

[Cite as *State v. Kapsouris*, 2006-Ohio-7056.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 06 MA 47
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
MICHAEL KAPSOURIS	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of  
Common Pleas of Mahoning County,  
Ohio  
Case No. 02 CR 395A

JUDGMENT: Sentence Vacated. Remanded.

APPEARANCES:

For Plaintiff-Appellee: Atty. Paul J. Gains  
Mahoning County Prosecutor  
Atty. Rhys B. Cartwright-Jones  
Assistant Prosecuting Attorney  
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For Defendant-Appellant: Atty. David H. Bodiker  
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JUDGES:  
Hon. Cheryl L. Waite  
Hon. Gene Donofrio  
Hon. Mary DeGenaro

Dated: December 18, 2006

[Cite as *State v. Kapsouris*, 2006-Ohio-7056.]  
WAITE, J.

{¶1} Appellant argues on appeal that he was improperly sentenced under the principles set forth in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, which determined that certain aspects of Ohio's felony sentencing statutes were unconstitutional. Appellant was convicted in the Mahoning County Court of Common Pleas in 2002 for aggravated robbery and felonious assault. He was sentenced to ten years in prison on the robbery charge and three years for assault, to be served consecutively. Appellant appealed the conviction and sentence, and this case was remanded for resentencing due to deficiencies in the findings and supporting reasons for imposing consecutive sentences. *State v. Kapsouris*, 7th Dist. No. 02 CA 230, 2005-Ohio-4476. The trial court conducted a resentencing hearing on February 2, 2006, which was three weeks prior to issuance of the *Foster* decision, and a judgment entry was prepared the same day. The trial court's judgment entry, though, was not filed until March 2, 2006, which was three days after *Foster* was released. The judgment entry is written as a pre-*Foster* entry, citing liberally to statutory sections that were deemed unconstitutional under *Foster*. The state concedes that the sentence does not conform to *Foster*. The conclusion of Appellant's brief on appeal suggests (without further argument or comment) that the trial court may only impose, at most, a three-year prison term based on due process and ex post facto concerns. Appellee argues that these issues are not ripe for review since it is not yet known what the trial court will do in response to yet another round of resentencing proceedings. Appellee is correct, and the case is hereby remanded for resentencing under *Foster*.

{¶12} On July 30, 2001, Appellant attacked and robbed Debra Mitchell as she was attempting to deposit \$6000 at Key Bank in Austintown. Appellant was convicted in a jury trial on October 25, 2002, of one count of aggravated robbery, a first degree felony under R.C. §2911.01(A)(1), and felonious assault, a second degree felony under R.C. §2903.11.(A)(2). He was originally sentenced to ten years in prison on the aggravated robbery charge, and three years in prison on the felonious assault charge, to be served consecutively.

{¶13} This Court upheld the conviction but remanded the case for resentencing based on the trial court's failure to follow the dictates of R.C. §2929.14(E)(4) regarding consecutive sentences. *Kapsouris*, supra, at ¶22.

{¶14} The trial court held a resentencing hearing on February 2, 2006. The trial court imposed the same sentence as originally imposed, and closely tracked the language of R.C. §§2929.13, 2929.14, and 2929.19, in order to impose maximum and consecutive sentences. The court's judgment entry was prepared on February 2, 2006, but was file-stamped on March 2, 2006.

{¶15} On February 27, 2006, the Ohio Supreme Court released its *Foster* decision, which held that Ohio's felony sentencing statutes violated the constitutional right to a have a jury decide all the facts essential to punishment. *Foster* determined that certain aspects of the felony sentencing statutes required judicial fact-finding, rather than jury fact-finding, in order to impose maximum sentences, consecutive sentences, or sentences above the minimum sentence for first-time offenders. *Foster* then severed the statutory sections requiring judicial fact-finding, and

determined that the remaining portions of the sentencing code gave trial courts full discretion to impose a sentence within the range of sentences allowed by the jury verdict.

{¶16} Appellant filed this timely appeal on March 27, 2006.

{¶17} Appellant's first appeal had been submitted to the Ohio Supreme Court and was accepted for review, but Appellant voluntarily withdrew that appeal on March 14, 2006. *03/14/2006 Case Announcements*, 2006-Ohio-1152.

