

NO. 11-1066

ORIGINAL

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 95376

STATE OF OHIO
Plaintiff-Appellant

-vs-

LINDELL W. BRUNNING, JR.
Defendant-Appellee

MEMORANDUM IN SUPPORT OF JURISDICTION

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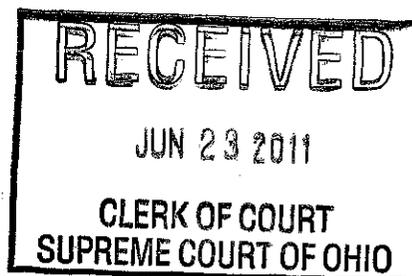
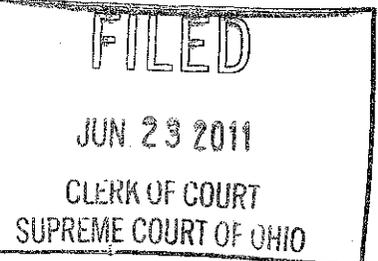


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EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC OR GENERAL INTEREST

This case presents the following substantial constitutional questions and issues of great public or general interest: are courts required to vacate convictions of sex offenders who were classified under Megan’s Law, but were indicted under the Adam Walsh Act, when their conduct constituted a violation under either act.

The Eighth District Court of Appeals (“Eighth District”) has excused a sex offender’s registration obligations finding that sex offenders cannot be criminally liable even if their conduct would have constituted a violation of both Megan’s Law and the Adam Walsh Act. Additionally, the Eighth District determined that Lindell W. Brunning could not be convicted for tampering with records, even though Brunning pled guilty to falsifying a government record.

Brunning was indicted for both failing to verify an address and for failing to provide a notice of change of address. Brunning’s duty to provide a notice of change of address did not change under the Adam Walsh Act; therefore, his conviction should stand. Further, providing false information on a government document is a crime regardless of what sex offender law applies to Brunning. The Eighth District disagreed and vacated the convictions.

This is not a case such as in *State v. Gingell*, 128 Ohio St.3d 444, 2011-Ohio-1481, where a sex offender’s conviction was based on an increased registration requirement. The General Assembly has made clear that the repeal of a statute does not affect any obligations incurred under the former statute. See R.C. 1.58. Vacation of Brunning’s conviction was

unnecessary where proof of the criminal conduct would have been the same under both Megan's Law and under the Adam Walsh Act.

The Eighth District reached similar decisions in three other cases. In *State v. Page*, 8th Dist. No. 94369, 2011-Ohio-83 (appeal not allowed, reconsideration pending), the Eighth District vacated a failure to verify conviction where the defendant was required to verify his address every 90 days under both Megan's Law and under the Adam Walsh Act. In *State v. Gilbert*, 8th Dist. No. 95083 and 95084, 2011-Ohio-1928, the Eighth District also vacated a failure to notify conviction where the defendant was required to provide a notice of change of address under both Megan's Law and under the Adam Walsh Act. In *State v. Campbell*, 8th Dist. No. 95348, 2011-Ohio-2281, the Eighth District vacated Campbell's conviction where he was required to register a current address upon entering the county. Campbell did not register a current address but instead registered a false address. See also *State v. Patterson*, Cuyahoga App. No. 93096, 2010-Ohio-3715 and *State v. Jones*, Cuyahoga App. No. 93822, 2010-Ohio-5004. In all of these cases the Eighth District found reversible error despite the fact that the offenders had the same obligations under both Megan's Law and under the Adam Walsh Act.

Many sex offenders have used *Page*, *Gilbert*, *Brunning*, and *Campbell* as authority to have their guilty pleas vacated. As a result any sex offender who was convicted prior to *Bodyke* and subject to the *Bodyke* remedy will have their convictions vacated in Cuyahoga County regardless of whether their obligations would have been the same under both Megan's Law and under the Adam Walsh Act. In contrast, sex offenders who were convicted in the Second District will be treated differently. This Court should accept jurisdiction to establish a uniform rule of law.

