

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-05-1146

Appellee

Trial Court No. CR-2004-1660

v.

Joseph Rodriguez

DECISION AND JUDGMENT ENTRY

Appellant

Decided: March 17, 2006

* * * * *

Julia R. Bates, Prosecuting Attorney, Bruce J. Sorg and Brenda J. Majdalani,
Assistant Prosecuting Attorneys, for appellee.

Neil Stewart McElroy, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶1} Defendant-appellant, Joseph Rodriguez, appeals the September 17, 2004 judgment entry of the Lucas County Court of Common Pleas which, following a plea of guilty pursuant to *North Carolina v. Alford* (1970), 400 U.S. 25, sentenced appellant to four years of imprisonment for possession of cocaine in violation of R.C. 2925.11(A) and (C)(4)(d). Appellant raises the following assignments of error:

{¶2} "Assignment of Error No. 1:

{¶3} "In sentencing the appellant to more than the statutory maximum [a non-minimum sentence], the trial court relied on facts not within the jury verdict or admitted by the defendant, contrary to the United States Supreme Court's ruling in *USA v. Booker* and *Blakely v. Washington*.

{¶4} "Assignment of Error No. 2:

{¶5} "In sentencing the appellant, the court failed to make its statutorily sanctioned findings on the record at the sentencing hearing, as required by R.C. § 2929.14(B) and the Ohio Supreme Court's decision in *State v. Comer*."

{¶6} Upon review, we find that this case is controlled by the Supreme Court of Ohio's decision in *State v. Foster*, ___ Ohio St.3d. ___, 2006-Ohio-856. In *Foster*, the court held that R.C. 2929.14(B) violates the Sixth Amendment to the United States Constitution, pursuant to *Blakely v. Washington* (2004), 542 U.S. 296, and *Apprendi v. New Jersey* (2000), 530 U.S. 466. Although it is unclear whether the trial court impermissibly relied on R.C. 2929.14(B), upon review of the record, including the co-defendant's case, and in order to ensure that appellant's constitutional rights are protected, we find that the sentence is void and must be vacated. *Foster* at ¶ 103-104. Accordingly, appellant's first assignment of error is found well-taken.

{¶7} Based on our disposition of appellant's first assignment of error, we find that appellant's second assignment of error is moot and not well-taken.

{¶8} On consideration whereof, we find that the judgment of the Lucas County Court of Common Pleas is reversed and appellant's sentence is vacated. The matter is

remanded to the trial court for a new sentencing hearing in accordance with *Foster*, supra. The state is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Dennis M. Parish, J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
