[Cite as *State v. Wellington*, 2015-Ohio-1359.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 14 MA 115
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
DANIEL WELLINGTON	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of Common Pleas of Mahoning County, OH Case No. 11CR866

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

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For Defendant-Appellant:

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JUDGES:

Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: March 31, 2015

[Cite as *State v. Wellington*, 2015-Ohio-1359.]
ROBB, J.

{¶1} Defendant-appellant Daniel Wellington ("Appellant") appeals the decision of the Mahoning County Common Pleas Court sentencing him to 10 years in prison, the maximum allowable by law, for one count of involuntary manslaughter. The crime Appellant committed occurred on August 5, 2011. Appellant contends the version of R.C. 2929.14(C) that was effective at the time the offense was committed mandated the sentencing court to make maximum sentence findings prior to ordering a maximum sentence. Appellant argues the sentencing court did not make the required maximum sentencing findings and therefore, the 10 year sentence is contrary to law and must be reversed.

{¶2} His argument is without merit. Prior to the commission of the offense, the Ohio Supreme Court deemed R.C. 2929.14(C) to be unconstitutional and severed that provision from the statute. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. As of date, the General Assembly has not enacted the maximum sentencing findings in the felony sentencing statutes. Hence, the trial court was not required to make maximum sentencing findings. For that reason and the reasons espoused below, the sentence is hereby affirmed.

Statement of the Case

{¶3} In August 2011, Appellant was indicted for one count of murder. Eventually a plea agreement was reached and Appellant pled guilty to one count of involuntary manslaughter, a first-degree felony in violation of R.C. 2903.04(A)(C). Appellant was sentenced on April 13, 2013 to an 11 year sentence. *State v. Wellington*, 7th Dist. No. 13MA90, 2014-Ohio-1179, ¶ 4 ("*Wellington I*").

{¶4} He appealed the sentence to our court arguing that the sentence was contrary to law because the maximum sentence for a first-degree felony pursuant to the version of R.C. 2929.14(A)(1) that was in effect at the time of the commission of the offense was ten, not eleven years. *Id*. at ¶ 6-7. The state agreed and confessed error. *Id*. at ¶ 8. Upon review, we discussed the prior version of R.C. 2929.14(A)(1) and the current version of R.C. 2929.14(A)(1) that was enacted as part of House Bill 86 *("H.B. 86"*). *Id*. at ¶ 10-13. We acknowledged that H.B. 86 changed the possible

prison terms for felonies. However, the bill did not become effective until after the commission of the offense and the provisions of H.B. 86 indicated it does not apply retroactively. *Id*. at ¶ 12-13. Accordingly, this court reversed the sentence and remanded the matter to the trial court with instructions for it to utilize the version of R.C. 2929.14(A)(1) that was in effect on the date Appellant committed the offense. *Id*. at ¶ 17.

{¶5} The re-sentencing hearing was held on August 13, 2014. The trial court imposed a 10 year sentence, the maximum allowable by law. 8/14/14 J.E.; 8/13/14 Tr. 10.

{¶6} Appellant filed a timely appeal from that sentence.

Assignment of Error

"The trial court erred when it failed to make the required findings for imposing a maximum sentence pursuant to the pre-House Bill 86 version of the Revised Code Section 2929.14(C)."

{¶7} Appellant argues the version of R.C. 2929.14(C) that was effective when he committed the offense required sentencing courts to make maximum sentence findings prior to sentencing an offender to the maximum term. He asserts that since the trial court did not make those mandated findings, the sentence is contrary to law and must be reversed.

{¶8} The state disagrees with those arguments and contends that maximum sentence findings are not required.

{¶9} Within the last year, we have stated that we will follow the felony sentencing standard of review as set forth in *State v. Kalish,* 120 Ohio St.3d 23, 2008–Ohio–4912, 896 N.E.2d 124. *State v. Hill,* 7th Dist. No. 13 MA 1, 2014–Ohio–919, ¶ 20 (Vukovich, J., Donofrio, J., majority with DeGenaro, J., concurring in judgment only with concurring in judgment only opinion). The *Kalish* review is a two-step approach which employs the "clearly and convincingly contrary to law" test and the abuse of discretion test. *Id*. at ¶ 12.

