

IN THE SUPREME COURT OF OHIO

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

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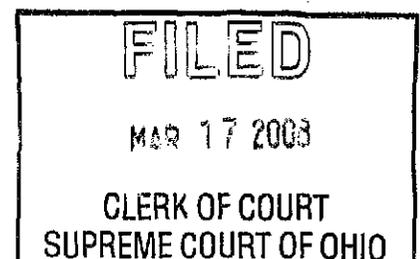


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STATEMENT OF THE CASE AND FACTS

On August 4, 2005, at approximately 1:00 a.m., appellant Laura Ann Kalish drove her vehicle the wrong way on Interstate 90. (Pre-Sentence Report, pg. 2, "PSR"; See also *State v. Kalish*, 11th Dist. No. 2006-L-093, 2007-Ohio-3850, at ¶¶2-9, Appendix). She entered the freeway heading eastbound in the westbound exit ramp. *Id.* The decedent Peter Briggs was driving his vehicle westbound on I-90 and tried to swerve to avoid hitting appellant's car. *Id.* Appellant's vehicle, however, struck the right side of Mr. Briggs' vehicle causing it to spin into the median where it rolled over. *Id.* Mr. Briggs was partially ejected from his vehicle and pronounced dead on the scene. (PSR, pgs. 2, 5).

Appellant exhibited no signs of injury when officers arrived. (PSR, pg. 2). Officers noted a strong odor of alcohol coming from appellant's person, red bloodshot looking eyes, and that she had difficulty on her feet once she exited her vehicle. (PSR, pgs. 2, 3, 4). When told that the driver of the other vehicle involved in the accident had died, appellant showed no emotion. (PSR, pg. 4). She refused to take field sobriety tests. *Id.* Test results later indicated a blood alcohol content of .12. (T.p. 29).

Prior to the accident, appellant had been out on a date. (PSR, pg. 5). She admitted to consuming alcohol over dinner and at a bar after dinner. (PSR, pgs. 5, 6, 17). Appellant, however, denied being intoxicated; instead, she claimed that she was in an "extreme emotional" state over her pending divorce and from being rejected by her date on the night in question. (PSR, pg. 17; T.p. 24).

Before this crime, on June 28, 2005, appellant crashed her vehicle on I-90. (PSR, pgs. 11-12). The responding officer smelled a strong odor of alcoholic beverage coming from appellant's person when talking with her. *Id.* Appellant refused to submit to a breath

test and, thus, was subjected to the Administrative License Suspension. (PSR, pgs. 11-12; T.p. 30). At the time of the instant incident, appellant was driving while under suspension and while she was out on bond for a pending DUI offense. (PSR, pgs. 11-12; T.p. 30, 40-41, 42).

Appellant pleaded guilty to aggravated vehicular homicide, a felony of the second degree, in violation of R.C. 2903.06(A)(2)(a), with a specification for driving under suspension (Count 2), and driving with prohibited concentration of alcohol in bodily substances, a misdemeanor of the first degree, in violation of R.C. 4511.19(A)(1)(b) (Count 4). The trial court referred the matter to the Adult Probation Department for a pre-sentence investigation and report and a victim impact statement. *Id.*

At the sentencing hearing, “[a]ppellant 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.” *Kalish*, at ¶19; (T.d. 52).

On appeal to the Eleventh District Court of Appeals, appellant argued that her sentence was inconsistent with and disproportionate to other sentences imposed for similar crimes committed by similar offenders and that this Court’s decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470 was unconstitutional. The Eleventh District disagreed. This Court has since accepted jurisdiction over this case to decide what the proper standard of review is when a defendant challenges their sentence on appeal and

whether the Eleventh District's decision that an abuse of discretion standard is proper violated the doctrines of stare decisis and separation of powers.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. I

***Foster* gave trial courts full discretion to impose a sentence within the statutory range. Appellate courts are to apply an abuse of discretion standard of review for felony sentences imposed within those ranges.**

At issue in the first proposition of law is what impact this Court's decision in *Foster* has had on the standard of review exercised by appellate courts when reviewing felony sentences under R.C. 2953.08(G), the sentencing review statute. The appellate districts, and even panels within districts, are split because each is simply interpreting the law in a manner that it deems to be consistent with the language and holding of *Foster* and subsequent decisions from this Court. See *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1; *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824; *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306. The impact and alterations that these decisions have made to Ohio's sentencing scheme, particularly R.C. 2953.08(G), must be clarified by this Court.

What must be decided is whether the appellate standard of review post-*Foster* is solely abuse of discretion, solely clear and convincing, or a combination of both. An abuse of discretion standard is most consistent with *Foster's* mandate, but the clear and convincing as contrary to law standard may still apply in limited circumstances. This approach is most consistent with the mandate in *Foster*, statutory authority, and the goals of Senate Bill 2.

A. This Court's decisions in *Foster* and *Mathis* changed Ohio's sentencing landscape. Trial courts now have full discretion to impose a sentence within the statutory range.

