[Cite as *State v. Hunger*, 2006-Ohio-6533.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2005-L-127**
- vs -	:	
MARK D. HUNGER, JR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 04 CR 000551.

Judgment: Sentence vacated; reversed and remanded.

Charles E. Coulson, Lake County Prosecutor, and *Karen A. Sheppert*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

R. Paul LaPlante, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

DONALD R. FORD, P.J.

{¶1} Appellant, Mark D. Hunger, Jr., appeals his sentencing order for a felonious assault conviction in which he received a more-than-the-minimum sentence. In light of the Supreme Court case, *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, we reverse and remand this matter for resentencing.

{¶2} On August 17, 2004, following a verbal exchange in a parking lot with his fiancé's ex-boyfriend ("the victim"), appellant drove his vehicle into a bus shelter where

the victim was standing. Two other bystanders were in the bus shelter at the time. The victim sustained injuries and the bus shelter was severely damaged.

{¶3} Appellant entered a plea of guilty to a bill of information charging him with one count of felonious assault, a violation of R.C. 2903.11(A)(2), and a felony of the second degree. On December 2, 2004, the trial court ordered him to serve four years in prison and to make restitution of $2,018 to the Regional Transit Authority.

{¶4} This court permitted appellant to file a delayed appeal.

{¶5} Appellant has raised two assignments of error for our review:

{¶6} "[1.] The trial court erred when it sentenced [appellant] to a more-than-the-minimum prison sentence based upon a finding of factors not found by the jury or admitted by the [appellant] in violation of [appellant's] state and federal constitutional rights to trial by jury.

{¶7} "[2.] The trial court erred in sentencing [appellant] to four years in prison when it sentenced him contrary to R.C. 2929.12 based upon findings not supported by the record."

{¶8} In his first assignment of error, appellant argues that the trial court erred when it sentenced him to a more-than-the-minimum sentence pursuant to R.C. 2929.14(B), since the sentence was based upon factors not admitted by him or found by a jury.

{¶9} In sentencing appellant to a more-than-the-minimum sentence, the trial court relied upon judicial fact-finding, formerly mandated by statute, but now deemed unconstitutional and void by the Supreme Court of Ohio. In *Foster*, the Supreme Court held that R.C. 2929.14(B) is unconstitutional for violating the Sixth Amendment because it deprives a defendant of the right to a jury trial, pursuant to *Apprendi v. New Jersey*

(2000), 530 U.S. 466, and *Blakely v. Washington* (2004), 542 U.S. 296. On that basis, appellant's assignment of error has merit.

{¶10} Further, pursuant to *United States v. Booker* (2005), 543 U.S. 220, the Supreme Court's remedy was to sever the unconstitutional provisions of the Revised Code, including R.C. 2929.14(B). After severance, judicial factfinding is not required before imposing a sentence that is more-than-the-minimum. *Foster* at paragraph one of the syllabus.

{¶11} Since *Foster* was released while this case was pending on direct review, appellant's sentence is void, must be vacated, and remanded for resentencing. *Foster* at ¶103-104. Upon remand, the trial court is no longer required to make findings or give its reasons for imposing maximum, consecutive or more-than-the-minimum sentences. Id. at paragraph seven of the syllabus.

{¶12} Accordingly, appellant's first assignment of error has merit.

{¶13} In his second assignment of error, appellant argues that the trial court erred when it sentenced him contrary to R.C. 2929.12 based upon findings not supported by the record.

{¶14} In *Foster*, at ¶37, the Supreme Court of Ohio stated:

{¶15} "*** R.C. 2929.12, grants the sentencing judge discretion 'to determine the most effective way to comply with the purposes and principles of sentencing.' *** R.C. 2929.12(A) directs that in exercising that discretion, the court shall consider, along with any other 'relevant' factors, the seriousness factors set forth in divisions (B) and (C) and the recidivism factors in divisions (D) and (E) of R.C. 2929.12. These statutory sections provide a nonexclusive list for the court to consider." (Footnote omitted.)

{¶16} After *Foster*, the question evolves as to whether a trial court, when *considering* this nonexclusive list of statutory factors under R.C. 2929.12, is still permitted to make findings pursuant to this section. We conclude that it is.

{¶17} In *Foster*, the Supreme Court held that portions of the applicable sentencing statutes were unconstitutional in light of *Blakely*, supra, because they offend the Sixth Amendment to the United States Constitution and Section 4, Article I of the Ohio Constitution. Id. at ¶1-3. This is because a jury, rather than a judge, must find all facts *essential* to punishment. Id. at ¶3. (Emphasis added.)

