[Cite as *State of Ohio vs. Scranton Buchanan*, 2006-Ohio-5653.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 05 MA 60
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
SCRANTON BUCHANAN,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 03CR751.

JUDGMENT: Conviction affirmed; Sentence Vacated; Case Remanded.

APPEARANCES:

For Plaintiff-Appellee:

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For Defendant-Appellant:

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JUDGES:

Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: October 26, 2006

VUKOVICH, J.

{¶1} Defendant-appellant Scranton Buchanan appeals from his conviction in the Mahoning County Common Pleas Court for rape, R.C. 2907.02(A)(1)(b) (first degree felony), and gross sexual imposition, R.C. 2907.05(A)(4) (third degree felony). Appointed appellate counsel filed a no-merit brief in accordance with *State v. Toney* (1970), 23 Ohio App.2d 203. Thus, the issue presented in this case is whether the appeal is frivolous. After conducting an independent review of this case, we find that the appeal is not frivolous and there exists one meritorious issue which deals with *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. Accordingly, the conviction is affirmed. However, appellant's sentence is reversed and vacated and this case is remanded for resentencing.

STATEMENT OF FACTS AND CASE

{¶2} On June 26, 2003, Buchanan was indicted on three counts of rape, violations of R.C. 2907.02(A)(1)(b), and three counts of gross sexual imposition, violations of R.C. 2907.05(A)(4). Counts one, two and three, the rape counts, were felonies that were punishable by life imprisonment. Counts four, five and six were third degree felonies. The victim to all these counts was Jameelah Wylie, who was under 10 years old when the crimes occurred.

{¶3} Buchanan was arraigned on July 17, 2003, and at that time entered a plea of not guilty. On January 11, 2005, after discovery, two motions and hearings to determine Buchanan's competency, two superceding indictments, and multiple motions to continue, Buchanan and the state entered into a plea agreement.

{¶4} Pursuant to the plea agreement, the state moved to strike the language in the first three counts of the indictment that stated "and further find that Jameelah Wylie was less than ten years of age or that Scranton Buchanan compelled her to submit by force or threat of force." 01/11/05 J.E. Striking this language from the indictment dismissed the potential for life in prison and rendered counts one, two and three first degree felonies. The trial court granted the motion to strike. 01/11/05 J.E. Buchanan then pled guilty to all counts in the amended indictment. 01/11/05 Tr. 23.

{¶5} Sentencing was set for March 18, 2005. The state recommended an eight year sentence on each offense as set forth in counts one and two. It recommended that those sentences be served consecutively. On count three, it

recommended three years. On counts four through six, it recommended one year a piece. It then recommended that counts three through six run concurrent with the sentences for counts one and two. Thus, the state recommended a total of 16 years in prison.

{¶6} The trial court sentenced Buchanan to 16 years in prison. However, instead of strictly following the state's recommendation it ordered the following:

{¶7} "[E]ight (8) years on Count 1, eight (8) years on Count 2 to be served consecutively with Count 1 and eight (8) years on Count 3 to be served concurrently with Count 1 and Count 2, and on Counts 4, 5, and 6 one (1) year on each count to be served concurrently with each other and with Counts 1, 2 and 3." 03/21/05 J.E. (underline in original).

{¶8} Following that sentence, appellate counsel was appointed. On December 29, 2005, counsel filed a no merit brief, i.e. a *Toney* brief.

ANALYSIS

{¶9} In *Toney*, this court set forth the procedure to be used when counsel of record determines that an indigent's appeal is frivolous:

{¶10} "3. Where court-appointed counsel, with long and extensive experience in criminal practice, concludes that the indigent's appeal is frivolous and that there is no assignment of error which could be arguably supported on appeal, he should so advise the appointing court by brief and request that he be permitted to withdraw as counsel of record.

{¶11} "4. Court-appointed counsel's conclusions and motion to withdraw as counsel of record should be transmitted forthwith to the indigent, and the indigent should be granted time to raise any points that he chooses, pro se.

{¶12} "5. It is the duty of the Court of Appeals to fully examine the proceedings in the trial court, the brief of appointed counsel, the arguments pro se of the indigent, and then determine whether or not the appeal is wholly frivolous.

