



**Sub. H.B. 331\***

123rd General Assembly  
(As Reported by S. Judiciary)

**Reps. DePiero, Perry, Jerse, Verich, Taylor, Metelsky, Pringle, Vesper, Goodman, Opfer, Sullivan, Tiberi, Myers, Sulzer, Jones, Ford, Stapleton, Flannery, Wilson, Distel, Allen, Smith, Barrett, Ogg, D. Miller, Hoops, Patton, Redfern, Boyd, Corbin, Barnes, Womer Benjamin**

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**BILL SUMMARY**

- Requires an appellate court hearing certain felony sentence appeals as of right to remand the case to the sentencing court if the sentencing court failed to make specified required findings on the record and to instruct the sentencing court to state, on the record, the required findings.
- Revises the standards by which an appellate court hearing certain felony sentence appeals as of right may increase, reduce, or otherwise modify the appealed sentence or may vacate the sentence and remand the matter for resentencing to permit those actions to be taken only if the sentence is otherwise contrary to law or if, in specified instances, the record does not support the sentencing court's findings.
- Delays until July 1, 2001, the date on which the requirements regarding the recording of transactions involving the dispensation or distribution of nitrous oxide will become operative.

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*\* This analysis was prepared before the report of the Senate Judiciary Committee appeared in the Senate Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

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## CONTENT AND OPERATION

### Rights of appeal in felony cases

#### Existing law--right to appeal

The existing Felony Sentencing Laws specifically authorize the appeal of a felony sentence in certain circumstances. The rights to appeal fall into four categories:

**R.C. 2953.08(A) appeals.** R.C. 2953.08(A) provides that, in addition to any other right to appeal, 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 the Felony Sentencing Laws and was not a major drug offender additional prison term, and the court imposed it under one of the following circumstances: (a) the sentence was imposed for only one offense, or (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, the offense for which it was imposed required the court to find that one or more specified factors apply relative to the defendant before a prison term could be imposed, and the court did not specify at sentencing that it found that one or more of those factors apply. (See **COMMENT 1**.)

(3) The person was convicted of or pleaded guilty to a sexually violent offense, was adjudicated as being a sexually violent predator, and was sentenced to an indefinite term under the Sexually Violent Predator Laws, if the minimum term of the indefinite term is the longest term available for the sexually violent offense. (See **COMMENT 2**.)

(4) The sentence is contrary to law.

(5) The sentence consisted of an additional prison term of ten years the Felony Sentencing Laws permit to be imposed upon a major drug offender. (See **COMMENT 3** and **4**.)

**R.C. 2953.08(B)(1) and (2) appeals.** In addition to any other right to appeal, 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 on either of the following grounds (R.C. 2953.08(B)(1) and (2)):

(1) The sentence did not include a prison term despite a presumption favoring a prison term for the offense for which it was imposed.

(2) The sentence is contrary to law.

**R.C. 2953.08(B)(3) appeals.** In addition to any other right to appeal, 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 the modification of a sentence imposed upon such a defendant on the ground that the sentence is a modification under judicial release (pursuant to R.C. 2929.20) of a sentence that was imposed for a felony of the first or second degree (R.C. 2953.08(B)(3)).

**R.C. 2953.08(C) appeals.** In addition to R.C. 2953.08(A) and (B) appeals, a defendant who is convicted of or pleads guilty to a felony may seek leave to appeal a sentence imposed upon the defendant on the basis that the sentencing judge has imposed specified consecutive sentences and that the consecutive sentences exceed the maximum prison term allowed under the Felony Sentencing Laws for the most serious offense of which the defendant was convicted. (See **COMMENT 5**.) Upon the filing of a motion under this provision, the court of appeals may grant leave to appeal the sentence if the court determines that the allegation included as the basis of the motion is true. (R.C. 2953.08(C).)

**No right to appeal.** A sentence imposed upon a defendant is not subject to review under any of the above provisions if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge. A sentence imposed for aggravated murder or murder is not subject to review under these provisions, as other appeal provisions apply. (R.C. 2953.08(D).)

