

IN THE SUPREME COURT OF OHIO

STATE OF OHIO : S.C. Case No. _____
Plaintiff-Appellant : On Appeal from the
-vs- : Clark County Court
ADAM OVERHOLSER : of Appeals, Second
Defendant-Appellant : Appellate District
Court of Appeals
Case No. 2014-CA-42

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT STATE OF OHIO**

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THIS IS A CASE OF GREAT PUBLIC AND GENERAL INTEREST

Numerous appellate courts throughout the State of Ohio have held that the appellate standard of review when reviewing imposition of consecutive sentences pursuant to R.C. 2929.14(C)(4) is "extremely deferential." The appellate standard of review, as stated in R.C. 2929.08(G)(2), is not whether the sentencing court abused its discretion. The First District (*State v. White*, 1st Dist. Hamilton No. C-130114, 2013-Ohio-4225, 997 N.E.2d 629), the Second District (*State v. Rodeffer*, 2nd Dist. Clark No. 2014-CA-13, 2013-Ohio-5759, 5 N.E.3d 1069, ¶ 31), the Twelfth District (*State v. Lee*, 12th Dist. Butler No. 2012-09-182, 2013-Ohio-3404, ¶ 9), the Fifth District (*State v. Gooding*, 5th Dist. Holmes No. 13CA006, 2013-Ohio-5148, ¶ 7), the Eleventh District (*State v. Lane*, 11th Dist. Geauga No. 2013-G-3144, 2014-Ohio-2010, ¶ 123), the Tenth District (*State v. Adams*, 2014-Ohio-1809, ¶ 7, and the Fourth District (*State v. Losey*, 4th Dist. Washington No. 14CA11, 2015-Ohio-285, ¶ 6-7) have cited and quoted *Venes* for the proposition that the review standard is "extremely deferential." Most of these cases also quoted the language from *State v. Venes*, 2013-Ohio-1891, 992 N.E.2d 453 (8th Dist.), recognizing that a trial court does not need clear and convincing evidence to support its findings. Accordingly, as long as a trial court makes the appropriate statutory findings, the consecutive nature of its sentencing should stand unless the record overwhelmingly suggests to the contrary. As a practical consideration, this means that appellate courts are prohibited from substituting their judgment for that of the trial judge. (*State v. Overhosler*, 2d Dist. Clark No. 2014-CA-42, 2015-Ohio-1989 (Wellbaum, J., dissenting) agreeing with the view opined by Judge Hall in a recent dissenting opinion. *State v. Adams*, 2d. Dist. Clark No. 2014-CA-13, 2015-Ohio-1160 (Hall, J., dissenting)). Clear and convincing evidence is that "which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

Furthermore, the clear and convincing standard used in R.C. 2953.08(G)(2) is written in the negative. The statute does not say that the trial judge must have clear and convincing evidence to support its findings. Instead, it is the court of appeals that must clearly and convincingly find that the record does not support the court's findings. In this particular case, the trial court properly imposed consecutive sentences pursuant to R.C. 2929.14(C)(4) and incorporated its findings into the sentencing entry but it was not required to state reasons to support its findings. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659.

The appellate court misapplied the appellate standard of review by impermissibly substituting its judgment for that of the trial judge. While the majority opinion opines that it has applied the appropriate standard of review, the Second District Court of Appeals has quite simply misapplied the standard of review as set forth in R.C. 2953.08(G)(2). This ruling erodes the discretion that is properly entrusted to the trial court by the Ohio General Assembly and it impermissibly intrudes upon the sentencing court's ability to sentence a defendant for the multiple crimes that he committed throughout his community.

It is the State of Ohio's contention that so long as the trial court makes the appropriate statutory findings, the consecutive nature of its sentencing should and a Court of Appeals should not substitute its conclusions for that of the trial court.

This Court should accept this case and remedy this statutory violation and further expound the holding of *State v. Bonnel*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 28, by holding that where the trial court makes the necessary findings to impose consecutive sentences and the record supports such findings, the appellate courts are prohibited from substituting their judgment for that of the trial judge. Furthermore, it is time that this Court

overrule *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, and hold that where a trial court imposes consecutive sentences pursuant to R.C. 2929.14(C)(4), the correct appellate standard of review is not whether the trial court abused its discretion but whether the court of appeals can clearly and convincingly find that the record does not support the court's findings.

