

[Cite as *State v. Brown*, 2006-Ohio-3366.]

IN THE COURT OF APPEALS OF DARKE COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 05CA1663
vs.	:	
	:	
JOSEPH A. BROWN	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 30th day of June, 2006.

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Richard M. Howell, Pros. Attorney, Courthouse, Third Floor,
Greenville, OH 45331
Attorney for Plaintiff-Appellee

Lucas W. Wilder, Atty. Reg. No.0074057, 120 West Second
Street, Suite 400, Dayton, OH 45402
Attorney for Defendant-Appellant

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GRADY, P.J.

{¶ 1} This case is before the court on a brief filed by Defendant-Appellant's counsel pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, stating that his review of the record reveals no non-frivolous issues for appellate review.

{¶2} Defendant's notice of appeal was filed on May 27, 2005. Subsequently, on February 27, 2006, the Supreme Court rendered its decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, holding that Ohio's sentencing statutes are unconstitutional to the extent that they authorize imposition of greater-than-minimum sentences of incarceration on findings made by the court instead of by a jury or on a defendant's admissions. *Foster* requires reversal of sentences thus imposed, and a remand for resentencing in all cases that were pending on appeal when *Foster* was decided in which a defendant challenges his sentence.

{¶3} An *Anders* brief, of course, challenges nothing, because no error is alleged. However, we are then required to conduct our own independent review for error. *Penson v Ohio* (1988), 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300.

{¶4} Our independent review reveals that Defendant-Appellant's three sentences were imposed on findings by the court that *Foster* prohibits; two of those being in support of non-minimum sentences, and two being in support of sentences consecutive to a third, community control sanctions having been rejected by the court with respect to any of the three based on other findings the court made. The error and resulting reversal for resentencing are particularly

unfortunate because the trial court made its findings in compliance with our remand in a prior appeal. *State v. Brown*, Darke App. No. CA1645, 2005-Ohio-1929.

{¶ 5} Like our prior decision, counsel's *Anders* brief was filed before *Foster* was decided. Prescience being a scarce commodity, neither counsel nor this court anticipated *Foster*.

It would add nothing to these proceedings to now appoint new counsel to argue the application of *Foster*, as it clearly does govern the issues involved. Therefore, Defendant-Appellant's sentence will be reversed and vacated and the case remanded for resentencing pursuant to *Foster*.

BROGAN, J. And WOLFF, J., concur.

Copies mailed to:

Richard M. Howell, Esq.
Lucas W. Wilder, Esq.
Joseph A. Brown
Hon. Jonathan P. Hein