

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	CASE No. 14-1825
PLAINTIFF-APPELLEE,	:	
	:	ON DISCRETIONARY APPEAL FROM THE
V.	:	GALLI COUNTY COURT OF APPEALS,
	:	FOURTH APPELLATE DISTRICT,
MARY MARCUM,	:	CASE No. 13CA11
	:	
DEFENDANT-APPELLANT.	:	

**MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT MARY MARCUM**

Gallia County Prosecutor's Office

Office of the Ohio Public Defender

C. Jeffrey Adkins, 0036744
Gallia County Prosecutor

Stephen P. Hardwick, 0062932
Assistant Public Defender

Gallia County Courthouse
18 Locust St., Rm. 1267
Gallipolis, Ohio 45631
740-446-0018
740-441-2050 - Fax

250 E. Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 (fax)
stephen.hardwick@opd.ohio.gov

Counsel for Appellee, State of Ohio

Counsel for Appellant, Mary Marcum

FILED
OCT 22 2014
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

Page No.

THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS OF PUBLIC AND GREAT GENERAL INTEREST1

I. Introduction1

II. The Second, Fourth, Sixth, Eighth, and Eleventh Appellate Districts no longer follow the *Kalish* plurality opinion.1

III. The Fifth, Seventh, and Ninth Appellate Districts, still conduct abuse-of-discretion reviews of criminal sentences.2

IV. The Second Appellate District is split internally.....3

V. Conclusion.4

STATEMENT OF THE CASE AND THE FACTS.....5

ARGUMENT.....7

Proposition of Law:

Because appellate review of criminal sentences under R.C. 2953.08 exists “[i]n addition to any other right to appeal,” R.C. 2505.03 empowers appellate courts to review discretionary sentencing decisions under an abuse of discretion standard.7

A. Introduction..7

B. Standard of Review.....7

1. Review under R.C. 2953.08(G)(2).....7

2. Review under R.C. 2505.03.7

3. Eliminating the abuse-of-discretion standard would make most sentencing decisions entirely unreviewable.8

TABLE OF CONTENTS

	<u>Page No.</u>
C. Discussion.....	9
CONCLUSION	10
CERTIFICATE OF SERVICE	11
APPENDIX:	
Decision and Judgment Entry, Gallia County Court of Appeals Case No. 13CA11 (September 8, 2014)	A-1

**THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION
AND IS OF PUBLIC AND GREAT GENERAL INTEREST**

I. Introduction.

This Court should hear this case because the courts of appeals are in conflict about whether R.C. 2953.08 provides the exclusive means for challenging criminal sentences, or whether, by its own terms, that section provides a remedy that is “[i]n addition to any other right to appeal.” R.C. 2953.08(A).

The Fifth, Seventh, and Ninth Appellate Districts follow the plurality opinion in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, which requires an abuse-of-discretion review of in-range criminal sentences. By contrast, like the Fourth Appellate District in this case, the Second, Sixth, Eighth, and Eleventh Appellate Districts treat R.C. 2953.08 as the exclusive authority for appellate review of sentences. Furthermore, two of five Second Appellate District judges agree that abuse-of-discretion review survives R.C. 2953.08.

II. The Second, Fourth, Sixth, Eighth, and Eleventh Appellate Districts no longer follow the *Kalish* plurality opinion.

In Ms. Marcum’s case, the Fourth Appellate District note that it had “acknowledged that we should no longer follow the *Kalish* two-step procedure.” Slip. Op., p. 11; ¶ 22, citing *State v. Brewer*, 4th Dist. Meigs No. 14CA1, 2014-Ohio-1903.¹

¹ The page number refers to the file-stamped copy of the opinion attached to this memorandum. The paragraph number refers to the numbering on the version of the opinion published on this Court’s website. The slip opinion does not contain paragraph

The Second, Sixth, Eighth, and Eleventh Appellate Districts have joined the Fourth Appellate District in abandoning the abuse-of-discretion standard set forth in *Kalish*. *State v. Battle*, 2d Dist. Clark No. 2014 CA 5, 2014-Ohio-4502, ¶ 7; *State v. Fraszewski*, 6th Dist. Lucas No. 3-13-1220, 2014-Ohio-4397, ¶ 10 (the “two-step approach set forth in *Kalish* no longer applies to appellate review of felony sentences”); *State v. Totty*, 8th Dist. Cuyahoga No. 100788, 2014-Ohio-3239, ¶ 18 (“[t]his court no longer applies the abuse of discretion standard of *State v. Kalish*”); *State v. Long*, 11th Dist. Lake No. 2013-L-102, 2014-Ohio-4416, ¶ 71 “we now conclude that *Kalish* is no longer good law”).

