

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

v.

MICHAEL CARSWELL,

Defendant-Appellant.

*
*
*
*
*
*
*
*
*
*

CASE NO. 2006-0151

On Appeal from the Warren County Court of Appeals, 12th Appellate District

Court of Appeals

Case No. CA 2005-04-047

Defendant Appellant

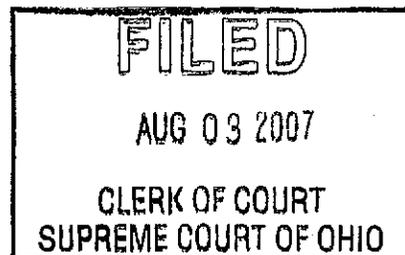
**MEMORANDUM BY THE STATE OF OHIO
IN OPPOSITION TO MOTION FOR RECONSIDERATION**

For the State of Ohio:

RACHEL A. HUTZEL (#0055757)
Warren County Prosecuting Attorney
JOSHUA A. ENGEL (#0075769)
(Counsel of Record)
Assistant Prosecuting Attorney
LEW BECHTOL (#0042435)
Assistant Prosecuting Attorney
WARREN COUNTY PROSECUTING
ATTORNEY'S OFFICE
500 Justice Drive
Lebanon, Ohio 45036
(513) 695-1325

For Michael Carswell:

THOMAS EAGLE (#0034492)
(Counsel of Record)
3386 North S.R. 123
Lebanon, Ohio 45036
(937) 743-2545



ARGUMENT

The Court held that the Defendant and supporting *amici curiae* failed to demonstrate to the required standard – beyond a reasonable doubt – that any conflict between the Marriage Amendment, Section 11, Article XV of the Ohio Constitution, and the Domestic Violence Statute, R.C. 2919.25, is necessary and obvious and that no fair course of reasoning can reconcile the Statute and the Constitutional Amendment. This Court’s decision was a correct and straightforward application of the appropriate test for repeals by implication. The Defendant’s Motion should be denied because it does not alert “the court to an obvious error in its decision” or raise “an issue that was either not considered or not fully considered by the court.” See *e.g. City of Columbus v. Hodge* (1987), 37 Ohio App.3d 68; *Matthews v. Matthews* (1981), 5 Ohio App. 3d 140.

This Court’s Rules of Practice provides that a motion for reconsideration “shall be confined strictly to the grounds urged for reconsideration, shall not constitute a reargument of the case.” S. Ct. Prac. R. XI, §2(A). The Defendant’s Motion is precisely what the Rules prohibit. The Court considered all of the issues presented by the Defendant in its Opinion and concluded that the Marriage Amendment and the Domestic Violence Statute are not in conflict with each other, do not violate any constitutionally protected activity, and should continue working independently to both define marriage for the citizens of Ohio and to define the crime of domestic violence between family and household members. The Defendant’s Motion is nothing but further argument in support of his position otherwise.

Response to First Claimed Reason for Reconsideration:

The Court noted that its analysis of the issue in this case began “with the established rule that statutes are presumed to be constitutional.” Op. ¶3 citing *inter alia Desenco, Inc. v. Akron* (1999), 84 Ohio St.3d 535, 538. The Defendant argues that the presumption of validity is inapplicable because the Domestic Violence Statute was passed prior to the adoption of the Marriage Amendment. This argument is not proper grounds for reconsideration, as the Court considered and rejected the Defendant’s arguments on this issue. Op. ¶6

The Defendant’s remaining arguments on this issue are flawed because they fail to take into account that this Court has recognized a duty to construe the Legislature’s enactments in such a manner as to uphold the state and federal constitutions, if at all possible. *State v. Dorso* (1983), 4 Ohio St.3d 60, 61, 446 N.E.2d 449; *Hughes v. Registrar, Ohio BMV* (1997), 79 Ohio St. 3d 305, 307, 1997-Ohio-387, 681 N.E.2d 430. Further, the Defendant’s arguments fail to take into account that this Court has recognized that any doubts regarding the validity of a legislative enactment are to be resolved in favor of the statute. *State, ex. rel. Swetland v. Kinney* (1982), 69 Ohio St.2d 567, 433 N.E.2d 217. See also *State v. Gill* (1992), 63 Ohio St.3d 53, 55, 584 N.E.2d 1200.

The Defendant does not seek reconsideration of the Court’s conclusion that this is a “repeal by implication” case. This is significant because the Court’s opinion was consistent with well established standards for repeals by implication and the Court’s longstanding reluctance to find repeals by implication. See *State ex rel. Roof v. Board of Comm'rs* (1974), 39 Ohio St. 2d 130, 314 N.E.2d 172, citing *State v. Cameron* (1914), 89 Ohio St. 214, 106 N.E. 28. The Court’s opinion notes that repeals by implication are disfavored as a matter of judicial policy in Ohio. Op. ¶ 8 citing *State ex rel. Kelley v. Bd. of Educ. of Clearcreek Local Sch. Dist.* (1990), 52 Ohio St.3d 93, 95, 556 N.E.2d 173.

The Defendant, citing *Cameron* and *Roof*, argues that the standard for repeals by implication and the presumption of constitutionality are not applicable to statutes which were adopted prior to voter approval of the constitutional provision. This argument was considered and rejected by the Court. Op. ¶¶ 8-9. This argument is also incorrect. As the Court noted in ¶¶8-9 of the Opinion, the general rule against repeals by implication has been applied to cases, like this case, where the repeal is by a constitutional amendment.¹ *Roof*, 39 Ohio St.2d at 138, citing *Cameron*, supra; *Cass v. Dillon* (1853), 2 Ohio St. 608.

