

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. John F. Boggins, J.
-vs-	:	
	:	
LARRY L. JAMES, JR.	:	Case No. 05COA057
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,
Case No. 05CRI081

JUDGMENT: Sentence Vacated/Remanded

DATE OF JUDGMENT ENTRY: December 4, 2006

APPEARANCES:

For Plaintiff-Appellee

PAUL T. LANGE
307 Orange Street
Ashland, OH 44805

For Defendant-Appellant

THOMAS J. MCGUIRE
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P.O. Box 1261
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Farmer, J.

{¶1} On August 29, 2005, a Bill of Information was filed against appellant, Larry James, Jr., alleging one count of rape in violation of R.C. 2907.02 and one count of gross sexual imposition in violation of R.C. 2907.05.

{¶2} On August 31, 2005, appellant pled guilty to the charges. By judgment entry filed October 25, 2005, the trial court sentenced appellant to ten years on the rape count and five years on the gross sexual imposition count, to be served consecutively.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

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{¶4} "THE TRIAL COURT'S FINDINGS OF FACT WITHOUT THOSE FACTS BEING PROVEN BEYOND A REASONABLE DOUBT BY A JURY VIOLATED MR. JAMES'S CONSTITUTIONAL RIGHTS PURSUANT TO THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION."

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{¶5} Appellant claims the trial court erred in sentencing him. We agree.

{¶6} Specifically, appellant claims the trial court sentenced him under unconstitutional statutes based upon the Supreme Court of Ohio's opinion in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, wherein the *Foster* court held R.C. 2929.14(B) and (C), R.C. 2929.19(B)(2), R.C. 2929.14(E)(4) and R.C. 2929.41(A), requiring "judicial factfinding before imposition of a sentence greater than the maximum term authorized by a jury verdict or admission of the defendant" and/or consecutive sentences, are unconstitutional. *Id.* at ¶83. The *Foster* court severed the statutes, and

concluded "****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." Id. at ¶100.

{¶7} In addition, the state concedes this issue in its brief at 2.

{¶8} In accordance with the directives of the *Foster* court, we grant the assignment of error and vacate the sentence herein. The matter is remanded to the trial court for resentencing pursuant to *Foster*.

{¶9} The sole assignment of error is granted.

{¶10} The sentence of the Court of Common Pleas of Ashland County, Ohio is hereby vacated and the matter is remanded to said court for resentencing.

By Farmer, J.

Gwin, P.J. and

Boggins, J. concur.

JUDGES

