Supreme Court of Ohio Clerk of Court - Filed April 02, 2015 - Case No. 2014-1825

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	CASE NOS. 2014-1825 AND 2014-2122
PLAINTIFF-APPELLEE,	:	
	:	ON DISCRETIONARY APPEAL FROM THE
v.	:	GALLIA COUNTY COURT OF APPEALS,
	:	FOURTH APPELLATE DISTRICT,
MARY MARCUM,	:	CASE NO. 13CA11
	:	
DEFENDANT-APPELLANT.	:	

AMENDED MERIT BRIEF OF APPELLANT MARY MARCUM

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INTRODUCTION

This case is about the first eight words of R.C. 2953.08: "In addition to any other right to appeal. . . ." Those eight words expressly acknowledge that the remedies in that section *supplement* and do not *replace* other appellate remedies. This Court should hold that R.C. 2505.03, which this Court has repeatedly and correctly applied to criminal cases, permits criminal defendants to seek an abuse-of-discretion review of their sentences.

STATEMENT OF THE CASE AND THE FACTS

I. Summary.

The police found materials from four "one pot shake and bake" bottles used to create methamphetamine on Mary Marcum's front porch. The State asserted that the materials belonged to Ms. Marcum, but she asserted that the materials belonged to her boyfriend and her friends. The trial court sentenced her to ten years in prison for a single count of producing methamphetamine plus a $10,000 fine. This appeal challenges her prison term.

II. Factual and procedural history.

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. T.p. 328, 330. Ms. Marcum knew Mr. White, but did not then know that he used methamphetamine. T.p. 328, 346. She did not know Mr. Schaefer. T.p. 328. After one of

them asked to use her house to make methamphetamine, Ms. Marcum said that "there was not going to be meth or nothing like that cooked in my home." T.p. 329. Mr. White tried to talk her into it, but she said no. T.p. 330. They were in the Marcum house for about ten minutes. T.p. 347.

While he was there, Mr. White asked to use the bathroom, where Ms. Marcum's mother had a single box of twelve-hour Sudafed that Ms. Marcum had recently purchased. T.p. 337, 338. Before he left, Mr. White asked for a trash bag. T.p. 332. Ms. Marcum remembers seeing her boyfriend, Aaron Fitzpatrick, give him a bag. *Id*. The State later obtained an arrest warrant for Mr. Fitzpatrick alleging that he also was responsible for the material on Ms. Marcum's porch. T.p. 345. Mr. Fitzpatrick did not testify at trial or sentencing, but in a postconviction affidavit he admitted that he and Mr. White had produced the drugs without Ms. Marcum's knowledge or consent. Affidavit of Aaron Fitzpatrick, attached to Postconviction Petition (May 16, 2014).[1] Mr. Fitzpatrick later threatened to withhold that testimony unless Ms. Marcum paid him money. Letter of Aaron Fitzpatrick, attached to Second Supp. to Postconviction Petition (Aug. 27, 2014).

Four days later, at about 3:00 in the morning, two police officers found two trash bags on Ms. Marcum's porch, one or both of which contained materials that appeared to have been used in four "one pot shake and bake" bottles used to make

[1] The petition remains pending before the common pleas court.

methamphetamine. T.p. 190, 196, 206. Those materials included a receipt from January 25, 2013, for the cash purchase of drain cleaner, stripped open lithium batteries, a hypodermic needle, a bottle for sulfuric acid, two two-liter Mountain Dew bottles, a Gatorade bottle, and an empty box of twelve-hour Sudafed. T.p. 205-13. The officers found no methamphetamine or methamphetamine precursors in Ms. Marcum's house. T.p. 226-8.

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. T.p. 274, 279. But Ms. Moore could not explain how accurate the test was or whether Ms. Marcum's prescription drugs could have affected the test. T.p. 288-91 The State discarded the sample before it could be tested further. T.p. 287. The State presented no evidence of anyone who even claims to have seen her use illegal drugs.

Ms. Marcum testified that she had never been to the store where the drain cleaner was purchased. T.p. 338. She also explained that she had been taking two prescription medications—Metadate, a stimulant, and Adderall, an amphetamine. T.p. 339. She also explained that she had never used methamphetamine. T.p. 339. 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. T.p. 223.

The jury convicted her of the illegal manufacture of methamphetamine in the vicinity of a juvenile. T.p. 412; R.C. 2925.04(A). At sentencing, the State did not object when defense counsel said that her prior history consisted only of two "minor infractions[.]" T.p. 422.

The trial court sentenced her to ten years in prison, one year shy of the eleven-year maximum for the first-degree felony. T.p. 426; R.C. 2929.14(A)(1). The court also imposed a $10,000 fine and a five-year driver's license suspension. T.p. 426.

On appeal, Ms. Marcum argued that her conviction was based on insufficient evidence and that the trial court's sentence was contrary to law and an abuse of discretion. The court of appeals rejected all of her claims, and specifically held that it could not conduct an abuse-of-discretion review of her sentence. Opinion at ¶ 22-23, Apx. A-21 to A-22. The court then certified its decision as in conflict with *State v. Hill*, 7th Dist. Carroll No. 13CA892, 2014-Ohio-1965, ¶9; and *State v. Simmons*, 9th Dist. Summit No. 27197, 2014-Ohio-4191, ¶ 39. Apx. A-07.

This Court then accepted Ms. Marcum's timely discretionary appeal and notice of certified conflict.

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. **The plain language of R.C. 2953.08 makes the provision non-exclusive.**

A "basic rule of statutory construction [is] that words in statutes should not be construed to be redundant, nor should any words be ignored[.]" *In re Andrew*, 119 Ohio St. 3d 466, 467, 2008-Ohio-4791, 895 N.E.2d 166, ¶ 6, quoting *E. Ohio Gas Co. v. Pub. Util. Comm.*, 39 Ohio St. 3d 295, 299, 530 N.E.2d 875 (1988). And this Court has repeatedly held that where possible, a "court should give meaning to every word in every act." *Id.*, quoting *State ex rel. Mitman v. Greene Cty. Bd. of Commrs.*, 94 Ohio St. 296, 308, 113 N.E. 831 (1916).

Here, R.C. 2953.08 begins with the words, "In addition to any other right to appeal. . . ." This Court should interpret those words to hold that Ms. Marcum may use "any other right to appeal" her sentence. Further, the General Assembly twice uses the same words, "[i]n addition to any other right to appeal[,]" to give prosecutors the same broad authority to appeal criminal sentences. R.C. 2953.08(B) and 2945.67(A). Accordingly, the remedies set forth is R.C. 2953.08 supplement other appellate remedies available to both criminal defendants and the State.

B. **Ohio Revised Code Chapter 2505 applies to criminal cases.**

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.

Nothing in Chapter 2505 limit its application to civil cases, and this Court has consistently applied the chapter to criminal cases. Perhaps most importantly, this Court held that Crim.R. 32(C) exists to describe when a criminal judgment becomes a final order as defined by R.C. 2505.02. *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, paragraph one of the syllabus. This Court has also applied Chapter 2505 to numerous other criminal appeals. *See, e.g., State v. Muncie*, 91 Ohio St.3d 440, 441, 2001-Ohio-93, 746 N.E.2d 1092, paragraph one of the syllabus (forced medication to restore competency); *State v. Anderson*, 138 Ohio St.3d 264, 2014-Ohio-542, 6 N.E.3d 23, ¶ 43-47

(orders denying motions to dismiss based on double jeopardy); *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, ¶ 18 (court costs); and *State v. Chambliss*, 128 Ohio St.3d 507, 2011-Ohio-1785, 947 N.E.2d 651, ¶ 16 (dismissal of counsel).