{¶18} Appellant's sole assignment of error states:

{¶19} "The trial court denied Mr. Kapsouris due process of law and the right to a jury trial, in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, by sentencing Mr. Kapsouris to prison based on facts not found by the jury nor admitted by Mr. Kapsouris. (February 2, 2006 Resentencing Hearing pp. 13-15; March 2, 2006 Judgment Entry)."

{¶110} Appellant's argument on appeal is that he received a sentence based on facts that were found by the trial judge and not by the jury, and that this violates the constitutional right to have a jury decide all the facts necessary to impose punishment. This line of reasoning was developed in a series of United States Supreme Court cases, including *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435; *Ring v. Arizona* (2002), 536 U.S. at 602, 122 S.Ct. 2428, 153 L.Ed.2d 556; *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403; and *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621. The Ohio Supreme Court determined in *Foster* that Ohio's felony

sentencing statutes also violated the Sixth Amendment because the trial judge, rather than the jury, was required to make certain findings to impose any sentence above the minimum sentence set forth in the sentencing statutes. As a remedy, the Supreme Court severed the statutory provisions requiring judicial fact-finding and retained the remainder of the sentencing code which provided for judicial discretion within the full range of sentences authorized by the jury verdict.

{¶11} Appellee concedes that the March 2, 2006, judgment entry of sentence violates the principles set forth in *Blakely* and *Foster*, and agrees that the case should be remanded for resentencing. Appellee argues that, upon remand, the trial court, “shall consider those portions of the sentencing code that are unaffected by today’s decision and impose any sentence within the appropriate felony range. If an offender is sentenced to multiple prison terms, the court is not barred from requiring those terms to be served consecutively. While the defendants may argue for reductions in their sentences, nothing prevents the state from seeking greater penalties.” *Foster*, supra, at ¶105.

{¶12} Appellee further addresses, though, a comment made by Appellant at the very end of his brief on appeal suggesting that the trial court could only impose, at most, a three-year prison term based on due process and ex post facto concerns. Appellant did not explain what he meant by this, and Appellee was left to make an educated guess in response.

{¶13} In *Beazell v. Ohio* (1925), 269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216, the United States Supreme Court explained the meaning of ex post facto legislation: “It

is settled, by decisions of this court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto." *Id.* at 169-170, 46 S.Ct. 68, 70 L.Ed. 216.

{¶14} Appellee contends that any issues concerning due process or ex post facto considerations will not be ripe for review until the trial court actually resentences Appellant. At least four appellate districts have also come to this conclusion since *Foster* was released. *State v. Davis*, 4th Dist. No. 05CA50, 2006-Ohio-3549; *State v. Rady*, 11th Dist. No. 2006-L-012, 2006-Ohio-3434; *State v. Lathan*, 6th Dist. No. L-03-1188, 2006-Ohio-2490; *State v. Sanchez*, 3rd Dist. No. 4-05-47, 2006-Ohio-2141. Issues are not typically ripe for review until they have been, "properly tested in a trial setting[.]" *State v. Kole* (2001), 92 Ohio St.3d 303, 308, 750 N.E.2d 148. The trial court has not had an opportunity to resentence Appellant in light of the analysis and holding of *Foster*, and any appeal challenging the penalty imposed upon resentencing must wait until the trial court actually imposes the sentence.

{¶15} Appellant filed a reply brief attempting to set forth the arguments regarding ex post facto and due process issues that should have been in the initial brief. Since Appellant did not actually present any argument relating to ex post facto or due process principles in his initial brief, there is a serious impropriety in presenting the primary argument on appeal in a reply brief to which Appellee has no

opportunity to respond. One can only hope that the State Public Defender's office, representing Appellant on appeal, will not be making a habit of this approach in future appellate matters. At any rate, Appellant concedes that numerous courts have already ruled that these issues are not ripe for review in *Foster* cases until after resentencing, and his argument is nothing more than a plea for this Court to simply disregard these rulings and to render a premature advisory opinion. "It has been long and well established that it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and to render judgments which can be carried into effect. It has become settled judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon potential controversies." *Fortner v. Thomas* (1970), 22 Ohio St.2d 13, 14, 257 N.E.2d 371. This case is remanded for resentencing under *Foster*, as acknowledged by both parties on appeal, and any additional premature arguments concerning due process and ex post facto principles will not be considered in this matter.

Donofrio, P.J., concurs in judgment only.

