

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO : Case No. 08-810  
: :  
Appellee : On Appeal from the  
: : Geauga County Court of Appeals,  
-vs- : Eleventh Appellate District  
: :  
WILLIAM J. PRICE : Court of Appeals  
: : Case No. 2007-G-2785  
Appellant :  
:

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**MEMORANDUM IN OPPOSITION OF JURISDICTION  
OF APPELLEE STATE OF OHIO**

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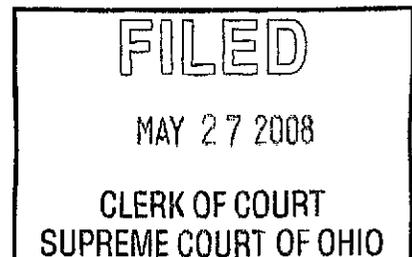


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**EXPLANATION AS TO WHY THIS CASE IS NOT A CASE THAT INVOLVES  
SUBSTANTIAL CONSTITUTIONAL QUESTIONS OR MATTERS OF  
GENERAL AND PUBLIC INTEREST**

This case concerned Appellant, who while driving with a blood alcohol content of more than three times the legal limit, struck a motorcycle head on killing the driver instantly and severely injuring his female passenger. The matter was the subject of a protracted suppression hearing. The Motion to Suppress filed by Appellant was a laundry list of alleged violations of the requisite ODH regulations, OAC 3701-53-03; 3701-53-05; 3701-53-06; 3701-53-07; 3701-53-08; and 3701-53-09.

In his brief to the Court of Appeals, Appellant argued among other things, that the State of Ohio failed to show substantial compliance with the OAC as it failed to prove that the test manual was on file in the lab where the test was to be performed and that the onsite manual applied to a different model of gas chromatograph than that which was used to test his blood sample and that the State failed to comply with OAC 3701-53-01(A) and 3701-53-04(E) when it failed to admit evidence of the gas chromatograph's maintenance. The Court of Appeals aptly noted that Appellant had failed to raise these issues at all in his Motion to Suppress and therefore the State of Ohio was not put on sufficient notice regarding those alleged violations. It should be noted that the Motion to Suppress was very specific about the violations that were alleged. Interestingly, there was absolutely no mention whatsoever of OAC 3701-53-01 or OAC 3701-53-04.

Appellant now argues that his due process rights have been violated by the Court of Appeals failing to find merit with an issue that the State of Ohio was not put on notice about. Essentially, Appellant's argument, if followed, would create a due process issue for the State of Ohio. Appellant argues waiver as if the State of Ohio were the Appellant here and is now

making arguments for the first time that weren't raised initially at the trial court level or in the Court of Appeals. That would be an example of waiver. Instead, Appellant argues that because the State of Ohio espoused a different argument than that relied upon by the Court of Appeals, that by not making the correct legal argument, the State of Ohio waived the right to have the Court of Appeals apply the law correctly. Absurd.

Therefore, this case does not involve a substantial constitutional question and is not one of general and public interest, and this court is respectfully urged to decline to accept jurisdiction in this case.

### **STATEMENT OF THE CASE AND FACTS**

On August, 13, 2006, Appellant, while intoxicated, caused a motor vehicle crash, resulting in the death of one person and the serious, debilitating injuries to another. Tpr. James Smith, of the Ohio State Highway Patrol, was dispatched to the crash site. Upon his arrival, Tpr. Smith observed a motorcycle and two occupants lying in the roadway. One of the occupants, a female, was being treated by rescue personnel and the male occupant was deceased. Tpr. Smith also observed a rust colored SUV in the roadway and Appellant, who had been operating the SUV, was sitting on a guard rail. Upon approaching Appellant, Tpr. Smith observed that Appellant was unresponsive, his eyes were glassy and bloodshot, his speech was slurred, and there was a strong odor of alcohol about his person. Three bottles of vodka were located in Appellant's SUV. Based upon his observations at the scene, Tpr. Smith felt Appellant was under the influence of alcohol, and sought to read Appellant a BMV 2255 form in order to obtain a blood sample. At this point, as Appellant had been transported to the hospital, Tpr. Smith followed Appellant to Geauga Hospital. Prior to arriving at the hospital, Tpr. Smith

stopped briefly at his patrol post to pick up an additional blood sampling kit, verified it was a current, non-expired kit, and then proceeded to the hospital.