C. After determining that a sentence is not contrary to law, courts of appeals should conduct an abuse-of-discretion analysis.

1. The standard of review for discretionary trial court decisions is abuse of discretion.

The standard of appellate review for discretionary decisions of lower courts is abuse of discretion. "Upon review, therefore, the question to be determined is whether the discretion committed to the trial court in such matters has been abused, resulting in manifest prejudice to the complaining party." *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶ 67 (other acts evidence), quoting *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 22. *See also Colvin v. Abbey's Rest.*, 85 Ohio St. 3d 535, 539, 709 N.E.2d 1156 (1999) (new trial order); *Fabian v. State*, 97 Ohio St. 184, 185, 119 N.E. 410, 410 (1918) (control of cross examination); *Charvat v. Ryan*, 116 Ohio St.3d 394, 2007-Ohio-6833, 879 N.E.2d 765, ¶ 26 (matter that was "committed to the sound discretion of the trial court" was reviewed for abuse its discretion).

2. The abuse-of-discretion standard is needed to correct unreasonable sentences.

As this Court has explained, despite the elimination of specific restrictions on non-minimum and maximum sentences, "courts have not been relieved of the obligation to consider the overriding purposes of felony sentencing, the seriousness and

recidivism factors, or the other relevant considerations set forth in R.C. 2929.11, 2929.12, and 2929.13." *State v. Hairston*, 2008-Ohio-2338, 118 Ohio St. 3d 289, 888 N.E.2d 1073, ¶ 25. And Ohio's sentencing scheme relies on vigorous appellate review to balance the increased sentencing ranges available to trial judges. The Sentencing Commission, whose 1993 recommendations were adopted almost verbatim by the General Assembly, faced a key question: "How to give judges discretion to be wise without giving discretion to be capricious? The answers: state clear purposes, use sentencing presumptions to guide judges, and monitor sentences through appellate review." A Plan for the Felony Sentencing in Ohio: A Formal Report of the Ohio Sentencing Commission (1993), p. 19. Giving trial judges unfettered discretion, as opposed to reviewable discretion, frustrates the legislative goal to avoid capriciousness in criminal sentencing.

This Court has defined an abuse of discretion as an "unreasonable, arbitrary, or unconscionable use of discretion, or as a view or action that no conscientious judge could honestly have taken." *Kirkland*, at ¶ 67, quoting *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, 894 N.E.2d 671, ¶ 23. At a minimum, when an appellate judge looks at a sentence and thinks, "that's ridiculous," the judge has identified a sentence that likely is an abuse of discretion. While only a relatively few sentences will fall afoul of the abuse-of-discretion standard, this Court should not tie the hands of appellate judges to reverse unreasonable sentences.

3. The trial court abused its discretion in sentencing Ms. Marcum to a near-maximum sentence.

This Court need not conduct an abuse-of-discretion analysis itself because it can simply reverse the Fourth District's decision and remand this case for that court to conduct the review. But if this Court chooses to take this step, this Court should find that Ms. Marcum's sentence is unreasonable because according to the factors set forth in R.C. 2929.12, her conduct was at the less serious end, rather than the more serious end, of the offense of producing methamphetamine near children, and she does not pose a high likelihood of recidivism.

Ms. Marcum's conduct was not "more serious than conduct normally constituting the offense." R.C. 2929.12(B). 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. 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. That's why the General Assembly created a sentencing range of three to eleven years in prison for the production of that drug. R.C. 2929.14(A)(1) and 2925.04(C)(3)(a). The dangers of methamphetamine production are built into the legislatively-created sentencing range.

Likewise, even though the production of methamphetamine near children creates an even greater hazard, 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 instead of the standard three-year minimum. R.C. 2925.04(C)(3)(b).

So even though Ms. Marcum was convicted of having a part in the production of methamphetamine near children, the proximity to children simply changes the range of punishment to four-to-eleven years from three-to-eleven years for offenses not committed near children. Those facts don't influence whether Ms. Marcum should be sentenced near the top or bottom of the four-to-eleven range. Elements are not sentencing enhancers. *See, e.g., State v. Stroud*, 7th Dist. Mahoning No. 07 MA 91, 2008-Ohio-3187, ¶ 2 (causing death does not make manslaughter more serious).

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 conduct was not some of the most serious forms 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.

Certified 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)?

Yes. The lead opinion in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, correctly states that an appellate court can still conduct and abuse of discretion review. *Id.* at ¶ 4 ("the trial court's decision shall be reviewed under an abuse-of-discretion standard"). Further, the lead opinion correctly described the abuse-of-discretion standard. *Kalish* at ¶ 19, quoting *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983), quoting *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980) (abuse of discretion is "more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." Finally, the lead opinion then correctly analyzed the substance of Ms. Kalish's sentence. *Kalish* at ¶ 20.

The holding in *Kalish* does not depend on the severance of any part of R.C. 2953.08. To the contrary, the opinion uses the abuse-of-discretion standard because the trial court's decision on how to apply R.C. 2929.12 is discretionary. As this Court has explained, "R.C. 2929.12 explicitly permits a trial court to exercise its discretion in considering whether its sentence complies with the purposes of sentencing. It naturally follows, then, to review the actual term of imprisonment for an abuse of discretion." *Kalish* at ¶ 17.

Section 2953.08 still applies when determining whether a sentence is contrary to law, but when reviewing a trial court's application of R.C. 2929.11 and 2929.12, the standard is abuse of discretion.

Because R.C. 2953.08 supplements and does not replace other avenues of appeal, defendants can still obtain abuse-of-discretion review of a trial court's decision to sentence a defendant within the statutory range.

CONCLUSION

For both the certified conflict and the discretionary appeal, this Court should reverse the decision of the court of appeals and remand this case for resentencing. In the alternative, this Court should remand this case to the court of appeals to perform an abuse of discretion analysis.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true copy of the foregoing was forwarded by regular U.S. Mail, postage pre-paid to the office of Britt T. Wiseman, Assistant Gallia County Prosecutor, 18 Locust Street, Rm. 1267, Gallipolis, Ohio 45631, on this 2nd of April, 2015.

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IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	CASE NOS. 2014-1825 AND 2014-2122
PLAINTIFF-APPELLEE,	:	
	:	ON DISCRETIONARY APPEAL FROM THE
V.	:	GALLIA COUNTY COURT OF APPEALS,
	:	FOURTH APPELLATE DISTRICT,
MARY MARCUM,	:	CASE NO. 13CA11
	:	
DEFENDANT-APPELLANT.	:	

APPENDIX TO

AMENDED MERIT BRIEF OF APPELLANT MARY MARCUM

ORIGINAL

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.	:	

NOTICE OF APPEAL OF APPELLANT MARY MARCUM

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FILED
OCT 22 2014
CLERK OF COURT
SUPREME COURT OF OHIO

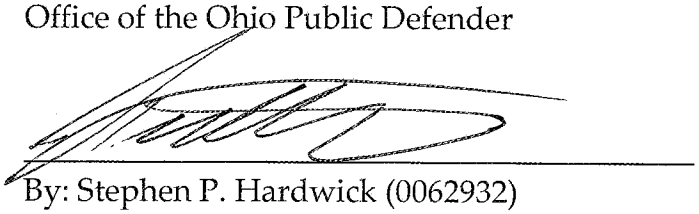
NOTICE OF APPEAL OF APPELLANT MARY MARCUM

Appellant Mary Marcum, hereby gives notice of appeal to the Supreme Court of Ohio from the Opinion and Journal Entry of the Gallia County Court of Appeals, Fourth Appellate District, entered in Court of Appeals Case No. 13CA11 on September 8, 2014.

