

[Cite as *State v. Cunningham*, 2007-Ohio-2785.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 06AP-317
 : (C.P.C. No. 05CR-01-458)
 Robert K. Cunningham, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

O P I N I O N

Rendered on June 7, 2007

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*, for appellee.

Robert W. Suhr, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, P.J.

{¶1} On January 17, 2006, defendant-appellant, Robert K. Cunningham ("appellant"), pled guilty in the Franklin County Court of Common Pleas, to two counts of gross sexual imposition, both felonies of the third degree. On February 27, 2006, the Supreme Court of Ohio issued its opinion in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. On March 6, 2006, the court of common pleas sentenced appellant to terms of incarceration of five years on one count and three years on the other count,

and ordered that he serve these terms consecutively. Appellant timely appealed and advances one assignment of error as follows:

THE COMMON PLEAS COURT VIOLATED APPELLANT'S RIGHT TO A JURY TRIAL BY SENTENCING APPELLANT TO A TERM OF INCARCERATION WHICH EXCEEDED THE STATUTORY MAXIMUM MANDATED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AS WELL AS A VIOLATION OF HIS RIGHTS UNDER THE EX POST FACTO CLAUSE AND THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION, AND ARTICLE I, SECTION 10, OF THE CONSTITUTION OF THE STATE OF OHIO.

{¶2} In support of his assignment of error, appellant argues that *Foster's* declaration that the findings necessary under the pre-*Foster* sentencing scheme were unconstitutional, means that the lawful way in which pre-*Foster* sentencing statutes should have been applied, including at the time appellant pled guilty, is that there was a presumption that a defendant would receive minimum and concurrent sentences. Appellant maintains that when the trial court applied the post-*Foster* scheme, which allows the trial court to impose a sentence up to the top of the range for the corresponding offense, it violated his Sixth Amendment right to a trial by jury. He also argues that because the court applied the post-*Foster* scheme, even though appellant pled guilty before *Foster*, it unlawfully subjected him to an ex post facto law.

{¶3} Plaintiff-appellee, State of Ohio ("appellee"), argues that because appellant failed to raise this issue at sentencing, the doctrine of waiver applies, and appellant has not demonstrated the existence of plain error. Appellee further contends that because the remedy fashioned by the *Foster* court was readily foreseeable, it does not operate as an ex post facto law when applied to appellant. Appellee argues that R.C. 2929.14(A) provided adequate notice that appellant was subject to sentences of up to five years for

each count to which he pled guilty, and R.C. 2929.01(E)(4) provided adequate notice that multiple offenses carry the possibility of consecutive sentences. We agree.

{¶4} "Constitutional arguments not raised at trial are generally deemed waived." *State v. Trewartha*, Franklin App. No. 05AP-513, 2006-Ohio-5040, ¶28, citing *State v. Awan* (1986), 22 Ohio St.3d 120, 22 OBR 199, 489 N.E.2d 277, paragraph three of the syllabus. Notwithstanding waiver, we find appellant's constitutional argument to be without merit. As we recently explained in *State v. Brown*, Franklin App. No. 06AP-718, 2007-Ohio-1701, at ¶4:

[I]n [*State v.*] *Gibson*, [Franklin App. No. 06AP-509, 2006-Ohio-6899] this court found the retroactive application of *Foster* did not violate the right to due process and the ex post facto clause. We determined that we were bound to apply *Foster* as it was written. *Id.*, at ¶15, citing *State v. Alexander*, Franklin App. No. 06AP-501, 2006-Ohio-6375. We explained that it is unlikely the Ohio Supreme Court would direct inferior courts to violate the constitution, and, in any event, inferior courts are bound by Ohio Supreme Court directives. *Id.*, citing *State v. Grimes*, Washington App. No. 04CA17, 2006-Ohio-6360; *State v. Hildreth*, Lorain App. No. 06CA008879, 2006-Ohio-5058; and *State v. Durbin*, Greene App. No. 2005-CA-134, 2006-Ohio-5125. We further reasoned in *Gibson* that, because criminal defendants were aware of the potential sentences at the time they committed their crimes, and because the remedial holding of *Foster* was not unexpected, *Foster* did not violate due process notions. *Id.*, at ¶16, citing *State v. McGhee*, Shelby App. No. 17-06-05, 2006-Ohio-5162. We also noted that the Fifth District Court of Appeals in *State v. Paynter*, Muskingum App. No. CT2006-0034, 2006-Ohio-5542, observed that several federal circuit courts have addressed these issues in relation to the United States Supreme Court's decision in *State v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, [160 L.Ed.2d 621], and rejected similar arguments regarding ex post facto and due process violations. *Id.*, citing *Paynter*, at ¶42.

{¶5} In the present case, like the defendant in *Gibson*, appellant knew the statutory range of possible punishments at the time he pled guilty. *Foster* did not change

the statutory range of punishments for third-degree felonies. Further, " 'at the time that appellant committed his crimes the law did not afford him an irrebuttable presumption of minimum and concurrent sentences.' " *State v. Gibson*, Franklin App. No. 06AP-509, 2006-Ohio-6899, at ¶18, citing *State v. Alexander*, Franklin App. No. 06AP-501, 2006-Ohio-6375, at ¶8. Thus, appellant could have received the sentence imposed whether he had been sentenced before or after *Foster*. Therefore, we conclude that the remedial holding of *Foster* does not violate appellant's constitutional rights.

{¶6} For all of the foregoing reasons, we overrule appellant's single assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and KLATT, JJ., concur.