{¶13} "* * *

{¶14} "7. Where the Court of Appeals determines that an indigent's appeal is wholly frivolous, the motion of court-appointed counsel to withdraw as counsel of record should be allowed, and the judgment of the trial court should be affirmed." *Toney*, 23 Ohio App.2d 203, syllabus.

{¶15} As stated above, the *Toney* brief was filed by counsel on December 29, 2005. On March 29, 2006, we informed Buchanan of counsel's *Toney* brief and granted him 30 days to file a written brief. As of date, Buchanan has not filed a pro se brief. Thus, we will proceed to independently examine the record to determine if the appeal is frivolous.

{¶16} A cursory glance of the docket in this case may raise a suspicion that Buchanan's speedy trial rights, either statutory or constitutional, may have been violated. Yet, in *State v. Synder*, 7th Dist. No. 03MA152, 2004-Ohio-3366, we explained that by entering a guilty plea appellant waives any claim to raise on appeal that his speedy trial rights were violated.

{¶17} "A guilty plea constitutes a complete admission of guilt. Crim.R. 11(B)(1). 'By entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime.' *State v. Barnett* (1991), 73 Ohio App.3d 244, 248, quoting *United States v. Broce* (1989), 488 U.S. 563, 570. Thus, the plea renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt. *Barnett,* quoting *Menna v. New York* (1975), 423 U.S. 61. This also includes the right to claim that the accused was not provided a speedy trial as required by law. *Montpelier v. Greeno* (1986), 25 Ohio St.3d 170. This includes the right to claim that the accused was prejudiced by constitutionally ineffective counsel, 'except to the extent the defects complained of caused the plea to be less than knowing and voluntary.' *Barnett* at 249." *Synder*, 2004-Ohio-3366, ¶13.

{¶18} Thus, Buchanan's guilty plea waived his ability to raise any speedy trial issues, as long as the plea was entered into knowingly, voluntarily, and intelligently.

{¶19} In order for a plea to be entered into knowingly, voluntarily and intelligently, Crim.R. 11 must be followed. Crim.R. 11(C) sets forth the requirements in felony cases. In *State v. Martinez*, 7th Dist. No. 03MA196, 2004-Ohio-6806, ¶12, this court explained Crim.R. 11(C) and its requirements:

{¶20} "A trial court must strictly comply with Crim.R. 11 as it pertains to the waiver of federal constitutional rights. These include the right to trial by jury, the right of confrontation, and the privilege against self-incrimination. [*Boykin v. Alabama* (1969), 395 U.S. 238], 243-44. Strict compliance is also required when waiving the right of compulsory process. *State v. Ballard* (1981), 66 Ohio St.2d 473, 477.

However, substantial compliance with Crim.R. 11(C) is sufficient when waiving non-constitutional rights. *State v. Nero* (1990), 56 Ohio St.3d 106, 108. The nonconstitutional rights that a defendant must be informed of are the nature of the charges with an understanding of the law in relation to the facts, the maximum penalty, and that after entering a guilty plea or a no contest plea, the court may proceed to judgment and sentence. Crim.R. 11(C)(2)(a)(b); *State v. Philpott* (Dec. 14, 2000), 8th Dist. No. 74392, citing *McCarthy v. U.S.* (1969), 394 U.S. 459, 466. Substantial compliance means that under the totality of the circumstances, the defendant subjectively understands the implications of his plea and the rights he is waiving. *Nero*, 56 Ohio St.3d at 108." Id.

{¶21} A review of the 27 page transcript indicates that Buchanan's plea conformed with Crim.R. 11(C). Buchanan was informed that by entering the guilty plea he was waiving his right to have the state prove its case beyond a reasonable doubt, the right to a jury trial, the right to subpoena (compulsory process), the right against self incrimination, and the right to confrontation. 01/11/05 Tr. 12-14. Buchanan was also informed of the nature of the charges against him. 01/11/05 Tr. 5-10. The trial court additionally indicated that even though it was not going to proceed to judgment and sentencing, that it could. 01/11/05 Tr. 14-16. Buchanan was additionally informed of the maximum penalty. 01/11/05 Tr. 10-11, 16-17. Lastly, the trial court asked if he had been coerced in any way and if he entered the plea on his own free will. 01/11/05 Tr. 19-20. Buchanan indicated that he was not coerced or threatened and that he entered the plea freely. 01/11/05 Tr. 19-20. In addition to all the above advisements, the record in this case displays that the trial court took exceptional care in determining that Buchanan made the plea knowingly.

