[Cite as *State v. Marcum*, 2014-Ohio-4048.]

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

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: 9-8-14
ABELE, P.J.

{¶ 1} 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."

{¶ 2} 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.

{¶ 3} 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).

{¶ 4} 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 meth was manufactured, were removed from the home.

{¶ 5} 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

[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."

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.

{¶ 6} The jury found appellant guilty and the trial court sentenced appellant to serve a 10 year sentence. This appeal followed.

I

{¶ 7} In her first assignment of error, appellant asserts that insufficient evidence exists to support her conviction. We disagree with appellant.

{¶ 8} 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).

{¶ 9} 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.

{¶ 10} 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.

{¶ 11} 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.

{¶ 12} Accordingly, for these reasons we hereby overrule appellant's first assignment of error.

II

{¶ 13} 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,

[2] The witness explained that she is frequently called to administer drug tests to women if no female officers are available.

that in the case sub judice appellant's convictions are against the manifest weight of the evidence.

{¶ 14} 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.

{¶ 15} 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.

{¶ 16} 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.

{¶ 17} 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.

{¶ 18} Accordingly, for these reasons we hereby overrule appellant's second assignment of error.

III

{¶ 19} 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.

{¶ 20} 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.

{¶ 21} 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 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.

[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).

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.

{¶ 22} 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]

{¶ 23} In the case sub judice, we find no merit to this argument. Appellant essentially concedes that her sentence is not contrary to law. Thus, we may reverse the sentence only if we

---

[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).

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.

{¶ 24} 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.

{¶ 25} Having reviewed all errors that appellant assigned, and having found merit in none, we hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED.

[Cite as *State v. Marcum*, 2014-Ohio-4048.]

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.