DeGenaro, J., dissents; see dissenting opinion.

DeGenaro, J., dissenting.

{¶16} In its opinion, the majority reverses Appellant's sentence and remands this case for resentencing pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-0856, even though Appellant was not sentenced until after *Foster* was released. I must respectfully disagree.

{¶17} *Foster* declared some of Ohio's felony sentencing statutes unconstitutional because they mandated that a trial court find certain facts before sentencing a defendant to more than the statutory minimum prison term, which violated the defendant's right to a jury trial. After *Foster*, these statutes are no longer effective, so a trial court cannot violate a defendant's right to a jury trial when explaining the basis for its sentence. Post-*Foster*, a defendant cannot be harmed when a trial court considers certain facts before sentencing a defendant to more than minimum, concurrent sentences, something the trial court is no longer statutorily required to do. Since *Foster* is the only basis for Appellant's appeal, his sentence should be affirmed.

{¶18} On appeal, Appellant contends that his sentence should be reversed since the trial court relied on statutes which had been declared unconstitutional when sentencing him. At first blush, this argument is persuasive. In its judgment entry, the trial court cites to R.C. 2929.14(B) and (C) and states that it makes findings in accordance with those statutes. R.C. 2929.14(B) required that a trial court make particular findings before sentencing an offender to more than the minimum possible prison term. R.C. 2929.14(C) required that a trial court make different findings before sentencing an offender to the maximum statutory prison sentence. In *Foster*, the Ohio Supreme Court held that R.C. 2929.14(B) and (C), along with other statutory sections, are unconstitutional and declared those statutory sections void. Thus, the trial court made findings pursuant to an unconstitutional statutory section when it sentenced Appellant.

{¶19} However, the error committed by the trial court in this case is distinct from the error addressed in *Foster*. In *Foster*, the Ohio Supreme Court held that R.C.

2929.14(B) was unconstitutional because it violated the defendant's right to a jury trial. When making this conclusion, the Ohio Supreme Court relied on the decisions in *Blakely v. Washington* (2004) 542 U.S. 296 and *United States v. Booker* (2005), 543 U.S. 220. In *Blakely*, the United States Supreme Court clarified its holding in *Apprendi v. New Jersey*, 530 U.S. 466, 490, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," by defining what the Court meant by the phrase "statutory maximum." *Blakely* held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." (Emphasis sic) (Citations omitted) *Id.* at 303-304.

{¶20} When reaching this conclusion, the United States Supreme Court was careful to clarify that a defendant's right to a jury trial is not violated when a judge finds facts when determining an appropriate sentence; they only do so when they find facts mandated by statute when determining an appropriate sentence. *Id.* at 308-309.

{¶21} "First, the Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. Indeterminate sentencing does not do so. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial fact-finding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence – and that makes all the difference insofar as judicial impingement on the traditional role of a jury is concerned." (Emphasis sic) *Id.*

{¶22} The Court's subsequent decision in *Booker* further demonstrated that the only thing in this context which violates a defendant's Sixth Amendment right to a jury trial is when a judge is required to find particular facts before increasing a defendant's sentence. That decision dealt with the constitutionality of the federal sentencing structure. The Court determined that trial courts violated defendants' rights when they sentenced them pursuant to the federal sentencing guidelines. *Id.* at 243-244. But when fashioning a remedy to this constitutional violation, the Court simply made those guidelines advisory, rather than mandatory. *Id.* at 245-246. Thus, the United States Supreme Court has clearly held that judges are allowed to find facts at sentencing. They just cannot be legislatively mandated to find a particular fact in order to increase an offender's sentence.

{¶23} The Ohio Supreme Court recognized this distinction in *Foster*. Although the Ohio Supreme Court held that the statutes, such as R.C. 2929.14(B) and (C), which mandated that certain findings were to be made, were unconstitutional, it held that other statutes, such as R.C. 2929.12, which only required that a trial court "consider" certain factors at sentencing, passed constitutional muster. *Id.* at ¶42. In other words, both the United States and Ohio Supreme Courts have recognized that judges must make factual findings when making appropriate sentencing decisions. These courts merely held that judicial fact-findings violates a defendant's right to a jury trial when statutes mandate that a trial court find certain facts in order to increase an offender's sentence beyond that authorized solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.

