

[Cite as *State v. Hayes*, 2006-Ohio-4330.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2006-01-018
	:	<u>DECISION</u>
-vs-	:	8/21/2006
	:	
DARRICK LEE HAYES,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2005-08-1463

Robin N. Piper, Butler County Prosecuting Attorney, Lina N. Kirchner, Government Services Center, 315 High Street, 11th Floor, P.O. Box 515, Hamilton, OH 45011-6057, for plaintiff-appellee

Christopher P. Frederick, 304 North Second Street, Hamilton, OH 45011, for defendant-appellant, Darrick Lee Hayes

Darrick Lee Hayes, # 515-975, Chillicothe Correctional Institution, P.O. Box 5500, Chillicothe, OH 45601, pro se

Per Curiam

{¶1} This cause came on to be considered upon a notice of appeal, the transcript of the docket and journal entries, the transcript of proceedings and original papers from the Butler County Court of Common Pleas, and upon a brief filed by

counsel for appellant, Darrick Lee Hayes, on May 8, 2006, a pro se supplemental brief filed by appellant on June 27, 2006, and a reply brief to appellant's supplemental brief filed by counsel for appellee, the state of Ohio, on July 13, 2006, oral argument having been waived.

{¶2} Counsel for appellant filed a brief with this court pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, which indicates that a careful review of the record from the proceedings below fails to disclose any errors by the trial court prejudicial to the rights of appellant upon which an assignment of error may be predicated; lists one potential error "that might arguably support the appeal," *Anders* at 744, 87 S.Ct. at 1400; and requests that this court review the record independently to determine whether the proceedings are free from prejudicial error and without infringement of appellant's constitutional rights. Counsel for appellant also filed a motion requesting permission to withdraw as counsel for appellant on the basis that the appeal is wholly frivolous, and has certified that a copy of both the brief and motion to withdraw have been served upon appellant.

{¶3} Appellant filed a pro se brief raising assignments of error pertaining to ineffective assistance of counsel and sentencing errors.

{¶4} We have examined the record, the potential assignments of error and counsel's brief, and the assignments of error in appellant's pro se brief. We find no error in the proceedings except as set forth below.

{¶5} Appellant was sentenced on January 13, 2006 for one count of trafficking cocaine, a second-degree felony, one count of trafficking marijuana, a third-degree felony, and one count of illegal use or possession of drug paraphernalia, a fourth-degree misdemeanor. The trial court sentenced the appellant to 5 years of imprisonment on the

first count, which is more than the minimum sentence. The trial court sentenced appellant to 5 years of community control on the third count, to be served consecutive to the 5 year term of imprisonment imposed on count one.

{¶16} On February 27, 2006, the Supreme Court decided *State v. Foster* (2006), 109 Ohio St.3d 1, 2006-Ohio-856. In *Foster*, the Supreme Court found that by imposing maximum or consecutive sentences pursuant to Ohio sentencing guidelines, the trial court engaged in fact-finding found unconstitutional in *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531. The Supreme Court held that cases where sentencing was based upon unconstitutional fact-finding "[m]ust be remanded to trial court for new sentencing hearings not inconsistent with this opinion." *Foster* at ¶103, 104.

{¶17} In his supplemental brief, appellant alleges that the trial court erred by imposing consecutive sentences, and erred by imposing a non-minimum sentence. Pursuant to *Foster*, this case must be remanded to the trial court for resentencing.

{¶18} Therefore, it is the order of this court that the motion of counsel for appellant requesting to withdraw as counsel is granted, and the decision of the trial court is hereby reversed as to sentencing only and remanded for resentencing pursuant to *Foster*.

WALSH, P.J., YOUNG and BRESSLER, JJ., concur.