

This summary of Ohio state case law addresses four topics: (1) the availability of and general standards for appellate review; (2) standards and allowable grounds for departure; (3) constitutional requirements for proof of facts permitting upward departure under *Blakely v. Washington*; and (4) other important appellate sentencing decisions.

1. Availability of and General Standards for Appellate Review.

Scope of review. Appeals of sentences are available as a matter of right for both defendants and prosecutors, under defined circumstances.

Defendants are entitled to appeal as a matter of right if a sentence is contrary to law.¹ This includes review of sentences that are outside the statutory range or otherwise facially illegal but can also include review of sentences where certain findings were required and the record does not support those findings.²

Defendants may also appeal the sentence as a matter of right if:

- A prison term was imposed for a non-violent fourth- or fifth-degree felony, or for certain drug offenses, and the sentencing court did not state that it found the presence of one of eleven specified aggravating factors;³ or,
- For certain offenses subject to indeterminate prison terms, the minimum sentence of the term imposed was the longest term available for that offense.⁴

Under the current appeals statute, there are two other enumerated grounds (described below) for defendants to appeal as of right. In *State v. Foster*,⁵ however, the Ohio Supreme Court applied *Blakely* and *Booker* to certain Ohio sentencing laws and found some sentencing provisions unconstitutional. This case is further discussed in §3 of this summary. Both the paragraph on appeal from a sentence to the maximum possible prison term⁶ and the paragraph on appeal from a repeat violent offender sentence⁷ refer to statutes that were held unconstitutional in *Foster* and were later repealed. Thus, these are now empty provisions.

A defendant may seek leave to appeal a felony sentence if a definite sentence was imposed that exceeds five years, in addition to the prison term ordinarily applicable.⁸

A prosecutor may appeal the sentence as a matter of right if:

- The offense carries a presumptive prison sentence and prison time was not imposed;
- The sentence is contrary to law; or
- For a first- or second-degree felony, the original sentence was reduced under the judicial release procedure.⁹

Sentences that are “recommended jointly” by both the prosecution and defense and are otherwise authorized by law cannot subsequently be appealed by an offender.¹⁰ In addition, certain repeat violent offender, murder, or aggravated murder sentences may not be appealed, as these are much more structured and less subject to judicial discretion under Ohio law.¹¹

Any criminal conviction for which a death sentence is imposed or that involves a question of the federal or state constitution may be directly appealed as a matter of right to the Supreme Court of Ohio.¹²

Standard of review. In *State v. Kalish*, the Supreme Court of Ohio held that in light of *Foster*, judges had full discretion to sentence within the permissible statutory range. Therefore, appellate courts could not review a trial court’s reasoning beyond an abuse of discretion standard.¹³ However, in 2011, the General Assembly passed a bill that effectively replaced the Supreme Court of Ohio’s abuse of discretion standard with the “clear and convincing” standard that existed before *Foster* and is found in statute today.¹⁴ Thus, the appellate court may modify a sentence if it finds “clearly and convincingly” either that the record did not support the trial court’s ultimate sentence, or that the sentence imposed is “otherwise contrary to law.”¹⁵

The appellate court may also correct a sentence contrary to law *sua sponte* (e.g., even if neither party has raised the issue) if the sentence is legally void.¹⁶ A judgment that is made by the court of appeals may in turn be appealed, by leave of the court, to the Supreme Court of Ohio.¹⁷

2. Standards and Allowable Grounds for Departure.

There is no equivalent of a “durational departure” in Ohio, and “the trial court has full discretion to impose any prison sentence within the authorized statutory range, and is not required to make any findings or give its reasons for imposing maximum or more than minimum sentences.”¹⁸ However, the court must consider the statutory sentencing policies, including the overriding purposes of felony sentencing and the list of sentencing factors.¹⁹ In addition, the court must make specific findings of fact if sentencing a defendant to a consecutive rather than concurrent sentence but does not have to state reasons for its findings.²⁰