This case raises a substantial constitutional question, involves a felony, and is of public or great general interest.

Respectfully submitted,

Office of the Ohio Public Defender



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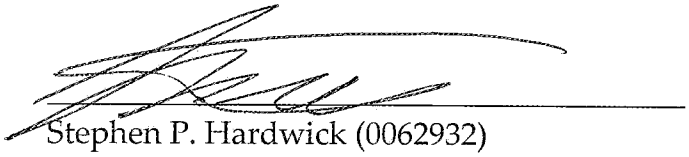
CERTIFICATE OF SERVICE

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

#428688

IN THE SUPREME COURT OF OHIO

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

NOTICE OF CERTIFIED CONFLICT OF APPELLANT MARY MARCUM

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Counsel for Appellant, Mary Marcum

NOTICE OF CERTIFIED CONFLICT OF APPELLANT MARY MARCUM

Appellant Mary Marcum, hereby gives notice to the Supreme Court of Ohio that on November 24, 2014, the Gallia County Court of Appeals, Fourth Appellate District, in Court of Appeals Case No. 13CA11, certified a conflict with *State v. Hill*, 7th Dist. Carroll No. 13CA892, 2014-Ohio-1965, and *State v. Simmons*, 9th Dist. Summit No. 27197, 2014-Ohio-4191. The Fourth District certified 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)?"

Respectfully submitted,

Office of the Ohio Public Defender

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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 11th day of December, 2014.

/s/ Stephen P. Hardwick
Stephen P. Hardwick (0062932)
Assistant Public Defender

#431767

Supreme Court of Ohio Clerk of Court - Filed December 11, 2014 - Case No. 2014-2122

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

COURT OF APPEALS
14 DEC -5 AM 11:04
FILED
CLERK OF COURTS
GALLIA COUNTY, OHIO

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]henever . . . 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

Supreme Court of Ohio Clerk of Court - Filed December 11, 2014 - Case No. 2014-2122

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

FILED
CLERK OF COURTS
GALLIA COUNTY, OHIO
14 SEP -8 AM 11:55
COURT OF APPEALS

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

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

[1]The 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

[2] The 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

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[4]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. 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.

[Cite as *State v. Hill*, 2014-Ohio-1965.]

STATE OF OHIO, CARROLL COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 13 CA 892
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	O P I N I O N
	)	
ANTHONY MICHAEL HILL,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 13CR5769.

JUDGMENT: Reversed and Remanded.

APPEARANCES:

For Plaintiff-Appellee:
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JUDGES:
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: May 5, 2014

[Cite as *State v. Hill*, 2014-Ohio-1965.]
VUKOVICH, J.

{¶1} Defendant-appellant Anthony Michael Hill appeals from the decision of the Carroll County Common Pleas Court sentencing him to an aggregate sentence of six years for violations of R.C. 2907.322(A)(1) and (A)(5), pandering sexually oriented matter involving a minor, second and fourth degree felonies respectively, and ordering that sentence to be served consecutive to the sentence issued in Carroll County Case No. 12CR5603 (three year sentence for attempted rape). Two issues are raised in this case. The first is whether the trial court erred when it ordered more than the minimum sentences on the pandering sexually oriented matter convictions. The second issue is whether the trial court erred when it ordered the sentence in the case at hand to run consecutive.

{¶2} For the reasons expressed below, the trial court did not err in ordering more than the minimum sentence; the trial court appropriately considered and weighed the purposes and principles of sentencing stated in R.C. 2929.11 and the seriousness and recidivism factors set forth in R.C. 2929.12. However, as to the consecutive sentencing order, it is not clear that the trial court considered the appropriate consecutive sentencing factors are the sentencing hearing. Therefore, the sentence is reversed and the matter is remanded for resentencing.

Statement of the Case

{¶3} On March 13, 2013, the grand jury issued a 30 count indictment against Hill. Counts 1 through 15 were for pandering sexually oriented matter involving a minor in violation of R.C. 2907.322(A)(5), fourth-degree felonies. Counts 16 through 30 were for pandering sexually oriented matter involving a minor in violation of R.C. 2907.322(A)(1), second-degree felonies. The evidence of these crimes was discovered during the investigation of Carroll County Case No. 12CR5603 (Hill pled to attempted rape and was sentenced to three years). The pandering offenses predate the offense in 12CR5603. 07/30/13 Sentencing Tr. 49-50.

{¶4} Hill originally pled not guilty to the offenses. However, a plea agreement was reached between the parties; the state entered a nolle prosequi for counts 17 through 30 and Hill changed his plea to guilty for the remaining 16 counts.

{¶5} After a Crim.R. 11 colloquy, the trial court accepted the guilty plea and proceeded directly to sentencing. The state recommended a 12 month sentence on each of counts 1 through 15 to be served concurrently with each other and an 8 year sentence on count 16 to be served consecutively with counts 1 through 15. 07/30/13 Sentencing Tr. 8. Thus, the state was recommending an aggregate sentence of 9 years for the pandering convictions. The state further recommended that the 9 year sentence be served concurrent with Hill's current 3 year term of incarceration for Carroll County Case No. 12CR5603. 07/30/13 Sentencing Tr. 8. Hill argued for a lesser sentence than the one recommended by the state.

{¶6} The court did not follow the state's recommendation. Instead, it sentenced Hill to 12 months for each conviction on counts 1 through 15. Those sentences were ordered to be served concurrent with each other. On count 16, the trial court issued a 5 year sentence and ordered that sentence to be served consecutive to the aggregate 12 month sentence on counts 1 through 15. Therefore, the trial court issued an aggregate sentence of 6 years for the instant case. The trial court then ordered the 6 year sentence to run consecutive to the 3 year sentence he was already serving for attempted rape.

{¶7} Hill timely appeals from that decision.

Assignment of Error

{¶8} "The court misapplied sentencing laws in imposing more than minimum sentence and running them consecutive to previous case."

{¶9} We review felony sentences using both the clearly and convincingly contrary to law and abuse of discretion standards of review. *State v. Hill*, 7th Dist. No. 13MA1, 2014-Ohio-919, ¶ 20. We first determine whether the sentencing court complied with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. *State v. Gratz,* 7th Dist. No. 08MA101, 2009–Ohio–695, ¶ 8, citing *State v. Kalish,* 120 Ohio St.3d 23, 2008–Ohio–4912, 896 N.E.2d 124, ¶ 13–14. Then, if it 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. *Gratz* at ¶ 8, citing *Kalish* at ¶ 17.

{¶10} Two arguments are presented under the sole assignment of error. The first is that the trial court erred in not giving the minimum sentence allowable by law for these offenses. Hill specifically contends that the trial court abused its discretion in weighing the factors in R.C. 2929.11 and R.C. 2929.12. The second argument concerns the trial court's imposition of consecutive sentences. Each will be addressed in turn.