STATEMENT OF THE CASE AND FACTS

On December 23, 1983, Brunning was convicted of rape. He was released on November 7, 2008, after serving a 25-year sentence. Brunning had a duty to register pursuant to Megan's Law. The Ohio Attorney General reclassified him as a Tier III sex offender according to Ohio's Adam Walsh Act ("AWA"). The state then indicted Brunning in two separate cases. The state advanced three counts in CR-532770: Brunning failed to verify his current address with the sheriff in violation of R.C. 2950.06(F); failed to notify the sheriff of a change of address in violation of R.C. 2950.05(E)(1); and tampered with records in violation of R.C. 2913.42(A), based on the allegation that he falsified documents in connection with the first two counts. The first two counts are felonies of the second degree, and the last is a felony of the third degree. Brunning pleaded guilty to all three counts.

In CR-532822, the state advanced 18 separate felony counts. Brunning pleaded guilty to Counts 4, 12, and 18 of the indictment. The state dismissed all other counts. Count 4 was an unlawful sexual conduct with a minor charge with the offender being ten years or older than the victim. Counts 12 and 18 were two sexual battery charges. All three counts were based on three separate incidents against the same victim, occurring sometime between June and September 2009. As part of the plea deal, the state amended the three counts by removing the sexually violent predator specifications.

Brunning pleaded guilty to the three counts in CR-532770. He received the maximum prison sentence of eight years on each of the first two counts for reporting violations and five years on the tampering with evidence charge despite the prosecutor and the trial court agreeing during the plea colloquy that all three reporting offenses should merge for purposes of sentencing. The trial court ordered those sentences to be served consecutively to each other. With the merger, the resulting sentence on CR-532770 should have been eight years. Brunning also pleaded guilty to the three counts in CR-532822. He received the maximum sentence of five years each, to be served consecutively with each other, having been made no promises during the plea colloquy as to the sentence on that case. Brunning received an aggregate sentence of 36 years.

State v. Brunning, 8th Dist. No. 95376, 2011-Ohio-1936, ¶2-4

The State of Ohio sought to certify a conflict with the Second District Court of Appeals decision in *State v. Milby*, 2nd Dist. No. 23798, 2010-Ohio-6344. The Eighth District found that no conflict existed. The State also filed a motion for reconsideration, which was denied as well.

LAW AND ARGUMENT

PROPOSITION OF LAW I: EVEN IF THE PERSON DOES NOT HAVE A LEGAL OBLIGATION TO COMPLETE THE GOVERNMENT RECORD , A PERSON CAN BE CONVICTED OF TAMPERING WITH RECORDS (R.C. 2913.42) IF THE PERSON FALSIFIES THE GOVERNMENT RECORD.

The Eighth District's analysis improperly adds an element for a conviction to tampering with government documents. The elements of tampering with records are as follows:

- Knowing that without privilege to do so;
- With a purpose to defraud;
- Falsify records and;
- Belonging to a government agency.

R.C. 2913.42(A).

The Eighth District's decision has added an additional element that the person must have a legal obligation in filling out the forms before the person can be convicted. The State argued in its motion for reconsideration that Brunning should be accountable for providing false information on a government record, even if he was not required to verify his address on the date in question. This case has ramifications beyond sex offender registration, if the Eighth District's decision is allowed to stand, the State will not be able to obtain convictions for tampering with government records in numerous factual situations where the statute clearly applies. The several situations that stick put and account for a majority of

prosecutions under this statute are when individuals knowingly provide false information on certain government documents such as:

- Driver's license;
- Vehicle registration;
- Worker's compensation or unemployment benefits and;
- Government aid.

In each of these instances the person filling out the government documents has no legal obligation to fill out the documents. Under this Court's analysis, that person cannot be convicted of tampering with records because there is no legal obligation to fill out that document. The requirement now imposed by this Court—a legal obligation to fill out the document—is beyond the requirements of the statute.

