

[Cite as *State v. Brewer*, 2006-Ohio-3124.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

KRISTEN M. BREWER

Defendant-Appellant

JUDGES:

Hon. John W. Wise, P. J.

Hon. W. Scott Gwin, J.

Hon. Julie A. Edwards, J.

Case No. 05 COA 021

O P I N I O N

CHARACTER OF PROCEEDING:

Criminal Appeal from the Court of Common
Pleas, Case No. 04 CRI 105

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

June 19, 2006

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Wise, P. J.

{¶1} Appellant Kristen Brewer appeals the sentence rendered by the Ashland County Court of Common Pleas. The following facts give rise to this appeal.

{¶2} On May 31, 2005, the trial court sentenced appellant following her guilty plea to the charges of forgery and grand theft. The trial court imposed a total period of incarceration of two years. Appellant timely filed a notice of appeal and sets forth the following assignments of error for our consideration:

{¶3} “I. THE TRIAL COURT ERRED IN ORDERING THE SENTENCE ON COUNT TWO OF THE INDICTMENT TO BE SERVED CONSECUTIVELY TO THE SENTENCE FOR COUNT ONE OF THE INDICTMENT.

{¶4} “II. THE TRIAL COURT’S SENTENCE IN THE INSTANT CASE IS CONTRARY TO LAW AND DOES NOT SERVE THE OVERRIDING PURPOSES OF FELONY SENTENCING.

{¶5} “III. THE TRIAL COURT ERRED IN IMPOSING SENTENCE UPON THE DEFENDANT IN EXCESS OF THE MINIMUM, CONCURRENT SENTENCE ON ALL COUNTS AS REQUIRED BY THE CONSTITUTION U.S. CONST. AMEND. VI.”

III

{¶6} We will address appellant’s Third Assignment of Error first as we find it dispositive of this matter on appeal. In this assignment of error, appellant maintains Ohio’s sentencing statute is unconstitutional because it permits the trial court to impose a sentence above the minimum sentence permitted by law absent further findings by a jury. We agree based upon the Ohio Supreme Court’s recent decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856.

{¶17} The Ohio Supreme Court's decision in the *Foster* case is based upon three opinions from the United States Supreme Court. The first decision, *Apprendi v. New Jersey*, (2000), 530 U.S. 466, held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490.

{¶18} The second decision pertinent to the Ohio Supreme Court's analysis in *Foster* is *Blakely v. Washington* (2004), 542 U.S. 296. In *Blakely*, the Court held that "**** the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. * * * In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (Emphasis sic.) *Id.* at 303-304.

{¶19} The final case relied upon by the Ohio Supreme Court is *United States v. Booker* (2005), 543 U.S. 220. In the *Booker* decision, the Supreme Court found that the federal sentencing guidelines violated the Sixth Amendment because they required the judge rather than the jury to make findings of fact necessary for punishment. *Id.* at 233-234. As a remedy for the *Blakely* violations, the Court held that the sentencing guidelines must be treated as advisory only, with the maximum sentence being the top of the range set by the statute under which the defendant was convicted. *Id.* at 259.

{¶10} Pursuant to the *Apprendi*, *Blakely* and *Booker* decisions, the Ohio Supreme Court addressed Ohio's sentencing statutes pertaining to the following areas: (1) more than the minimum prison term [R.C. 2929.14(B)]; (2) the maximum prison term

[R.C. 2929.14(C)]; (3) consecutive prison terms [R.C. 2929.14(E)(4)]; (4) prison rather than community control for lower level felonies [R.C. 2929.13(B)(2)(a) and R.C. 2929.13(B)(2)(b)]; (5) and repeat violent offender and major drug offender penalty enhancements [R.C. 2929.14(D)(2)(a), R.C. 2929.14(D)(2)(b), and R.C. 2929.14(D)(3)(b)].

{¶11} The Ohio Supreme Court, in *Foster*, found the following provisions of Ohio's sentencing statute unconstitutional because it required judicial factfinding to exceed the sentence allowed simply as a result of a conviction or plea. The unconstitutional provisions are as follows: more than the minimum prison term [R.C. 2929.14(B), 2929.19(B)(2) and R.C. 2929.41]; the minimum prison term [R.C. 2929.14(C)]; consecutive prison terms [R.C. 2929.14(E)(4)]; repeat violent offender [R.C. 2929.14(D)(2)(b)]; and major drug offender [2929.14(D)(3)(b)]. Thus, under the *Blakely* analysis, only the provisions of the sentencing statute addressing prison rather than community control for lower level felonies [R.C. 2929.13(B)(2)(a) and R.C. 2929.13(B)(2)(b)] and repeat violent offender [R.C. 2929.14(D)(2)(a)] are constitutional.

{¶12} To remedy Ohio's felony sentencing statutes, the Court severed the *Blakely*-offending portions that either create presumptive minimum or concurrent terms or require judicial factfinding to overcome the presumption. *Foster* at ¶ 97. Thus, the Court concluded “* * * that 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.” *Id.* at ¶ 100.

{¶13} In applying the *Foster* decision to the facts of the case sub judice, appellant correctly concludes that Ohio's sentencing statute is unconstitutional. Accordingly, because appellant's sentence is based upon an unconstitutional statute that is deemed void, this matter is remanded to the trial court for a new sentencing hearing.

{¶14} Appellant's Third Assignment of Error is sustained. We will not address appellant's First and Second Assignments of Error as they are moot based upon our disposition of appellant's Third Assignment of Error.

By: Wise, P. J.

Gwin, J., and

Edwards, J., concur.

HON. JOHN W. WISE

HON. W. SCOTT GWIN

HON. JULIE A. EDWARDS

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