

COPY

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	Case No. 07-1703
	:	
Appellee	:	On Appeal from Lake
	:	County Court of Appeals,
vs.	:	Eleventh Appellate District
	:	
LAURA ANN KALISH	:	Court of Appeals
	:	Case No. 2006-L-093
Appellant	:	

MERIT BRIEF OF APPELLANT
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Proposition of Law No. II:

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STATEMENT OF FACTS

Appellant Laura Kalish was indicted in the trial court on the following charges: Aggravated Vehicular Homicide with specifications for Operating a Vehicle under the Influence (OVI), OVI, Driving with a Prohibited Concentration of Alcohol in the body (BAC), Driving Under Suspension and Driving Under OVI Suspension. Appellant moved to suppress evidence and dismiss certain counts of the indictment and the specifications pursuant to constitutional arguments. The motion to suppress was partially argued before the trial court.

While a portion of the hearing remained continued and there was no ruling on the motion to suppress, counsel on both sides agreed to a plea agreement. Thus, Appellant withdrew the motion to suppress and other pending motions and entered a guilty plea to one count of Aggravated Vehicular Homicide, a felony of the second degree with the DUS specification and the BAC count, a misdemeanor of the first degree. (See docket, journal entries in record). The convictions provided for a mandatory aggregate prison term of two years pursuant to the respective statutes for the offenses. (*Id.*).

The trial court sentenced Appellant on April 24, 2006 to a prison term of five years on the Aggravated Vehicular Homicide conviction and six months on the BAC conviction, both to run concurrent, with credit for time served. (Sentencing Transcript, hereinafter T, p. 42-43). The trial court also imposed upon Appellant a mandatory fine of \$250.00, a fifteen year license suspension and a restitution order for her to pay \$11,248.89 for the funeral expenses incurred by the victim's family. (T. p. 43).

Following her sentence, Appellant timely appealed to the Eleventh District Court of Appeals. Both parties waived oral argument and the Court decided the case on the briefs. Appellant presented two assignments of error. The first was that the trial court erred by sentencing her in a manner inconsistent and disproportionate with similarly situated Ohio offenders. In the second assignment of error Appellant argued that the trial court violated her rights under the *Ex Post Facto* clause when it sentenced her pursuant to the Ohio sentencing statutes as altered by this Honorable Court's decision in *State v. Foster*, which she could not have predicted at the time of her offense or her guilty plea.

On the second issue, the Court of Appeals disposed of Appellant's argument and found no *Ex Post Facto* violation, based on the Court's prior holding in *State v. Elswick, supra*. Appellant is not further challenging that decision in this appeal. The Court of Appeals also rejected Appellant's first assignment of error, and as a result affirmed the sentence imposed by the trial court. *State v. Kalish* (July 27, 2007), 11th Dist. App. No. 2006-L-093, 2007 Ohio 3850 at *P26 - *P29.

This case arose from an automobile accident that occurred on August 4, 2005 when Defendant-Appellant Laura Ann Kalish drove eastbound onto the westbound exit ramp at Interstate 90 and Route 615 in Kirtland Hills, Ohio. Laura Kalish is 40 years old and has no prior criminal record. (T. p. 5, 41). She has been the primary caretaker of her now eleven-year-old daughter, Hannah. (T. p. 5, 21-22). Her daughter looks to her for direction, guidance, love and affection. (*Id.*).

For the last six years, Ms. Kalish has taught preschool at Notre Dame Preschool. (T. p. 5, Sentencing Memorandum). She obtained an Early Childhood Education

Degree after helping to put her husband through college and after Hannah was old enough to tolerate her absence for short periods while she attended Lakeland Community College. (T. p. 22).

Appellant submitted letters to the trial court from parents of the students, friends and others who know her. (T. p. 35). She is well liked and highly respected. She has touched the lives and sparked the spirit of many children and their parents. She has given much more than her meager salary required.

In regards to the night of the offense, contrary to allegations by the State of Ohio, Ms. Kalish presented two witnesses who had extensive contact with her on the night of the accident and did not believe she was under the influence of alcohol. (T. p. 10-16). Ms. Kalish admitted her offenses via her guilty plea, but also does not believe she was driving under the influence of alcohol at the time of the accident. (T. p. 16-17, 24). Rather, Appellant feels she made an error in judgment that night that may have been provoked by her distraught emotional state. (*Id.*).

Unfortunately, Laura has also touched the lives of her victim Peter Briggs and his family and friends. Laura took responsibility for the death of Peter Briggs by pleading guilty to Aggravated Vehicular Homicide and OVI. Despite the issues raised herein, she has accepted her punishment and knows that her guilt and remorse will last forever. She expressed these feelings on the record at her sentencing hearing and apologized directly to the family, who were present. (T. p. 25).

ARGUMENT

Proposition of Law No. 1:

The decision in *State v. Foster* does not change the standard of review for Ohio felony sentencing appeals, pursuant to R.C. 2953.08(G)(2) the required analysis remains *de novo*, applying the clear and convincing evidence standard.

Undoubtedly, this Honorable Court's decision in *State v. Foster*, (2006) 109 Ohio St.3d 1, has significantly altered the sentencing process in Ohio by severing requirements for judicial fact finding from Ohio's sentencing statutes, thereby curing potential Sixth Amendment violations and comports with the United States Supreme Court's holdings in *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 and *Blakely v. Washington*, 542 U.S. 296.

However, this Court's decision in *Foster* did not give lower Ohio courts the power to make alterations to their judicial process not justified by the holding. In this case, the Court of Appeals went far beyond the holding of *Foster* by making a unilateral decision not supported by this Court's holding: that the standard of review on sentencing appeals has now changed to a *de novo*, abuse of discretion standard rather than the clear and convincing evidence standard mandated by R.C. 2953.08(G)(2). This is despite the fact that the *Foster* decision explicitly stated what portions of the sentencing statutes were deemed unconstitutional and severed and R.C. 2953.08(G)(2) was not entirely severed. The applicable portion of the *Foster* holding reads: "The appellate statute R.C.2953.08(G), insofar as it refers to the severed sections, no longer applies." *Foster*, *supra* at 99, emphasis added.

In fact, a review of the *Foster* decision reveals that the only change it made to sentencing appeals was that it removed a right to appeal based on the trial court's failure to make the required factual findings on the record. See *Foster, supra*. Appellant contends that the standard of review on sentencing appeals remains otherwise unchanged. The appellate jurisdiction of the Courts of Appeals is determined by statute. Article IV, Section 3 (B)(2), Ohio Constitution. The current version of R.C. 2953.08(G)(2), the controlling statute on this issue, reads:

(2) The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.

The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

(a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (D)(2)(e) or (E)(4) of section 2929.14, or division (H) of section 2929.20 of the Revised Code, whichever, if any, is relevant;

(b) That the sentence is otherwise contrary to law.
R.C. 2953.08(G)(2), (2007), Page's Ohio Revised Code Annotated.

Undoubtedly, the underlined language of the above statute confirms that the standard of review in sentencing appeals remains unchanged post-*Foster*. While this Honorable Court has not directly addressed this issue since *Foster*, it has supported Appellant's position in dicta:

Although we held in *State v. Foster* that certain portions of the sentencing statutes that require judicial factfinding to impose a sentence of more than the statutory minimum, to impose consecutive sentences, and to impose repeat violent offender and major drug offender sentence enhancements are unconstitutional in light of *Blakely v. Washington*, the sentencing review statute, R.C. 2953.08(G), remains effective, although no longer relevant with respect to the statutory sections severed by *Foster*. *State v. Saxon* (2006), 109 Ohio St.3d 176, footnote 1, internal citations omitted, citing *State v. Mathis* (2006), 109 Ohio St.3d 54, paragraph two of the syllabus, *Foster, supra* at P97, 99.

Nevertheless, in this case the Eleventh District Court of Appeals reasoned that since this Court gave trial judges full authority to sentence a defendant to any amount of time allowed within the applicable sentencing range, rather than requiring judicial fact-finding, that decision also changed the standard of review on sentencing appeals to an abuse of discretion standard, rather than the *de novo* standard required pre-*Foster*. *Kalish, supra* at *P14. The Court of Appeals cited decisions of the Second, Third, Fifth and Ninth District Courts of Appeals in reaching its conclusion regarding the standard of review.

While the Second, Third, Fifth and Ninth District Courts of Appeals all initially agreed with the Eleventh District's position on this issue, The Third and Tenth District Courts, while originally adopting the "abuse of discretion" standard have since similarly concluded that the "clear and convincing evidence" standard has survived the alterations in sentencing promulgated by *Foster*. See *State v. Ramos* (February 26, 2007), 3rd Dist. No. 4-06-242, 2007 Ohio 767 and *State v. Burton* (April 24, 2007), 10th Dist. No. 06AP-690.

In *Burton, supra*, the Tenth District Court adopted the Fourth District's reasoning on the issue. The Fourth District Court has succinctly held:

While the *Foster* Court declared that a sentencing court possesses full discretion in sentencing an offender, the Court abrogated R.C. 2953.08 (G), which defines the appellate court's role in sentencing, only "insofar as it applies to the severed sections" of Ohio's statutory sentencing scheme. Thus, even after *Foster*, [t]he appellate court's standard of review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds *** [t]hat the sentence is otherwise contrary to law. *State v. Vickroy* (October 16, 2006), 4th Dist. App. No. 06CA4, 2006 Ohio 5461, citing *Foster* at P 97-99, R.C. 2953.08(G).

The First, Sixth, Eighth and Twelfth District Courts have also held that the "clear and convincing evidence" standard of review survives *Foster*. Hence, there is a conflict among the Ohio appellate districts on this issue, with seven districts supporting Appellant's argument and the other five districts following the abuse of discretion standard.