A downward dispositional departure from the recommended prison sentences for first- and second-degree felons may be ordered if the court makes a finding that (1) a community control sanction or multiple community control sanctions would adequately punish the offender due to a lower likelihood of recidivism under the applicable sentencing factors, and (2) a community control sanction or multiple community control sanctions would not demean the seriousness of the offense after consideration of the applicable sentencing factors. Specific reasons for this type of downward departure are no longer required by statute.²¹

There are statutory limitations on upward dispositional departure in non-violent fourth or fifth degree felony cases; the court must impose a mandatory community control sanction rather than a prison sentence.²² However, this is only the case if:

- The offender has not been previously convicted of or pleaded guilty to a felony offense;
- The offender has not been previously convicted of or pleaded guilty to a violent misdemeanor offense committed within the two years prior to the current sentence;
- The most serious charge against the offender at the time of sentencing is a felony of the fourth or fifth degree; and
- If the court asked the Department of Rehabilitation and Correction to provide information about available community control sanctions, the Department did so within 45 days.²³

There are eleven other specific exceptions to this rule listed in statute, and the court has discretion to impose a prison term if any of them apply.²⁴

3. Constitutional Requirements For Proof of Facts Permitting Upward Departure (*Blakely v. Washington* issues)

The Supreme Court’s decision in *Blakely v. Washington* triggered analysis of Ohio’s statutory sentencing scheme. In *State v. Foster*, the Supreme Court of Ohio ruled that, in light of *Blakely*, several aspects of Ohio’s statutory sentencing were unconstitutional.²⁵ The Court reasoned that because the Ohio legislature mandated that sentencing judges make underlying findings before increasing the presumptive sentence provided by law, sentences under Ohio’s scheme did not comply with the language in *Blakely* that requires that sentences be determined “solely on the basis of facts reflected in the jury verdict or admitted by the defendant.”²⁶

To correct the flaw in the sentencing scheme, the *Foster* court severed seven unconstitutional provisions that required judicial fact-finding prior to “upward adjustment.” The provisions excised were related not only to sentencing enhancements or upward departures; but also those related to imposition of consecutive sentences. Accordingly, judges now have full discretion and are “no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than minimum sentences” or to find facts before they impose “additional penalties for repeat violent offender or major drug offender specifications.”²⁷ In the 2009 case *State v. Hunter*, the Supreme Court of Ohio held that the *Foster* court did not excise the repeat violent offender statute as a whole but only the portions that required judicial fact-finding.²⁸ The legislature has formally repealed the provisions of the sentencing statutes stricken in *Foster*.²⁹

In 2009, the U.S. Supreme Court held in *Oregon v. Ice* that judicial fact-finding in consecutive sentencing was not a Sixth Amendment violation, abrogating one of the main holdings in *Foster*.³⁰ Accordingly, the Ohio legislature reenacted judicial fact-finding for consecutive sentencing but without the requirement that the court give reasons for imposing consecutive sentences.³¹

4. Other Important Appellate Sentencing Decisions

In *State v. Hand* (2016), the Supreme Court of Ohio considered whether practice of treating prior juvenile adjudications as equivalent to adult convictions, for the purpose of enhancing felony sentences, violated due process.³² In the *Apprendi v. New Jersey* decision, which led to *Blakely* (discussed above), the U.S. Supreme Court held that apart from prior convictions, any fact that increased a penalty beyond the statutory maximum had to be found by a jury and proved beyond a reasonable doubt. The court in *Apprendi* felt that prior convictions did not require additional fact finding because the defendant already had the right to a jury trial and to be convicted beyond a reasonable doubt. However, Ohio juveniles do not have the right to a jury trial. In *Hand*, the court decided that this use of juvenile adjudications did not meet the *Apprendi* standard and that this was a violation of due process rights.³³

In *State v. Amos* (2014), the Supreme Court of Ohio wrestled with the procedural question of whether courts could sentence low-level felony offenders to time served without a pre-sentence investigation. The court wrote that truth in sentencing limited judicial discretion “by design,” but that “later developments have tightened some of those constraints, perhaps to the breaking point” and that these cases would address “how far those constraints reach.”³⁴ The court concluded that trial courts act contrary to law when they do not order a pre-sentence investigation before making sentencing decisions that place defendants in the community.³⁵