1. Non Minimum Sentences

{¶11} Hill was sentenced to 5 years on the second-degree felony pandering conviction. The sentencing range for a second-degree felony is two, three, four, five, six, seven, or eight years. R.C. 2929.14(A)(2). Thus, Hill received neither the maximum nor the minimum sentence for that conviction. Likewise, the sentence for each of the 15 convictions for fourth-degree felony pandering was neither the maximum or minimum sentence allowable by law. The sentencing range for those offenses are: six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen or eighteen months. Hill received a 12 month sentence for each of those convictions.

{¶12} In reaching the appropriate sentence, the trial court considered R.C. 2929.11, the principles and purposes of sentencing; and R.C. 2929.12, the seriousness and recidivism factors. 07/31/13 J.E.; 7/30/13 Sentencing Tr. 55-67. Hill acknowledges that the trial court considered these statutes, but asserts that the court improperly weighed the seriousness and recidivism factors and had they been weighed properly, he should have received the minimum sentence.

{¶13} The seriousness factors are set forth in R.C. 2929.12(B) and (C). Division (B) sets forth the factors that indicate that the offender's conduct is more serious than conduct normally constituting the offense. The trial court discussed all nine factors and concluded that none applied. 07/30/13 Sentencing Tr. 59-62. Section (C) sets forth the factors that indicate that the offender's conduct is less serious than conduct normally constituting the offense. The trial court considered all

four factors and determined that all were inapplicable. 07/30/13 Sentencing Tr. 62-63.

{¶14} The trial court then went on to discuss the recidivism factors found in R.C. 2929.12(D) and (E). Section (D) sets forth the factors indicating that the offender is likely to commit future crimes, while section (E) sets forth the factors indicating that the offender is less likely to commit future crimes. A criminal history, including adjudication as a delinquent and not responding favorably to previous sanctions imposed, are factors that demonstrate that recidivism is likely. R.C. 2929.12(D)(2), (3). Conversely, having no criminal history, including no juvenile record, and leading a law abiding life for a significant number of years, demonstrates that recidivism is unlikely. R.C. 2929.12(E)(1)–(3). The presentence investigation report showed that Hill had been adjudicated a delinquent child and has a criminal history. 07/30/13 Sentencing Tr. 64-66. Therefore, R.C. 2929.12(D)(2) and (3) were applicable, while R.C. 2929.12(E)(1)-(3) were not applicable. Thus, the trial court found that under those factors, recidivism was likely.

{¶15} However, those were not the only factors that indicated that recidivism was likely. The trial court also stated that the offense was committed under circumstances that were likely to reoccur. 07/30/13 Sentencing Tr. 66. This statement is an indication that division (E)(4), which states that the offense was committed under circumstances not likely to reoccur, was not applicable.

{¶16} Remorsefulness is also a consideration in determining whether recidivism is likely or unlikely. An offender who is remorseful is less likely to recommit, while an offender who is not remorseful is more likely to recommit. R.C. 2929.12(D)(5) (no genuine remorse); R.C. 2929.12(E)(5) (genuine remorse). The trial court neither found that Hill was remorseful or that he was unremorseful. 07/30/13 Sentencing Tr. 64-65, 66. Rather, the trial court stood neutral on the position of remorse:

> [(D)](5) The offender shows genuine remorse of the offense.

> I'll give you credit at this hearing, whether it's for show or otherwise, you have demonstrated that you're learning insights into your condition with regard to this and your other sexual offense.
>
> And, hopefully – and I believe that you're showing insight. I don't know if you're remorseful, but I would think that those two things would go hand-in-hand. But I'm going to go neutral on number (5) because I don't know if what you've said is remorse or just insight. I'll give you some credit for it.
>
> * * *
>
> And says here [(E)(5)], the offender shows genuine remorse for the offense. I believe you mean to show remorse, but that's a judgment call. And I believe that I'm neutral on that finding.

07/30/13 Sentencing Tr. 64-65, 66.

{¶17} The trial court's analysis does show that it considered all relevant factors. Considering that the recidivism factors show that committing future crimes is likely, we hold that the trial court did not abuse its discretion when it ordered a nonminimum sentence. Therefore, Hill's argument regarding the nonminimum sentence is meritless.

2. Consecutive Sentences

{¶18} Next, Hill argues that the trial court erred when it ordered the sentence for the second-degree felony pandering conviction to run consecutive to the fourth-degree felony pandering convictions, and when it ordered that sentence to run consecutive to the sentence issued in Carroll County Case No. 12CR5603. He cites to R.C. 2929.41(A) for support for his position.

{¶19} That is the statute governing multiple sentences. It provides, in pertinent part:

> (A) Except as provided in division (B) of this section, division (C) of section 2929.14, or division (D) or (E) of section 2971.03 of the Revised Code, a prison term, jail term, or sentence of imprisonment shall be served concurrently with any other prison term, jail term, or

> sentence of imprisonment imposed by a court of this state, another state, or the United States.

R.C. 2929.41(A).

{¶20} This statute has three provisions for when ordering consecutive sentences is appropriate. R.C. 2929.41(B) deals with misdemeanor sentences, which is not applicable in this case. R.C. 2971.03(D) and (E) deals with life imprisonment sentences, which also is inapplicable in this case. R.C. 2929.14(C) is the new felony sentencing provision requiring a trial court to make certain findings before imposing consecutive sentences. Pre-*Foster*, appellate courts consistently stated that consecutive sentencing findings are required when the sentences are imposed in separate cases. *State v. Givens,* 8th Dist. No. 80319, 2002-Ohio-4904, at ¶ 8 (pre-*Foster* case discussing consecutive sentence findings under R.C. 2929.14(E)); *State v. Wallace,* 5th Dist. No. 03-CA-A-07-043, 2004-Ohio-1694, at ¶ 25 (same); *State v. Gillman,* 10th Dist. No. 01AP-662, 2001-Ohio-3968 (same). The wording of R.C. 2929.14(C) and R.C. 2929.41 indicates that that rule of law is still applicable. Thus, in order for the trial court to order the second-degree felony pandering and fourth-degree felony pandering sentences in the case at hand to be served consecutive to each other and consecutive to the sentence imposed in Carroll County Case No. 12CR5603, the trial court had to comply with R.C. 2929.14(C).

{¶21} That statute provides:

> (4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> (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.

R.C. 2929.14(C)(4).

{¶22} This consecutive sentencing statutory provision was part of House Bill 86 and became effective September 20, 2011. The legislation was enacted in response to the Supreme Court's statement that its *Foster* decision was incorrect in striking down statutory consecutive sentence provisions and that the legislature would need to enact a new statute to revive any requirement of findings for consecutive sentences. *State v. Hodge,* 128 Ohio St.3d 1, 2010–Ohio-6320, 941 N.E.2d 768, ¶ 3 of syllabus.

{¶23} At this point, it is pointed out that the crimes in this case occurred prior to the effective date of the statute; the indictment indicates that the crimes occurred in April and May 2011. Although not raised in this case, the state has argued to another appellate court that this provision is inapplicable to offenses committed before the effective date. Since application of the appropriate standard is imperative to determine whether the trial court erred when it issued consecutive sentences, we must determine if R.C. 2929.14(C), as amended by House Bill 86, is applicable to Hill. If it is not applicable, then the law as announced in *Foster* would control, i.e. the trial court would not be required to articulate any specific statutory findings before issuing multiple prison terms to be served consecutively.

