

STATE OF OHIO, MAHONING COUNTY  
IN THE COURT OF APPEALS  
SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 06 MA 60
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	OPINION
	)	
BRENDA MOORE,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 05CR606.

JUDGMENT: Sentence Vacated; Case Remanded.

APPEARANCES:  
For Plaintiff-Appellee:

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JUDGES:  
Hon. Joseph J. Vukovich  
Hon. Mary DeGenaro  
Hon. Cheryl L. Waite

Dated: March 29, 2007

VUKOVICH, J.

{¶1} Defendant-appellant Brenda Moore appeals the decision of the Mahoning County Common Pleas Court, which sentenced her to more than the minimum jail term. The issue on appeal is whether we must remand for resentencing where the trial court cited to R.C. 2929.14(B), which was declared unconstitutional and excised by *State v. Foster* 109 Ohio St.3d 1, 2006-Ohio-856, and where the court made findings for deviating from a minimum sentence that were previously required by this statute. For the following reasons, we hereby conclude that the trial court's cite to an unconstitutional statute and the resulting unconstitutional limitation this created requires vacation of appellant's sentence and remand for resentencing.

#### STATEMENT OF THE CASE

{¶2} On January 6, 2006, appellant pled guilty to burglary in violation of R.C. 2911.12(A)(3), a third degree felony. On March 16, 2006, appellant's sentencing hearing was held. In a March 20, 2006 entry, the court sentenced appellant to three years in prison after finding in pertinent part:

{¶3} "The Court finds pursuant to R.C. 2929.14(B) that the shortest prison term possible will demean the seriousness of the offense AND will not adequately protect the public and therefore imposes a greater term."

{¶4} Appellant filed timely notice of appeal from this sentencing entry. The state has not filed a response to appellant's brief.

#### ASSIGNMENT OF ERROR

{¶5} Appellant's sole assignment of error provides:

{¶6} "THE TRIAL COURT ERRED WHEN IT IMPOSED A NON-MINIMUM PRISON TERM ON DEFENDANT-APPELLANT BRENDA MOORE BASED UPON R.C. 2929.14(B), WHICH WAS DECLARED UNCONSTITUTIONAL BY THE OHIO SUPREME COURT."

{¶7} Appellant notes that she was sentenced approximately two weeks after the Ohio Supreme Court released its *Foster* decision. Appellant urges that the trial

court's actual reliance on R.C. 2929.14(B) requires reversal of her sentence because it establishes that the trial court failed to follow the mandate of *Foster*. That is, reliance on an unconstitutional statute that has been excised from the code requires reversal just as in the cases where reliance on such statute occurred before *Foster* was decided.

#### LAW AND ANALYSIS

{¶8} It is well-known that in *Foster*, the Ohio Supreme Court found R.C. 2929.14(B) an unconstitutional requirement of judicial fact-finding. *Foster* at ¶1 of syllabus. The Court imposed the remedy of excision and severance of R.C. 2929.14(B), as well as other provisions not at issue herein. *Id.* at ¶2 of syllabus. The Court then held that all sentences pending on direct review must be reversed and remanded for resentencing. *Id.* at 104, 106.

{¶9} After *Foster*, a sentencing court has discretion to consider any factors it finds relevant. See R.C. 2929.11 (setting forth the overriding purposes of felony sentencing); R.C. 2929.12 (listing the factors to consider in felony sentencing and allowing the court to consider any other factor the court finds relevant). See, also, *Foster* at ¶42, 102, 105 (stating that courts now have full discretion to impose a prison term within the basic ranges and noting that there is no judicial fact-finding in applying the general guidance statutes). This is true regardless of whether such court-chosen factors happen to have been previously contained in the now-excised statutory provisions. See *id.* However, it is error and a violation of *Foster* to expressly cite and rely upon a statutory provision which was specifically found to be unconstitutional by the Ohio Supreme Court.

{¶10} The trial court's entry reads as if the court was unaware of the *Foster* holding. In fact, the sentencing hearing was a mere two weeks after release of the *Foster* opinion. The effect of the court's entry here is analogous to the entry of a court that sentenced a defendant pre-*Foster*. The Ohio Supreme Court explicitly instructed us to reverse and remand for resentencing all cases pending on direct appeal. *Foster* at ¶104, 106. Where a sentencing court's language seemingly ignores the implications of *Foster*, we must similarly reverse and remand.

