

[Cite as *State v. Osborn*, 2006-Ohio-2878.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 86314

STATE OF OHIO

Plaintiff-appellee

vs.

TERRELL OSBORN

Defendant-appellant

JOURNAL ENTRY

AND

OPINION

DATE OF ANNOUNCEMENT  
OF DECISION:

JUNE 8, 2006

CHARACTER OF PROCEEDING:

Criminal appeal from Common  
Pleas Court, Case No. CR-452798

JUDGMENT:

Sentence vacated and remanded  
for resentencing.

DATE OF JOURNALIZATION:

APPEARANCES:

For plaintiff-appellee:

WILLIAM D. MASON, ESQ.  
Cuyahoga County Prosecutor  
RICHARD J. BOMBIK, ESQ.  
Assistant County Prosecutor  
The Justice Center, 8th Floor  
1200 Ontario Street  
Cleveland, Ohio 44113

For defendant-appellant:

THOMAS E. CONWAY  
13363 Madison Avenue  
LAKEWOOD, OH 44107

KARPINSKI, J.:

{¶ 1} Defendant appeals the eight-year sentence he received on his convictions for reckless homicide, a felony of the third degree, and an accompanying firearm specification.

{¶ 2} Defendant was indicted for the murder of Jeanine Chatman in May 2004. Following a jury trial, defendant was convicted of the lesser offense of reckless homicide with a firearm specification. Defendant was sentenced to a maximum five years on the reckless homicide conviction which was to be served consecutively with a three year prison term on the firearm specification. This appeal followed, in which defendant raises only one assignment of error:

APPELLANT'S DUE PROCESS AND SIXTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE TRIAL COURT ERRED BY SENTENCING APPELLANT TO A NON-MINIMUM PRISON SENTENCE BASED UPON FACTUAL FINDINGS MADE BY THE JUDGE AND NOT THE JURY.

{¶ 3} Defendant argues that when the trial court made factual findings beyond those determined by the jury for purposes of sentencing, the court violated *Blakely v. Washington* (2004), 124 S.Ct. 2531. Defendant further argues that he should have received a minimum one-year prison term on his reckless homicide conviction.<sup>1</sup>

{¶ 4} This case is controlled by the Ohio Supreme Court's recent decisions in *State v. Foster*, 2006-Ohio-856 and *State v.*

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<sup>1</sup>Reckless homicide is a third degree felony. R.C. 2929.14(A)(3) specifies that the statutory sentencing range for a

*Mathis*, 2006-Ohio-855. In *Foster*, the Court determined that some of Ohio's felony sentencing statutes included judicial fact-finding requirements that violated *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, and *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403. Relevant here was the Court's determination that the fact-finding required by R.C. 2929.14(B)(2) (to incarcerate for more than the minimum someone who has never been to prison before) and (C) (to impose the maximum prison term) is unconstitutional. *Foster*, ¶¶59-62. We thus agree with defendant's challenge to the required fact-finding procedure the court was mandated by statute to follow. We do not agree, however, to the remedy defendant proposes.

{¶ 5} As a remedy, the Supreme Court of Ohio in *Foster* severed parts of various statutes, including R.C. 2929.14. As a result, trial courts no longer need to make findings of fact before imposing more than the minimum term on an offender who has never served a prison term (R.C. 2929.14(B)) or before imposing a maximum term (R.C. 2929.14(C)). "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." *Foster*, at ¶7, syllabus.

{¶ 6} Just after *Foster* was decided, the Court rendered its decision in *Mathis*. In *Mathis*, decided on other grounds, the Court

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third degree felony is one to five years.

explained the resentencing procedure required by *Foster* on remand to the trial court. The trial court is to conduct a resentencing hearing<sup>2</sup> de novo<sup>3</sup> and

in exercising its discretion the court must carefully consider the statutes that apply to every felony case. Those include R.C. 2929.11, which specifies the purposes of sentencing, and R.C. 2929.12, which provides guidance in considering factors relating to the seriousness of the offense and recidivism of the offender. In addition, the sentencing court must be guided by statutes that are specific to the case itself.

*Mathis*, at ¶38.

{¶7} Defendant's first assignment of error is sustained, insofar as it challenges the trial court for following statutes now deemed to be unconstitutional because they require judicial fact-finding for imposing more than a minimum sentence and for imposing a maximum term.

{¶8} Accordingly, this case is remanded to the trial court for resentencing proceedings in accordance with *Foster* and *Mathis*.

Judgment accordingly.

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<sup>2</sup>R.C. 2929.19(A) (1).

<sup>3</sup>Because the resentencing hearing is "de novo," the trial court may take and consider new evidence along with considering the existing evidentiary record in the case.

This cause is vacated and remanded.

It is, therefore, ordered that appellant recover of appellee his costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

DIANE KARPINSKI  
JUDGE

ANN DYKE, P.J., CONCURS.

MICHAEL J. CORRIGAN, J., CONCURS IN JUDGMENT ONLY.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).