III. The Fifth, Seventh, and Ninth Appellate Districts, still conduct abuse-of-discretion reviews of criminal sentences.

By contrast, the Fifth, Seventh, and Ninth Appellate Districts continue to apply an abuse-of-discretion standard after determining that a sentence is not clearly and convincingly contrary to law. As the Seventh District wrote:

[If a sentence] is not clearly and convincingly contrary to law, we must determine whether the sentencing court abused its discretion in applying the factors in R.C. 2929.11, R.C. 2929.12 and any other applicable statute.

State v. Hill, 7th Dist. Carroll No. 13 CA 892, 2014-Ohio-1965, ¶ 9. Likewise, the Fifth District continues to follow *Kalish*. *State v. Nugent*, 5th Dist. Guernsey No. 13 CA 30 2014-Ohio-3848, ¶ 9-10. And the Ninth District has explained that it “reviews sentences

numbers, and the pages of the slip opinion are numbered differently from the version on this Court’s website.

pursuant to the two-step approach set forth in” *Kalish. State v. Simmons*, 9th Dist.

Summit No. 27197, 2014-Ohio-4191, ¶ 39.

IV. The Second Appellate District is split internally.

Further, two of five judges of the Second Appellate District have come to the same conclusion as the Fifth, Seventh, and Ninth Appellate Districts. As Judge Froelich explained, the abuse-of-discretion standard survives because R.C. 2953.08 begins with the words, “[i]n addition to any other right to appeal. . . .” *Rodeffer* at ¶ 41 (Froelich, J. concurring in judgment only) (“[t]hus, by its language, R.C. 2953.08 does not limit an appellate court’s review only to the grounds stated in that statute”). And as Judge Froelich explained in another case, R.C. 2953.08 “allows the right to appeal . . . on specific listed grounds; it does not prohibit an appeal . . . on other, non-listed grounds.” *State v. Jones*, 2d Dist. Clark No. 12CA61, 2013-Ohio-4820, ¶ 43 (Froelich, J., dissenting in part and concurring in judgment). Judge Donovan has joined Judge Froelich’s analysis. *State v. Polhamus*, 2d Dist. Miami No. 2013-CA-3, 2014-Ohio-145, ¶ 46, n.8 (Donovan, J., dissenting).

V. The Fourth Appellate District explained that the law is unclear as to how appellate courts should review criminal sentences.

In its opinion in Ms. Marcum’s case, the Fourth District acknowledged that the law concerning appellate review of sentences is unclear:

Nothing in this opinion should be construed as being critical of either party on this particular issue. Over the last decade, the Ohio Supreme Court and the Ohio General Assembly, have constructed an ever-moving

target for felony sentencing review and the standard of review for criminal sentences changes almost by the day.

Slip. Op., p.11, n.4; ¶ 22, n.4.

VI. Conclusion.

The courts of appeals are conflicted about how to review criminal sentences. This Court should accept this case and set a clear standard for the appellate review of sentences.

STATEMENT OF THE CASE AND THE FACTS

The police found materials from a "one pot shake and bake" methamphetamine lab on Mary Marcum's front porch. The State asserts that the materials belonged to Ms. Marcum, but she asserts that the materials belonged to her boyfriend and her friends.

* * *

On Sunday, January 27, 2013, early in the afternoon, Bryan White and Ronnie Schaefer visited the house Ms. Marcum shared with her mother and children. Ms. Marcum knew Mr. White, but did not then know that he used methamphetamine. She did not know Mr. Schaefer. After one of them asked, Ms. Marcum said that "there was not going to be meth or nothing like that cooked in my home." Mr. White tried to talk her into it, but she said no. They were in the Marcum house for about ten minutes.

