

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,)	Case No. 2007-1703
)	
Plaintiff-Appellee,)	On Appeal from the
)	Lake County Court of Appeals,
v.)	Eleventh Appellate District
)	
LAURA ANN KALISH)	
)	
Defendant-Appellant.)	Court of Appeals Case No. 2006-L-093CA

MEMORANDUM IN RESPONSE OF APPELLEE STATE OF OHIO

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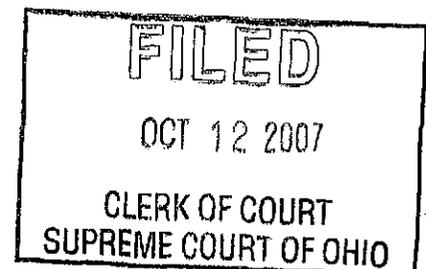


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**EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE
A SUBSTANTIAL CONSTITUTIONAL QUESTION, NOR A
QUESTION OF PUBLIC OR GREAT GENERAL INTEREST**

On September 13, 2007, appellant Laura Ann Kalish filed a Notice of Appeal and Memorandum in Support of Jurisdiction with this Court, appealing the judgment of the Eleventh District Court of Appeals in *State v. Kalish*, 11th Dist. No. 2006-L-093, 2007-Ohio-3850. In *Kalish*, the court addressed appellant's arguments challenging her sentence. Specifically, the Eleventh District rejected appellant's arguments pertaining to the application of this Court's holding in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, to her sentencing hearing and held: (1) *Foster* does not violate federal or state notions of due process and the prohibition against ex post facto laws; and (2) the trial court's application of *Foster* to her sentence, resulting in a more-than-the-minimum sentence, did not violate the rule of lenity. The Eleventh District also properly rejected appellant's argument that her sentence violated R.C. 2929.11(B) by being inconsistent with and disproportionate to other sentences imposed for the same offense.

In this appeal, appellant only challenges the appellate court's holding regarding the consistency and proportionality of her sentence, as well as the standard of review applied by the appellate court in making its ruling. In making her arguments, appellant contends the Eleventh District violated the doctrine of stare decisis. But the Eleventh District committed no error in rendering its decision and appellant has failed to set forth a permissible reason warranting further review by this Court. For the reasons discussed below, jurisdiction should be declined.

STATEMENT OF THE CASE AND FACTS

A thorough review of the procedural posture and facts of this case can be found in *Kalish*, at ¶1-9.

ARGUMENT IN RESPONSE TO APPELLANT'S PROPOSITIONS OF LAW

APPELLEE'S POSITION REGARDING PROPOSITION OF LAW NO. I

Applying an abuse of discretion standard of review ensures that the purposes and principles of felony sentencing are achieved and maintains the trial court's full discretion to impose a sentence within the statutory range as set forth in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

In appellant's first proposition of law, she argues the appellate court applied an incorrect standard of review when addressing her claim that her sentence was inconsistent with sentences imposed on similarly situated offenders who committed similar crimes. The Eleventh District, however, properly affirmed appellant's sentence and this case does not warrant further review.

While the standard of review issue was not briefed below, appellant now takes issue with the Eleventh District's following ruling:

Prior to the Ohio Supreme Court's decision in *State v. Foster* (2006), 109 Ohio St.3d 1, 2006-Ohio-856, appellate courts reviewed felony sentences de novo, not disturbing the trial court's determination absent a finding, by clear and convincing evidence, that the record did not support the term at issue. See R.C. 2953.08(G)(2). Pursuant to *Foster*, a trial court is vested with full discretion to impose a sentence within the statutory range. *Id.* at paragraph seven of the syllabus. Therefore, post-*Foster*, we apply an abuse of discretion standard in reviewing a sentence within the statutory range. *Id.* at ¶99. ***. *Kalish*, at ¶14.

