

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	CASE NO. 15-1330
	:	
Appellee	:	On Appeal from the Butler County
	:	Court of Appeals
vs.	:	
	:	Twelfth Appellate District
JONATHAN BRANDENBURG,	:	
	:	Court of Appeals Case No.
Appellant	:	CA2014-10-0201

MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT,  
JONATHAN BRANDENBURG

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**FILED**  
AUG 13 2015  
CLERK OF COURT  
SUPREME COURT OF OHIO

## TABLE OF CONTENTS

EXPLANATION OF WHY THIS CASE INVOLVES A QUESTION OF PUBLIC OR GREAT GENERAL INTEREST	1
STATEMENT OF THE CASE AND FACTS	1
ARGUMENT IN SUPPORT OF PROPOSITION OF LAW NO. 1	1-4
<p><u>Proposition of Law, No. 1:</u> The test outlined by the Ohio Supreme Court in <i>State v. Kalish</i>, 120 Ohio St.3d 23, 2008-Ohio-4912, continues to apply in reviewing felony sentences after the passage of R.C. 2953.08(G).</p>	
<p><u>Authorities Presented</u></p>	
<i>Revised Code 2929.12(E)</i>	2
<i>Revised Code 2953.08(G)(2)</i>	2
<i>State v. Adams</i> (1989), 62 Ohio St.2d 151	2
<i>State v. Banks</i> , 185 Ohio App.3d 648, 2010-Ohio-277	2
<i>State v. Crawford</i> , Clermont App. No. CA2012-12-088 2013-Ohio-3315	3
<i>State v. Hill</i> , Carroll App. No. 13 CA 892, 2014-Ohio-1965	3
<i>State v. Kalish</i> , 120 Ohio St.3d 23, 2008-Ohio-4912	2
<i>State v. Marcum</i> , 2014-2122, 2015-Ohio-239	4
<i>State v. Simmons</i> , Summit App. No. 27197, 014-Ohio-4191	3
CONCLUSION	4
CERTIFICATE OF SERVICE	4
APPENDIX	5

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

Appellant Jonathan Brandenburg was convicted of one count of robbery and one count of attempted failure to appear, and was sentenced to three months in prison. This case involves a substantial question of public or great general interest, specifically, application of R.C. 2953.08(G) in light of *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. The Twelfth Appellate District held in this case that the abuse of discretion standard announced by the *Kalish* Court was inapplicable after the Ohio Legislature re-enacted R.C. 2953.08(G). Other appellate districts continue to review sentences pursuant to *Kalish*. Resolution of this question will resolve the conflict existing among the appellate districts in Ohio.

**STATEMENT OF THE CASE AND FACTS**

Appellant Brandenburg was convicted following guilty pleas to one count of Robbery, a felony of the third degree, in violation of *Revised Code* section 2911.02(A)(2), and one of attempted failure to appear, a felony of the fifth degree, in violation of *Revised Code* sections 2923.02 ~ 2937.29.

The court imposed thirty six months, with jail credit of 97 days, on the Robbery charge; and twelve months on the Attempted Failure to Appear charge, run concurrently. The court found that Brandenburg had been to prison for forgery in 2005 and theft in 2006, and also had a misdemeanor record.

**ARGUMENT IN SUPPORT OF PROPOSITION OF LAW**

Proposition of Law, No. 1: The test outlined by the Ohio Supreme Court in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, continues to apply in reviewing felony sentences after the passage of R.C. 2953.08(G).

A two-step analysis is required to review felony sentences. The court must comply “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.” ***State v. Kalish***, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶ 26. “The term ‘abuse of discretion’ connotes more than an error of law or judgment; it implies that the trial court’s attitude is unreasonable, arbitrary, or unconscionable. ***State v. Adams*** (1989), 62 Ohio St.2d 151, 157. A trial court abuses its discretion when it imposes a “substantially enhanced penalty” without a basis to support it. ***State v. Banks***, 185 Ohio App.3d 648, 2010-Ohio-277, at ¶ 38.