There have also been several appellate cases that center around the issues of sentencing parity and proportionality, particularly in the sentencing of codefendants. In *State v. Hall*, two brothers were convicted of crimes arising out of the same robbery incident. In this case, the defendant argued that he was penalized with a harsher sentence for unwillingness to testify against his brother before his own case was concluded; he claimed that this was both disproportionate and a Fifth Amendment violation. The appellate court vacated Hall’s sentence and remanded the case for resentencing.³⁶

In both *State v. Moore* and *State v. Land*, defendants argued that the court erred in sentencing them more harshly than similarly situated codefendants who did not take their cases to trial. In *Moore*, the court found that there was not enough on the record to support the consecutive sentences that totaled 27 years for one codefendant (when the other codefendant had entered a plea and received nine years in concurrent sentences). The court remanded the case to give the lower court the opportunity to demonstrate in the record that the sentences were not disproportionate.³⁷ In *Land*, the court did not find evidence that the defendant was punished more severely than his codefendants for taking his case to trial; or that the sentencing judge knew the lengths of the other defendants’ sentences.³⁸

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¹ Ohio Rev. Code Ann. § 2953.08(A)(4) (West 2017).

² Ohio Rev. Code Ann. § 2953.08(G)(2)(a) (West 2017); *State v. Marcum*, 59 N.E.3d 1231 (Ohio 2016).

³ Ohio Rev. Code Ann. § 2953.08(A)(2) (West 2017). This is based on the language of Ohio Rev. Code Ann. § 2929.13(B) which was held not to violate *Blakely* in *State v. Foster*, 845 N.E.2d 470, 491-92 (Ohio 2006), discussed further below.

⁴ Ohio Rev. Code Ann. § 2953.08(A)(3) (West 2017). This appeal from an indeterminate term applies to those who have committed violent sex crimes, homicides, assaults, or kidnappings and have afterwards been adjudicated to be sexually violent predators based on the crime. For these offenders, the maximum term is life. See § 2971.03(3)(a).

⁵ *Foster*, 845 N.E. 2d at 496-97.

⁶ Ohio Rev. Code Ann. § 2953.08(A)(1) (West 2017).

⁷ *Id.* at (A)(5).

⁸ *Id.* at (C).

⁹ *Id.* at (B); Ohio Rev. Code Ann § 2929.20 (West 2017) (judicial release).

¹⁰ Ohio Rev. Code Ann. § 2953.08(D)(1) (West 2017); see, e.g. *State v. Sergeant*, 69 N.E.3d 627 (Ohio 2016) (holding that even when a jointly recommended sentence contains non-mandatory consecutive sentences, it is authorized by law and non-appealable by statute); but see *State v. Underwood*, 922 N.E.2d 923 (Ohio 2010) (holding that jointly recommended sentences can be appealed where they are not authorized by law; in this case, where they do not comport with mandatory sentencing provisions).

¹¹ Ohio Rev. Code Ann. §§ 2953.08(D)(2)– (3) (West 2017).

¹² *State v. Smith*, 684 N.E.2d 668, 678 (Ohio 1997); Ohio Rev. Code Ann. § 2953.02 (West 2017).

¹³ *State v. Kalish*, 896 N.E.2d 124 (Ohio 2008).

¹⁴ 2011 Ohio H.B. 86; see also *State v. Rodeffer*, 5 N.E.3d 1069, 1075 (Ohio Ct. App. 2013) (“the Ohio General Assembly enacted 2011 Am. Sub. H.B. No. 86, which removed the unconstitutional statutory provisions cited in R.C. 2953.08(G) and revived the judicial fact-finding requirement for consecutive sentences. In doing so, H.B. 86 reenacted the felony sentencing standard of review set forth in section (G)(2) of R.C. 2953.08.”) In light of this change, the Supreme Court of Ohio held in *State v. Marcum* that appellate courts may not apply abuse-of-discretion when reviewing challenges to sentences. 59 N.E.3d 1231, 1233 (Ohio 2016).

