

[Cite as *State v. Ferguson*, 2007-Ohio-181.]

IN THE COURT OF APPEALS OF GREENE COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 06CA0013
vs.	:	T.C. CASE NO. 05CR168
MICHAEL FERGUSON	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

. . . . .

O P I N I O N

Rendered on the 19<sup>TH</sup> day of January, 2007.

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Stephen K. Haller, Pros. Attorney; Elizabeth A. Ellis, Asst.  
Pros. Attorney, Atty. Reg. No. 0074332, 61 Greene Street,  
Xenia, OH 45385  
Attorney for Plaintiff-Appellee

Patrick J. Conboy, II, 5613 Brandt Pike, Huber Heights, OH  
45424, Atty. Reg. No.0070073  
Attorney for Defendant-Appellant

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GRADY, J.

{¶ 1} Defendant, Michael Ferguson, was convicted on his  
pleas of no contest of twenty violations of R.C.  
2907.323(A)(3), which prohibits use of a minor in nudity-  
oriented material or performances. The offense is a fifth  
degree felony. R.C. 2907.323(B). Fifth degree felonies are  
punishable by definite terms of imprisonment of six, seven,

eight, nine, ten, eleven, or twelve months. R.C. 2929.14(A)(5).

{¶ 2} The trial court sentenced Ferguson to terms of imprisonment of ten months on each count on findings the court made pursuant to R.C. 2929.14(B). Some of those ten-month terms must be served consecutively on findings the court made pursuant to R.C. 2929.14(E). Ferguson filed a timely notice of appeal from that judgment on February 3, 2006.

{¶ 3} Ferguson argues that, because his greater than minimum and consecutive sentences were imposed on findings the court made, his sentence must be reversed and the case remanded for resentencing on the rule announced in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, which was decided on February 27, 2006, while Ferguson's appeal was pending.

{¶ 4} The State agrees and confesses error. We likewise agree. The assignment of error is therefore sustained, and Defendant's sentence will be reversed and the case remanded for resentencing.

WOLFF, P.J. And FAIN, J., concur.

Copies mailed to:  
Elizabeth A. Ellis, Esq.  
Patrick J. Conboy, Esq.  
Hon. Stephen A. Wolaver