Interestingly, since its decision in this case, The Eleventh District Court of Appeals has already adopted a new standard of review for sentencing appeals:

We recognize that although the abuse of discretion standard will govern most post-*Foster* sentencing appeals, there are certain, limited circumstances in which the clear and convincing standard that was left unexcised by *Foster*, pursuant to R.C. 2953.08(G)(2)(b), would still apply. For instance, if it is determined that a sentence is contrary to law because the sentence falls outside the applicable range of sentencing, and the trial court has failed to even consider R.C. 2929.11 and the factors enumerated in R.C. 2929.12, then the matter must be reviewed under the clear and convincing standard of R.C. 2953.08(G)(2)(b). *State v. Payne* (December 14, 2007), 11th Dist. No. 2006-L-272, 2007 Ohio 6740.

While the *Payne* case represents progress by the Eleventh District Court, for the reasons that follow Appellant maintains that the "clear and convincing evidence"

standard always applies in Ohio felony sentencing appeals, not in limited circumstances.

Based on its misapplication of the abuse of discretion standard, in this case the Eleventh District Court of Appeals affirmed the decision of the trial court, ruling that the trial court's sentence was similar and consistent with sentences imposed upon similarly situated offenders, who were sentenced on a conviction for aggravated vehicular homicide. *Id.* at *P25 -*P26.

Appellant contends that the lower court made a grave mistake in this case, that violates her right to statutory due process of law, as provided by R.C. 2953.08. Whenever followed, the decision will nearly eliminate any criminal defendant's attempt at a sentencing appeal. The difference between the two standards of review, clear and convincing evidence and abuse of discretion, is not trivial, but vast. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151. Presumably, if the trial court now has the discretion to sentence an offender to any amount of time within the statutory range for the degree of felony and to consecutive or maximum terms without making findings on the record, then an abuse of discretion standard of review could leave the appellate court with only one issue to look at: was the sentence within the allowed range?

On the other hand, this Honorable Court has defined "clear and convincing evidence" as "that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required

'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford* (1954), 161 Ohio St. 469, 53 O.O. 361, 120 N.E.2d 118, paragraph three of the syllabus, followed by *In Re D.A.* (2007), 113 Ohio St.3d 88, 97, Moyer, C.J., concurring in part and dissenting in part.

Furthermore, the "clear and convincing evidence" standard of review is not limited by its definition, but expanded by the statute. R.C. 2953.08 incorporates R.C. 2929.13, "Sentencing guidelines for various specific offenses and degrees of offenses," which in part requires a trial court to consider the stated purposes and principles of sentencing as mandated by R.C. 2929.11 and the seriousness and recidivism factors under R.C. 2929.12.

The purposes and principles in R.C. 2929.11 and factors in R.C. 2929.12 are the only remaining sentencing safeguards for criminal defendants in Ohio. Consistency and proportionality in sentencing are not suggestions for trial courts, but mandatory under the Revised Code. R.C. 2929.11(B) states:

A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning with the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders." R.C. 2929.11(B), as quoted in *State v. Robbie Moore* (September 8, 2005), 8th Dist. App. No. 85451. *McMonagle, J.*, concurring in part and dissenting in part.

Hence, the purposes and principles of sentencing require the trial court to consider the particular facts and circumstances of each case and decide on a sentence that is consistent and proportionate with sentences for similarly situated offenders. The trial

court's analysis and decision making process does not begin and end with picking a number that is somewhere between the minimum and maximum allowable sentence.

Additionally, R.C. 2929.12, as survived by *Foster*, still requires the trial court to consider a detailed list of seriousness and recidivism factors and whether they apply in each case. In this case, if the standard of review was "abuse of discretion" rather than the "clear and convincing evidence" standard required by R.C. 2953.08, the appellate review could arguably be limited to a cursory finding that Appellant was sentenced to a five year prison term, which could be considered appropriate merely because it fell within the statutory range. However, if the "clear and convincing evidence" standard is applied, as required by R.C. 2953.08, the appellate court must truly examine whether the trial court considered the facts and circumstances of the case, as evidenced by the record.

Here, the record and the available evidence do not support Appellant's sentence. In her appellate brief, Appellant provided a sampling of other aggravated vehicular homicide cases where there were far worse fact patterns, more aggravating facts and/or serious criminal histories to be considered by the trial judge and those defendants received less prison time.

More importantly, a review of the facts in this case reveals that Ms. Kalish should have been entitled to the benefit of the presumptive minimum sentence for a first time felony offender. Ms. Kalish was an asset to her community as a preschool teacher. She was a responsible mother for her daughter. Ms. Kalish had no criminal record prior to this offense. Although her license was suspended due to a pending misdemeanor case,

she had court ordered driving privileges that included "personal maintenance" and, on the night of the accident, was forced to driver herself home due to an unexpected argument with a friend. Ms. Kalish admitted having three and a half drinks that night. The available evidence also shows that her emotional state due to her pending divorce may also have played a part in the accident that night. Immediately before the accident, Appellant was crying and undoubtedly distraught.

Hence, this is not a case of a career alcoholic, repeat DUI offender or a criminal on their usual course of conduct. This offense has undoubtedly been tragic for the family of the victim. Ms. Kalish acknowledged the same and apologized to the family directly at her sentencing hearing. Her genuine remorse could be seen that day by her own tears. A victim's death is an element of the offense of aggravated vehicular homicide and, therefore, the death alone cannot make it justification for a first offender to be sentenced to five years imprisonment. With all of these facts considered, it becomes clear that this offense was aberrant behavior for Ms. Kalish and she has a low likelihood of recidivism. By any stretch of the imagination, it was not the worst form of the offense. With all of the evidence considered, a minimum sentence would not have demeaned the seriousness of the offense or failed to adequately protect the public from potential future crime.

The result is that Appellant's sentence is severely inconsistent and disproportionate with other sentences imposed for the same offenses in the State of Ohio. Accordingly, the sentence violates the requirements of R.C. 2929.11(B) and the stated purposes and principles of Ohio's felony sentencing laws. See *Moore, supra*. A

thorough consideration of the sentencing factors should have led to the minimum of sentence of three years in this case.

Thus, the mandated standard of review under R.C. 2953.08 allows the appellate court to review the factual arguments in each case. Appellant contends that an appropriate review under that standard leads to the conclusion that her sentence was not consistent with the law as mandated by the existing versions of R.C. 2929.11, R.C. 2929.12 and R.C. 2929.13. In fact, Appellant's sentence was disproportionate with sentences imposed upon similarly situated offenders being sentenced on a conviction of aggravated vehicular homicide. Her sentence was inconsistent and disproportionate with those received by many offenders with criminal records and more condemning fact patterns.

In light of the above, Appellant asks this Honorable Court to clarify its holding in *Foster, supra*, affirm that the standard of review for felony sentencing appeals remains a "clear and convincing evidence" standard, as codified by the current R.C. 2953.08, and remand this case for reconsideration by the Court of Appeals under that appropriate standard of review.

Proposition of Law No. II:

Under the doctrine of *stare decisis*, an Ohio Court of Appeals does not have authority to overrule a decision of the same district, reached by a differently composed panel.

The Court of Appeals reached its decision on the issue of appellate standard of review based on an alleged implication it found in the *Foster* case. However, a reading of *Foster* illustrates that it does not affect the appellate standard of review for a

sentence. As argued above, *Foster* only affects sentencing appeals in that the trial court is no longer required to make factual findings on the record and the Court of Appeals reviewing a trial court's sentence post-*Foster* will not now review the record to find whether or not those factual findings were made. *Foster, supra*, paragraph seven of the syllabus.

Additionally, as also addressed in Proposition of Law No. I, the Court of Appeals' decision in this case is contrary to the current version of R.C. 2953.08, whether applying the Eleventh District's standard as applied in this case or their newly revised standard as announced by their more recent holding in *Payne, supra*.

In fact, the Court of Appeals admitted it was overruling past precedent of its own Court. *Kalish, supra* at *P14. It also "overruled" portions of this Honorable Court's decision in *State v. Edmonson*, (1999), 86 Ohio St.3d 324 that survived *Foster*, i.e. that *de novo* review, based on clear and convincing evidence, is the standard of review for felony sentencing appeals, pursuant to R.C. 2953.08 (G)(2). The Court also ignored guidance provided by this Court in post-*Foster* decisions, *State v. Saxon* and *State v. Mathis, supra*.

The Court of Appeals' ignorance of past decisions of its own Court and of this Honorable Court violated the doctrine of *stare decisis*. *Stare decisis* is an abbreviated version of the maxim "*stare decisis et non quieta movere* – stand by the past decisions and do not disturb settled things." *Rocky River v. State Emp. Relations Bd.* (1989), 43 Ohio St.3d 1, 4 (quoting Black's Law Dictionary, 5th Ed.Rev. 1979). This Honorable Court has held:

The doctrine of *stare decisis* is of fundamental importance to the rule of law. Like the United States Supreme Court, we recognize that our precedents are not sacrosanct, for we have overruled prior decisions where the necessity and propriety of doing so has been established. But any departure from the doctrine of *stare decisis* demands special justification." *Wampler v. Higgins* (2001), 93 Ohio St.3d 111, 120 (Internal citations and quotations omitted).

This Court has further reasoned, "whenever possible we must maintain and reconcile our prior decisions to foster predictability and continuity, prevent the arbitrary administration of justice, and provide clarity to the citizenry. *Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St.3d 216 at P43. That understanding is perhaps particularly true in cases driven by statutory interpretation and any legislative response to that interpretation. See *Square D Co. v. Niagara Frontier Tariff Bur., Inc.* (1986), 476 U.S. 409, 424 quoting *Burnet v. Coronado Oil & Gas Co.* (1932), 285 U.S. 393, 406 (Brandeis, J., dissenting) ("As Justice Brandeis himself observed * * * in commenting on the presumption of stability in statutory interpretation: 'Stare decisis is usually the wise policy because in most matters, it is more important that the applicable rule of law be settled than that it be settled right. * * * This is commonly true, even where the error is a matter of serious concern, provided correction can be had by legislation'").

