

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

STATE OF OHIO,	:	APPEAL NO. C-070059
	:	TRIAL NO. B-0306872
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
WILLIAM HAVERLAND,	:	
	:	
Defendant-Appellant.	:	

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

Defendant-appellant William Haverland was charged with three counts of sexual battery and three counts of unlawful sexual contact with a minor, all third-degree felonies. His nephew was the victim. Haverland was found guilty of two counts of sexual battery and two counts of unlawful sexual contact with a minor. At the original sentencing hearing, the trial court stated that it was going to impose five years' incarceration on each count, the maximum sentence for a third-degree felony. The sentences on counts one and two were to be served concurrently, but were made consecutive to the concurrent sentences imposed on counts three and four. The total aggregate sentence was to be ten years' incarceration.

Before the sentencing entry was journalized, this court decided *State v. Bruce* ("*Bruce I*"),² which precluded maximum sentences in this case. The trial court held a

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

second sentencing hearing and reduced the sentence on each count to four years, for an aggregate term of eight years' incarceration. The court stated that had it not been for *Bruce I* it would have imposed maximum sentences. Haverland's convictions were affirmed on appeal. Haverland appealed to the Ohio Supreme Court, which reversed the sentence and specifically remanded the case to the trial court for resentencing pursuant to *State v. Foster*.³ The trial court held another sentencing hearing and sentenced Haverland to an aggregate term of ten years' incarceration, imposing the maximum sentence on each count. Haverland has appealed.

Haverland's first assignment of error alleges, pursuant to *North Carolina v. Pearce*,⁴ that the trial court erred in imposing a more severe sentence after appeal because the increased sentence created a presumption of vindictiveness that was not overcome.

A defendant's due-process rights are violated when, after a successful appeal, a harsher sentence is imposed as a result of the trial court's vindictiveness.⁵ Increased sentences on remand are not prohibited unless the increase is motivated by actual vindictiveness against the defendant as punishment for exercising his constitutionally guaranteed rights.⁶ Unless there is a "reasonable likelihood" that an increased sentence was the result of vindictiveness, the burden is on the defendant to show actual vindictiveness.⁷

² 159 Ohio App.3d 562, 2005-Ohio-373, 824 N.E.2d 609.

³ 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 740.

⁴ (1969), 395 U.S. 711, 89 S.Ct. 2072.

⁵ See *id.*

⁶ See *Wasman v. United States* (1984), 468 U.S. 559, 104 S.Ct. 3217.

⁷ See *Alabama v. Smith* (1989), 490 U.S. 794, 109 S.Ct. 2201.

Several Ohio appellate courts have expressed reluctance to apply the traditional *Pearce* analysis to resentencings under *Foster*.⁸ This is especially true where it is either apparent or can be readily assumed that the original sentence was the result of a constraint imposed by a statutory scheme that the Ohio Supreme Court subsequently determined to be unconstitutional and void.⁹ Further, the Ohio Supreme Court expressly stated in *Foster* that during resentencing “[w]hile defendants may argue for reductions in their sentences, nothing prevents the state from seeking greater penalties.”¹⁰

When imposing Haverland’s original sentence, the trial court made it clear that it considered the maximum sentences to be appropriate, but that it was constrained by our decision in *Bruce I* from imposing those sentences. Upon remand for resentencing under *Foster*, the court again stated that it considered maximum sentences to be the appropriate punishment.

We hold that the record is sufficient to dispel any “reasonable likelihood of vindictiveness” and that Haverland has not demonstrated that his sentences resulted from actual vindictiveness. The first assignment of error is overruled.

Haverland’s second assignment of error, alleging that the trial court improperly sentenced him to maximum terms of imprisonment, is overruled on the authority of *State v. Bruce* (“*Bruce II*”)¹¹ and *State v. Lockett*,¹² in which we held that resentencing a defendant under *State v. Foster* does not violate the right to due process, the

⁸ See *State v. Andrews*, 12th Dist. No. CA2006-06-142, 2007-Ohio-223; *State v. Baker*, 3rd Dist. No. 14-06-41, 2007-Ohio-1914; *State v. Warden*, 6th Dist. No. WD-06-041, 2007-Ohio-1046; *State v. Wagner*, 3rd Dist. No. 14-04-30, 2006-Ohio-6855.

⁹ See *id.*

¹⁰ See *State v. Foster*, *supra*, at ¶105, citing *United States v. DiFrancesco* (1980), 449 U.S. 117, 101 S.Ct. 426.

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

¹² 1st Dist. No. C-060404, 2007-Ohio-308.

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constitutional ban on ex post facto and retroactive laws, or the rule of lenity in statutory construction.

Therefore, the judgment of the trial court is affirmed.

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.

HILDEBRANDT, P.J., HENDON and WINKLER, JJ.

RALPH WINKLER, retired, from the First Appellate District, sitting by assignment.

To the Clerk:

Enter upon the Journal of the Court on December 12, 2007
per order of the Court _____.
Presiding Judge