Whether Brunning had a legal obligation to fill out these documents truthfully—and he did—he still made a decision to plead guilty falsify a government records. Thus, all the elements of tampering with records have been established and his plea was proper. Even if Brunning was not required to verify his address on the date in question, Brunning made a knowing choice to falsify a government record and entered a knowing plea to falsifying a government record. Brunning's conviction for tampering with records should not have been disturbed by the Eighth District.

PROPOSITION OF LAW II: STATE V. BODYKE DOES NOT REQUIRE VACATION OF CONVICTIONS WHERE THE CONDUCT OF THE SEX OFFENDER, CLASSIFIED UNDER MEGAN'S LAW, WOULD HAVE BEEN A VIOLATION UNDER BOTH MEGAN'S LAW AND THE ADAM WALSH ACT.

The Eighth District held that Brunning could not be convicted of failing to provide a notice of change of address because the statutes in effect when he was classified had been

repealed and replaced by the Adam Walsh Act. Even though those statutes have been repealed, Brunning is still accountable for any obligation incurred under Megan's Law.

As R.C. 1.58 makes clear:

(A) The reenactment, amendment, or repeal of a statute does not, except as provided in division (B) of this section:

(1) Affect the prior operation of the statute or any prior action taken thereunder;

(2) **Affect any** validation, cure, right, privilege, **obligation**, or liability **previously acquired, accrued, accorded, or incurred thereunder;**

(3) Affect any violation thereof or penalty, forfeiture, or punishment incurred in respect thereto, prior to the amendment or repeal;

(4) Affect any investigation, proceeding, or remedy in respect of any such privilege, obligation, liability, penalty, forfeiture, or punishment; and the investigation, proceeding, or remedy may be instituted, continued, or enforced, and the penalty, forfeiture, or punishment imposed, as if the statute had not been repealed or amended.

R.C. 1.58 (emphasis added)

The Eighth District held vacated Brunning's convictions and held that, "once offenders already under the obligation to report pursuant to Megan's Law were reclassified pursuant to R.C. 2950.031 and R.C. 2950.032, their duties to report were derived from the AWA." *Brunning*, supra. at ¶10.

Yet as R.C. 1.58 makes clear even if Megan's Law was replaced by the AWA, Brunning's obligations under Megan's Law remained.

As shown below the language of the division of R.C. 2950.05 which imposes criminal liability remained relatively unchanged by the Adam Walsh Act and Brunning's indictment is consistent with both laws.

R.C. 2950.05(E)(1), H.B. 180, S.B. No. 135 (eff. July 1, 1997 and January 1, 2002).	R.C. 2950.05(F)(1), S.B. No.10 (eff. January 1, 2008).
No person who is required to notify a sheriff of a change of address pursuant to division (A) of this section shall fail to notify the appropriate sheriff in accordance with that division. ¹	<u>No person who is required to notify a sheriff of a change of address pursuant to division (A) of this section or a change in vehicle information or identifiers pursuant to division (D) of this section shall fail to notify the appropriate sheriff in accordance with that division.</u>
Language of Brunning's Indictment	
That the above named Defendant(s), on or about [August 3, 2009] in the County of Cuyahoga, unlawfully: did fail to notify the Cuyahoga County Sheriff of a change of address and the basis of the registration, notice of intent to reside, change of address notification, or address verification requirement that was violated under the prohibition was a felony of the third degree if committed by an adult or a comparable category of offenses committed in another jurisdiction, to wit: on or about December 23, 1983, in the Common Pleas Court of Ohio, Cuyahoga County, Ohio, Case No. CR 185706, having been convicted of the crime of Rape, in violation of Revised Code Section 2907.02 of the State of Ohio.	

The State would note however the law as enacted in 1997 required sex offenders provide a seven day notice of change of address as opposed to twenty day notice. The twenty-day notice became effective on May 7, 2002, before Brunning began to register. Moreover, subsequent amendments to Megan's Law, which required the 20 day notice were affirmed in *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, 896 N.E.2d 110.

