

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon: W. Scott Gwin, P.J.
	:	Hon: Julie A. Edwards, J.
Plaintiff-Appellee	:	Hon: John F. Boggins, J.
	:	
-vs-	:	
	:	Case No. 05-CAA-06-0034
WILLIAM BERRY, III	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal appeal from the Delaware County Court of Common Pleas, Case No. 04-CR-I-12-569

JUDGMENT: Reversed and Remanded

DATE OF JUDGMENT ENTRY: MARCH 30, 2006

APPEARANCES:

For Plaintiff-Appellee

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Boggins, J.

{¶1} Appellant William Berry, III appeals his sentence entered by the Delaware County Court of Common Pleas.

STATEMENT OF THE CASE

{¶2} On December 17, 2004, the Delaware County Grand Jury indicted appellant, William Berry, III, on one count of Burglary in violation of R.C. 2911.12(A)(2) and one count of Theft, in violation of R.C. 2913.02(A)(1).

{¶3} On March 25, 2005, Appellant entered a Guilty plea to the Theft count and to the lesser included offense of the Burglary charge.

{¶4} By judgment entry filed May 4, 2005, the trial court sentenced appellant to four (4) years on the Burglary count and seventeen (17) months on the Theft count, to be served consecutively. The trial court further ordered appellant to serve the 620 day balance of time remaining on Post-Release Control, arising from a prior offense in Franklin County, consecutively to the prison term imposed in the instant case.

{¶5} Appellant now appeals, assigning the following error for review:

ASSIGNMENT OF ERROR

{¶6} "I. THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO A NON-MINIMUM PRISON TERM AND AN EFFECTIVE CONSECUTIVE PRISON TERM BASED ON FACTS NOT FOUND BY THE JURY OR ADMITTED BY THE DEFENDANT."

I.

{¶7} Appellant claims the trial court erred in sentencing.

{¶8} The Ohio Supreme Court, in its recent decision in *State v. Foster*, ___ Ohio St.3d ___, 2006-Ohio-856, reviewed Ohio's current sentencing law in light of *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct.2538, *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, and *Ring v. Arizona* (2002, 536 U.S. 584, 122 S.Ct. 2428, and held as follows:

{¶9} "The following sections, because they either create presumptive minimum or concurrent terms or require judicial factfinding to overcome the presumption, have no meaning now that judicial findings are unconstitutional: R.C. 2929.14(B), 2929.19(B)(2), and 2929.41. These sections are severed and excised in their entirety, as is R.C. 2929.14(C), which requires judicial factfinding for maximum prison terms, and 2929.14(E)(4), which requires judicial findings for consecutive terms. R.C. 2953.08(G), which refers to review of statutory findings for consecutive sentences in the appellate record, no longer applies. We also excise R.C. 2929.14(D)(2)(b) and (D)(3)(b), which require findings for repeat violent offenders and major drug offenders.

{¶10} "This approach conforms to the *Geiger* standard. Excising the unconstitutional provisions does not detract from the overriding objectives of the General Assembly, including the goals of protecting the public and punishing the offender. See R.C. 2929.11(A). The excised portions remove only the presumptive and judicial findings that relate to "upward departures," that is the findings necessary to increase the potential prison penalty. We add no language and the vast majority of S.B. 2, which is capable of being read and of standing alone, is left in place.

{¶11} "We therefore hold that R.C. 2929.14(B) and (C) and 2929.19(B)(2) are capable of being severed. After the severance, judicial factfinding is not required before

a prison term may be imposed within the basic ranges of R.C. 2929.14(A) based upon a jury verdict or admission of the defendant. We further hold that R.C. 2929.14(E)(4) and 2929.41(A) are capable of being severed. After the severance, judicial factfinding is not required before imposition of consecutive prison terms. Finally, we hold that R.C. 2929.14(D)(2) and (3) are capable of being severed. After the severance, judicial factfinding is not required before imposition of additional penalties for repeat violent offender and major drug offender specifications. The appellate statute R.C. 2953.08(G), insofar as it refers to the severed sections, no longer applies.

