University of Cincinnati Law Review

Volume 87 | Issue 2 Article 3

December 2018

Consecutive Sentences in Ohio—'Reserved for the Worst'—or Not: Trial Court Discretion and Appellate Review

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CONSECUTIVE SENTENCES IN OHIO—'RESERVED FOR THE WORST'—OR NOT: TRIAL COURT DISCRETION AND APPELLATE REVIEW

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Since the General Assembly enacted H.B. 86, effective September 30, 2011, Ohio appellate courts have heard numerous appeals regarding the presumption for concurrent sentences in Ohio Rev. Code §2929.41(A) because trial courts continue to impose consecutive sentences. The presumption was part of S.B. 2, effective in 1996.[1] It simply states, with few exceptions, that "a prison term, jail term, or sentence of imprisonment shall be served concurrently with any other prison term."[2] In *State v. Comer*,[3] the Supreme Court concluded, "[c]onsecutive sentences are reserved for the worst offenses and offenders." The exceptions require specific judicial findings before imposing consecutive sentences. Nevertheless, many appellate courts defer to the trial court's conclusions. These decisions misinterpret the standard of review of sentences as constraining review in favor of broad trial court discretion.

PRESUMPTION FOR CONCURRENT SENTENCES; LIMITED DISCRETION

The Ohio Supreme Court recognized early the legislative presumption and the legislative intent to limit trial court discretion. In *State v. Barnhouse*, the Court rejected consecutive sentences for violations of another statute without proscribed findings, stating: "[w]e do not believe that the language in [Ohio Rev. Code] Chapter 2929 reflects an intention of the General Assembly to grant such unfettered discretion to the trial court."[4] The Court confirmed its prescient conclusions in *Comer*—that invoking the exceptions must be supported by "findings or reasons" why

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1. Am. Sub. S.B. No. 2, 146 Ohio Laws, Part IV, eff. 7-1-96. *See* Hon. B. Griffin and L.R. Katz, OHIO FELONY SENTENCING LAW 376-377 (2008 Ed.). The previous provision allowed consecutive sentences when the trial court so specified. *Id.*

2. Ohio Rev. Code §2929.41(A).

3. State v. Comer, 793 N.E.2d 473, 477 (Ohio 2003). S.B. 2 included certain specifications that are mandated to run consecutive to the underlying offense. Ohio Rev. Code §2941.141-.1423. They are required to be set forth in the indictment and cover specific situations, usually involving weapons, violence, repeat offender, or special situations. The actual length of sentences was designed to be for the most serious offenders, with mandatory prison terms and specifications. The focus of this article is sentencing of multiple offenses not involving mandatory consecutive sentences, after H.B. 86.

4. State v. Barnhouse, 808 N.E.2d 874, 878-879 (Ohio 2004).

the sentence is not to be served concurrently. The findings and reasons were necessary for "meaningful review of the sentencing decision."[5] In *State v. Bates*, the Court stated the intent of S.B. 2 was "that trial courts be permitted to impose consecutive sentences only in certain circumstances."[6] In other words, the legislature sought "to limit a trial court's ability to impose consecutive sentences."[7] Under S.B. 2, the "law now provides precise guidance for criminal sentencing with clearly defined constraints."[8] The clear understanding was that the sentencing court has much less discretion.

ALONG CAME *FOSTER*

However, in *State v. Foster*, the Supreme Court severed Ohio Rev. Code §2929.41(A) and the presumption for concurrent sentences by holding that judicial fact-finding violated the right to trial by jury under the Sixth Amendment to the United States Constitution.[9] In its remedy of severance, the *Foster* Court excised Ohio Rev. Code §2929.41(A) even though it did not require judicial fact-finding for concurrent sentences, only for the exceptions which were in other sections of Chapter 2929.[10] Nevertheless, *Bates* confirmed that *Foster* left "no statute to establish" the presumption for concurrent sentences.[11] "After severance, judicial fact-finding is not required before imposition of consecutive prison terms."[12] The *Bates* Court stated that *Foster* returned Ohio criminal sentencing law to the common law presumption of consecutive sentences and placed the issue solely within the discretion of the trial court.[13]

5. *Comer*, 793 N.E.2d 473 at 468.

6. State v. Bates, 887 N.E.2d 328, 332 (Ohio 2008).

7. *Id*. at 333.

8. *Comer*, 793 N.E.2d 473 at 465.

9. State v. Foster, 845 N.E.2d 470, 499 (Ohio 2006).

10. The most common exception is now Ohio Rev. Code §2929.14(C)(4). The court must find "the consecutive service is necessary to protect the public from future crime or 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* . . . (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender." (emphasis added). This exception is strictly construed and requires findings by the sentencing court, including that "consecutive sentences were not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public." State v. Bonnell, 16 N.E.3d 659, 667 (Ohio 2014). The required conditions for this exception appear to be limited to a violent offender. An "egregious" criminal record does not meet the conditions. *Id*. Nevertheless, by misconstruing the standard of review, appellate courts have affirmed applying the exception to nonviolent offenders. *See* State v. Purk II, 86 N.E.3d 905 (Ohio Ct. App. 2017); State v. Gibson, No. 2016-CA-12, 2017 Ohio App. LEXIS 684 (Ohio Ct. App. 2017); State v. Hill, No. 13 MA 1, 2014 Ohio App. LEXIS 1000 (Ohio Ct. App. 2014).

11. *Bates*, 887 N.E.2d at 332.