In contrast to the Eighth District's holdings, the Second District Court of Appeals recognized that convictions for registration violations do not need to be vacated simply because a defendant's reclassification under the Adam Walsh Act was unconstitutional. In *State v. Milby*, 2nd Dist. No. 23798, 2010-Ohio-6344, the Second District affirmed a defendant's conviction for failing to provide a notification of address change. The court held that:

¹ The version contained in the S.B. 5 version of R.C. 2950.05(E)(1) is identical to the current R.C. 2950.05(F)(1). The amendments to R.C. 2950.05 through S.B. 5 were affirmed by the majority in *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, 896 N.E.2d 110.

Pursuant to *Bodyke*, Milby's reclassification as a Tier III sex offender and the community-notification and registration orders attending that reclassification may not be applied, and his original classification as a sexual predator and the community-notification and registration orders attending that classification are reinstated.

When Milby's original sexual predator classification and registration requirements are applied to the facts of his case, his failure to notify conviction is not offended. Under former law, Milby was required to provide notice of change of an address change twenty days prior to change [***]. This requirement did not change with the enactment of S.B. 10. Therefore, because Milby had an ongoing duty since his release from prison to notify [the Sheriff] of any change of his registered address, neither S.B. 10 nor *Bodyke* changed this requirement or his duty.

State v. Milby, 2nd Dist. No. 23798, 2010-Ohio-6344, ¶30-31.

The logic of *Brunning* is in direct contrast to *Milby*. As the Second District recognized, courts do not need to vacate convictions such as *Brunning's*. When *Brunning's* original classification and registration requirements are applied to his case, his conviction for failure to provide a notice of change of address is not offended. Under Megan's Law, *Brunning* is required to provide a 20 day notice of change of address to the sheriff pursuant to *State v. Ferguson*, supra. The same would have been required under the Adam Walsh Act. The effective administration of justice does not result from the *Brunning* decision. Instead of affirming a valid finding of guilt, the Eighth District unnecessarily vacated a case, despite the absence of plain error. As a result of the *Brunning* decision and other decisions from the Eighth District, convictions for registration offenses are unnecessarily called into question, even where the conduct would be an unequivocal violation of both Megan's Law and the Adam Walsh Act.

PROPOSITION OF LAW III: A DEFENDANT WHO PLEADS GUILTY TO AN OFFENSE WAIVES ANY DEFECT IN AN INDICTMENT EXCEPT FOR PLAIN ERROR.

Brunning pled guilty to tampering with records, to failing to notify a change of address and to failing to verify an address. The Eighth District construed the indictment to have unconstitutionally charged Brunning under the Adam Walsh Act. Despite his guilty pleas, the Eighth District found error and vacated the convictions.

This Court recently held, “By failing to timely object to a defect in an indictment, a defendant waives all but plain error on appeal.” *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26. Moreover, many appellate courts have agreed that a guilty plea waives *any defect* in the indictment. See *State v. Gaston*, 8th Dist. No. 92242, 2009-Ohio-3080. See also *State v. Lane*, 3rd Dist. No. 1-10-10, 2010-Ohio-4819; *State v. Gotel*, 11th Dist. No. 2009-L-051, 2009-Ohio-6516. In contrast with this case, the Second District in *State v. Stivender*, Second Dist. No. 23973 found that “Stivender entered a guilty plea of to the charge against him, and a guilty plea is a complete admission of the defendant’s guilty. For that reason, and because the alleged errors are not ones which constitute plain error, we believe the sound and orderly administration of justice supports an exercise of our discretion to decline to review the errors assigned.” See *State v. Stivender*, 2nd Dist. No. 23973, 2011-Ohio-247, ¶11.

The Eighth District construed Brunning to have been indicted based on an unconstitutional indictment that failed to charge an offense against Brunning. *State v. Brunning*, 8th Dist. No. 95376, 2011-Ohio-1936.

