[Cite as *State v. Glenn*, 2014-Ohio-5844.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. William B. Hoffman, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. CT2014-0026
MICHAEL H. GLENN	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Muskingum County Court of Common Pleas, Case No. CR2014-0003
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 31, 2014

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
RONALD WELCH Assistant Prosecuting Attorney 27 North Fifth Street Zanesville, OH 43701	ERIC ALLEN 713 South Front Street Columbus, OH 43206

Gwin, J.

{¶1} Defendant-appellant Michael H. Glenn ["Glenn"] appeals from the sentence imposed by the Muskingum County Court of Common Pleas after he entered guilty pleas to two counts of aggravated robbery, felonies of the first degree.

Facts and Procedural History

{¶2} A two count indictment in case number CR2014-03 charged Glenn with one count of aggravated robbery in violation of R.C.2911.01, a felony of the first degree and theft in violation of R.C. 2913.02, a misdemeanor of the first degree. On March 17, 2014, Glenn entered a guilty plea to count one, aggravated robbery. He also entered a plea of guilty to a bill of information in case number CR 2014-83. This bill contained a single count of aggravated robbery in violation of R.C. 2911.01, a felony of the first degree.

{¶3} On April 21, 2014, Glenn was sentenced to five years in case number CR2014-03 and five years in case number CR2014-83, for an aggregate prison of ten years.

{¶4} Glenn raises one assignment of error:

{¶5} "I. THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING THE DEFENDANT TO A SENTENCE OF TEN YEARS."

Analysis

{¶6} In his sole assignment of error, Glenn maintains that the trial court erred and abused its discretion in imposing a prison sentence upon him.

{¶7} In the case at bar, Glenn was convicted of two counts of aggravated robbery, first-degree felonies. For a violation of a felony of the first degree, the court

must impose a definite prison term of three, four, five, six, seven, eight, nine, or ten years. Glenn was not given the maximum sentence for either count.

{¶8} In *State v. Kalish*, 120 Ohio St.3d 23, 2008–Ohio–4912, 896 N.E.2d 124, the Ohio Supreme Court reviewed its decision in *State v. Foster*, 109 Ohio St.3d 1, 2006–Ohio–856, 845 N.E.2d 470 as it relates to the remaining sentencing statutes and appellate review of felony sentencing. *See, State v. Snyder*, 5th Dist. Licking No. 2008–CA–25, 2080–Ohio–6709.

{¶9} *Kalish* holds that, in reviewing felony sentences and applying *Foster* to the remaining sentencing statutes, the appellate courts must use a two-step approach. "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 shall be reviewed under an abuse of discretion standard." *Kalish*, ¶4, *State v. Foster*, 109 Ohio St.3d 1, 2006–Ohio–856, 845 N.E.2d 470.

{¶10} As a plurality opinion, *Kalish* is of limited precedential value. See *Kraly v. Vannewkirk*, 69 Ohio St.3d 627, 633, 635 N.E.2d 323 (1994) (characterizing prior case as "of questionable precedential value inasmuch as it was a plurality opinion which failed to receive the requisite support of four justices of this court in order to constitute controlling law"). *See*, *State v. Franklin*, 182 Ohio App.3d 410, 912 N.E.2d 1197, 2009-Ohio-2664(10th Dist.), ¶8, *reversed on other grounds In re Cases Held For The Decision In State v. Williams*, 130 Ohio St.3d 254, 2011-Ohio-5348, 957 N.E.2d 289; "Whether *Kalish* actually clarifies the issue is open to debate. The opinion carries no

syllabus and only three justices concurred in the decision. A fourth concurred in judgment only and three justices dissented." *State v. Ross*, 4th Dist. Adams No. 08CA872, 2009-Ohio-877, at FN 2; *State v. Welch*, 4th Dist. Washington App. No. 08CA29, 2009-Ohio-2655, ¶ 6; *State v. Ringler*, 5th Dist. Ashland No. 09-COA-008, 2009-Ohio-6280, ¶20.

{¶11} In *Kalish*, the Ohio Supreme Court did not review R.C. 2953.08(A). Thus, a question remains unanswered by the Ohio Supreme Court. *Kalish* does not hold that a defendant may file an appeal as of right from the sentence imposed in every case.[1] We find this to be in so because the Legislature's intent as set forth in R.C. 2953.08 is that a defendant may only appeal as a matter of right a sentence imposed on one of the enumerated grounds.

