

[Cite as *State v. Stokes*, 2006-Ohio-3966.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 87319

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	JOURNAL ENTRY
	:	
vs.	:	and
	:	
	:	OPINION
RUSSELL STOKES	:	
	:	
Defendant-Appellant	:	

DATE OF ANNOUNCEMENT
OF DECISION:

August 3, 2006

CHARACTER OF PROCEEDING:

Criminal appeal from
Common Pleas Court
Case No. CR-466472

JUDGMENT:

SENTENCE VACATED AND
CASE REMANDED FOR
RESENTENCING

DATE OF JOURNALIZATION:

APPEARANCES:

For Plaintiff-Appellee:

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ANTHONY O. CALABRESE, JR., J.:

{¶ 1} Defendant Russell Stokes (appellant) appeals his 17-year prison sentence as being unconstitutional. After reviewing the facts of the case and pertinent law, we vacate appellant's sentence and remand his case for a new sentencing hearing.

I.

{¶ 2} On October 25, 2005, the court sentenced appellant to an aggregate of 17 years in prison, after he pled guilty to two counts of rape, one count of aggravated burglary and one count of felonious assault. This included a seven-year sentence on the first rape charge, to run consecutive to a maximum ten-year sentence on the second rape charge.

II.

{¶ 3} In his first assignment of error, appellant argues that "the trial court erred by ordering appellant to serve a consecutive sentence without making the appropriate findings required by R.C. 2929.14(e)(4)." In his second assignment of error, appellant makes the same argument, as applied to his maximum sentence. Specifically, appellant argues that the court failed to make the statutory findings that were required under parts of S.B. 2 that have since been found unconstitutional by the Ohio Supreme Court in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. Appellant acknowledges *Foster*, which was handed down after he filed his notice of appeal but before he filed his appellate brief; however,

he argues that the case does not apply to him under the principles prohibiting ex post facto laws.

{¶ 4} We reject appellant's argument and apply *Foster* to his case. "As the Supreme Court mandated in *Booker*, we must apply [*Foster*] to all cases on direct review." *Id.* at 31 (internal citations omitted). The notice of appeal in the instant case was filed on October 27, 2005, and *Foster* was decided on February 27, 2006; therefore, appellant's case was pending as contemplated by the *Foster* court.

{¶ 5} In *Foster*, the Ohio Supreme Court found that several provisions of S.B. 2 violate *Blakely v. Washington* (2004), 542 U.S. 269. 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).

{¶ 6} 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.

{¶ 7} Thus, in accordance with *Foster*, we sustain this assignment of error and remand this case 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."

{¶ 8} Accordingly, we sustain appellant's assignments of error, although for reasons different than those argued in his brief. Appellant's sentence is vacated and his case is remanded to the trial court for a new sentencing hearing.

{¶ 9} 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

COLLEEN CONWAY COONEY, 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).