But the indictment did charge offenses against Brunning. The Eighth District’s reasoning ignores that the tampering with records statute itself was never deemed to be

unconstitutional. It remains an offense in Ohio, just as Brunning had the ongoing obligation to provide the Sheriff a notice of change of address. Brunning's conduct constituted criminal offenses under both Megan's Law and under the Adam Walsh Act and as a result he cannot demonstrate plain error.

CONCLUSION

Even though Megan's Law was repealed and replaced by the Adam Walsh Act, Brunning had a duty to comply. Although, there were no significant differences between Megan's Law and the Adam Walsh Act regarding Brunning's duty to provide a notice of change of address, the Eighth District held that Brunning could not be held accountable. Brunning also lied on a government document. In the absence of plain error, his guilty pleas should not be vacated. Acceptance of this case will provide a uniform rule of law regarding the issue. For the foregoing reasons, the State asks this Honorable Court to accept jurisdiction in this case as raising substantial constitutional questions and issues of great public or general interest.

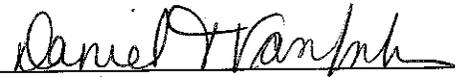
Respectfully Submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction has been sent this 22nd day of June, 2011 via U.S. Mail to: Richard A. Neff, 614 W. Superior Avenue, Suite 1310 Cleveland, Ohio 44113.


Assistant Prosecuting Attorney

[Cite as *State v. Brunning*, 2011-Ohio-1936.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95376

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LINDELL W. BRUNNING, JR.

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED IN PART;
REVERSED AND VACATED IN PART**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-532770 and CR-532822

BEFORE: S. Gallagher, J., Kilbane, A.J., and E. Gallagher, J.

RELEASED AND JOURNALIZED: April 21, 2011

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SEAN C. GALLAGHER, J.:

{¶ 1} Appellant Lindell Brunning (“Brunning”) appeals his conviction and sentence, after pleading guilty, in Cuyahoga County Common Pleas Court Case Nos. CR-532770 and CR-532822. For the following reasons, we reverse Brunning’s conviction and vacate his sentence in CR-532770, and affirm the trial court’s judgment in CR-532822.

{¶ 2} On December 23, 1983, Brunning was convicted of rape. He was released on November 7, 2008, after serving a 25-year sentence. Brunning had a duty to register pursuant to Megan’s Law. The Ohio Attorney General reclassified him as a Tier III sex offender according to Ohio’s Adam Walsh Act (“AWA”). The state then indicted Brunning in two separate cases. The state advanced three counts in CR-532770: Brunning failed to verify his current address with the sheriff in violation of R.C. 2950.06(F); failed to notify the sheriff of a change of address in violation of R.C. 2950.05(E)(1)¹; and tampered with records in violation of R.C. 2913.42(A), based on the allegation that he falsified documents in connection with the first two counts. The first two counts are felonies of the second degree, and the last is a felony of the third degree. Brunning pleaded guilty to all three counts.

{¶ 3} In CR-532822, the state advanced 18 separate felony counts. Brunning pleaded guilty to Counts 4, 12, and 18 of the indictment. The state dismissed all other counts. Count 4 was an unlawful sexual conduct with a minor charge with the offender being ten years or older than the victim. Counts 12 and 18 were two sexual battery charges. All three counts were based on three separate incidents against the same victim, occurring sometime between June and September 2009. As part of the plea deal, the state amended the three counts by removing the sexually violent predator specifications.

¹ The indictment lists the violation pursuant to R.C. 2950.05(E)(1) rather than R.C. 2950.05(F)(1). The version of that section in effect at the time of the indictment was R.C. 2950.05(F)(1). The language of the provisions did not change.

