



OHIO

CRIMINAL SENTENCING COMMISSION

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APPELLATE REVIEW OF FELONY SENTENCING PROPOSAL

R.C. § 2953.08

In 1996 Senate Bill 2 introduced a process for appellate review of felony sentencing codified in O.R.C. §2953.08. The section was intended to provide for review of sentences that fell outside the guidelines set forth in S.B. 2, but the *Foster* decision and subsequent case law have led to conflicting interpretations of the section and inconsistent application of its provisions. In their efforts to provide meaningful review of felony sentencing Appellate courts have struggled with the definition of the term “contrary to law” as used in the statute leading to substantial conflicts and several cases currently pending before the Ohio Supreme Court. The need for reform of R.C. § 2953.08 has long been a subject of Commission discussions and this draft represents the culmination of those efforts.

Sentencing Commission members and staff have worked in conjunction with Judge Sean Gallagher of the 8th District Court of Appeals as well as the Ohio Judicial Conference to move forward a revision to §2953.08. This proposal opens up appeal of nearly all sentences, adopting an abuse of discretion standard for review, a presumption of proportionality for concurrent sentences, and in doing so does away with the problematic phrase “contrary to law.” It also requires that sentencing courts identify relevant factors from §2929.12 that were determinate of the imposition of a consecutive sentence, in order to provide a meaningful record for an Appellate Court to review. The proposal also expands the State’s ability to appeal a sentence, subject to the same abuse of discretion standard and presumptions of fairness, and excludes appeals for jointly recommended or agreed sentences.

Provisions regarding the State’s right to appeal, specifically proposed (B)(4) [see lines 33-36 of attached draft] have proven a sticking point to in discussion particularly for representatives of the Ohio Public Defender, and pending Ohio Supreme Court cases such as *State v. Gwynne*, 2017-1506 and *State v. Jones*, 2018-0444 cause representatives from the Prosecuting Attorney’s Association to adopt a “wait-and-see” approach to issues of Appellate review. Members of the Sentencing and Criminal Justice Committee voted to advance the draft proposal for consideration of the full commission and to allow both the OPD and OPAA the opportunity to discuss their position on the point of contention in the draft.

These proposed changes to §2953.08 will provide a straightforward, uniform standard of review for sentencing throughout the state, allowing an opportunity for meaningful review of sentences while preserving the trial court’s discretion as well as jointly-recommended sentences.



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2953.08 Appeal as a matter of right - grounds.

(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 in the following circumstances:

(1) The sentencing court imposed only one sentence, or imposed multiple sentences and ordered the offender to serve the individual prison terms concurrently.

(2) The sentencing court imposed any prison term to be served consecutive to another prison term.

(3) An additional prison term was imposed upon the defendant pursuant to division (B)(2)(a) or (b) of section 2929.14 of the Revised Code.

(4) The sentence fails to comport with all mandatory sentencing provisions, indefinite sentencing provisions, or is not otherwise within the statutory range of prison terms for the applicable degree of felony as provided by section 2929.14 (A) of the Revised Code.

(5) The sentencing court abused its discretion in determining that the defendant's individual sentence comports with the principles and purposes of felony sentencing as set forth in section 2929.11 of the Revised Code and the seriousness and recidivism factors as set forth in section 2929.12 of the Revised Code.

(6) The sentencing court denied a timely motion for judicial release after a hearing conducted pursuant to 2929.20(D) or (E).

(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.

(2) The sentence fails to comport with all mandatory sentencing provisions, indefinite sentencing provisions, or is not otherwise within the statutory range of prison terms for the applicable degree of felony as provided by section 2929.14 (A) of the Revised Code.



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30 (3) The sentence is a modification under section 2929.20 of the Revised Code of a sentence that was
31 imposed for a felony of the first or second degree.

32 (4) The sentencing court abused its discretion in determining that the defendant's individual sentence
33 comports with the principles and purposes of felony sentencing as set forth in section 2929.11 of the
34 Revised Code and the seriousness and recidivism factors as set forth in section 2929.12 of the Revised
35 Code.

36 (C) (1) For the purposes of this section, "sentencing range(s)" means a jointly recommended range from
37 which the parties request the judge to choose a sentence, and "sentencing cap(s)" means a joint
38 recommendation for a maximum amount of time the parties are requesting be imposed.