12. *Id.* at 333.

13. *Id*. at 333. S*ee Foster*, 845 N.E.2d 475, syllabus ¶ 4.

After *Foster*, the Supreme Court recognized that its severance remedy was not consistent with a later United States Supreme Court decision and that judicial fact-finding for the purpose of imposing consecutive sentences did not violate the right to a jury trial.[14] However, in *State v. Hodge*, the Supreme Court refused to re-instate the language it had severed in *Foster*.[15] It left it to the General Assembly to determine whether it still preferred concurrent sentences even though the presumption had been part of S.B. 2 in 1996.[16] Thus, the legislative presumption and limitation of discretion intended for more than twelve years remained left out.

H.B. 86 REVIVAL

In response, the General Assembly adopted H.B. 86, stating in §11 its intention to "revive" the language severed in *Foster*.[17] However, H.B. 86 did not re-enact *all* the severed language. It did not re-enact Ohio Rev. Code §2929.19(B)(1)(c) which specifically required the trial court at the sentencing hearing to set forth its findings *and its reasons* for imposing a consecutive sentence.

Beginning in the Summer of 2012, appellate courts began holding that a trial court was no longer required to provide its reasons.[18] Most others followed that lead. A few decisions from the Fifth District Court of Appeals held that the trial court's reasons were again required since the General Assembly had revived the Supreme Court decision in *Comer*.[19] Most of the appellate decisions contained very little discussion of legislative intent in H.B. 86 as a whole, i.e., whether the General Assembly really intended that reasons not be given. As stated by the Fifth District Court of Appeals in *State v. Ducker*, it was "the legislature's intent that courts interpret the language in [Ohio Rev. Code

14. State v. Elmore, 912 N.E.2d 582, 590-591 (Ohio 2009) (citing Oregon v. Ice, 555 U.S. 160 (2009)).

15. State v. Hodge, 941 N.E.2d 768, 777 (Ohio 2010) (citing *Elmore*, 912 N.E.2d 582 and *Bates*, 887 N.E.2d 328).

16. *Id*. at 772-778. *See* State v. Lett, 829 N.E.2d 1281 (Ohio Ct. App. 2005) (*en banc*; rev'd on other grounds in *In re* Ohio Crim. Sentencing Statutes Cases, 847 N.E.2d 1174 (Ohio 2006). The Court in *Lett* explained that consecutive sentences were presumed in Ohio common law since 1868. *Lett*, 829 N.E.2d at 1290 (citing King v. Maxwell, 184 N.E.2d 380 (1962) and Stewart v. Maxwell, 187 N.E.2d 888 (1963)). It noted that the presumption for concurrent sentences was actually based on the Model Penal Code approach adopted in 1974. *Id*. The *Lett* court described this change in presumption as "a sea change in the law." *Id*.

17. Am. Sub. H.B. No. 86, effective September 30, 2011, §11, uncodified.

18. State v. Alexander, No. C-110828, 2012 Ohio App. LEXIS 3009 (Ohio Ct. App. 2012); State v. Frasca, No. 2011-T-0108, 2012 Ohio App. LEXIS 3320 (Ohio Ct. App. 2012).

19. State v. Williams, No. 2013CA 189, 2013 Ohio App. LEXIS 3535 (Ohio Ct. App. 2013); State v. Trout, No. CT2013-0043, 2014 Ohio App. LEXIS 1657 *4 (Ohio Ct. App. 2014). *See Comer*, 793 N.E.2d 473.

§2929.14(C)(4)] in the same manner as the courts did prior to *State v. Foster*."[20] Nevertheless, almost all other appellate districts did not accept that the interpretations in the early 2000s were revived with the statutory language.[21]

FINDINGS WITHOUT REASONS

The Eighth District Court of Appeals, sitting *en banc*, ruled that separate and distinct factual findings must be made and supported by the record before a consecutive sentence could be upheld.[22] It adopted the view that the trial court findings were strictly required to be specific and separate from the general sentencing factors. In *State v. Venes*, the Court had observed, "[t]here is no doubt that the provisions of H.B. 86, like those of S.B. 2 before it, were intended, among other things, to alleviate overcrowding in the prison system."[23] Thus, sentences "are presumptively concurrent."[24] In other words, the General Assembly expressly sought to lower costs by reducing the length of prison sentences.

In July 2014, the Supreme Court decided *State v. Bonnell*,[25] but it did not reference any of the discussion that had been ongoing in the appellate districts. It traced the legislative history, expressed the legislature's intention to reduce prison costs, and emphatically held that the specific statutory findings must be made at the sentencing hearing before an exceptional consecutive sentence could be imposed. It failed to consider whether the General Assembly's re-enactment of the severed language, including Ohio Rev. Code §2929.41(A), had included its decision in *State v. Comer*, which interpreted the statute prior to the severance by the Court in *Foster*. It did not mention (and it was not argued) that a settled principle of statutory construction applied that when the legislature re-enacts a statute in substantially the same language that had been construed by the state's highest court, the legislature is deemed to have adopted that construction, unless a contrary intention is readily evident.[26]

In fact, the *Bonnell* Court did not discuss the practical purposes of the trial court providing its reasons for imposing a consecutive sentence. There was no mention of former Chief Justice Moyer's opinion in

20. State v. Ducker, No. 2012CA00192, 2013 Ohio App. LEXIS 3785 *5-6 (Ohio Ct. App. 2013).

21. *See e.g.*, *Alexander*, 2012 Ohio App. LEXIS 3009.