While he was there, Mr. White asked to use the bathroom, where Ms. Marcum's mother had a box of twelve-hour Sudafed that Ms. Marcum had recently purchased. Before he left, Mr. White asked for a trash bag. Ms. Marcum remembers seeing her boyfriend, Aaron Fitzpatrick, give him a bag. The State later obtained an arrest warrant for Mr. Fitzpatrick alleging that he also was responsible for the material on Ms. Marcum's porch.

Four days later, at about 3:00 in the morning, two police officers found two trash bags on the porch, one or both of which contained materials that appeared to have been used in a small methamphetamine lab. Those materials included a receipt from January 25, 2013, for the cash purchase of drain cleaner, stripped open lithium batteries, a

hypodermic needle, a Gatorade bottle with untested residue, and an empty box of twelve-hour Sudafed. The officers found no methamphetamine precursors in Ms. Marcum's house.

After Ms. Marcum's arrest, Anita Moore, an employee of the local juvenile court, administered a urine drug screen, which indicated positive results for amphetamines and methamphetamine, but Ms. Moore could not explain how accurate the test was or whether Ms. Marcum's prescription drugs could have affected the test. The State discarded the sample before it could be tested further. The State presented no evidence of anyone who claims to have seen her use illegal drugs. An officer conceded that he did not notice any needle marks on Ms. Marcum's arms.

The jury convicted her of the illegal manufacture of methamphetamine in the vicinity of a juvenile. R.C. 2925.04(A). The trial court sentenced her to ten years in prison, one year shy of the eleven-year maximum for the first-degree felony. R.C. 2929.14(A)(1). The court also imposed a \$10,000 fine and a five-year driver's license suspension.

Ms. Marcum timely appealed, and the Fourth District held that the evidence was sufficient and that her conviction was not against the manifest weight of the evidence. The Court also rejected her claim that her sentence was both contrary to law and an abuse of discretion.

ARGUMENT

Proposition of Law:

Because appellate review of criminal sentences under R.C. 2953.08 exists “[i]n addition to any other right to appeal,” R.C. 2505.03 empowers appellate courts to review discretionary sentencing decisions under an abuse of discretion standard.

A. Introduction.

The trial court abused its discretion by imposing a near-maximum prison term because 1) this case does not present anything close to the most serious kind of methamphetamine manufacturing , and 2) Ms. Marcum is far from posing the greatest risk to the public of people convicted of her offense. This Court should accept this case and reverse because the trial court’s sentence was “unreasonable, arbitrary, or unconscionable[.]” *State v. Kirkland*, 2014-Ohio-1966, ¶ 67, 140 Ohio St.3d 73, 81, 15 N.E.3d 818, quoting, *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, 894 N.E.2d 671, ¶ 23 (setting forth the abuse-of-discretion standard of review).

B. Standard of Review.

1. Review under R.C. 2953.08(G)(2).

Under R.C. 2953.08(G)(2), an appellate court should reverse a sentence when it “clearly and convincingly finds” that a sentence is not supported by adequate findings or that the sentence is “otherwise contrary to law.”

2. Review under R.C. 2505.03.

But R.C. 2953.08(A) expressly states that R.C. 2953.08 is *not* the exclusive authorization for an appeal of a criminal sentence:

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

In addition to review under R.C. 2953.08, criminal sentences are subject to review under R.C. 2505.03(A), which provides a right to appeal from all final orders:

Every final order, judgment, or decree of a court and, when provided by law, the final order of any administrative officer, agency, board, department, tribunal, commission, or other instrumentality may be reviewed on appeal by a court of common pleas, a court of appeals, or the supreme court, whichever has jurisdiction. (Emphasis added.)

Further, Article IV, Section 3(A)(2) of the Ohio Constitution confers appellate jurisdiction to courts of appeals, except when death has been imposed, to “review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeal[.]” So, courts of appeals have the constitutional authority to review non-death sentences under Article IV, Section 3(A)(2) of the Ohio Constitution, as well as the statutory authority under both R.C. 2505.03 and R.C. 2953.08.