{¶12} “Accordingly, we have concluded that trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences. By vesting sentencing judges with full discretion, it may be argued, this remedy vitiates S.B. 2's goals, particularly with respect to reducing sentencing disparities and promoting uniformity. Indeed, the dissenters in *Blakely* fretted that as a result of the *Apprendi* expansion, “[o]ver 20 years of sentencing reform are all but lost* * *.” 542 U.S. at 326, 124 S.Ct. 2531, 159 L.Ed.2d 403 (O'Connor, J., dissenting). It may well be that in future the Ohio Criminal Sentencing Commission may recommend *Blakely*-compliant statutory modifications to the General Assembly that will counteract these, among other, concerns. Nevertheless, we are constrained by the principles of separation of powers and cannot rewrite the statutes.

{¶13} “Significantly, the severance remedy preserves “truth in sentencing,” a fundamental element of S.B. 2. Because offenders will continue to be sentenced to a specific prison term, all parties and the victim of the crime will know at the time of

sentencing exactly what sanction that the court is imposing on the defendant. Moreover, S.B. 2 established an entirely new framework for felony sentencing in Ohio, and the breadth of its reforms is wide. For example, the legislation recategorized numerous felonies, added various sentence enhancing specifications, permitted courts to use residential and nonresidential sanctions in lieu of a prison term, required a definite term of imprisonment, and created the option of a life sentence without the possibility of parole. The overwhelming majority of those reforms survive today's constitutional decision.

{¶14} “Severance also is the remedy that will best preserve the paramount goals of community safety and appropriate punishment and the major elements of our sentencing code. Removing presumptive terms and preserving the remainder of the sentencing provisions of the Code will most effectively preserve the General Assembly's goal of truth in sentencing. However tempting it may be for this court to reconfigure the sentencing code to cause the least impact on our criminal justice system, we must adhere to our traditional judicial role. Our remedy does not rewrite the statutes but leaves courts with full discretion to impose a prison term within the basic ranges of R.C. 2929.14(A) based upon a jury verdict or admission of the defendant without the mandated judicial findings that *Blakeley* prohibits.”

{¶15} In the case sub judice, the sentence was based on unconstitutional statutes. When a sentence is deemed void, the ordinary course is to vacate that sentence and remand to the trial court for a new sentencing hearing. See, e.g., *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, ¶ 23 (where a sentence

is void because it does not contain a statutorily mandated term, the proper remedy is to resentence the offender).

{¶16} In *Foster*, supra, the Supreme Court has directed that all cases “pending on direct review must be remanded to trial courts for new sentencing hearings not inconsistent with this opinion.”

{¶17} In addressing the need for resentencing, the Supreme Court went on to state:

{¶18} “We do not order resentencing lightly. Although new sentencing hearings will impose significant time and resource demands on the trial courts within the counties, causing disruption while cases are pending on appeal, we must follow the dictates of the United States Supreme Court. Ohio's felony sentencing code must protect Sixth Amendment principles as they have been articulated.

{¶19} “Under R.C. 2929.19 as it stands without (B)(2), the defendants are entitled to a new sentencing hearing although the parties may stipulate to the sentencing court acting on the record before it. Courts shall consider those portions of the sentencing code that are unaffected by today's decision and impose any sentence within the appropriate felony range. If an offender is sentenced to multiple prison terms, the court is not barred from requiring those terms to be served consecutively. While the defendants may argue for reductions in their sentences, nothing prevents the state from seeking greater penalties. *United States v. DiFrancesco* (1980), 449 U.S. 117, 134-136, 101 S.Ct. 426, 66 L.Ed.2d 328.

{¶20} “As the Supreme Court mandated in *Booker*, we must apply this holding to all cases on direct review. *Id.*, 543 U.S. at 268, 125 S.Ct. 738, 160 L.Ed.2d 621,

quoting *Griffith v. Kentucky*, 479 U.S. at 328, 107 S.Ct. 708, 93 L.Ed.2d 649. ("[a] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases * * * pending on direct review or not yet final')."

{¶21} For the foregoing reasons, the judgment of the Court of Common Pleas of Delaware County, Ohio, is hereby reversed. The sentence is vacated and this matter is remanded to the trial court for re-sentencing in accord with the law and consistent with this opinion.

By Boggins, J.,

Gwin, P.J., and

Edwards, J., concurs

JUDGE JOHN F. BOGGINS

JUDGE W. SCOTT GWIN

JUDGE JULIE A. EDWARDS