{¶24} In other cases, the state has argued that R.C. 1.58 indicates that the consecutive sentencing findings required by House Bill 86 does not apply to offenses committed prior to the effective date of the bill. *State v. Wilson*, 10th Dist. No. 12AP-551, 2013-Ohio-1520, ¶ 14-18. The Tenth Appellate District has disagreed with such conclusion. *Id*. It explained that R.C. 1.58(A) provides that an amendment or reenactment of a statute does not apply to pending cases unless R.C. 1.58(B) applies. R.C. 1.58(B) provides that when a statutory penalty or punishment for an offense is reduced by a statutory reenactment or amendment, the reduced penalty or punishment shall apply if the penalty or punishment is not "already imposed." *Id*. at ¶ 16. It explained that the penalty or punishment for the offenses might arguably be reduced if the trial court were required to make the findings required by R.C. 2929.14(C)(4) before imposing consecutive sentences. *Id*. at ¶ 17. Therefore, it was concluded that the consecutive sentence findings required by House Bill 86 applied to all offenders who had not been sentenced prior to its effective date. *Id*.

{¶25} Furthermore, recently we have likewise concluded that the consecutive sentencing findings in R.C. 2929.14(C)(4) are applicable even though the crimes were committed prior to the effective date of the statute. *State v. Stout*, 7th Dist. No. 13MA30, 2014-Ohio-1094, ¶ 17. Therefore, R.C. 2929.14(C) is applicable to Hill.

{¶26} This leads us to whether the trial court made the required findings. This court and our sister courts have explained that under R.C. 2929.14(C)(4), the trial court is once again required to make consecutive sentencing findings. *State v. Power*, 7th Dist. No. 12CO14, 2013-Ohio-4254, ¶ 38. However, unlike the pre-*Foster* consecutive sentencing requirements, R.C. 2929.14(C) does not require the court to provide reasons on the record for those findings. *Id*., citing *State v. Galindo–Barjas,* 7th Dist. No. 12MA37, 2013–Ohio–431, ¶ 16–17, 19; *State v. Wilson,* 2d Dist. No. 24978, 2012–Ohio–4756, ¶ 18 (court need not specifically identify the factual bases for its findings); *State v. Frasca,* 11th Dist. No.2011–T–0108, 2012–Ohio–3746, ¶ 57 (reasons were required by former R.C. 2929.19(B)(2), which was not reenacted).

{¶27} Furthermore, we have explained that the sentencing court should, but need not, use the exact statutory language to make the findings required by statute.

Id. at ¶ 40, citing *State v. Verity,* 7th Dist. No. 12MA139, 2013–Ohio–1158, ¶ 28–29; *State v. Thompson,* 7th Dist. No. 05JE16, 2005–Ohio–6792, ¶ 58. That is, the trial court is not required to recite any "magic" or talismanic" words when imposing consecutive sentences, as long as it is "clear from the record that the trial court engaged in the appropriate analysis." *State v. McKenzie,* 3d Dist. No. 15–12–07, 2012–Ohio–6117, ¶ 10; *State v. Nowlin,* 5th Dist. No. CT2012–0015, 2012–Ohio–4923, ¶ 70; *State v. Davis,* 8th Dist. Nos. 97689, 97691, 97692, 2012–Ohio–3951, ¶ 8.

{¶28} We now turn to the determination of whether the trial court "engaged in the appropriate analysis." In the sentencing judgment entry, the trial court specifically lays out R.C. 2929.14(C)(4) and makes all of the required findings. It found that "a consecutive sentence is necessary to protect the public from future crime and to punish the defendant and that consecutive sentences are not disproportionate to the seriousness of the defendant's conduct and to the danger the defendant poses to the public." 07/31/13 J.E. This is the requirement in R.C. 2929.14(C)(4). The trial court also found that "defendant's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the defendant." 07/31/13 J.E. This met the requirement in R.C. 2929.14(C)(4)(c).

{¶29} Despite the trial court's concise findings in the sentencing entry, the sentencing transcript does not evince that the trial court engaged in the appropriate analysis for issuing consecutive sentences.

{¶30} As discussed above, the trial court discusses, in depth, all of the provisions of R.C. 2929.11 and 2929.12 in determining the appropriate sentence. Following that discussion directly before imposition of the sentence, the trial court made the following statement:

> Now, having reviewed those two statutes on the record and going through the factors, speaking to each of those factors, it is the Court's intention to follow, to the best of the Court's ability the law in this area and view this as objectively as possible rather than subjectively or emotionally or personally with you.

> This Court finds it has to protect the public from future crime by you in this area of sexual offense. And the Court believes it needs to invoke a punishment for the offenses that you have committed. But the Court does understand that it can use minimum sanctions to accomplish those goals. But it cannot do that to the degree that it demeans the seriousness of your conduct.

07/20/13 Sentencing Tr. 66-67.

{¶31} The above statement does not indicate that the trial court **only** considered R.C. 2929.11 and R.C. 2929.12 when issuing the sentence. However, in reviewing the entire transcript, it is devoid of any clear reference to R.C. 2929.14(C)(4) or its factors. While it is possible to envision a situation where we could glean the factors from a sentencing hearing transcript even when there is no reference to R.C. 2929.14(C)(4) made during the sentencing hearing, this is not one of those situations. Given the trial courts in-depth discussion and reference to the multiple factors in R.C. 2929.11 and 2929.12 in determining the appropriate length of the sentences, and the fact that there is no discussion or mention of R.C. 2929.14(C)(4) or its factors, we must conclude that the trial court did not engage in the appropriate analysis prior to issuing a consecutive sentence. Thus, the trial court did not comply with the mandates of R.C. 2929.14(C) by making the consecutive sentencing findings solely in the sentencing judgment entry.

{¶32} That conclusion is supported by a decision from our sister district that found that the consecutive sentence findings are required to be made at the sentencing hearing. *State v. Brooks*, 9th Dist. No. 26437, 2013-Ohio-2169, ¶ 12-13. In reaching that decision, it considered both R.C. 2929.14(C) and Crim.R. 32(A)(4), which states that at the time of imposing sentence, the court shall state its statutory findings and, if appropriate, give reasons supporting those findings. The *Brooks* court reasoned:

> We agree with our colleagues' sentiments. In an environment of prison overcrowding, funding limitations, and remedial alternatives to prison, the reenactment of R.C. 2929.14(C)(4) evidences the General

> Assembly's intent that trial courts carefully consider certain factors and make certain findings prior to making the decision to impose consecutive sentences. *See* Ohio Legislative Service Commission, *Fiscal Note and Local Impact Statement,* http://www.lsc.state.oh.us/fiscal/fiscalnotes/ 129ga/hb0086en.pdf (accessed Mar. 13, 2013) (noting that the changes made by the new legislation, including the reenactment of some of the provisions struck by *Foster,* "are generally designed to reduce the size of the state's prison population and related institutional operating expenses[.]"). The fact that trial courts do not have to explain their reasoning behind their findings does not negate the fact that the trial courts still must make the findings. *See* R.C. 2929.14(C)(4). In light of the foregoing, this Court concludes that such findings must be made at the sentencing hearing on the record. *See also* Crim.R. 32(A)(4) ("At the time of imposing sentence, the court shall[ ] * * * [i]n serious offenses, state its statutory findings and give reasons supporting those findings, if appropriate."). Ideally, those findings would also then be memorialized in the sentencing entry.

State v. Brooks, 9th Dist. No. 26437, 2013-Ohio-2169, ¶ 12-13.