STATEMENT OF THE CASE AND FACTS

On December 26, 2013, twenty-one year old Adam Overholser was indicted on six counts of gross sexual imposition in violation of R.C. 2907.05(A)(4) and one count of rape in violation of R.C. 2907.02(A)(1)(b). *Indictment*. Pursuant to a plea agreement, Overholser pleaded guilty to five counts of gross sexual imposition in violation of R.C. 2907.05(A)(4) and counts six and seven were dismissed. *Plea*. A pre-sentence investigation report was conducted. *Pre-sentence Investigation Report ("PSI")*.

The PSI indicates that Overholser admitted to inappropriately touching the victim and masturbating in front of him. The record further indicates that there was skin to skin contact and the abuse occurred multiple times over a five month period. This sexual abuse was facilitated by a family friendship, as Overholser gained the trust of the victim's family who allowed him to take the victim to Kings Island, hockey games, camping, fishing trips, and sleepovers at Overholser's house. The record demonstrates that Overholser manipulated the victim and took advantage of him.

The victim was a mere 11 years old at the time of the multiple abuses. The victim reported to the trial court that Overholser hurt him and that the abuse has changed his life. The record further indicates that the victim suffered psychological harm, as the victim explained he has to go to therapy and avoid certain locations and triggers that cause him problems. The victim

also expressed that the abuse has affected his daily life. As the trial court aptly stated: “[N]o matter how good [Overholser] was, no matter how involved he was in the community and the things that he did, he has taken a child and forever broken him[.]” *Disposition Trans.* (Mar. 19, 2014), pg. 22.

On March 19, 2014, the trial court sentenced Overholser to four years in prison on each offense to run consecutively for a total of twenty years with jail time credit. It must be noted that Overholser was facing a a possible term of life in prison for the first-degree felony rape charge involving allegation of oral sex and thirty years for the six counts of gross sexual imposition.

ARGUMENT

Appellant’s Proposition of Law:

The appellate court misapplies the appellate standard of review as set forth in R.C. 2953.08(G)(2)(a), in overruling the trial court, when the record supports all of the trial court’s findings in imposing consecutive sentences.

The Second District departed from the two-part test in *Kalish* in *State v. Rodeffer*, 2nd Dist. Clark No. 2014-CA-13, 2013-Ohio-5759, 5 N.E.3d 1069, ¶ 31. In order to understand the court of appeals departure from the two-part test, one must first look back to this Court’s decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. The following is a brief analysis of the *Kalish* two-part test that has since been abrogated by the Second District.

In *Foster*, the Supreme Court declared that portions of Ohio's felony sentencing statutes were unconstitutional and excised them, because they required judges to make certain factual findings before imposing maximum, minimum, or consecutive sentences. Former R.C. 2953.08(G), which provided the standard of review for felony sentencing, referred to some of the statutory provisions that *Foster* had deemed unconstitutional. As a result, the Supreme Court in *Kalish* held that the standard of review in R.C. 2953.08(G)(2) was no longer applicable, "because it expressly related to 'findings' that had been abrogated as unconstitutional." *State v. Venes*, 2013-Ohio-1891, 992 N.E. 2d 453, ¶ 8 (8th

Dist.). To rectify the issue, a plurality of the court adopted the aforementioned two-part test for reviewing felony sentences. *Kalish* at ¶ 14-19.

After *Kalish*, the United States Supreme Court held that it is constitutionally permissible for States to require judges 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 Ohio Supreme Court subsequently held that its decision in *Foster* remained valid after *Ice*, and that the judiciary was not required to make findings of fact prior to imposing maximum or consecutive sentences "unless the General Assembly enacts new legislation requiring that findings be made." *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768, paragraph three of the syllabus. Thereafter, the Ohio General Assembly enacted 2011 Am.Sub.H.B. No. 86 ("H.B. 86"), which removed the unconstitutional statutory provisions cited in R.C. 2953.08(G) and revived the judicial fact-finding requirement for consecutive sentences. In doing so, H.B. 86 reenacted the felony sentencing standard of review set forth in section (G)(2) of R.C. 2953.08.

