

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

State of Ohio

Court of Appeals No. L-06-1310

Appellee

Trial Court No. CR-2005-1875

v.

Paul Baccus

DECISION AND JUDGMENT ENTRY

Appellant

Decided: November 9, 2007

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Jennifer L. Donovan, Assistant Prosecuting Attorney, for appellee.

Spiros P. Cocoves, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Paul Baccus, appeals from his conviction in the Lucas County Court of Common Pleas for aggravated robbery. For the reasons that follow, we affirm.

{¶ 2} On July 18, 2005, appellant entered a guilty plea to the charge of aggravated robbery, a violation of R.C. 2911.01(A)(1) and a felony of the first degree. He was sentenced to eight years in prison. On October 25, 2006, this court granted

appellant leave to file a delayed appeal. He now asserts the following assignment of error:

{¶ 3} "The trial court's sentence must be remanded to the trial court for resentencing in light of *State v. Foster*, or, in the alternative, trial counsel was ineffective in not raising the Foster issue."

{¶ 4} In sentencing appellant to eight years in prison, the court found that the shortest prison term would demean the seriousness of the offender's conduct or would not adequately protect the public. He was ordered to serve the sentence consecutively to his sentence for a parole violation. Appellant contends that his non-minimum, consecutive sentence is now void in light of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. In *Foster*, the Ohio Supreme Court found that by imposing non-minimum or consecutive sentences pursuant to Ohio sentencing guidelines, the trial court engaged in fact-finding found unconstitutional in *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531. Appellant contends that his void sentence must be remanded for resentencing. Appellee agrees and concedes that the case must be remanded.

{¶ 5} Recently, in *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, the Ohio Supreme Court addressed the issue of resentencing after *Foster*.

{¶ 6} In *Payne*, the appellant was convicted of four felony offenses pursuant to an "Alford" plea. *North Carolina v. Alford* (1970), 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162. The trial court sentenced Payne to four consecutive sentences. Payne's indictment was pre-*Blakely* whereas his plea and sentencing were post-*Blakely*. Payne did not object

to the sentence in the trial court; however, he appealed his sentence to the Tenth District Court of Appeals claiming a Sixth Amendment and *Blakely* error. The Tenth District Court of Appeals found that Payne had waived his *Blakely* argument and affirmed his conviction.

{¶ 7} The Ohio Supreme Court, recognizing that it had remanded cases pursuant to *Foster* for resentencing with similar factual patterns, determined that these remands were not determinative of the issue as it had not been "raised at the time of the adjudication," quoting their decision in *State ex rel. Gordon v. Rhodes* (1952), 158 Ohio St. 129, 48 O.O. 64, 107 N.E.2d 206, paragraph one of the syllabus. Relying on *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621, the Ohio Supreme Court then addressed the issue finding that failure to raise an objection in the trial court after sentencing, post-*Blakely*, forfeits a claim for a *Blakely* error. However, a claim of plain error survives.

{¶ 8} The Supreme Court of Ohio, following *Washington v. Recuenco* (2006), ___ U.S. ___, 126 S.Ct. 2546, held that a *Blakely* type of error should be analyzed pursuant to Crim.R. 52, as a nonstructural constitutional error.¹ As Payne failed to

¹The court defined a structural error as an error which requires an automatic reversal because it permeates the entire "framework within which the trial proceeds." *Payne* at ¶ 18, citing *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, 789 N.E.2d 222, ¶ 9, quoting *Arizona v. Fulminante* (1991), 499 U.S. 279, 309-310, 111 S.Ct. 1246, 113 L.Ed.2d 302. In *Washington v. Recuenco*, supra, the court reasoned that the failure to submit a sentencing factor to the jury is akin to failure to submit an element of an offense to the jury. In that the United States Supreme Court has held that the later omission does not render an entire trial fundamentally unfair, *Neder v. United States*,

establish that his sentence would have been different "absent the error," *State v Hill* (2001), 92 Ohio St.3d 191, 203, the court held that there was no plain error.

{¶ 9} Finally, the court addressed Payne's claim that the use of the word "void" by the *Foster* court in describing his sentence requires that he be resentenced. The court stated that:

{¶ 10} "A void sentence is one that a court imposes despite lacking subject-matter jurisdiction or the authority to act. *State v. Wilson* (1995), 73 Ohio St.3d 40, 44. Conversely, a voidable sentence is one that a court has jurisdiction to impose, but was imposed irregularly or erroneously. *State v. Filiaggi* (1999), 86 Ohio St.3d 230, 240." *Payne*, supra.

{¶ 11} The court held that *Foster* addressed a situation in which the trial courts had both subject-matter jurisdiction and personal jurisdiction over a defendant, and thus held that pre-*Foster* sentences within the statutory range are voidable. Resentencing can occur only after a successful direct appeal.

{¶ 12} In this case, appellant was sentenced in 2005, before *Foster* was released in 2006. Appellant's sentence is therefore voidable. Appellant, however, did not object to

(1999), 527 U. S. 1, 19-20, 119 S.Ct. 1827, 144 L.Ed.2d 35, the *Payne* court reasoned that a *Blakely* violation should be treated identically.

the constitutionality of his sentence at the sentencing hearing. Following *Payne*, we hold that appellant has forfeited² the issue for appellate purposes. *Payne*, at ¶ 21.

{¶ 13} Pursuant to *Payne*, we are confined to a plain error analysis.

{¶ 14} Post-*Foster*, it is axiomatic that "[t]rial 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 paragraph seven of the syllabus. Therefore, post-*Foster*, trial courts are still required to consider the general guidance factors in their sentencing decisions. In its judgment entry, the trial court specifically stated that it had considered the purposes and principles of sentencing under R.C. 2929.11 and balanced the seriousness and recidivism factors under R.C. 2929.12. The trial court additionally stated that it had considered the record and oral statements when making its decision.

{¶ 15} Appellant in this case was convicted of a first degree felony which carries a maximum penalty of ten years. R.C. 2929.14(A)(1). The record shows that appellant has a lengthy record including five felony convictions, prison sentences and numerous parole revocations. At the time of his sentencing in this case, he was on parole for aggravated robbery. Upon review, this court cannot say that the trial court committed plain error in

²The *Payne* court distinguished between forfeiture and waiver. "Waiver is the intentional relinquishment or abandonment of a right, and waiver of a right "cannot form the basis of any claimed error under Crim.R. 52(B)." * * * On the other hand, forfeiture is a failure to preserve an objection, and because *Payne* failed to timely assert his rights under *Blakely*, his failure to preserve the objection must be treated as a forfeiture. * * * "[A] mere forfeiture does not extinguish a claim of plain error under Crim.R. 52(B)."

sentencing appellant to eight years, well within the statutory range. Appellant's sole assignment of error is found not well-taken.

{¶ 16} The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant 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 AFFIRMED.

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

Peter M. Handwork, J.

JUDGE

Arlene Singer, J.

JUDGE

William J. Skow, J.
CONCUR.

JUDGE

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.