{¶33} Considering the language of Crim.R. 32(A)(4), we find that this reasoning is sound and adopt it as our own to a limited extent. Previously, we have considered both the sentencing entry and the transcript of the sentencing hearing to determine whether the findings under R.C. 2929.14(C) were made. *Verity*, 7th Dist. No. 12MA139, 2013-Ohio-1158, ¶ 34-35; *Power*, 7th Dist. No. 12CO14, 2013-Ohio-4254, ¶ 42-43. We find that considering both is permissible. However, in situations like the one before us where the sentencing transcript is devoid of any indication that the consecutive sentencing factors articulated in R.C. 2929.14(C) were considered, the case must be remanded for resentencing. The failure to consider the mandated consecutive sentencing findings cannot be cured by a journal entry that uses boilerplate language from the statute. Therefore, on that basis, we reversed and

remanded the matter for resentencing, at which the trial court should consider R.C. 2929.14(C) and determine which, if any, of those factors are applicable.

Conclusion

{¶34} The imposition of nonminimum sentences was not an abuse of discretion. However, given the record, it is unclear to this court whether the trial court considered the consecutive sentencing factors when issuing the sentence. Thus, the matter is reversed and remanded for resentencing.

Waite, J., concurs.
DeGenaro, P.J., concurs.

[Cite as *State v. Simmons*, 2014-Ohio-4191.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C.A. No. 27197
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
AARON J. SIMMONS	
Appellant	CASE Nos. CR 13 07 1991 CR 13 08 2208

DECISION AND JOURNAL ENTRY

Dated: September 24, 2014

MOORE, Judge.

{¶1} Defendant-Appellant, Aaron J. Simmons, appeals from the December 12, 2013 judgment entries of the Summit County Court of Common Pleas. We affirm.

I.

{¶2} This matter arises from two separate incidents involving the same three individuals: Mr. Simmons, Ms. Kayla Hale, and Mr. Daryle Dean. The first incident occurred at the Circle K gas station when Mr. Dean approached his estranged wife, Ms. Hale, as she was pumping gas.[1] Mr. Dean grabbed Ms. Hale's arm and began questioning her about Mr. Simmons. While this was happening, Mr. Simmons was seated in the passenger's seat of Ms. Hale's car, and Ms. Hale's two young children were in the back seat. Mr. Simmons got out of the car and began arguing with Mr. Dean, and Ms. Hale asked Mr. Simmons to drive her children

[1] Ms. Hale and Mr. Dean had a child together and she had a protection order against Mr. Dean at this time.

to a nearby parking lot. Mr. Simmons complied and when the police arrived, Mr. Dean stated that Mr. Simmons threatened him with a gun. The police searched Mr. Simmons' person, but did not find a weapon. Mr. Dean then told the police that the gun was in Ms. Hale's car, and during a second search, they discovered a black and silver Taurus .45 caliber semiautomatic pistol.

{¶3} The second incident occurred several weeks later, when Mr. Simmons and Ms. Hale allegedly drove past Mr. Dean's house, pointed a gun at him, and threatened him, saying: "[i]t ain't over with yet[.]"

{¶4} In Case No. CR 13 07 1991, Mr. Simmons was indicted for having weapons while under disability, in violation of R.C. 2923.13(A)(3), a felony of the third degree; carrying concealed weapons, in violation of R.C. 2923.12(A)(2), a felony of the fourth degree; and aggravated menacing, in violation of R.C. 2903.21, a misdemeanor of the first degree. In Case No. CR 13 08 2208, Mr. Simmons was indicted for intimidation of a crime victim or witness, in violation of R.C. 2921.04(B), a felony of the third degree, with a firearm specification pursuant to R.C. 2941.145; possession of cocaine, in violation of R.C. 2925.11(A)(C)(4), a felony of the fifth degree; violating a protection order, in violation of R.C. 2919.27, a misdemeanor of the first degree; aggravated menacing, in violation of R.C. 2903.21, a misdemeanor of the first degree; and possession of marijuana, in violation of R.C. 2925.11(A)(C)(3), a minor misdemeanor.

{¶5} Mr. Simmons pleaded not guilty to all charges and filed a motion to suppress. After a hearing, the trial court denied Mr. Simmons' motion, and these matters proceeded to jury trial. The jury resolved Case No. CR 13 07 1991 by finding Mr. Simmons guilty of (1) having weapons while under disability, (2) carrying concealed weapons, and (3) aggravated menacing. Additionally, in Case No. CR 13 08 2208, the trial court dismissed the charge of possession of cocaine, and the jury found Mr. Simmons not guilty of (1) intimidation of a crime victim or

witness, with a firearm specification, (2) violating a protection order, and (3) aggravated menacing. The jury, however, did find Mr. Simmons guilty of possession of marijuana.

{¶6} The trial court sentenced Mr. Simmons to 30 months' imprisonment for having weapons while under disability, which, pursuant to *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, merged with the charge of carrying concealed weapons, and six months in the Summit County Jail for aggravated menacing, to run concurrently with one another. The trial court also ordered Mr. Simmons to pay a fine of $150 for possession of marijuana, suspended his driver's license for six months, and further ordered him to have no contact with Mr. Dean.

{¶7} Mr. Simmons appealed, raising five assignments of error for our consideration. To facilitate our discussion, we will address Mr. Simmons' assignments of error out of order.

II.

ASSIGNMENT OF ERROR I

> THE TRIAL COURT ERRED BY DENYING [MR. SIMMONS'] MOTION TO SUPPRESS.

{¶8} In his first assignment of error, Mr. Simmons argues that the trial court erred in denying his motion to suppress. Specifically, Mr. Simmons argues that Ms. Hale "never gave specific consent to the Akron Police to search her vehicle." The State responds by arguing that Mr. Simmons did not have standing to contest the search of Ms. Hale's vehicle because he does not own it, nor did he present any evidence at the suppression hearing of an expectation of privacy in the vehicle.

{¶9} In *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8, the Supreme Court of Ohio set forth the appellate standard of review on motions to suppress, stating:

> Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of

> trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. (Citations omitted.)

{¶10} "The Fourth Amendment to the United States Constitution and Article I, Section 14, of the Ohio Constitution prohibit the police from conducting unreasonable and warrantless searches and seizures." *State v. White*, 9th Dist. Lorain No. 11CA010005, 2011-Ohio-6748, ¶ 6. "However, 'Fourth Amendment rights are personal in nature and may not be vicariously asserted by others.'" (Citations omitted.) *White* at ¶ 6, quoting *State v. Dennis*, 79 Ohio St.3d 421, 426 (1997). Therefore, "suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself[.]" *Alderman v. United States*, 394 U.S. 165, 171–72 (1969).

{¶11} "Both drivers and passengers in a vehicle may challenge the validity of a traffic stop." *White* at ¶ 7, citing *State v. Carter*, 69 Ohio St.3d 57, 63 (1994). "This is because, 'when the vehicle is stopped, they are equally seized, and their freedom of movement is equally affected.'" *Id.* "However, '[t]he question of whether a person may challenge the search of a vehicle in which they have placed an item of property is a distinct inquiry.'" *White* at ¶ 7, quoting *State v. Redding*, 9th Dist. Medina No. 10CA0018-M, 2010-Ohio-4286, ¶ 9; *see also Brendlin v. California*, 551 U.S. 249, 256-58 (2007). "Thus, the passenger of a car which was validly stopped must establish a legitimate expectation of privacy in the vehicle in order to contest its search." *White* at ¶ 7; citing *Rakas v. Illinois*, 439 U.S. 128, 148 (1978) ("[Defendants] made no showing that they had any legitimate expectation of privacy in the glove compartment or area under the seat of the car in which they were merely passengers."); *see also State v. McCoy*, 9th Dist. Lorain No. 08CA009329, 2008-Ohio-4947, ¶ 6 (the defendant bears

the burden of establishing a legitimate expectation of privacy). This legitimate expectation of privacy may be established by the defendant's testimony or otherwise be established by the evidence at the suppression hearing. *See Simmons v. United States*, 390 U.S. 377, 390 (1968).