{¶10} Since our decision, the majority of appellate courts that have addressed the issue of felony sentencing standard of review have determined that H.B. 86

revived the standard of review set forth in R.C. 2953.08(G), which clearly indicates that appellate courts only review sentences to determine if they are contrary to law, not to determine if the trial court abused its discretion. *State v. Tammerine,* 6th Dist. No. L–13–1081, 2014–Ohio–425 ("Based upon all of the foregoing, we now likewise apply the statutory standard of review rather than the former *Kalish* approach to our review of felony sentences * * * [W]e now will consider the propriety of the disputed sentence in this case pursuant to the new R.C. 2953.08(G)(2) statutory parameters."); *State v. Brewer,* 4th Dist. No. 14CA1, 2014–Ohio–1903, ¶ 33 ("we join the growing number of appellate districts that have abandoned the *Kalish* plurality's second-step abuse-of-discretion standard of review; when the General Assembly reenacted R.C. 2953.08(G)(2), it expressly stated that '[t]he appellate court's standard of review is not whether the sentencing court abused its discretion'"); *State v. Tate*, 8th Dist. No. 97804, 2014-Ohio-5269, ¶ 55 (no longer applies the abuse of discretion standard of *Kalish*); *State v. Rodeffer,* 2013-Ohio-5759, 5 N.E.3d 1069 (2d.Dist.); *State v. Murphy*, 10th Dist. No. 12AP-952, 2013-Ohio-5599, ¶ 12; *State v. Crawford,* 12th Dist. No. CA2012–12–088, 2013–Ohio–3315; *State v. White*, 997 N.E.2d 629, 2013-Ohio-4225, ¶ 10 (1st Dist.). See also *State v. Marcum*, 141 Ohio St.3d 1453, 2015-Ohio-239, 23 N.E.3d 1453 (Ohio Supreme Court has accepted the certified conflict question of what is the felony sentencing standard of review).

{¶11} Likewise, recently the Ohio Supreme Court in *Bonnell* stated:

> On appeals involving the imposition of consecutive sentences, R.C. 2953.08(G)(2)(a) directs the appellate court "to review the record, including the findings underlying the sentence" and to modify or vacate the sentence "if it clearly and convincingly finds * * * [t]hat the record does not support the sentencing court's findings under division * * * (C)(4) of section 2929.14 * * * of the Revised Code." But that statute does not specify where the findings are to be made. Thus, the record must contain a basis upon which a reviewing court can determine that the trial court made the findings required by R.C. 2929.14(C)(4) before it imposed consecutive sentences.

State v. Bonnell, 140 Ohio St. 3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 28.

{¶12} The Ohio Supreme Court did not reference the abuse of discretion standard of review in *Bonnell*. Such omission appears to be an implicit indication that the Court has moved away from the abuse of discretion standard and is embracing R.C. 2953.08 as the proper method of review.

{¶13} Considering the above, we depart from our prior holding in *Hill*, which indicated this court would continue to use the *Kalish* standard of review to review felony sentences. We do so not only based on the above reasoning, but the clear language of R.C. 2953.08(G), which was re-enacted as part of H.B. 86. That provision clearly states, "The appellate court's standard for review is not whether the sentencing court abused its discretion." R.C. 2953.08(G)(2).

{¶14} Having set forth the standard of review, we now turn to the merits of this appeal, which is whether the trial court was required to make maximum sentencing findings.

{¶15} As we stated in *Wellington I*, the commission of the offense occurred prior to H.B. 86. That bill made changes to R.C. 2929.14 and mandated in section (C)(4) that certain findings are required for the imposition of consecutive sentences. The H.B. 86 version of R.C. 2929.14 does not require findings for the imposition of maximum sentences.

{¶16} The pre-H.B. 86 version of R.C. 2929.14(C) mandated maximum sentencing findings before the imposition of a maximum sentence. However, what Appellant fails to acknowledge is that the pre-H.B. 86 version of R.C. 2929.14(C) that required judicial findings of fact for maximum prison terms was rendered unconstitutional and severed from the statute. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, paragraphs two and three of the syllabus. The Court further stated, "Trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *Id*. at paragraph 7 of the syllabus.

