

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

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2006-02-011
 :
 - vs - : OPINION
 : 9/25/2006
 :
 TERRY A. SMITH, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2005CR00646

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, 123 North Third Street, Batavia, Ohio 45103-3033, for plaintiff-appellee

R. Daniel Hannon, Clermont County Public Defender, Robert F. Benintendi, 10 South Third Street, Batavia, Ohio 45103, for defendant-appellant

BRESSLER, J.

{¶1} Defendant-appellant, Terry A. Smith, pled guilty to a fourth-degree felony charge of operating a vehicle while intoxicated in violation of R.C. 4511.19(A)(1)(a). The trial court, citing R.C. 2929.14(C) and (E), imposed a maximum 30-month prison term and ordered that it be served consecutive to an 18-month term that the court imposed for a community control violation in another case.

{¶2} On appeal, appellant presents one assignment of error which claims that

the trial court erred by imposing a maximum and consecutive term of imprisonment.

{¶3} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Ohio Supreme Court held that portions of Ohio's statutory sentencing scheme were unconstitutional. Among the statutes found unconstitutional were R.C. 2929.14(C), concerning the imposition of a maximum prison term, and R.C. 2929.14(E)(4) and 2929.14(A), governing the imposition of consecutive prison sentences. *Id.* at ¶¶83, 97-99. The *Foster* court severed these sections from the sentencing code and instructed that all cases pending on direct review in which the unconstitutional sentencing provisions were utilized must be remanded for resentencing. *Id.* at ¶104. Because the trial court utilized R.C. 2929.14(C) and (E) to impose a maximum and consecutive sentence, we must remand this case for resentencing consistent with *Foster*.

{¶4} Appellant's sole assignment of error is sustained.

{¶5} The judgment of the trial court is reversed as to sentencing only and the case is remanded for resentencing.

POWELL, P.J., and WALSH, J., concur.