

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case No. 05CA40
 :
 vs. :
 :
 CHRISTOPHER LEE SPENCE, : DECISION AND JUDGMENT ENTRY
 Defendant-Appellant. :

APPEARANCES:

COUNSEL FOR APPELLANT: Todd W. Barstow, 4185 East Main Street, Columbus, Ohio
43213¹

COUNSEL FOR APPELLEE: J.B. Collier, Jr., Lawrence County Prosecuting Attorney,
and W. Mack Anderson, Assistant Prosecuting
Attorney, Lawrence County Courthouse, Ironton,
Ohio 45638

CRIMINAL

APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 5-30-07

ABELE, J.

{¶ 1} This is an appeal from a Lawrence County Common Pleas Court
judgment of conviction and sentence. A jury found Christopher Lee Spence,
defendant below and appellant herein, guilty of rape in violation of R.C.
2907.02 (A) (1) (b).

{¶ 2} Appellant assigns the following error for review:
"THE TRIAL COURT'S SENTENCING OF APPELLANT TO A NON-MINIMUM
SENTENCE, BASED ON FACTS NOT FOUND BY A JURY OR
ADMITTED BY APPELLANT, VIOLATES APPELLANT'S RIGHT TO
DUE PROCESS AND TRIAL BY JURY AS GUARANTEED BY THE

¹ Different counsel represented appellant during the trial court
proceedings. Appellant has been represented by several different
attorneys during the course of this appeal.

FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION."

{¶ 3} The Lawrence County Grand Jury returned an indictment charging appellant with rape. Appellant pled not guilty and was found guilty after his jury trial. The trial court sentenced appellant to serve five years in prison and stated that any lesser sentence will "demean the seriousness of the offense and would not adequately protect the public."²

{¶ 4} Appellant asserts that the trial court erred by sentencing him to more than the minimum allowable sentence for a rape offense based on facts that he neither admitted or that a jury determined. The trial court stated that it imposed the five year prison sentence because "the shortest term would demean the seriousness of the offense and would not adequately protect the public." We note that this language appears to come from R.C. 2929.14(B)³ and the Ohio Supreme Court has determined this provision to be unconstitutional. See State v. Foster, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856, at paragraph one of the syllabus.

{¶ 5} If a sentence is arguably based on an unconstitutional statute, the proper remedy is to vacate that sentence and remand the case for re-sentencing. *Id.* at ¶103. This applies to all cases pending on direct review at the time Foster was decided. *Id.* at ¶104. Thus, we hereby vacate appellant's sentence and remand the matter for re-sentencing.

2Appellant timely appealed that judgment but we dismissed the case for failure to prosecute. On December 19, 2006, we granted appellant's App.R. 26(B) application to reopen the appeal.

³ R.C. 2929.14(B)(2) states that if a trial court imposes a prison term, it should impose the shortest prison term authorized by law unless, inter alia, "[t]he court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others."

{¶ 6} Appellee argues that in light of the facts and circumstances in this case, the trial court did not abuse its discretion by imposing a five year sentence. However, our review does not involve the trial court's exercise of discretion; rather, our review involves the bases on which the court imposed a prison sentence. Here, the trial court apparently considered an unconstitutional statutory provision when it imposed more than a minimum sentence and the Ohio Supreme Court has determined that in such a situation the sentence must be vacated and the case remanded for re-sentencing. As an intermediate appellate court we are obligated to obey the Ohio Supreme Court's directives. See State v. Richardson, Pickaway App. No. 05CA29, 2006-Ohio-386, at ¶16; State v. Cain (Mar. 6, 2001), Hocking App. No. 99CA025.

{¶ 7} Accordingly, based upon the foregoing we hereby sustain appellant's assignment of error, vacate appellant's sentence and remand the case for re-sentencing consistent with Foster.

JUDGMENT AFFIRMED IN PART,
 REVERSED IN PART AND CASE
 REMANDED FOR FURTHER
 PROCEEDINGS CONSISTENT WITH THIS
 OPINION.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed in part, reversed in part and that the case be remanded for further proceedings consistent with this opinion. Appellant to recover of appellee costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of

the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

McFarland, P.J. & Harsha, J.: Concur in Judgment & Opinion

For the Court

BY:
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.