

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-060675
	:	TRIAL NO. B-0401654
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
DANNY WAYNE ROBERTS,	:	
	:	
Defendant-Appellant.	:	
	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Defendant-appellant, Danny Wayne Roberts, appeals the judgment of the Hamilton County Court of Common Pleas sentencing him to a total of eight years' imprisonment for five counts of gross sexual imposition.

Roberts was found guilty of the offenses after a jury trial. He appealed, and this court reduced his sentence to a total of two years' imprisonment.²

The state then appealed, and the Supreme Court of Ohio stayed this court's judgment.³ Despite the stay of our judgment, Roberts was released from prison after serving the two-year term mandated by our holding.

While the state's appeal was pending, the supreme court invalidated a large portion of the state's sentencing statutes in *State v. Foster*.⁴ The supreme court then

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

² See *State v. Roberts*, 1st Dist. Nos. C-040575 and C-050005, 2005-Ohio-4848.

³ See *State v. Roberts*, 106 Ohio St.3d 1554, 2005-Ohio-5531, 836 N.E.2d 580.

remanded the instant cause for resentencing in light of *Foster*.⁵ Roberts was taken into custody, and the trial court imposed the original eight-year sentence.

In his first assignment of error, Covington now argues that the trial court erred in resentencing him under *Foster*. We recently rejected this argument in *State v. Bruce*.⁶ Because *Bruce* is controlling, we find no error in the application of *Foster*, and we overrule the first assignment of error.

In the second and final assignment of error, Roberts argues that the trial court violated his double-jeopardy rights by resentencing him after he had served the two-year prison term mandated by this court's holding. We disagree.

Although this case presents the unusual circumstance of Roberts having been erroneously released after the stay of this court's judgment, that circumstance was of no constitutional significance. In light of the stay granted by the supreme court, Roberts could claim no vested right to be released after serving two years. The trial court was bound by the supreme court's order under *Foster*, and we find no error in the resentencing. Accordingly, we overrule the second assignment of error.

But we do note that the trial court committed a clerical error in imposing a sentence on one count of rape for which Roberts had been acquitted. Although the error did not affect the aggregate sentence, we hereby vacate the sentence for rape and discharge Roberts from any further prosecution for that offense.

In all other respects, we overrule the assignments of error and affirm the judgment of the trial court.

⁴ 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

⁵ See *In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 313, 2006-Ohio-2109, 847 N.E.2d 1174.

⁶ 170 Ohio App.3d 92, 2007-Ohio-175, 866 N.E.2d 44.

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Further, a certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

PAINTER, P.J., HILDEBRANDT and SUNDERMANN, JJ.

To the Clerk:

Enter upon the Journal of the Court on June 27, 2007
per order of the Court _____.
Presiding Judge