

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Julie A. Edwards, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 2006CA00154
ANDREW CRUSSE, JR.	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal appeal from the Licking County Court of Common Pleas, Case No. 06-CR-479

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: April 28, 2008

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

KENNETH W. OSWALT
DANIEL H. HUSTON
20 S. Second Street, 4th Fl.
Newark, OH 43055

ANDREW T. SANDERSON
21 W. Church Street, Ste. 201
Newark, OH 43055

Gwin, P.J.

{¶1} Defendant-appellant Andrew J. Crusse appeals a judgment of the Court of Common Pleas of Licking County, Ohio, which accepted his guilty plea and sentenced him for aggravated robbery with a gun specification and obstruction of justice. Appellant assigns a single error to the trial court:

{¶2} “THE SENTENCING OF THE DEFENDANT-APPELLANT WAS UNCONSTITUTIONAL.”

{¶3} The record indicates appellant was indicted for one count of aggravated robbery, one count of robbery, one count of having weapons while under a disability, and one count of obstructing justice. The first two counts had firearm specifications. In a negotiated plea, appellant pled guilty to aggravated robbery and obstruction of justice and the State dismissed the remaining two counts. The trial court rejected the State’s sentencing recommendation, which was for four years on the aggravated robbery charge and three years on the gun specification, with the sentence on the obstruction of justice charge to run concurrently, for a total of seven years. The court sentenced appellant to five years on the aggravated robbery charge, with an additional three years on the firearm specification, and one year on the obstruction of justice charge, all to run consecutively, for a total of nine years.

{¶4} During the change of plea and sentencing hearing, the court stated it was appellant’s fourth felony offense, and noted the most recent offense was a drug possession offense. Appellant argues the court also considered the weapons under a disability charge, although the State had dismissed that charge. The court did not enter a conviction or sentence appellant on the weapons under a disability charge.

{15} Citing *United States v. Booker* (2005), 543 U.S. 220, 125 S. Ct. 738; *Blakely v. Washington* (2004), 542 U.S. 296, 124 S. Ct. 2531; and *State v. Foster*, 109 Ohio St. 3d. 1, 2006-Ohio-856, 845 N.E.2d 470, appellant argues the sentence imposed on him was unconstitutional because the trial court made findings of fact.

{16} In *Blakely*, the United State Supreme Court determined the federal sentencing scheme was unconstitutional because the sentence could be enhanced on facts found by the court rather than the jury. Following the reasoning in *Blakely*, the Ohio Supreme Court found because certain portions of R.C. 2929.14 and R.C. 2929.19 require judicial fact-finding before imposing a sentence greater than the maximum term allowable on the jury verdict, Ohio's sentencing scheme is also unconstitutional. *State v. Foster*, 109 Ohio St. 3d at 29, 2006-Ohio-856 at ¶ 96, 845 N.E. 2d at 497. The remedy applied by the Court in *Foster* is to sever the offending provisions. The Court concluded that after severing the unconstitutional provisions, judicial fact-finding is not required before a prison term can be imposed within the basic ranges of R.C. 2929.14(A) based upon a jury verdict or admission of the defendant, or before imposition of consecutive prison terms. *Id.* at paragraphs 2 and 4 of the syllabus.

{17} In *State v. Goggans*, Delaware Co. App. No. 2006-CA-07-0051, this court stated: "Although the appellant characterizes the trial judge's statements as 'judicial fact-finding' his argument is essentially one of form over substance. ***

{18} "The trial court was not required to find any additional fact in order to impose this sentence. The court could have imposed the maximum sentence without making any statement on the record. The fact that the trial judge explained his reasons for imposing the maximum sentence on the record cannot transform a sentence *within*

the range provided by statute into a constitutionally infirm sentence on the grounds that the statements constitute impermissible ‘judicial fact-finding.’ ” Id, paragraph 23-24.

{¶9} The sentence the trial court imposed here is within the statutory range allowable for the offenses to which appellant pled guilty. We find appellant’s sentence is not unconstitutional. The assignment of error is overruled.

{¶10} For the foregoing reasons, the judgment of the Court of Common Pleas of Licking County, Ohio, is affirmed.

By: Gwin, P.J.,

Edwards, J., and

Delaney, J., concur

HON. W. SCOTT GWIN

HON. JULIE A. EDWARDS

HON. PATRICIA A. DELANEY