{¶12} In the present matter, it is undisputed that Ms. Hale owned the vehicle in question, and that Mr. Simmons only challenged the *search* of the vehicle. As such, Mr. Simmons had to point to evidence that demonstrated his legitimate expectation of privacy in Ms. Hale's vehicle. *See White* at ¶ 10 (observing that "no facts indicate that the gun was found within a container in which [Mr.] White would have a reasonable expectation of privacy."). At the suppression hearing, Akron Police Officers Edward Patalon and Dean Prosperi testified that Ms. Hale twice gave them permission to search her vehicle for Mr. Simmons' alleged gun. Officer Prosperi further testified that, during the second search of the vehicle, he found a loaded black and silver Taurus .45 caliber semiautomatic pistol underneath the carpeted area by the plastic console.

{¶13} In order to effectively argue that the search of Ms. Hale's vehicle violated his Fourth Amendment rights, Mr. Simmons "was required to show that his expectation of privacy was one that 'society is prepared to consider reasonable[.]'" *White* at ¶ 11, citing *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). "This required [Mr. Simmons] to do more than to show a 'subjective expectation of not being discovered,'" through his placement of the gun under the carpeted area of the vehicle. *White* at ¶ 11, citing *Rakas*, 439 U.S. at 143 fn. 12; *see also State v. Earley*, 9th Dist. Wayne No. 99CA0059, 2000 WL 840506, *4 (June 28, 2000), (concluding that a defendant passenger did not have standing to contest the validity of the search of a vehicle when he failed to show that he had a legitimate expectation of privacy in the vehicle's console). However, the officers' testimony does not support the conclusion that Mr. Simmons had a legitimate expectation of privacy in Ms. Hale's vehicle, nor did Mr. Simmons testify or present

any evidence to support that conclusion. Therefore, because the suppression record before us does not establish that Mr. Simmons had a legitimate expectation of privacy in Ms. Hale's vehicle, we cannot say that his Fourth Amendment rights were violated in this instance.

{¶14} Accordingly, Mr. Simmons' first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> THE EVIDENCE IS INSUFFICIENT TO SUSTAIN A FINDING OF GUILT FOR HAVING WEAPON[S] WHILE UNDER DISABILITY, CARRYING CONCEALED WEAPON[S], AND AGGRAVATED MENACING.

ASSIGNMENT OF ERROR IV

> THE TRIAL COURT ERRED BY NOT GRANTING DEFENSE COUNSEL'S CRIMINAL RULE 29 MOTION.

{¶15} In his second and fourth assignments of error, Mr. Simmons argues that there is insufficient evidence to support his convictions for having weapons while under disability, carrying concealed weapons, and aggravated menacing. As such, Mr. Simmons also argues that the trial court erred in denying his Crim.R. 29 motion for acquittal.

{¶16} In determining whether a conviction is supported by sufficient evidence:

> An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

State v. Jenks, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. *See also State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). "In essence, sufficiency is a test of adequacy." *Id*.

{¶17} Further, Crim.R. 29(A) provides, in relevant part, that:

> The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The

> court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case.

Having weapons while under disability

{¶18} R.C. 2923.13 states, in relevant part, that:

> (A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:
>
> * * *
>
> (3) The person is under indictment for or has been convicted of any felony offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse.

{¶19} As stated above, Officer Prosperi discovered a black and silver Taurus .45 caliber semiautomatic pistol in Ms. Hale's vehicle. On direct examination, Mr. Dean testified that Mr. Simmons threatened him with this gun at the Circle K gas station. Additionally, Officer Patalon testified that, after completing his initial investigation, he ran a criminal case history on Mr. Simmons "which brings up the prior convictions of a particular person which may exclude him from possessing a firearm." Officer Patalon indicated that he conducted this search by using the birthdate and social security number provided to him by Mr. Simmons. As a result, Officer Patalon discovered that Mr. Simmons had previously been convicted of trafficking in marijuana, a fourth degree felony. *See State v. Ward*, 9th Dist. Lorain No. 09CA009720, 2011-Ohio-518, ¶ 18 (Pursuant to R.C. 2923.13(A)(3), marijuana is a "drug of abuse."). Further, the State introduced evidence of a certified copy of Mr. Simmons' September 29, 1995 Hamilton County sentencing entry for trafficking in marijuana.

{¶20} In viewing this evidence in a light most favorable to the prosecution, we conclude that a rational jury could have found the essential elements of having weapons while under disability proven beyond a reasonable doubt.

Carrying concealed weapons

{¶21} Pursuant to R.C. 2923.12: "(A) No person shall knowingly carry or have, concealed on the person's person or concealed ready at hand, any of the following: * * * (2) a handgun other than a dangerous ordnance[.]"

{¶22} On direct examination, Mr. Dean testified as follows:

> [The State]: So [] Mr. Simmons asks who you are and you say [Ms. Hale's] husband?
>
> [Mr. Dean]: Uh-huh.
>
> [The State]: What happens next?
>
> [Mr. Dean]: [Mr. Simmons] reached in his – somewhere in his front pants, or whatever that is, and brandished a silver handgun, and he cocked it. And I know when he cocked it he had loaded the chamber, you know. And when he did that I just looked at him like, okay, you got your gun. You pulled out your gun on me, you know what I'm saying? Now what?
>
> Because my focus was on my wife because I immediately grabbed her and pushed her towards the gas station because I didn't know what he was going to do with this gun.
>
> And once I got her up towards the gas station area that's when I began to question her, like: Who is this guy that's pulling this gun out on me.
>
> * * *
>
> So [while] we were, you know, basically in a confrontation about who this guy is, by that time he had jumped in the car with my daughter and stepson in the car and he pulled off.
>
> Well, that's when me and [Ms. Hale], we both started running toward the car. By that time he had parked on the other side of the gas station over by this little deli and got out of the car and he started coming towards us.

> And by the time we got, not even five feet, ten feet from one another, the police pulled up and they told him to get down on the ground. And when they came I immediately told them, you know: He's got a gun, you know.
>
> And they searched the car. They initially searched it and they kept looking and they said they didn't see a gun. And I'm telling them there is a gun in that car, you know. And * * * everybody was asking me why I didn't leave, you know. I wasn't about to leave, not with my daughter in the back seat of that car. So I kept pressing the issue, like: There is a gun in that car.
>
> And they searched it, I think, a second time and that's when they found the gun.
>
> * * *

Additionally, Officer Patalon testified that when he arrived at the scene, Mr. Dean was "very agitated and very adamant over and over again that Mr. Simmons threatened him with a gun." Mr. Dean also identified State's Exhibit 2 at trial as the gun Mr. Simmons "pulled" on him.

{¶23} In viewing this evidence in a light most favorable to the prosecution, we conclude that a rational jury could have found the essential elements of carrying concealed weapons proven beyond a reasonable doubt.