{¶12} R.C. 2953.08, provides

> (A) In addition to any other right to appeal and except as provided in division (D) of this section, a defendant who is convicted of or pleads guilty to a felony *may appeal as a matter of right the sentence imposed upon the defendant on one of the following grounds:*
>
> (1) The sentence consisted of or included the maximum prison term allowed for the offense by division (A) of section 2929.14 or section 2929.142 of the Revised Code, the maximum prison term was not

[1] In *Kalish*, the defendant pleaded guilty to aggravated vehicular homicide a felony of the second degree in violation of R.C. 2903.06(A)(2)(a), and driving with a prohibited concentration of alcohol in bodily substances, a misdemeanor of the first degree, in violation of R.C. 4511.19(A)(1)(b). The trial court sentenced Kalish to five years in prison on the aggravated vehicular homicide charge and a concurrent prison term of six months on the remaining count. Id. at ¶5. Kalish challenged her sentence on the basis that it was inconsistent with and disproportionate to other sentences for the same offense. Id. at ¶6. The Supreme Court found that Kalish's sentence was neither contrary to law nor an abuse of discretion. Id. at ¶¶18; 20.

required for the offense pursuant to Chapter 2925. or any other provision of the Revised Code, and the court imposed the sentence under one of the following circumstances:

(a) The sentence was imposed for only one offense

(b) The sentence was imposed for two or more offenses arising out of a single incident, and the court imposed the maximum prison term for the offense of the highest degree.

(2) The sentence consisted of or included a prison term and the offense for which it was imposed is a felony of the fourth or fifth degree or is a felony drug offense that is a violation of a provision of Chapter 2925. of the Revised Code and that is specified as being subject to division (B) of section 2929.13 of the Revised Code for purposes of sentencing. If the court specifies that it found one or more of the factors in division (B)(1)(b) of section 2929.13 of the Revised Code to apply relative to the defendant, the defendant is not entitled under this division to appeal as a matter of right the sentence imposed upon the offender.

(3) The person was convicted of or pleaded guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense, was adjudicated a sexually violent predator in relation to that offense, and was sentenced pursuant to division (A)(3) of section 2971.03 of the Revised Code, if the minimum term of the indefinite term imposed pursuant to division (A)(3) of section 2971.03 of the Revised Code is the longest term available for the offense from among the range of terms listed in section

> 2929.14 of the Revised Code. As used in this division, "designated homicide, assault, or kidnapping offense" and "violent sex offense" have the same meanings as in section 2971.01 of the Revised Code. As used in this division, "adjudicated a sexually violent predator" has the same meaning as in section 2929.01 of the Revised Code, and a person is "adjudicated a sexually violent predator" in the same manner and the same circumstances as are described in that section.
>
> (4) The sentence is contrary to law.
>
> (5) The sentence consisted of an additional prison term of ten years imposed pursuant to division (B)(2)(a) of section 2929.14 of the Revised Code.(Emphasis added).

{¶13} In the case at bar, Glenn did not receive the maximum sentence. R.C. 2953.08(A)(1). Glenn's sentence was for two first-degree felonies, making R.C. 2953.08(A)(2) inapplicable. Glenn was not sentenced pursuant to R.C. 2971.03, making R.C. 2953.08(A)(3) inapplicable. Glenn does not argue that his sentence is contrary to law. R.C. 2953.08(A)(4). The sentence imposed by the trial court did not consisted of an additional prison term of ten years imposed pursuant to division (B)(2)(a) of section 2929.14 of the Revised Code, making R.C. 2953.08(A)(5) inapplicable. Glenn did not file a leave to appeal and has not argued in this case that the sentencing judge has imposed consecutive sentences under division (C)(3) of section 2929.14 of the Revised Code and that the consecutive sentences exceed the maximum prison term allowed by division (A) of that section for the most serious offense of which the defendant was convicted. Therefore, R.C. 2953.08(C)(1) does not apply to Glenn's case. Finally, R.C.

2953.08(C)(2) would not apply to the case at bar because any additional sentence imposed is not longer than five years.

{¶14} If a defendant may appeal as a matter of right the sentence imposed for an "abuse of discretion" then R.C. 2953.08 is rendered a nullity. The appellate courts would be re-writing the statute to include an appeal as a matter of right for a ground that the Legislature has not provided. The language of R.C. 2953.08 is clear and unambiguous on its face and requires no interpretation. Subsections (A), (B) and (C) clearly state when a criminal defendant may appeal as a matter of right a sentence imposed upon the defendant. Had the General Assembly intended to include an appeal as a matter of right for a sentence imposed upon the ground that the sentencing court abused its discretion it could have easily done so by including the words "abuse of discretion" in R.C. 2953.08. In fact, R.C. 2953.08(G)(2) expressly states,

> The court hearing an appeal *under division (A), (B), or (C) of this section* shall review the record, including the findings underlying the sentence or modification given by the sentencing court.
>
> 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. *The appellate court's standard for review is not whether the sentencing court abused its discretion.* The appellate court may take any action authorized by this division *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 (B)(2)(e) or (C)(4) of

section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;

(b) That the sentence is otherwise contrary to law.

Emphasis added. Thus, as an appellate court, we do not review the discretion of the trial court; rather our emphasis is upon the record made in support of the trial court's decision.