{¶ 4} Brunning pleaded guilty to the three counts in CR-532770. He received the maximum prison sentence of eight years on each of the first two counts for reporting violations and five years on the tampering with evidence charge despite the prosecutor and the trial court agreeing during the plea colloquy that all three reporting offenses should merge for purposes of sentencing. The trial court ordered those sentences to be served consecutively to each other. With the merger, the resulting sentence on CR-532770 should have been eight years. Brunning also pleaded guilty to the three counts in CR-532822. He received the maximum sentence of five years each, to be served consecutively with each other, having been made no promises during the plea colloquy as to the sentence on that case. Brunning received an aggregate sentence of 36 years.

{¶ 5} Brunning raises three assignments of error relating to both cases. The first two assignments of error deal with CR-532770 and will be addressed in reverse order.

{¶ 6} The second assignment of error is as follows: “Appellant’s conviction in case 10-CR-532770 must be vacated because the law on which it is based, Ohio’s Adam Walsh Act, is unconstitutional as applied to appellant.” We find that Brunning’s second assignment of error has merit.

{¶ 7} The crux of the charges against Brunning in CR-532770 was that he failed to verify and notify the sheriff of a change in his primary address. As part of those charges, the state claimed Brunning falsified documents by providing the sheriff with a wrong address.

All occurred on August 3, 2009. Brunning was reclassified as a Tier III offender after the AWA became effective. He had previously been adjudicated under Megan's Law and had a duty to register from the 1983 conviction.

{¶ 8} The Supreme Court held that the reclassification under the AWA was unconstitutional if offenders had a duty to report from a prior court order under Megan's Law.

State v. Bodyke, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶ 22. Further, any reporting violation based on an AWA registration requirement that is inapplicable to the defendant is unlawful. *State v. Gingell*, Slip Opinion No. 2011-Ohio-1481 (reversing defendant's conviction for failing to verify residency under the heightened AWA standards based on *Bodyke*).

{¶ 9} Likewise, in *State v. Page*, Cuyahoga App. No. 94369, 2011-Ohio-83, this court presciently held that the reclassification cannot serve as the basis for reporting violations if an offender had a duty to register under Megan's Law from a prior order of a court. *Id.* at ¶ 11. The majority noted that *Bodyke* does not create "a fictitious distinction between an unlawful reclassification 'that imposes a more onerous verification requirement' and a reclassification that does not impose heightened verification requirements. *Bodyke* deemed reclassifications under the AWA unlawful, the only condition being that the offender has 'already been classified by court order under former law.'" *Id.* at ¶10, fn. 1.

{¶ 10} This distinction is important. Once offenders already under the obligation to report pursuant to Megan's Law were reclassified pursuant to R.C. 2950.031 and 2950.032, their duties to report were derived from the AWA. The violations for an offender's failure to verify or notify of a change of address pursuant to R.C. 2950.06(F) and R.C. 2950.05(E)(1), or any tampering with evidence charge for falsifying documents stemming from the reporting violation, were based on the duty to register and verify unlawfully imposed upon those already subject to reporting requirements through prior court order.

{¶ 11} In the instant case, we first note that neither the trial court nor Brunning had the benefit of the *Bodyke* decision during the pendency of the trial court's proceedings. Brunning's reclassification under the AWA is contrary to the law. Brunning's conviction arising from reporting violations under the AWA is therefore also contrary to law. *Gingell*, 2011-Ohio-1481; see, also, *State v. Smith*, Cuyahoga App. No. 92550, 2010-Ohio-2880, ¶ 29; *State v. Patterson*, Cuyahoga App. No. 93096, 2010-Ohio-3715; *State v. Jones*, Cuyahoga App. No. 93822, 2010-Ohio-5004.

