

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	CASE NO. CA2005-12-112
	:	
- VS -	:	<u>OPINION</u>
	:	12/18/2006
	:	
BRANDON W. HENSLEY,	:	
	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 05-CR-000155

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, 123 North Third Street, Batavia, Ohio 45103, for plaintiff-appellee

John T. Willard, 6 South Second Street, Hamilton, Ohio 45011, for defendant-appellant

BRESSLER, J.

{¶1} Defendant-appellant, Brandon Hensley, appeals the sentencing judgment of the Clermont County Court of Common Pleas following his conviction for operating a vehicle under the influence of alcohol.

{¶2} Appellant was indicted on two third-degree felony counts of operating a vehicle under the influence of alcohol ("OVI"), in violation of R.C. 4511.19(A)(1)(a) and (A)(1)(d) respectively, and one first-degree misdemeanor count of operating a vehicle under an OVI suspension, in violation of R.C. 4510.14(A). Appellant had previously been convicted of a

felony OVI offense for which he was subject to community control at the time these charges arose.

{¶3} Upon a negotiated plea agreement, appellant entered a plea of guilty to one count of OVI in violation of R.C. 4511.19(A)(1)(a), with the state dismissing the remaining charges. The trial court sentenced appellant to a greater than minimum, four-year prison term for this offense. Appellant presents a single assignment of error arising out of the trial court's sentencing decision.

{¶4} Assignment of Error No. 1:

{¶5} "THE TRIAL COURT ERRED AS A MATTER OF LAW BY IMPOSING A SENTENCE GREATER THAN THE MINIMUM SENTENCE REQUIRED IN VIOLATION OF OHIO REVISED CODE SECTION 2929.14(B)."

{¶6} In his sole assignment of error, appellant argues that the trial court's imposition of a greater than minimum sentence based upon factors set forth in R.C. 2929.14 is unconstitutional in that it violates appellant's Sixth Amendment right to a trial by jury and the mandates of *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531 and *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. The state concedes this issue, recognizing that the appropriate remedy for such violation is to vacate the trial court's sentence and remand the case for the imposition of a new sentence. Nevertheless, the state argues that appellant waived any objection to the trial court's sentence by failing to address it during the sentencing hearing.

{¶7} As acknowledged by both appellant and the state on appeal, portions of Ohio's statutory sentencing scheme have been ruled unconstitutional by the Ohio Supreme Court. See *Foster* at ¶83. Among such provisions is R.C. 2929.14(B), concerning the imposition of a greater than minimum prison term. *Id.* The *Foster* court severed this section from the sentencing code and instructed that all cases pending on direct review in which

unconstitutional sentencing provisions were utilized must be remanded for resentencing. *Id.* at ¶104.

{¶8} In this case, the trial court made express findings during sentencing that "*** the minimum prison sentence is not appropriate because the shortest prison term possible will demean the seriousness of the offense AND will not adequately protect the public ***." (Emphasis sic.) Because the trial court utilized R.C. 2929.14(B) to sentence appellant, we must remand this case for resentencing consistent with *Foster*.

{¶9} Appellant's assignment of error is sustained.

{¶10} The judgment of the trial court is reversed as to sentencing only, and the case is remanded for resentencing.

POWELL, P.J., and YOUNG, J., concur.

