

[Cite as *State v. McCollins*, 2006-Ohio-2888.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 86561

STATE OF OHIO	:	
	:	JOURNAL ENTRY
Plaintiff-Appellee	:	
	:	and
-vs-	:	
	:	OPINION
MICHAEL McCOLLINS	:	
	:	
Defendant-Appellant	:	
	:	

DATE OF ANNOUNCEMENT OF DECISION:	<u>JUNE 8, 2006</u>
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CHARACTER OF PROCEEDING:	Criminal appeal from Common Pleas Court Case No. CR-453575
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JUDGMENT:	Vacated and Remanded for Resentencing.
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DATE OF JOURNALIZATION:

APPEARANCE:

For Plaintiff-Appellee:	WILLIAM D. MASON Cuyahoga County Prosecutor T. ALLAN REGAS Assistant County Prosecutor 8 th Floor Justice Center 1200 Ontario Street Cleveland, Ohio 44113
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For Defendant-Appellant:	ROBERT L. TOBIK Cuyahoga County Public Defender CULLEN SWEENEY PATRICIA KOCH LONDON Assistant Public Defenders 1200 West Third Street, N.W. Cleveland, Ohio 44113
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PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Michael McCollins appeals the sentence imposed by the trial court for his convictions for attempted murder and aggravated burglary. He assigns the following error for our review:

"Appellant's nonminimum sentence violates his constitutional right to a jury trial."

{¶ 2} Having reviewed the record and pertinent law, we vacate McCollins' sentence and remand the matter for resentencing based on the Ohio Supreme Court's recent decision of *State v. Foster*.¹ The apposite facts follow.

{¶ 3} On June 29, 2004, the Cuyahoga County Grand Jury indicted McCollins on one count each for attempted murder, felonious assault, aggravated burglary, and domestic violence. The attempted murder and aggravated burglary counts included a prior conviction and repeat violent offender specification.

{¶ 4} On November 8, 2004, McCollins pled guilty to attempted murder and aggravated burglary, with the prior conviction and repeat violent offender specifications deleted. The remaining counts were nolle. The trial court sentenced McCollins to four years on each count, to run concurrent with each other.

Nonminimum Sentence

¹109 Ohio St.3d. 1, 2006-Ohio-856.

{¶ 5} In his sole assigned error, McCollins contends his nonminimum sentence violated the U.S. Supreme Court's decisions of *Blakely v. Washington*² and *United States v. Booker*.³

{¶ 6} This case is controlled by the Ohio Supreme Court's recent decision of *State v. Foster*.⁴ In *Foster*, the Court held several of Ohio's sentencing statutes were unconstitutional⁵ for violating the Sixth Amendment to the United States Constitution in the manner set forth in *Apprendi v. New Jersey*,⁶ and *Blakely v. Washington*,⁷ and ordered them severed from the Ohio Revised Code. Trial courts are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences, and have full discretion to impose a prison sentence within the statutory range.⁸

²(2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403.

³(2005), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d. 621.

⁴*Id.*

⁵*Foster* holds that the following statutory sections are unconstitutional: R.C. 2929.14(B), (C), (D)(2)(b), (D)(3)(b), and (E)(4); R.C. 2929.19(B)(2); and R.C. 2929.41(A).

⁶*Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435

⁷*Blakely*, *supra*.

⁸*Foster* at ¶100.

{¶ 7} The Court held that with respect to cases pending on direct review, where a trial court relied on any of the unconstitutional statutes when imposing a sentence, the sentence is deemed void, must be vacated, and the matter should be remanded to the trial court for a new sentencing hearing.⁹

{¶ 8} In this case, the trial court relied on R.C. 2929.14(B) when sentencing McCollins to more than the minimum prison term. The court found that a nonminimum sentence was appropriate because McCollins had served a prior prison term. Although the U.S. Supreme Court in *Blakely* held findings of prior convictions were properly determined by the trial court and no jury determination was needed, the Ohio Supreme Court in *Foster* declared R.C. 2929.14(B) unconstitutional in its entirety and severed it from Ohio's sentencing code. Because McCollins' sentence is based on an unconstitutional statute, it is void and must be vacated and the matter remanded for resentencing. Accordingly, McCollins' sole assigned error is sustained.

{¶ 9} This matter is affirmed as to the trial court's finding of guilty; sentence vacated and remanded for resentencing.

{¶ 10} This matter is affirmed in part, sentence vacated and remanded for resentencing.

⁹¶103 and ¶104.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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.

FRANK D. CELEBREZZE, JR., P.J., and

ANTHONY O. CALABRESE, JR., J., CONCUR.

PATRICIA ANN BLACKMON
JUDGE

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).