

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

State of Ohio,	:	
	:	Case No. 06CA819
Plaintiff-Appellee,	:	
	:	
v.	:	
	:	<u>MEMORANDUM</u>
James E. Hilderbrand,	:	<u>DECISION AND JUDGMENT ENTRY</u>
	:	
Defendant-Appellant.	:	Released 8/21/06

APPEARANCES:

David H. Bodiker, Ohio Public Defender, and Sheryl A. Trzaska, Assistant State Public Defender, Columbus, Ohio, for Appellant.

David C. Kelley, Adams County Prosecutor, and Aaron E. Haslam, Assistant Adams County Prosecutor, West Union, Ohio, for Appellee.

Harsha, P.J.

{¶1} James Hilderbrand appeals the trial court's judgment, entered on remand from this court, resentencing him to a non-minimum prison term for violating the terms and conditions of his community control sanctions. Hilderbrand contends the new sentence is void because it was imposed under R.C. 2929.14(B), a statute the Supreme Court of Ohio declared unconstitutional in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, after the trial court resentenced Hilderbrand. Because the record reflects that the trial court applied R.C. 2929.14(B), as we instructed it to, we reluctantly must again reverse and remand for resentencing. In light of the Supreme Court's holding in *Foster*, we conclude any application of an unconstitutional statute

renders the entire sentence void even though the surviving sections of the sentencing statute may support the sentence.

JUDGMENT REVERSED AND
CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED AND CAUSE REMANDED and that the Appellant 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 Adams 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 BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Ohio Supreme Court an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Ohio Supreme Court in the forty-five day appeal 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 expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Abele, J. & Kline, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Presiding 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.