3. Eliminating the abuse-of-discretion standard would make most sentencing decisions entirely unreviewable.

The Second District has illustrated the dangers of eliminating abuse-of-discretion review because doing so effectively eliminates all review of the length of in-range sentences. A 3-2 majority of that court has eschewed abuse-of-discretion review under

R.C. 2505.03. *State v. Battle*, 2d Dist. Clark No. 2014 CA 5, 2014-Ohio-4502, ¶ 7, citing *State v. Rodeffer*, 2013-Ohio-5759, 5 N.E.3d 1069 (2d Dist.). But it has also foreclosed almost any review of in-range sentences so long as the trial court utters a few magic words. The court explained that review under R.C. 2953.08 would consist only of verifying that the trial court made the required rote findings, that the sentence was within the statutory range, and that the trial court summarily stated that it followed R.C. 2929.11 and 2929.12. *Battle* at ¶ 7, citing *Rodeffer* at ¶ 32.

C. Discussion.

None of the R.C. 2929.12(B) factors that make an offense more serious apply to this case. First, the State has not contested that the materials found in this case would have created a relatively small amount of methamphetamine, especially when only one box of twelve-hour Sudafed was found. It's true that any amount of a banned substance is dangerous, but that's why the General Assembly made the production of any amount of any illegal drug (except for marijuana) a second-degree felony. R.C. 2925.04(C)(2). It's also true that the production of methamphetamine is particularly dangerous. But, that's why the General Assembly imposed a three-year minimum sentence for the production of that drug. R.C. 2925.04(C)(3)(a). And, finally, it's true that the production of methamphetamine near children creates an even greater hazard. But the General Assembly incorporated that risk into the sentencing range by making the offense a first-degree felony with a four-year minimum prison sentence. R.C. 2925.04(C)(3)(b).

Ms. Marcum's conviction for helping in the production of methamphetamine near children creates a range of punishment from four to eleven years. Those facts don't influence whether Ms. Marcum should be sentenced near the top or bottom of that range. Elements are not sentencing enhancers.

As to likelihood of recidivism, the State did not object when defense counsel said at sentencing that her prior history consisted only of two "minor infractions[.]" Ms. Marcum concedes that a "lack of remorse" is one factor that can enhance a sentence, but that is the only relevant aggravating factor the State has proposed. R.C. 2929.12(D)(5). Perhaps more importantly, Ms. Marcum has never argued that using or making methamphetamine is acceptable—she just says she has not done so.

Ms. Marcum's actions were not a more serious form of the offense she was convicted of. And the State has not shown that she has an elevated chance of recidivism. Accordingly, the trial court abused its discretion by sentencing Ms. Marcum to a near-maximum ten-year sentence.

CONCLUSION

The courts of appeals are hopelessly split as to how to review criminal sentences. The Second, Fourth, Sixth, Eighth, and Eleventh Appellate Districts refuse to conduct the abuse-of-discretion review performed in the Fifth, Seventh, and Ninth Appellate Districts.

This Court should accept Ms. Marcum's case, vacate her sentence, and remand this case to the trial court for resentencing. Or, in the alternative, this Court should accept this case, reverse the decision of the court of appeals, and remand this case to the court of appeals to apply the correct standard.

Respectfully submitted,

Office of the Ohio Public Defender



By: Stephen P. Hardwick (0062932)
Assistant Public Defender

250 E. Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394; (614) 752-5167 (fax)
stephen.hardwick@opd.ohio.gov

Counsel for Appellant, Mary Marcum

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been sent by regular U.S. mail, postage prepaid upon C. Jeffrey Adkins, Gallia County Prosecutor, Gallia County Courthouse, 18 Locust Street, Rm. 1267, Gallipolis, Ohio 45631 on this 22nd day of October, 2014.



