[Cite as *State v. Napper*, 2009-Ohio-3922.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 08CA3081
vs.	:	
CHESTON L. NAPPER,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: Timothy Young, Ohio Public Defender, and Jeremy J. Masters, Assistant Ohio Public Defender, 250 East Broad St., Suite 1400, Columbus, Ohio 43215

COUNSEL FOR APPELLEE: Michael M. Ater, Ross County Prosecuting Attorney, and Richard W. Clagg, Ross County Assistant Prosecuting Attorney, 72 North Paint Street, Chillicothe, Ohio 45601

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 7-30-09

ABELE, J.

{¶ 1} This is an appeal from a Ross County Common Pleas Court judgment. A jury found Cheston L. Napper, defendant below and appellant herein, guilty of (1) murder in violation of R.C. 2903.02; (2) attempted murder in violation of R.C. 2923.03; and (3) having a firearm under disability in violation of R.C. 2923.13. Appellant assigns the following error for review:

> "THE TRIAL COURT ERRED IN REIMPOSING ADD-ON REPEAT VIOLENT OFFENDER TERMS OF

> IMPRISONMENT UPON MR. NAPPER AFTER THIS COURT DETERMINED THAT THE STATUTE CONTAINING AND AUTHORIZING THOSE TERMS OF IMPRISONMENT, R.C. 2929.14(D)(2)(b), HAD BEEN SEVERED BY THE SUPREME COURT OF OHIO IN STATE V. FOSTER, 109 OHIO ST.3D 1, 2006-OHIO-856."

{¶ 2} On the evening of February 11, 2005, appellant was part of a group of individuals who gathered at a home to socialize. After a fight erupted, appellant brandished a firearm and shot two individuals. Marvin Woodfork, III later died.

{¶ 3} The Ross County Grand Jury returned an indictment charging appellant with murder, with both a firearm and a repeat violent offender specification, attempted murder, with both a firearm and repeat violent offender specification, and having a weapon while under disability. The jury found appellant guilty on all counts.

{¶ 4} The trial court sentenced appellant to serve fifteen (15) years to life on the murder charge, with nine (9) and three (3) years (respectively) for the repeat violent offender and firearm specifications, both to be served consecutively to the prison term on the murder charge; ten (10) years on the attempted murder charge, together with nine (9) additional years on the repeat violent offender specification to be served consecutively to the prison term for attempted murder; and five years for having a firearm under a disability. The court also ordered the sentences be served consecutively and that appellant pay $3,944 in restitution for his victim's funeral expenses.

{¶ 5} We affirmed appellant's conviction, but vacated his prison sentences (as they were based on statutes ruled unconstitutional by the Ohio Supreme Court) and the

order of restitution (as there was no evidence in the record to support a finding appellant had the means to make such restitution). We remanded the case for re-sentencing. State v. Napper, Ross App. No. 06CA2885, 2006-Ohio-6614, at ¶¶7-9, (Napper I).

{¶ 6} At re-sentencing in February 2007, the trial court imposed the same sentences, but without any order of restitution. We reversed that sentence because it appeared that the trial court imposed add-on sentences that had been permitted under R.C. 2929.14(D)(2)(b), a statute that the Supreme Court had declared unconstitutional in State v. Foster, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856, paragraph five of the syllabus. See State v. Napper, Ross App. No. 07CA2975, 2008-Ohio-2555, (Napper II). We vacated the add-on sentences and remanded the matter.

{¶ 7} At re-sentencing, both the State and the trial court expressed confusion as to Napper II regarding the R.C. 2929.14(D)(2)(b) add-on provisions. The trial court gave the following rendition of its interpretation of that statute, the Foster ruling and our ruling in Napper II:

> "The confusion arose in this matter because of a misreading of State v. Foster and its effect on the repeat violent offender statute as it existed at that point in time. Foster simply declared that the repeat violent offender statute to the extent it required findings that in considering the sentence to be imposed under the R B O [sic] statute. The court was to consider the seriousness and recividivism factors. That was unconstitutional because a fact-finder was supposed to do that. The court of appeals, although it declared its statute unconstitutional, actually – simply removed the requirement the court considered the seriousness and recidivism factors in determining a number of a sentence under the repeat violent offender statute and that's all they did. They didn't do anything further I'm uncertain why the court of appeals interpreted Foster to require anything different."