Tpr. Smith testified that whenever he or anyone employed at his highway patrol post wants to test for the presence of drugs or alcohol in a person's blood or urine, they use a blood kit supplied by the department. Tpr. Smith testified that the blood kit is contained in a box demarcated with a mailing address and prepaid postage so that once it has been used it can be placed in the mail. Tpr. Smith explained that the kit contains a container for collecting urine, a tube for collecting blood, a non-alcohol cleansing swab, a property control form and evidence label/seals.

At the hospital, Tpr. Smith with a witness, read Appellant the BMV 2255 form and informed him he was under arrest. Tpr. Smith received consent from Appellant to draw his blood. Before handing the blood sampling kit over to draw the blood, Tpr. Smith inspected the tube, determining that the vial was not broken, the seal was intact and the tube contained a powder. The blood sample was drawn by medical personnel using the cleansing pad included in the kit and a dry, sterile needle and the tube was then handed to Tpr. Smith at 3:35 p.m. The label was filled out and placed on the tube by Tpr. Smith who also filled out the property control form and placed it back into the box along with the tube.

After obtaining the blood sample, Tpr. Smith returned to the scene of the crash, during which time, the blood sample was kept in his air-conditioned patrol car. After completing his responsibilities at the crash scene, Tpr. Smith left the scene and placed the blood sample in a mailbox at approximately 10:00 p.m.

Jeffrey Turnau, a criminalist employed by the State Highway Patrol Crime Lab, testified regarding how the blood sample was received by his office and what occurred with it once it

arrived at the Ohio State Highway Patrol crime lab. Mr. Turnau testified that Appellant's blood sample arrived at the crime lab on August, 21, 2006. It is undisputed that the sample was in transit for eight days. Mr. Turnau testified that it is not unusual to have a sample in transit for eight, even up to twelve days.

Mr. Turnau testified that the gray top on the blood sample indicates the presence of potassium oxalate, an anti-coagulant, and sodium fluoride, a blood preservative. Mr. Turnau testified that if an anti-coagulant was not present, he would have been able to notice coagulation when attempting to take a sample of blood. Douglas Rohde, an expert witness in toxicology and Senior Forensic Chemist Toxicologist at the Lake County Crime Lab, confirmed that coagulation would have been visible if potassium oxalate had not been present. Robert Williams, Appellant's own witness in toxicology, testified that the gray top blood sample vial was indicative of the presence of both sodium fluoride and potassium oxalate, and confirmed Mr. Turnau's testimony that, because a gray-topped blood sample indicates the presence of those chemicals, it is not routine practice to test for their presence.

Mr. Turnau also testified that while the sample was not tested for the presence of the preservative sodium fluoride, if sodium fluoride had not been present and fermentation had occurred, the effect of the fermentation would have been observable. The record repeatedly demonstrates that the presence of sodium fluoride acts in the place of refrigeration, inhibiting bacterial growth regardless of any temperature that the sample may be subjected to. Mr. Turnau also testified that even *if* sodium fluoride had not been present, this error would only act to the *benefit* of Appellant, as a test would have resulted in a lower blood-alcohol level.

Mr. Turnau testified that he has been a criminalist for the Ohio State Highway Patrol crime lab for nineteen years. Mr. Turnau testified that he holds a laboratory director's permit

issued by the Ohio Department of Health for alcohol testing and held the same permit during the month of August, 2006. Mr. Turnau testified that the lab utilizes the Gas Chromatography method. Mr. Turnau further testified that he, in the course of his career, has tested approximately 30,000 blood or urine samples for the presence of drugs or alcohol and has testified over 200 times in Ohio State and federal courts regarding his testing.