Stephen P. Hardwick (0062932)
Assistant Public Defender

Counsel for Appellant, Mary Marcum

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:
	: CASE No.
PLAINTIFF-APPELLEE,	:
	: ON DISCRETIONARY APPEAL FROM THE
V.	: GALLI COUNTY COURT OF APPEALS,
	: FOURTH APPELLATE DISTRICT,
MARY MARCUM,	: CASE No. 13CA11
	:
DEFENDANT-APPELLANT.	:

APPENDIX TO

MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT MARY MARCUM

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
GALLIA COUNTY

STATE OF OHIO, :
Plaintiff-Appellee, : Case No. 13CA11
vs. :
MARY C. MARCUM, : DECISION AND JUDGMENT ENTRY
Defendant-Appellant. :

FILED
CLERK OF COURT
GALLIA COUNTY, OHIO

14 SEP -8 AM 11:55

COURT OF APPEALS

APPEARANCES:

COUNSEL FOR APPELLANT: Timothy Young, Ohio Public Defender, and
Stephen P. Hardwick, Ohio Assistant
Public Defender, 250 East Broad Street,
Ste. 1400, Columbus, Ohio 43215

COUNSEL FOR APPELLEE: C. Jeffrey Adkins, Gallia County
Prosecuting Attorney, and Britt T.
Wiseman, Gallia County Assistant
Prosecuting Attorney, 18 Locust Street,
Room 1267, Gallipolis, Ohio 45631

CRIMINAL APPEAL FROM COMMON PLEAS COURT

DATE JOURNALIZED:

ABELE, P.J.

This is an appeal from a Gallia County Common Pleas Court judgment of conviction and sentence. A jury found Mary C. Marcum, defendant below and appellant herein, guilty of the illegal manufacture of a controlled substance in violation of R.C. 2925.04(A). Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION."

SECOND ASSIGNMENT OF ERROR:

"MARY MARCUM'S CONVICTION IS AGAINST THE
MANIFEST WEIGHT OF THE EVIDENCE."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT ABUSED ITS DISCRETION BY
IMPOSING A NEAR-MAXIMUM PRISON TERM."

The Gallia County Sheriff's office received a tip about a "meth" lab in a mobile home at 1962 Georges Creek Road in Gallipolis. Apparently, this mobile home was the residence of appellant, her two children (ages nine and eleven) and her mother, Ida Marcum.

On January 31, 2013, at approximately 3 A.M., Gallia County Sheriff's Deputies Chris Gill and Randy Johnson visited the residence to investigate. They approached the front porch and noted a number of trash bags emitting a strange odor that Deputy Gill associated with the production of methamphetamine (meth).

After the deputies knocked on the door, Aaron Fitzpatrick answered.¹ Fitzpatrick summoned appellant who was asked to give consent to search the premises. She answered in the affirmative. The deputies found meth manufacturing materials in several trash bags on the front porch. Appellant's two children, in a bedroom between fifteen and twenty feet from the front porch where the

¹The record is not entirely clear as to appellant's relationship with Fitzpatrick. During testimony, appellant stated "Aaron Fitzpatrick, my son," but later characterized him as her "boyfriend."

meth was manufactured, were removed from the home.

The Gallia County Grand Jury returned an indictment that charged appellant with the illegal manufacture of a controlled substance. She pled "not guilty" to the charge and the matter proceeded to a jury trial. At the trial, the state presented the testimony of Deputies Gill and Johnson. The defense adduced evidence to show that (1) appellant purchased the pseudoephedrine found at the scene, described as a precursor to manufacture of meth, for her mother because she had a cold, and (2) some of appellant's friends and acquaintances brought the garbage bags to the residence that evening. These friends supposedly wanted to use the residence to set up their own meth lab, but appellant testified that she denied them permission to do so.

The jury found appellant guilty and the trial court sentenced appellant to serve a 10 year sentence. This appeal followed.

I

In her first assignment of error, appellant asserts that insufficient evidence exists to support her conviction. We disagree with appellant.

When an appellate court conducts a review for the sufficiency of the evidence, the court will look to the adequacy of the evidence and whether such evidence, if it is believed by the trier of fact, supports a finding of guilt beyond a