Brandenburg averred to the Twelfth District Court of Appeals that the trial court in this matter clearly and convincingly imposed a sentence contrary to law and abused its discretion by imposing a maximum prison sentence. He claimed that he had demonstrated genuine remorse, ***Revised Code*** 2929.12(E)(5), and that the offense was committed under circumstances not likely to reoccur. ***Revised Code*** 2929.12(E)(4). Moreover, Brandenburg claimed that he hadn’t committed any felony offenses in about eight years, and had an extensive work history installing carpet, with employment expected upon his release from jail.

The appellate court rejected Brandenburg’s claims that *Kalish* controlled its review, holding that

...as this has stated multiple times, the standard of review set forth in R.C. 2953.08(G)(2) shall govern all felony sentences. [Citation omitted]  
Pursuant to R.C. 2953.08(G)(2), when hearing an appeal of a trial court’s

felony sentencing decision, “the appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing.” However, as explicitly stated in R.C. 2953.08(G)(2), “[t]he appellate court’s standard for review is not whether the sentencing court abused its discretion.”

***State v. Brandenburg***, Butler App. No. CA2014-10-201, -202, 2015-Ohio-2573, ¶ 7, citing ***State v. Crawford***, 12<sup>th</sup> Dist. Clermont No. CA2012-12-088, 2013-Ohio-3315, ¶¶ 6, 7. The Twelfth District further found that

Instead, an appellate court may only take action authorized by R.C. 2953.08(G)(2) if the court “clearly and convincingly” finds “that the sentence is contrary to law. A sentence is not clearly and convincingly contrary to law where the trial court considers the purposes and principles of sentencing as set forth in R.C. 2929.11, as well as the seriousness and recidivism factors listed in R.C. 2929.12, and sentences appellant within the permissible statutory range. *Crawford* at ¶ 9; *State v. Elliot*, 12<sup>th</sup> Dist. Clermont No. CA2009-03-020, 2009-Ohio-5926, ¶ 10.

*Brandenburg*, at ¶ 8.

Other appellate courts have rejected the rationale of the Twelfth District and have explicitly continued to apply the abuse of discretion enunciated by the *Kalish* Court, including the Summit County Court of Appeals in ***State v. Hill***, 2014-Ohio-1965, and the Carroll County Court of Appeals in ***State v. Simmons***, 2014-Ohio-4191.

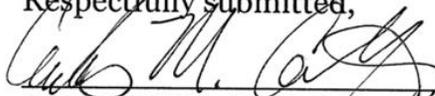
Appellant Jonathan Brandenburg submits that this Honorable Court should

accept discretionary review because this matter involves a question of public or great general interest, specifically a conflict among intermediary Ohio appellate courts. This Honorable Court has accepted review of a certified conflict from the Gallia County Court of Appeals on the same question in ***State v. Marcum***, 2014-2122, 2015-Ohio-239. On July 1, 2015, Brandenburg filed in the Butler County Court of Appeals a Motion to Certify a Conflict to the Supreme Court of Ohio; on July 10, 2015, Appellee State of Ohio filed a reply memorandum supporting Brandenburg's request. However, as of August 11, 2015, the Twelfth District Court of Appeals has not ruled on his motion.

**CONCLUSION**

For the reasons stated above, Appellant Jonathan Brandenburg respectfully requests that this Honorable Court accept jurisdiction over this matter.

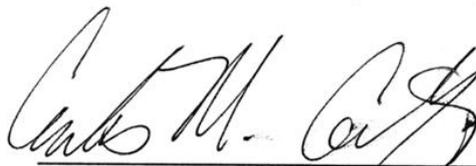
Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Memorandum in Support of Jurisdiction has been sent by ordinary U.S. mail to counsel for Appellee, Michael Gmoser, Butler County Prosecuting Attorney, Audra Adams, Assistant Prosecuting Attorney, this 13<sup>th</sup> day of August, 2015.