{¶ 12} The state argues that Brunning pleaded guilty and thereby waived any right to challenge his conviction based on the unconstitutionality of the law upon which it was based. The state cites to *State v. Hayden*, Cuyahoga App. No. 90474, 2008-Ohio-6279, at ¶ 6, for the proposition that a defendant cannot claim the indictment is insufficient after pleading guilty. While this is a correct statement of law, Brunning is not arguing that the indictment is

merely defective. Crim.R. 12(C)(2) provides that defenses and objections based on defects in the indictment shall be raised prior to trial. However, the rule also provides two exceptions: (1) when the indictment fails to show jurisdiction in the court, and (2) when the indictment fails to charge an offense. Crim.R. 12(C)(2). In this case, the basis of the indictment was found to be unconstitutional, and therefore the indictment failed to charge an offense against Brunning. The law cited by the state is inapplicable to the current appeal.

{¶ 13} Because of the foregoing analysis, we reverse Brunning’s conviction in CR-532770. Brunning’s conviction was predicated upon the reporting requirements held to be unconstitutional as applied to him. We vacate his sentence, and note that Brunning is subject to the reporting requirements established under Megan’s Law.

{¶ 14} Brunning’s first assignment of error is as follows: “(a) The defendant-appellant’s guilty plea was not knowingly and voluntarily entered into since it was conditioned on false promises made by the State and the trial court. (b) The trial court erred when it failed to merge the offenses in case 10-CR-532770 for sentencing.” Because of our resolution of Brunning’s second assignment of error, the first assignment of error is moot and we need not address the issues raised. See App.R. 12(A)(1)(c).

{¶ 15} Brunning’s third assignment of error is as follows: “The sentence imposed by the court is inconsistent with the principles and purpose of sentencing under the Ohio Revised Code and therefore is contrary to law.” Having vacated Brunning’s conviction under

CR-532770, we will address this assignment of error based on the 15-year aggregate sentence Brunning received in CR-532822. Contrary to the state's argument, we do not agree that this argument is moot because Brunning's total sentence was reduced through the disposition of the first two assignments of error. Brunning argues that the trial court failed to properly consider the factors contained in R.C. 2929.11 through 2929.14 and rendered a sentence that is inconsistent with sentences of similar offenders. Brunning's third assignment of error is not well taken.

{¶ 16} This court has already recognized that we review felony sentences using the *Kalish* framework.² *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. In *Kalish*, the Ohio Supreme Court applied a two-prong approach to appellate review of felony sentences. We must ensure that the sentencing courts complied with all applicable rules and statutes in imposing a sentence to determine whether the sentence is clearly and convincingly contrary to law. *Id.* at 25. If the first prong is satisfied, we then review the trial court's decision under an abuse-of-discretion standard. *Id.*

²In this district, there have been discussions on whether *Kalish* is binding precedent or merely persuasive because it was a plurality opinion. See, e.g., *State v. Wuff*, Cuyahoga App. No. 94087, 2011-Ohio-700 (recognizing that *Kalish* is a plurality decision and has no binding precedent); cf., *State v. Walker*, Cuyahoga App. No. 94490, 2011-Ohio-456 (citing to *Kalish* without limitation). Whether *Kalish* is persuasive or binding is no longer relevant in this district. This court has applied, and therefore adopted, the Ohio Supreme Court's two-pronged approach to reviewing felony sentences in all cases.

{¶ 17} We first must review whether the sentence is contrary to law pursuant to R.C. 2953.08(G). “[T]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings and give reasons for imposing maximum, consecutive or more than the minimum sentence.” (Internal quotations omitted.) *Id.* at ¶ 11; citing *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, ¶ 100.

Although *Foster* eliminated mandatory judicial fact-finding, it did not invalidate R.C. 2929.11 and 2929.12. *Kalish* at ¶ 13. Therefore, the trial court must consider those statutes in determining an appropriate sentence within the permissible statutory ranges. *Id.*

{¶ 18} In the current case, we do not find Brunning’s sentence contrary to law. The trial court sentenced him to the maximum consecutive sentences possible within the statutory range for his convictions. Brunning pleaded guilty to three third-degree felony counts, all of which are punishable by prison for a term between one to five years. Moreover, the trial court acknowledged in the sentencing entry that it considered all factors of law and found that the prison term was consistent with the purposes of R.C. 2929.11. Brunning’s sentence is not clearly and convincingly contrary to law.