{¶11} We cannot say that the trial court's citation to R.C. 2929.14(B) was harmless. Such argument flies in the face of the *Foster* court's rationale and the effect of that holding. In fact, critics of *Foster* employ the harmless error rationale that most of the severed statutes only served to benefit the *Foster* defendants as they made it more difficult for the sentencing court to impose sentences that were greater than the minimum, maximum or consecutive. Yet, this principle did not deter the Ohio Supreme Court in fashioning its decision and its remedy of resentencing.

{¶12} The trial court here placed a limit on itself. However, the Supreme Court's resentencing order requires that such limits be lifted as they are unconstitutional. Trial courts cannot choose to ignore (or accidentally ignore) *Foster* and act as if judicial fact-finding is still required. This is the case regardless of whether the fact-finding actually increases the defendant's chances for a lesser sentence.

{¶13} The error is just as unconstitutional post-*Foster* as it was pre-*Foster*. Thus, one could not categorize the error as non-constitutional in order to distinguish the *Foster* remedy and avoid *Foster*'s resentencing mandate. Logically, a trial court's act of restricting itself to and relying on a recently declared unconstitutional statute cannot be non-constitutional error merely because in reality the statute has been erased by the Supreme Court. The fact remains that the trial court overlooked that act of erasure. Disregarding the Supreme Court's constitutionally-required severance pronouncement is just as unconstitutional as originally applying the unconstitutional statute.

{¶14} Thus, the trial court can in its new statutorily unfettered sentencing discretion consider the factors that were previously-required factual findings in order to impose what the court finds to be an appropriate sentence. However, the court cannot cite a severed and excised unconstitutional statute without calling into question whether the court actually followed the requirements of *Foster*. The timing of the hearing and entry within weeks of *Foster* further arouses our suspicions regarding the court's proper application of the new precedent.

## CONCLUSION

{¶15} It is not logical to hold that a sentence imposed prior to the Supreme Court's *Foster* decision must be vacated because it was imposed in reliance upon an

unconstitutional statute, but a sentence imposed a few weeks after the *Foster* decision and relying upon that same unconstitutional statute is not a proper reason to have the trial court address sentencing anew.

{¶16} For the foregoing reasons, appellant's sentence is vacated and the case is remanded for resentencing as we have been doing with pre-*Foster* sentences. At such resentencing, the trial court should not place limits upon its sentencing discretion by engaging in unconstitutional judicial fact-finding and thus should refrain from citing invalidated statutory sections as though they still exist.

DeGenaro, P.J., dissents; see dissenting opinion.  
Waite, J., concurs.

DeGenaro, P.J., dissenting:

{¶17} The issue presented by the parties in this case is whether a trial court commits reversible error when it relies on former R.C. 2929.14(B) when sentencing an offender to more than the minimum sentence. That statute was severed by the Ohio Supreme Court in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-0856, as unconstitutional because it violated the offender's right to a jury trial. The majority contends that such an error is a constitutional error because "[d]isregarding the Supreme Court's constitutionally-required severance pronouncement is just as unconstitutional as originally applying the unconstitutional statute. I must respectfully disagree.

{¶18} A trial court clearly errs when it relies on a statute which has been declared unconstitutional by a higher court. However, such an error is not a constitutional error and, therefore, is subject to harmless error review. Appellant has failed to demonstrate that she was prejudiced by the trial court's judgment since the trial court at least considered imposing the minimum sentence, something the trial court is no longer statutorily required to do. Accordingly, the trial court's decision in this case should be affirmed.

{¶19} In *Foster*, the Ohio Supreme Court held that R.C. 2929.14(B) was unconstitutional because it violated the defendant's right to a jury trial. When making

this conclusion, the Ohio Supreme Court relied on the decisions in *Blakely v. Washington* (2004) 542 U.S. 296 and *United States v. Booker* (2005), 543 U.S. 220. In *Blakely*, the United States Supreme Court clarified its holding in *Apprendi v. New Jersey*, 530 U.S. 466, 490, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," by defining what the Court meant by the phrase "statutory maximum." *Blakely* held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." (Emphasis sic) (Citations omitted) *Id.* at 303-304.