22. State v. Nia, 15 N.E.2d 892 (Ohio Ct. App. 2014).

23. State v. Venes, 992 N.E.2d 453, 457 (Ohio Ct. App. 2013).

24. The *Venes* court noted that Ohio's presumption was unique, stating that "[t]he imposition of consecutive sentences in Ohio is thus an exception to the rule that sentences should be served concurrently." *Id*.

25. *Bonnell*, 16 N.E.3d 659.

26. 85 Ohio Jur.3d, *Statutes*, §276; Pierce v. Underwood, 487 U.S. 552 (1988); State v. Ferguson, 896 N.E.2d 110 (2008).

Barnhouse or the analysis set forth in *Comer* and confirmed in *Foster* that such findings and reasons were necessary for effective appellate review. The Court in *Bonnell* did hold that the trial court must make the findings in the Ohio Rev. Code §2929.14(C)(4) exception to the rule of concurrent sentences. In other words, the trial court must find that a consecutive sentence is required because the conduct or offender is too dangerous to the public and the conduct is so serious that consecutive sentences are not disproportionate to sentences for similar conduct.

The Supreme Court rejected the appellate court's quotation of the statutory findings in summary form and inquired about whether the record supported each finding.[27] This conduct demonstrated the importance of appellate review of the evidence, not just deference. It remanded to the lower court to determine whether a consecutive sentence is not disproportionate based on the seriousness of the conduct in the case (a petty theft) even though the trial court found the defendant had "an atrocious" criminal record and showed disrespect for society.[28]

Nevertheless, the Supreme Court in *Bonnell* concluded that the omission in the re-enacted statutes meant the trial court did not have to provide its reasons supporting its statutory findings. The Court failed to acknowledge that without the reasons, meaningful review was hampered; encouraging deference to the trial court discretion that the legislature had sought to restrict. It held if the appellate court "can discern that the trial court engaged in the correct analysis [the specified legal criteria] and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld."[29]

Some appellate decisions have "recommended" that the trial court provide its reasons to assist the public's perceived legitimacy of the process in the criminal justice system.[30] The United States Supreme Court had commented earlier that providing reasons is helpful to parties and the public perception, and adds to the evolving decision-making.[31] After *Bonnell*, those reasons are no longer required and the trial court's failure to provide them, without more, is not "contrary to law."[32] Nevertheless, the Court emphasized that the record must support the findings.[33] Reading

27. *Bonnell*, 16 N.E.3d at 667.

28. *Id*.

29. *Id*. at 666. Engaging in the correct analysis means considering the requirements set forth in the exception to concurrent sentences like Ohio Rev. Code §2929.14(C)(4). *See* the text of *supra* note 10. The second duty regarding whether "the record contains evidence to support the findings" does not imply deference to a silent record before the trial court. *See* the text of *infra* note 72. Without the trial court's reasoning, the review is *de novo* of the evidentiary record.

30. State v. Summers, No. 2013 CA 16, 2014 Ohio App. LEXIS 2368 *4 (Ohio Ct. App. 2014).

31. Rita v. United States, 551 U.S. 338, 357 (2007).

32. *Bonnell*, 16 N.E.3d, syllabus.

33. *Id*. at 667.

or quoting the statutory language is not required to apply the Ohio Rev. Code §2914(C)(4) exception.[34] On the other hand, quoting the statutory language is not conclusive because the record must support each of the findings to demonstrate that the trial court used the appropriate analysis.

EVIDENCE SUPPORTING FINDINGS

Appellate courts can require that the trial court provide an explanation for the findings by holding that the "bare" record, without explanation, does not dictate that a consecutive sentence is necessary to overcome the legislative presumption. After H.B. 86, the courts must have evidence that the intention of the General Assembly to reduce prison sentences must give way because the conduct in the case is (1) so dangerous to the public or the risk is so high or demands more punishment and (2) is so serious that a consecutive sentence is not disproportionate given the maximum sentences for the individual crimes. Given the purposes expressed in H.B. 86 and emphasized in *Bonnell*, and the revived rule for concurrent sentences, the courts should be strict in requiring a clear record with distinct findings.[35] There should be no *implicit* finding of support in the record. As the Eighth District Court of Appeals discussed in *State v. Moore*,[36] the "proportionality" element focuses on the seriousness of the defendant's *conduct* in the case before the court and "the danger the offender poses to the public." The other two elements in Ohio Rev. Code §2929.14(C)(4) focus on punishment and recidivism. All three elements must support the consecutive sentences. The record must "show why consecutive sentences are not disproportionate to his conduct."[37] The courts should take to heart that "[c]onsecutive sentences are reserved for the worst offenses and offenders."[38]

STANDARD OF REVIEW IN THE COURTS OF APPEAL

The standard of review of sentences does not change this analysis. Ohio Rev. Code §2953.08(G)(2) provides the standard for appellate review of trial court sentencing. It was part of S.B. 2, effective on July 1, 1996, and the move to "truth in sentencing."[39] It provides in positive language that

34. *Id*. at 666.

35. *Nia*, 15 N.E.2d 892.

36. State v. Moore, No. 99788, 2014 Ohio App. LEXIS 5576 (Ohio Ct. App. 2014).

37. *Id*.; *Bonnell*, 16 N.E.3d 659.

38. *Comer*, 793 N.E.2d 473.

