

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

FILED
CLERK OF COURTS
GALLIA COUNTY, OHIO
Mary C. Marcum

14 DEC -5 AM 11:04

COURT OF APPEALS

STATE OF OHIO, :
 :
Plaintiff-Appellee, : Case No. 13CA11
 :
vs. :
 :
MARY C. MARCUM, : ENTRY ON MOTION TO
 : CERTIFY A CONFLICT
 :
Defendant-Appellant. :

ABELE, P.J.

This matter comes on for consideration of an application by Mary C. Marcum, defendant below and appellant herein, to certify a conflict between the disposition of her case and two decisions rendered by other Ohio appellate districts.

On September 8, 2014, we affirmed appellant's conviction and sentence for the illegal manufacture of a controlled substance in violation of R.C. 2925.04(A). *State v. Marcum*, 4th Dist. Gallia No. 13CA11, 2014-Ohio-4048. In affirming her sentence, we indicated that we no longer follow the two-part test adopted in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, that would require us to consider whether the trial court abused its discretion when it imposed sentence. 2014-Ohio- 4048, at ¶21. Instead, we followed *State v. Brewer*, 4th Dist., 2014-Ohio-1903, 11 N.E.3d 317, wherein we abandoned the *Kalish* abuse of discretion test in light of recent state and federal decisions and, perhaps more important, in light of 2011 Am.Sub.

H.B. No 86. That provision revived the judicial fact-finding requirements for sentences and reenacted the R.C. 2953.08(G) felony sentencing standard of review. We held that we may increase, reduce, modify or vacate and remand a challenged sentence if we clearly and convincingly find either (1) the record does not support a trial court's findings under the specified statutory provisions, or (2) the sentence is otherwise contrary to law. 2014-Ohio- 4048, at ¶22; also see e.g. *State v. Brewer*, 4th Dist., 2014- Ohio-1903, 11 N.E.3d 317, at ¶¶26-31.

Under App.R. 25(A), a party may file a motion to certify a conflict within ten days of an appellate court decision. Section 3(B)(4), Article IV of the Ohio Constitution gives a court of appeals the power to certify a case to the Supreme Court

"[w]henver . . . a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals." Before an appellate court may certify a case to the Supreme Court, three conditions must be satisfied:

(1) the court must find that the asserted conflict is upon the same question; (2) the alleged conflict must be on a rule of law rather than on facts; and (3) the court must clearly set forth the rule of law that it contends is in conflict with the judgment on the same question by another district court of appeals.

Whitelock v. Gilbane Bldg. Co., 66 Ohio St.3d 594, 596, 613 N.E.2d 1032 (1993).

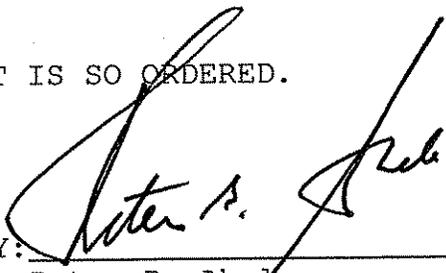
In her motion to certify, appellant argues that our refusal to apply the *Kalish* abuse of discretion test conflicts with cases from the Seventh and Ninth District. We agree with her argument.

In *State v. Hill*, 7th Dist. Carroll No. 13CA892, 2014-Ohio-1965, at ¶9, our Seventh District colleagues cited the *Kalish* two step process in reviewing an assignment of error asserting that more than a minimum sentence was imposed. In *State v. Simmons*, 9th Dist. Summit No. 27197, 2014-Ohio-4191, at ¶39, our colleagues in the Ninth District continued to apply the *Kalish* standard when it resolved an assignment of error that asserted that the trial court abused its discretion in sentencing. Additionally, we note that both *Hill* and *Simmons* were decided after the enactment of R.C. 2953.08(G) and, thus, directly conflict with our decision on the application of that statute.

Accordingly, appellant's motion is hereby well-taken and we certify this case to the Ohio Supreme Court as being in conflict with *Hill* and *Simmons*, and ask for a final resolution of the following question: does the test outlined by the Court in *State v. Kalish* apply in reviewing felony sentences after the passage of R.C. 2953.08(G)?

Harsha, J. & McFarland, J.: Concur

IT IS SO ORDERED.

BY: 

Peter B. Abele
Presiding Judge