Thus, *stare decisis* is another crucial issue in this case. For one, the Court of Appeals does not have the ability to go against prior precedent of the Ohio Supreme Court, since it is the highest court in Ohio. Beyond that, an Ohio Court of Appeals can only overrule a prior decision from the same district with the special justification necessary to overcome *stare decisis*. The Court of Appeals also cannot ignore statutory authority, absent a constitutional justification.

In this case, the Court of Appeals violated the doctrine of *stare decisis*; there was no special justification to overrule its prior adherence to R.C. 2953.08(G)(2), only a misguided reading of a decision by this Court. An appellate court can only depart from *stare decisis* and overrule past precedent 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 practicable workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.

Galatis, supra at P48.

Here, the Court of Appeals entirely skipped the analysis required by *Galatis* and incorrectly jumped to the conclusion that its decision was justified by *Foster*, despite the fact that *Foster* only severed a portion of R.C. 2953.08 and the statute otherwise remained intact and constitutional. The past precedent of the Eleventh District should have been altered by *Foster*, but not inconsistent with the case, R.C. 2953.08 or this Court's clarification in *Saxon, supra*.

If the Eleventh District Court would have correctly considered the *Galatis* factors, it would have found no justification for abandoning its precedent other than an adjustment for *Foster*, i.e. eliminating appeals based on a lack of statutory findings on the record at the sentencing hearing. Altering the appellate standard of review, without any justification, was wholly inappropriate and inconsistent with *stare decisis*.

Beyond the ignorance of past precedent, the Court of Appeals cannot overrule plain language mandated by statute, here R.C. 2953.08, without constitutional justification. The survival of R.C. 2953.08 and its clear and convincing evidence standard for felony sentencing appeals was intended by *Foster* and is a direct product

of the sweeping reforms enacted by the General Assembly with the enactment of Senate Bill 2 in 1996. Even though the portions of R.C. 2953.08 referencing judicial fact finding requirements have been excised, the appellate standard of review remains a crucial safeguard for criminal defendants and, as explained in Proposition No. 1, goes beyond the definition of “clear and convincing evidence” by incorporating other sentencing statutes regarding the purposes and principles of sentencing and seriousness and recidivism factors that must be considered by the trial court, even if findings on the record are not required. See R.C. 2929.11, 2929.12, 2929.13.

While the past requirement that a trial court make factual findings at sentencing violated a defendant’s Sixth Amendment rights, as held in *Foster, supra*, the remaining portions of R.C. 2953.08, regarding the standard of review on sentencing appeals, pose no constitutional violation. Without a constitutional violation in the statute, the Court of Appeals lacks the authority to overrule it and thus has violated the doctrine of Separation of Powers by rewriting legislation.

The founders of the Ohio Constitution, representing the people of the State of Ohio, decided how governmental power was to be distributed, and the boundaries of each branch of Ohio government’s power. “[T]he people possessing all governmental power, adopted constitutions, completely distributing it to appropriate departments.” *Hale v. State* (1896), 55 Ohio St. 210, 214. They vested the legislative power of the state in the General Assembly (*Section 1, Article II, Ohio Constitution*), the executive power in the Governor (*Section 5, Article III, Ohio Constitution*), and the judicial power in the courts (*Section 1, Article IV, Ohio Constitution*). *City of Norwood v. Horney* (2006),

110 Ohio St. 3d 353, 386.

Undoubtedly, in this case the Eleventh District Court of Appeals violated the Separation of Powers doctrine by altering an existing statute without constitutional justification. In this regard, the lower court exceeded its judicial authority. This provides an additional, compelling reason that the decision below was not justified by *stare decisis*, but violated the doctrine.

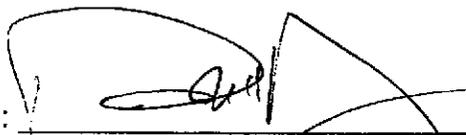
CONCLUSION

The decision below is an incorrect aberration of this Honorable Court's precedent and the statutory authority of R.C. 2953.08. The decision undermines the purposes and principles of our General Assembly's Senate Bill 2, enacted in 1996, by destroying meaningful appellate rights for Ohio criminal defendants that undoubtedly should survive this Court's holding in the *Foster* case. The decision also violates the doctrines of *stare decisis* and Separation of Powers.

For these reasons, this Honorable Court must clarify that the standard of review for Ohio felony sentencing appeals remains "clear and convincing evidence" as outlined by R.C. 2953.08. Accordingly, the decision of the Eleventh District Court of Appeals

must be reversed and this case must be remanded for reconsideration at the appellate level with the correct standard of review.

Respectfully submitted,

By: 
Richard J. Perez, Counsel of Record

By: 
Jesse M. Schmidt

COUNSEL FOR APPELLANT
LAURA A. KALISH

PROOF OF SERVICE

A copy of the foregoing Merit Brief of Appellant was sent by regular U.S. Mail,
postage prepaid to the following this 19th day of February, 2008:

Charles E. Coulson
Lake County Prosecuting Attorney
Post Office Box 490
Painesville OH 44077



RICHARD J. PEREZ (0010216)
ROSPLOCK & PEREZ
Attorney for Appellant

COPY
07-1703

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

NOTICE OF APPEAL OF APPELLANT LAURA ANN KALISH

RICHARD J. PEREZ (0010216)
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FILED
 SEP 13 2007
 CLERK OF COURT
 SUPREME COURT OF OHIO

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 Cleveland OH 44113
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COUNSEL FOR APPELLANT LAURA ANN KALISH

CHARLES E. COULSON
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 Post Office Box 490
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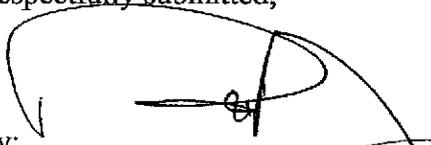
COUNSEL FOR APPELLEE STATE OF OHIO

Notice of Appeal of Appellant Laura Ann Kalish

Appellant Laura Ann Kalish hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Lake County Court of Appeals, Eleventh Appellate District, entered in Court of Appeals case No. 2006-L-093 on July 27, 2007 and posted on July 30, 2007.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,

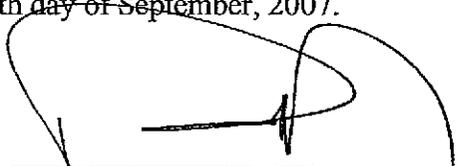
By: 

Richard J. Perez, Counsel of Record

COUNSEL FOR APPELLANT
LAURA ANN KALISH

Certificate of Service

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel for appellee, Charles E. Coulson, Lake County Prosecuting Attorney, Post Office Box 490, Painesville, Ohio 44077 on this 12th day of September, 2007.


Richard J. Perez

COUNSEL FOR APPELLANT
LAURA ANN KALISH

STATE OF OHIO
COUNTY OF LAKE

IN THE COURT OF APPEALS

188
FILED
COURT OF APPEALS
JUL 30 2007
LYNNE L. MAZEIKA
CLERK OF COURT
LAKE COUNTY, OHIO

ELEVENTH DISTRICT

STATE OF OHIO,

Plaintiff-Appellee,

CLERK OF COURT
LAKE COUNTY, OHIO

JUDGMENT ENTRY

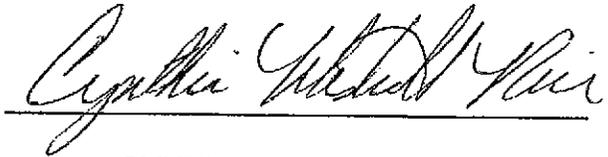
- vs -

CASE NO. 2006-L-093

LAURA ANN KALISH,

Defendant-Appellant.

For the reasons stated in the Opinion of this court, the assignments of error are without merit, and it is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed.



CYNTHIA WESTCOTT RICE
PRESIDING JUDGE

DIANE V. GRENDALL, J., concurs in judgment only,

COLLEEN MARY O'TOOLE, J., concurs in part, dissents in part with Concurring/Dissenting Opinion.

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO

STATE OF OHIO, : OPINION

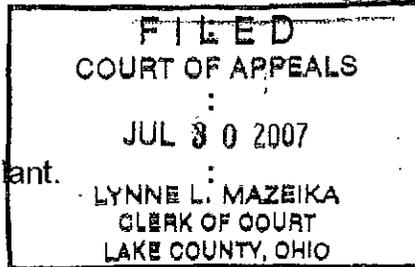
Plaintiff-Appellee, :

CASE NO. 2006-L-093

- vs -

LAURA ANN KALISH,

Defendant-Appellant.



Criminal Appeal from the Court of Common Pleas, Case No. 05 CR 000559.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Richard J. Perez, Interstate Square Building I, 4230 State Route 306, #240, Willoughby, OH 44094 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, P.J.

{¶1} Appellant, Laura Ann Kalish, appeals the sentence imposed by the Lake County Court of Common Pleas. At issue is whether appellant's sentence was inconsistent and disproportionate under Ohio's sentencing statutes and whether it violated the ex post facto clause of the United States Constitution. For the reasons that follow, we affirm.

{¶2} On August 5, 2005, at approximately 1:00 a.m., appellant was driving her vehicle in Kirtland Hills when she entered I-90 from the I-90 westbound exit ramp at

Center Street. She was heading eastbound on westbound I-90. As she entered the exit ramp, a van was exiting at that ramp. The driver flashed his headlights to warn appellant she was going the wrong way. Appellant noticed the flashing lights and realized she had entered the freeway going the wrong way. However, she did not stop, but instead continued heading toward oncoming traffic, swerving to avoid vehicles.

{¶3} The decedent Peter Briggs was driving his truck westbound. He swerved to avoid a collision with appellant's vehicle. Her vehicle struck the right side of Briggs' truck, causing it to spin and go into the median where it rolled over, causing his death by asphyxiation.