39. The Supreme Court decision in *Foster* limited Ohio Rev. Code §2953.08(G) review only to sections of the Code that were not severed. *Foster*, 845 N.E.2d at 498. *See* State v. Kalish, 896 N.E.2d 124, 126 (Ohio 2008); Griffin and Katz, *supra* note 1, §1:5 regarding "truth in sentencing" objective.

the appellate court, upon review of the record, including findings underlying the sentence, "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."[40] The statute explicitly states that this is not a matter of abuse of discretion.[41] Instead, the "appellate court may take any action authorized by this division if it *clearly and convincingly finds*" either that it is contrary to law or not supported by the record.[42] The appellate review is designed to assure that the sentences are definite, not disparate, and mostly concurrent.[43]

ABUSE OF DISCRETION

In deciding what the Ohio Rev. Code §2953.08(G)(2) standard of review entails, the initial premise should be understanding what it is not—abuse of discretion.[44] It is commonly understood that the "abuse of discretion" standard of review is considered to mean substantial deference to the trial court decision. It has been described as "1. [a]n adjudicator's failure to exercise sound, reasonable, and legal decision making. . . [and] . . . 2. [a]ppellate court's standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, or illegal."[45] "Judicial discretion" is the "exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rule and principles of law."[46] It is a choice between or among alternatives, "with the selection of the outcome left to the decision maker."[47] Trial court discretion varies with the type of decision being made.

Understanding the vagaries of the "abuse of discretion" concept leads to the conclusion that the standard in Ohio Rev. Code §2953.08(G)(2) of "clearly and convincingly" is not a *more* deferential standard. It is a different standard, and a less deferential standard. A proper reading of Ohio Rev. Code §2953.08(G)(2) sentence review must be consistent with the purposes of S.B. 2. This is especially the case because S.B. 2

40. Ohio Rev. Code §2953.08(G)(2).

41. This language was added in Sub. H.B. 331, 148 Ohio Laws, Part II, 3414, 1419, enacted in 2000. In *State v. Marcum*, the Supreme Court finally made clear that the abuse of discretion standard is not applicable after the adoption of H.B. 86: "[T]he General Assembly has indicated a clear intent to return to the pre-*Foster* language of Ohio Rev. Code §2953.08(G)(2), which specifically precludes abuse-of-discretion review." State v. Marcum, 59 N.E.3d 1231, 1234-1235 (Ohio 2016).

42. *Id*. (emphasis added).

43. *See* Griffin and Katz, *supra* note 1, §10:16.

44. *Id*. at §10:20.

45. Black's Law Dictionary 10 (Deluxe Seventh Ed.)

46. *Id*. at 479. M. Painter and P. Welker, *Abuse of Discretion: What Should It Mean Under Ohio Law ?*, 29 OHIO N.U. L.REV. 209, 212 (2002).

47. *Id*.

"completely overhauled Ohio's sentencing system."[48] "The bill was partly the result of growing concerns about prison overcrowding and the increasing need for additional prison space. Also, there was a notion that offenders received disparate sentences for the same crime in different sections of the state."[49] All of these purposes support the view recognized in *Barnhouse* and *Comer*, that trial court discretion was being limited or controlled.

Accordingly, it is inconsistent to limit appellate review of the trial court sentence by deferring to broad discretion. In express terms, the appellate review is not "whether the sentencing court abused its discretion."[50] That admonition fits well with the overall intention of S.B. 2—that sentences be definite and consistent, and no longer than necessary, including sentences for multiple offenses again presumed to run concurrently after H.B. 86.

Moreover, the broad definitions of "abuse of discretion" further substantiate that the legislature was *not* attempting to create an even *more* deferential standard. The Supreme Court of Ohio has referenced a definition used by another state court as an appropriate definition of "abuse of discretion." It stated that:

> an abuse of discretion involves far more than a difference in . . . opinion . . . . The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.[51]

For example, "where the trial court completely misconstrues the letter and spirit of the law, it is clear that the court has been unreasonable and has abused its discretion."[52] An abuse of discretion is when the trial court "applies the wrong legal standard, misapplies the correct standard, or relies on clearly erroneous findings of fact."[53]

Judicial discretion is defined as a "choice,"[54]—a matter where the trial

48. M. Painter, *Appellate Review Under The New Felony Sentencing Guidelines: Where do we Stand?,"* 47 CLEVE. ST.L.REV. 533, 537 (1999).

49. *Id.*

50. Ohio Rev. Code §2953.08(G)(2).

51. State v. Jenkins, 473 N.E.2d 264, 313 (Ohio 1984). *See* Painter and Welker, *supra* note 46, at 225.

52. Warner v. Waste Management Waste, Inc., 521 N.E.2d 1091, 1098 n.10 (Ohio 1988).

53. Thomas v. Cleveland, 892 N.E.2d 454, 458 (Ohio Ct. App. 2008).

54. Painter and Welker, *supra* note 46.

court is free to determine what is reasonable in this case.[55] Consistent with the purposes of S.B. 2, the legislature was jettisoning "unfettered discretion" with regard to the length of sentences in prison. By expressly stating that appellate review of trial court sentencing is not for an abuse of discretion, the legislature was stating that the trial court's sentencing is not a matter of broad discretion. The legislature specifically set definite prison sentences for felonies, specific terms for specifications, and a presumption for concurrent sentences unless certain criteria are found to justify a longer sentence. It was seeking to limit the discretion—choices or alternatives—for trial courts. Having "fixed" rules for sentences limits disparate prison terms in similar circumstances. It is not logical to think the General Assembly intended the "clearly and convincingly" standard to require a more lenient standard of review.

