

IN THE COURT OF APPEALS FOR CHAMPAIGN COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2005 CA 29
v.	:	T.C. NO. 2005 CR 056
MICHAEL E. CURRENT, JR.	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

OPINION

Rendered on the 12th day of May, 2006.

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WOLFF, J.

{¶ 1} Michael E. Current, Jr., pled guilty in the Champaign County Court of Common Pleas to one count of vehicular homicide and one count of breaking and entering. He was sentenced to eighteen months in prison for the vehicular homicide and to twelve months of imprisonment for breaking and entering, to be served consecutively for a total of thirty months. In addition, Current’s driver’s license was suspended for five years, and he

was fined \$500 and ordered to pay court costs. Current appeals from his sentence.

{¶ 2} During the evening of September 17, 2004, Current and his girlfriend, Shelby Watts, were patrons at the Woodstock Bar in Woodstock, Ohio. While there, Current consumed approximately fourteen beers. When Current and Watts left around midnight, Watts wanted to drive but Current refused. Current drove away in a Chevrolet Blazer with Watts in the passenger seat. Current and Watts argued in the vehicle because Watts wanted Current to stop the car so she could drive. Current told Watts to “take the wheel” and a crash ensued. Watts was killed. Current crawled out of the vehicle, went into the woods, and broke into a trailer, where he spent the night.

{¶ 3} On March 15, 2005, Current was indicted for one count of vehicular homicide in violation of R.C. 2903.06(A)(3)(C), three counts of vehicular homicide in violation of R.C. 2903.06(A)(4)(D), one count of breaking and entering, and one count of tampering with evidence. On May 9, 2005, Current pled guilty to vehicular homicide, in violation of R.C. 2903.06(A)(3)(C), and breaking and entering, in violation of R.C. 2911.13(A). Current received the maximum sentence for both counts, to be served consecutively. The additional four counts were dismissed with prejudice.

{¶ 4} In his sole assignment of error, Current claims that his sentence was not supported by sufficient evidence, was erroneous as a matter of law, and was excessive. He asserts that, as a first-time felony offender, he should not have been subjected to maximum and consecutive sentences.

{¶ 5} Current argues that the court improperly used essential elements of the offense – the resulting death and his driving under a suspended license – as justifications for imposing the maximum sentence for vehicular homicide. He also asserts that there was

no support for imposing the maximum sentence for breaking and entering. Although Current acknowledges that the court made the requisite findings for the imposition of consecutive sentences, he claims they were “perfunctory.” In addition, Current claims that his sentence was influenced by the more than fifty persons present during sentencing, most of whom were there in support of Watts.

{¶ 6} The Supreme Court of Ohio recently held that parts of Ohio’s felony sentencing scheme are unconstitutional. *State v. Foster*, – Ohio St.3d –, 2006-Ohio-856. The unconstitutional provisions include R.C. 2929.14(B) and (C), R.C. 2929.14(E)(4), and R.C. 2929.19(B)(2)(c). R.C. 2929.14(B) states that a court must impose the minimum sentence for an offense unless (1) the offender was serving or had previously served a prison term, or (2) the court finds that the shortest term will demean the seriousness of the offense or will not adequately protect the public from future crime by the offender or others. *Id.* at ¶61. R.C. 2929.14(C) provides that a court may impose the maximum sentence for an offense upon finding that the defendant had committed the worst form of the offense, upon offenders who pose the greatest likelihood of committing future crimes, and upon certain major drug offenders and repeat violent offenders. R.C. 2929.14(E)(4), which concerns consecutive sentences, states:

{¶ 7} “If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender’s conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

{¶ 8} “(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16 [residential sanctions], 2929.17 [non-residential sanctions], or 2929.18 [financial sanctions; restitution] of the Revised Code, or was under post-release control for a prior offense.

{¶ 9} “(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender’s conduct.

{¶ 10} “(c) The offender’s history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.”

{¶ 11} In addition, R.C. 2929.19(B)(2)(c) requires the court to state its reasons for imposing consecutive sentences. See *State v. Rothgeb*, Champaign App. No. 02CA7, 2003-Ohio-465, ¶25; *State v. Howard*, Montgomery App. No. 20575, 2005-Ohio-3702, ¶20.

{¶ 12} Following the United States Supreme Court’s decisions in *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, and *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, the Supreme Court of Ohio held in *Foster* that R.C. 2929.14(E)(4) violated the principles set forth in *Blakely* and that the use of such sentencing criteria is unconstitutional because it “require[s] judicial finding of facts not proven to a jury beyond a reasonable doubt or admitted by the defendant before imposition of consecutive sentences.” *Foster* at ¶65-67, ¶83. The supreme court further held that R.C. 2929.14(B) and (C) and R.C. 2929.19(B)(2) are unconstitutional because

they “require judicial factfinding before imposition of a sentence greater than the maximum term authorized by a jury verdict or admission of the defendant. ” Id. at ¶83. The supreme court severed the provisions that it found to be unconstitutional. Id. at ¶97. In light of this holding, trial courts now have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or to give their reasons for imposing maximum sentences. Id.; *State v. Mathis*, – Ohio St.3d –, 2006-Ohio-855, ¶37. Moreover, judicial factfinding is no longer required before the imposition of consecutive prison terms. *Foster* at ¶99; *Mathis*, at ¶37.

{¶ 13} Because *Foster* held the statutes under which Current’s sentence was imposed to be unconstitutional and severed them from the sentencing provisions of the Revised Code, we must remand this case for a new sentencing hearing. *Foster* at ¶104-105. At the sentencing hearing, the trial court “shall consider those portions of the sentencing code that are unaffected by [*Foster*] and impose any sentence within the appropriate felony range. If the offender is sentenced to multiple prison terms, the court is not barred from requiring those terms to be served consecutively.” Id. at ¶105.

{¶ 14} The assignment of error is sustained.

{¶ 15} The sentence is reversed, and the matter is remanded for resentencing.

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BROGAN, J. and FAIN, J., concur.

Copies mailed to:

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- Hon. Roger B. Wilson