On February 27, 2006, this Court altered Ohio's sentencing landscape. This Court ruled certain felony-sentencing statutes unconstitutional to the extent that they required judicial fact-finding before the imposition of a sentence greater than the "statutory maximum" as that term is used in *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, and *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531. *Foster*, at ¶97; See R.C. 2929.14(B), 2929.14(C), 2929.14(D)(2)(b) and (D)(3)(b), 2929.14(E)(4), 2929.19(B)(2), and 2929.41. However, the provisions of the sentencing statute addressing prison rather than community control for lower level felonies under R.C. 2929.13(B)(2)(a) and (B)(2)(b) were found to be constitutional. *Id.* at ¶70.

To ensure compliance with *Blakely* and its progeny, this Court employed the same remedy used in *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, and severed the offending statutes. *Foster*, at ¶84, 90-97. After severance, "trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings and give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *Id.* at paragraph seven of the syllabus; ¶100; *Mathis*, at paragraph three of the syllabus.

This Court noted that "[t]he appellate statute R.C. 2953.08(G), insofar as it refers to the severed sections, no longer applies." *Foster*, at ¶99. Subsequently, in *Saxon*, this Court stated "the sentencing review statute, R.C. 2953.08(G), remains effective, although

no longer relevant with respect to the statutory sections severed by *Foster*.” *Id.* at FN 1, citing *Mathis*, at paragraph two of the syllabus and *Foster*, at ¶¶97, 99.

- B. Post-*Foster*, R.C. 2929.11 and R.C. 2929.12 must still be considered by a trial court when sentencing an offender. R.C. 2929.12(A) gives the trial court discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in R.C. 2929.11, through its consideration of the seriousness and recidivism factors set forth in R.C. 2929.12(B)-(E).**

Irrespective of the particular standard of review, while trial courts have full discretion to impose a prison term within the statutory range, their discretion is guided by those statutes unaffected by *Foster*, particularly R.C. 2929.11 and R.C. 2929.12, the general judicial guidance statutes. *Foster*, at ¶¶36-37, 105; *Mathis*, at ¶83. “R.C. 2929.11 and R.C. 2929.12, two key statutory provisions of Ohio’s sentencing scheme, survive after *Foster*. Even though trial courts are no longer required to make specific findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences on the record, R.C. 2929.11 and R.C. 2929.12 must still be considered when sentencing offenders.” *State v. Elswick*, 11th Dist. No. 2006-L-075, 2006-Ohio-7011, at ¶53; See *Foster*, at ¶42 (noting that “there is no mandate for judicial fact-finding in the general guidance statutes. The court is merely to ‘consider’ the statutory factors.”).

R.C. 2929.11 provides that the court “shall be guided by” the overriding purposes and principles of felony sentencing, which are “to protect the public from future crime by the offender and others and to punish the offender.” In achieving these purposes, the court shall also consider the need for incapacitation, deterrence, rehabilitation, and restitution. R.C. 2929.11(A); See *Foster*, at ¶36.

R.C. 2929.11(B) provides that a felony sentence “shall be reasonably calculated to achieve the two overriding purposes of felony sentencing” and be “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.” *Foster*, at ¶36. “Although a trial court is required to engage in the analysis set forth by R.C. 2929.11(B) to ensure consistency of sentences, a court is not required to make specific findings on the record in this regard.” *State v. Rady*, 11th Dist. No. 2006-L-213, 2007-Ohio-1551, at ¶42 (Citations omitted). “The trial court possesses ‘broad discretion to determine the most effective way to comply with the purposes and principles of sentencing within the statutory guidelines.’” *Id.*

R.C. 2929.12(A) provides that a trial court “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 this discretion, the court is required to consider a series of factors that pertain to the seriousness of the offense and the recidivism of the offender. R.C. 2929.12(A); R.C. 2929.12(B)-(E). The court is also free to consider any other “relevant” factors. *Id.* Only after taking into account these initial considerations may a court proceed to decide whether to imprison the offender and, if so, for what length of time under R.C. 2929.14(A).

Moreover, while “the trial court is required to consider the seriousness and recidivism factors, the court does not need to make specific findings on the record in order to evince the requisite consideration of all applicable seriousness and recidivism factors.” *State v. Spicuzza*, 11th Dist. No. 2005-L-078, 2006-Ohio-2379, at ¶16 (Citations omitted).

C. Post-Foster, the clear and convincing standard of review set forth in R.C. 2953.08(G)(2) remains viable to the extent that a sentence was imposed contrary to law.

As part of Senate Bill 2, the General Assembly enacted a provision concerning appellate review of sentences. R.C. 2953.08(G) provides:

- (1) If the sentencing court was required to make the findings required by division (B) or (D) of section 2929.13, division (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 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 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 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 (E)(4) of section 2929.14, or division (H) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
- (b) The sentence is contrary to law.

In *Foster*, this Court stated that "[t]he appellate statute R.C. 2953.08(G), insofar as it refers to the severed sections, no longer applies." *Foster*, at ¶99. Subsequently, this Court in *Saxon*, stated that "the sentencing review statute, R.C. 2953.08(G), remains

effective, although no longer relevant with respect to the statutory sections severed by *Foster*." *Id.* at FN 1, citing *Mathis*, at paragraph two of the syllabus and *Foster*, at ¶¶97, 99.