{¶4} After the collision, the responding police officer smelled a strong odor of alcohol on appellant's breath. Her eyes were bloodshot. When she exited her vehicle, she almost fell and the officer had to catch her to keep her from falling. Appellant refused to take any field sobriety tests.

{¶5} Appellant had been out on a date that evening. She had two glasses of wine and two beers at a restaurant and then at a bar. One hour after the crash, appellant's blood alcohol level was .12.

{¶6} Prior to this incident, on June 28, 2005, appellant had been arrested for driving under the influence ("OVI"), OVI refusal, and failure to control. She had refused to take any field sobriety tests and breath tests in that case. At the time of the instant incident, appellant was out on bond for the previous arrest, and her license had been suspended.

{¶7} Appellant was indicted for aggravated vehicular homicide with specifications for OVI and for driving under suspension ("DUS") in violation of R.C. 2903.06(A)(1)(a), a felony of the first degree (Count 1), aggravated vehicular homicide

with a specification for DUS in violation of R.C. 2903.06(A)(2)(a), a felony of the second degree (Count 2), OVI in violation of R.C. 4511.19(A)(1)(a), a misdemeanor of the first degree (Count 3), driving with a prohibited concentration of alcohol in bodily substances ("BAC") in violation of R.C. 4511.19(A)(1)(b), a misdemeanor of the first degree (Count 4), DUS in violation of R.C. 4510.11(A), a misdemeanor of the first degree (Count 5), and driving under OVI suspension in violation of R.C. 4510.14(A), a misdemeanor of the first degree (Count 6).

{¶8} On March 20, 2006, appellant pleaded guilty to aggravated vehicular homicide with a specification for DUS, Count 2, and to BAC, Count 4.

{¶9} The sentencing hearing was held on April 24, 2006. The aggravated vehicular homicide offense to which appellant pleaded guilty carried a sentence of two to eight years, and the BAC offense carried a potential sentence of six months. Appellant acknowledged her driver's license had been suspended. Diane Briggs, the decedent's daughter-in-law, testified he was a devoted husband, father and friend. She explained the devastating effect of his death on their family, and asked the court for justice in sentencing appellant. The State requested the maximum sentence for both offenses. The trial court sentenced appellant to five years in prison on Count 2 and six months in prison on Count 4, to run concurrent to the sentence on Count 2.

{¶10} Appellant now appeals and states her assignments of error, as follows:

{¶11} "[1] The trial court erred when it sentenced appellant in a manner inconsistent and disproportionate with similar Ohio cases.

{¶12} "[2] The trial court erred and violated appellant's rights protected by the ex post facto clause of the United States Constitution and the rule of lenity when it

sentenced her under a new statute and case law that put her at a severe disadvantage when compared to the law that existed at the time of the offense.”

{¶13} In her first assignment of error, appellant argues that her sentence was inconsistent with and disproportionate to other sentences imposed for the same offense, in violation of R.C. 2929.11(B).

{¶14} 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; see, *State v. Stone*, 2d Dist. Nos. 2005 CA 79 and 2006 CA 75, 2007-Ohio-130, at ¶7; see, also, *State v. Schweitzer*, 3d Dist. No. 2-06-25, 2006-Ohio-6087, at ¶19; *State v. Firouzmandi*, 5th Dist. No. 2006-CA-41, 2006-Ohio-5823, at ¶37-40; *State v. Windham*, 9th Dist. No. 05CA0033, 2006-Ohio-1544, at ¶11-12. An abuse of discretion is more than an error in judgment or law; it implies an attitude on the part of the trial court that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Further, when applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621, 1993-Ohio-122. To the extent that 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.

{¶15} Appellant was sentenced pursuant to *Foster*, supra. In *Foster* the Ohio Supreme Court held that two sections of Ohio's sentencing scheme under S.B. 2 must still be followed by trial courts in sentencing. R.C. 2929.11 and R.C. 2929.12 apply as a general guide for every sentencing. The Court held that these two sections do not mandate judicial fact-finding; rather, a court is merely to consider the statutory factors set forth in these two sections prior to sentencing. *Id.* at ¶¶ 36-42.

{¶16} R.C. 2929.11(A) provides that a trial court that sentences an offender for a felony conviction must be guided by the "overriding purposes of felony sentencing."

Those purposes are "to protect the public from future crime by the offender and others who commit crime and to punish the offender."

{¶17} R.C. 2929.11(B) provides that a felony sentence must be reasonably calculated to achieve the purposes set forth under R.C. 2929.11(A), commensurate with the offense and not demeaning to the seriousness of the crime and its impact on the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.

{¶18} R.C. 2929.11(B) requires consistency when applying Ohio's sentencing guidelines. However, we have held that sentencing consistency is not derived from the trial court's comparison of the current case to prior sentences for similar offenders and similar offenses. *State v. Spellman*, 160 Ohio App.3d 718, 2005-Ohio-2065, at ¶12. Rather, it is the trial court's proper application of the statutory sentencing guidelines that ensures consistency. *State v. Swiderski*, 11th Dist. No. 2004-L-112, 2005-Ohio-6705, at ¶58. Thus, in order to show a sentence is inconsistent, a defendant must show the trial court failed to properly consider the statutory factors and guidelines.

{¶19} Here, appellant's position that consistency in a sentence is determined by a numerical comparison to other sentences for similar crimes lacks merit. Simply

because appellant's sentence was not identical to sentences in other cases does not imply that her sentence was inconsistent with sentences of other similarly situated offenders.

{¶20} Appellant pleaded guilty to aggravated vehicular homicide, a felony of the second degree. She was therefore subject to a mandatory prison term of two, three, four, five, six, seven, or eight years. R.C. 2929.14(A)(2); R.C. 2903.06(E). She also pleaded guilty to BAC, a misdemeanor of the first degree. The plea to that offense subjected her to a maximum prison term of six months.

{¶21} The court stated on the record that it considered the purposes of felony sentencing under R.C. 2929.11, including the requirement that sentences imposed be consistent. The court also considered the seriousness factors of R.C. 2929.12. The court did not find any present which made the offense more serious than conduct normally constituting the offense. The court also found that no factors were present which made the offense less serious.

{¶22} Under factors indicating a higher likelihood of recidivism, the court noted that 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. Appellant pleaded guilty to the specification to Count 2 that she was driving under suspension. As a result, the court discounted her excuse that she felt her driving privileges authorized her to drive to and from a date during which she consumed alcohol. The court found that the presence of these factors indicated a greater likelihood of recidivism. Under factors indicating less likelihood of recidivism, the court noted appellant had otherwise led a law-abiding life and showed genuine remorse.

{¶23} The court found that Count 2 subjected appellant to a mandatory prison term; that after weighing these factors, a term of imprisonment was consistent with the purposes and principles of sentencing; and that she was not amenable to any available community control sanction.

{¶24} Upon review of the record, we hold that appellant's sentence of five years on Count 2 and six months on Count 4 are within the statutory range of penalties for the offenses to which she pleaded guilty. Moreover, the trial court properly applied and considered the statutory sentencing factors before imposing appellant's sentence. The court's sentencing thus met the consistency requirement of R.C. 2929.11(B).

{¶25} While we do not believe that a numerical comparison to other sentences is dispositive of the issue of consistency, we note that courts have imposed similar sentences for similar offenses. In *State v. Tomkalski*, 11th Dist. No. 2003-L-097, 2004-Ohio-5624, the trial court imposed a five-year prison term for one count of second-degree aggravated vehicular homicide and a six-month prison term for BAC. In *State v. Hough*, 11th Dist. No. 2001-T-0009, 2002-Ohio-2942, the trial court imposed a sentence of three years on each of two counts of second-degree aggravated vehicular homicide, to be served consecutively. Finally, in *State v. Holmes*, 159 Ohio App.3d 501, 2005-Ohio-52, the court imposed a six year prison term for each of two counts of second-degree aggravated vehicular homicide, to be served consecutively. Even a review of the cases appellant cites in support of her inconsistency argument reveals that those defendants were sentenced to terms in the mid-range of sentencing options. These cases therefore support appellant's sentence.

{¶26} Appellant's first assignment of error is without merit.

{¶27} In her second assignment of error, appellant argues that her sentence is unconstitutional and violates the rule of lenity because she committed her crimes prior to the Supreme Court of Ohio's decision in *Foster*, supra, but was sentenced pursuant to the post-*Foster* version of R.C. 2929.14. This court has recently addressed appellant's arguments in the case of *State v. Elswick*, 11th Dist. No. 2006-L-075, 2006-Ohio-7011. In *Elswick*, this court held the same arguments raised in this appeal to be without merit. *Id.*

{¶28} Based on the authority of *State v. Elswick*, appellant's second assignment of error is without merit.

{¶29} For the reasons stated in the Opinion of this court, the assignments of error are without merit, and it is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDALL, J., concurs in judgment only,

COLLEEN MARY O'TOOLE, J., concurs in part, dissents in part with Concurring/Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., concurs in part, dissents in part with Concurring/Dissenting Opinion.

{¶30} I concur with the majority regarding its disposition of the second assignment of error, but am obliged to dissent regarding disposition of the first.

{¶31} By her first assignment, appellant challenges the proportionality of her sentence, pursuant to R.C. 2929.11(B). In effect, she argues that the seriousness and

recidivism factors, set forth at R.C. 2929.12, indicate a shorter sentence was appropriate. The majority's application of *Foster* to this challenge is not justified. *Foster* gives trial courts full discretion to impose sentences in the statutory range, and consecutive sentences. *Id.* at paragraph seven of the syllabus. It eliminates the appellate statute, R.C. 2953.08(G)(2), regarding sections of the sentencing statutes which were severed. *Foster* at ¶99. However, nothing in *Foster* dictates that the sentencing statute is inapplicable regarding sections of the sentencing statutes which retain their vitality – such as R.C. 2929.11(B), and R.C. 2929.12. *Any challenge to the proportionality of a sentence of imprisonment will, necessarily, challenge its length.* But absent further direction from the Supreme Court of Ohio, this collateral effect of a proportionality challenge does not justify appellate courts in applying an abuse of discretion standard to such challenges. Stare decisis indicates the appropriate analysis is that dictated by R.C. 2953.08(G)(2): de novo, applying the clear and convincing standard.