MEANING OF "CLEARLY AND CONVINCINGLY" STANDARD

In the review of a sentence under Ohio Rev. Code §2953.08(G)(2), the statute mandates that the appellate court "review the record, including the findings underlying the sentence."[56] The authorized appellate court action, under that review, is based on whether the sentence meets the "check list" of statutory requirements and separate review of the evidence that may or may not support the sentence. The review mandated in Ohio Rev. Code §2953.08(G)(2) is *de novo*. An appeal *de novo* is an appeal "in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings."[57] Given the overall intent in S.B. 2 and again in H.B. 86, the legislature did not intend to leave the length of sentences to a trial court's "unfettered discretion."[58] The Supreme Court in *State v. Gondor*, described the difference between abuse of discretion review and *de novo* review, reversing trial court findings in a post-conviction relief matter, rather than applying an abuse of discretion standard.[59] In a *de novo* review, the appellate court may reach a different conclusion based on an independent

55. *Id*. In a separate context, the Supreme Court of the United States followed the established view that abuse of discretion is the appropriate standard of review of decisions whether to enforce an EEOC subpoena. The Court repeatedly referred to this as a deferential review. *McLane Co. v. EEOC*, 581 U.S. 1159 (2017), slip opinion. In this case, unlike *McLane Co.*, there is an "explicit statutory command" that such a discretionary review not be applied. The Supreme Court agreed with commentators that "abuse-of-discretion review is employed not only where a decisionmaker has 'a wide range of choice as to what he decides, free from the constraints which characteristically attach whenever legal rules enter the decision [making] process'; it is also employed where the trial judge's decision is given 'an unusual amount of insulation from appellate revision' for functional reasons." *Id*., slip opinion, at 9-10.

56. Ohio Rev. Code §2953.08(G)(2).

57. Black's Law Dictionary, Seventh Deluxe Edition, 94.

58. *See* Griffin and Katz, *supra* note 1, §10:2.

59. State v. Gondor, 860 N.E.2d 77, 79 (Ohio 2006).

review of the facts and law.[60] In an ordinary appeal, the appellate court cannot substitute its judgment for the trial court judgment. Thus, the trial court's findings in denying post-conviction relief after a hearing are reviewable for abuse of discretion. The trial court is said to have a "gatekeeping" role that is entitled to deference within the abuse of discretion standard.[61] In that context, a *de novo* review was error.[62]

The "clearly and convincingly" standard was in effect in 2003 and 2004 when *Barnhouse* and *Comer* were decided. There, the Supreme Court referenced the lack of "unfettered discretion" or deference to the trial court.[63] Contrary to the post-H.B. 86 appellate court language, the standard of "clearly and convincingly" was *not* considered to be "an extremely deferential standard of review."[64] The language is known to mean having a "firm conviction" (greater than "more likely than not") that the record does not support the findings for consecutive sentences.[65] In practice, this is not unlike every appellate decision to affirm, reverse, or modify a trial court ruling based on the record presented to it. If a trial court does not provide an explanation for the findings called for in the exception, then the "bare" record must clearly demonstrate that this is an unusual case where a consecutive sentence is necessary. It is only where the appellate court finds that the evidence in the record supports each element of the exception that it can find the trial court engaged in the appropriate analysis in imposing consecutive sentences.[66] Appellate court review is designed to assure the sentencing scheme works. An "extremely deferential standard of review" would effectively return to the broad trial

60. *Id*. at 87.

61. *Id*.

62. *Id*. at 88.

63. Barnhouse, 808 N.E.2d 874.

64. In *State v. Hacker*, the Court addressed consecutive sentences for aggravated vehicular homicide. *State v. Hacker*, No. 2001-CA-85, 2002 Ohio App. LEXIS 2986 (Ohio Ct. App. 2002). The Court reviewed the sentence pursuant to former Ohio Rev. Code §2929.14(E), which was later severed and then replaced in H.B. 86 as part of Ohio Rev. Code §2929.14(C). *Id*. at *8-9. The Court stated: "Before the enactment of Ohio Rev. Code §2953.08 as part of Senate Bill 2 in 1996, the standard of appellate review of a sentence imposed within statutory limits was abuse of discretion." *Id*. "Thus, the abuse of discretion standard of appellate review for sentencing has been replaced by a standard of review *that is less deferential to the trial court* . . . a trial court's sentencing findings are entitled to deference, *but not the same extent of deference that prevailed under the abuse of discretion standard of review*." *Id*. (emphasis added). The Court reviewed the trial court findings and whether they were supported by the record, including each element of the exception allowing consecutive sentences that are now present in Ohio Rev. Code §2929.14(C). *Id*. This reasoning was followed in several other cases. State v. Price, No. 03AP-459, 2004 Ohio App. LEXIS 1068 *10 (Ohio Ct. App. 2004); State v. Vickroy, No. 06CA4, 2006 Ohio App. LEXIS 5458 *8 (Ohio Ct. App. 2006) ("Under this statutory standard, we neither substitute our judgment for that of the trial court nor simply defer to its discretion."); State v. Burton, No. 06AP-690, 2007 Ohio App. LEXIS 1761 *16 (Ohio Ct. App. 2007).