Mr. Turnau then testified as to how samples are typically received in his office and how they are handled. He indicated virtually all of the samples arrive through the U.S. Post Office, where they are delivered to Ohio State Highway Patrol Headquarters and are then picked up by a staff person during normal weekday business hours. Mr. Turnau then explained what happens to a sample after it arrives at the lab. He explained that the sample is immediately refrigerated where then each sample is removed one at a time from the refrigerator and is logged in by a staff member. The sample is then tested or placed back into the refrigerator.

Mr. Turnau testified as to the actual testing process, including the calibration that is done prior to each test. Mr. Turnau also testified that the policies and procedures manual for the lab is located “on a shelf just right above where I sit to perform the alcohol testing.” And that as a result it was available to him at all times during his testing procedures.

Mr. Turnau identified the blood sample of Appellant and testified that he tested the sample on August 21, 2006. After analyzing Appellant’s blood sample, it was revealed that Appellant had a blood-alcohol level of .244.

### **ARGUMENT IN RESPONSE TO APPELLANT’S PROPOSITION OF LAW NO. 1**

**A COURT OF APPEALS ACTS PROPERLY WHEN IT RENDERS A DECISION BASED UPON THE LAW.**

The Motion to Suppress filed by Appellant was a laundry list of alleged violations of the requisite ODH regulations, OAC 3701-53-03; 3701-53-05; 3701-53-06; 3701-53-07; 3701-53-

08; and 3701-53-09. The State of Ohio filed a written response addressing those specific alleged violations. At the suppression hearing, the State of Ohio introduced evidence that the blood sample in the case was tested using a Perkin-Elmer 8500 machine and that the policy and procedure manual relating to that machine was located in the testing area. Defense counsel questioned whether or not the manual located in the lab was the appropriate manual for the machine and further questioned the existence and/or whereabouts of maintenance or repair records of the gas chromatograph that was used in this particular case.

In his brief to the Court of Appeals, Appellant argued among other things, that the State of Ohio failed to show substantial compliance with the OAC as it failed to prove that the test manual was on file in the lab where the test was to be performed and that the onsite manual applied to a different model of gas chromatograph than that which was used to test his blood sample and that the State failed to comply with OAC 3701-53-01(A) and 3701-53-04(E) when it failed to admit evidence of the gas chromatograph's maintenance. The Court of Appeals aptly noted that Appellant had failed to raise these issues at all in his Motion to Suppress and therefore the State of Ohio was not put on sufficient notice regarding those alleged violations. It should be noted that the Motion to Suppress was very specific about the violations that were alleged. Interestingly, there was absolutely no mention whatsoever of 3701-53-01 or 3701-53-04.

Appellant now argues that his due process rights have been violated by the Court of Appeals failing to find merit with an issue that the State of Ohio was not put on notice about. Essentially, Appellant's argument, if followed, would create a due process issue for the State of Ohio. Appellant argues waiver as if the State of Ohio were the Appellant here and is now making arguments for the first time that weren't raised first at the trial court level or in the Court of Appeals. That would be an example of waiver. Instead, Appellant argues that because the

State of Ohio espoused a different argument than that relied upon by the Court of Appeals, that by not making the correct legal argument, the State of Ohio waived the right to have the Court of Appeals apply the law correctly.

The trial judge indicated in its “Findings of Facts and Conclusions of Law” that the evidence adduced by the State of Ohio at the suppression hearing in this case, ‘approached strict compliance”, therefore overruling the Motion to Suppress. The Court of Appeals found that in keeping with *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372 the State of Ohio produced sufficient evidence to establish substantial compliance with the requisite administrative regulations.