reasonable doubt. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997) at paragraph two of the syllabus; *State v. Jenks*, 61 Ohio St.3d 259, 273, 574 N.E.2d 492 (1991). In other words, after viewing the evidence, and each inference reasonably drawn therefrom, in a light most favorable to the prosecution, could any rational trier of fact find all of the essential elements of the offense to have been proven beyond a reasonable doubt? *State v. Were*, 118 Ohio St.3d 448, 890 N.E.2d 263, 2008-Ohio-2762, at ¶132; *State v. Hancock*, 108 Ohio St.3d 57, 840 N.E.2d 1032, 2006-Ohio-160, at ¶34. Furthermore, the weight of evidence and credibility of witnesses are issues that the trier of fact must determine. See e.g. *State v. Frazier*, 115 Ohio St.3d 139, 873 N.E.2d 1263, 2007-Ohio-5048, at ¶106; *State v. Dye*, 82 Ohio St.3d 323, 329, 695 N.E.2d 763 (1998); *State v. Williams*, 73 Ohio St.3d 153, 165, 652 N.E.2d 721 (1995). Here, the jury, sitting as the trier of fact, could opt to believe all, part or none of the testimony of any witness who appeared before it. See *State v. Mockbee*, 2013-Ohio-5504, 5 N.E.3d 50 (4th Dist.), at ¶13; *State v. Colquitt*, 188 Ohio App.3d 509, 2010-Ohio-2210, 936 N.E.2d 76, at ¶ 10, fn. 1 (2nd Dist.). The underlying rationale for deferring to the trier of fact on evidentiary weight and credibility issues is that the trier of fact is far better positioned to view the witnesses and to observe their demeanor, gestures and voice inflections and to use those observations to

weigh witness credibility. See *Myers v. Garson*, 66 Ohio St.3d 610, 615, 614 N.E.2d 742 (1993); *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984).

Appellant offers two arguments in support of this assignment of error. First, she asserts that the prosecution did not adduce evidence to show that the materials found on the porch were actually used to produce meth. However, at trial Deputy Gill provided a very thorough description concerning the chemical process necessary to produce meth. He testified that various materials (including pseudoephedrine, a drain cleaner with sulfuric acid, lithium batteries, etc.) were found on the premises and are precursors for the production of meth. Deputy Johnson confirmed his testimony and both deputies testified as to unique smell of the chemicals emanating from garbage bags that contained what was characterized as "one pot reaction vessels." In view of the officers' extensive training and experience (particularly Deputy Gill), established at the outset of their testimony, we conclude that sufficient evidence exists to demonstrate that methamphetamine was being manufactured at this particular residence. See, also, *State v. Gerhart*, 9th Dist. Summit No. 24384, 2009-Ohio-4165.

Appellant's second argument, in essence, is that even if sufficient evidence exists to show that meth was being produced at the residence, insufficient evidence exists to show that she

produced it. Again, we disagree.

At trial, the prosecution adduced evidence that appellant purchased pseudoephedrine, a precursor to the production of meth. Moreover, the evidence revealed that she signed receipts for the purchase of various other chemical compounds necessary for the production of meth. Deputy Gill also related that appellant had "sores on her forehead" that meth users commonly display. Anita Moore, an employee of the Gallia County Probate/Juvenile Court, also testified that she administered a drug test to appellant that showed positive results for use of meth.² After our review of the evidence, we readily conclude that sufficient evidence exists, if believed, for the jury to conclude beyond a reasonable doubt that appellant manufactured meth.

Accordingly, for these reasons we hereby overrule appellant's first assignment of error.

II

Appellant's second assignment asserts that her conviction is against the manifest weight of the evidence. It is true, as an abstract proposition of law, that sufficient evidence may support a conviction, but the conviction may nevertheless be against the manifest weight of the evidence. *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541. We are not persuaded, however, that in the

²The witness explained that she is frequently called to administer drug tests to women if no female officers are available.

case sub judice appellant's convictions are against the manifest weight of the evidence.

Generally, a reviewing court will not reverse a conviction on grounds that the conviction is against manifest weight of the evidence unless it is obvious that the jury lost its way and created such a manifest miscarriage of justice that a reversal of the judgment and a new trial are required. *State v. Garrow*, 103 Ohio App.3d 368, 370-371, 659 N.E.2d 814 (4th Dist.1995); *State v. Mynes*, 4th Dist. Scioto No. 12CA3480, 2013-Ohio-4811, at ¶22.

Appellant concedes in her brief that the argument underlying this assignment of error is essentially the same argument that she made under her first assignment of error. That being the case, we overrule it for the same reasons.

