE NO. 2006-G-2725
- vs -	:	
WILLIAM J. SILSBY,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 04 C 0000105.

Judgment: Affirmed.

David P. Joyce, Geauga County Prosecutor, and *Susan T.* Wieland, Assistant Prosecutor, Courthouse Annex, 231 Main Street, Chardon, OH 44024 (For Plaintiff-Appellee).

Derek Cek, 3500 West Market Street, #4, Fairlawn, OH 44333 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, William J. Silsby, appeals from the October 19, 2005 judgment entry of the Geauga County Court of Common Pleas, in which he was sentenced for obstructing official business.

{¶2} On October 19, 2004, appellant was indicted by the Geauga County Grand Jury on two counts: count one, domestic violence, a felony of the third degree, in

violation of R.C. 2919.25(A); and count two, obstructing official business, a felony of the fifth degree, in violation of R.C. 2921.31(A). Appellant pleaded not guilty at his arraignment on January 25, 2005.

{¶3} On October 6, 2005, the trial court held a joint change of plea and sentencing hearing. Appellant withdrew his former not guilty plea, and pleaded guilty to count two, obstructing official business, a felony of the fifth degree, in violation of R.C. 2921.31(A). The trial court accepted appellant's guilty plea with respect to count two, and dismissed count one.

{¶4} Pursuant to its October 19, 2005 judgment entry, the trial court sentenced appellant to twelve months in prison, to be served consecutively with an existing sentence from Lake County, Ohio, Case No. 04 CR 000793, and placed him on post release control for a period of up to three years.[1] It is from that judgment that appellant filed the instant appeal and raises the following three assignments of error:[2]

{¶5} "[1.] The trial court erred when it sentenced appellant to the maximum

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1. In the Lake County case, appellant was sentenced on September 29, 2005, to ten years for attempted murder, four years for having weapons while under disability, and one year for grand theft of a motor vehicle, to be served consecutively. The trial court also imposed an additional mandatory term of three years for a firearm specification with respect to the attempted murder count, to be served prior to and consecutive to the foregoing prison term. Thus, appellant was sentenced to a total prison term of eighteen years in the Lake County case. On October 27, 2005, in Case No. 2005-L-180, appellant filed a timely notice of appeal with this court. On October 20, 2006, we vacated appellant's sentence and reversed and remanded the matter to the trial court for resentencing and further proceedings consistent with *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. *State v. Silsby*, 11th Dist. No. 2005-L-180, 2006-Ohio-5500, at ¶17.

2. Appellant filed a motion for leave to file a delayed appeal pursuant to App.R. 5(A). Along with the motion, appellant filed his notice of appeal on August 2, 2006, almost nine months beyond the thirty-day requirement in App.R. 4(A). Appellant asserted the following: his trial counsel indicated that he would speak to the public defender's office and have someone file an appeal on his behalf; he did not receive anything in the mail about his appeal; he sent several letters to his trial attorney requesting certain information and did not receive anything from him since July 24, 2006; and he is not a lawyer and does not have any knowledge of the appellate process. No brief or memorandum in opposition was filed. Pursuant to this court's November 2, 2006 judgment entry, we determined that appellant satisfied the requirements of App.R. 5(A), and granted his motion for leave to file a delayed appeal.

sentence and consecutive sentences based upon findings of facts not found by a jury or admitted by the appellant in violation of appellant's federal and state constitutional rights to trial by jury.

{¶6} "[2.] The trial court's sentence of appellant to the maximum sentence and a consecutive sentence was contrary to law.

{¶7} "[3.] The trial court denied appellant due process of law when it imposed a maximum and consecutive sentence which was not agreed to by appellant and the state in the plea agreement."

{¶8} In his first assignment of error, appellant argues that the trial court erred when it sentenced him to the maximum and consecutive sentences based upon facts not found by a jury or admitted by him in violation of his federal and state constitutional rights to trial by jury.