{¶22} Consequently, considering all the above, the guilty plea was entered into intelligently, knowingly, and voluntarily. Thus, the entering of a valid guilty plea waives any speedy trial issues. Therefore, no meritorious issues exist as to speedy trial or the entering of the plea.

{¶23} As such, our analysis must now turn to sentencing. Buchanan was sentenced for three first degree felonies and three third degree felonies. On each first degree felony, Buchanan received an eight year sentence. On each of the third degree felonies, Buchanan received a one year sentence. None of these sentences

were maximum sentences, however, the trial court did order two of the sentences to be served consecutively. It stated:

{¶24} "The Court considered the record, oral statements and the pre-sentence investigation, as well as the principles and purposes of sentencing under ORC § 2929.11 and has balanced the seriousness of the crime and recidivism factors under ORC § 2929.12. The Court finds Defendant is not amenable to community control, that a consecutive sentence is necessary to protect the public from future crime and to punish the offender, all of which are demonstrated by the offender's criminal history. Consecutive terms are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public and that the multiple offenses were so great or unusual that no single prison term adequately reflects the seriousness of the offender's conduct." 03/21/05 J.E.

{¶25} Thus, the trial court made findings in accordance with R.C. 2929.14(E) for the imposition of consecutive sentences. However, recently in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Ohio Supreme Court held that the provision of the Revised Code relating to nonminimum (R.C 2929.14(B)), maximum (R.C. 2929.14(C)), and **consecutive** (R.C. 2929.14(E)(4)) sentences are unconstitutional because they require judicial findings of facts not proven to a jury beyond a reasonable doubt or admitted by the defendant. Id. at paragraphs one and three of the syllabus. The Ohio Supreme Court's decision was based upon the United States Supreme Court's decisions in *Blakely v. Washington* (2004), 542 U.S. 296 and *United States v. Booker* (2205), 543 U.S. 220.

{¶26} The Ohio Supreme Court, after finding R.C. 2929.14(B)(C)(E)(4) unconstitutional, determined that those portions were capable of severance. *Foster*, 109 Ohio St.3d 1, at paragraphs two and four of the syllabus. Since the provision could be severed, "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." Id. at paragraph seven of the syllabus.

{¶27} The implication of *Foster* is that trial courts are no longer required to give reasons or findings prior to imposing maximum, consecutive, and/or nonminimum sentences; it has full discretion to impose a sentence within the statutory range. Id. at ¶100. However, if a trial court does state findings and reasons for imposing maximum,

consecutive and/or nonminimum sentences, the sentence must be vacated and the cause remanded to the trial court for a new sentencing hearing in order for the sentencing to comport with *Foster*. Id. at ¶104.

{¶28} The Ohio Supreme Court explained:

{¶29} "These 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 resentencing 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.

{¶30} "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." Id. at ¶104-105.

{¶31} Thus, considering the *Foster* mandates, since the trial court made R.C. 2929.14(E) findings, the sentence must be vacated and the cause remanded for resentencing.

{¶32} That said, the Ninth and Tenth Appellate District have found that *Foster* issues in some situations are waived if they are not raised to the trial court. *State v. Silverman*, 10th Dist. Nos. 05AP-837, 05AP-838, 05AP839, 2006-Ohio-3826, ¶139-141; *State v. Jones*, 9th Dist. No. 22811, 2006-Ohio-1820. The Sixth Appellate District, however, has determined that the principles of waiver are inapplicable in the *Foster* analysis. *State v. Brinkman*, 6th Dist. No. WD-05-058, 2006-Ohio-3868. The situations in which these districts are addressing waiver are where the defendant was sentenced after *Blakely* was decided and failed to raise *Blakely* and it principles to the sentencing court. The matter at hand is one of those situations. Buchanan was sentenced post-*Blakely* and the record is devoid of any indication that Buchanan

raised any *Blakely* issue with the sentencing court. Accordingly, we must determine whether the principles of waiver are applicable in this situation.