{¶ 8} The trial court imposed the same sentences previously given. This appeal followed.

{¶ 9} Appellant asserts in his sole assignment of error that the trial court erred by re-imposing add-on sentences that we stated were impermissible in Napper II. While appellant is correct that our ruling in Napper II would have disallowed these sentences, after careful reconsideration we agree with the trial court that we misinterpreted the interplay between two syllabus paragraphs in Foster and, thus, reverse Napper II.

{¶ 10} To begin, as we have stated on previous occasions, Ohio's sentencing scheme has become a morass of byzantine complexity. See State v. Poston, Pickaway App. No. 06CA15, 2007-Ohio-3936, at fn. 6. This problem is the responsibility of both the Ohio General Assembly (see Napper II, supra at fn. 2) noting R.C. 2929.14 had been amended no fewer than seven times since appellant perpetrated the crimes committed herein), as well as the Ohio Supreme Court (see e.g. State v. Kalish, 120 Ohio St.3d 23, 896 N.E.2d 124, 2008-Ohio-4912 a plurality opinion stating that an abuse of discretion standard should not to be used in reviewing sentences, despite having ruled in Foster that trial courts have discretion to impose such sentences). As we point out infra, the Supreme Court's imprecise language has further confused the problem in this case as well.

{¶ 11} The Foster opinion, 2006-Ohio-856, at paragraph five of the syllabus, held that R.C. 2929.14(B)(2)(b) is unconstitutional because it required judicial fact-finding as a prerequisite to imposing add-on penalties for repeat violent offenders. This

paragraph of the syllabus does not limit itself to the fact-finding language of the statutory provision but, instead, holds that the entire provision is unconstitutional. The Supreme Court then indicates in paragraph six of the syllabus that section (B)(2)(b) of that statute would be severed. Again, the severance is not limited solely to the fact-finding language but appears to extend to the entire statutory subsection. This is reinforced by the text of the Foster decision itself that explicitly states: "[w]e also excise R.C. 2929.14(D)(2)(b). . . which require findings for repeat violent offenders[.]" 2006-Ohio-856, at ¶97. Again, the court does not state that it excises specific language from the subsection; rather, it excises the entire subsection. This is the reason for our decision in Napper II.

{¶ 12} However, the sixth syllabus paragraph of Foster specifies that "[a]fter the severance [R.C. 2929.14(D)(2)(b)], judicial fact-finding is not required before imposition of additional penalties for repeat violent offender[s] and major drug offender[s] specifications." Id. While paragraph five of the syllabus appears to strike the entire provision, paragraph six appears to only strike the judicial fact-finding language from the statutory subsection.

{¶ 13} Other Ohio appellate courts have taken the position that subsection (D)(2)(b) has not been stricken from R.C. 2929.14 in its entirety; rather, only that language of the statutory subsection that requires judicial fact-finding. See e.g State v. Hunter, Cuyahoga App. No. 89456, 2008-Ohio-794, at ¶22[1]; State v. Payne, Lake App.

[1] The Eighth District's decision in Hunter is now before the Ohio Supreme Court

No. 2006-L-272, 2007-Ohio-6740, supra at ¶11; State v. Fulton, Erie App. No. E-07-12, 2007-Ohio-4608, at ¶12. We find these cases persuasive.

{¶ 14} Although allowing the imposition of add-on sentences pursuant to R.C. 2929.14 (D)(2)(b) seems to run afoul of the fifth syllabus paragraph of Foster, as well as some of the text of the decision, it is the only way to reconcile the language of the fifth and sixth syllabus paragraphs.

{¶ 15} For these reasons, the assignment of error is hereby overruled and Napper II is, likewise, overruled to the extent it conflicts with our ruling here.[2]

{¶ 16} Accordingly, having found no merit in appellant's assignment of error, we hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the 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 Ross County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously

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for review. See State v. Hunter, 119 Ohio St.3d 1407, 891 N.E.2d 768, 2008-Ohio-3880.

[2] We parenthetically note that we are not the only court who interpreted Foster in the manner we did in Napper II. See e.g. State v. Adams, Lake App. No. 2006-L-114, 2007-Ohio-2434 (O'Neill, J. Dissenting) at ¶¶33-35.

granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.