

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-06-1104

Appellee

Trial Court No. CR-0200502221-000

v.

Maximino Macias Jr. aka
Maximo Macias Jr.

DECISION AND JUDGMENT ENTRY

Appellant

Decided: January 18, 2008

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellee.

Spiros P. Cocoves, for appellant.

* * * * *

PIETRYKOWSKI, P.J.

{¶ 1} Defendant-appellant, Maximino Macias, Jr., appeals the October 4, 2005 judgment of the Lucas County Court of Common Pleas which, following a guilty plea, sentenced appellant to seven months of imprisonment for a violation of R.C. 2925.11(A), (C)(6)(a), possession of heroin, a fifth degree felony. Appellant's sentence was ordered to be served consecutively to his sentence for a post-release control violation. For the reasons that follow, we affirm the trial court's decision.

{¶ 2} Appellant raises the following assignment of error for our consideration:

{¶ 3} "The trial court's sentence must be remanded to the trial court for resentencing in light of *State v. Foster*."

{¶ 4} In his sole assignment of error, appellant contends that the Supreme Court of Ohio's decision in *State v. Foster*, 109 Ohio St.3d, 2006-Ohio-856, mandates that appellant be resentenced due to the trial court's reliance on unconstitutional felony sentencing provisions. The state concedes appellant's argument.

{¶ 5} In *Foster*, applying the United States Supreme Court's decisions in *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 and *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, the Supreme Court of Ohio found that various provisions of the Ohio sentencing statutes were unconstitutional because they required judicial factfinding in violation of a defendant's Sixth Amendment rights. The court severed those provisions including R.C. 2929.14(B) and (E)(4), which addressed non-minimum and consecutive sentences, and R.C. 2929.19(B)(2), which required certain findings by the trial court at the sentencing hearing.

{¶ 6} Subsequently, clarifying *Foster*, the Supreme Court of Ohio addressed the issue of whether, where a defendant is sentenced after the date of the decision in *Blakely v. Washington*, supra, a defendant forfeits the *Blakely* argument by failing to object at sentencing. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642. The court determined that such argument is forfeited and that the claim could only be addressed under the "plain error" standard. *Id.*, ¶ 13.

{¶ 7} In the present case, appellant was sentenced in October 2005, after *Blakely* was decided. Since appellant did not object at the time of sentencing, we must review appellant's assignment of error under the "plain error" standard.

{¶ 8} To prevail on a claim governed by the plain error standard, appellant must demonstrate that the trial outcome would have been clearly different but for the alleged errors. *State v. Waddell*, 75 Ohio St.3d 163, 166, 1996-Ohio-100. Regarding *Blakely* claims, unless a defendant shows that the court would have imposed a different or more lenient sentence absent the *Blakely* error, no plain error occurred. *Payne*, supra, ¶ 25.

{¶ 9} In this case, appellant was sentenced within the statutory limits. Furthermore, even presuming a *Blakely* error existed, after review of the sentencing hearing we cannot say that the trial court would have imposed a more lenient sentence. Therefore, we find that no plain error occurred and appellant's *Foster/Blakely* claim must fail. Appellant's sole assignment of error is found not well-taken.

{¶ 10} On consideration whereof, we find that appellant was not prejudiced or prevented from having a fair proceeding and the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

JUDGMENT AFFIRMED.

State v. Macias
C.A. No. L-06-1104

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, P.J.

JUDGE

Arlene Singer, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.