

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,)	Case No. 2014-1402
)	
Plaintiff-Appellee,)	On Appeal from the
)	Lake County Court of Appeals,
v.)	Eleventh Appellate District
)	
ROBERT J. CORNELISON,)	
)	Court of Appeals Case No. 2013-L-064
Defendant-Appellant.)	

MEMORANDUM IN RESPONSE OF APPELLEE STATE OF OHIO

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**EXPLANATION OF WHY THIS CASE INVOLVES A
QUESTION OF PUBLIC OR GREAT GENERAL INTEREST**

On August 13, 2014, Appellant Robert J. Cornelison filed a notice of appeal and memorandum in support of jurisdiction with this Court, appealing the decision of the Eleventh District Court of Appeals in *State v. Cornelison*, 11th Dist. No. 2013-L-064, 2014-Ohio-2884. In *Cornelison*, Appellant argued, inter alia, that the trial court's sentence was clearly and convincingly contrary to law for two reasons: (1) the trial court improperly weighed the seriousness and recidivism factors under R.C. 2929.12; and (2) the record did not support the trial court's findings to impose consecutive sentences under R.C. 2929.14(C)(4). *Id.* at ¶ 5, 17, 40. The Eleventh District concluded that the record demonstrated that (1) the trial court gave proper consideration to the statutory factors under R.C. 2929.11 and R.C. 2929.12; and (2) the trial court's findings to impose consecutive sentences were supported by the record. *Id.* at ¶ 25, 41, 42. Thus, the appellate court concluded that Appellant's sentence was not clearly and convincingly contrary to law. *Id.* at ¶ 25, 42.

At issue in this appeal is the proper standard of review appellate courts should use when reviewing felony sentences. In *Cornelison*, the appellate court, as Appellant describes, utilized a "hybrid" approach. (Appellant's Br. 5, 7). In reviewing Appellant's challenge under R.C. 2929.12, the appellate court was guided by the two-step approach set forth in this Court's opinion in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124.

Cornelison at ¶ 6-7. In reviewing Appellant's challenge to the consecutive nature of his sentence, the appellate court concluded that the more appropriate standard for an appellate court's review of consecutive sentences, post-H.B. 86, is under R.C. 2953.08(G)(2). *Id.* at ¶¶27-35.

There is a split among the appellate districts, and even within districts, regarding the appropriate standard of review to be utilized when reviewing felony sentencing challenges post-H.B. 86: the two-part test announced in *Kalish*, the statutory standard set forth in R.C. 2953.08(G)(2), or a combination of both. When reviewing consecutive sentences, courts agree that the statutory standard set forth in R.C. 2953.08(G)(2) applies post-H.B. 86. Thus, the Eleventh District Court of Appeals's review of Appellant's consecutive sentence was properly conducted under R.C. 2953.08(G)(2). A gray area exists, however, regarding the continued use of *Kalish*, and whether R.C. 2953.08(G)(2) applies to all felony sentencing challenges.

On September 9, 2014, the Eleventh District Court of Appeals, in denying Appellant's motion to certify this case as a conflict, noted that "[t]heoretically, appellant has identified a difference in which this district approaches felony review. In practice, however, there is no real distinction." There is, however, no dispute that differing standards of review for felony sentences are being used across, and within, the appellate districts, and inconsistencies and confusion exist.

In an effort to obtain consistency, the State joins Appellant in asking this Court to accept jurisdiction over this appeal to clarify the standard of review for appellate courts across the State of Ohio.

STATEMENT OF THE CASE AND FACTS

The facts giving rise to this case are not pertinent to this appeal but were generally summarized by the Eleventh District Court of Appeals as follows:

On January 15, 2013, appellant was indicted on three counts of robbery, felonies of the third degree, in violation of R.C. 2911.02(A)(3), and one count of petty theft, a misdemeanor of the first degree, in violation of R.C. 2913.02(A)(1). Appellant entered a plea of not guilty to all charges. Appellant later withdrew his plea and entered a plea of guilty to all four counts in the indictment. The trial court deferred sentencing and referred the matter to the Lake County Adult Probation Department for a presentence investigation report ("PSI") and a drug and alcohol evaluation. Victim Impact Statements were also prepared pending sentencing.

On March 14, 2013, the trial court sentenced appellant to two and one-half years on each count of robbery and six months in jail on the theft charge. The trial court ordered the robbery counts to be served consecutively to each other, and concurrently with the term for the theft charge, for an aggregate term of seven and one-half years in prison. Appellant was also ordered to pay restitution to the victims of his crimes.

On November 13, 2013, this court granted appellant's motion for delayed appeal. Appellant now assigns three errors for this court's review. His first assignment of error provides: "The trial court's sentence was clearly and convincingly contrary to law."

Cornelison at ¶ 2-5.