**Existing law--findings required for amending or vacating a sentence**

**R.C. 2953.08(A), (B)(1), or (B)(2) appeals.** The court hearing an R.C. 2953.08(A) appeal or an R.C. 2953.08(B)(1) or (2) appeal may increase, reduce, or otherwise modify the appealed sentence or may vacate the sentence and remand the matter to the trial court for resentencing if the court clearly and convincingly finds any of the following (R.C. 2953.08(G)(1)):

(1) That the record does not support the sentence;

(2) That the sentence included a prison term, and that (a) the offense for which it was imposed required the court to find that one or more of the specified factors apply relative to the defendant before a prison term could be imposed, (b) the court did not specify at sentencing that it found that one or more of those factors apply, and (c) either the procedures set forth for determining whether to impose a prison term for such an offense were not followed or those procedures were followed but there is an insufficient basis for imposing a prison term for the offense;

(3) That the sentence did not include a prison term, and that (a) the offense for which it was imposed is an offense for which there is a presumption in favor of a prison term, and (b) either the procedures set forth in the Felony Sentencing Laws that set forth the only circumstances in which the presumption may be overridden (and a sanction other than a prison term may be imposed in lieu of a prison term) were not followed or those procedures were followed but there is an insufficient basis for overriding the presumption and imposing a sanction other than a prison term for the offense;

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

**R.C. 2953.08(B)(3) appeals.** The court hearing an R.C. 2953.08(B)(3) appeal may overturn the modification and reinstate the original sentence, or may vacate the modification of the sentence and remand the matter to the trial court for reconsideration, only if the court clearly and convincingly finds any of the following (R.C. 2953.08(G)(2)):

(1) That the record does not support the modification based on the criteria for modification set forth in the Judicial Release Law;

(2) That the modification was not made in accordance with the procedures set forth in the Judicial Release Law, that the defendant was not eligible for the modification under that Law, or that the modification otherwise was contrary to law.

**R.C. 2953.08(C) appeals.** Existing law does not state what findings the court hearing an R.C. 2953.08(C) appeal must make in order to increase, reduce, or otherwise modify the sentence or to vacate the sentence and remand the matter to the trial court for resentencing (R.C. 2953.08(G)).

### **Operation of the bill**

The bill replaces the provisions regarding the findings required for amending or vacating a sentence described above under "**Existing law--findings required for amending or vacating a sentence**" with new provisions governing

the appeal. Under the bill, if the sentencing court was required to make the findings required by R.C. 2929.13(B) (related to an R.C. 2953.08(A) appeal), R.C. 2929.13(D) (related to an R.C. 2953.08(B)(1) appeal), R.C. 2929.14(E)(4) (related to an R.C. 2953.08(C) appeal), or R.C. 2929.20(H) (related to an R.C. 2953.08(B)(3) appeal) relative to the imposition or modification of the sentence, and if the sentencing court failed to state the required findings on the record, the court hearing an appeal described under "Existing law--right to appeal" must remand the case to the sentencing court and instruct the sentencing court to state, on the record, the required findings (R.C. 2953.08(G)(1)).

The bill also requires the court hearing such an appeal to 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 the appealed sentence 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. (R.C. 2953.08(G)(2).) The appellate court may take any action authorized by this provision if it clearly and convincingly finds either of the following (R.C. 2953.08(G)(2)):

(1) That the record does not support the sentencing court's findings under R.C. 2929.13(B) (related to an R.C. 2953.08(A) appeal--see **COMMENT 1**), R.C. 2929.13(D) (related to an R.C. 2953.08(B)(1) appeal), R.C. 2929.14(E)(4) (related to an R.C. 2953.08(C) appeal--see **COMMENT 5**), or R.C. 2929.20(H) (related to an R.C. 2953.08(B)(3) appeal), whichever, if any, is relevant;

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

### Dispensation and distribution of nitrous oxide

#### Existing law

Prohibitions. Existing law contains a number of prohibitions regarding the dispensation or distribution of nitrous oxide. One of the prohibitions prohibits a person who dispenses or distributes nitrous oxide in cartridges from failing to comply with either of the following: (a) the recordkeeping requirements established by law, as described below in "Recordkeeping requirement," and (b) the labeling and transaction identification requirements established by law, as described below in "Labeling requirement." (R.C. 2925.32(A) and (B).)