{¶32} In the instant case, I believe that either a de novo review, or one premised on abuse of discretion, indicates potential misapplication of those factors indicating a lower chance of recidivism.¹ See, e.g., R.C. 2929.12(E). I think the record indicates that the R.C. 2929.12(E)(4) factor (“[t]he offense was committed under circumstances not likely to recur ***”) was present in this case, and required more complete exploration by the learned trial judge.

1. Review under an abuse of discretion standard still requires this court to consider whether sentencing guidelines have been properly applied. *State v. Elswick*, 11th Dist. No. 2006-L-075, 2006-Ohio-7011, at ¶49, quoting *Firouzmandi*, supra, at ¶56.

{¶33} I further question the power of this panel to issue opinions overruling established precedent of this court, and purporting to be binding on other, differently constituted panels. This is in complete contravention of the principle of stare decisis.

{¶34} Accordingly, while concurring regarding the second assignment of error, I must dissent regarding the first.

ation from the Supreme Court of Ohio, this court's decision of
no longer does not justify application to the present case
to extend the principle of stare decisis to the present case
and to the present case.

11

FILED
2006 APR 27 A 11:30
LYNNE L. MAZEIKA
LAKE CO CLERK OF COURT

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

STATE OF OHIO)	CASE NO. 05-CR-000559
Plaintiff)	
vs.)	JUDGMENT ENTRY OF SENTENCE
LAURA ANN KALISH)	
Defendant)	JUDGE VINCENT A. CULOTTA

This day, to-wit: April 24, 2006, this matter came on for Defendant's sentencing hearing pursuant to R.C. 2929.19 with the Lake County Prosecuting Attorney, Charles E. Coulson, by and through Mark J. Bartolotta, Assistant Prosecuting Attorney, Major Felony Prosecutions, on behalf of the State of Ohio, and the Defendant, Laura Ann Kalish, represented by Richard J. Perez, Esquire, being present in court.

The Defendant previously entered a plea of "Guilty" to Count 2, Aggravated Vehicular Homicide, a felony of the second degree, in violation of Section 2903.06(A)(2)(a) of the Ohio Revised Code; and Count 4, Driving With a Prohibited Concentration of Alcohol in Bodily Substances, a misdemeanor of the first degree, in violation of Section 4511.19(A)(1)(b) of the Ohio Revised Code.

As to Count 2, the Court finds that this offense is subject to a mandatory prison term under division (F) of Section 2929.13 of the Ohio Revised Code.

The Court has also considered the record, oral statements, any victim impact statement, pre-sentence report and/or drug and alcohol evaluation submitted by the Lake County Adult Probation Department of the Court of Common Pleas, as well as the principles and purposes of sentencing under R.C. 2929.11, and has balanced the seriousness and recidivism factors under R.C. 2929.12.

In considering the foregoing, and for the reasons stated in the record, this Court finds that a prison sentence is consistent with the purposes and principles of sentencing set forth in R.C. 2929.11 and that Defendant is not amenable to an available community control sanction.

The Court finds that Defendant was afforded all rights pursuant to Crim.R. 32 and was given the opportunity to speak before judgment and sentence was pronounced against her.

IT IS HEREBY ORDERED:

That the Defendant serve a stated prison term of five (5) years in prison on Count 2, which is a mandatory term of imprisonment and six (6) months in prison on Count 4. Said prison terms shall be served concurrent with each other at the Ohio Reformatory for Women, Marysville, Ohio, with two (2) days of credit for time already served.

Pursuant to Revised Code Section 2929.18(B)(1), a mandatory fine of Two Hundred Fifty and 00/100 Dollars (\$250.00) is imposed as to Count 4. The Clerk of Courts is hereby ordered to disperse any funds collected from this mandatory fine to the Kirtland Hills Police Department.

The Court, having determined that the defendant is able to pay a financial sanction of restitution or is likely in the future to be able to pay a financial sanction of restitution, hereby orders that the defendant is to make restitution to the victim of the defendant's criminal act, in the amount of Eleven Thousand Two Hundred Forty-eight and 89/100 Dollars (\$11,248.89), the victim's economic loss. It is further ordered that the payment of restitution will be monitored by the Adult Parole Authority and

that all payments of restitution shall be made to the Lake County Clerk of Courts on behalf of the victim. The Clerk of Courts is further ordered to disperse any restitution collected to the victim. This order of restitution is a Judgment in favor of the victim, Beverly Briggs, and against the defendant, Laura A. Kalish. Said victim, pursuant to this Judgment, may bring any action to collect said debt as provided for in R.C. 2929.18(D), and/or may accept payment pursuant to a payment schedule that will be determined and monitored by the Adult Parole Authority.

The Defendant's driver's license shall be suspended for fifteen (15) years.

The Court does not recommend that the Defendant be placed in a Shock Incarceration or an Intensive Program Prison (IPP).

The Court has further notified the Defendant, that post release control is mandatory in this case up to a maximum of three (3) years, as well as the consequences for violating conditions of post release control imposed by the Parole Board under Revised Code section 2967.28. The Defendant is ordered to serve as part of this sentence any term of post release control imposed by the Parole Board, and any prison term for violation of that post release control.

That the Clerk of Courts issue a warrant directed to Daniel A. Dunlap, Sheriff of Lake County, Ohio, to convey the said Defendant to the custody of the Ohio Reformatory for Women, Marysville, Ohio, forthwith.

Defendant is ordered to pay all court costs and all costs of prosecution in an amount certified by the Lake County Clerk of Courts. Defendant is further ordered to pay any supervision fees as permitted pursuant to R.C. 2929.18(A)(4).

Bond is hereby released.

IT IS SO ORDERED.

JUDGE VINCENT A. CULOTTA

APPROVED:

CHARLES E. COULSON (0008667)
PROSECUTING ATTORNEY



Mark J. Bartolotta (0059430)
Assistant Prosecuting Attorney
Major Felony Prosecutions

MJB/jma

Oh. Const. Art. II, § 1

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Practitioner's Toolbox  

*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH JANUARY 25, 2008 ***

*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2008 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JANUARY 15, 2008 ***

CONSTITUTION OF THE STATE OF OHIO
ARTICLE II. LEGISLATIVE

[Go to the Ohio Code Archive Directory](#)

Oh. Const. Art. II, § 1 (2008)

§ 1. In whom legislative power is vested

The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the general assembly, except as hereinafter provided; and independent of the general assembly to propose amendments to the constitution and to adopt or reject the same at the polls. The limitations expressed in the constitution, on the power of the general assembly to enact laws, shall be deemed limitations on the power of the people to enact laws.

 History:

(As amended Nov. 3, 1953; 125 v 1095.)

Oh. Const. Art. III, § 5

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*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JANUARY 15, 2008 ***

CONSTITUTION OF THE STATE OF OHIO
ARTICLE III. EXECUTIVE

Go to the Ohio Code Archive Directory

Oh. Const. Art. III, § 5 (2008)

§ 5. Executive power vested in governor

The supreme executive power of this state shall be vested in the governor.

Oh. Const. Art. IV, § 1

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*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2008 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JANUARY 15, 2008 ***

CONSTITUTION OF THE STATE OF OHIO
ARTICLE IV. JUDICIAL

[Go to the Ohio Code Archive Directory](#)

Oh. Const. Art. IV, § 1 (2008)

§ 1. In whom judicial power vested

The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the supreme court as may from time to time be established by law.

History:

(Amended May 7, 1968; Nov. 6, 1973; SJR No.30.)

Related Statutes & Rules:

Oh. Const. Art. IV, § 3

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH JANUARY 25, 2008 ***

*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2008 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JANUARY 15, 2008 ***

CONSTITUTION OF THE STATE OF OHIO
 ARTICLE IV. JUDICIAL

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Oh. Const. Art. IV, § 3 (2008)

§ 3. Court of appeals

(A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B) (1) The courts of appeals shall have original jurisdiction in the following:

- (a) Quo warranto;
- (b) Mandamus;
- (c) Habeas corpus;
- (d) Prohibition;
- (e) Procedendo;
- (f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district, except that courts of appeals shall not have jurisdiction to review on direct appeal a judgment that imposes a sentence of death. Courts of appeals shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2(B) (2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals.

(Amended November 8, 1994)

† Section Notes:

Analogous to former Art. IV, § 6.

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CONSTITUTION OF THE UNITED STATES OF AMERICA
AMENDMENTS
AMENDMENT 6

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USCS Const. Amend. 6

THE CASE NOTES SEGMENT OF THIS DOCUMENT HAS BEEN SPLIT INTO 8 DOCUMENTS.
THIS IS PART 1.
USE THE BROWSE FEATURE TO REVIEW THE OTHER PART(S).

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

ORC Ann. 2929.11

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2929. PENALTIES AND SENTENCING
PENALTIES FOR FELONY

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ORC Ann. 2929.11 (2008)

§ 2929.11. Purposes of felony sentencing; discrimination prohibited

(A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.

(C) A court that imposes a sentence upon an offender for a felony shall not base the sentence upon the race, ethnic background, gender, or religion of the offender.

History:

[146 v S 2. Eff 7-1-96.](#)

ORC Ann. 2929.12

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TITLE 29. CRIMES -- PROCEDURE
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 PENALTIES FOR FELONY

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ORC Ann. 2929.12 (2008)

§ 2929.12. Seriousness and recidivism factors

(A) Unless otherwise required by [section 2929.13](#) or [2929.14](#) of the Revised Code, a court that imposes a sentence under this chapter upon an offender for a felony has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in [section 2929.11](#) of the Revised Code. In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct and the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing.