In the case sub judice, the jury apparently accepted testimony of Deputies Gill and Johnson that appellant manufactured meth on her front porch. Further, although appellant claimed that other people brought the materials to her residence so they could use her home as a meth lab, the jury obviously afforded little weight to her explanation.

The same is true for the assertion of appellant's mother, Ida Marcum, that appellant bought the pseudoephedrine for her cold. However, the trial testimony established that pseudoephedrine is a necessary precursor for the manufacture of meth. Even though appellant's mother testified her daughter

purchased the drug for her benefit, the jury apparently disregarded her testimony.

Accordingly, for these reasons we hereby overrule appellant's second assignment of error.

III

In her third assignment of error, appellant asserts that the trial court abused its discretion in sentencing her to a near maximum prison term.³ We, however, find no error in the trial court's sentencing.

Appellant, understandably, relies on the two part test the Ohio Supreme Court adopted in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. This court used this standard on a number of occasions. See e.g. *State v. Tolle*, 4th Dist. Adams No. 13CA964, 2013-Ohio-5568, at ¶22; *State v. Johnson*, 4th Dist. Adams Nos. 11CA925, 11CA926, 11CA927, 2012-Ohio-5879, at ¶10. We, however, recently rejected the application of that standard in light of recent statutory enactments.

In *State v. Brewer*, 4th Dist. Meigs No. 14CA1, 2014-Ohio-1903, we provided a thorough rendition of pre-*Kalish* and post-*Kalish* history concerning the long, tortured and ever-evolving standard of review that we must employ for reviewing felony

³ Production of meth within the vicinity of a juvenile is a first degree felony. See R.C. 2925.04(C)(3)(b). Available prison sentences for first degree felony cases range from three to eleven years. R.C. 2929.14(A)(1).

sentencing, as follows:

"Prior to [*State v.*] *Foster*, [109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470], there was no doubt regarding the appropriate standard for reviewing felony sentences. Under the applicable statute, appellate courts were to 'review the record, including the findings underlying the sentence or modification given by the sentencing court. * * * The appellate court's standard for review [was] not whether the sentencing court abused its discretion. R.C. 2953.08(G)(2)." *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶9. "The statute further authorized a court of appeals to 'take any action * * * 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) That the sentence is otherwise contrary to law.' Former R.C. 2953.08(G)(2), 2004 Am.Sub.H.B. No. 473, 150 Ohio Laws, Part IV, 5814." *Id.* at ¶ 10.

In *Foster*, the Supreme Court of Ohio declared certain provisions of the felony sentencing statutes unconstitutional and excised them because they required judges to make certain factual findings before imposing maximum, non-minimum, or consecutive sentences. The Supreme Court held that insofar as former R.C. 2953.08(G), referred to the severed unconstitutional judicial findings provisions, it no longer applied. *Id.* at ¶99.

Following *Foster*, appellate districts applied different standards of review in felony sentencing cases. *Kalish* at ¶3. In *Kalish*, the Supreme Court of Ohio attempted to resolve the conflicting standard, and a three-judge plurality held that based on the court's previous opinion in *Foster*, "appellate courts must apply a two-step approach when reviewing felony sentences. 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 first prong is satisfied, the trial court's decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard." *Id.* at ¶26. A fourth

judge concurred in judgment only and advocated a differing standard based on which statutes were being challenged. Id. at ¶27-42 (Willamowski, J., concurring). The remaining three judges joined the author of the court's decision in *Foster* in an opinion that stated *Foster* did not modify the standard for appellate review of felony sentences set forth in R.C. 2953.08, which did not include an abuse-of-discretion standard. Id. at ¶ 43-68 (Lanzinger, J., dissenting).

In the wake of *Kalish*, most appellate courts, including this one, followed the two-step standard of review specified by the plurality, even though it had not garnered the support of a majority of the Supreme Court. See, e.g., *State v. Tolle*, 4th Dist. Adams No. 13CA964, 2013-Ohio-5568, 2013 WL 6707023, ¶ 22.