Thus, R.C. 2953.08(G) no longer applies to upward-departure findings since judicial fact-finding is no longer required for non-minimum, maximum, and consecutive sentences. *Mathis*, at ¶¶27, 34-36. R.C. 2953.08(G) remains applicable to challenges for downward departures pursuant to R.C. 2929.13 or a judicial release pursuant to R.C. 2929.20. *Mathis*, at paragraph two of the syllabus; ¶¶34-36. Further, and as several appellate courts have ruled, R.C. 2953.08(G)(2)(b) appears to remain viable to the extent that an appellate court may take any action authorized by R.C. 2953.08(G)(2) if it clearly and convincingly finds that the sentence is contrary to law.

D. An abuse of discretion standard of review for felony sentences imposed within the statutory range, and where the trial court considered R.C. 2929.11 and R.C. 2929.12, is most consistent with *Foster's* mandate, statutory authority, and the goals of Senate Bill 2.

The majority of Ohio appellate districts, including panels from the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh, have ruled that *Foster* altered an appellate court's standard of review for more than the minimum, maximum, and consecutive sentences to abuse of discretion. See *State v. Ashipa*, 1st Dist. No. C-060411, 2007-Ohio-2245, at ¶¶14; *State v. Slone*, 2nd Dist. Nos. 2005 CA 79 and 2006 CA 75, 2007-Ohio-130, at ¶¶7; *State v. Schweitzer*, 3rd Dist. No. 2-06-25, 2006-Ohio-6087, at ¶¶19; *State v. Davis*, 4th Dist. No. 06CA21, 2007-Ohio-3944, at ¶¶42; *State v. Firouzmandi*, 5th Dist. No. 2006-CA-41, 2006-Ohio-5823, at ¶¶40; *State v. Kerr*, 6th Dist. No. WD-05-080, 2006-Ohio-6058, at ¶¶36; *State v. Palmer*, 7th Dist. No. 06-JE-20, 2007-Ohio-1572, at ¶¶14; *State v.*

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These courts have found their rulings to be consistent and in harmony with *Foster's* mandate: “[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences.” *Id.* at paragraph seven of the syllabus; ¶100. Some, however, have misinterpreted that *Foster* completely excised R.C. 2953.08(G)(2), as opposed to simply abrogating it. See *Windham*, 2006-Ohio-1544 (finding that “the *Foster* Court’s removal of R.C. 2953.08(G)(2) from the statutory sentencing scheme eliminated the clear and convincing standard and left a void concerning the applicable standard of review in sentencing matters” and holding that the abuse of discretion standard now applies); *Firouzmandi*, 2006-Ohio-5823 (following *Windham*). Nonetheless, this Court made clear in *Foster* that trial courts are vested with full discretion to impose a prison sentence within the statutory range.

“Something is discretionary because it is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers and witnesses, and who can better assess the impact of what occurs before him.” *Firouzmandi*, at ¶55 (Citations omitted). It has been recognized that “the term ‘abuse of discretion’ is one of art, essentially connoting judgment exercised by a court which neither comports with reason,

nor the record.” *State v. Coulter*, 11th Dist. No. 2007-P-1021, 2008-Ohio-1021, citing *State v. Ferranto* (1925), 112 Ohio St.667, 676-678. An “abuse of discretion” also constitutes more than an error of law or judgment and implies that the trial court acted unreasonably, arbitrarily, or unconscionably. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140. When applying the abuse of discretion standard, a reviewing court may not simply substitute its judgment for that of the trial court. *Id.*

Further, it has been said that “to establish an abuse of discretion, the result must be so palpably and grossly violative of fact or logic that it evidences not the exercise of will, but the perversity of will; not the exercise of judgment, but the defiance of judgment; and not the exercise of reason, but, instead, passion or bias.” *State v. Evans*, 4th Dist. No. 06CA34, 2007-Ohio-6575, at ¶8 (Citations omitted).

The Fifth District Court of Appeals recognized that a review for abuse of discretion still provides meaningful appellate review post-*Foster* in the following ways:

- Appellate courts can find an ‘abuse of discretion’ where the record establishes that a trial judge refused or failed to consider statutory sentencing factors. ***.
- An ‘abuse of discretion’ has also been found where a sentence is greatly excessive under traditional concepts of justice or is manifestly disproportionate to the crime or the defendant. ***.
- The imposition by a trial judge of a sentence on a mechanical, pre-determined or policy basis is subject to review. ***.
- Where the severity of the sentence shocks the judicial conscience or greatly exceeds penalties usually exacted for similar offenses or defendants, and the record fails to justify and the trial court fails to explain the imposition of the sentence, the appellate court’s can reverse the sentence.***. *Firouzmandi*, at ¶56 (Internal citations omitted).