Crim. R. 47 requires a motion to “state with particularity the grounds upon which it is made.” Additionally, it is well-settled that a motion to suppress must state its legal and factual bases with sufficient particularity to place the prosecutor and the court on notice as to the alleged wrongdoings of law enforcement. *State v. Shindler*, 70 Ohio St.3d 54, 1994-Ohio-452. The Motion to Suppress here did not indicate any issue with OAC 3701-53-01 or OAC 3701-53-04 therefore it is clearly the Appellant, not the State of Ohio who waived any argument with regard to these issues. As an aside, the State of Ohio feels compelled at this juncture to correct a misrepresentation made by Appellant. Appellant indicates that the “trial court in the instant case sanctioned the state for a discovery violation...” This is simply not true. If Appellant had an issue with what was or was not provided to him in discovery, he had a remedy. For whatever reason, that remedy was not utilized. Once again, Appellant attempts to shift the blame to the State of Ohio. This Court should see that argument for what it is and deny jurisdiction over the matter.

## **ARGUMENT IN RESPONSE TO APPELLANT'S PROPOSITION OF LAW NO. 2**

A MOTION TO SUPPRESS IS PROPERLY OVERRULED WHEN THE RECORD REVEALS THE STATE DEMONSTRATED SUBSTANTIAL COMPLIANCE WITH THE REQUISITE OHIO ADMINISTRATIVE CODE SECTIONS.

It is well-established in the Eleventh District and Ohio that substantial compliance with the procedure mandated by the Ohio Administrative Code at 3701-53-01 et seq. is sufficient for the admissibility of alcohol testing results. *State v. Click*, Portage App. No. 99-P-0111, unreported; *See also State v. Plummer* (1986), 22 Ohio St.3d 292, 490 N.E.2d 902. In *Plummer*, the appellant argued that the State of Ohio had not substantially complied with OAC 3701-53-05 in that the sample was not placed in the mail until almost ninety minutes after its collection and that there was no evidence that the sample was refrigerated immediately upon its receipt by the crime lab and prior to testing. The Ohio Supreme Court opined that, "if \* \* \* we were to agree with appellant that any deviation from this regulation rendered the results of a urine analysis inadmissible, we would be ignoring the fact that strict compliance is not always realistically or humanly possible." *Id.* at 294. The Ohio Supreme Court held that absent a showing of prejudice to defendant, the results of an alcohol test administered in substantial compliance with the Ohio Administrative Code are admissible in a prosecution under R.C. § 4511.19. *Id.* at 295.

In determining substantial compliance, a reviewing court can apply two tests. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372.

One approach is to consider whether the noncompliance rendered the test results unreliable. *See, e.g., State v. Gray* (1980) [citation omitted]. Under this approach, a court will conclude that the state has substantially complied with the Department of Health regulations if the alleged deviation did not affect the reliability of the test results. *Id.* The other approach for determining substantial compliance is to consider whether the alleged deviation prejudiced the defendant. *See, e.g., State v. Zuzga* (2001), [citation omitted]. Under this approach, a court will conclude that the state has substantially complied with the Department of Health regulations so long as the alleged deviation did not cause an erroneously higher test result. *Id.*

*Id.* at ¶ 28.

Once the State demonstrates substantial compliance, it creates a presumption of admissibility of the test results. *State v. Brown* (1996), 109 Ohio App.3d 629, 672 N.E.2d 1050. The burden then shifts to the defendant to rebut that presumption by demonstrating that he was prejudiced by anything less than strict compliance. *Id.* In reaching its determination in the case *sub judice*, the trial court concluded that the procedures followed were “not just substantial, but strict compliance with such testing requirements.”

