

[Cite as *State v. Bradway*, 2006-Ohio-5975.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Sheila G. Farmer, J.
	:	Julie A. Edwards, J.
-vs-	:	
	:	Case No. 05 COA 051
GREGORY C. BRADWAY	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal Appeal From Ashland County
Court Of Common Pleas Case No.
04-CRI-068

JUDGMENT: Vacated, and Remanded to the Trial Court
for resentencing

DATE OF JUDGMENT ENTRY: November 8, 2006

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Ashland County Prosecutor
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Edwards, J.

{¶1} Defendant-appellant Gregory Bradway appeals the sentence entered by the Ashland County Court of Common Pleas following his plea of guilty to one count of sexual battery, a felony of the third degree. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND LAW

{¶2} On or about August 25, 2004, a Bill of Information was filed against the appellant on one count of sexual battery in violation of R.C. 2907.03(A)(2), a felony of the third degree. Appellant pleaded guilty on or about August 31, 2004. The trial court held a sentencing hearing on or about October 4, 2004, at which time appellant was sentenced to the maximum of five (5) years imprisonment. Appellant appealed, and this Court reversed and remanded for re-sentencing pursuant to *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, 793 N.E.2d 473, and *State v. Evans*, 102 Ohio St.3d 240, 2004-Ohio-2659, 809 N.E.2d 11.

{¶3} On or about October 3, 2005, appellant was re-sentenced on remand, at which time the trial court considered the factors set forth in R.C. 2929. et seq., and once again imposed the maximum sentence of five (5) years.

{¶4} Appellant now raises the following assignment of error on appeal:

{¶5} "I. THE IMPOSITION OF A PRISON SENTENCE IN THIS CASE WAS UNCONSTITUTIONAL AS IT WAS BASED ON AN UNCONSTITUTIONAL STATUTE."

{¶6} Appellant, in his sole assignment of error, argues that the trial court's imposition of the maximum allowable sentence was unconstitutional, as it was based on a statute that has been found unconstitutional. We agree.

{¶7} Subsequent to the October 3, 2005, sentencing hearing and judgment entry of the trial court, the Ohio Supreme Court announced its decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, in which the Court reviewed Ohio's sentencing laws in light of *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2538, *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, and *Ring v. Arizona* (2002), 536 U.S. 584, 122 S.Ct. 2428. The *Foster* Court held:

{¶8} “The following sections, because they either create presumptive minimum or concurrent terms or require judicial fact-finding to overcome the presumption, have no meaning now that judicial findings are unconstitutional: R.C. 2929.14(B), 2929.19(B)(2), and 2929.41. These sections are severed and excised in their entirety, as is R.C. 2929.14(C), which requires judicial fact-finding for maximum prison terms, and 2929.14(E)(4), which requires judicial findings for consecutive terms. R.C. 2953.08(G), which refers to review of statutory findings for consecutive sentences in the appellate record, no longer applies. We also excise R.C. 2929.14(D)(2)(b) and (D)(3)(b), which require findings for repeat violent offenders and major drug offenders.”
Id. at ¶97.

{¶9} The Court determined further that sentences based upon 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 ¶103.

{¶10} Appellant's assignment of error is, therefore, sustained.

{¶11} Appellant's sentence is ordered vacated, and the case remanded to the trial court for resentencing in accordance with *Foster*, supra.

By: Edwards, J.

Gwin, P.J. and

Farmer, J. concur

JUDGES

JAE/0712