{¶9} We note that the sentencing guidelines at issue have recently been addressed by this court in *State v. Elswick*, 11th Dist. No. 2006-L-075, 2006-Ohio-7011.[3] In *Elswick*, at ¶49, quoting *State v. Firouzmandi*, 5th Dist. No. 2006-CA-41, 2006-Ohio-5823, at ¶54-57, we stated:

{¶10} "'*** appellate courts can find an "abuse of discretion" where the record establishes that a trial judge refused or failed to consider statutory sentencing factors. *Cincinnati v. Clardy* (1978), 57 Ohio App.2d 153 *** (***). An "abuse of discretion" has also been found where a sentence is greatly excessive under traditional concepts of justice or is manifestly disproportionate to the crime or the defendant. *Woosley v. United States* (1973), 478 F.2d 139, 147. The imposition by a trial judge of a sentence

3. In *Elswick*, the appeal dealt with more than the minimum sentences. However, the same analysis applies to maximum and consecutive sentences.

on a mechanical, predetermined or policy basis is subject to review. *Woosley*, supra, at 143-145. Where the severity of the sentence shocks the judicial conscience or greatly exceeds penalties usually exacted for similar offenses or defendants, and the record fails to justify and the trial court fails to explain the imposition of the sentence, the appellate court's (sic) can reverse the sentence. *Woosley*, supra, at 147. ***'"

{¶11} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, at paragraphs one and three of the syllabus, the Supreme Court of Ohio held that R.C. 2929.14(C) and R.C. 2929.14(E)(4) are unconstitutional for violating the Sixth Amendment because they deprive a defendant of the right to a jury trial, pursuant to *Apprendi v. New Jersey* (2000), 530 U.S. 466, and *Blakely v. Washington* (2004), 542 U.S. 296. Further, pursuant to *United States v. Booker* (2005), 543 U.S. 220, the Supreme Court's remedy was to sever the unconstitutional provisions of the Revised Code, including R.C. 2929.14(C) and R.C. 2929.14(E)(4). After severance, judicial factfinding is not required before imposing maximum or consecutive sentences. *Foster* at paragraphs two and four of the syllabus. A trial court is no longer required to make findings or give its reasons for imposing maximum, consecutive or more than the minimum sentences. Id. at paragraph seven of the syllabus.

{¶12} The *Foster* decision did not announce a new constitutional right. *Foster* simply applied existing decisions of the United States Supreme Court to Ohio statutes. Any claim appellant may assert under *Foster* is actually based upon the *Apprendi* and *Blakely* decisions. *Apprendi* was decided in 2000, long before appellant entered his guilty plea and was sentenced. *Blakely* was decided on June 24, 2004, also before

appellant entered his guilty plea and was sentenced. Therefore, appellant could have raised a claim based on *Blakely* at the time he entered his negotiated guilty plea.

{¶13} "When a sentence is deemed void, the ordinary course is to vacate that sentence and remand to the trial court for a new sentencing hearing." Id. at ¶103. However, the remedy of vacating a sentence following the *Foster* decision applies only to those cases pending on direct review. Id. at ¶104.

{¶14} Here, appellant's case was not pending on direct review at the time of the *Foster* decision, which was decided on February 27, 2006. Appellant's August 2, 2006 filing of his delayed appeal, does not change the fact that the conviction and sentence had become final long before *Foster* was announced. "Delayed appeal is not the same as direct appeal." *State v. Lewis*, 10th Dist. No. 06AP-327, 2006-Ohio-2752, at ¶10, citing *State v. Bird* (2000), 138 Ohio App.3d 400. "Because appellant's case was final before *Foster* was decided, *Foster* cannot be a basis to vacate the judgment of the trial court." *Lewis* at ¶10.

{¶15} Appellant's first assignment of error is without merit.

{¶16} In his second assignment of error, appellant contends that his sentence is contrary to law. He asserts three issues for our review. In his first issue, appellant alleges that the trial court erred in sentencing him to the maximum sentence for a single fifth degree felony because the evidence presented does not prove that he poses the greatest likelihood of committing future crimes. In his second issue, appellant stresses that the trial court erred in sentencing him to a consecutive sentence because it failed to consider the factor that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the

public. In his third issue, appellant maintains that a maximum twelve month sentence and a consecutive sentence is contrary to law since he pleaded guilty to a fifth degree felony and is already serving a sentence for other crimes.

{¶17} Because appellant's three issues are interrelated, we will address them together.

{¶18} On examining a felony sentence, an appellate court conducts a de novo review. R.C. 2953.08(G). However, "'[a] reviewing court will not disturb a defendant's sentence absent a finding, by clear and convincing evidence, that the record does not support the sentence or that the sentence is contrary to law.'" *State v. Bush*, 11th Dist. No. 2005-P-0004, 2006-Ohio-4038, at ¶49, quoting *State v. Lloyd*, 11th Dist. No. 2002-L-069, 2003- Ohio-6417, at ¶6.