{¶24} In this case, Appellant cannot claim a constitutional error because he was not sentenced until after *Foster* was decided. Appellant's sentencing hearing was held on February 2, 2006, and the trial court's sentencing entry was filed on March 2, 2006. The Ohio Supreme Court decided *Foster* between these two dates, on February 27, 2006. A court speaks through its journal and a sentence is not effective until it is journalized. Crim.R. 32(C); *Kaine v. Marion Prison Warden*, 88 Ohio St.3d 454, 455, 2000-Ohio-0381. Thus, Appellant was sentenced on the day his sentencing entry was filed, which was post-*Foster*.

{¶25} After *Foster*, there are no statutory limits on the facts a trial court can use to determine whether to give a minimum prison sentence, more than the minimum prison sentence, maximum prison sentences, or consecutive prison sentences. A judge can use any fact it wants to determine the sentence it will impose on a particular offender without violating that offender's right to a jury trial, the right protected by *Blakely*, *Booker*, and *Foster*. Instead, the only error Appellant can claim is that the trial court erred when considering an inoperative statute at sentencing.

{¶26} The difference between a constitutional error and a non-constitutional error is significant. A court faced with a constitutional error can only be considered harmless if the appellate court can "declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California* (1967), 386 U.S. 18, 24. In contrast, non-constitutional errors are only reversible when they "affect substantial rights," a much lower standard. Crim.R. 52(A); *State v. Brown*, 65 Ohio St.3d 483, 485, 1992-Ohio-0061. A party's substantial rights are not automatically affected merely because a trial court relies on a statute which is no longer operable when reaching a judgment. See *In re Day*, 01 BA 28, 2003-Ohio-1215. In such a case, this court must determine whether the error is harmless before reversing the trial court's decision. *Id.* at ¶13-16. Accordingly, before we can reverse Appellant's sentence, it must first determine whether the error has affected Appellant's substantial rights.

{¶27} In this case, it does not appear that the trial court's citation to R.C. 2929.14(B) or (C) has actually harmed Appellant in any way. There are no longer any limits on a trial court's ability to sentence an offender to more than the minimum possible statutory prison term. However, the trial court placed such a limit on itself by making certain findings before sentencing Appellant to more than the minimum sentence and maximum sentences. These voluntary limits only benefited Appellant.

{¶28} Furthermore, while there is nothing requiring that the trial court make that particular finding, there is nothing preventing the trial court from making a particular finding either. It would be perfectly acceptable, post-*Foster* for a trial court to find that "the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or

others," the findings formerly required by R.C. 2929.14(B) in most cases, when sentencing an offender because that finding is no longer required by statute. Likewise, there is nothing preventing a court from sentencing an offender to the maximum sentence because he committed "the worst form of the offense," a finding formerly required by R.C. 2929.14(C). This conclusion should not change merely because the trial court cites to the former statute when making this finding.

{¶29} One could reasonably ask how this court could conclude that the error in this case is harmless, while the same action taken pre-*Foster* would result in reversal. The difference appears to be in how courts judge prejudice in cases involving constitutional error and how they judge prejudice in cases involving non-constitutional error. In the former, such as with *Blakely* and *Foster*, prejudice is presumed and an error is only harmless if it is harmless beyond a reasonable doubt. In contrast, the defendant must demonstrate prejudice in the latter set of cases, such as this one. Thus, a finding of harmless error in this case is not inconsistent with the decisions in *Blakely* and *Foster* since prejudice in this case is measured differently than prejudice in those cases.

{¶30} We should not reverse Appellant's sentence just because the trial court cited to R.C. 2929.14(B) after that statute had been declared unconstitutional. Since *Foster* severed the statutory sections which caused the violation of the right to a jury trial, the trial court was no longer capable of violating that right when sentencing Appellant and could consider any factor it wished to give Appellant any authorized sentence within the statutory range. It chose to consider the factors formerly required by R.C. 2929.14(B) and (C). There is nothing in either a statute or rule prohibiting the trial court from considering these factors, which had formerly been required by statute. Furthermore, the consideration of these factors actually benefited Appellant since they made the trial court consider giving the minimum term.

{¶31} For these reasons, the arguments in Appellant's sole assignment of error are meritless. The trial court erred when it relied on a statute which the Ohio Supreme Court had declared unconstitutional. However, this error did not affect

Appellant's substantial rights. Accordingly, the trial court's judgment should be affirmed.