Indeed, the Fifth District noted that while these examples are “by no means *** an exhaustive or exclusive list of the circumstances under which an appellate court may find the trial court abused its discretion in the imposition of sentence in a particular case,” they “demonstrate that appellant’s right to a meaningful appellate review have not been impeded by the decision in *Foster*. Accordingly, nothing in the *Foster* decision prevents an appellate court from conducting an effective and meaningful appellate review of the final judgments, orders, or sentences of inferior courts.” *Firouzmandi*, at ¶56.

Moreover, it has been recognized that the abuse of discretion standard has been preserved by R.C. 2929.12(A). R.C. 2929.12(A) provides that “a court that imposes a sentence *** for a felony has *discretion* to determine the *most effective way* to comply with the purposes and principles of sentencing set forth in R.C. 2929.11[,]” through the application of the seriousness and recidivism factors set forth in R.C. 2929.12. (Emphasis added). See Griffin and Katz, *Ohio Felony Sentencing Law*, (2007 Ed.), § 10:21. See also *State v. Carter*, 11th Dist. No. 2006-P-0056, 2007-Ohio-4953, at FN 1 (recognizing the discretion vested in trial courts through R.C. 2929.12(A) “would indicate an intent by the General Assembly that appellate courts should review the application of the R.C. 2929.12 factors for abuse of discretion.”); *State v. Daugherty* (1999), 4th Dist. No. 99CA09, at *3.

Accordingly, an abuse of discretion standard of review is the most practical form of review for felony sentences imposed within the allowable statutory range. In challenging sentences imposed within the range, most defendants base their arguments on alleged violations of R.C. 2929.12, claiming that the trial court failed to properly balance the seriousness and recidivism factors and a shorter sentence should have been imposed. Even consistency and proportionality challenges under R.C. 2929.11 are based on the

seriousness and recidivism factors in R.C. 2929.12. Because a trial court has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth R.C. 2929.11, through its consideration of R.C. 2929.12's discretionary factors, appellate review of such challenges should be for an abuse of that discretion.

In *Payne*, this Court stated that “[s]ince *Foster*, trial courts no longer must navigate a series of criteria that dictate the sentence and ignore judicial discretion.” *Id.* at ¶25. Applying an abuse of discretion standard ensures that the judicial discretion intended by R.C. 2929.12 is not ignored, that the purposes and principles of felony sentencing are achieved, and maintains the trial court's full discretion to impose a sentence within the statutory range as set forth in *Foster*.

E. R.C. 2953.08(G)(2)(b)'s clear and convincing as contrary to law standard of review may still apply post-*Foster*, but only in limited circumstances.

In contrast, panels from the First, Third, Fourth, Tenth, Eighth, and Twelfth Appellate Districts have ruled that appellate courts are to continue to review felony sentences under the clear and convincing standard of review set forth in R.C. 2953.08(G)(2). See *State v. Sheppard*, 1st Dist. Nos. C-060042, C-060066, 2007-Ohio-24, at ¶16; *State v. Ramos*, 3rd Dist. No. 4-06-24, 2007-Ohio-767, at ¶18-23; *State v. Vickroy*, 4th Dist. No. 06CA4, 2006-Ohio-5461, at ¶15-16; *State v. Kravochuck*, 8th Dist. No. 89294, 2007-Ohio-6323, at ¶11-14; *State v. Burton*, 10th Dist. No. 06AP-690, 2007-Ohio-1941, at ¶29; *State v. Grays*, 12th Dist. No. CA2005-07-187, 2006-Ohio-2246, at ¶6, 21. These courts have relied on *Foster's* abrogation of R.C. 2953.08(G)(2) and, in applying the clear and convincing as contrary to law standard, have “looked to the record to determine whether the sentencing

court considered and properly applied the statutory guidelines and whether the sentence is otherwise contrary to law.” *Vickroy*, at ¶16; *Burton*, at ¶19.

“Clear and convincing evidence is that ‘which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought be established.’” *Ramos*, at ¶18. “Contrary to law” has been defined as “a sentencing decision [that] manifestly ignores an issue or factor which a statute requires a court to consider.” *State v. Furrow*, 2nd Dist. No. 03CA19, 2004-Ohio-5272, at ¶11, citing *Griffin and Katz*, Ohio Felony Sentencing Law (2002 Ed.), §T 9.7.

Presumably, post-*Foster*, a sentence can be contrary to law under R.C. 2953.08(G)(2)(b), but only in limited circumstances. Indeed, the Eleventh District Court of Appeals has recognized 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).

In sum, we continue to adhere to our prior holdings in which we have applied the abuse of discretion standard of review in a post-*Foster* appeal where the trial court considered R.C. 2929.11 and the factors set forth in R.C. 2929.12, but recognize that the clear and convincing standard of review remains viable in those very limited circumstances where the sentence is contrary to law. *State v. Payne*, 11th Dist. No. 2006-L-272, 2007-Ohio-6740, at ¶19-20.