{¶20} When reaching this conclusion, the United States Supreme Court was careful to clarify that a defendant's right to a jury trial is not violated when a judge finds facts when determining an appropriate sentence; they only do so when they find facts mandated by statute when determining an appropriate sentence. *Id.* at 308-309.

{¶21} "First, the Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. Indeterminate sentencing does not do so. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. *Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion.* But the fact do (sic) not pertain to whether the defendant has a legal *right* to a lesser sentence – and that makes all the difference insofar as judicial impingement on the traditional role of a jury is concerned." (Emphasis added) *Id.*

{¶22} The Court's subsequent decision in *Booker* further demonstrated that *the only thing in this context which violates a defendant's Sixth Amendment right to a jury trial is when the a judge is required to find particular facts before increasing a defendant's sentence.* That decision dealt with the constitutionality of the federal

sentencing structure. The Court determined that trial courts violated defendants' rights when they sentenced them pursuant to the federal sentencing guidelines. *Id.* at 243-244. But when fashioning a remedy to this constitutional violation, the Court simply made those guidelines advisory, rather than mandatory. *Id.* at 245-246. Thus, the United States Supreme Court has clearly held that judges are allowed to find facts at sentencing. They just cannot be legislatively mandated to find a particular fact in order to increase an offender's sentence.

{¶23} The Ohio Supreme Court recognized this distinction in *Foster*. Although the Ohio Supreme Court held that the statutes, such as R.C. 2929.14(B), which mandated that certain findings were to be made, were unconstitutional, it held that other statutes, such as R.C. 2929.12, which only required that a trial court "consider" certain factors at sentencing, passed constitutional muster. *Id.* at ¶42.

{¶24} "Because R.C. 2929.14(B) and (C) and 2929.19(B)(2) *require* judicial fact-finding before imposition of a sentence greater than the maximum term authorized by a jury verdict or admission of the defendant, they are unconstitutional. Because R.C. 2929.14(E)(4) and 2929.41(A) *require* judicial finding of facts not proven to a jury beyond a reasonable doubt or admitted by the defendant before imposition of consecutive sentences, they are unconstitutional. Because R.C. 2929.14(D)(2)(b) and (D)(3)(b) *require* judicial finding of facts not proven to a jury beyond a reasonable doubt or admitted by the defendant before repeat-violent-offender and major-drug-offender penalty enhancements are imposed, they are unconstitutional." (Emphasis added) *Id.* at ¶83.

{¶25} In other words, *both the United States and Ohio Supreme Courts have recognized that judges must make factual findings when making appropriate sentencing decisions. These courts merely held that judicial factfindings violates a defendant's right to a jury trial when statutes mandate that a trial court find certain facts* in order to increase an offender's sentence beyond that authorized solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.

{¶26} The Constitution does not prevent judges from finding and considering facts when sentencing offenders for their crimes. Instead, a constitutional violation occurs when judges are required to find particular facts, which have not been found by

a jury, when sentencing an offender to a particular sentence. A trial judge in Ohio did not violate an offender's rights when that judge determined that the minimum prison term would demean the seriousness of the offense; the offender's rights were violated because the judge was *required* to find this fact before imposing more than a minimum sentence. After *Foster*, Ohio's trial courts are no longer required to make those findings, so the offender's rights cannot be violated when the trial court considers those facts.

{¶27} In this case, the trial court did not err when it considered whether the minimum sentence would demean the seriousness of Appellant's offense. It's error was citing to R.C. 2929.14(B) after the Ohio Supreme Court had declared that statute unconstitutional when making that determination. That statute was no longer operable and could not be relied upon by the trial court when sentencing Appellant. However, we do not reverse trial courts merely because they have committed an error; an appellant must be prejudiced by the error before we will overturn the trial court's judgment. *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-0297, at ¶8.

{¶28} The error at issue in *Foster* was a constitutional error; the trial court's actions denied Foster his constitutional right to a jury trial since the trial court found facts (the findings required by former R.C. 2929.14(B)) when sentencing Foster. The majority claims the trial court's error in this case was a constitutional error as well. However, the trial court's error could not have violated the defendant's right to a jury trial, the right protected by *Blakely*, *Booker*, and *Foster*, since there are no statutory limits on the facts a trial court can use to determine whether to give a minimum prison sentence, more than the minimum prison sentence, maximum prison sentences, or consecutive prison sentences after *Foster*. A trial judge in Ohio can now use any fact it wants to determine the sentence it will impose on a particular offender without violating that offender's right to a jury trial.