39 A sentence or an aggregate prison term imposed upon a defendant is not subject to review under this
40 section if the sentence or the aggregate prison term is authorized by law; has been jointly recommended
41 or agreed to by the defendant and the prosecution in the case, including a specific sentence as well as a
42 jointly recommended sentencing range(s) or sentencing cap(s); and the sentencing court imposes a
43 sentence or aggregate prison term consistent with that agreement. The sentencing court's imposition
44 of consecutive service shall not be subject to review if the aggregate prison term imposed is within the
45 jointly recommended sentencing range or sentencing cap.

46 (2) A sentence imposed for murder pursuant to sections 2929.02 to 2929.06 of the Revised Code is not
47 subject to review under this section.

48 (D) A defendant, prosecuting attorney, city director of law, village solicitor, or chief municipal legal officer shall
49 file an appeal of a sentence under this section to a court of appeals within the time limits specified in the Rules
50 of Appellate Procedure, provided that if the appeal is pursuant to division (A)(6) or (B)(3) of this section, the
51 time limits specified in that rule shall not commence running until the court grants the motion that makes the
52 sentence modification in question or denies a motion for judicial release at a hearing conducted pursuant to
53 2929.20(D). A sentence appeal under this section shall be consolidated with any other appeal in the case. If no
54 other appeal is filed, the court of appeals may review only the portions of the trial record that pertain to
55 sentencing.

56 (E) On the appeal of a sentence under this section, the record to be reviewed shall include all of the following,
57 as applicable:

58 (1) Any presentence, psychiatric, or other investigative report that was submitted to the court in writing
59 before the sentence was imposed. An appellate court that reviews a presentence investigation report
60 prepared pursuant to section 2947.06 or 2951.03 of the Revised Code or Criminal Rule 32.2 in
61 connection with the appeal of a sentence under this section shall comply with division (D)(3) of
62 section 2951.03 of the Revised Code when the appellate court is not using the presentence investigation
63 report, and the appellate court's use of a presentence investigation report of that nature in connection
64 with the appeal of a sentence under this section does not affect the otherwise confidential character of



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65 the contents of that report as described in division (D)(1) of section 2951.03 of the Revised Code and
66 does not cause that report to become a public record, as defined in section 149.43 of the Revised Code,
67 following the appellate court's use of the report.

68 (2) The trial record in the case in which the sentence was imposed;

69 (3) Any oral or written statements made to or by the court at the sentencing hearing at which the
70 sentence was imposed;

71 (4) Any written findings that the court was required to make in connection with the modification of the
72 sentence pursuant to a judicial release under division (I) of section 2929.20 of the Revised Code.

73 (F) (1) If the sentencing court was required to make the findings required by division (B) or (D) of
74 section 2929.13 or division (I) of section 2929.20 of the Revised Code, or to state the findings of the trier
75 of fact required by division (B)(2)(e) or (C)(4) of section 2929.14 of the Revised Code, relative to the
76 imposition or modification of the sentence or the manner in which the sentences are to be served, and
77 if the sentencing court failed to state the required findings on the record, the court hearing an appeal
78 under division (A) or (B) of this section shall reverse and remand the case to the sentencing court and
79 instruct the sentencing court to state, on the record, the required findings. The failure to include any
80 findings made at the time of sentencing in the sentencing entry shall be harmless error unless the
81 offender can demonstrate prejudice.

82 (2) The court hearing an appeal under division (A) or (B) of this section shall review the record, including
83 the findings underlying the sentence or modification given by the sentencing court, under an abuse of
84 discretion standard.

85 The appellate court may vacate an individual felony sentence, or the imposition of consecutive or
86 concurrent service of multiple sentences, under the abuse of discretion standard of review and remand
87 the matter to the sentencing court for a de novo resentencing hearing on that portion of the sentence
88 or sentences only where the appellate court finds any of the following:

89 (a) That the trial court abused its discretion in making statutory findings because the record does
90 not support the sentencing court's findings under division (B) or (D) of section 2929.13, division
91 (B)(2)(e) of section 2929.14, division (C)(4) of section 2929.14 subject to the limitations in division
92 (I) of this section, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is
93 relevant;

94 (b) That the sentence fails to comport with all mandatory sentencing provisions or is not
95 authorized by any provision of the Revised Code;

96 (c) That the sentence is not within the statutory range of prison terms for the applicable degree
97 of felony as provided by section 2929.14 (A) of the Revised Code;



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98 (d) That the sentencing court abused its discretion in determining that the defendant's sentence
99 imposed for any felony offense comports with the principles and purposes of felony sentencing
100 as set forth in section 2929.11 of the Revised Code and the seriousness and recidivism factors as
101 set forth in section 2929.12 of the Revised Code subject to the presumption established in
102 division (H) of this section.