(B) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is more serious than conduct normally constituting the offense:

- (1) The physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim.
- (2) The victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense.
- (3) The offender held a public office or position of trust in the community, and the offense related to that office or position.
- (4) The offender's occupation, elected office, or profession obliged the offender to prevent the offense or bring others committing it to justice.
- (5) The offender's professional reputation or occupation, elected office, or profession was used to facilitate the offense or is likely to influence the future conduct of others.
- (6) The offender's relationship with the victim facilitated the offense.
- (7) The offender committed the offense for hire or as a part of an organized criminal activity.
- (8) In committing the offense, the offender was motivated by prejudice based on race, ethnic background, gender, sexual orientation, or religion.

(9) If the offense is a violation of [section 2919.25](#) or a violation of [section 2903.11](#), [2903.12](#), or [2903.13](#) of the Revised Code involving a person who was a family or household member at the time of the violation, the offender committed the offense in the vicinity of one or more children who are not victims of the offense, and the offender or the victim of the offense is a parent, guardian, custodian, or person in loco parentis of one or more of those children.

(C) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is less serious than conduct normally constituting the offense:

- (1) The victim induced or facilitated the offense.
- (2) In committing the offense, the offender acted under strong provocation.
- (3) In committing the offense, the offender did not cause or expect to cause physical harm to any person or property.
- (4) There are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense.

(D) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is likely to commit future crimes:

(1) At the time of committing the offense, the offender was under release from confinement before trial or sentencing, under a sanction imposed pursuant to [section 2929.16](#), [2929.17](#), or [2929.18](#) of the Revised Code, or under post-release control pursuant to [section 2967.28](#) or any other provision of the Revised Code for an earlier offense or had been unfavorably terminated from post-release control for a prior offense pursuant to division (B) of [section 2967.16](#) or [section 2929.141 \[2929.14.1\]](#) of the Revised Code.

- (2) The offender previously was adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1,

2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has a history of criminal convictions.

(3) The offender has not been rehabilitated to a satisfactory degree after previously being adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has not responded favorably to sanctions previously imposed for criminal convictions.

(4) The offender has demonstrated a pattern of drug or alcohol abuse that is related to the offense, and the offender refuses to acknowledge that the offender has demonstrated that pattern, or the offender refuses treatment for the drug or alcohol abuse.

(5) The offender shows no genuine remorse for the offense.

(E) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is not likely to commit future crimes:

(1) Prior to committing the offense, the offender had not been adjudicated a delinquent child.

(2) Prior to committing the offense, the offender had not been convicted of or pleaded guilty to a criminal offense.

(3) Prior to committing the offense, the offender had led a law-abiding life for a significant number of years.

(4) The offense was committed under circumstances not likely to recur.

(5) The offender shows genuine remorse for the offense.

History:

146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 148 v S 9 (Eff 3-8-2000); 148 v S 107 (Eff 3-23-2000); 148 v S 179, § 3 (Eff 1-1-2002); 149 v H 327. Eff 7-8-2002.

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ORC Ann. 2929.13 (2008)

§ 2929.13. Guidance by degree of felony; monitoring of sexually oriented offenders by global positioning device

(A) Except as provided in division (E), (F), or (G) of this section and unless a specific sanction is required to be imposed or is precluded from being imposed pursuant to law, a court that imposes a sentence upon an offender for a felony may impose any sanction or combination of sanctions on the offender that are provided in sections 2929.14 to 2929.18 of the Revised Code. The sentence shall not impose an unnecessary burden on state or local government resources.

If the offender is eligible to be sentenced to community control sanctions, the court shall consider the appropriateness of imposing a financial sanction pursuant to section 2929.18 of the Revised Code or a sanction of community service pursuant to section 2929.17 of the Revised Code as the sole sanction for the offense. Except as otherwise provided in this division, if the court is required to impose a mandatory prison term for the offense for which sentence is being imposed, the court also may impose a financial sanction pursuant to section 2929.18 of the Revised Code but may not impose any additional sanction or combination of sanctions under section 2929.16 or 2929.17 of the Revised Code.

If the offender is being sentenced for a fourth degree felony OVI offense or for a third degree felony OVI offense, in addition to the mandatory term of local incarceration or the mandatory prison term required for the offense by division (G)(1) or (2) of this section, the court shall impose upon the offender a mandatory fine in accordance with division (B)(3) of section 2929.18 of the Revised Code and may impose whichever of the following is applicable:

(1) For a fourth degree felony OVI offense for which sentence is imposed under division (G)(1) of this section, an additional community control sanction or combination of community control sanctions under section 2929.16 or 2929.17 of the Revised Code. If the court imposes upon the offender a community control sanction and the offender violates any condition of the community control sanction, the court may take any action prescribed in division (B) of section 2929.15 of the Revised Code relative to the offender, including imposing a prison term on the offender pursuant to that division.

(2) For a third or fourth degree felony OVI offense for which sentence is imposed under division (G)(2) of this section, an additional prison term as described in division (D)(4) of section 2929.14 of the Revised Code or a community control sanction as described in division (G)(2) of this section.

(B) (1) Except as provided in division (B)(2), (E), (F), or (G) of this section, in sentencing an offender for a felony of the fourth or fifth degree, the sentencing court shall determine whether any of the following apply:

(a) In committing the offense, the offender caused physical harm to a person.

(b) In committing the offense, the offender attempted to cause or made an actual threat of physical harm to a person with a deadly weapon.

(c) In committing the offense, the offender attempted to cause or made an actual threat of physical harm to a person, and the offender previously was convicted of an offense that caused physical harm to a person.

(d) The offender held a public office or position of trust and the offense related to that office or position; the offender's position obliged the offender to prevent the offense or to bring those committing it to justice; or the offender's professional reputation or position facilitated the offense or was likely to influence the future conduct of others.

(e) The offender committed the offense for hire or as part of an organized criminal activity.

(f) The offense is a sex offense that is a fourth or fifth degree felony violation of section 2907.03, 2907.04, 2907.05, 2907.22, 2907.31, 2907.321 [2907.32.1], 2907.322 [2907.32.2], 2907.323 [2907.32.3], or 2907.34 of the Revised Code.

(g) The offender at the time of the offense was serving, or the offender previously had served, a prison term.

(h) The offender committed the offense while under a community control sanction, while on probation, or while released from custody on a bond or personal recognizance.

(i) The offender committed the offense while in possession of a firearm.

(2) (a) If the court makes a finding described in division (B)(1)(a), (b), (c), (d), (e), (f), (g), (h), or (i) of this section and if the

of age.

(ii) The offense was committed on or after August 3, 2006.

(4) A felony violation of section 2903.04, 2903.06, 2903.08, 2903.11, 2903.12, or 2903.13 of the Revised Code if the section requires the imposition of a prison term;

(5) A first, second, or third degree felony drug offense for which section 2925.02, 2925.03, 2925.04, 2925.05, 2925.06, 2925.11, 2925.13, 2925.22, 2925.23, 2925.36, 2925.37, 3719.99, or 4729.99 of the Revised Code, whichever is applicable regarding the violation, requires the imposition of a mandatory prison term;

(6) Any offense that is a first or second degree felony and that is not set forth in division (F)(1), (2), (3), or (4) of this section, if the offender previously was convicted of or pleaded guilty to aggravated murder, murder, any first or second degree felony, or an offense under an existing or former law of this state, another state, or the United States that is or was substantially equivalent to one of those offenses;

(7) Any offense that is a third degree felony and either is a violation of section 2903.04 of the Revised Code or an attempt to commit a felony of the second degree that is an offense of violence and involved an attempt to cause serious physical harm to a person or that resulted in serious physical harm to a person if the offender previously was convicted of or pleaded guilty to any of the following offenses:

(a) Aggravated murder, murder, involuntary manslaughter, rape, felonious sexual penetration as it existed under section 2907.12 of the Revised Code prior to September 3, 1996, a felony of the first or second degree that resulted in the death of a person or in physical harm to a person, or complicity in or an attempt to commit any of those offenses;

(b) An offense under an existing or former law of this state, another state, or the United States that is or was substantially equivalent to an offense listed in division (F)(7)(a) of this section that resulted in the death of a person or in physical harm to a person.

(8) Any offense, other than a violation of section 2923.12 of the Revised Code, that is a felony, if the offender had a firearm on or about the offender's person or under the offender's control while committing the felony, with respect to a portion of the sentence imposed pursuant to division (D)(1)(a) of section 2929.14 of the Revised Code for having the firearm;

(9) Any offense of violence that is a felony, if the offender wore or carried body armor while committing the felony offense of violence, with respect to the portion of the sentence imposed pursuant to division (D)(1)(d) of section 2929.14 of the Revised Code for wearing or carrying the body armor;

(10) Corrupt activity in violation of section 2923.32 of the Revised Code when the most serious offense in the pattern of corrupt activity that is the basis of the offense is a felony of the first degree;

(11) Any violent sex offense or designated homicide, assault, or kidnapping offense if, in relation to that offense, the offender is adjudicated a sexually violent predator;

(12) A violation of division (A)(1) or (2) of section 2921.36 of the Revised Code, or a violation of division (C) of that section involving an item listed in division (A)(1) or (2) of that section, if the offender is an officer or employee of the department of rehabilitation and correction.