Recordkeeping requirement. Existing law provides that, *beginning July 1, 2000*, a person who dispenses or distributes nitrous oxide must record each transaction involving the dispensing or distributing of the nitrous oxide on a separate card. The person must require the purchaser to sign the card and provide a complete residence address. The person dispensing or distributing the nitrous

oxide must sign and date the card. The person must retain the card recording a transaction for one year from the date of the transaction. The person must maintain the cards at the person's business address and make them available during normal business hours for inspection and copying by officers or employees of the state board of pharmacy or of other law enforcement agencies of Ohio or the United States that are authorized to investigate violations of R.C. Chapter 2925., 3719., or 4729. or the federal drug abuse control laws. The cards used to record each transaction must inform the purchaser of the following: (1) that nitrous oxide cartridges are to be used only for purposes of preparing food, (2) that inhalation of nitrous oxide can have dangerous health effects, and (3) that it is a violation of state law to distribute or dispense cartridges of nitrous oxide to any person under age twenty-one, punishable as a felony of the fifth degree. (R.C. 2925.32(F).)

**Labeling requirement.** Existing law requires that each cartridge of nitrous oxide dispensed or distributed in this state bear the following printed warning:

"Nitrous oxide cartridges are to be used only for purposes of preparing food. Nitrous oxide cartridges may not be sold to persons under age twenty-one. Do not inhale contents. Misuse can be dangerous to your health."

**Penalties.** A violation of the recordkeeping or labeling prohibition described above is the offense of "improperly dispensing or distributing nitrous oxide," a misdemeanor of the fourth degree (R.C. 2925.32(D)).

### **Operation of the bill**

The bill delays for one year the date on which the requirements regarding the recording of transactions involving the dispensation or distribution of nitrous oxide, as described above in "**Recordkeeping requirement,**" will become operative. Under the bill, a person who dispenses or distributes nitrous oxide must comply with those requirements beginning on July 1, 2001, instead of on July 1, 2000, as under existing law. (R.C. 2925.32(F).)

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## **COMMENT**

1. Generally, in sentencing an offender for a felony of the fourth or fifth degree or for certain specified felony drug abuse offenses, the sentencing court must determine whether certain factors described below apply relative to the offense. If the court makes a finding that one of those factors apply, and if the court, after considering other specified factors required to be considered in felony sentencing, finds that a prison term is consistent with the purposes and principles of sentencing and finds that the offender is not amenable to an available

community control sanction, the court must impose a prison term upon the offender. (R.C. 2929.13(B)(2).) Otherwise, the court generally must impose a community control sanction or combination of community control sanctions upon the offender. In sentencing an offender for a felony of the fourth or fifth degree or for certain specified felony drug abuse offenses, the sentencing court must determine whether any of the following apply (R.C. 2929.13(B)(1)):

(a) In committing the offense, the offender caused physical harm to a person.

(b) In committing the offense, the offender attempted to cause or made an actual threat of physical harm to a person with a deadly weapon.

(c) In committing the offense, the offender attempted to cause or made an actual threat of physical harm to a person, and the offender previously was convicted of an offense that caused physical harm to a person.

(d) The offender held a public office or position of trust, and the offense related to that office or position; the offender's position obliged the offender to prevent the offense or to bring those committing it to justice; or the offender's professional reputation or position facilitated the offense or was likely to influence the future conduct of others.

(e) The offender committed the offense for hire or as part of an organized criminal activity.

(f) The offense is a specified fourth or fifth degree felony sex offense.

(g) The offender previously served a prison term.

(h) The offender previously was subject to a community control sanction, and the offender committed another offense while under the sanction.

2. Under the Sexually Violent Predator Law, a person adjudicated a sexually violent predator is given a sentence of life imprisonment or an indefinite prison term consisting of a minimum term fixed by the court and a maximum term of life imprisonment, or depending on the circumstances underlying the adjudication as a sexually violent predator. Generally, if the person is given an indefinite term, the sentencing court retains control over the place at which the sentence is to be served, and the duration of the sentence. The sentence is determined as follows:

(a) If the offense is aggravated murder and if the court does not impose upon the offender a sentence of death, it must impose upon the offender a term of

life imprisonment without parole. If the court sentences the offender to death and the sentence of death is vacated, overturned, or otherwise set aside, the court must impose upon the offender a term of life imprisonment without parole. (R.C. 2971.03(A)(1).)