65. Cross v. Ledford, 120 N.E.2d 118 (Ohio 1954).

66. Bonnell, 16 N.E.3d at 666.

court discretion that the legislature intended to restrict.[67]

THE ERRONEOUS "EXTREMELY DEFERENTIAL" REVIEW STANDARD

Nevertheless, Ohio appellate courts have not read this legislative intention in Ohio Rev. Code §2953.08(G)(2). Beginning with *State v. Venes*[68] and followed in *State v. Rodeffer*[69]—and without defining the deferential review in the "abuse of discretion" standard—these courts repeatedly read the standard enacted by S.B. 2 as "an extremely deferential standard of review."[70] Some judges even take the view that "as long as a trial court makes the appropriate statutory findings, the consecutive nature of its sentencing should stand unless the record overwhelmingly supports a contrary result."[71] "In my view, even a record that is largely silent is not clearly and convincingly contrary to a trial court's consecutive-sentencing determination unless there is substantial affirmative factual information in support of the defendant to conclude that the trial court is clearly wrong."[72] Such a standard of review is consistent with the broadest of discretion—unfettered discretion—even broader than "clearly erroneous."

The *Venes* court reasoned: "[a]s a practical consideration, this [clearly and convincingly] means that appellate courts are prohibited from substituting their judgment for that of the trial judge."[73] The same rule

67. *See Bates*, 887 N.E.2d 328 (citing *Elmore*, 912 N.E.2d 582).

68. *Venes*, 992 N.E.2d 453.

69. State v. Rodeffer, 5 N.E.3d 1069, 1076 (Ohio Ct. App. 2013).

70. *Venes*, 992 N.E.2d at 458; *Rodeffer*, 5 N.E.3d at 1077. *See* State v. Blair-Walker, No. 2012-P-125, 2013 Ohio App. LEXIS 4300 (Ohio Ct. App. 2013) (following *Venes*); State v. Hargrove, No. 15AP-102, 2015 Ohio App. LEXIS 3038 *16 (Ohio Ct. App. 2015) ("Several appellate courts have noted that the 'clearly and convincingly' standard under [Ohio Rev. Code §2953.08(G)(2)] is written in the negative which means that it is an 'extremely deferential standard of review.'"). *But see* State v. Rea, No. 2012-A-0044, 2013 Ohio App. LEXIS 4154 *15 (Ohio Ct. App. 2013) (O'Toole, J., dissenting: "Thus, in light of H.B. 86, I believe my colleagues improperly apply *Kalish*, an outdated plurality opinion.").

71. State v. Kay, No. 26344, 2015 Ohio App. LEXIS 4268 *24 (Ohio Ct. App. 2015) (Hall, J., dissenting).

72. *Id*. *See* State v. Brewer, 80 N.E.3d 1257, 1264 (Ohio Ct. App. 2017) (Welbaum, J., dissenting). *But see* State v. Hart, No. 14 BE 0025, 2016 Ohio App. LEXIS 909 *11 (Ohio Ct. App. 2016) (after noting its liberal review, stated: "However, as demonstrated by the outcome in *Bonnell*—the Supreme Court reversed and remanded Bonnell's sentence because the trial court failed to make a proportionality finding—there are limits to that deference."); Elmore, 60 N.E.3d at 807 ("And even though *Bonnell* advocates deference when reviewing the trial court's findings, there are limits to that deference, as demonstrated by the outcome of *Bonnell*."). However, the Court in *Elmore* is erroneously comparing the ease in reviewing whether the trial court made the requisite findings in Ohio Rev. Code §2929.14(C)(4), the exception to the presumption favoring concurrent sentences, with the different determination as to whether the evidence at the sentencing hearing supports each finding.

73. *Venes*, 992 N.E.2d at 458. After noting that the defendant had no felony convictions after reaching age 18, and 'led a law-abiding life for almost ten years" before becoming addicted to heroin, an appellate court stated: "Despite these facts, *'appellate courts are prohibited from substituting their judgment for that of the trial judge.*'" State v. Withrow, 64 N.E.3d 553, 560-561 (Ohio Ct. App. 2016)

applies with an abuse of discretion review. Moreover, the legislative direction is the opposite of this statement in *Venes*: the review *does* authorize the appellate court to substitute its judgment for the trial court's judgment if the appellate court is firmly convinced that the sentence does not comply with statutory requirements or is not supported by the evidence.[74] This is not "merely" substituting judgment. This review is calculated to make sure that the specified goals of S.B. 2 are met in the proscribed sentence. The statement in *Venes*—that the statute prohibits the appellate court from substituting its judgment for the trial court judgment—is not supported by the language or the intent of S.B. 2 and, subsequently, H.B. 86. It does not support the asserted "broad discretion."

These appellate courts inappropriately focus on the so-called "negative" language in Ohio Rev. Code §2953.08(G)(2) as calling for affirmation of the sentence unless appellate review clearly demonstrates that it is contrary to law or *not* supported by the record. These appellate courts erroneously read this language as indicative of broad deference to the trial court's sentence.[75] However, the negative wording is more appropriately read as a description of review to assure that the trial court is following the specific fixed terms set forth in S.B. 2 designed to meet the goals of the new criminal code. It is a minor limitation on the appellate court's authority to modify or vacate the sentence imposed by the trial court where (1) the appellate court is firmly convinced the sentence is contrary to the requirements in the statutes or (2) the findings are not supported by the evidence in the record *on the considerations that the legislature directs are controlling.*[76]

The standard of review in Ohio Rev. Code §2953.08(G)(2) is stated negatively because it is a limitation on the appellate court's authority to *change* the sentence. It limits *de novo* review as to the statutory requirements for sentences; it is an independent *de novo* review of the record to assure it supports the findings required for a consecutive sentence. Contrary to the interpretation in *Venes*, *Rodeffer*, and others, the negative language has nothing to do with the deference to be shown to the trial court sentence. It provides a threshold level from which the appellate

((Emphasis sic.; citing State v. Oversholser, No. 2014-CA-42, 2015 Ohio App. LEXIS 1948 *32 (Ohio Ct. App. 2015) (Welbaum, J., dissenting)).