{¶18} The Supreme Court stated that "[i]n conducting a *Blakely* analysis, we must determine whether a *presumptive sentence* is created and whether judicial factfinding is *required* to exceed that sentence." Id. at ¶55. (Emphasis added.) However, where the Supreme Court found that judicial factfinding was not mandatory or there was no presumptive sentence, the court found that it was constitutional. Id. at ¶70.[1] Thus, it is clear that the *distinction* between unconstitutional provisions (i.e., impermissible judicial factfinding) and constitutional provisions (i.e., permissible judicial factfinding), is whether the factfinding was mandated by the statute.

{¶19} Further, with respect to the general guidance statutes, R.C. 2929.11 and R.C. 2929.12, the Supreme Court stated that "[i]t is *important* to note that there is *no mandate* for judicial factfinding ***. The court is merely to 'consider' the statutory factors." Id. at ¶42. (Emphasis added.) Thus, the Supreme Court did not declare R.C. 2929.11 and R.C. 2929.12 to be unconstitutional. Id. at ¶97-99.

1. For example, "R.C. 2929.13(B)(2)(b) and 2929.13(B)(2)(a) do not violate *Blakely* by *requiring* the sentencing court to make additional findings of fact before *increasing* a penalty at the fourth or fifth degree felony level." *Foster* at ¶70.

{¶20} In the sections of the sentencing statute which the Supreme Court declared violated *Blakely*, the court stressed that judicial factfinding was mandatory before the court could overcome the minimum presumption, and impose the greater sentence. See paragraphs one, three, and five of the syllabus. The court applied the remedy set forth in *Booker*, supra, and severed the unconstitutional portions. See paragraphs two, four, and six of the syllabus.

{¶21} The Supreme Court instructed sentencing courts on remand to "consider those portions of the sentencing code that are unaffected by today's decision and impose any sentence within the appropriate felony range." Id. at ¶105. The Supreme Court was more explicit in this mandate in *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, when it stated: "[a]lthough after *Foster*, the trial court is *no longer compelled* to make findings and give reasons at the sentencing hearing since R.C. 2929.19(B)(2) has been excised, nevertheless, in exercising its discretion the court must carefully consider the statutes that apply to every felony case. Those include R.C. 2929.11, which specifies the purposes of sentencing, and R.C. 2929.12, which provides guidance in considering factors relating to the seriousness of the offense and recidivism of the offender. In addition, the sentencing court must be guided by statutes that are specific to the case itself." Id. at ¶38. (Emphasis added.)

{¶22} Furthermore, we look to federal district courts for guidance. In *Foster*, the Supreme Court stated that "the [United States] Supreme Court excised from the Sentencing Reform Act of 1984 those provisions that made the Guidelines mandatory, rendering the Guidelines 'effectively advisory.' *** District courts, although no longer bound to apply them, must consider the Guidelines and take them into account in sentencing." Id. at ¶10. Since *Booker*, federal district courts *still rely on judicial*

factfinding under the Guidelines.[2] Thus, it would be reasonable to presume that under Ohio's sentencing statutes, trial court judges may still employ qualified judicial factfinding, just as federal districts courts do, as long as it is not required by the statute.

{¶23} It is clear that R.C. 2929.12 *was not affected* by *Foster*. The Supreme Court did not find it to be unconstitutional, since "there is no mandate for judicial factfinding" in it. Id. at ¶42. R.C. 2929.12 remains as it did prior to *Foster* and courts should treat it as such. Prior to *Foster*, trial courts could make findings pursuant to R.C. 2929.12, and nothing in *Foster* says that they cannot still do so. Likewise, appellate courts should analyze issues regarding R.C. 2929.12 as they did prior to *Foster*.

{¶24} Therefore, although *Foster* and *Mathis* do not expressly hold that trial courts *can* still make findings under R.C. 2929.12, i.e, they only directed trial courts to still *consider* R.C. 2929.12 factors when sentencing, based on the foregoing reasons, we conclude that trial courts can make findings pursuant to this section when considering the relevant factors.

{¶25} In addition, since *Foster* was decided, this court has addressed the issue at bar; i.e., whether the trial court erred when it sentenced an appellant "contrary to R.C. 2929.12 based upon findings not supported by the record." *State v. Spicuzza*, 11th

2. Professor Douglas Berman of Ohio State University Moritz College of Law, explains that Justice Breyer (who authored the *Booker* remedial opinion) preserved a central role for the guidelines and judicial factfinding at sentencing. Professor Berman stated that "[b]ased on a year of experience with the *Booker* remedy, *** it now appears that Justice Breyer largely succeeded in preserving the fundamental pre-*Booker* features of federal sentencing: the *Booker* decision does not appear to have radically changed either basic practices or typical outcomes in the federal sentencing system. Though courts have been engaged in a dynamic debate over the precise weight to be given the guidelines now that they are only advisory, this debate probably should be considered more a matter of style than substance because there is universal lower-court agreement that, after *Booker*, district judges must still properly calculate guideline sentencing ranges and must still provide a reasoned justification for any decision to deviate from the guidelines. *** Consequently, a full year after *Booker*, we observe *** a federal sentencing process that still remains exceedingly focused on guideline calculations based on *judicial factfinding*[.]" Douglas A. Berman, "Editor's Observations: Perspectives on *Booker's* Potential," (Dec. 2005), Federal Sentencing Reporter, Vol. 18, No. 2. (Emphasis added.)

Dist. No. 2005-L-078, 2006-Ohio-2379, at ¶6. In *Spicuzza*, the appellant maintained that the trial court did not properly consider R.C. 2929.12 factors. Id. at ¶13. We disagreed, stating that "not only did the trial court properly weigh the *relevant* factors, it went into extensive detail in discussing each of them." Id. at ¶17. Further, we pointed out that, although a trial court must consider the seriousness and recidivism factors, the court does not need to make specific findings on the record in order to evince the requisite consideration of all applicable factors. Id. at ¶16, citing *State v. Blake*, 11th Dist. No. 2003-L-196, 2005-Ohio-686. Implicit in this statement, is that although a court *need not* make specific findings on the record, it certainly is not error to do so. See, also, *State v. Nichols*, 11th Dist. No. 2005-L-017, 2006-Ohio-2934, at ¶74-98.[3]

{¶26} In the case sub judice, appellant argues that the trial court improperly weighed a number of mitigating factors under R.C. 2929.12, including the fact that the victim facilitated the offense; there was nothing in the record to suggest that appellant was more likely to commit a criminal offense in the future; and that appellant had been a law-abiding citizen for a significant number of years.

{¶27} However, the record reflects that at the sentencing hearing, the trial court also found a number of aggravating factors under R.C. 2929.12, including the fact that the victim suffered physical harm; appellant harmed the victim with a deadly weapon; appellant's relationship with the victim facilitated the offense; and the fact that two bystanders were in the bus shelter when appellant drove his car into it intending to hit the victim. The trial court also found another factor, the fact that appellant took the law

3. Other districts have addressed this issue similarly. See, e.g., *State v. Raisley*, 4th Dist. No. 05CA2867, 2006-Ohio-1388; *State v. Warren*, 7th Dist. No. 05 MA 91, 2006-Ohio-1281; *State v. Patterson*, 2d Dist. No. 20977, 2006-Ohio-1422; *State v. Mason*, 3d Dist. No. 9-05-21, 2006-Ohio-1998; and *State v. Grays*, 12th Dist. No. CA2005-07-187, 2006-Ohio-2246.

into his own hands, to be an aggravating factor. The trial court stated that it could not condone appellant's action because a person cannot take the law into one's own hands, or else we would be faced with a lawless, chaotic, and dangerous society.

{¶28} Furthermore, the trial court stated in its sentencing order, as well as at the hearing, that it considered the principles and purposes of sentencing under R.C. 2929.11, and balanced the seriousness and recidivism factors under R.C. 2929.12. Therefore, we conclude that the trial court adequately complied with the requirements of R.C. 2929.12.[4] Appellant's second assignment of error is without merit.

{¶29} Accordingly, appellant's first assignment of error has merit and his second assignment of error is overruled. The sentence of the Lake County Court of Common Pleas is vacated. This case is reversed and remanded for resentencing for proceedings consistent with this opinion pursuant to *Foster*.

DIANE V. GRENDELL, J., concurs,

WILLIAM M. O'NEILL, J., concurs in judgment only with Concurring Opinion.

WILLIAM M. O'NEILL, J., concurring in judgment only.

{¶30} While I agree with the majority opinion with respect to the first assignment of error, I write to separately concur in judgment only because I believe that the second assignment of error is moot in light of the analysis of the first assignment of error.

4. Appellant also argues that the trial court erred when it found that the victim suffered psychological harm since there was no evidence to support it in the record. We agree. However, this error standing alone, is harmless, as the trial court's consideration of the remaining factors of R.C. 2929.12(B) support its determination of the seriousness of the offense. See, also, *Nichols*, supra, at ¶86-87.

Hunger will get a new sentencing hearing pursuant to *State v. Foster*,[5] and, therefore, errors, if any, committed by the trial court during the first sentencing hearing will be corrected.[6] Hunger will be able to challenge anew the trial court's findings made at the subsequent sentencing hearing.

5. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, at ¶104.
6. Id. at ¶104-105.