Rodeffer at ¶ 26-27.

As the majority opinion recognized below, Overhosler does not challenge the individual sentences imposed for the five offenses to which he entered pleas (F3 GSI-four years; F3 GSI-four years; F3 GSI-four years; F3 GSI-four years; and F3 GSI-four years). He simply challenged the trial court's consecutive-sentence determination. This squarely brings into play R.C. 2953.08(G)(2)(a) and the "extremely deferential" standard of review recognized by *State v. Venes*, 2013-Ohio-1891, 992 N.E.2d 453 (8th Dist.). In that decision the appellate court indicated:

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

It is also important to understand that the clear and convincing standard used by R.C. 2953.08(G)(2) is written in the negative. *It does not say that the trial judge must have clear and convincing evidence to support its findings.* Instead, it is the court of appeals that must clearly and convincingly find that the record does not support the court's findings. In other words, *the restriction is on the appellate court, not the trial judge. This is an extremely deferential standard of review.*

Id. at ¶ 20-21 (emphasis added).

The First District (*State v. White*, 1st Dist. Hamilton No. C-130114, 2013-Ohio-4225, 997 N.E.2d 629), Second District (*State v. Rodeffer*, 2nd Dist. Clark No. 2014-CA-13, 2013-Ohio-5759, 5 N.E.3d 1069, ¶ 31), the Twelfth District (*State v. Lee*, 12th Dist. Butler No. 2012-09-182, 2013-Ohio-3404, ¶ 9), the Fifth District (*State v. Gooding*, 5th Dist. Holmes No. 13CA006, 2013-Ohio-5148, ¶ 7), the Eleventh District (*State v. Lane*, 11th Dist. Geauga No. 2013-G-3144, 2014-Ohio-2010, ¶ 123), and the Fourth District (*State v. Losey*, 4th Dist. Washington No. 14CA11, 2015-Ohio-285, ¶ 6-7) have cited and quoted *Venes* for the proposition that the review standard is "extremely deferential." Most of these cases also quoted the language from *Venes* recognizing that a trial court does not need clear and convincing evidence to support its findings. Most of these courts have quoted the language of *Venes* to assert that, as long as the trial court makes the appropriate statutory findings, the consecutive nature of its sentencing should stand unless the record overwhelmingly suggests to the contrary. *Adams*, ¶ 37 (Hall, J., dissenting).

Accordingly, as long as a trial court makes appropriate statutory findings, the consecutive nature of its sentencing should stand unless the record overwhelming suggests otherwise. In the State of Ohio's view, which is the same view shared by Judge Hall in the dissenting opinion he authored in *State v. Adams*, 2d Dist. Clark No. 2014-CA-13, 2015-Ohio-1160, and Judge Wellbaum in the dissenting opinion he authored in the case *sub judice* "a record that is silent except for the offenses and dates committed, perhaps after pleas without a presentence investigation and with only minimal information concerning the offenses, is sufficient if the trial court made the necessary statutory findings. Under such circumstances, we should not substitute our conclusions for those of the trial court." *Id.* at ¶ 37.

Recently this Court in *State v. Bonnell*, 140 Ohio St.3d 209, 219, 2014-Ohio-3177, held that in order to impose consecutive terms of imprisonment, a trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry, but it has no obligation to state reasons to support its findings. Nor is it required to give a talismanic incantation of the words of the statute, provided that the necessary findings can be found in the record and are incorporated into the sentencing entry.

The record in the present case supports the trial court's findings in imposing consecutive sentences and the appellate court misapplied the appellate standard of review in finding that the record did not support the conclusion that consecutive sentences (1) are necessary to protect the public from future crime or to punish Overholser; (2) consecutive sentences are not disproportionate to the seriousness of Overholser's conduct and to the danger he poses to the public; and (3) 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 Overholser's conduct. *See* R.C. 2929.14(C)(4)(b).

Overhosler challenges the consecutive nature of his sentence. However, Overhosler overlooks the fact that the plea agreement itself resulted in the dismissal of an additional GSI charge, and a more severe first-degree felony rape charge involving an allegation of oral sex that carried a possible term of life in prison. He was facing a statutory maximum sentence of thirty (30) years in prison for the fsix GSI charges he was indicted on and a possible term of life in prison for the first-degree felony rape charge. In fashioning an appropriate sentence, the trial court could consider these dismissed charges. *State v. Clemons*, 2d Dist. Montgomery No.