The Eleventh District joined the Second, Third, Fifth, Sixth, Eighth, and Ninth appellate districts by ruling that the appellate standard of review for felony sentencing

appeals post-*Foster* is an abuse of discretion. See *Kalish*, at ¶14; *State v. Slone*, 2nd Dist. Nos. 2005 CA 79 and 2006 CA 75, 2007-Ohio-130, at ¶7; *State v. Schweitzer*, 3rd Dist. No. 2-06-25, 2006-Ohio-6087, at ¶19; *State v. Firouzmandi*, 5th Dist. No. 2006-CA-41, 2006-Ohio-5823, at ¶40; *State v. Kerr*, 6th Dist. No. WD-05-080, 2006-Ohio-6058, at ¶36; *State v. Shamaly*, 8th Dist. No. 88409, 2007-Ohio-3409, at ¶12; *State v. Windham*, 9th Dist. No. 05CA0033, 2006-Ohio-1544, at ¶11-12. Contra *State v. Sheppard*, 1st Dist. Nos. C-060042, C-060066, 2007-Ohio-24, at ¶16; *State v. Ramos*, 3rd Dist. No. 4-06-24, 2007-Ohio-767, at ¶19-23; *State v. Vickroy*, 4th Dist. No. 06CA4, 2006-Ohio-5461, at ¶15-16; *State v. Burton*, 10th Dist. No. 06AP-690, 2007-Ohio-1941, at ¶29 (all continuing to review felony sentences under R.C. 2953.08(G)(2) and the clear and convincing standard of review).

While a split appears to exist among the appellate districts, and even within districts, as to the appropriate standard of appellate review post-*Foster*, appellee is not aware of any district that has certified a conflict to this Court. Nonetheless, in the instant case, the Eleventh District properly determined appellant's sentence was within the statutory range, the trial court properly applied and considered the pertinent sentencing statutes prior to imposing appellant's sentence, and thus, met the consistency requirement under R.C. 2929.11(B).

As noted above, post-*Foster*, trial courts have full discretion to impose a prison sentence within the statutory range, and are required to consider R.C. 2929.11 and R.C. 2929.12 in their sentencing decisions. *Foster*, at paragraph seven of the syllabus; *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, at ¶38. The Eleventh District

conducted a thorough review of the purposes and principles of sentencing, the relevant sentencing statutes, and the law on consistency. *Kalish*, at ¶15-18. Specifically, the appellate court noted that “in order to show a sentence is inconsistent, a defendant must show the trial court failed to properly consider the statutory factors and guidelines.” *Id.* at ¶18. Appellant simply failed to do that in this case.

Appellant pled guilty to aggravated vehicular homicide with a specification for DUS, a felony of the second degree, subjecting her to a mandatory prison term of two, three, four, five, six, seven, or eight years. R.C. 2929.14(A)(2). Appellant also pled guilty to BAC, a misdemeanor of the first degree, subjecting her to a maximum prison sentence of six months. R.C. 4511.19(A)(1)(b). She was sentenced to five years in prison for aggravated vehicular homicide, and six months for BAC, to run concurrently. Surely, appellant’s sentence was within the permissible ranges for each of the offenses to which she pled guilty and within the broad sentencing discretion of the trial court.

The record also indicated that the trial court considered the appropriate statutory guidelines in R.C. 2929.11 and R.C. 2929.12. Specifically, the trial court emphasized the need to impose a consistent sentence and that it had balanced the seriousness and recidivism factors. *Kalish*, at ¶21. The trial court recognized appellant led a law abiding life and showed genuine remorse. *Id.* at ¶22. But the court could not ignore one significant fact: “appellant was on bail for another OVI offense when she committed the instant offense, and that she committed this offense while she was driving under suspension.” *Id.* Appellant pled guilty to the specification for DUS, thus the trial court “discounted her excuse that she felt her driving privileges authorized her to drive to and from a date during which she consumed alcohol.” *Id.*