CHARLES M. CONLIFF #0059432  
ATTORNEY FOR APPELLANT

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
BUTLER COUNTY

FILED  
2015 JUN 29 PM 1:39  
MARY L. SWAIN  
BUTLER COUNTY  
CLERK OF COURTS

STATE OF OHIO, :  
Plaintiff-Appellee, : CASE NOS. CA2014-10-201  
 : CA2014-10-202  
 :  
- vs - : JUDGMENT ENTRY  
 : FILED BUTLER CO.  
 : COURT OF APPEALS  
JONATHAN BRANDENBURG, : JUN 29 2015  
 : MARY L. SWAIN  
Defendant-Appellant. : CLERK OF COURTS

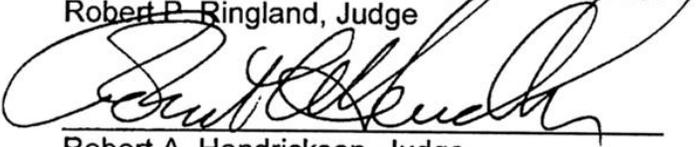
The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Butler County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24

  
\_\_\_\_\_  
Robin N. Piper, Presiding Judge

  
\_\_\_\_\_  
Robert P. Ringland, Judge

  
\_\_\_\_\_  
Robert A. Hendrickson, Judge

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
BUTLER COUNTY

STATE OF OHIO,  
Plaintiff-Appellee,

- vs -

JONATHAN BRANDENBURG,  
Defendant-Appellant.

CASE NOS. CA2014-10-201  
CA2014-10-202

OPINION  
6/29/2015

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS  
Case Nos. CR2013-09-1498 and CR2014-05-0848

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Charles Conliff, P.O. Box 18424, Fairfield, Ohio 45018-0424, for defendant-appellant

**PIPER, P.J.**

{¶ 1} Defendant-appellant, Jonathan Brandenburg, appeals his three-year sentence imposed by the Butler County Court of Common Pleas after pleading guilty to one count of robbery and one count of attempted failure to appear.

{¶ 2} Brandenburg and his co-defendant committed multiple robberies by stealing money from travelers who stopped at rest areas along Interstate 75. Brandenburg and his co-defendant would approach travelers and either ask for help in assisting another motorist

or ask the travelers to engage in card games for money. Once the travelers left their vehicle to help or gamble, Brandenburg and his co-defendant would surround the victim and steal his or her money. One victim, however, fought back and chased Brandenburg into the rest area facility where he hid in the bathroom. The victim called police, and Brandenburg was arrested.

{¶ 3} Brandenburg was indicted on two counts of robbery and later charged with failure to appear when he did not attend a hearing as ordered. Brandenburg and the state entered into plea negotiations and Brandenburg agreed to plead guilty to one count of robbery and an amended charge of attempted failure to appear. The trial court accepted Brandenburg's pleas after a hearing on the matter. The trial court then ordered a presentence investigation report and scheduled a sentencing hearing.

{¶ 4} The trial court sentenced Brandenburg to three years in prison for the robbery charge and one year for the attempted failure to appear, and the sentences were ordered concurrently for an aggregate three-year sentence. Brandenburg now appeals his sentence, raising the following assignment of error.

{¶ 5} THE TRIAL COURT ERRED TO THE APPELLANT'S PREJUDICE BY IMPOSING A PRISON SENTENCE.

{¶ 6} Brandenburg argues in his assignment of error that the trial court abused its discretion by imposing a maximum prison sentence.

{¶ 7} In support of his argument that the trial court incorrectly sentenced him, Brandenburg relies upon the standard set forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. However, and as this court has stated multiple times, the standard of review set forth in R.C. 2953.08(G)(2) shall govern all felony sentences. *State v. Crawford*, 12th Dist. Clermont No. CA2012-12-088, 2013-Ohio-3315, ¶ 6. Pursuant to R.C. 2953.08(G)(2), when

hearing an appeal of a trial court's felony sentencing decision, "the appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing." However, as explicitly stated in R.C. 2953.08(G)(2), "[t]he appellate court's standard for review is not whether the sentencing court abused its discretion." *Id.* at ¶ 7.

