

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-05-1251

Appellee

Trial Court No. CR-2000-1410

v.

Robert L. Harwell

DECISION AND JUDGMENT ENTRY

Appellant

Decided: December 22, 2006

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Jeffrey D. Lingo, Assistant Prosecuting Attorney, for appellee.

Deborah Kovac Rump, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This case is before the court on appeal from the judgment of the Lucas County Court of Common Pleas which resentenced appellant, Robert L. Harwell, on June 29, 2005,¹ sentencing him to life imprisonment, with parole eligibility after 30 years for aggravated murder, ten years for rape, ten years for aggravated burglary, and three years for the merged firearms specifications, each to run consecutively to one another, for a total of 53 years.

¹Appellant had originally been sentenced on October 19, 2000, but due to sentencing errors, not related to *Foster*, infra, the trial court was ordered to resentence appellant. *State v. Harwell*, 102 Ohio St.3d 128, 2004-Ohio-2149.

{¶ 2} On appeal, appellant states the following as his sole assignment of error:

{¶ 3} "The sentencing court improperly made findings of fact in imposing sentences pursuant to R.C. 2929.14 that were not the shortest authorized, that were found to be the 'worst form of the crime', and by imposing consecutive sentences."

{¶ 4} We find that this case is controlled by the Supreme Court of Ohio's decision in *State v. Foster*, 109 Ohio St.3d. 1, 2006-Ohio-856, wherein the court held that R.C. 2929.14(B), which relates to non-minimum sentences, and R.C. 2929.14(E)(4), which relates to consecutive sentences, violates the Sixth Amendment to the United States Constitution, pursuant to *Blakely v. Washington* (2004), 542 U.S. 296, and *Apprendi v. New Jersey* (2000), 530 U.S. 466. Having relied on unconstitutional statutes when sentencing appellant, we find that the trial court's sentence must be vacated and this case remanded for resentencing. *Foster* at ¶ 103 and ¶ 104.

{¶ 5} Appellant, however, additionally argues that the remedy that was adopted by the court in *Foster*, the severance of particular portions of Ohio's sentencing scheme, violates both the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the ban against ex post facto laws as found in Section 10, Article I of the United States Constitution, and should not be applied to offenses occurring prior to the release date of *Foster*. In remanding this case for resentencing, appellant argues that, in accordance with *Miller v. Florida* (1987), 482 U.S. 423, this court must additionally order the trial court to sentence appellant to the minimum sentence available for each offense, to be served concurrently.

{¶ 6} Because appellant has not been resentenced in accordance with *Foster*, we find that any question regarding the Ohio Supreme Court's alleged constitutional violations in severing portions of Ohio's sentencing guidelines, and in applying *Foster* to offenses occurring prior to its release date, are premature and not yet decisional. See *State v. Lathan*, 6th Dist. No. L-03-1188, 2006-Ohio-2490, ¶ 12; and *State v. Wood*, 6th Dist. No. L-05-1420, 2006-Ohio-4910, ¶ 7.

{¶ 7} Appellant's sole assignment of error is therefore found well-taken to the extent indicated herein. The judgment of the Lucas County Court of Common Pleas is therefore reversed and this matter is remanded to the trial court for a new sentencing hearing in accordance with *Foster*, supra.

{¶ 8} The state is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
