

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2005-L-096
TERRANCE D. BARNWELL,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 05 CR 000163.

Judgment: Vacated; reversed and remanded.

Charles E. Coulson, Lake County Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

R. Paul LaPlante, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

DONALD R. FORD, P.J.

{¶1} Appellant, Terrance D. Barnwell, appeals from the June 8, 2005 judgment entry of the Lake County Court of Common Pleas, in which he was sentenced for assault.

{¶2} On April 11, 2005, appellant was indicted by the Lake County Grand Jury on four counts: count one, assault, a felony of the fourth degree, in violation of R.C. 2903.13(A); count two, having weapons while under disability, a felony of the third degree, in violation of R.C. 2923.13(A)(1); count three, having weapons while under

disability, a felony of the third degree, in violation of R.C. 2923.13(A)(2); and count four, having weapons while under disability, a felony of the third degree, in violation of R.C. 2923.13(A)(3). On April 15, 2005, appellant filed a waiver of his right to be present at the arraignment and the trial court entered a not guilty plea on his behalf.

{¶3} A jury trial commenced on May 2, 2005. Following trial, the jury returned a verdict of guilty on count one, assault, and not guilty on count four, having weapons while under disability. Counts two and three were dismissed.

{¶4} A sentencing hearing was held on June 1, 2005. Pursuant to its June 8, 2005 judgment entry, the trial court sentenced appellant to serve a prison term of twelve months on count one, with ninety-seven days of credit for time served. It is from that judgment that appellant filed a timely notice of appeal and makes the following assignment of error:

{¶5} “The trial court erred when it sentenced [appellant] to a more-than-the-minimum prison sentence based upon a finding of factors not found by the jury or admitted by [appellant] in violation of [appellant’s] state and federal constitutional rights to trial by jury.”

{¶6} In sentencing appellant, the trial court relied upon judicial fact-finding, formerly mandated by statute, but now deemed unconstitutional and void by the Supreme Court of Ohio. On that basis, appellant’s assignment of error is with merit.

{¶7} Appellant’s sentence in this case is impacted by the recent decision of the Supreme Court of Ohio in *State v. Foster*, 109 Ohio St.3d. 1, 2006-Ohio-856. In *Foster*, at paragraph one of the syllabus, the Supreme Court held that R.C. 2929.14(B) is unconstitutional for violating the Sixth Amendment because it deprives 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.

{¶8} 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(B). After severance, judicial fact-finding is not required before imposing more than the minimum sentence. *Foster* at paragraph two of the syllabus.

{¶9} Since *Foster* was released while this case was pending on direct review, appellant's sentence is void, must be vacated, and remanded for resentencing. *Foster* at ¶103-104. Upon remand, the 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.

{¶10} Appellant's sole assignment of error is with merit.

{¶11} The sentence of the Lake County Court of Common Pleas is vacated. This case is reversed and remanded for resentencing for proceedings consistent with this opinion pursuant to *Foster*.

CYNTHIA WESTCOTT RICE, J.,
COLLEEN MARY O'TOOLE, J.,
concur.