(13) A violation of division (A)(1) or (2) of section 2903.06 of the Revised Code if the victim of the offense is a peace officer, as defined in section 2935.01 of the Revised Code, or an investigator of the bureau of criminal identification and investigation, as defined in section 2903.11 of the Revised Code, with respect to the portion of the sentence imposed pursuant to division (D)(5) of section 2929.14 of the Revised Code;

(14) A violation of division (A)(1) or (2) of section 2903.06 of the Revised Code if the offender has been convicted of or pleaded guilty to three or more violations of division (A) or (B) of section 4511.19 of the Revised Code or an equivalent offense, as defined in section 2941.1415 [2941.14.15] of the Revised Code, or three or more violations of any combination of those divisions and offenses, with respect to the portion of the sentence imposed pursuant to division (D)(6) of section 2929.14 of the Revised Code;

(15) Kidnapping, in the circumstances specified in section 2971.03 of the Revised Code and when no other provision of division (F) of this section applies.

(G) Notwithstanding divisions (A) to (E) of this section, if an offender is being sentenced for a fourth degree felony OVI offense or for a third degree felony OVI offense, the court shall impose upon the offender a mandatory term of local incarceration or a mandatory prison term in accordance with the following:

(1) If the offender is being sentenced for a fourth degree felony OVI offense and if the offender has not been convicted of and has not pleaded guilty to a specification of the type described in section 2941.1413 [2941.14.13] of the Revised Code, the court may impose upon the offender a mandatory term of local incarceration of sixty days or one hundred twenty days as specified in division (G)(1)(d) of section 4511.19 of the Revised Code. The court shall not reduce the term pursuant to section 2929.20, 2967.193 [2967.19.3], or any other provision of the Revised Code. The court that imposes a mandatory term of local incarceration under this division shall specify whether the term is to be served in a jail, a community-based correctional facility, a halfway house, or an alternative residential facility, and the offender shall serve the term in the type of facility specified by the court. A mandatory term of local incarceration imposed under division (G)(1) of this section is not subject to extension under section 2967.11 of the Revised Code, to a period of post-release control under section 2967.28 of the Revised Code, or to any other Revised Code provision that pertains to a prison term except as provided in division (A)(1) of this section.

(2) If the offender is being sentenced for a third degree felony OVI offense, or if the offender is being sentenced for a fourth degree felony OVI offense and the court does not impose a mandatory term of local incarceration under division (G)(1) of this section, the court shall impose upon the offender a mandatory prison term of one, two, three, four, or five years if the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1413 [2941.14.13] of the Revised Code or shall impose

upon the offender a mandatory prison term of sixty days or one hundred twenty days as specified in division (G)(1)(d) or (e) of section 4511.19 of the Revised Code if the offender has not been convicted of and has not pleaded guilty to a specification of that type. The court shall not reduce the term pursuant to section 2929.20, 2967.193 [2967.19.3], or any other provision of the Revised Code. The offender shall serve the one-, two-, three-, four-, or five-year mandatory prison term consecutively to and prior to the prison term imposed for the underlying offense and consecutively to any other mandatory prison term imposed in relation to the offense. In no case shall an offender who once has been sentenced to a mandatory term of local incarceration pursuant to division (G) (1) of this section for a fourth degree felony OVI offense be sentenced to another mandatory term of local incarceration under that division for any violation of division (A) of section 4511.19 of the Revised Code. In addition to the mandatory prison term described in division (G)(2) of this section, the court may sentence the offender to a community control sanction under section 2929.16 or 2929.17 of the Revised Code, but the offender shall serve the prison term prior to serving the community control sanction. The department of rehabilitation and correction may place an offender sentenced to a mandatory prison term under this division in an intensive program prison established pursuant to section 5120.033 [5120.03.3] of the Revised Code if the department gave the sentencing judge prior notice of its intent to place the offender in an intensive program prison established under that section and if the judge did not notify the department that the judge disapproved the placement. Upon the establishment of the initial intensive program prison pursuant to section 5120.033 [5120.03.3] of the Revised Code that is privately operated and managed by a contractor pursuant to a contract entered into under section 9.06 of the Revised Code, both of the following apply:

(a) The department of rehabilitation and correction shall make a reasonable effort to ensure that a sufficient number of offenders sentenced to a mandatory prison term under this division are placed in the privately operated and managed prison so that the privately operated and managed prison has full occupancy.

(b) Unless the privately operated and managed prison has full occupancy, the department of rehabilitation and correction shall not place any offender sentenced to a mandatory prison term under this division in any intensive program prison established pursuant to section 5120.033 [5120.03.3] of the Revised Code other than the privately operated and managed prison.

(H) If an offender is being sentenced for a sexually oriented offense or child-victim oriented offense that is a felony committed on or after January 1, 1997, the judge shall require the offender to submit to a DNA specimen collection procedure pursuant to section 2901.07 of the Revised Code.

(I) If an offender is being sentenced for a sexually oriented offense or a child-victim oriented offense committed on or after January 1, 1997, the judge shall include in the sentence a summary of the offender's duties imposed under sections 2950.04, 2950.041 [2950.04.1], 2950.05, and 2950.06 of the Revised Code, and the duration of the duties. The judge shall inform the offender, at the time of sentencing, of those duties and of their duration. If required under division (A)(2) of section 2950.03 of the Revised Code, the judge shall perform the duties specified in that section, or, if required under division (A)(6) of section 2950.03 of the Revised Code, the judge shall perform the duties specified in that division.

(J) (1) Except as provided in division (J)(2) of this section, when considering sentencing factors under this section in relation to an offender who is convicted of or pleads guilty to an attempt to commit an offense in violation of section 2923.02 of the Revised Code, the sentencing court shall consider the factors applicable to the felony category of the violation of section 2923.02 of the Revised Code instead of the factors applicable to the felony category of the offense attempted.

(2) When considering sentencing factors under this section in relation to an offender who is convicted of or pleads guilty to an attempt to commit a drug abuse offense for which the penalty is determined by the amount or number of unit doses of the controlled substance involved in the drug abuse offense, the sentencing court shall consider the factors applicable to the felony category that the drug abuse offense attempted would be if that drug abuse offense had been committed and had involved an amount or number of unit doses of the controlled substance that is within the next lower range of controlled substance amounts than was involved in the attempt.

(K) As used in this section, "drug abuse offense" has the same meaning as in section 2925.01 of the Revised Code.

(L) At the time of sentencing an offender for any sexually oriented offense, if the offender is a tier III sex offender/child-victim offender relative to that offense and the offender does not serve a prison term or jail term, the court may require that the offender be monitored by means of a global positioning device. If the court requires such monitoring, the cost of monitoring shall be borne by the offender. If the offender is indigent, the cost of compliance shall be paid by the crime victims reparations fund.

History:

146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v H 445 (Eff 9-3-96); 146 v S 166 (Eff 10-17-96); 146 v H 180 (Eff 1-1-97); 147 v H 32 (Eff 3-10-98); 147 v S 111 (Eff 3-17-98); 147 v H 293 (Eff 3-17-98); 147 v H 122 (Eff 7-29-98); 148 v S 142 (Eff 2-3-2000); 148 v S 107 (Eff 3-23-2000); 148 v S 22 (Eff 5-17-2000); 148 v H 528 (Eff 2-13-2001); 148 v S 222 (Eff 3-22-2001); 149 v H 485 (Eff 6-13-2002); 149 v H 327, Eff 7-8-2002; 149 v S 123, § 1, eff. 1-1-04; 150 v S 5, § 1, Eff 7-31-03; 150 v S 5, § 3, eff. 1-1-04; 150 v H 52, § 1, eff. 6-1-04; 150 v H 163, § 1, eff. 9-23-04; 150 v H 473, § 1, eff. 4-29-05; 151 v H 95, § 1, eff. 8-3-06; 151 v S 260, § 1, eff. 1-2-07; 151 v S 281, § 1, eff. 1-4-07; 151 v H 461, § 1, eff. 4-4-07; 152 v S 10, § 1, eff. 1-1-08.

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TITLE 29. CRIMES -- PROCEDURE
 CHAPTER 2953. APPEALS; OTHER POSTCONVICTION REMEDIES

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ORC Ann. 2953.08 (2008)

§ 2953.08. Grounds for appeal by defendant or prosecutor of sentence for felony; appeal cost oversight committee

(A) In addition to any other right to appeal and except as provided in division (D) of this section, a defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right the sentence imposed upon the defendant on one of the following grounds:

(1) The sentence consisted of or included the maximum prison term allowed for the offense by division (A) of section 2929.14 or section 2929.142 [2929.14.2] of the Revised Code, the sentence was not imposed pursuant to division (D)(3)(b) of section 2929.14 of the Revised Code, the maximum prison term was not required for the offense pursuant to Chapter 2925. or any other provision of the Revised Code, and the court imposed the sentence under one of the following circumstances:

(a) The sentence was imposed for only one offense.

(b) The sentence was imposed for two or more offenses arising out of a single incident, and the court imposed the maximum prison term for the offense of the highest degree.

(2) The sentence consisted of or included a prison term, the offense for which it was imposed is a felony of the fourth or fifth degree or is a felony drug offense that is a violation of a provision of Chapter 2925. of the Revised Code and that is specified as being subject to division (B) of section 2929.13 of the Revised Code for purposes of sentencing, and the court did not specify at sentencing that it found one or more factors specified in divisions (B)(1)(a) to (i) of section 2929.13 of the Revised Code to apply relative to the defendant. If the court specifies that it found one or more of those factors to apply relative to the defendant, the defendant is not entitled under this division to appeal as a matter of right the sentence imposed upon the offender.

(3) The person was convicted of or pleaded guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense, was adjudicated a sexually violent predator in relation to that offense, and was sentenced pursuant to division (A)(3) of section 2971.03 of the Revised Code, if the minimum term of the indefinite term imposed pursuant to division (A)(3) of section 2971.03 of the Revised Code is the longest term available for the offense from among the range of terms listed in section 2929.14 of the Revised Code. As used in this division, "designated homicide, assault, or kidnapping offense" and "violent sex offense" have the same meanings as in section 2971.01 of the Revised Code. As used in this division, "adjudicated a sexually violent predator" has the same meaning as in section 2929.01 of the Revised Code, and a person is "adjudicated a sexually violent predator" in the same manner and the same circumstances as are described in that section.