RESPONSE TO APPELLANT'S PROPOSITION OF LAW

APPELLANT'S PROPOSITION OF LAW NO. I

An appellate court must review a challenge to a felony sentence under the standard set forth in R.C. 2953.08(G)(2).

In 2008, this Court delineated the standard of review for a sentencing challenge in the post-*State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, era. In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 12, a plurality of this Court stated that “appellate courts must apply a two-step approach. First, they must examine the sentencing court’s compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this prong is satisfied, the trial court’s decision shall be reviewed under an abuse of discretion standard.” *Id.* at ¶ 4. Indeed, “assuming the trial court has complied with the applicable rules and statutes, the exercise of its discretion in selecting a sentence within the permissible statutory range is subject to review for abuse of discretion pursuant to *Foster*.” *Id.* at ¶ 17.

In 2011, the General Assembly enacted H.B. 86, which revived the findings that a trial court must make when imposing consecutive sentences that were severed by *Foster* and also portions of the appellate review statute, R.C. 2953.08(G). Pursuant to R.C. 2929.14(C)(4), consecutive sentences can be imposed if the court finds that (1) a consecutive sentence is necessary to protect the public from future crime or to punish the offender; and

(2) consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public. In addition to these two factors, the court must find one of the following three factors:

- a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
- b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
- c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

Since the enactment of H.B. 86, some Ohio appellate district courts have departed from the standard announced in *Kalish* and adopted the standard of review set forth in R.C. 2953.08(G)(2) when reviewing consecutive sentences which provides, in pertinent part, that:

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

- (a) That the record does not support the sentencing court's findings under division * * * (C)(4) of section 2929.14 * * *;

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

In *State v. Venes*, 8th Dist. No. No. 98682, 2013-Ohio-1891, the Eighth District Court of Appeals explained its departure from *Kalish* as follows:

The post-*Foster* era ended with the enactment of H.B. 86 and the revival of statutory findings necessary for imposing consecutive sentences under R.C. 2929.14(C)(4). By reviving the requirement for findings as a predicate for imposing consecutives, the ground offered by *Kalish* for rejecting the standard of review set forth in former R.C. 2953.08—that it could not stand as a standard of review for a statute that improperly required findings of fact before imposing consecutive sentences—was nullified. With the basis for the decision in *Kalish* no longer valid, and given that *Kalish* had questionable precedential value in any event [as a plurality opinion], we see no viable reasoning for continuing to apply the standard of review used in that case. Henceforth, we review consecutive sentences using the standard of review set forth in R.C. 2953.08.

Id. at ¶ 10. The *Venes* court further elaborated that:

It is important to understand that the “clear and convincing” standard applied in R.C. 2953.08(G)(2) is not discretionary. In fact, R.C. 2953.08(G)(2) makes it clear that “[t]he appellate court’s standard for review is not whether the sentencing court abused its discretion.” As a practical consideration, this means that appellate courts are prohibited from substituting their judgment for that of the trial judge.

Id. at ¶ 20. See also, *State v. Lane*, 11th Dist. No. 2013-G-3144, 2014-Ohio-2010, at ¶ 21; *State v. Bever*, 4th Dist. No. 13CA21, 2014-Ohio-600, at ¶ 7-18; *State v. Blair-Walker*, 11th Dist. No. 2012-P-0125, 2013-Ohio-4118, at ¶ 12.

This approach is also consistent with this Court’s recent opinion in *State v. Bonnell*, —N.E.2d—, 2014-Ohio-3177, in which this Court held “in order to impose consecutive

terms of imprisonment, a trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry, but it has no obligation to state reasons to support its findings.” *Id.* at syllabus. In reaching its decision, this Court recognized that:

On appeals involving the imposition of consecutive sentences, R.C. 2953.08(G)(2)(a) directs the appellate court “to review the record, including the findings underlying the sentence” and to modify or vacate the sentence “if it clearly and convincingly finds * * * [t]hat the record does not support the sentencing court’s findings under division * * * (C)(4) of section 2929.14 * * * of the Revised Code.”

Id. at ¶ 28. Accordingly, it is clear that, post-H.B. 86, R.C. 2953.08(G)(2) governs appellate review of challenges to the imposition of consecutive sentences.