{¶33} The Ohio Supreme Court addressed waiver in the *Foster* opinion. However, the defendants in *Foster* were sentenced pre-*Blakely*. The *Foster* holding clearly indicates that if a defendant had been sentenced prior to the decision in *Blakely* and does not make an argument about the potential unconstitutionality of Ohio's felony sentencing scheme, the argument is not waived. *Foster,* at ¶30-33. However, *Foster* does not speak to the situation where a defendant was sentenced after *Blakely* was decided and failed to raise issues concerning *Blakely* and Ohio's felony sentencing scheme.

{¶34} As stated above, the Ninth and Tenth Appellate Districts have stated that defendants sentenced post *Blakely* and did not raise *Blakely* to the sentencing court have waived any such argument. These courts have explained:

{¶35} "In *State v. Draughon,* Franklin App. No. 05AP-860, 2006-Ohio-2445, at ¶7, we acknowledged the 'broad language the Supreme Court of Ohio used in *Foster* when it ordered resentencing for all cases pending on direct review.' However, we concluded that 'a defendant who did not assert a *Blakely* challenge in the trial court waives that challenge and is not entitled to a resentencing hearing based on *Foster.*' *Id.* In concluding as such, we 'consider[ed] the language used in *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, the case that *Foster* relied on in arriving at' its decision to sever the unconstitutional statutes from Ohio's felony sentencing laws. *Id.* 'In *Booker,* the United States Supreme Court applied *Blakely* to the Federal Sentencing Guidelines.' *Id.* 'The *Booker* Court applied its holding to all cases on direct review.' *Id.* However, the *Booker* court 'expected reviewing courts to apply "ordinary prudential doctrines," such as waiver * * * to determine whether to remand a case for a new sentencing.' *Id.,* quoting *Booker* at 268. 'Thus, in accordance with the well-settled doctrine of waiver of constitutional challenges, and the language in *Booker,*' we held in *Draughon* that a '*Blakely* challenge is waived by a defendant sentenced after *Blakely* if it was not raised in the trial court.' *Draughon* at ¶8.

{¶36} "Here, the trial court sentenced appellant after the United States Supreme Court issued *Blakely.* Thus, appellant could have objected to his sentencing based on *Blakely* and the constitutionality of Ohio's sentencing scheme. Appellant did

not do so. Therefore, pursuant to *Draughon,* we conclude that appellant waived his *Blakely* argument on appeal. See *Draughon* at ¶7.

{¶37} "Accordingly, based on the above, we need not reverse appellant's prison sentences on Eighth Amendment or *Blakely* grounds. As such, we overrule appellant's second and third assignments of error." *State v. Silverman*, 10th Dist. Nos. 05AP-837, 05AP-838, 05AP839, 2006-Ohio-3826, ¶139-141. See, also, *State v. Jones*, 9th Dist. No. 22811, 2006-Ohio-1820.

{¶38} On the other hand, the Sixth Appellate District has taken the opposite view. *State v. Brinkman*, 6th Dist. No. WD-05-058, 2006-Ohio-3868. It explained:

{¶39} "The state responds that appellant is not entitled to be resentenced because he failed to raise the *Blakely* issue at his sentencing hearing. Citing *State v. Murphy,* 91 Ohio St.3d 516, 532, 2001-Ohio-112, the state observes that the failure of a party to interject a contemporaneous objection to error, even constitutional error, waives further consideration. The state insists that such should be the fate of a *Blakely* objection.

{¶40} "We find this argument to be inconsistent with *Foster,* which clearly directs that, '* * * those [cases] pending on direct review must be remanded to trial courts for new sentencing hearings * * *.' *Foster* at ¶104; *State v. Mota,* 6th Dist. No. L-04-1354, 2006-Ohio-3800. Consequently, appellant's third assignment of error is well-taken." Id. at ¶30-31.

{¶41} In making such a holding, the Sixth Appellate District acknowledged that its decision was in conflict with the Ninth and Tenth Appellate Districts. As such, it certified a conflict to the Ohio Supreme Court on July 28, 2006.