See also *State v. Nayar*, 4th Dist. No. 07CA6, 2007-Ohio-6092, at ¶32-33 (applying a “hybrid” approach and holding “we afford the trial court no deference in its application of

the statutory analytical requirements that survive post-*Foster*. However, in conjunction with *Foster's* mandate, we afford trial courts the most deferential review in their ultimate decisions about the length of sentences if they have applied the proper analysis in reaching those decisions.”). Moreover, a sentence can also be said to be contrary to law if it were imposed “base[d] *** upon the race, ethnic background, gender, or religion of the offender[.]” as prohibited by R.C. 2929.11(C).

F. The Eleventh District properly applied an abuse of discretion standard of review to appellant’s sentence. Her sentence was within the authorized statutory range and the trial court considered R.C. 2929.11 and R.C. 2929.12.

Here, appellant argued on appeal that her sentence violated R.C. 2929.11(B) in that it was inconsistent with and disproportionate to sentences imposed on similarly situated offenders who committed similar crimes. In effect, she argued that the seriousness and recidivism factors, set forth in R.C. 2929.12, indicate that a shorter sentence was appropriate. The Eleventh District Court of Appeals reviewed the trial court’s sentence for an abuse of discretion and found that appellant’s sentence was within the statutory range of penalties for the offenses to which she pleaded guilty, and that the trial court properly considered and applied the statutory sentencing factors before imposing appellant’s sentence.

In rendering its decision, the court of appeals conducted a thorough review of the purposes and principles of sentencing in R.C. 2929.11(A) and (B), the relevant sentencing statutes, and the law on consistency: “consistency is not derived from the trial court’s comparison of the current case to prior sentences for similar offenders and similar offenses. *** Rather, it is the trial court’s proper application of the statutory sentencing

guidelines that ensures consistency. *** Thus, in order to show a sentence is inconsistent, a defendant must show the trial court failed to properly consider the sentencing statutory factors and guidelines." *Kalish*, at ¶¶15-18.

Appellant pleaded guilty to aggravated vehicular homicide with a specification for driving under suspension, a felony of the second degree, subjecting her to a mandatory prison term of two, three, four, five, six, seven, or eight years. R.C. 2929.14(A)(2). Appellant also pleaded guilty to driving with a prohibited concentration of alcohol in bodily substances, a misdemeanor of the first degree, subjecting her to a maximum prison sentence of six months. R.C. 4511.19(A)(1)(b). She was sentenced to five years in prison for aggravated vehicular homicide, and six months on the misdemeanor, to run concurrently. Appellant's sentence was within the permissible ranges for each of the offenses to which she pleaded guilty and within the broad sentencing discretion of the trial court. But the appellate court did not stop its review there, as appellant incorrectly asserts. (Appellant's Merit Brief, pgs. 8, 10).

The Eleventh District went on to note that the record indicated the trial court considered and applied the appropriate statutory guidelines in R.C. 2929.11 and R.C. 2929.12. The trial court noted that "it has considered the presentence report and investigation, the psychological evaluation, drug and alcohol evaluations that were prepared, considered the victim impact statement, considered all the letters that I received on behalf of the victim's family and I have considered all of the letters I have received on behalf of the Defendant." T.p. 39. The trial court went on to state that it had considered the purposes and principles of felony sentencing under R.C. 2929.11, and emphasized the need to impose a consistent sentence. *Kalish*, at ¶21; T.p. 39-40. The trial court also

thoroughly considered and balanced the seriousness and recidivism factors set forth in R.C. 2929.12(B)-(E). *Id.*; T.p. 40-42. Under factors indicating a less likelihood of recidivism, the trial court recognized appellant led a law abiding life and showed genuine remorse. *Id.* at ¶22; T.p. 41.

But under factors indicating a higher likelihood of recidivism, the court could not ignore one significant fact: “appellant was on bail for another OVI offense when she committed the instant offense, and that she committed this offense while she was driving under suspension.” *Id.*; T.p. 40-41, 42. Appellant pleaded guilty to the specification for driving under suspension, thus the trial court “discounted her excuse that she felt her driving privileges authorized her to drive to and from a date during which time she consumed alcohol.” *Id.*; T.p. 40-41. The trial court concluded that after weighing these factors, a term of imprisonment was consistent with the purposes and principles of sentencing, and that appellant was not amenable to any available community control sanction. *Id.* at ¶23; T.p. 41-42. The trial court’s judgment entry of sentence reiterated its consideration of R.C. 2929.11 and R.C. 2929.12. (Appellant’s Appendix, pgs. 14-17).

Further, the appellate court went on to state that, “while a numerical comparison to other sentences is [not] dispositive of the issue of consistency, we note that courts have imposed similar sentences for similar offenses.” *Kalish*, at ¶25. Indeed, the Eleventh District cited other cases where defendants received terms in the mid-range of sentencing options for second degree aggravated vehicular homicide counts. *Id.* The appellate court also stated that “[e]ven 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.” *Id.*

Nothing supports appellant's claim that the trial court erred by imposing an inconsistent sentence in violation of R.C. 2929.11(B). The trial court complied with the statutory requirements and it imposed a legal sentence. Indeed, nothing in the record suggested that the trial court refused or failed to consider a statute or factor it was required to consider or that the sentence was unreasonable, grossly disproportionate, or shocking to the judicial conscience. This case simply presented a situation where a more than the minimum sentence was imposed within the authorized statutory range, and where the record supported the trial court's proper and thorough consideration of R.C. 2929.11 and R.C. 2929.12.