26038, 2014-Ohio-4248, ¶ 8 (recognizing that a trial court at sentencing may consider a defendant's uncharged yet undisputed conduct *as well as facts related to charges dismissed under a plea agreement*).

Overholser contends that his sentence was disproportionate to sentences imposed in other jurisdictions. However, this is not the case. As Judge Wellbaum opined, sentencing decisions are very fact dependent. In a factually similar case, *State v. Wilson*, 3d Dist. Henry No. 7-12-25, 2013-Ohio-5195, the Third District Court of Appeals affirmed a trial court's imposition of maximum-consecutive sentences totaling 25 years for five counts of third-degree felony GSI using the standard of review in R.C. 2953.08(G)(2).

Like the present case, the offenses in *Wilson* involved a single victim that was under the age of thirteen. Wilson was indicted for one count of first-degree felony rape and five counts of gross sexual imposition. As in the present case, the single count of rape was dismissed pursuant to a plea agreement while Wilson pled guilty to the gross sexual imposition charges. Wilson committed the offenses over a nine month period and was able to commit the offenses because he had gained a position of trust with the victim's family as a babysitter. Like Overholser, Wilson was a first-time offender who, during sentencing, apologized for his actions.

The only difference between *Wilson* and the present case is that it was estimated Wilson abused the child approximately 40 times, and that Wilson himself had been abused as a child and Overholser had not.

Furthermore, the Second District recently concluded that the record in *State v. Hawkins*, 2d Dist. Greene No. 2014-CA-6, 2014-Ohio-4960, supported the imposition of consecutive sentences of three years each on two counts of gross sexual imposition.

The Second District opined that even though Hawkins had no prior record other than a seat belt violation, he admitted engaging in numerous sex acts that constituted rape, a first-degree felony. Even under Hawkins' version of events, he knew that the victim was under the legal age of consent. He also acknowledged providing her with alcohol and opined that having sex with a fifteen year old girl was not inappropriate.

Simply put, the Second District's opinions in *State v. Adams*, 2d Dist. Clark No. 2014-CA-13, 2015-Ohio-1160 and *State v. Overholser*, 2d Dist. Clark No. 2014-CA-42, 2015-Ohio-1980, reflect the following: so long as a defendant has a relatively mild criminal record and the defendant appears to show genuine remorse during their allocution, the Court of Appeals will clearly and convincingly find that the record does not support the consecutive sentence findings in R.C. 2929.14(C)(4). And, it is disconcerting that the very same Court of Appeals that affirmed Hawkins' consecutive sentences abrogates the appropriate standard of review, and overturns Overholser's consecutive sentences when Overholser repeatedly victimized the child over a period of five months.

In conclusion, this case is of great public and general interest. When an offender repeatedly commits sexual offenses like gross sexual imposition and allegedly rapes an eleven year child, and the record overwhelmingly supports the imposition of consecutive sentences, the court of appeals misapplies the appropriate standard of review as set forth by the General Assembly in R.C. 2953.08(G)(2). It is not the role of a Court of Appeals to substitute the judgment of the trial court in imposing consecutive sentences. It is the Court of Appeals that must clearly and convincingly find that the record does not support the trial court's findings. In this case, the record overwhelmingly supported that consecutive sentences were necessary to

protect the public and to punish Overholser, and were not disproportionate to the seriousness of Overholser's conduct and to the danger he posed to the community.

CONCLUSION

The Second District Court of Appeals has misapplied the appellate standard of review as set forth in R.C. 2953.08(G)(2)(a). The State of Ohio respectfully asks this Court to accept jurisdiction and reverse the Second District Court of Appeals decision in this case, and further expand upon *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that the foregoing Memorandum in Support of Jurisdiction was forwarded by regular U.S. First Class mail to Attorney Richard E. Mayhall, 20 South Limestone Street, Suite 120, Springfield, Ohio 45502 and to Timothy Young, State Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215 on this 10th day of June, 2015.



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