{¶42} After reviewing our sister districts analysis on the issue, we tend to agree with the Sixth Appellate District. We agree that the principles of waiver do not apply to *Foster*.

{¶43} However, we must take this opportunity to explain why we hold as such. First, we note that the general rule is that challenges to constitutional issues must first be raised to the trial court or they are deemed waived for appellate review. The doctrine of waiver is fundamental and well established. That said, *Foster* and its progeny created an exception to the doctrine of waiver. Many of the cases the Ohio Supreme Court has remanded pursuant to *Foster* involved post-*Blakely* sentencing dates. Yet, the Ohio Supreme Court gave no indication whether *Blakely* issues were

raised to the trial court. Instead, it has unlimitedly remanded the cases. See *State v. Moser*, 5th Dist. No. 05CA39, 2006-Ohio-165 (sentencing took place on April 20, 2005); *State v. Bryant*, 9th Dist. No. 22723, 2006-Ohio-517 (sentencing took place on May 9, 2005), *State v. Kendrick*, 2d Dist No. 20965, 2006-Ohio-311 (sentencing took place on March 9, 2005), *State v. Phipps*, 8th Dist. No. 86133, 2006-Ohio-99 (sentencing took place on March 3, 2005); *State v. Hampton*, 10th Dist. No. 04AP-806, 2005-Ohio-7063 (sentencing took place on July 12, 2004), *State v. Herbert*, 3d Dist No. 16-5-08, 2005-Ohio-6869 (sentencing took place on May 24, 2005); *State v. Wassil*, 11th Dist. No. 2004-P-0102, 2005-Ohio-7053 (sentencing took place on October 18, 2004); *State v. Cottrell*, 7th Dist. No. 04CO53, 2005-Ohio-6923 (sentencing took place on September 3, 2004). This is just a small representative sample of cases from eight different appellate courts which affirmed sentences in which the defendant was sentenced post-*Blakely*, and in which the Ohio Supreme Court later reversed the sentences and remanded for resentencing under *Foster*.

{¶44} The above cited cases contain no clear indication that *Blakely* issues were preserved for review. Yet, a review of the cases seems to indicate that they were not. In both the *Phipps* (Eighth Appellate District) and *Kendrick* (Second Appellate District) cases, it does not appear that *Blakely* issues were raised to the appellate courts. In neither of those decisions is *Blakely* even mentioned. Thus, it appears as if *Blakely* was raised for the first time to the Ohio Supreme Court and yet the Court still reversed and remanded that case for resentencing pursuant to *Foster*.

{¶45} If that were not enough for this court to conclude that the doctrine of waiver is inapplicable to *Foster* issues, in *Cottrell*, *Blakely* issues were not raised to the trial court. Yet, the Ohio Supreme Court still reversed and remanded the case for resentencing pursuant to *Foster*. Thus, the Supreme Court's reversal and remanding of *Cottrell* for resentencing based on *Foster* is a clear indication that *Foster* is a special case in which the doctrine of waiver is inapplicable.

{¶46} Accordingly, considering all the above, we agree with the Sixth Appellate District and hold that the doctrine of waiver is inapplicable to *Foster* issues. Thus, even though Buchanan was sentenced post-*Blakely* and did not raise issues related to *Foster* and *Blakely* to the sentencing court, those issues are not deemed waived. Therefore, in accordance with *Foster*, we find that this case must be reversed.

{¶47} It is noted that typically when reviewing a *Toney* case, if during our independent review of the case we find an appealable issue, we order counsel to file a brief. However, given the analysis in *Foster* and our analysis of the issues, we view it as a waste of judicial economy to send this case back for briefing.

{¶48} In conclusion, the appeal is not frivolous. The conviction is affirmed. However, appellant's sentence is reversed and vacated. The case is remanded for resentencing.

Donofrio, P.J., concurs.
DeGenaro, J., dissents; see dissenting opinion.

DeGenaro, J., dissenting:

{¶49} In its decision, the majority concludes that it must remand this cause for resentencing pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-0856, even though Appellant did not raise his Sixth Amendment right to a jury trial when he was sentenced after the United States Supreme Court had decided *Blakely v. Washington* (2004), 542 U.S. 296. In doing so, it sides with the Second and Sixth Districts in a conflict with the Ninth and Tenth Districts which has already been certified to the Ohio Supreme Court. I must respectfully disagree.