{¶19} As indicated in appellant's first assignment of error, a trial court is no longer required to make findings or give its reasons for imposing maximum, consecutive or more than the minimum sentences. *Foster*, supra, at paragraph seven of the syllabus. However, appellant's case was not pending on direct review at the time of the *Foster* decision. Again, his conviction and sentence had become final long before *Foster* was announced. Accordingly, the trial court was required to make the requisite findings before imposing sentence on October 19, 2005.

{¶20} At the sentencing hearing, the trial court stated the following:

{¶21} "I do find that the Domestic Violence and the Obstructing Official Business charges, and only addressing the plea on the Obstructing Official Business, occurred prior to the incidents leading on the Lake County sentence. I do find that [appellant] has served prior prison sentences. I find that the crime was committed while [appellant] was

subject to community control sanctions. I do find that [appellant] does pose the greatest likelihood of committing future crimes. I do find that a consecutive sentence is necessary to protect the public. And referring again to the fact that this crime was committed while he was on probation/community control. And [appellant's] career criminal history shows that a consecutive sentence is necessary to protect the public.

{¶22} "For reasons: [Appellant] in the Court's opinion has demonstrated a history of causing injuries to people. He's demonstrated a history of failing to comply with probation sanctions, community control sanctions, and the law. He's unable to control his own behavior.

{¶23} "Consequently, I am sentencing [appellant] to 12 months in prison; that sentence is consecutive to the sentence in Lake County. ***"

{¶24} In addition, the trial court made a similar pronouncement in its October 19, 2005 judgment entry. The trial court stated that it made the following findings:

{¶25} "a. The Court finds that [appellant] committed this crime prior to the incidents leading to the Lake County sentence.

{¶26} "b. The Court finds that [appellant] has served a prior prison sentence.

{¶27} "c. The Court finds that [appellant's] conduct presents the greatest likelihood of committing future crimes.

{¶28} "d. The Court further finds that [appellant] committed this crime while on community control.

{¶29} "e. The Court further finds that a consecutive sentence is necessary to protect the public. [Appellant] has demonstrated a history of causing injuries to people.

{¶30} "f. The Court further finds that [appellant's] conduct presents the greatest likelihood of committing future crimes.

{¶31} "g. The Court finds that [appellant] has a history of failure to comply with probation's sanctions, community control sanctions, and the law.

{¶32} "h. [Appellant] is unable to control his behavior."

{¶33} The trial court further indicated in its sentencing order that it considered the record, information presented by or on behalf of appellant, the prosecuting attorney, appellant's ability to pay financial sanctions, and any victim impact statement(s), as well as the principles and purposes of sentencing under R.C. 2929.11, and balanced the seriousness and recidivism factors under R.C. 2929.12.

{¶34} Based on the foregoing, we conclude that the trial court properly sentenced appellant on October 19, 2005, pursuant to R.C. 2929.14(C) and R.C. 2929.14(E)(4).

{¶35} Appellant's second assignment of error is without merit.

{¶36} In his third assignment of error, appellant alleges that the trial court denied him due process of law when it imposed a maximum sentence for a fifth degree felony and a consecutive sentence which was not agreed to by him and appellee, the state of Ohio, in the plea agreement.

{¶37} Appellant relies on *State v. Patrick*, 163 Ohio App.3d 666, 2005-Ohio-5332, for the proposition that a sentence is void if a trial court imposes a different sentence than that agreed on by a defendant and the state. In *Patrick*, the trial court acknowledged on the record its adoption of the plea agreement and sentencing recommendation prior to taking the plea. Id. at ¶12, 24. The Eighth District noted that

when a defendant is promised a sentence prior to a plea and then receives a different sentence, that sentence is void. Id. at ¶26, citing *State v. Adams* (May 22, 1997), 8th Dist. No. 70045, 1997 Ohio App. LEXIS 2215. The Eighth District further indicated that "[w]hile it is true that a trial court may accept or reject an agreed upon sentence, if a defendant and his attorney reached an agreement with the prosecutor and the trial court then accepted this agreement on the record, to impose anything other than the agreed upon sentence renders it void or voidable." Id. at ¶26.