103 (G) On an appeal under division (A) or (B) of this section challenging the sentence imposed upon any individual
104 felony offense, there is a rebuttable presumption that the individual sentence is consistent and proportional
105 under R.C. 2929.11 and 2929.12 if the sentence(s) are within the authorized range for the offense or offenses
106 and the individual sentences are imposed to be served concurrently. This presumption is rebuttable by either
107 the defendant or the government.

108 (H) An appellate court hearing an appeal challenging the imposition of multiple sentences to be served
109 consecutively under section (A) or (B), shall examine the purposes and principles from section 2929.11 and the
110 factors from section 2929.12 of the Revised Code to determine if the trial court abused its discretion (1) by
111 imposing consecutive service based on the trial court's reliance on the sentencing factors considered under R.C.
112 2929.19(B)(2)(a) or, (2) if the proponent of the sentencing challenge can demonstrate with specific references
113 to the record, based on all the factors considered under R.C. 2929.12(B)(2)(a) being unsupported by any
114 evidence. An appellate court shall not reverse the imposition of consecutive service based on any of the R.C.
115 2929.12 factors that are not offered for consideration or independently considered under R.C. 2929.19(B)(2)(a).
116 If the appellate court determines that the sentencing court abused its discretion as stated in this subdivision,
117 the appellate court may reverse and remand for a de novo sentencing hearing. In such a hearing, the sentencing
118 court may consider the factors under section 2929.12 and section 2929.14(C)(4) of the revised code anew to
119 determine whether some or all of the individual prison terms are to be served consecutively or concurrently.

120 (I) An appellate court hearing an appeal challenging the imposition of a single sentence or a series of sentences
121 imposed concurrently under section (A) or (B), shall examine the purposes and principles from section 2929.11
122 and the factors from section 2929.12 of the Revised Code to determine if the trial court abused its discretion.
123 The appellate court, reviewing such sentences, shall give the trial court's sentence a presumption that both the
124 purposes and principles from section 2929.11 and the factors from section 2929.12 of the Revised Code were
125 properly considered and applied. The appellate court shall not overturn a single or concurrent sentence within
126 the applicable range because the trial court did not identify any of the relevant factors under section 2929.12.
127 It is presumed that the individual sentence, or sentences, are consistent and proportional under R.C. 2929.11
128 and 2929.12 if the sentence(s) are within the authorized range for the offense or offenses and the individual
129 sentences are imposed to be served concurrently. An appellate court shall only reverse such a sentence under
130 section (A) or (B) where the appealing party can specifically delineate how the sentencing court abused its
131 discretion in imposing such a sentence.

132 (J) A judgment or final order of a court of appeals under this section may be appealed, by leave of court, to
133 the Supreme Court.
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R.C. 2929.14 Definite Prison Terms

(C) (4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds based on and articulated from the relevant seriousness and recidivism factors under R.C. 2929.12 and as required under 2929.19(B)(2)(a), that the consecutive service is necessary to protect the public from future crime or to 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 if the court also finds any of the following:

a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section [2929.16](#), [2929.17](#), or [2929.18](#) of the Revised Code, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

R.C. 2929.19 Sentencing Hearing

(B) (2) Subject to division (B)(3) of this section, if the sentencing court determines at the sentencing hearing that a prison term is necessary or required, the court shall do all of the following:

(a) Impose a stated prison term and, if the court imposes a mandatory prison term, notify the offender that the prison term is a mandatory prison term;

(b) In addition to any other information, include in the sentencing entry the name and section reference to the offense or offenses, the sentence or sentences imposed and whether the sentence or sentences contain mandatory prison terms, if sentences are imposed for multiple counts whether the sentences are to be served concurrently or consecutively, and the name and section reference of any specification or specifications for which sentence is imposed and the sentence or sentences imposed for the specification or specifications;

(c) If a consecutive sentence or consecutive sentences are imposed, identify the relevant factors under R.C. 2929.12 that are either offered by the defendant or the prosecution or identified by the trial judge, that are determinate of the findings required under R.C. 2929.14(C)(4). The trial



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court is not required to identify the relevant factors under R.C. 2929.12 that weighed in favor of defaulting to concurrent service of the sentences imposed.

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