{¶50} In *Foster*, the Ohio Supreme Court held that R.C. 2929.14(B), 2929.14(C), and 2929.14(E)(4), which respectively address non-minimum, maximum, and consecutive felony sentences, are unconstitutional because they violate a defendant's right to a jury trial. When reaching this conclusion, the court primarily relied on the United States Supreme Court's recent decisions in *Blakely*, decided on June 24, 2004, and *United States v. Booker* (2005), 543 U.S. 220, decided on January 12, 2005. Both *Blakely* and *Booker* were outgrowths of the Court's prior decision in *Apprendi v. New Jersey* (1999), 530 U.S. 466, 490, which held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The United States Supreme Court expects "reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain-error' test." *Booker* at 268.

{¶51} In *Foster*, each of the defendants was sentenced prior to June 24, 2004, the date *Blakely* was decided. The State argued that the defendant waived the issue since he did not raise it in the trial court. The Ohio Supreme Court rejected that argument, concluding that he "could not have relinquished his sentencing objections as a known right when no one could have predicted that *Blakely* would extend the *Apprendi* doctrine to redefine 'statutory maximum.'" Id. at ¶31, citing *Smylie v. State* (Ind.2005), 823 N.E.2d 679, 687.

{¶52} The court then issues the following mandate:

{¶53} "These 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 resentencing 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. * * *

{¶54} "As the Supreme Court mandated in *Booker*, we must apply this holding to all cases on direct review." (Footnote omitted) (Citations omitted) Id. at ¶103-106.

{¶55} Although the language mandating the remand of cases pending on direct review in *Foster* is sweeping, the Ohio Supreme Court twice explicitly stated that it made this mandate to comply with *Booker*. Thus, it cannot have intended for Ohio's appellate courts to ignore "ordinary prudential doctrines," such as waiver. Furthermore, the Ohio Supreme Court's decision to address the waiver issue in *Foster* itself shows that the court did not intend to suspend these doctrines in all sentencing cases involving a defendant's Sixth Amendment right to a jury trial. Thus, I must respectfully disagree with the majority's conclusion that we must ignore the "ordinary prudential doctrine" of waiver when faced with a defendant who raises a *Foster* issue.

{¶56} In this case, Appellant was sentenced on May 5, 2005, well after both *Blakely* and *Booker* were decided. Indeed, by the time Appellant was sentenced in August 2005, one of Ohio's appellate districts had applied *Blakely* and *Booker* to Ohio's felony sentencing scheme and found that scheme unconstitutional. See *State v. Montgomery*, 159 Ohio App.3d 752, 2005-Ohio-1018 (Decided on Mar. 11, 2005); *State v. Bruce*, 159 Ohio App.3d 562, 2005-Ohio-0373 (Decided on Feb. 4, 2005). Furthermore, the Ohio Supreme Court had already accepted some of the cases

consolidated in *Foster* for review on this issue by the time Appellant was sentenced. See *State v. Quinones*, 2004-1771, 2005-Ohio-0286; *State v. Foster*, 2004-1568, 2004-Ohio-7033. Appellant surely should have known that this issue was not a settled issue in the State of Ohio, even though this district decided a case reaching the opposite conclusion of *Foster* in December 2004. See *State v. Barnette*, 7th Dist. No. 02CA65, 2004-Ohio-7211. There is no excuse for Appellant's failure to raise *Blakely*-related issues at his sentencing. These facts are drastically different than the ones facing the Ohio Supreme Court in regard to the waiver issue in *Foster*.