Appellant first raises the issue that the manual present at the Ohio State Highway Patrol crime lab was insufficient pursuant to the requirements of the Ohio Administrative Code. During his testimony, Mr. Turnau stated that the sample of blood was analyzed on a Perkin-Elmer 8500 gas chromatograph. Mr. Turnau testified that while the listed number on the procedure manual present at the test site was 8410, the manual was intended for the entire 8000 series. When questioned on the difference between the 8410 and 8500, Mr. Turnau stated that the 8410 and the 8500 are in fact the “*same instrument.*” (emphasis added). He explained that the updated model number was not the result of a new testing instrument, but the result of “a new board put in, a software upgrade, some kind of change.” Mr. Turnau testified that the Perkin-Elmer machine is the “same instrument that we have had for 20 years, almost, . . .” Mr. Turnau continued by stating that any changes that occurred in the upgrade of the instrument were likewise changed and reflected in the procedural manual. Mr. Turnau testified that the written procedure manual present was in fact the proper procedure manual for conducting tests with the Perkin-Elmer 8500 gas chromatograph. Mr. Turnau also stated that this procedural handbook is located at the site of the analytical testing, “right above where [he] sit[s] to perform the alcohol testing,” as required by OAC § 3701-53-01(B).

The determination of a trial court during a Suppression will stand, “so long as they are supported by competent and credible evidence.” *In re McDonald*, Lake App. No. 2006-L-027, 2007-Ohio-782, at ¶ 14. The trial court concluded that Mr. Turnau, as an expert witness, “convincingly testified that these models were essentially the same and that the manual applies to each.”

Next, Appellant argues that the State of Ohio failed to establish substantial compliance with the Ohio Administrative Code as the manual required by OAC 3701-53-01(B) was not introduced as an exhibit during the suppression hearing. The code, however, only mandates that a written procedural manual exist, that is be up-to-date, and that it be located in the area where the testing is performed. The Code does not say that for blood evidence to be admitted, the manual must be admitted into evidence at a suppression hearing. Certainly the record here is more than adequate to demonstrate through the testimony of Jeffrey Turnau that the manual existed, that it contained what it was supposed to and that it was kept in the testing area. The State of Ohio met its burden of proof with regard to the manual. Appellant does not cite, nor can the State of Ohio locate any authority which would require the State of Ohio to introduce the actual manual as an exhibit as opposed to having a person with knowledge, testifying about the manual. Nothing would have prevented Appellant from attempting to acquire his own copy of the manual or travelling to Columbus to the laboratory and visually inspecting the manual.

### **ARGUMENT IN RESPONSE TO APPELLANT’S PROPOSITION OF LAW NO. 3**

A SENTENCE IS PROPER WHEN THE TRIAL COURT CONSIDERED THE SENTENCING GUIDELINES AND PURPOSES OF SENTENCING PRIOR TO THE IMPOSITION OF SENTENCE.

*State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, significantly altered sentencing guidelines regarding the imposition of maximum, consecutive, and non-minimum sentences. Specifically, *Foster* held unconstitutional (amongst other provisions) sentencing requirements for

determining consecutive sentences under R.C. § 2929.14(B), (C), and (E). *Foster* at 29. In doing so, the Ohio Supreme Court gave trial courts, “*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 30 (emphasis added). *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, further elaborated on this change in policy, stating that while trial courts were now free to impose consecutive sentences without judicial findings and reasoning at sentencing, courts were still to consider sentencing factors under R.C. § 2929.11 and 2929.12.

Although after *Foster* the trial court is no longer compelled to make findings and give reasons at the sentencing Suppression...nevertheless, in exercising its discretion, the court must carefully consider the statutes that apply to every sentencing case. Those include R.C. 2929.11, which specifies the purposes of sentencing, and R.C. 2929.12 which provides guidance in considering factors relating to the seriousness of the offense and the recidivism of the offender. In addition, the sentencing court must be guided by statutes that are specific to the case itself. *Id.* at 62.

However, while courts are to consider the guidelines under R.C. § 2929.11 and 2929.12, these factors are not dispositive or meant as a “formula” in determining sentences. *Foster* at 13-14. “These statutory sections provide a nonexclusive list for the court to consider... It is important to note that there is no mandate for judicial fact-finding in the general guidance statutes. The court is merely to ‘consider’ the statutory factors,” along with “any other relevant factors.” *Id.*