{¶38} Appellant's reliance on *Patrick* is misplaced with respect to the facts in the instant matter. The trial court here never accepted the recommended sentence or indicated acceptance of that sentence on the record. The signed plea agreement specifies that appellee recommended a concurrent sentence, but that the judge is not bound by the terms of the plea agreement and may choose to accept or reject the agreement as he sees fit. In addition, at the sentencing hearing, the trial judge put appellant on notice, prior to the plea, that he was not bound by the plea agreement. The trial judge advised appellant that it was up to him, as the judge, to determine whether the sentence would run concurrent or consecutive. Appellant indicated that he understood.

{¶39} Appellant's third assignment of error is without merit.

{¶40} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Geauga County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, P.J.,
MARY JANE TRAPP, J.,
concur.

[Cite as *State v. Jenkins*, 2007-Ohio-1742.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2006 CA 37
v.	:	T.C. NO. 05 CR 309
KEITH W. JENKINS	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

. . . . . .

OPINION

Rendered on the 13th day of April, 2007.

. . . . . .

WILLIAM H. LAMB, Atty. Reg. No. 0051808, 50 E. Columbia Street, Springfield, Ohio 45502
Attorney for Plaintiff-Appellee

CHRISTOPHER W. THOMPSON, Atty. Reg. No. 0055379, 130 West Second Street, Suite 2050, Dayton, Ohio 45402
Attorney for Defendant-Appellant

. . . . . .

WOLFF, P.J.

{¶ 1} Keith W. Jenkins pled guilty to one count of burglary in the Clark County Court of Common Pleas. On September 28, 2005, the court sentenced him to five years in prison. Jenkins did not file a timely appeal. However, Jenkins sought leave to file a delayed appeal, which we granted on May 3, 2006. Jenkins appeals his sentence based on *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

{¶ 2} In his sole assignment of error, Jenkins claims that the trial court imposed a non-minimum sentence under R.C. 2929.14(B), which the Supreme Court of Ohio held to be unconstitutional in *Foster*. Jenkins asserts that the court erroneously found that there was a high likelihood of recidivism and made findings regarding the seriousness of his offense. Jenkins requests that his sentence be reversed and his case be remanded for resentencing.

{¶ 3} In response, the state questions whether Jenkins's case was pending on direct appeal at the time *Foster* was decided, because he did not timely appeal and he was not granted a delayed appeal until after *Foster*. Although the state does not concede that Jenkins's argument on appeal is meritorious, it does not oppose a remand for resentencing.

{¶ 4} Although Jenkins's notice of appeal was not filed until after *Foster* was decided, we consider his case to be pending on direct appeal within the meaning of *Foster*. See *State v. January*, Clark App. No. 2006-CA-21, 2007-Ohio-435; *State v. Corbin*, Allen App. No. 1-06-23, 2006-Ohio-6902.

{¶ 5} On appeal, Jenkins claims that his sentence is unconstitutional in light of *Foster*. In *Foster*, the Supreme Court of Ohio held that portions of the sentencing statute are unconstitutional, because they require judicial fact-finding. The unconstitutional portions include R.C. 2929.14(B), (C), (D)(2)(b), (D)(3)(b), and (E)(4); R.C. 2929.19(B)(2); and R.C. 2929.41(A). The supreme court severed the provisions that it found to be unconstitutional.

{¶ 6} R.C. 2929.11 and R.C. 2929.12, which set forth statutory "considerations" and do not require judicial factfinding, were not affected by *Foster*. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, ¶38. R.C. 2929.11 sets forth the

purposes of felony sentencing. R.C. 2929.12 instructs the court to consider seriousness and recidivism factors.

{¶ 7} R.C. 2929.13(D) also survived *Foster*. Indeed, the supreme court held in *Mathis* that "a trial court at sentencing is required to make judicial findings only for a downward departure pursuant to R.C. 2929.13(D) or a judicial release pursuant to 2929.20(H). When findings under R.C. 2929.13(D) or 2929.20(H) are missing from the appellate record, the appellate court shall remand the case to the sentencing court to state on the record the required findings pursuant to R.C. 2953.08(G)(1), after which the appellate court shall either affirm or modify the sentence, or vacate the sentence and remand the case for a hearing de novo if the sentence is contrary to law." *Mathis* at ¶36.