(b) If the offense is murder or another offense for which a term of life imprisonment may be imposed or, regardless of the offense, if the offender previously has been adjudicated a sexually violent predator, the court must impose upon the offender a term of life imprisonment without parole (R.C. 2971.03(A)(2) and (4)).

(c) Otherwise, if the offense is an offense other than an offense for which a term of life imprisonment may be imposed, the court must impose an indefinite prison term consisting of a minimum term fixed by the court from among the range of terms available as a definite term for the offense, but not less than two years, and a maximum term of life imprisonment (R.C. 2971.03(A)(3)).

3. The Felony Sentencing Laws provide that generally a court must impose upon an offender a ten-year prison term that cannot be reduced if the offender commits specified drug offenses that require the imposition of a ten-year prison term on the offender or if the court finds that the offender is a "major drug offender" (R.C. 2929.14(D)(3)(a)). The court also may impose an additional prison term of 1, 2, 3, 4, 5, 6, 7, 8, 9, or 10 years, if the court makes both of the following findings (R.C. 2929.14(D)(3)(b)):

(a) The terms so imposed are inadequate to punish the offender and protect the public from future crimes, because statutory factors indicating a greater likelihood of recidivism outweigh the statutory factors indicating a lesser likelihood of recidivism.

(b) The terms so imposed are demeaning to the seriousness of the offense, because one or more statutory factors indicating that the offender's conduct is more serious than conduct normally constituting the offense are present, and they outweigh the statutory factors indicating that the offender's conduct is less serious than conduct normally constituting the offense.

4. "Major drug offender" means an offender who is convicted of or pleads guilty to the possession of, sale of, or offer to sell any drug, compound, mixture, preparation, or substance that consists of or contains (R.C. 2929.01(Y)):

(a) At least 1,000 grams of hashish;

(b) At least 100 grams of crack cocaine;

(c) At least 1,000 grams of cocaine that is not crack cocaine;

(d) At least 250 grams of heroin;

(e) At least 5,000 unit doses of L.S.D.;

(f) At least 100 times the amount of any other Schedule I or II controlled substance other than marihuana that is necessary to commit a drug trafficking offense, a drug possession offense, illegal manufacture of drugs, illegal cultivation of marihuana, aggravated funding of drug trafficking, funding of drug trafficking, funding of marihuana trafficking, or illegal administration of anabolic steroids, which offense is a felony of the third degree and is based on the possession of, sale of, or offer to sell the controlled substance.

5. The Felony Sentencing Laws permit consecutive sentences to be imposed upon an offender in specified circumstances (see R.C. 2929.14(E) and 2929.41--not in the bill). When consecutive prison terms are imposed pursuant to these provisions, the term to be served is the aggregate of all of the terms so imposed. The circumstances specified in the Felony Sentencing Laws that are referred to in "**R.C. 2953.08(C) appeals**," above include:

(a) If a prison term is imposed for aggravated robbery when the offense involves knowingly removing or attempting to remove a deadly weapon from the person of a law enforcement officer or involves knowingly depriving or attempting to deprive a law enforcement officer of a deadly weapon, in specified circumstances, or is imposed for failure to comply with an order or signal of a police officer when the offense involves the use of a motor vehicle, the offender must serve that prison term consecutively to any other prison term (R.C. 2929.14(E)(3)--not in the bill).

(b) 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 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 (R.C. 2929.14(E)(4)--not in the bill):

(i) The offender committed the multiple offenses while the offender was awaiting trial or sentencing, was under a community control sanction, or was under post-release control for a prior offense.

(ii) The harm caused by the multiple offenses was so great or unusual that no single prison term for any of the offenses committed as part of a single course of conduct adequately reflects the seriousness of the offender's conduct.

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

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## HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	05-05-99	p. 557
Reported, H. Criminal Justice	06-30-99	p. 1162
Passed House (95-0)	10-19-99	pp. 1280-1281
Reported, S. Judiciary	---	---

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