¹⁵ Ohio Rev. Code. Ann. § 2953.08(G) (West 2017). Note that although the standard of review in *Kalish* is no longer applicable, the case still provides “adequate guidance for determining whether a sentence is clearly and convincingly contrary to law.” Under that case, “a sentence is not clearly and convincingly contrary to law where the trial court had considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the seriousness and recidivism factors contained [in the applicable statute][...] and imposed a sentence within the statutory range.” *State v. White*, 997 N.E. 2d 629, 632 (Ohio Ct. App. 2013).

¹⁶ *State v. Anderson*, 54 N.E.3d 610 (Ohio Ct. App. 2015). An earlier case, *State v. Holcomb*, 921 N.E.2d 1077 (Ohio Ct. App 2008) distinguishes a void sentence (one for which the court lacks subject matter jurisdiction or the authority to act) from a voidable sentence (one in which the court has jurisdiction to impose, but imposes irregularly or erroneously).

¹⁷ Ohio Rev. Code Ann. § 2953.08(H) (West 2017).

¹⁸ *State v. King*, 992 N.E.2d 491, 500 (Ohio Ct. App. 2013) (citing *State v. Foster*, 845 N.E.2d 470 (Ohio 2006)).

¹⁹ *Id.*; see also *State v. Castle*, 67 N.E.3d 1283 (Ohio Ct. App. 2016).

²⁰ Ohio Rev. Code Ann. § 2929.14(C)(4) (West 2017); see also *State v. Bonnell*, 16 N.E.3d 659, 667 (Ohio 2014) (stating that the legislature repealed the requirement to give reasons for imposing consecutive sentences in 2011 Ohio H.B. 86, §11).

²¹ See Ohio Rev. Code Ann. § 2929.13(D)(2) (West 2017); see also *State v. Milhoan*, 2014 WL 351991, at *2 (Ohio Ct. App. 2014) (“The enactment of 2011 Am. Sub. H.B. No. 86, effective September 30, 2011, removed the requirement for the trial court to state its reasons for making findings under RC 2929.13(D)(2).”).

²² Ohio Rev. Code Ann. § 2929.13(B)(1) (West 2017); see also *State v. Wells*, 41 N.E. 3d 216, 223 (Ohio Ct. App. 2015).

²³ *Id.* at § (B)(1)(a). Note that if the court follows the proper procedure and requests community sanction information from the Department and it does not provide it within 45 days, the court may impose a prison term under §§ 2929.13(B)(1)(b)(iv) and (B)(1)(c).

²⁴ Ohio Rev. Code Ann. § 2929.13(B)(1)(b) (West 2017).

²⁵ *State v. Foster*, 845 N.E.2d 470 (Ohio 2006).

²⁶ *Id.* at 494 (citing *Blakely v. Washington*, 124 S.Ct. 2531, 159).

²⁷ *Id.*

²⁸ *State v. Hunter*, 915 N.E.2d 292 (Ohio 2009).

²⁹ See, e.g. *State v. White*, 997 N.E.2d 629, 631-32 (Ohio Ct. App. 2013) (discussing developments in Ohio statutes and case law after *Foster*); Lewis R. Katz et. al., 3 Baldwin’s Oh. Prac. Crim. L. § 80:22 (2016).

³⁰ *Oregon v. Ice*, 555 U.S. 160 (2009).

³¹ Ohio Rev. Code Ann. § 2929.14(C)(4) (West 2017); see also *State v. Bonnell*, 16 N.E.3d 659 (Ohio 2014).

³² *State v. Hand*, 73 N.E.3d 448 (Ohio 2016).

³³ *Id.* at 459.

³⁴ *State v. Amos*, 17 N.E.3d 528, 529 (Ohio 2014).

³⁵ *Id.* at 533.

³⁶ *State v. Hall*, 903 N.E.2d 676 (Ohio Ct. App. 2008).

³⁷ *State v. Moore*, 24 N.E.3d 1197 (Ohio Ct. App. 2014).

³⁸ *State v. Land*, 69 N.E.3d 196 (Ohio Ct. App. 2016).