

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-VS-

LUKE A. THOMPSON

Defendant-Appellant

JUDGES:

Hon. John W. Wise, P. J.

Hon. William B. Hoffman, J.

Hon. Sheila G. Farmer, J.

Case No. CT2006-0012

O P I N I O N

CHARACTER OF PROCEEDING:

Criminal Appeal from the Court of Common
Pleas, Case No. CR2004-0189B

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

August 18, 2006

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Wise, P. J.

{¶1} Appellant Luke A. Thompson appeals the imposition of his felony prison sentence upon a community control revocation. The relevant facts leading to this appeal are as follows.

{¶2} On July 22, 2004, appellant was indicted on one count of theft by deception, a felony of the fifth degree. On October 8, 2004, appellant appeared before the court and entered a plea of guilty to the charge in the indictment. The court issued a sentencing entry on November 16, 2004, placing appellant on community control for three years, with the provision that he would serve a prison term of eleven months upon any violation of community control.

{¶3} On January 30, 2006, appellant appeared before the court and admitted to violating community control via a misdemeanor conviction in the Cambridge Municipal Court, Guernsey County, and by consuming alcohol. The court thereupon imposed an eleven month prison sentence on appellant, ordering said sentence consecutive to his sentence in Guernsey County.

{¶4} Appellant filed a notice of appeal on March 2, 2006. He herein raises the following sole Assignment of Error:

{¶5} "I. THE COURT ERRED IN SENTENCING THE APPELLANT TO ELEVEN MONTHS IN PRISON CONTRARY TO STATE V. FOSTER, _____ OHIO ST.3D _____, 2006-OHIO-856.

I.

{¶6} In his sole Assignment of Error, appellant challenges his sentence in light of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. In *Foster*, the Ohio Supreme

Court found certain provisions of Ohio's sentencing statute unconstitutional pursuant to *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, because said provisions required judicial factfinding to exceed the sentence allowed simply as a result of a conviction or plea. These included the provision for a more than minimum sentence under R.C. 2929.14(B). To remedy Ohio's felony sentencing statutes, the Ohio Supreme Court severed the *Blakely*-offending portions that either create presumptive minimum or concurrent terms or require judicial factfinding to overcome the presumption. *Foster* at ¶ 97. The Court concluded " * * * that trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *Id.* at ¶ 100.

{¶7} We thus find appellant's sentencing is based upon at least one unconstitutional statutory provision now deemed void. Therefore, we are persuaded under these circumstances to remand this matter to the trial court for a new sentencing hearing.¹

{¶8} Appellant's sole Assignment of Error is sustained.

¹ The State's brief implies that this *Foster*-based appeal is untimely, as the judgment entry under appeal "merely imposed the eleven month sentence that had been ordered." Appellee's Brief at 2. Although there is technical merit in the State's responsive argument, in *State v. Gibson*, Ashland App.No. 05-COA-32, 2006-Ohio-4052, this Court announced it would not apply such a rule retroactively to individuals who were placed on community control prior to the date of that opinion.

{¶19} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Muskingum County, Ohio, is reversed and remanded for a new sentencing hearing.

By: Wise, P. J. and

Farmer, J., concur.

Hoffman, J., dissents.

HON. JOHN W. WISE

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER

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Hoffman, J., dissenting,

{¶10} I respectfully dissent from the majority opinion because appellant failed to raise his constitutional claims as recognized by the *Foster* Court on direct appeal. To such extent, I respectfully disagree with this court's decision in *Gibson*.

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER