

[Cite as *State v. Moore*, 2006-Ohio-2810.]

COURT OF APPEALS  
DELAWARE COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

BENJAMIN LUTHER MOORE

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Julie A. Edwards, J.

Hon. John F. Boggins, J.

Case No. 05CAA11077

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Delaware County Court of  
Common Pleas, Case No. 03CRI070269

JUDGMENT:

Vacated and Remanded

DATE OF JUDGMENT ENTRY:

June 2, 2006

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

DAVID YOST

Delaware County Prosecutor

140 N. Sandusky St.

Delaware, Ohio 43015

CHAD A. HEALD

125 N. Sandusky St.

Delaware, Ohio 43015

*Hoffman, P.J.*

{¶1} Defendant-appellant Benjamin Luther Moore appeals his sentence entered by the Delaware County Court of Common Pleas, following his conviction on one count of Identity Fraud, a felony of the fourth degree.

#### STATEMENT OF THE CASE<sup>1</sup>

{¶2} Following appellant's entering a guilty plea to the aforementioned charge, the trial court ordered a pre-sentence investigation. On November 9, 2005, appellant was sentenced to the maximum penalty of eighteen months imprisonment consecutive to the Federal sentence appellant was then serving. The trial court also ordered restitution and imposed costs. The sentence was journalized via Judgment Entry of Sentence filed November 15, 2005. It is from that entry appellant prosecutes this appeal, assigning as error:

{¶3} "I. THE TRIAL COURT ERRED BY SENTENCING THE APPELLANT TO THE MAXIMUM PRISON TERM.

{¶4} "II. THE TRIAL COURT ERRED BY SENTENCING THE APPELLANT TO CONSECUTIVE SENTENCES.

{¶5} "III. THE TRIAL COURT ERRED BY SENTENCING MR. MOORE TO A NON-MINIMUM PRISON TERM BASED ON FACTS NOT FOUND BY THE JURY OR ADMITTED BY MR. MOORE."<sup>2</sup>

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<sup>1</sup> A rendition of the facts is unnecessary for our resolution of appellant's assignments of error.

<sup>2</sup> Appellant orally withdrew his fourth assignment of error at oral argument.

## I &amp; II

{¶6} We address appellant's first and second assignments of error together as we find their disposition both controlled by the Ohio Supreme Court's recent decision in *State v. Foster*, \_\_\_Ohio St.3d\_\_\_, 2006-Ohio-856.

{¶7} The trial court sentenced appellant to the maximum sentence, making the requisite finding under R.C. 2929.14 (C), and ordered the sentence to be served consecutively to the Federal sentence appellant was then serving, making the requisite finding under R.C. 2929.14 (E)(4). In *Foster*, the Ohio Supreme Court found R.C. 2929.14 (C) and R.C. 2929.14 (E)(4) unconstitutional. *Id.*, at syllabus no. 1 and 3, respectively. The *Foster* Court determined sentences based on unconstitutional statutes are void and the appropriate disposition is to vacate the sentence and remand the matter to the trial court for a new sentencing hearing. *Id.* at para. 103. Based upon *Foster*, we sustain appellant's first and second assignments of error.

## III

{¶8} Based upon our disposition of appellant's first and second assignments of error, we find appellant's argument herein to be moot.

{19} Appellant's sentence is ordered vacated and the case remanded to the trial court for resentencing.

By: Hoffman, P.J.

Edwards, J. and

Boggins, J. concur

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HON. WILLIAM B. HOFFMAN

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HON. JULIE A. EDWARDS

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HON. JOHN F. BOGGINS