{¶57} In support of its conclusion that waiver does not apply in the wake of *Foster*, the majority cites eight cases in which the defendant was sentenced after *Blakely*, but before *Foster*, *State v. Moser*, 5th Dist. No. 05CA39, 2006-Ohio-0165; *State v. Bryant*, 9th Dist. No. 22723, 2006-Ohio-0517; *State v. Kendrick*, 2d Dist. No. 20965, 2006-Ohio-0311; *State v. Phipps*, 8th Dist. No. 86133, 2006-Ohio-0099; *State v. Hampton*, 10th Dist. No. 04AP-806, 2005-Ohio-7063; *State v. Herbert*, 3d Dist. No. 16-5-08, 2005-Ohio-6869; *State v. Wassil*, 11th Dist. No. 2004-P-0102, 2005-Ohio-7053; and *State v. Cottrell*, 7th Dist. No. 04CO53, 2005-Ohio-6923. See Opinion at ¶43. The Ohio Supreme Court remanded each of these cases for resentencing in accordance with *Foster*. See *In re Criminal Sentencing Cases*, 109 Ohio St. 3d 509, 2006-Ohio-2721, at ¶5 (Reversing *Wassill* and remanding the case for resentencing), ¶9 (Reversing *Moser* and remanding the case for resentencing), ¶10 (Reversing *Bryant* and remanding the case for resentencing); *In re Criminal Sentencing Cases*, 109 Ohio St. 3d 411, 2006-Ohio-2394, at ¶12 (Reversing *Cottrell* and remanding the case for resentencing), ¶18 (Reversing *Phipps* and remanding for resentencing), ¶19 (Reversing *Kendrick* and remanding for resentencing); *In re Criminal Sentencing Cases*, 109 Ohio St. 3d 313, 2006-Ohio-2109, at ¶251 (Reversing *Herbert* and remanding for resentencing), ¶252 (Reversing *Hampton* and remanding for resentencing). However, a review of the appellate decisions in those cases does not reveal whether the defendant objected to his sentence pursuant to *Blakely* at the sentencing hearing. Accordingly, they do not shed any light on the issue of waiver.

{¶58} The only case cited by the majority which does discuss waiver is *Cottrell*. However, this court concluded that the defendant had waived the issue in that case because he had agreed to a bench trial, rather than a jury trial. *Cottrell* at ¶37. At no time does the opinion ever address whether the defendant waived his right to a jury

trial for the purpose of the sentencing factors addressed in *Foster*. The United States Supreme Court in *Blakely* distinguished between a jury trial waiver for the purpose of facts leading to guilt and the facts to be considered for sentencing. Thus, none of the cases cited by the majority provide "a clear indication that *Foster* is a special case in which the doctrine of waiver is inapplicable." Opinion at ¶45.

{¶59} Although none of the cases cited by the majority demonstrates that its conclusion is correct, there is at least one case decided in the *In re Criminal Sentencing Cases* decisions which demonstrate that it is incorrect. For instance, in *State v. Taylor*, 4th Dist. No. 04CA13, 2005-Ohio-2223, the Fourth District affirmed a defendant's sentence for more than the statutory minimum, finding that *Blakely* did not apply to Ohio's felony sentencing structure. Despite the fact that the Fourth District's conclusion is directly contrary to the Ohio Supreme Court's decision in *Foster*, the Ohio Supreme Court *affirmed* this decision in *In re Criminal Sentencing Cases*, 109 Ohio St. 3d 313, 2006-Ohio-2109, at ¶159. The obvious explanation for this apparent contradiction is that the Ohio Supreme Court concluded that the defendant in *Taylor* had waived his right to raise the issue and affirmed his sentence accordingly. Thus *Foster*'s progeny shows that the Ohio Supreme Court did not intend to make the doctrine of waiver inapplicable in this area of the law.

{¶60} Currently, there is a split in the districts over this direct issue. The Second and Sixth Districts conclude that this type of error cannot be waived. See *State v. Davis*, 2nd Dist. No. 21047, 2006-Ohio-4005; *State v. Brinkman*, 6th Dist. No. WD-05-058, 2006-Ohio-3868, at ¶30-34; *State v. Miller*, 2nd Dist. No. 21054, 2006-Ohio-1138. I agree with the Ninth and Tenth Districts, which conclude that this error can be waived. See *State v. Draughon*, 10th Dist. No. 05AP-860, 2006-Ohio-2445, at ¶8; *State v. Dudukovich*, 9th Dist. No. 05CA008729, 2006-Ohio-1309, at ¶24. This split should not last long, since the Sixth District has certified a conflict to the Ohio Supreme Court on this issue. See *Brinkman* at ¶34. In the meantime, however, I must disagree with the majority's conclusion. The judgment of the trial court should be affirmed.