{¶15} R.C. 2929.13(D) provides:

(D) Except as provided in division (E) or (F) of this section, *for a felony of the first* or second degree and for a felony drug offense that is a violation of any provision of Chapter 2925., 3719., or 4729, of the Revised Code for which a presumption in favor of a prison term is specified as being applicable, *it is presumed that a prison term is necessary in order to comply with the purposes and principles of sentencing under section 2929.11 of the Revised Code*. Notwithstanding the presumption established under this division, the sentencing court may impose a community control sanction or a combination of community control sanctions instead of a prison term on an offender for a felony of the first or second degree or for a felony drug offense that is a violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code for which a presumption in favor of a prison term is specified as being applicable if it makes both of the following findings:

(1) A community control sanction or a combination of community control sanctions would adequately punish the offender and protect the

> public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a lesser likelihood of recidivism outweigh the applicable factors under that section indicating a greater likelihood of recidivism.
>
> (2) A community control sanction or a combination of community control sanctions would not demean the seriousness of the offense, because one or more factors under section 2929.12 of the Revised Code that indicate that the offender's conduct was less serious than conduct normally constituting the offense are applicable, and they outweigh the applicable factors under that section that indicate that the offender's conduct was more serious than conduct normally constituting the offense.

(Emphasis added). Thus, in order to impose a community control sanction in the instant case, the trial court would have been required to find that such a sanction would adequately punish Glenn, that Glenn was less likely to re-offend, and that such a sanction would not demean the seriousness of the offense because Glenn's conduct was less serious than conduct normally constituting the offense. *State v. Morin*, 5th Dist. Fairfield No. 2008-CA-10, 2008-Ohio-6707, ¶27.

{¶16} R.C. 2953.08(B) provides:

> (B) In addition to any other right to appeal and except as provided in division (D) of this section, a prosecuting attorney, a city director of law, village solicitor, or similar chief legal officer of a municipal corporation, or the attorney general, if one of those persons prosecuted the case, may appeal as a matter of right a sentence imposed upon a defendant who is

> convicted of or pleads guilty to a felony or, in the circumstances described in division (B)(3) of this section the modification of a sentence imposed upon such a defendant, on any of the following grounds:
>
> (1) The sentence did not include a prison term despite a presumption favoring a prison term for the offense for which it was imposed, as set forth in section 2929.13 or Chapter 2925 of the Revised Code.

{¶17} The Legislature has expressly provided that the prosecution can appeal a trial court's decision overcoming the presumption of imprisonment contained in R.C. 2929.13. No such provision has been made for a defendant to appeal a sentence on the basis that the trial court refused to supersede the presumption for a prison term on a first or a second-degree felony. *Morin,* ¶31. In *Morin*, this Court noted:

> Appellant seeks to appeal his sentence as of right based upon the trial court's refusal to supersede the presumption for a prison term on a second-degree felony. R.C. Section 2953.08 sets forth the circumstances under which a defendant may appeal a felony sentence as of right. The statute does not provide an appeal as of right in this circumstance, nor does the 'contrary to law' provision require each and every sentence be subjected to review under the guidelines. *State v. Untied*, March 5, 1998, Muskingum App. No. CT97-18; *State v. Taylor*, August 8, 2003, Tuscarawas App. No.2002CA78. Here, appellant was convicted of a first and a second-degree felony and was not given the maximum sentence for either; therefore, his appeal is not permitted by R.C. 2953.08. Id." *State v.*

> *Barton*, 5th Dist. No. 2003CA00064, 2004-Ohio-3058 at ¶ 74; *State v. Miller*, 5th Dist. No. 04-COA-003, 2004-Ohio-4636 at ¶ 38.
>
> Appellant's contention, therefore, is that the trial court abused the discretion conferred on it, which is not a matter for which R.C. 2953.08(G) permits appellate review. *See State v. Cochran*, 2nd Dist. No. 20049, 2004-Ohio-4121; *State v. Alvarez* (2003), 154 Ohio App.3d 526, 2003-Ohio-5094, 797 N.E.2d 1043; *State v. Kennedy* (Sept. 12, 2003), Montgomery App. No. 19635, 2003-Ohio-4844; *State v. Miller*, supra at ¶ 38.

Morin, ¶¶32-33.

{¶18} Glenn's only argument in the case at bar is that he was treated unfairly and should have been given a much reduced sentence or perhaps not even any jail time. The law is clear, however, that an abuse of discretion is not a proper ground for appeal nor is it a matter that R.C. 2953.08 permits appellate review. *Morin,* ¶33.(*citing State v. Cochran*, 2nd Dist. Montgomery No. 20049, 2004-Ohio-4121; *State v. Alvarez*, 154 Ohio App.3d 526, 2003-Ohio-5094, 797 N.E.2d 1043(2nd Dist.); *State v. Kennedy*, 2nd Dist. Montgomery App. No. 19635, 2003-Ohio-4844; *State v. Miller*, 5th Dist. Ashland No. 04-COA-003, 2004-Ohio-4636, ¶ 38. *See also, State v. Black*, 2nd Dist. Montgomery No. 20600, 2005-Ohio-2232, ¶5.

{¶19} Accordingly, Glenn's sole assignment of error is overruled.

{¶20} The judgment of the Court of Common Pleas, Muskingum County, Ohio is affirmed.

By Gwin, J.,

Hoffman, P.J., and

Wise, J., concur