Aggravated menacing

{¶24} R.C. 2903.21 states, in relevant part, that: "[n]o person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of the other person, the other person's unborn, or a member of the other person's immediate family."

{¶25} As indicated above, the State presented evidence that Mr. Simmons threatened Mr. Dean with a black and silver Taurus .45 caliber semiautomatic pistol, and then drove away in Ms. Hale's vehicle with Mr. Dean's daughter in the back seat. Further, Mr. Dean testified that Mr. Simmons cocked the gun, and that he was "scared" for his daughter's safety, causing him to run after the car.

{¶26} In viewing this evidence in a light most favorable to the prosecution, we conclude that a rational jury could have found the essential elements of aggravated menacing proven beyond a reasonable doubt.

{¶27} Therefore, based upon the foregoing, the State presented sufficient evidence to support Mr. Simmons' convictions for having weapons while under disability, carrying concealed weapons, and aggravated menacing. The trial court did not err in denying Mr. Simmons' Crim.R. 29 motion.

{¶28} Accordingly, Mr. Simmons' second and fourth assignments of error are overruled.

ASSIGNMENT OF ERROR III

> THE VERDICT OF GUILTY FOR HAVING WEAPON[S] WHILE UNDER DISABILITY, CARRYING CONCEALED WEAPON[S], AND AGGRAVATED MENACING WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶29} In his third assignment of error, Mr. Simmons asserts that his convictions for having weapons while under disability, carrying concealed weapons, and aggravated menacing are against the manifest weight of the evidence. However, Mr. Simmons only specifically develops a weight of the evidence argument regarding his conviction for having weapons while under disability. We limit our discussion accordingly.

{¶30} When a defendant asserts that his conviction is against the manifest weight of the evidence:

> an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.

State v. Otten, 33 Ohio App.3d 339, 340 (9th Dist.1986).

{¶31} In making this determination, this Court is mindful that "[e]valuating evidence and assessing credibility are primarily for the trier of fact." *State v. Shue*, 97 Ohio App.3d 459, 466 (9th Dist.1994), citing *Ostendorf-Morris Co. v. Slyman*, 6 Ohio App.3d 46, 47 (8th Dist.1982) and *Crull v. Maple Park Body Shop*, 36 Ohio App.3d 153, 154 (12th Dist.1987).

{¶32} Here, Mr. Simmons argues that the testimony of Officer Dean Reed "clearly refutes" Officer Patalon's testimony that Mr. Simmons "could be connected to the 1995 conviction in Hamilton County using the LEADS computer."

{¶33} As previously stated, Officer Patalon testified that he used Mr. Simmons' birthdate and social security number to run a criminal case history report in order to find any prior convictions which may exclude Mr. Simmons from possessing a firearm. In doing so, Officer Patalon discovered that Mr. Simmons had a 1995 conviction for trafficking in marijuana, which would prevent him from possessing a firearm. Officer Patalon explained that he requested a copy of the criminal case history from *the office where LEADS is located* and Mr. Simmons' unique identifiers, (name, birthdate and social security number), matched up with the 1995 conviction.

{¶34} Officer Reed testified that, on a subsequent occasion, he ran Mr. Simmons' social security number through LEADS in the police cruiser, and found that Mr. Simmons had a felony warrant. When asked whether LEADS shows "any prior criminal history," Officer Reed responded, "[i]n our computers it doesn't show any previous charges, no."

{¶35} We note that Officer Patalon did not testify that he *got* Mr. Simmons' criminal case history through LEADS, but that he *requested* it from the office where LEADS is located. Additionally, even if Officers Patalon and Reed testified differently about LEADS' functionality, the jury was free to believe the testimony of Officer Patalon over that of Officer Reed. *See State*

v. Howard, 9th Dist. Lorain No. 13CA010372, 2014-Ohio-3373, ¶ 57; *Prince v. Jordan*, 9th Dist. Lorain No. 04CA008423, 2004-Ohio-7184, ¶ 35 ("[I]n reaching its verdict, the jury is free to believe all, part, or none of the testimony of each witness.").

{¶36} Therefore, after review of the record, we cannot conclude that this is the exceptional case where the jury clearly lost its way and created a manifest miscarriage of justice. *See Otten*, 33 Ohio App.3d at 340.

{¶37} Accordingly, Mr. Simmons' third assignment of error is overruled.

ASSIGNMENT OF ERROR V

> THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY SENTENCING [MR. SIMMONS] TO THIRTY MONTHS IN PRISON.

{¶38} In his fifth assignment of error, Mr. Simmons argues that, in sentencing him to 30 months of imprisonment, the trial court failed to comply with the sentencing guidelines set forth in R.C. 2929.11.

{¶39} This Court reviews sentences pursuant to the two-step approach set forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912.

> First, [we] 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. Further, in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, paragraph seven of the syllabus, the Supreme Court of Ohio held that "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum * * * sentences."

> [N]evertheless, in exercising its discretion, the [trial] court must carefully consider the statutes that apply to every felony case. Those include R.C. 2929.11, which specifies the purposes of sentencing, and R.C. 2929.12, which provides

> guidance in considering factors relating to the seriousness of the offense and recidivism of the offender.

State v. Mathis, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 38. "An abuse of discretion implies that the court's decision is arbitrary, unreasonable, or unconscionable." *Smith v. Smith*, 9th Dist. Summit No. 26013, 2012-Ohio-1716, ¶ 8, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶40} R.C. 2929.11 sets forth Ohio's guidelines for felony sentencing as follows:

> (A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.
>
> (B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.
>
> (C) A court that imposes a sentence upon an offender for a felony shall not base the sentence upon the race, ethnic background, gender, or religion of the offender.

{¶41} In the present matter, the trial court sentenced Mr. Simmons to 30 months' imprisonment, which falls within the statutory range of 36 months for third degree felonies of this nature. *See* R.C. 2929.14(A)(3)(b). The record reflects that the trial court had before it information from which it could make the required inquiry pursuant to R.C. 2929.11. Additionally, to the extent Mr. Simmons argues, pursuant to R.C. 2929.11(B), that he and Mr. Dean received inconsistent sentences for similar crimes, the record before us does not support this contention. As such, Mr. Simmons' sentence is not contrary to law.

{¶42} Further, based upon Mr. Simmons' criminal record dating back to 1992[2], the higher likelihood of recidivism as noted in the PSI report, the State's and probation department's recommendation that Mr. Simmons be sentenced to the Ohio Department of Rehabilitation and Corrections, Mr. Dean's victim impact statement, the trial court's concern that Mr. Simmons had a loaded .45 semiautomatic pistol in a vehicle with two minor children, the fact that the trial court did not sentence Mr. Simmons to the maximum time allowed by statute, and the trial court's statement that it considered all "relevant sentencing factors and the Revised Code," we cannot conclude that the trial court's sentence of 30 months' imprisonment was arbitrary, unreasonable, or unconscionable.

{¶43} Therefore, the trial court did not abuse its discretion in sentencing Mr. Simmons to 30 months' imprisonment for having weapons while under disability.

{¶44} Accordingly, Mr. Simmons' fifth assignment of error is overruled.

III.

{¶45} In overruling Mr. Simmons' five assignments of error, the judgments of the Summit County Court of Common Pleas are affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

[2] The trial court ordered a pre-sentence investigation ("PSI") report which was supplemented into the record on appeal and reviewed by this Court.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

BELFANCE, P. J.
CARR, J.
CONCUR.

APPEARANCES:

JAMES W. ARMSTRONG, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.