

[Cite as *State v. Fagan*, 2006-Ohio-1253.]

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. Case No. 2005-CA-41
v.	:	T.C. Case No. 04-CR-410
JUSTIN R. FAGAN	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

.....

OPINION

Rendered on the 17th day of March, 2006.

.....

WILLIAM F. SCHENCK, Prosecuting Attorney, By: CHERI L. STOUT, Assistant Prosecuting Attorney, Atty. Reg. #0073725, 61 Greene Street, Xenia, Ohio 45385  
Attorneys for Plaintiff-Appellee

ALAN D. GABEL, Atty. Reg. #0025034, 411 E. Fifth Street, P.O. Box 1423, Dayton, Ohio 45401-1423  
Attorney for Defendant-Appellant

.....

FAIN, J.

{¶ 1} Defendant-appellant Justin R. Fagan appeals from his sentence, following a negotiated plea of guilty to Vehicular Assault and Operating a Vehicle Under the Influence. Fagan’s two assignments of error are as follows:

{¶ 2} “THE TRIAL COURT ERRED THROUGH SENTENCING APPELLANT TO A NON-MINIMUM PRISON SENTENCE BASED ON FACTS NOT FOUND BY THE JURY BEYOND A REASONABLE DOUBT NOR ADMITTED BY APPELLANT.

{¶ 3} “APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.”

{¶ 4} In Fagan's Second Assignment of Error, he argues that if he failed to preserve the issue raised in his First Assignment of Error, then his trial counsel was ineffective for having failed to preserve that issue. In response to Fagan's Second Assignment of Error, the State concedes that he did preserve the issue raised for appellate review in his First Assignment of Error. We agree.

{¶ 5} Fagan received a seventeen-month sentence for Vehicular Assault, a fourth-degree felony, and a five-month sentence for Operating a Vehicle Under the Influence, a first-degree misdemeanor. The two sentences were ordered to be served concurrently. The minimum sentence for a fourth-degree felony is six months. R.C. 2929.14(A)(4). Unless an offender has previously served a prison term, R.C. 2929.14(B) provides that he may not be sentenced to more than a minimum term for a fourth-degree felony in the absence of certain findings of fact, to be made by the trial judge. This provision of the statute has been held to violate the right to a jury trial provided by the Sixth Amendment to the United States Constitution. *State v. Foster*, \_\_\_ Ohio St.3d \_\_\_, 2006-Ohio-856. Pursuant to ¶104 of *State v. Foster*, a sentence imposed pursuant to this provision of the statute must be reversed, and the cause must be remanded for re-sentencing.

{¶ 6} Fagan's Second Assignment of Error is overruled. His First Assignment of Error is sustained upon the authority of *State v. Foster*, supra. The sentence imposed by the trial court is Reversed, and this cause is Remanded for re-sentencing.

.....

BROGAN and VALEN, JJ., concur.

(Hon. Anthony Valen, Retired from the Twelfth Appellate District, Sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

Cheri L. Stout  
Alan D. Gabel  
Hon. Stephen Wolaver