

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :
Plaintiff- Appellee : C.A. Case No. 21054
vs. : T.C. Case No. 04-CR-4449
SHANE P. MILLER : (Criminal Appeal from Common
: Pleas Court)
Defendant-Appellant :

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OPINION

Rendered on the 10th day of March, 2006.

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DONOVAN, J.

{¶ 1} Shane P. Miller appeals from his conviction and sentence following a guilty plea to one count of aggravated assault. In his sole assignment of error, Miller contends the trial court violated his Sixth Amendment right to a jury trial by making a factual determination to impose a sentence beyond the statutory minimum.

{¶ 2} The essence of Miller's argument is that the trial court contravened *Blakely*

v. Washington (2004), 542 U.S. 296, when it made a sentencing determination that the shortest prison term would demean the seriousness of his crime. We note, however, that Miller failed to raise this issue in the trial court. We previously have recognized that a defendant waives a *Blakely* issue by failing to raise it in the trial court. See, e.g., *State v. Goss*, Montgomery App. No. 21162, 2006-Ohio-836, at ¶9; *State v. Austin*, Montgomery App. No. 20445, 2005-Ohio-1035, at ¶¶23-24. We also have declined to find plain error. *Id.*

{¶ 3} However, the Ohio Supreme Court recently decided *State v. Foster* (2006), ____ Ohio St.3d ____, 2006-Ohio-856, declaring R.C. § 2929.14(B) governing imposition of more than a minimum sentence unconstitutional. Thus, consistent with *Foster's* mandate, we remand this case for a new sentencing hearing.

{¶ 4} The trial court's judgment is reversed and remanded for resentencing.

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FAIN, J., concurring.

{¶ 5} The issue of the application of *State v. Foster*, ____ Ohio St.3d ____, 2006-Ohio-856, to cases in which the issue raised in *Blakely v. Washington* (2004), 124 S.Ct. 2531, 159 L.Ed.2d 403, was not raised in the trial court is not free from difficulty.

{¶ 6} This appeal is a direct review of a sentence imposed by a trial court by following a procedure set forth in a provision of a statute that the Supreme Court of Ohio has held to be unconstitutional. In view of the breadth of the language in ¶104 of *State v. Foster*, *supra*, in which the subject of remedy on direct appeal is addressed, I conclude that the proper course is to reverse any sentence imposed pursuant to the procedure set forth in the statutory provision that has been held to be unconstitutional, where the sentence is within the scope of the appeal, and, unless the sentencing issue

is rendered moot as a result of other aspects of disposition on appeal, to remand the cause for re-sentencing in accordance with *State v. Foster*. Therefore, I concur in the opinion of this court in this case.

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BROGAN, J., dissenting:

{¶ 7} I respectfully dissent. Miller should have requested that a jury determine his sentence if he thought the trial court would impose more than a minimum sentence upon him. In *Foster* and *Quinones*, the trial court did not apply “waiver” because the supreme court found Foster and Quinones could not have anticipated that Blakely would extend the “Apprendi” doctrine to redefine “statutory maximum.” Miller was sentenced after Blakely, however, and he should have been required to raise his constitutional claim that he had a right to have a jury impose the sentence. The State did argue in its appellate brief that Miller had waived his *Blakely* objection. Also, reviewing courts are expected to apply ordinary prudential doctrines, determining whether the issue was raised below or whether it fails the “plain error” test. *U.S. v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738. Miller’s appellate counsel did not argue “plain error,” and in any event the error was not “plain.” Miller was not prejudiced by the trial court’s sentence because he did not demonstrate that the trial court clearly would have imposed a more lenient sentence had it used the sentencing factors in an “advisory” manner only.

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Hon. Jeffrey E. Froelich