This case also presented a situation where the sentence was argued to be inconsistent with other sentences imposed on similar offenders for similar offenses. In making such a challenge, appellant essentially argued the court improperly weighed the seriousness and recidivism factors under R.C. 2929.12 and a shorter sentence should have been imposed. As discussed above, a trial court's consideration and balance of the factors in R.C. 2929.12, which certainly vary from case to case, should be reviewed for an abuse of discretion. Indeed, R.C. 2929.12(A) places discretion with the trial court to determine the most effective way to comply with the purposes and principles of felony sentencing in R.C. 2929.11, including ensuring consistent sentences, through its consideration of R.C. 2929.12's discretionary factors. Therefore, the application of an abuse of discretion standard of review was appropriate. See *Payne*, 2007-Ohio-6740, at ¶19-20.

While R.C. 2953.08(G)(2) remains fully applicable to post-*Foster* sentencing challenges under R.C. 2929.13 and R.C. 2929.20, it runs contrary to *Foster's* mandate that

trial courts have full discretion to impose prison sentences within the statutory range. Its intended purpose was to review those non-discretionary findings mandated by the General Assembly, which this Court has found unconstitutional. R.C. 2953.08(G)(2)'s clear and convincing standard does not further the appellate review of the discretionary considerations set forth in R.C. 2929.12, nor does it ensure that the purposes and principles of felony sentencing under R.C. 2929.11 are achieved. Rather, it effectively impedes, and essentially ignores, a trial court's discretion in fashioning an appropriate sentence within the authorized range. If, however, a record reveals that a trial court failed to even consider either R.C. 2929.11 or R.C. 2929.12, or any other applicable statutory section, or sentenced a defendant outside of the authorized range, then a sentence can be reviewed under the clear and convincing as contrary to law standard. See *Payne*, 2007-Ohio-6740, at ¶¶19-20.

A clear and convincing as contrary to law standard does not apply to appellant's case, nor would it have afforded appellant any more meaningful review than that which was afforded to her by the Eleventh District under the abuse of discretion standard. As indicated above, the record showed the sentencing court considered and properly applied the statutory guidelines under R.C. 2929.11 and R.C. 2929.12. While it was not required to make any findings regarding sentencing appellant to a more than the minimum term of imprisonment, the court was required to and did consider R.C. 2929.11 and R.C. 2929.12, as evidenced by the sentencing hearing as well as the judgment entry. Nothing was presented to show that the court failed to consider R.C. 2929.11 and R.C. 2929.12 or any other applicable statutory section, that it "manifestly ignore[d] an issue or factor which a statute requires a court to consider," or that appellant was sentenced outside the statutory

range. *Furrow*, 2004-Ohio-5272. Thus, it simply cannot be said that appellant's sentence was imposed contrary to law.

PROPOSITION OF LAW NO. II

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

At issue in the second proposition of law, is whether the Eleventh District Court of Appeals violated the doctrines of stare decisis and separation of powers. Appellant contends that based on the appellate court's alleged misinterpretation of *Foster's* impact on the sentencing review statute, R.C. 2953.08(G), the appellate court improperly "overruled" its prior decisions, as well as decisions from this Court, and that it violated the separation of powers doctrine by ignoring the plain language mandated in R.C. 2953.08(G)(2). For the reasons discussed below, appellant's argument is without merit.

A. The Eleventh District's decision to reevaluate its prior holdings and depart from those that were no longer compatible with *Foster's* mandate is not a violation of the doctrine of stare decisis.

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

justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it. ***.” *Burton*, at ¶22, quoting *Galatis*, at ¶48.

Here, the majority did not specifically “overrule” its prior decisions regarding the standard of review under R.C. 2953.08(G), but merely *modified* its earlier rulings rendered soon after *Foster* was released that applied the clear and convincing standard of review. *Kalish*, at ¶14. Indeed, the appellate court stated that “[t]o the extent our holding concerning the standard of review is inconsistent with any previous decision of this court, such decision is modified to be consistent with our holding today.” *Id.* This was done in an effort to bring its sentencing decisions in line with the mandates set forth in *Foster*.

Just like the Eleventh District did below, the Tenth District Court of Appeals has also reconsidered some of its previous holdings. In *Burton*, the appellate court overruled its prior decisions that held *Foster* altered the standard of appellate review to abuse of discretion. *Burton*, at ¶21-29 (concluding that it should not continue to apply its prior decisions which held that an abuse of discretion standard applies to post-*Foster* felony sentencing appeals and holding that the clear and convincing standard enunciated in R.C. 2953.08(G) applies to post-*Foster* sentencing appeals). While the Eleventh District did not expressly consider the *Galatis* factors in its opinion in *Kalish*, nothing indicates that the court had to expressly engage in such analysis. Moreover, nothing indicates that the court ignored the doctrine of stare decisis. (Appellant’s Merit Brief, pg. 15). In fact, the more logically sound conclusion is that prior to issuing its opinion, the appellate court determined

that it was not violating the principle of stare decisis. Indeed, just as the *Burton* court found no violation in overruling its prior decisions, the same can be said for the Eleventh District.