Following *Kalish*, however, the United States Supreme Court held contrary to *Foster*, that it is constitutionally permissible for states to require judges rather than juries to make findings of fact before imposing consecutive sentences. *Oregon v. Ice*, 555 U.S. 160, 164, 129 S.Ct. 711, 172 L.Ed.2d 517 (2009). The Supreme Court of Ohio then held that the sentencing provisions it ruled unconstitutional in *Foster* remained invalid following *Ice* unless the General Assembly enacted new legislation requiring the judicial findings. *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768, paragraphs two and three of the syllabus. Thereafter, the General Assembly enacted 2011 Am.Sub.H.B. No 86 ("H.B. 86"), which revived some of the judicial fact-finding requirements for sentences and reenacted the felony sentencing standard of review in R.C. 2953.08(G).

In light of these quickly changing circumstances, many appellate courts have abandoned the standard of review set forth in the *Kalish* plurality and returned to the standard set forth in the statute. Recently, in *State v. Bever*, 4th Dist. Washington No. 13CA21, 2014-Ohio-600, 2014 WL 688250, ¶13, the lead opinion espoused the view that we should adopt the holdings of those other appellate districts that have addressed the issue and hold that the abuse-of-discretion part of the *Kalish* test no longer controls. In that case, the author of this opinion concurred in judgment because the appeal was manifestly governed by the standard of review in R.C. 2953.08(G)(2), so we did not need to address the

viability of the second part of the standard of review set forth in *Kalish*. Id. at ¶24 (Harsha, J., concurring in judgment only) FN3; see also *State ex rel. Asti v. Ohio Dept. of Youth Servs.*, 107 Ohio St.3d 262, 2005-Ohio-6432, 838 N.E.2d 658, ¶34, quoting *PDK Laboratories, Inc. v. United States Drug Enforcement Administration* (D.C.Cir.2004), 362 F.3d 786, 799 (Roberts, J., concurring in part and in the judgment) ('This is a sufficient ground for deciding this case, and the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more—counsels us to go no further' ")." (Internal references to paragraph numbers in *Brewer* omitted.) Id. at ¶¶26-31.

Thus, in *Brewer* we acknowledged that we should no longer follow the *Kalish* two-step procedure. Instead, we will only increase, reduce, modify, or vacate and remand a challenged sentence if we clearly and convincingly find either (1) that the record does not support the trial court's findings under the specified statutory provisions, or (2) that the sentence is otherwise contrary to law. In any event, under this standard we no longer consider whether a trial court abused its discretion by imposing a sentence. *Brewer*, at ¶¶33&37.⁴

In the case sub judice, we find no merit to this argument. Appellant essentially concedes that her sentence is not contrary

⁴Nothing in this opinion should be construed as being critical of either party on this particular issue. Over the last decade, the Ohio Supreme Court and the Ohio General Assembly, have constructed an ever-moving target for felony sentencing review and the standard of review for criminal sentences changes almost by the day. Neither liberty, nor stare decisis, finds refuge in a jurisprudence of doubt. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 844, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).

to law. Thus, we may reverse the sentence only if we clearly and convincingly find that the record does not support the trial court's findings. In the sentencing hearing transcript, the trial court was somewhat vague as to the reasons it imposed this particular sentence, except that it considered the relevant statutory criteria and appellant committed the offense in the vicinity of a juvenile. We also point out that it is not simply that appellant committed the crime within fifteen to twenty feet of the children. Deputy Gill also testified that "hydrogen gas" was still being emitted from the "vessels" and could have reacted with the "lithium particles" to start a fire. In short, appellant placed her children in an extremely dangerous situation.

After our review of the record, we conclude the trial court's findings for the sentences that it imposed are amply-supported in the record and we have no reason to reverse that sentence. Thus, appellant's third assignment of error is thus without merit and is overruled.

Having reviewed all errors that appellant assigned, and having found merit in none, we hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed. Appellee to recover of appellant 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 Gallia County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

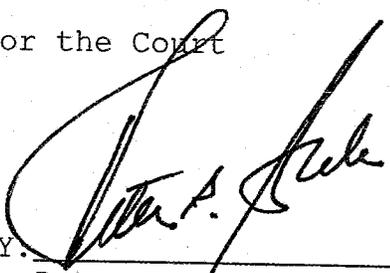
The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

Harsha, J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY.


Peter B. Abele
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.