{¶29} This jurist is at a loss as to what other constitutional right was at stake when Appellant was sentenced and the majority fails to identify any. If there was no constitutional right at stake, then the trial court's error must have been a non-constitutional, rather than a constitutional, error.

{¶30} The difference between a constitutional error and a non-constitutional error is significant. A court faced with a constitutional error can only be considered harmless if the appellate court can "declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California* (1967), 386 U.S. 18, 24. In contrast, non-constitutional errors are only reversible when they "affect substantial rights," a much lower standard. Crim.R. 52(A); *State v. Brown*, 65 Ohio St.3d 483, 485, 1992-Ohio-0061.

{¶31} In this case, the trial court's citation to R.C. 2929.14(B) did not actually harm Appellant in any way. There are no longer any limits on a trial court's ability to sentence an offender to more than the minimum possible statutory prison term. However, the trial court placed such a limit on itself by making certain findings before sentencing Appellant to more than the minimum sentence. These voluntary limits only benefited Appellant.

{¶32} Furthermore, while there is nothing requiring that the trial court make that particular finding, there is nothing preventing the trial court from making a particular finding either. It is perfectly acceptable, post-*Foster* for a trial court to find that "the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others," the findings formerly required by R.C. 2929.14(B) in most cases, when sentencing an offender because that finding is no longer required by statute. This conclusion does not change merely because the trial court cites to the former statute when making this finding.

{¶33} The majority correctly points out that this analysis is similar to that used by the critics of *Foster*, who claim that the severed statutes only served to benefit defendants by making it more difficult for sentencing courts to impose sentences above the statutory minimum. However, there is an important distinction between this case and *Foster*, the nature of the error. In cases involving constitutional error, such as *Blakely* and *Foster*, prejudice is presumed and an error is only harmless if the prosecution can demonstrate that the error is harmless beyond a reasonable doubt. In contrast, in cases involving non-constitutional errors, such as this one, the defendant bears the burden of demonstrating prejudice.

{¶34} This shift in the burden to show prejudice from the prosecution to the defense is critical because it changes the perspective we use when deciding whether a particular error is reversible. Thus, the critics of *Foster* are wrong, since the Ohio Supreme Court could not be sure that the error was harmless beyond a reasonable doubt. Nevertheless, those same arguments are important now since Appellant must show us how she was prejudiced. Thus, a finding of harmless error in this case is not inconsistent with the decisions in *Blakely* and *Foster*.

{¶35} The majority suspects that the trial court may not have been aware of *Foster* when sentencing Appellant. This may very well be correct, but is legally irrelevant. We can rationally affirm Appellant's sentence because the trial court's error was not a constitutional error, even though the actions would have been a constitutional error prior to *Foster*, and Appellant cannot show that she was prejudiced by that non-constitutional error.

{¶36} In this appeal, Appellant has not challenged the reasonableness of her sentence (an issue which has been raised in other cases). Instead, Appellant's only basis for challenging her sentence is that the trial court cited to R.C. 2929.14(B) when imposing that sentence. But we cannot reverse Appellant's sentence just because the trial court erroneously cited to R.C. 2929.14(B) after that statute had been declared unconstitutional. Since the trial court's error was not a constitutional error, Appellant has the duty of demonstrating that she is prejudiced by that error before we can reverse her sentence.

{¶37} Since *Foster* severed the statutory sections which caused the violation of the right to a jury trial, the trial court could consider any factor it wished to give Appellant any authorized sentence within the statutory range. It chose to consider whether the minimum sentence would demean the seriousness of the offense or adequately protect the public. There is nothing in either a statute or rule prohibiting the trial court from considering these factors. Furthermore, the consideration of these factors actually benefited Appellant since they made the trial court consider giving the minimum term. Appellant has failed to demonstrate that the trial court's error in this case prejudiced her in any way.

{¶38} For these reasons, the arguments in Appellant's sole assignment of error are meritless. The trial court did not commit prejudicial error when it relied on a statute which the Ohio Supreme Court had declared unconstitutional since the trial court's decision did not affect Appellant's substantial rights. Accordingly, the trial court's judgment should be affirmed.