{¶17} Admittedly, three years after the Ohio Supreme Court's decision in *Foster*, the United States Supreme Court held that it is constitutionally permissible for states to require judges to make findings of fact before imposing consecutive sentences. *Oregon v. Ice,* 555 U.S. 160, 164, 129 S.Ct. 711 (2009). Thereafter, the Ohio Supreme Court acknowledged that the *Ice* decision "undermines some of the reasoning in the *Foster* decision that judicial fact-finding in the imposition of consecutive sentences violates the Sixth Amendment" and that had it had the benefit of the United States Supreme Court's decision in *Ice* prior to *Foster,* it "likely would have ruled differently as to the constitutionality, and continued vitality," of Ohio's consecutive-sentencing provisions. *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768, ¶ 19-20. Although the Ohio Supreme Court made those statements, it also specifically indicated that the United States Supreme Court's decision in *Ice* does not revive Ohio's former consecutive-sentencing statutory provisions that were held unconstitutional in *Foster*. *Id*. at ¶ 39. "Because the statutory provisions are not revived, trial court judges are not obligated to engage in judicial fact-finding prior to imposing consecutive sentences unless the General Assembly enacts new legislation requiring that findings be made." *Id*.

{¶18} Multiple appellate courts have read *Hodge* to also apply maximum sentences. These courts have stated the Ohio Supreme Court in *Hodge* held that its decision in *Foster* remained valid after *Ice* and the judiciary was not required to make findings of fact prior to imposing maximum or consecutive sentences "unless the General Assembly enacts new legislation requiring that findings be made." *State v. Ross*, 8th Dist. No. 100708, 2014-Ohio-4566, fn. 2, quoting *Hodge* at paragraph three of the syllabus; *State v. Crum*, 4th Dist. No. 13CA13, 2014-Ohio-2361, fn. 4, quoting *Hodge* at paragraph three of the syllabus; *Rodeffer*, 2013-Ohio-5759, 5 N.E.3d 1069, at ¶ 27, quoting *Hodge* at paragraph three of the syllabus; *State v. Mullins*, 11 Dist. No. 2012-P-0144, 2013-Ohio-4301, ¶ 13; *State v. Martinez*, 3d Dist. No. 13-11-21, 2012-Ohio-3750, ¶ 18.

{¶19} Our sister districts' reasoning is logical because *Hodge* specifically indicated that *Ice* did not directly overrule *Foster*. *Hodge*, 2010-Ohio-6320 at ¶ 18.

Accordingly, *Foster* remains valid in all respects until the General Assembly acts. *Id*. at ¶ 37, 39. In H.B. 86 the General Assembly did re-enact consecutive sentencing findings, however, maximum sentence findings were not revived in that bill or any bill to date. Therefore, the trial court was not required to make maximum sentencing findings; *Foster,* 2006-Ohio-856 at ¶ 99–100. *See also State v. Parsons*, 7th Dist. No. 12BE11, 2013-Ohio-1281, ¶ 14 (judicial fact-finding in order to justify imposing maximum sentences is no longer required pursuant to *Foster*).

{¶20} Consequently, for the reasons expressed above, the sole assignment of error lacks merit. The sentence is hereby affirmed.

Donofrio, P.J., Concurs in judgment only; see concurring in judgment only opinion.

DeGenaro, J., Concurs; see concurring opinion.

Donofrio, P.J. concurs in judgment only.

{¶21} For the following reasons, I respectfully concur in judgment only.

{¶22} For years this Court has followed the Ohio Supreme Court's plurality decision in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, regarding the standard of review for felony sentencing. *Kalish* employs a two-step approach examining first whether the sentence is clearly and convincingly contrary to law and then moving on to determine if the trial court abused its discretion in sentencing the offender. We most recently reexamined whether we would continue to apply *Kalish's* two-step approach in *State v. Hill*, 7th Dist. No. 13 MA 1, 2014-Ohio-919. We reaffirmed that we would continue to follow *Kalish*. *Hill,* at ¶20.