{¶ 19} We next must consider whether the trial court abused its discretion. The term “abuse of discretion” means “an unreasonable, arbitrary, or unconscionable action.” *State ex rel. Doe v. Smith*, 123 Ohio St.3d 44, 47, 2009-Ohio-4149, 914 N.E.2d 159. It is “a discretion exercised to an end or purpose not justified by, and clearly against reason and

evidence. The term has been defined as a view or action that no conscientious judge, acting intelligently, could honestly have taken.” (Citations and quotations omitted.) *State v. Hancock*, 108 Ohio St.3d 57, 77, 2006-Ohio-160, 840 N.E.2d 1032.

{¶ 20} Under current Ohio law, a trial court “now has the discretion and inherent authority to determine whether a prison sentence within the statutory range shall run consecutively or concurrently.” *State v. Elmore*, 122 Ohio St.3d 472, 480, 2009-Ohio-3478, 912 N.E.2d 582; *State v. Bates*, 118 Ohio St.3d 174, 178, 2008-Ohio-1983, 887 N.E.2d 328. Although trial courts have this discretion, the trial court must still consider the purposes of the felony sentencing statutes set forth in R.C. 2929.11 and 2929.12, which provide factors to consider relating to the seriousness of the offense and recidivism of the offender. See *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470; *State v. Mathis*, 109 Ohio St.3d 54, 62, 2006-Ohio-855, 846 N.E.2d 1.

{¶ 21} Brunning argues the trial court abused its discretion by imposing the maximum sentences to be served consecutively when offenders in similar situations received lesser prison terms. See *State v. Omiecinski*, Cuyahoga App. No. 90510, 2009-Ohio-1066 (sentencing defendant to an aggregate sentence of four years on three counts of sexual battery without describing the facts underlying the charges or whether the defendant was a repeat offender); *State v. Felton*, Cuyahoga App. No. 92295, 2010-Ohio-4105 (sentencing the defendant with a community control sanction for one count of sexual battery based on a single

incident); *State v. Fortson*, Cuyahoga App. No. 92337, 2010-Ohio-2337 (sentencing the defendant, a corrections officer, to an aggregate seven-year sentence on three counts of rape, three counts of sexual battery, and three counts of gross sexual imposition against six inmates).

{¶ 22} The trial court considered all the factors required under Ohio law and discussed the seriousness of the offense. The court was particularly troubled with the fact that Brunning's 25-year sentence for raping a child under the age of 13 did not deter him from recommitting a similar offense against another minor. The trial court further reviewed the presentence investigation report; heard arguments from counsel, including a review of mitigating factors; heard from Judith Huggins, who spoke on Brunning's behalf; and considered Brunning's remorse. In reviewing the record, we find that the trial court considered the statutory factors and did not abuse its discretion in imposing the maximum sentences to be served consecutively for an aggregate sentence of 15 years. We therefore overrule Brunning's third assignment of error.

{¶ 23} We vacate Brunning's sentence and reverse his conviction in CR-532770 and affirm the trial court's judgment in CR-532822.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, JUDGE

MARY EILEEN KILBANE, A.J., and
EILEEN A. GALLAGHER, J., CONCUR

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.
95376

LOWER COURT NO.
CP CR-532822
CP CR-532770

COMMON PLEAS COURT

-vs-

LINDELL W. BRUNNING, JR.

Appellant

MOTION NO. 444115

Date 05/09/11

Journal Entry

MOTION BY APPELLEE FOR RECONSIDERATION IS DENIED.

COPIES MAILED TO COUNSEL FOR
ALL PARTIES--COSTS TAKEN

RECEIVED FOR FILING

MAY 09 2011
GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

Adm. Judge, MARY EILEEN KILBANE, Concur

Judge EILEEN A. GALLAGHER, Concur


Judge SEAN C. GALLAGHER

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