Post-*Foster*, the Eleventh District has held that abuse of discretion occurs in sentencing only when the record establishes that a trial judge refused or failed to consider statutory sentencing factors under R.C. § 2929.11 and 2929.12, where the “severity of the sentence shocks the judicial conscience” by being manifestly disproportionate to the crime or defendant, and the trial court fails to explain the imposition of the sentence. *State v. Silsby*, Geauga App. No. 2006-G-2725, 2007-Ohio-2308, at ¶ 10. While judicial findings and reasoning for a sentence need not

be given in the same style as Pre-*Foster*, mere discussion of the factors at sentencing serves as evidence that the judge considered the general guidelines of R.C. § 2929.11 and 2929.12. *State v. Bradford*, Lake App. No. 2006-L-140, 2007-Ohio-2575, at ¶ 18; *State v. Sebring*, Lake App. No. 2006-L-211, 2007-Ohio-1637, at ¶ 15.

R.C. § 2929.11(A) provides in pertinent part:

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, [and] rehabilitating the offender...

R.C. § 2929.11(B) provides:

A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing...commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim...

Appellant makes a bare bones argument at best that the trial court abused its discretion in imposing consecutive sentences. It is well-established that R.C. § 2929.12 does not require a sentencing court to make specific findings regarding the seriousness and recidivism factors as long as the trial court has considered the mitigating circumstances in arriving at its sentence. *State v. Green*, Ashtabula App. Nos. 2005-A-0069, 2005-A-0070, 2006-Ohio-6695, citing *State v. Glenn*, Lake App. No. 2003-L-022, 2004-Ohio-2917. This Honorable Court had also held that a sentencing court complies with these mandates by making a generalized statement on the record that it has considered the purposes and principles of sentencing and the seriousness and recidivism factors. *Id.*; *State v. Mosier*, Portage App. No. 2005-P-0100, 2006-Ohio-4187. The Ohio Revised Code does not require that the "sentencing judge must use specific language or make specific findings on the record in order to evince the requisite consideration of the

applicable seriousness and recidivism factors.” *State v. Arnett* (2000), 88 Ohio St.3d 208, 215, 724 N.E.2d 793; *State v. Blake*, Lake App. No. 2003-L-196, 2005-Ohio-686, at ¶ 16.

In the case *sub judice*, the trial court went to great lengths to explain its rationale for the sentence imposed, and the record clearly reflects the Court considered all of the sentencing factors and guidelines under R.C. § 2929.11 and 2929.12. The judge stated it had considered the sentencing factors and guidelines under Revised Code Chapter 2929 with the intent to protect the public from future harm. The trial court stated it sought to achieve a sentence which did not demean the seriousness of the offense and to impose a sentence “commensurate with the offender’s conduct and its impact.” In meting out its sentence, the Court noted it has considered consistency with sentences imposed for similar crimes. Appellant’s reliance on the trial court’s statement that Appellant’s crime did not constitute the *worst* form of the offense (and thus Appellant is entitled to a minimum, concurrent sentence), is a myopic and selective review of the record in light of the Court’s other comments.

The trial court noted the obvious seriousness of the offense in that Appellant’s act of driving while intoxicated resulted in the death of another human being, as well as serious, life-long, debilitating injuries to another person. In conjunction with the seriousness of the offense, the trial court observed that imposing a minimum sentence would demean the seriousness of the offense. The Court also noted that Appellant already had three prior OVI convictions, and despite the previous penalties, chose yet again to drive while intoxicated. As such, the trial court considered the need to protect the public from future harm, by finding that Appellant had a high chance of recidivism and had not been responsive to previous sanctions and was not amenable to community control. While the Court did state that the offense was not the worst possible form, it noted that given the seriousness of the offense, as well as Appellant’s high likelihood of

recidivism, a minimum sentence would be inappropriate. As part of these observations, the Court finally noted that consecutive sentence were necessary in order to protect the public and to punish the offender for his egregious conduct.