The law is less clear among the appellate districts when determining whether the two-part test in *Kalish* remains viable in light of the statutory standard set forth in R.C. 2953.08(G)(2), which specifically precludes an abuse of discretion standard of review, when reviewing felony sentences. Some appellate courts have continued to adhere to the two-part test set forth in *Kalish*. See *State v. Harrison*, 11th Dist. No. 2013-G-3168, 2014-Ohio-2880, at ¶ 6; *State v. Brown*, 11th Dist. No. 2013-A-0065, 2014-Ohio-2878, at ¶ 66-67; *State v. Jarrells*, 11th Dist. No. 2013-L-090, 2014-Ohio-2703, at ¶ 8; *State v. Dudley*, 5th Dist. No. 13-COA-017, 2014-Ohio-584, at ¶ 12-13, 16; *State v. Koeser*, 11th Dist. No. 2013-P-0041, 2013-Ohio-5838, at ¶ 12; *State v. Vanderhoof*, 11th Dist. No. 2013-L-036, 2013-Ohio-5366, at ¶ 7; *State v. Grodzik*, 11th Dist. No. 2012-P-0111, 2013-Ohio-5364, at ¶ 5; *State v. Jirousek*, 11th Dist. Nos. 2013-G-

3128, 2013-G-3130, 2013-Ohio-5267, 2 N.E.3d 981, at ¶ 28; *State v. Rardin*, 11th Dist. No. 2012-P-0100, 2013-Ohio-4297, at ¶ 6; *State v. Esmail*, 7th Dist. No. 11CO35, 2013-Ohio-2165, at ¶14; *State v. Drobny*, 8th Dist. No. 98404, 2013-Ohio-937, at ¶ 5, fn. 2.

Some courts have departed entirely from *Kalish* and reviewed sentencing challenges under R.C. 2953.08(G)(2). In *State v. White*, 2013-Ohio-4225, 997 N.E.2d 629, the First District Court of Appeals explained its departure from *Kalish*:

Prior to the enactment of H.B. 86, the portions of Ohio’s sentencing laws found unconstitutional in *Foster* remained part of the Revised Code. H.B. 86 cleaned up the Code by removing the provisions found unconstitutional in *Foster*, but not reenacted in H.B. 86. 2011 Am.Sub.H.B. No. 86, Section 2. Thus, the provisions requiring findings for maximum and more than minimum sentences that the legislature did not intend to revive were explicitly repealed. *Id.* At the same time, H.B. 86 specifically reenacted the standard of review provisions of R.C. 2953.08(G)(2) that had been rejected by the *Kalish* plurality. 2011 Am.Sub.H.B. No. 86, Section 1.

We presume the legislature knew what it was doing when it reenacted the R.C. 2953.08(G)(2) standard of review. And we cannot justify applying an abuse of discretion standard where the legislature has explicitly told us that the standard of review is not an abuse of discretion. Thus, henceforth, we will apply the statutory standard rather than the *Kalish* plurality framework to our review of felony sentences.

Our decision today is consistent with the approach of the other Ohio appellate districts that have directly considered the issue since the enactment of H.B. 86. See *State v. Venes*, 2013-Ohio-1891, 992 N.E.2d 453, (“By reviving the requirement for findings as a predicate for imposing consecutives, the ground offered by *Kalish* for rejecting the standard of review set forth in former R.C. 2953.08—that it could not stand as a standard of review for a statute that improperly required findings of fact before imposing consecutive sentences—was nullified.”); *State v. A.H.*, 8th Dist. Cuyahoga No. 98622, 2013-Ohio-2525, 2013 WL 3156521 (concluding that the statutory standard

applies to all felony sentences, not just those where findings are required); *State v. Crawford*, 12th Dist. Clermont No. CA2012-12-088, 2013-Ohio-3315, 2013 WL 3946242, ¶ 6 (“[F]rom this day forward, rather than continue to apply the two-step approach as provided by *Kalish*, we find” that the standard in R.C. 2953.08(G)(2) applies to all felony sentences); *State v. Worth*, 10th Dist. Franklin No. 10AP-1125, 2012-Ohio-666, 2012 WL 554457, ¶ 83 (applying statutory test and noting that, as a plurality opinion, *Kalish* is of limited precedential value); *State v. Blair-Walker*, 11th Dist. Portage No. 2012-P-0125, 2013-Ohio-4118, 2013 WL 5347222 (“[W]e no longer apply the two-step analysis contained in the 2008 *Kalish* case to defendants sentenced under H.B. 86’s enactment. Rather, we apply R.C. 2953.08(G) and the clear and convincing standard”); see also *State v. Fletcher*, 3rd Dist. Auglaize No. 2-13-02, 2013-Ohio-3076 (continuing to apply R.C. 2953.08 after *Kalish*).

Id. at ¶ 8-10. See also, *State v. Brewer*, 2014-Ohio-1903, 11 N.E.3d 317, at ¶ 26-37; *State v. Henry*, 12th Dist. No. CA2013-03-050, 2014-Ohio-1318, at ¶ 7-8; *State v. Tammerine*, 6th Dist. No. L-13-1081, 2014-Ohio-425, at ¶ 9-16; *State v. Rodeffer*, 2nd Dist. Nos. 25574, 25575, 25576, 2013-Ohio-5759, 5 N.E.3d 1069, at ¶ 24-32; *State v. Duka*, 11th Dist. No. 2012-L-106, 2013-Ohio-4548, at ¶ 11; *State v. Mullins*, 11th Dist. No. 2012-P-0144, 2013-Ohio-4301, at ¶ 14; *State v. Kennedy*, 2013-Ohio-4221, 998 N.E.2d 1189, at ¶ 117.