As to the first prong of *Galatis*, the Eleventh District's prior decisions reviewing felony sentences de novo and not disturbing a trial court's determination, absent clear and convincing evidence that the record did not support the term at issue, were no longer consistent with the mandate set forth by this Court in *Foster*, to wit: trial courts are vested with full discretion to impose a sentence within the statutory range. *Kalish*, at ¶14. *Foster* changed over a decade of sentencing law in this state. The appellate court was permitted to reexamine its prior position regarding the standard of review, particularly in light of more recent nuances pertaining to the *Foster* chain of cases and their holdings. *Id.* (citing to four other appellate districts applying an abuse of discretion standard in reviewing a post-*Foster* sentence within the statutory range). There was simply nothing improper about the Eleventh District readdressing its prior decisions on evolving questions and deciding to depart from its prior holdings.

As to the second prong of *Galatis*, continuing to adhere to the clear and convincing standard for all post-*Foster* sentencing appeals "defies practical workability" in reviewing sentencing appeals. As the *Burton* court noted, "[i]n considering this prong, we evaluate whether 'widespread criticism' of the pertinent decisions exists from other jurisdictions, whether 'numerous conflicts' with the pertinent decisions have emanated from the courts, and whether the pertinent decisions have created 'massive and widespread confusion[.]'" *Id.* at ¶23, citing *Galatis*, at ¶50, 845 N.E.2d 470. Although the appellate court did not specify the prior decisions it was modifying, it cannot be said they were subject to the

“massive” or “widespread” criticism at issue in *Galatis*. Moreover, as set forth in the first proposition of law, the Ohio appellate courts are clearly in conflict as to the appropriate standard of review for felony sentences post-*Foster*. The majority of districts, however, have found *Foster* altered the appellate standard of review to abuse of discretion. Again, *Foster* changed over a decade of sentencing law in this state. It is no surprise that courts are reevaluating their prior decisions to bring them into line with *Foster* and its progeny.

As to the third and final prong of *Galatis*, abandoning its prior decisions does not create an “undue hardship.” As noted in *Burton*, “[i]n considering this prong, we analyze whether the precedence ‘has become so embedded, so accepted, so fundamental to everyone’s expectations that to change it would produce not just readjustments, but practical world dislocations.’” *Id.* at ¶126, citing *Galatis*, at ¶58. This Court decided *Foster* on February 27, 2006 and *Kalish* was decided July 27, 2007. Thus, not enough time passed for such cases to become embedded and accepted as fundamental law. Moreover, because *Foster* changed Ohio’s sentencing landscape, it was the appellate court’s duty to reexamine its former decisions and depart from those holdings that were no longer compatible.

To find a violation of the doctrine of stare decisis in this case would inextricably bind an appellate court to its earlier decisions where it did not have the benefit, based on the passage of time, to consider evolving questions or the actions taken by other appellate courts. Indeed, an appellate court’s ability to resolve conflicting decisions with other appellate districts, and possibly reevaluate its position, would be severely limited. This Court’s pivotal announcement in *Foster* altered Ohio’s sentencing statutes and its effects

are still being felt by the lower courts. In a circumstance such as this, an appellate court's right, duty, and ability to reexamine its prior holdings and make changes it deems necessary to bring its decisions in line with mandates set forth by a superior court should not be hindered.

B. Inferior courts are bound to follow this Court's mandates. As such, the Eleventh District's decision to employ an abuse of discretion standard is consistent with the mandate in *Foster*, is supported by statutory authority, and does not violate the doctrine of separation of powers.

Appellant also contends that the appellate court's decision was a violation of the separation of powers doctrine to the extent that the court allegedly "overrule[d] plain language mandated by [R.C. 2953.08(G)]" and by "rewriting legislation." (Appellant's Merit Brief, pgs. 15-16). The Ohio Constitution does not have an overt provision declaring a separation of powers doctrine, but the concept is firmly established in those sections defining the substance and scope of powers granted to the three branches of state government. These sections "recognize that the executive, legislative, and judicial branches of our government have their own unique powers and duties that are separate and apart from the others." *State v. Thompson* (2001), 92 Ohio St.3d 584, 586, 752 N.E.2d 276. The purpose is "to create a system of checks and balances so that each branch maintains its integrity and independence." *Id.* Under the Ohio Constitution, the General Assembly is vested with the power to make laws. Section 1, Article II, Ohio Constitution. Conversely, "the interpretation of the laws is the proper and peculiar province of the courts." *State ex rel. Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 493, 715 N.E.2d 1062.