Based on the foregoing, and under Ohio's sentencing scheme as it stands post-*Foster*, nothing in the record supported appellant's claim that the trial court erred by imposing an inconsistent sentence in violation of R.C. 2929.11(B). *Kalish*, at ¶24. Moreover, "while a numerical comparison to other sentences is [not] dispositive of the issue of consistency, we note that courts have imposed similar sentences for similar offenses." *Id.* at ¶25. Indeed, the Eleventh District cited other cases where defendants received terms in the mid-range of sentencing options for second degree aggravated vehicular homicide counts. *Id.*

Additionally, even under the clear and convincing standard of review, the result below would have been the same. As discussed above, the trial court considered and applied the appropriate statutory sentencing factors to appellant's case, despite appellant's contention to the contrary. (Appellant's Memorandum, 7-8). Nothing in the record "clearly and convincingly" supported appellant's claim that her sentence was imposed in error.

For the foregoing reasons, appellant's case does not warrant further review by this Court. Therefore, jurisdiction should be declined.

APPELLEE'S POSITION REGARDING PROPOSITION OF LAW NO. II

An appellate court not only has the right, but also a duty to reexamine its former decisions. Such action is consistent with the doctrine of stare decisis.

In appellant's second proposition of law, she contends the appellate court violated the doctrine of stare decisis. Appellant's contention is wholly misplaced and further review by this Court is not necessary.

"[A] court of appeals, or any panel of judges sitting therein, is not unalterably bound to follow the precedent of a rule previously announced or followed by such court ***." *State v. George* (1975), 50 Ohio App.2d 297, 310, 362 N.E.2d 1223. "[A]n appellate court 'not only has the right, but is entrusted with the duty to examine its former decisions and, when reconciliation is impossible, to discard its former errors.'" *State v. Burton*, 10th Dist. No. 06AP-690, 2007-Ohio-1941, at ¶21, quoting *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, at ¶43. "Pursuant to *Galatis*, we may overrule prior precedent and depart from stare decisis if: "**** (1) [T]he decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it. ****" *Burton*, 2007-Ohio-1941, at ¶22, quoting *Galatis*, 2003-Ohio-5849, at ¶48.

Appellant incorrectly relies on the dissenting opinion in *Kalish* in making her argument that the appellate court violated the doctrine of stare decisis. *Id.* at ¶31, 33. The majority did not "overrule" its prior decisions regarding the standard of review under R.C. 2953.08(G)(2), but merely *modified* its earlier rulings rendered soon after *Foster* was

released that applied the clear and convincing standard of review. *Kalish*, at ¶14. Indeed, the appellate court stated that “[t]o the extent our holding concerning the standard of review is inconsistent with any previous decision of this court, such decision is modified to be consistent with our holding today.” *Id.*

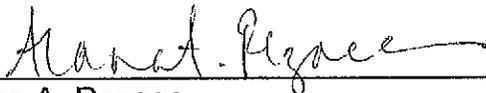
Surely, the appellate court was permitted to reexamine its prior position regarding the standard of review, particularly in light of more recent nuances pertaining to the *Foster* chain of cases and their holdings. There was simply nothing improper about the Eleventh District readdressing its prior decisions on evolving questions and deciding to depart from its prior holdings. Thus, there was no violation of the doctrine of stare decisis and this Court should deny jurisdiction.

CONCLUSION

For the foregoing reasons, the State of Ohio, Appellee herein, respectfully requests that this Honorable Court deny jurisdiction.

Respectfully submitted,

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PROOF OF SERVICE

A copy of the foregoing Memorandum in Response of Appellee, State of Ohio, was sent by regular U.S. Mail, postage prepaid, to counsel for the appellant, Richard J. Perez, Esquire, 4230 State Route 306, Suite 240, Willoughby, OH 44094, and Jesse M. Schmidt, Esquire, 55 Public Square, Suite 1414, Cleveland, OH 44113 on this 10th day of October, 2007.



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