Some of these same courts, despite departing from the standard of review set forth in *Kalish*, have recognized that *Kalish* can be used as guidance in analyzing a sentencing challenge:

We further note that while we find that *Kalish* is no longer controlling in our review of felony sentences, it may still be utilized in the course of determining whether a sentence is clearly and convincingly contrary to law. As held in *White* at ¶ 12, ‘Although *Kalish* no longer provides the framework for reviewing felony sentences, it does provide *** guidance for determining whether a sentence is clearly and convincingly contrary to law.’ Significantly,

Kalish determined that a sentence was not clearly and convincingly contrary to law in a scenario in which it found that the trial court had considered the R.C. 2929.11 purposes and principles of sentencing, had considered the R.C. 2929.12 seriousness and recidivism factors, had properly applied post release control, and had imposed a sentence within the statutory range. *Kalish*, 120 Ohio St.3d 23, 2008–Ohio–4912, 896 N.E.2d 124 at ¶18.

Tammerine, 2014-Ohio-425, at ¶ 15, quoting *White*, 2013-Ohio-4225, at ¶ 12; *See also, State v. A.H.*, 8th Dist. No. 98622, 2013-Ohio-2525, at ¶ 10.

Some courts, similar to the court in *Cornelison*, are continuing to apply both standards of review. *See State v. Hill*, 7th Dist. No. 13MA1, 2014-Ohio-919, at ¶ 7-20; *State v. Cochran*, 10th Dist. No. 11AP-408, 2012-Ohio-5899, at ¶ 52. In *Cornelison*, the Eleventh District Court of Appeals was guided by *Kalish* when reviewing Appellant’s challenge to the trial court’s balancing of the seriousness and recidivism factors under R.C. 2929.12, a statute that expressly grants trial courts discretion in sentencing. R.C. 2929.12 is a guidance statute that sets forth the seriousness and recidivism criteria that a trial court “shall consider” in fashioning an appropriate sentence. *State v. Sanders*, 11th Dist. No. 2006-L-222, 2007-Ohio-3207, at ¶ 15. But this statute is only a general guide for the trial court, and “the trial court is not required to make specific findings on the record to ‘evinced the requisite consideration of the applicable seriousness and recidivism factors.’ ” *Id.* at ¶ 16, quoting *State v. Arnett*, 88 Ohio St.3d 208, 215, 2000-Ohio-302, 724 N.E.2d 793; *See also Kalish*, at ¶17. Additionally, “[a] trial court is not required to give any particular weight or emphasis to a given set of circumstances; it is merely required to consider the statutory factors in

exercising its discretion.” *State v. Delmanzo*, 11th Dist. No. 2007-L-218, 2008-Ohio-5856, at ¶23.

Accordingly, a trial court utilizes R.C. 2929.12 in exercising its discretion to select a sentence within the permissible statutory range. Given the discretionary nature of R.C. 2929.12, the second prong of *Kalish* appears to remain viable post-H.B. 86 when reviewing challenges made regarding a trial court’s weighing of the seriousness and recidivism factors, except to the extent that R.C. 2953.08(G)(2) specifically prohibits an abuse of discretion standard of review.

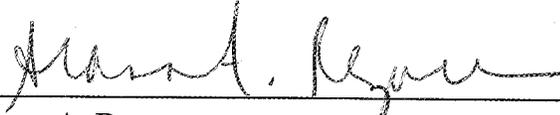
Surely, an inconsistency exists among the appellate districts regarding the appropriate standard of review to use when reviewing felony sentences post-H.B. 86. Clarity is needed from this Court to ensure consistency among the appellate districts in this state.

CONCLUSION

For the foregoing reasons, the State of Ohio, Appellee herein, respectfully requests that this Honorable Court accept jurisdiction to provide clarity and consistency among the appellate districts.

Respectfully submitted,

By: Charles E. Coulson, Prosecuting Attorney

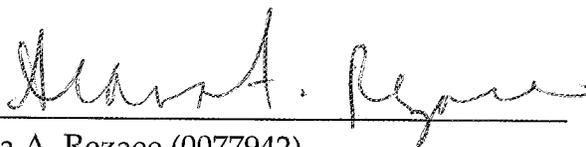
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PROOF OF SERVICE

A copy of the foregoing Memorandum in Response of Appellee, State of Ohio, was sent by regular U.S. Mail, postage prepaid, to counsel for the appellant, Derek Cek, Esquire, 2725 Abington Road, Suite 102, Fairlawn, OH 44333, on this 15th day of September, 2014.



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