Appellant has failed to demonstrate that the trial court's attitude was unreasonable, arbitrary, unconscionable, or that the severity of the sentence "shocks the judicial conscience." To the contrary, the record proves that the trial court was prepared for the Suppression as the Court reviewed Appellant's prior criminal history, his propensity for recidivism, the seriousness of the offense, as well as the fact a minimum and concurrent sentence would both demean the seriousness of the offense and would fail to protect the public from future harm. These observations are above and beyond what is expected of courts post-*Foster*, and clearly reflect a consideration of the R.C. § 2929.11 and 2929.12 factors. The trial court did not abuse its discretion in meting out an appropriate sentence for Appellant. Appellant received a nine year sentence, which was below the maximum potential sentence that could have been imposed.

As the Court of Appeals noted, although "a trial court is required to engage in the analysis set forth by R.C. 2929.11(B), to ensure the consistency of sentences," a court is not required "to make specific findings on the record" in this regard. *State v. Newman*, 11<sup>th</sup> Dist. No. 2002-A-0007, 2003-Ohio-2916, at ¶10. "[I]t is not the trial court's responsibility to research prior sentences from undefined, and largely unavailable, databases before reaching its sentencing decision." *State v. Quinn*, 9<sup>th</sup> Dist. No. 20968, 2002-Ohio-6987, at ¶12. "In short, a consistent sentence is not derived from a case-by-case comparison; it is the trial court's proper application of the statutory sentencing guidelines that ensures consistency." *State v. Swiderski*, 11<sup>th</sup> Dist. No. 2004-L-112, 2005-Ohio-6705, at ¶58. "Thus, the only way for Appellant to demonstrate tht his sentence was 'inconsistent' \*\*\* is if he establishes that the trial court failed to \*\*\* consider

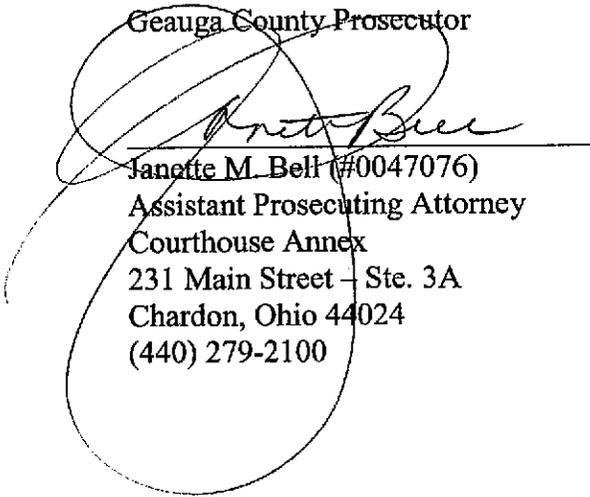
the \*\*\* guidelines contained in [Ohio's sentencing statutes]." *State v. Romig*, 11<sup>th</sup> Dist. No. 2007-L-096, 2008-Ohio-525, at ¶75 (citation omitted).

Appellant received a sentence that was within the statutory framework for each count. Post-*Foster*, there is no presumption of concurrent sentences and trial courts are not required to make any findings before imposing consecutive sentences. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. The trial court's obligation was to follow and apply Ohio's felony sentencing laws which it did. Therefore, there is nothing to support an assertion that Appellant's sentence was contrary to law.

### CONCLUSION

In light of the foregoing, Appellee, the State of Ohio, respectfully urges this Honorable Court to decline jurisdiction over this matter as Appellant has failed to state a case of any public or great interest or involves a substantial constitutional question.

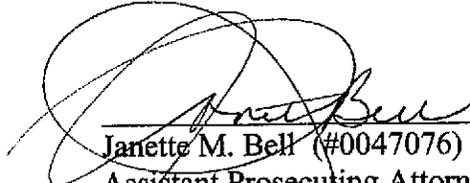
Respectfully submitted,  
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Geauga County Prosecutor



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**PROOF OF SERVICE**

A true and accurate copy of the foregoing was forwarded by regular U.S. mail, postage prepaid, to Craig T. Weintraub, Esq., 23220 Chagrin Blvd., Ste. 360, Cleveland, Ohio, 44122, on this 22 day of May 2008.



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