

[Cite as *State v. Humphrey*, 2006-Ohio-1135.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. Case No. 20920
v.	:	T.C. Case No. 2004-CR-03035
DAVID M. HUMPHREY	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

OPINION

Rendered on the 10th day of March, 2006.

MATHIAS H. HECK, JR., Prosecuting Attorney, By: KIRSTEN A. BRANDT, Assistant Prosecuting Attorney, Atty. Reg. #0070162, Appellate Division, P.O. Box 972, 301 West Third Street, 5<sup>th</sup> Floor, Dayton, Ohio 45422  
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FAIN, J.

{¶ 1} Defendant-appellant David D. Humphrey appeals from the sentence imposed upon him for Endangering Children, a second-degree felony. He was sentenced to three years, when the minimum sentence is two years. R.C. 2929.14(A)(2).

{¶ 2} Humphrey asserts two assignments of error, as follows:

{¶ 3} "THE TRIAL COURT ERRED IN IMPOSING A SENTENCE THAT IS

CONTRARY TO LAW.

{¶ 4} “APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.”

{¶ 5} In imposing sentence, the trial court followed the dictates of R.C. 2929.14(B)(2), which requires the imposition of a minimum sentence upon a felony offender who has not previously served a prison term, unless certain findings are made by the trial judge. In his First Assignment of Error, Humphrey asserts that the statutory provision that the trial court followed in imposing more than a minimum sentence is unconstitutional, since it violates his right to a jury. In his Second Assignment of Error, Humphrey asserts that if he is deemed to have waived the issue presented by his First Assignment of Error, then his trial counsel was ineffective for having failed to preserve that issue for appellate review.

{¶ 6} In *State v. Foster*, \_\_\_ Ohio St.3d \_\_\_, 2006-Ohio-856, the Ohio Supreme Court has held that R.C. 2929.14(B)(2) is unconstitutional in that it deprives a defendant of his right to a jury trial. At ¶104, the Ohio Supreme Court prescribed the appropriate remedy for all cases pending on direct review as a reversal of the sentence and the remand of the cause for re-sentencing.

{¶ 7} Humphrey’s First Assignment of Error is sustained, upon the authority of *State v. Foster*, supra. His Second Assignment of Error is overruled as moot.

{¶ 8} The sentence imposed by the trial court is Reversed, and this cause is Remanded for re-sentencing in accordance with *State v. Foster*, supra.

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BROGAN and DONOVAN, JJ., concur.

Copies mailed to:

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Hon. John W. Kessler