{¶23} The majority now departs from our holding in *Hill*. For the reasons this Court set out in *Hill*, I respectfully disagree with this departure and would continue to employ the two-step review set out in *Kalish*. See *Hill*, at ¶¶15-20. The fact that the Ohio Supreme Court has accepted this issue for review in *State v. Marcum*, 141 Ohio St.3d 1453, 2015-Ohio-239, 23 N.E.3d 1453, as noted in the majority opinion, further supports my view that we should not depart at this time from our precedent.

{¶24} In this case, however, whether we apply the "contrary to law" test set out by the majority or the *Kalish* two-step approach, the result is the same. Therefore, I concur in judgment only.

DeGenaro, J., concurring.

{¶25} I concur with the majority's analysis, and write separately to respond to the minority opinion's concern regarding the propriety of overruling our prior decision in *State v. Hill,* 7th Dist. No. 13 MA 1, 2014–Ohio–919. Although it is rare to depart from prior precedent and courts must be cautious in doing so, here we are presented with a situation where it is the necessary and proper course of action. *Hill* must be rejected because it relies upon *State v. Kalish*, 120 Ohio St.3d 23, 2008–Ohio–4912, 896 N.E.2d 124, a plurality decision that has merely persuasive rather than precedential value. More importantly, *Kalish* has been supplanted by the General Assembly's enactment of HB. 86.

{¶26} In *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 228, 2003-Ohio-5849, 797 N.E.2d 1256, the Supreme Court of Ohio established an analytical methodology to review precedent and determine the rare instance where a court should depart from principles of stare decisis and reverse that prior decision. *Galatis* frames the question as whether the prior decision was wrongly decided, defies practical workability, and there is no reliance interest that would suffer an undue hardship by abandoning the precedent. *Id.* at ¶48. Thus, the propriety of reversing *Hill* instead of continuing to apply it (and ergo the *Kalish* two-part standard of review) when a defendant challenges a sentence on appeal must be examined within the *Galatis* framework.

{¶27} First, *Hill* was wrongly decided. As noted in the majority opinion here, we cannot continue to rely on *Kalish*—and by extension *Hill*—post-H.B. 86 because the General Assembly specifically reenacted the standard of review with respect to alleged felony sentencing errors: clearly and convincingly contrary to law and not abuse of discretion. *Hill* at ¶41 (DeGenaro, P.J., concurring in judgment only). To continue to do otherwise raises separation of powers concerns, because courts "cannot apply a standard of review that is expressly prohibited by the legislature." *Hill* at ¶44 (DeGenaro, P.J., concurring in judgment only).

{¶28} Second, *Hill* is unworkable due to its reliance on *Kalish*—the unworkability of which is self-evident given the confusion regarding its application—

which has been recognized by more of our sister districts since we decided *Hill*. When *Hill* was decided just over a year ago, the First, Second, Third, Eighth and Twelfth Districts held that H.B. 86 supplanted *Kalish*. Since we decided *Hill,* the Fourth, Sixth and Tenth Districts have likewise applied the R.C. 2953.08(G)(2) standard of review. And the source of the unworkability of *Kalish* is that the decision has "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." *Kraly v. Vannewkirk*, 69 Ohio St.3d 627, 633, 635 N.E.2d 323 (1994). "Thus, there is no controlling case law to guide the courts of appeals in the application of the syllabus law." *State v. Bickerstaff*, 7th Dist. No. 09JE33, 2011-Ohio-1345, ¶ 75. Our sister districts and the majority here recognize that by enacting H.B. 86, the General Assembly legislatively resolved the unworkability of *Kalish* by reenacting the standard of review articulated in R.C. 2953.08(G)(2), which specifically precludes abuse of discretion review.

{¶29} Third, there is no reliance interest that would suffer an undue hardship by abandoning the holding in *Hill.* The majority here and our sister districts recognize that the General Assembly expressly chose to replace a more deferential standard of review with one that is less deferential to the trial court's decision. This runs to the benefit, rather than the detriment, of defendants challenging their sentences on appeal.

{¶30} In sum, I concur with the majority's decision to overrule our decision in *Hill,* therefore applying the standard of review set forth in R.C. 2953.08(G)(2), and no longer applying the *Kalish* two-part analysis. By applying the *Galatis* analysis, it is appropriate to depart from principles of stare decisis and hold that *Hill* no longer has precedential value.