{¶ 8} Instead, an appellate court may only take action authorized by R.C. 2953.08(G)(2) if the court "clearly and convincingly finds" that the sentence is contrary to law. A sentence is not clearly and convincingly contrary to law where the trial court considers the purposes and principles of sentencing as set forth in R.C. 2929.11, as well as the seriousness and recidivism factors listed in R.C. 2929.12, and sentences appellant within the permissible statutory range. *Crawford* at ¶ 9; *State v. Elliott*, 12th Dist. Clermont No. CA2009-03-020, 2009-Ohio-5926, ¶ 10.

{¶ 9} After reviewing the record, the trial court's sentence is not contrary to law. We begin by noting that at the sentencing hearing, the trial court did not reference R.C. 2929.11 or R.C. 2929.12. However, and while a statement regarding the trial court's consideration of the statutory sentencing factors would have clarified the issue for Brandenburg, the record is obvious that the trial court made the proper considerations. Throughout the sentencing hearing, the trial court referenced information in the presentence investigation report, and also highlighted various aspects of Brandenburg's extensive criminal history and questioned Brandenburg's recidivism risks. The trial court also discussed facts of the case, specific to Brandenburg victimizing people at rest areas. These discussions by the trial court demonstrate that it had properly considered the purposes and principles of sentencing, as well as the seriousness and recidivism factors.

{¶ 10} Moreover, the trial court expressly stated in its entry that it had considered the

purposes and principles of sentencing according to R.C. 2929.11 as well as the seriousness and recidivism factors within R.C. 2929.12. See *State v. Ballard*, 12th Dist. Butler No. CA2014-09-197, 2015-Ohio-2084 (affirming a sentence where the trial court failed to cite R.C. 2929.11 or 2929.12 during the sentencing hearing but stated in its judgment entry of conviction that it had considered the principles and purposes of sentencing pursuant to R.C. 2929.11 and balanced the seriousness and recidivism factors pursuant to R.C. 2929.12); and *State v. Lancaster*, 12th Dist. Butler No. CA2007-03-075, 2008-Ohio-1665 (affirming a sentence where the trial court did not state at the sentencing hearing that the court considered R.C. 2929.11 or R.C. 2929.12 specifically, but stated its consideration of both statutes in its judgment entry of conviction). Based on the record, it is clear that the trial court gave the proper consideration to the purposes and principles of sentencing as well as the seriousness and recidivism factors as required by Ohio's sentencing statutes.

{¶ 11} Brandenburg was convicted of robbery in violation of R.C. 2911.02(A)(3), which is a third-degree felony. According to R.C. 2929.14(A)(3)(b), "for a felony of the third degree \* \* \* the prison term shall be nine, twelve, eighteen, twenty-four, thirty, or thirty-six months." As such, Brandenburg's three-year sentence was within the sentencing range for a third-degree felony. Brandenburg was also convicted of attempted failure to appear in violation of R.C. 2937.29, a fifth-degree felony. According to R.C. 2929.14(A)(5), "for a felony of the fifth degree, the prison term shall be six, seven, eight, nine, ten, eleven, or twelve months." As such, Brandenburg's one-year sentence was also within the sentencing range for a fifth degree felony.

{¶ 12} After reviewing the record, we find that Brandenburg's sentence was not clearly and convincingly contrary to law where the trial court considered the purposes and principles of sentencing according to R.C. 2929.11, as well as the seriousness and recidivism factors

listed in R.C. 2929.12, and sentenced Brandenburg within the permissible statutory range. Brandenburg's sentence was not contrary to law, and his assignment of error is overruled.

{¶ 13} Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.