(4) The sentence is contrary to law.

(5) The sentence consisted of an additional prison term of ten years imposed pursuant to division (D)(2)(a) of section 2929.14 of the Revised Code.

(6) The sentence consisted of an additional prison term of ten years imposed pursuant to division (D)(3)(b) of section 2929.14 of the Revised Code.

(B) In addition to any other right to appeal and except as provided in division (D) of this section, a prosecuting attorney, a city director of law, village solicitor, or similar chief legal officer of a municipal corporation, or the attorney general, if one of those persons prosecuted the case, may appeal as a matter of right a sentence imposed upon a defendant who is convicted of or pleads guilty to a felony or, in the circumstances described in division (B)(3) of this section the modification of a sentence imposed upon such a defendant, on any of the following grounds:

(1) The sentence did not include a prison term despite a presumption favoring a prison term for the offense for which it was imposed, as set forth in section 2929.13 or Chapter 2925. of the Revised Code.

(2) The sentence is contrary to law.

(3) The sentence is a modification under section 2929.20 of the Revised Code of a sentence that was imposed for a felony of the first or second degree.

(C) (1) In addition to the right to appeal a sentence granted under division (A) or (B) of this section, a defendant who is convicted of or pleads guilty to a felony may seek leave to appeal a sentence imposed upon the defendant on the basis that the sentencing judge has imposed consecutive sentences under division (E)(3) or (4) of section 2929.14 of the Revised Code and that the consecutive sentences exceed the maximum prison term allowed by division (A) of that section for the most serious offense of which the defendant was convicted. Upon the filing of a motion under this division, the court of appeals may grant leave to appeal the sentence

if the court determines that the allegation included as the basis of the motion is true.

(2) A defendant may seek leave to appeal an additional sentence imposed upon the defendant pursuant to division (D)(2)(a) or (b) of section 2929.14 of the Revised Code if the additional sentence is for a definite prison term that is longer than five years.

(D) (1) A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge.

(2) Except as provided in division (C)(2) of this section, a sentence imposed upon a defendant is not subject to review under this section if the sentence is imposed pursuant to division (D)(2)(b) of section 2929.14 of the Revised Code. Except as otherwise provided in this division, a defendant retains all rights to appeal as provided under this chapter or any other provision of the Revised Code. A defendant has the right to appeal under this chapter or any other provision of the Revised Code the court's application of division (D)(2)(c) of section 2929.14 of the Revised Code.

(3) A sentence imposed for aggravated murder or murder pursuant to sections 2929.02 to 2929.06 of the Revised Code is not subject to review under this section.

(E) A defendant, prosecuting attorney, city director of law, village solicitor, or chief municipal legal officer shall file an appeal of a sentence under this section to a court of appeals within the time limits specified in Rule 4(B) of the Rules of Appellate Procedure, provided that if the appeal is pursuant to division (B)(3) of this section, the time limits specified in that rule shall not commence running until the court grants the motion that makes the sentence modification in question. A sentence appeal under this section shall be consolidated with any other appeal in the case. If no other appeal is filed, the court of appeals may review only the portions of the trial record that pertain to sentencing.

(F) On the appeal of a sentence under this section, the record to be reviewed shall include all of the following, as applicable:

(1) Any presentence, psychiatric, or other investigative report that was submitted to the court in writing before the sentence was imposed. An appellate court that reviews a presentence investigation report prepared pursuant to section 2947.06 or 2951.03 of the Revised Code or Criminal Rule 32.2 in connection with the appeal of a sentence under this section shall comply with division (D)(3) of section 2951.03 of the Revised Code when the appellate court is not using the presentence investigation report, and the appellate court's use of a presentence investigation report of that nature in connection with the appeal of a sentence under this section does not affect the otherwise confidential character of the contents of that report as described in division (D)(1) of section 2951.03 of the Revised Code and does not cause that report to become a public record, as defined in section 149.43 of the Revised Code, following the appellate court's use of the report.

(2) The trial record in the case in which the sentence was imposed;

(3) Any oral or written statements made to or by the court at the sentencing hearing at which the sentence was imposed;

(4) Any written findings that the court was required to make in connection with the modification of the sentence pursuant to a judicial release under division (H) of section 2929.20 of the Revised Code.

(G) (1) If the sentencing court was required to make the findings required by division (B) or (D) of section 2929.13, division (D)(2)(e) or (E)(4) of section 2929.14, or division (H) of section 2929.20 of the Revised Code relative to the imposition or modification of the sentence, and if the sentencing court failed to state the required findings on the record, the court hearing an appeal under division (A), (B), or (C) of this section shall remand the case to the sentencing court and instruct the sentencing court to state, on the record, the required findings.

(2) The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.

The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

(a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (D)(2)(e) or (E)(4) of section 2929.14, or division (H) of section 2929.20 of the Revised Code, whichever, if any, is relevant;

(b) That the sentence is otherwise contrary to law.

(H) A judgment or final order of a court of appeals under this section may be appealed, by leave of court, to the supreme court.

(I) (1) There is hereby established the felony sentence appeal cost oversight committee, consisting of eight members. One member shall be the chief justice of the supreme court or a representative of the court designated by the chief justice, one member shall be a member of the senate appointed by the president of the senate, one member shall be a member of the house of representatives appointed by the speaker of the house of representatives, one member shall be the director of budget and management or a representative of the office of budget and management designated by the director, one member shall be a judge of a court of appeals, court of common pleas, municipal court, or county court appointed by the chief justice of the supreme court, one member shall be the state public defender or a representative of the office of the state public defender designated by the state public defender, one member shall be a prosecuting attorney appointed by the Ohio prosecuting attorneys association, and one member shall be a county commissioner appointed by the county commissioners association of Ohio. No more than three of the appointed members of the committee may be members of the same political party.

The president of the senate, the speaker of the house of representatives, the chief justice of the supreme court, the Ohio prosecuting attorneys association, and the county commissioners association of Ohio shall make the initial appointments to the committee of the appointed members no later than ninety days after July 1, 1996. Of those initial appointments to the committee, the members appointed by the speaker of the house of representatives and the Ohio prosecuting attorneys association shall serve a term ending two years after July 1, 1996, the member appointed by the chief justice of the supreme court shall serve a term ending three

years after July 1, 1996, and the members appointed by the president of the senate and the county commissioners association of Ohio shall serve terms ending four years after July 1, 1996. Thereafter, terms of office of the appointed members shall be for four years, with each term ending on the same day of the same month as did the term that it succeeds. Members may be reappointed. Vacancies shall be filled in the same manner provided for original appointments. A member appointed to fill a vacancy occurring prior to the expiration of the term for which that member's predecessor was appointed shall hold office as a member for the remainder of the predecessor's term. An appointed member shall continue in office subsequent to the expiration date of that member's term until that member's successor takes office or until a period of sixty days has elapsed, whichever occurs first.

If the chief justice of the supreme court, the director of the office of budget and management, or the state public defender serves as a member of the committee, that person's term of office as a member shall continue for as long as that person holds office as chief justice, director of the office of budget and management, or state public defender. If the chief justice of the supreme court designates a representative of the court to serve as a member, the director of budget and management designates a representative of the office of budget and management to serve as a member, or the state public defender designates a representative of the office of the state public defender to serve as a member, the person so designated shall serve as a member of the commission for as long as the official who made the designation holds office as chief justice, director of the office of budget and management, or state public defender or until that official revokes the designation.

The chief justice of the supreme court or the representative of the supreme court appointed by the chief justice shall serve as chairperson of the committee. The committee shall meet within two weeks after all appointed members have been appointed and shall organize as necessary. Thereafter, the committee shall meet at least once every six months or more often upon the call of the chairperson or the written request of three or more members, provided that the committee shall not meet unless moneys have been appropriated to the judiciary budget administered by the supreme court specifically for the purpose of providing financial assistance to counties under division (I)(2) of this section and the moneys so appropriated then are available for that purpose.

The members of the committee shall serve without compensation, but, if moneys have been appropriated to the judiciary budget administered by the supreme court specifically for the purpose of providing financial assistance to counties under division (I)(2) of this section, each member shall be reimbursed out of the moneys so appropriated that then are available for actual and necessary expenses incurred in the performance of official duties as a committee member.

(2) The state criminal sentencing commission periodically shall provide to the felony sentence appeal cost oversight committee all data the commission collects pursuant to division (A)(5) of section 181.25 of the Revised Code. Upon receipt of the data from the state criminal sentencing commission, the felony sentence appeal cost oversight committee periodically shall review the data; determine whether any money has been appropriated to the judiciary budget administered by the supreme court specifically for the purpose of providing state financial assistance to counties in accordance with this division for the increase in expenses the counties experience as a result of the felony sentence appeal provisions set forth in this section or as a result of a postconviction relief proceeding brought under division (A)(2) of section 2953.21 of the Revised Code or an appeal of a judgment in that proceeding; if it determines that any money has been so appropriated, determine the total amount of moneys that have been so appropriated specifically for that purpose and that then are available for that purpose; and develop a recommended method of distributing those moneys to the counties. The committee shall send a copy of its recommendation to the supreme court. Upon receipt of the committee's recommendation, the supreme court shall distribute to the counties, based upon that recommendation, the moneys that have been so appropriated specifically for the purpose of providing state financial assistance to counties under this division and that then are available for that purpose.

History:

146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v H 180 (Eff 1-1-97); 147 v H 151 (Eff 9-16-97); 148 v S 107 (Eff 3-23-2000); 148 v H 331, Eff 10-10-2000; 150 v H 473, § 1, eff. 4-29-05; 151 v H 95, § 1, eff. 8-3-06; 151 v H 461, § 1, eff. 4-4-07.