

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2005-08-208
 :
 - vs - : OPINION
 : 6/19/2006
 :
 JOSHUA STEVEN BANKS, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR05-03-0442

Robin N. Piper, Butler County Prosecuting Attorney, Daniel G. Eichel, Government Services Center, 315 High Street, 11th Fl., Hamilton, Ohio 45011, for plaintiff-appellee

Brian K. Harrison, 240 East State Street, Trenton, Ohio 45067, for defendant-appellant

BRESSLER, J.

{¶1} Defendant-appellant, Joshua Steven Banks, was originally charged with two first-degree felony counts of rape. Appellant pled guilty to one count and the state agreed to merge the remaining count. The trial court sentenced appellant to five years in prison.

{¶2} On appeal, appellant presents the following single assignment of error:

{¶3} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT SENTENCED HIM TO A TERM OF IMPRISONMENT IN EXCESS OF THE MINIMUM SENENCE [sic]."

{¶4} Appellant claims the trial court erred by imposing more than the minimum

sentence for a first-degree felony. Appellant maintains that the imposition of a nonminimum sentence based upon facts neither found by a jury nor admitted by appellant infringes upon his constitutional right to a jury trial as defined by the United States Supreme Court in *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531.

{¶15} The Ohio Supreme Court recently found portions of Ohio's statutory sentencing scheme unconstitutional and severed those portions from Ohio's sentencing code. See *State v. Foster*, 109 Ohio St.3d1, 2006-Ohio-856. Among these unconstitutional sections was R.C. 2929.14(B), which requires certain judicial findings before the imposition of more than a minimum sentence. See *Foster* at paragraph one of the syllabus. As a result of the severance of this provision from Ohio's felony sentencing scheme, judicial fact-finding prior to the imposition of a sentence within the basic range of R.C. 2929.14(A) is no longer required. *Id.* at paragraph two of the syllabus. See, also, *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, paragraph three of the syllabus.

{¶16} In this case, the trial court made certain findings under R.C. 2929.14(B) to impose more than the minimum prison term.

{¶17} The *Foster* court instructed that all cases pending under direct review in which the unconstitutional sentence provisions were utilized must be remanded for sentencing. See *Foster* at ¶104. Accordingly, appellant's assignment of error is sustained.

{¶18} The judgment of the trial court is reversed as to sentencing and the case is remanded for resentencing as to Count One.

POWELL, P.J., and WALSH, J., concur.

[Cite as *State v. Banks*, 2006-Ohio-3089.]