74. Ohio Rev. Code §2953.08(G)(2).

75. In *State v. Withrow*, the Court viewed the standard of review as "constrained, stating: "While we may not have imposed such a harsh sentence, our review in sentencing is extremely deferential, because 'the clear and convincing' standard used by Ohio Rev. Code §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." *Withrow*, 64 N.E.3d at 558 (quoting *Venes*, 992 N.E. at 458). Withrow had been sentenced to two consecutive terms of nine years each for aggravated robberies committed over three days. *Id*. at 555. "No one was injured." *Id.*

76. *See* Gondor, 860 N.E.2d 77 (distinguishing de novo review from abuse of discretion).

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."[77] This is *de novo* review.

After *Foster*, and before H.B. 86 re-enacted the severed statutes, the Supreme Court in *State v. Kalish* stated: "[a]fter *Foster*, a trial court can simply impose consecutive sentences, and no reason need be stated. Thus, a record after *Foster* may be silent as to the judicial findings that appellate courts were originally meant to review under [Ohio Rev. Code §2953.08(G)(2)]."[78] The Supreme Court endorsed using a "clearly and convincingly" standard for reviewing whether the sentence complied with all legal requirements *and* an "abuse of discretion" standard otherwise.[79] Even though *Kalish* was just a plurality opinion and it was addressing sentencing after *Foster* and before the severed sentencing statutes were re-instated in H.B. 86, appellate courts have applied it to post-H.B. 86 decisions. The dissents in *Kay* and *Brewer* reference the "silent record" that may have come from *Kalish.*[80] In other words, even if the record does not provide express support for a finding required for a consecutive sentence, the presumption of regularity or the negative wording of the standard of review dictates that the consecutive sentence should be upheld. The return of "full discretion" to the trial courts was during the time Ohio Rev. Code §2929.41 was severed by *Foster*, not *after* it was revitalized in H.B. 86. This reasoning would nullify the statutory directive for *de novo* appellate review of the sentence. It did not mean that the

77. Ohio Rev. Code §2953.08(G)(2). In *State v. Harris*, the judge who authored *Venes* again addressed consecutive sentences, this time for drug trafficking offenses, noting that the trial court had to overcome the presumption for concurrent sentences. *State v. Harris*, No. 103803, 2016 Ohio App. LEXIS 4342 *4 (Ohio Ct. App. 2016). The court held it could not review the 20-year sentence because that would be using the abuse of discretion standard and would improperly substitute the appellate court's sentence. *Id*. at *6. The court's view turns the appellate authority on its head, stating, "that appellate courts are not authorized to review for abuse of discretion." *Id*. The legislative intent was to limit judicial discretion and to "monitor sentences through appellate review." Formal Report of the Ohio Criminal Sentencing Commission, "A Plan for Felony Sentencing in Ohio," 19 (July 1, 1993).

78. *Kalish*, 896 N.E.2d at 128 (referencing *Elmore* and *Bates*).

79. *Id*. at 128-130.

80. *See supra* notes 71 and 72. The decision in *State v. Withrow* adopted the view of the dissenting opinion in *Kay*, stating: "The dissenting opinion in *Kay* . . . is correct in that the consecutive nature of the trial court's sentencing should stand unless the record overwhelmingly supports a contrary result." Withrow, 64 N.E.3d at 561. In *Withrow*, that standard made the difference—"the record supporting the trial court findings is thin, but does not overwhelmingly support a contrary result concerning the imposition of consecutive sentences." *Id*. The dissenting opinion correctly noted that the presumption of concurrent sentences is "a benchmark." *Id*. at 563 (Donovan, J., dissenting). It notes that S.B. 2 "limited judicial discretion regarding the imposition of consecutive sentences and established a presumption in favor of concurrent sentences." *Id*. "Our review of the record must include whether the presumption was overcome by the findings set forth in [Ohio Rev. Code §2929.14(C)(4)]." *Id*. at 564. It describes the majority review as requiring that the factual information be "clearly wrong" before the court of appeals may alter the sentence. *Id*. at 565. It further notes that "the clear and convincing standard set forth in *Cross v. Ledford*" is not close to this "clearly wrong" standard. *Id*.

standard of review under Ohio Rev. Code §2953.08(G)(2) would change *after* the presumption for concurrent sentences was re-enacted. *Kalish* did not deal with that issue.

