

[Cite as *State v. Ratliff*, 2006-Ohio-5785.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 06AP-84 (C.P.C. No. 05CR-6353)
Robert D. Ratliff, II,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

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O P I N I O N

Rendered on September 19, 2006

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*Ron O'Brien*, Prosecuting Attorney, and *Jennifer L. Maloon*,  
for appellee.

*Yeura R. Venters*, Public Defender, and *David L. Strait*, for  
appellant.

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APPEAL from the Franklin County Court of Common Pleas.

McCORMAC, J.

{¶1} On September 22, 2005, Robert D. Ratliff, II, defendant-appellant, was indicted on two counts of robbery, one as a second-degree felony, and the other as a third-degree felony. After plea negotiations, the trial court accepted appellant's plea to the stipulated lesser-included offense of attempted robbery, a fourth-degree felony, and continued the matter for a pre-trial investigation.

{¶2} At the sentencing hearing, defense counsel pointed out that the instant offense was appellant's first felony conviction. The trial court imposed a sentence greater

than the minimum, a sentence of 17 months, after reviewing the pre-sentence report and appellant's record as well as considering the argument of counsel.

{¶3} Appellant appeals, asserting the following assignment of error:

The trial court sentenced Appellant pursuant to provisions of the Ohio Revised Code subsequently declared unconstitutional by the Ohio Supreme Court.

{¶4} At the time of sentencing, pertinent statutes contained in Am.Sub.S.B. No. 2 were still on the books in Ohio and those statutes, notably R.C. 2929.14(B), allowed the trial court to enhance the sentence of first offenders like appellant herein if certain findings were made. This was held to be a matter for the court and not a jury issue. These provisions were found to be unconstitutional by the Ohio Supreme Court in 2006, a case decided after the trial court hearing in this case. See *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856.

{¶5} Appellant asserts that, because a jury did not make the factual findings, appellant's Sixth Amendment right to a trial by jury and his Fourteenth Amendment right to due process were violated.

{¶6} In two previous cases in this court, we held that appellant was not entitled to a remand for resentencing if the United States Supreme Court cases, upon which *Foster* was based, had been decided prior to the trial court sentencing and the issue of entitlement to a trial by jury on this issue was not asserted. Our court has found there to be a waiver of the right to trial by jury on the trial court enhancement issue. See *State v. Silverman*, Franklin App. No. 05AP-837, 2006-Ohio-3826, at ¶136-140:

Next, appellant contends that the trial court erred by sentencing appellant to non-minimum, consecutive sentences under Ohio's felony sentencing statutes. In particular, appellant asserts that the trial court imposed the non-minimum, consecutive sentences in violation of jury trial

principles afforded by the Sixth Amendment to the United States Constitution and in contravention of *Blakely v. Washington* (2004), 542 U.S. 296.

*Blakely* stems from *Apprendi v. New Jersey* (2000), 530 U.S. 466, 490, wherein the United States Supreme Court 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." *Id.* at 490. Otherwise, the sentence violates a defendant's right to a jury trial under the Sixth Amendment to the United States Constitution and Fourteenth Amendment due process guarantees. *Apprendi* at 476-478, 497. In *Blakely*, the United States Supreme Court defined "'statutory maximum' for *Apprendi* purposes" as "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" (Emphasis sic.) *Blakely* at 303.

Since appellant's sentencing, and since the parties submitted their appellate briefs, the Ohio Supreme Court decided the applicability of *Blakely* to Ohio's felony sentencing laws in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. In *Foster*, the Ohio Supreme Court concluded that portions of Ohio's felony sentencing statutes violate the Sixth Amendment to the United States Constitution in the manner set forth in *Blakely*. *Foster* at ¶50-83. In particular, the Ohio Supreme Court declared unconstitutional the statutes involved in appellant's case, which are statutes governing a trial court's imposition of: (1) non-minimum sentences on first time offenders, like appellant; and (2) consecutive sentences. See *Foster* at ¶83. Thus, in *Foster*, the Ohio Supreme Court severed the unconstitutional statutes from Ohio's felony sentencing laws. *Id.* at ¶99. The Ohio Supreme Court then concluded that cases pending on direct review "must be remanded to the trial courts for new sentencing hearings." *Id.* at ¶104.

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.

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.

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.

See, also, *State v. Draughon*, Franklin App. No. 05AP-860, 2006-Ohio-2445, at ¶7-8:

We acknowledge the broad language the Supreme Court of Ohio used in *Foster* when it ordered resentencing for all cases pending on direct review. However, we conclude 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*. We first note that, normally, constitutional arguments not made in the trial court are waived. *State v. Awan* (1986), 22 Ohio St.3d 120, 122; *State v. Samatar*, 152 Ohio App.3d 311, 2003-Ohio-1639, at ¶1115. Appellant did not present a *Blakely* argument in the trial court. We also must consider 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 choice of remedy. *Foster*, at ¶106. In *Booker*, the United States Supreme Court applied *Blakely* to the Federal Sentencing Guidelines. The *Booker* Court applied its holding to all cases on direct review. *Booker*, at 268. The *Booker* Court stated, however, that despite the application of its holding to all those cases, not

every appeal would lead to a new sentencing. *Id.* The Court expected reviewing courts to apply "ordinary prudential doctrines," such as waiver or plain error, to determine whether to remand a case for a new sentencing. See, also, *Smylie v. Indiana* (Ind.2005), 823 N.E.2d 679, 688 (cited with approval in *Foster*, noting application of *Blakely* to cases on direct appeal subject to standard rules of appellate review, including waiver).

Thus, in accordance with the well-settled doctrine of waiver of constitutional challenges, and the language in *Booker*, we hold that a *Blakely* challenge is waived by a defendant sentenced after *Blakely* if it was not raised in the trial court. Unlike each of the defendants in *Foster*, appellant was sentenced after the Supreme Court's decision in *Blakely*. See [*State v. Dudukovich*, Lorain App. No. 05CA008729, 2006-Ohio-1309]. Thus, he could have objected to his sentencing based on *Blakely* and the constitutionality of Ohio's sentencing scheme. Appellant, however, did not raise such a constitutional challenge to Ohio's sentencing statutes in the trial court. While he did object to the trial court's imposition of a non-minimum sentence, he did not object based on *Blakely*. Therefore, appellant waived his *Blakely* argument on appeal.

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{¶7} Appellant did not raise the jury trial issue at the trial court sentencing hearing. Following the above asserted authority of this court, we find that the right has been waived and appellant is not entitled to a remand for resentencing.

{¶8} Appellant's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed.*

BROWN and FRENCH, JJ., concur.

McCORMAC, J., retired of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

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