

[Cite as *State v. Jones*, 2006-Ohio-3699.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 87011

STATE OF OHIO

Plaintiff-Appellee

VS .

DUANE JONES

Defendant-Appellant

DATE OF ANNOUNCEMENT
OF DECISION:

July 20, 2006

CHARACTER OF PROCEEDING:

Criminal appeal from
Common Pleas Court
Case No. CR-461220

JUDGMENT :

SENTENCE VACATED
AND REMANDED FOR
RESENTENCING

DATE OF JOURNALIZATION:

APPEARANCES :

For Plaintiff-Appellee:

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For Defendant-Appellant:

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ANTHONY O. CALABRESE, JR., J.:

{¶ 1} Defendant Duane Jones (appellant) appeals his ten-month prison sentence.

After reviewing the facts of the case and pertinent law, we vacate his sentence and remand the case for resentencing.

I.

{¶ 2} On January 20, 2005, appellant was indicted for domestic violence, a fifth-degree felony, in violation of R.C. 2912.25. After being found guilty by a jury, appellant was sentenced to ten months in prison.

II.

{¶ 3} In his sole assignment of error, appellant argues that “the imposition of sentences beyond the minimum available sentences was done in violation of Mr. Jones’ sixth amendment right to trial by jury.” Specifically, appellant argues that his sentence violates *Blakely v. Washington* (2004), 542 U.S. 269, as, in his case, there was a presumption against prison and in favor of community control sanctions. We agree with appellant’s argument.

{¶ 4} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Ohio Supreme Court found that several provisions of S.B. 2 violate *Blakely*. Specifically, the court held:

“Ohio’s sentencing statutes offend the constitutional principles announced in *Blakely* in four areas. As was reaffirmed by the Supreme Court in *Booker*, ‘Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.’”

Foster, supra, at ¶ 82 (citing *United States v. Booker* (2005), 543 U.S. 220, 224).

{¶ 5} The *Foster* court severed R.C. 2929.14(B), 2929.19(B)(2) and 2929.14(E)(4), which govern more than the minimum and consecutive sentences, and rendered them unconstitutional. As a result, the trial court is no longer obligated to follow these mandatory

guidelines when sentencing a felony offender. “Where sentencing is left to the unguided discretion of the judge, there is no judicial impingement upon the traditional role of the jury.” *Foster*, supra, at ¶ 90.

{¶ 6} Thus, in accordance with *Foster*, we sustain this assignment of error, vacate appellant’s sentence and remand for a new sentencing hearing. We note that the court may want to keep in mind the Ohio Supreme Court’s holding in *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, at ¶ 38:

“Although after *Foster*, the trial court is no longer compelled to make findings and give reasons at the sentencing hearing, *** nevertheless, 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 purpose of sentencing, and R.C. 2929.12, which provides guidance in considering the factors relating to the seriousness of the offense and recidivism of the offender. In addition, the sentencing court must be guided by the statutes that are specific to the case itself.”

{¶ 7} Accordingly, we sustain appellant’s assignment of error, vacate his sentence and remand his case for resentencing.

This cause is vacated and remanded to the lower court for further proceedings consistent with this opinion.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas 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.

ANTHONY O. CALABRESE, JR.
JUDGE

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

JAMES J. SWEENEY, J., CONCUR.

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).