Furthermore, the dissent in *Kalish* points out that Ohio Rev. Code §2953.08(G)(2) was not severed and "[t]his court should not impose the *more deferential abuse of discretion standard* when the statute expressly rejected that standard."[81] There was no disagreement in *Kalish* that the "abuse of discretion" standard provided the sentencing court broader discretion than the "clearly and convincingly" standard. However, as indicated, appellate courts have mistakenly used the language of *Kalish* to support this broad discretion even after the legislature re-instated Ohio Rev. Code §2929.41(A) and the presumption for concurrent sentences.[82] The standard of review did not change after *Foster* but the plurality opinion in *Kalish* ignored the statutory prohibition and inserted "abuse of discretion" based on its ruling that the trial courts now had broad discretion because the judicial fact finding no longer applied.[83] This binary review set forth in *Kalish* has now been expressly repudiated.[84]

Also, the actual conduct of the Supreme Court in *Bonnell*[85] demonstrates a lack of deference to the sentencing court. The Supreme Court reviewed the trial court's record and concluded the evidence did not support the trial court's findings, implicitly holding that a "silent record" would not comply with Ohio Rev. Code §2953.08(G) (2) review.[86] The Supreme Court did not provide "extreme deference" to the trial court's findings. The Supreme Court should resolve the proper standard of review and uphold the legislative intention that concurrent sentences are presumed and consecutive sentences are reserved for the worst situations.

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81. *Kalish*, 896 N.E.2d at 136 (Lanzinger J., dissenting; emphasis added).

82. *See supra* notes 70-73.

83. *See supra* note 80.

84. *Marcum*, 59 N.E.3d 1231. Ironically, the Ohio Supreme Court, in an opinion from newly elected Justice DeWine, joined only by Justice French, in *obiter dictum*, referred to the "clearly and convincingly" standard as supporting the traditional view of broad trial court discretion in sentencing. State v. Rahab, 80 N.E.3d 431, 433 (Ohio 2017) (referring to case law from 1949 and 1984—obviously well before the "overhauling" of the sentencing system in S.B. 2 in 1996). *See Kalish*, 896 N.E.2d 124. The *dictum* is clearly incorrect. The opinion was using it to justify its rejection of a claim of "vindictive sentencing" (or a "trial tax") by a trial court after the defendant rejected a plea for an agreed lower sentence. Hopefully, the lower Ohio courts will not rely on this misstatement as support for the view of extreme deference to the trial court.

85. *Bonnell*, 16 N.E.3d 659. A key feature of S.B. 2 was the role of the appellate courts in securing consistent sentences. *See* Burt Griffin & Lewis R. Katz, *Sentencing Consistency: Basic Principles Instead of Numerical Grids: The Ohio Plan*, 53 CASE W. RES. L.REV. 1 (2002).

86. *Bonnell*, 16 N.E.3d 659.

CONCLUSION

The General Assembly's objective to have definite and shorter prison terms has failed. The Supreme Court decision in *Foster*, severing the presumption for concurrent sentences along with other provisions involving judicial fact-finding, was a major factor. The Supreme Court's decision in *Kalish*, before the severed statutes were re-instated, contributed to the misapplication of the appellate oversight of sentencing and the return to broad trial court discretion without the presumption of concurrent sentences. The judicial obstinacy in refusing to reinstate the severed portions of S.B. 2 extended this costly excursion back to indefinite, disparate, and longer sentences. Once the legislature took up the challenge and adopted H.B. 86 in 2011, there should have been shorter, similar sentences, and fewer consecutive sentences. Yet, in *Bonnell*, the high court still construed the legislative intent narrowly against limiting trial court discretion, holding the trial court did not have to explain why it was not following the legislative presumption for concurrent sentences. It did require that the record support the findings that the trial court determined justified imposing the exceptional consecutive sentence.

Finally, in 2016, the Supreme Court held that the "clearly and convincingly" standard of review, and not abuse of discretion, is the standard for review of sentences.[87] However, the Court did not inform the lower courts what the "clearly and convincingly" standard means.[88] Surely, the Supreme Court was aware of the aberrant decisions defining it as an "extremely deferential standard." Nevertheless, it only answered the narrow inquiry of whether the standard of review was the "clearly and convincingly" standard from S.B. 2, or "abuse of discretion" that was expressly ruled out by the legislature.

The Ohio Supreme Court should provide guidance at the next opportunity. Consecutive sentences are for the worst offenses and offenders, but appellate courts have been upholding them for non-violent crimes and as a substitute for drug addiction where the offender is a danger to himself.[89] The Supreme Court should make clear that the

87. *Marcum*, 59 N.E.3d 1231.

88. In *Withrow*, the court implied that the Supreme Court in *Marcum* had approved the "extremely deferential" standard, *Withrow*, 64 N.E.3d at 561, but *Marcum* only confirmed that the standard of review is the "clearly and convincingly" standard, not abuse of discretion.

89. *See supra* note 10. Only one appellate opinion has been found that follows the approach presented here and it is a dissenting opinion of Judge Mary J. Boyle of the Eighth District Court of Appeals. State v. Roberts, 101 N.E.3d 1067, 1075-1085 (Ohio Ct. App. 2017). On the other hand, consecutive sentences continue to be upheld in situations far from the "worst." For example, the Second District Court of Appeals upheld a consecutive sentence for a 19-year old offender who was eligible for community control sanctions and only had a juvenile court record. State v. Ward, No. 2015-CA-115, 2018 Ohio App. LEXIS 1313 (Ohio Ct. App. 2018). The trial court had found his conduct egregious because

legislative intent is contrary to the "extremely deferential" interpretation of the "clearly and convincingly" standard that has resulted in returning "unfettered discretion" to trial court sentencing in Ohio.

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he stole a child's Christmas gifts. *Id*. at *3.