

COURT OF APPEALS
MORGAN COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon: W. Scott Gwin, P.J.
	:	Hon: John W. Wise, J.
Plaintiff-Appellee	:	Hon: Patricia A. Delaney, J.
	:	
-VS-	:	
	:	Case No. 2006-CA-10
JEFFREY D. DILLE	:	
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING:	Criminal appeal from the Morgan County Court of Common Pleas, Case No. CR-02-048
--------------------------	--

JUDGMENT:	Affirmed
-----------	----------

DATE OF JUDGMENT ENTRY:	July 3, 2007
-------------------------	--------------

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
------------------------	-------------------------

RICHARD D. WELCH
Prosecuting Attorney
19 E. Main Street
McConnellsville, OH 43756-1100

JEFFREY D. DILLE PRO SE
15708 McConnellsville Road
Caldwell, OH 43724-8902

Gwin, P.J.

{¶1} On July 3, 2002, defendant-appellant Jeffrey D. Dille [hereinafter appellant] was indicted on one count of rape, in violation of R.C. 2907.02. The matter proceeded to a jury trial which commenced on May 20, 2003. The jury returned a verdict of guilty.

{¶2} Sentencing and sexual offender classification hearings were held on July 17, 2003. Appellant was sentenced to a definite prison term of six years and ordered to pay restitution upon his release from prison. In addition, the trial court classified appellant as a sexual offender. This Court upheld appellant's conviction and sentence. See, *State v. Dille*, 5th Dist. No. 03 CA 003, 2004-Ohio-6367.

{¶3} On May 9, 2006 appellant filed a motion in the trial court to vacate or set aside his sentence. The trial court denied the motion by Judgment Entry filed August 29, 2006.

{¶4} It is from the trial court's Judgment Entry filed August 29, 2006 denying his motion to vacate or correct sentence that appellant now appeals raising as his two assignments of error:

{¶5} "I. THE TRIAL COURT ERRED BY ENHANCING DEFENDANT-APPELLANT'S SENTENCE OVER THE PRESUMPTIVE MINIMUM WITHOUT SUBMITTING THE JUDICIAL FACT FINDINGS TO A JURY AND PROVEN BEYOND A REASONABLE DOUBT OR ADMISSION FROM DEFENDANT-APPELLANT. SEE *BLAKELY V. WASHINGTON* (2004), 542 U.S. 296, 124 S. CT. 2531, 159 L. ED 403.

{¶6} "II. THE TRIAL COURT ERRED BY DENYING DEFENDANT-APPELLANT'S MOTION TO VACATE OR SET ASIDE JUDGMENT OF SENTENCE

FOR RE-SENTENCING UNDER THE *STATE V. FOSTER*, OHIO ST. 3D, 2006-OHIO-856 AT 105-106 MANDATE, QUOTING *RING V. ARIZONA*, 536 U.S. 584 (2002).”

I. & II.

{¶7} In his first assignment of error appellant argues, in essence, that the trial court’s imposition of more than the minimum sentence is unconstitutional pursuant to *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531 and *State v. Foster*, 109 Ohio St.3d. 1, 2006-Ohio-856, 845 N.E.2d 470. In his second assignment of error appellant contends the trial court erred in denying his motion to vacate and set aside judgment of sentence as such was not in compliance with the rulings in *Blakely*, *Booker* and *Foster*. We disagree.

{¶8} Appellant raised the *Blakely/ Foster* issue for the first time in his motion to vacate and set aside judgment of sentence filed subsequent to this Court’s affirmance of his conviction on direct appeal.

{¶9} In *Booker*, supra, the United States Supreme Court limited its holdings in *Blakely* and *Apprendi* to cases on direct review. Similarly, in *Foster*, the Ohio Supreme Court restricted retroactive application of its holding to cases on direct review.

{¶10} This Court as well as numerous other state and federal courts have found *Blakely* or *Foster* do not apply retroactively to cases already final on direct review. *State v. Craig*, Licking App. No. 2005CA16, 2005-Ohio-5300; See, also, *State v. Myers*, Franklin App. No. 05AP-228, 2005-Ohio-5998 (concluding *Blakely* does not apply retroactively to cases seeking collateral review of a conviction); *State v. Cruse*, Franklin App. No. 05AP-125, 2005- Ohio-5095; *State v. Stillman*, Fairfield App. No.2005-CA-55,

2005- Ohio-6299 (concluding U.S. Supreme Court did not make *Blakely* retroactive to cases already final on direct review); *In re Dean* (C.A.11, 2004), 375 F.3d 1287; *Cuevas v. Derosa* (C.A.1, 2004), 386 F.3d 367; *United States v. Stoltz* (D.Minn.2004), 325 F.Supp.2d 982; *United States v. Stancell* (D.D.C.2004), 346 F.Supp.2d 204; *United States v. Traeger* (N.D.Ill.2004), 325 F.Supp.2d 860.

{¶11} Appellant's case is before us on appeal from a denial of his motion for the vacating and setting aside of sentence. Therefore, we find appellant's argument based upon *Blakely* and *Foster* unpersuasive as this sentencing issue is not being raised on direct review.

{¶12} Appellant's first and second assignments of error are overruled.

By Gwin, P.J.,

Wise, J., and

Delaney, J., concur

HON: W. SCOTT GWIN

HON: JOHN W. WISE

HON: PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR MORGAN COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-VS-

JEFFREY D. DILLE

Defendant-Appellant

JUDGMENT ENTRY

CASE NO. 2006-CA-10

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Morgan County Court of Common Pleas is affirmed. Costs to appellant.

HON: W. SCOTT GWIN

HON: JOHN W. WISE

HON: PATRICIA A. DELANEY