{¶ 8} During Jenkins's sentencing hearing, the trial court balanced the seriousness and recidivism factors under R.C. 2929.12. The court noted that the victim was elderly, that her economic injury was $800, and that Jenkins knew her from having done some work for her. The court reviewed Jenkins's criminal history, as well as letters from his wife, mother-in-law, and daughter. Because Jenkins's offense carried a presumption in favor of a prison sentence, the trial court also considered whether the presumption was overridden under R.C. 2929.13(D). The court found it was not, and it sentenced Jenkins to five years in prison and ordered him to pay restitution of $800 plus court costs. The court's judgment entry, dated September 28, 2005, likewise stated that the court considered factors under R.C. 2929.11, R.C. 2929.12, and R.C. 2929.13. The court did not expressly consider any portions of the statute which were subsequently held unconstitutional in *Foster*.

{¶ 9} *Foster* established a bright line rule that any pre-*Foster* sentence to which the statutorily required findings of fact applied (i.e. non-minimum, maximum and consecutive sentences), pending on direct appeal at the time that *Foster* was decided, must be reversed and remanded for resentencing, because judicial fact-finding violates a defendant's Sixth Amendment right to a trial by jury. *State v. Nunez*, Montgomery App. No. 21495, 2007-Ohio-1054, ¶4. In *Mathis*, the supreme court remanded for resentencing on the basis of *Foster* where the defendants received maximum and consecutive prison terms, even though the trial court had failed to make the findings that were required prior to *Foster*.

{¶ 10} Although the trial court here did not make express findings under the unconstitutional portions of the sentencing statute, the trial court imposed more than the minimum sentence for Jenkins's offense, a second degree felony. Accordingly, Jenkins was sentenced under a portion of the sentencing statute that was subsequently found to be unconstitutional and was severed from the sentencing statute. In accordance with *Foster* and *Mathis*, we must reverse Jenkins's sentence and remand this case for a new sentencing hearing. *Foster* at ¶104-105; see *State v. Caver*, Montgomery App. No. 21241, 2006-Ohio-4278.

{¶ 11} The assignment of error is sustained.

{¶ 12} The judgment of the trial court will be reversed and the cause remanded for resentencing.

. . . . . .

BROGAN, J. and DONOVAN, J., concur.

[Cite as *State v Corbin*, 2006-Ohio-6092.]

COURT OF APPEALS
THIRD APPELLATE DISTRICT
ALLEN COUNTY

STATE OF OHIO

PLAINTIFF-APPELLEE

v.

DANTE L. CORBIN

DEFENDANT-APPELLANT

CASE NUMBER 1-06-23

OPINION

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.

JUDGMENT: Judgment affirmed in part, reversed in part and cause remanded.

DATE OF JUDGMENT ENTRY: November 20, 2006

ATTORNEYS:

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Shaw, J.

{¶1} The defendant-appellant, Dante L. Corbin ("Corbin"), appeals the January 24, 2006 Judgment of conviction and sentence entered in the Court of Common Pleas of Allen County, Ohio.

{¶2} On June 16, 2005, Corbin was indicted by the Allen County Grand Jury on Counts 1, 3 and 5 – trafficking in crack cocaine, in violation of R.C. 2925.03(A) and (C)(4)(d), felonies of the third degree; Count 2 – permitting drug abuse, in violation of R.C. 2925.13(A) and (C)(3), a felony of the fifth degree; and Count 4 – trafficking in crack cocaine, in violation of R.C. 2925.03(A) and (C)(4)(d), a felony of the first degree.

{¶3} On December 13, 2005, Corbin entered into a negotiated plea arrangement and pled guilty to Counts 3, 4, and 5 of the indictment, in exchange for the dismissal of Counts 1 and 2. The trial court ordered a presentence investigation. On January 23, 2006, a sentencing hearing was held. Corbin was sentenced to two years in prison for Count 3, four years in prison for Count 4, and two years in prison for Count 5, with the sentences to be served consecutively.

{¶4} On February 28, 2006, Corbin filed a notice of appeal. On March 13, 2006, this Court dismissed the appeal for lack of jurisdiction because the appeal was untimely and filed outside the thirty days required by App.R. 4(A). On

April 6, 2006, Corbin filed a Motion for Delayed Appeal and a Notice of Appeal. On May 30, 2006, this Court granted the Motion for Delayed Appeal.

{¶5} In Corbin's April 6, 2006 notice of appeal, he raised the following assignments of error:

Assignment of Error I

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT UNDER A STATUTE DECLARED UNCONSTITUTIONAL PURSUANT TO STATE v. FOSTER (2006) 109 Ohio St.3d 1.

Assignment of Error II

THE OHIO SENTENCING SCHEME IS UNCONSTITUTIONAL EVEN AFTER STATE v. FOSTER SINCE POST FOSTER SENTENCING REPRESENTS APPLICATION OF A LAW EX POST FACTO.

Assignment of Error III

THE SENTENCE IMPOSED BY THE TRIAL COURT VIOLATES THE RULE OF LENITY.

{¶6} Corbin's first assignment of error poses an issue concerning his felony sentencing. He alleges that his sentence is void because it is based upon statutes which have recently been found unconstitutional by the Ohio Supreme Court.

{¶7} The Supreme Court of Ohio recently addressed constitutional issues concerning felony sentencing in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. In *Foster,* the Supreme Court of Ohio held that portions of Ohio's felony

sentencing framework are unconstitutional and void, including R.C. 2929.14(B) requiring judicial findings that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crimes by the offender. *Foster*, 2006-Ohio-856, at ¶ 97, 103. Pursuant to the ruling in *Foster*, Corbin's first assignment of error is sustained.

{¶8} Corbin asserts in his second assignment of error that the application of *Foster* to his case and sentence violates the ex post facto clause of the United States Constitution.

{¶9} This Court has recently held that violations of the ex post facto clause were not properly before the Court because the defendant was yet to be resentenced in conformity with *Foster* in *State v. Pitts* (2006), 3rd Dist. No. 1-06-02, 2006-Ohio-2796; *State v. Sanchez* (2006), 3rd Dist. No. 4-05-47, 2006-Ohio-2141; *State v. McKercher* (2006), 3rd Dist. No. 1-05-83, 2006-Ohio-1772. In each of those cases, the defendants were in the process of being remanded for resentencing in light of the *Foster* decision. Furthermore, a claim that rests upon future events that may not occur at all, or may not occur as anticipated, is not considered ripe for review. *State ex rel. Keller v. Columbus* (2005), 164 Ohio App.3d 648, at ¶ 20.

{¶10} In this case, the issues that Corbin raises regarding the ex post facto clause are not properly before us because Corbin has yet to be re-sentenced. Thus, the second assignment of error is deemed moot.

{¶11} Corbin argues in his third assignment of error that the "rule of lenity" requires that a defendant receive minimum and concurrent sentences because the rule cautions against increasing the penalty imposed on a particular offender where the increase is based on nothing more than a guess as to what criminal sanction the legislature intended.

{¶12} The "rule of lenity" was originally a common law rule of statutory construction that has been codified in R.C. 2901.04(A), which provides:

> **Except as otherwise provided in division (C) or (D) of this section, sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.**

{¶13} While courts are required to strictly construe statutes defining criminal penalties against the state, the rule of lenity applies only where there is ambiguity in a statute or conflict between multiple states. *United States v. Johnson* (2000), 529 U.S. 53, 59, 120 S.Ct. 1114, 146 L.Ed.2d 39; *United States v. Lanier* (1997), 520 U.S. 259, 266, 117 S.Ct. 1219 137 L.Ed.2d 432; *State v. Arnold* (1991), 61 Ohio St.3d 175, 178, 573 N.E.2d 1079. There exists no ambiguity in the sentencing statutes in Ohio because the Supreme Court of Ohio held that portions of Ohio's felony sentencing framework was unconstitutional and

void in *State v. Foster, supra.* Therefore, the rule of lenity has no bearing on the present case because *Foster* can be easily understood to state that portions of the sentencing framework are unconstitutional and provides no ambiguity as to the unconstitutionality of certain statutes. Accordingly, Corbin's third assignment of error is overruled.

{¶14} Accordingly, Corbin's first assignment of error is sustained. His second assignment of error is deemed moot and his third assignment of error is overruled. Therefore, the January 24, 2006 Judgment of conviction and sentence entered in the Court of Common Pleas of Allen County, Ohio is affirmed in part, reversed in part and pursuant to the *Foster* decision, the matter is remanded for resentencing.

Judgment affirmed in part, reversed in part, and remanded for resentencing.

WALTERS, J., concurs.
ROGERS, J., concurs separately.

{¶15} ROGERS, J., concurring separately. I concur with the result reached by the majority in this case, and the majority's reasoning on the first and second assignments of error. However, I would find that our resolution of the first and second assignments of error renders the third assignment of error moot and I would decline to address it. App.R. 12(A)(1)(c).

WALTERS, J., sitting by assignment in the Third Appellate District.)