Appellant's assertion that the appellate court violated the doctrine of separation of powers fails for two reasons. First, the appellate court did not "overrule" R.C. 2953.08(G), but simply rendered a decision it found, along with several other appellate courts, to be compatible and consistent with the mandate in *Foster*, to wit: that trial courts have full discretion to impose a sentence within the statutory range. Indeed, numerous appellate courts have recognized that, as inferior courts, they are bound to follow the Ohio Supreme Court's mandates. See *State v. Spicuzza*, 11th Dist. No. 2006-L-141, 2007-Ohio-783, at ¶24, citing *State v. Hildreth*, 9th Dist. No. 06CA8879, 2007-Ohio-5058, at ¶10 ("[I]nferior courts are bound by Supreme Court of Ohio directives."); See also *State v. Gibson*, 10th Dist. No. 06AP-509, 2006-Ohio-6899, at ¶15 ("[w]e are bound to apply *Foster* as it was written.").

Moreover, in rendering its decision in *Foster*, this Court went to great lengths to explain that it was mindful of the doctrine of separation of powers and that it in no way was violating said doctrine:

The excised portions remove only the presumptive and judicial findings that relate to "upward departures," that is, the findings necessary to increase the potential prison penalty. We add no language, and the vast majority of S.B. 2, which is capable of being read and standing alone, is left in place.

Accordingly, we have concluded that trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences. By vesting sentencing judges with full discretion, it may be argued, this remedy vitiates S.B. 2's goals, particularly with respect to reducing sentencing disparities and promoting uniformity. *** It may well be that in the future, the Ohio Criminal Sentencing Commission may recommend *Blakely*-compliant statutory modifications to the General Assembly that will counteract these, among

other, concerns. Nevertheless, we are constrained by the principles of separation of powers and cannot rewrite the statutes.

Severance also is the remedy that will best preserve the paramount goals of community safety and appropriate punishment and the major elements of our sentencing code. Removing presumptive terms and preserving the remainder of the sentencing provisions of the code will most effectively preserve the General Assembly's goal of truth in sentencing. However tempting it may be for this court to reconfigure the sentencing code to cause the least impact on our criminal-justice system, we must adhere to our traditional role. Our remedy does not rewrite the statutes but leaves courts with full discretion to impose a prison term within the basic ranges of R.C. 2929.14(A) based upon a jury verdict or admission of the defendant without the mandated judicial findings that *Blakely* prohibits. *Foster*, at ¶¶98, 100, 102.

Based on the foregoing, it follows that in adhering to the mandates set forth by this Court in *Foster*, the appellate court cannot be said to have violated the doctrine of separation of powers.

Second, an apparent conflict exists between R.C. 2929.12(A) and R.C. 2953.08(G)(2). As discussed in the first proposition of law, R.C. 2929.12(A) specifies that "a court that imposes a sentence *** on 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 R.C. 2929.11 of the Revised Code." In exercising that discretion, the court shall consider the seriousness and recidivism factors set forth in R.C. 2929.12(B)-(E). This language "would indicate an intent by the General Assembly that appellate courts should review the application of R.C. 2929.12 factors for abuse of discretion." *Carter*, 2007-Ohio-4953, at FN 1; See also Griffin and Katz, *Ohio Felony Sentencing Law*, (2007 Ed.), §10:21.

In contrast, R.C. 2953.08(G)(2) provides that "[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 either of the following ***.” While this statute would appear to condemn the application of an abuse of discretion standard for felony sentences, it runs contrary to the specific language set forth in R.C. 2929.12(A). “Where statutes conflict, the more specific provision controls the more general provision.” *State ex rel. Brinda v. Lorain Cty. Bd. of Elections*, 115 Ohio St.3d 299, 2007-Ohio-5228, 874 N.E.2d 1205, at ¶21 (Citations omitted). The discretionary language in R.C. 2929.12(A) applies specifically to R.C. 2929.11 and R.C. 2929.12, thereby taking precedence over the general language of R.C. 2953.08(G)(2) for appeals involving sentencing challenges based on the non-discretionary findings once mandated by the General Assembly, but now found unconstitutional by this Court. Accordingly, the appellate court did not violate the doctrine of separation of powers. Not only was the Eleventh District’s decision to employ an abuse of discretion standard consistent with the mandate in *Foster*, but statutory authority also supports it.

CONCLUSION

Based upon the foregoing analysis, the State of Ohio, Plaintiff-Appellee herein, respectfully requests that this Honorable Court affirm the decision of the Eleventh District Court of Appeals.

Respectfully submitted,

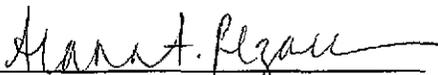
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PROOF OF SERVICE

A copy of the foregoing Merit Brief of Appellee, State of Ohio, was sent by regular U.S. Mail, postage prepaid, to counsel for the appellee, Richard J. Perez, Esquire, 4230 State Route 306, Suite 240, Willoughby, OH 44094, and, Jesse M. Schmidt, Esquire, 55 Public Square, Suite 1414, Cleveland, OH 44113, on this 14th day of March, 2008.


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