

**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-199
TERRY W. NICHOLSON,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 05 CR 000134.

Judgment: Sentenced vacated and matter remanded for resentencing.

Charles E. Coulson, Lake County Prosecutor, and *Stephanie G. Snevel*, Assistant 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).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Terry W. Nicholson, was involved in a traffic accident and was charged with one count of operating a vehicle under the influence of alcohol on February 11, 2005. On August 3, 2005, he pled guilty to operating a vehicle under the influence of alcohol, a third degree felony in violation of R.C. 4511.19(A)(1)(a), with a DWI specification as set forth at R.C. 2941.1413. Nicholson was sentenced on October

24, 2005, to consecutive prison sentences totaling six years. The state stipulated to the facts as presented by appellant.

{¶2} Appellant raises one assignment of error:

{¶3} “1. The trial court erred when it sentenced the defendant-appellant to a more-than-the-minimum, consecutive sentence based upon a finding of factors not found by the jury or admitted by the defendant-appellant in violation of the defendant-appellant’s State and Federal Constitutional rights to trial by jury.”¹

{¶4} In sentencing appellant, the trial court relied upon judicial factfinding, formerly mandated by statute, but now deemed unconstitutional and void by the Supreme Court of Ohio. On that basis, appellant’s assignments of error are with merit.

{¶5} 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*, the Supreme Court held that R.C. 2929.14(B), (C), and (E), and 2929.19(B)(2) 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.

{¶6} 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), (C), and (E), and 2929.19(B)(2). After severance, judicial factfinding is not required before imposing a sentence within the basic ranges authorized by R.C. 2929.14(A) based on a jury verdict or admission of the defendant. *Foster* at paragraph two of the syllabus. Neither is it required when imposing

1. We note that in the body of his brief, appellant refers to the assignment of error as his “second” assignment.

consecutive sentences. *Foster* at paragraph 4 of the syllabus.

{¶7} 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 minimum sentences. *Id.* at paragraph seven of the syllabus.

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

DONALD R. FORD, P.J.,

DIANE V. GRENDALL, J.,

concur.