Response to Second Claimed Reason for Reconsideration

The Defendant argues that the Court incorrectly interpreted the Marriage Amendment and the Domestic Violence Statute. This is merely a reargument, in other language, of the Defendant's original arguments.

The Defendant's reargument fails because, as the Court's opinion recognizes, the purposes behind the Marriage Amendment and the Domestic Violence Statute are not in conflict. The purpose of the Marriage Amendment is to recognize and define marriage, and to exclude from that recognition and definition any attempt to add gay marriages and civil unions. Op. ¶15. The purpose of the Domestic Violence Statute is to provide enhanced penalties for violence within familial relationships. Op. ¶29. Accordingly, because these purposes are mutually exclusive, any potential conflict between the two provisions is not necessary and obvious.

¹The Defendant's reliance on *State v. Ward* (2006), 166 Ohio App. 3d 188, 2006-Ohio-1407, is inappropriate for a motion for reconsideration. The *Ward* opinion is not binding on this Court and pre-dated the briefing in this matter. Moreover, the *Ward* opinion was also in opposition to many opinions by other courts of appeals. See State's Merit Br. at 4-8 (collecting cases).

The Defendant's reargument fails for the additional reason that the Domestic Violence Statute does not create or recognize a "legal status" within the meaning of the Marriage Amendment. Rather, as this Court recognized, the Domestic Violence Statute merely classifies a person living as a spouse with the offender as a victim for purposes of the particular criminal provision.² Op. ¶37. The Defendant's heated rhetoric concerning "giving meaning" to the Constitution notwithstanding, Motion at 5, the self-evident fact remains that while persons may be "living as spouses" within the meaning of the Domestic Violence statute, this classification has no meaning outside of the context of the Domestic Violence Statute. See Op. ¶33.

Response to Third Claimed Reason for Reconsideration

The Defendant claims that certain pre-election statements concerning the intent of the Marriage Amendment do not support the Court's conclusions concerning the intent behind the first and second sentences of the Marriage Amendment. This is not proper grounds for a motion for reconsideration, as the Court clearly considered and addressed this argument. Op. ¶15 and n.1.

²The Defendant's argument actually acknowledges that marriage is a legal status, unlike the classification in the Domestic Violence Statute. Def. Motion at 4. The Defendant argues that "some married people" do not share familial or financial responsibilities yet have certain "legal rights and responsibilities" because of the formal marriage arrangement. This proves the State's point. The essential elements of cohabitation recognized by this Court in *State v. Williams* (1997), 79 Ohio St. 3d 459, 683 N.E. 2d 1126, are descriptive of the class of persons to be protected by the Domestic Violence Statute and was not intended to mirror the marriage relationship. In fact, as the State noted in its Merit Brief, this Court in *Williams* rejected definitions of cohabitation which were synonymous with "common law" marriage. St. Merit Br. at 23-24

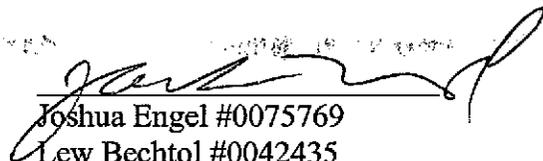
The Defendant's argument for reconsideration fails because the Court's opinion did not rely upon the statements from the official voter information provided by the Secretary of State's Office, nor did the Court rely upon the contemporaneous statements by the proponents of the Marriage Amendment cited in the State's Merit Brief. The Defendant does not cite any materials which suggest that the source relied upon by the Court, the editor's comments to Baldwin's Ohio Revised Code Annotated (2006 Pocket Part), is incorrect. Nor does the Defendant provide any material which suggests that the language contained in the second sentence of the Marriage Amendment was intended to do anything more than prohibit the State from establishing marriage "equivalents" intended to circumvent the language in the first sentence, like civil unions. See Op. ¶15. Finally, the general and ambiguous language cited by the Defendant is contradicted by the direct statements concerning the limited intent of the second sentence provided to the Court by the State in its Merit Brief. See State's Merit Br. at 17-19.

CONCLUSION

The Motion for Reconsideration should be denied.

Respectfully Submitted,

RACHEL A. HUTZEL
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Joshua Engel", is written over a horizontal line. The signature is fluid and cursive.

Joshua Engel #0075769
Lew Bechtol #0042435
Assistant Prosecuting Attorneys
Warren County Prosecutor's Office
500 Justice Drive
Lebanon, Ohio 45036
(513) 695-1325

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to the following on this 3rd day of August 2007:

Thomas Eagle
Counsel for Defendant Michael Carswell
3386 N. State Rt. 123
Lebanon, Ohio 45036

David Langdon
Joshua Bolinger
Counsel for *amicus curiae* Citizens for Community Values
LANGDON AND HARTMAN, LLC
11175 Reading Road
Suite 104
Cincinnati, Ohio 45241

Erika Cunliffe
Counsel for *amicus curiae* Cuyahoga County Public Defender
1200 West Third Street, 1st Floor
Cleveland, Ohio 44113

Charles Clovis
Counsel for *amicus curiae* Ohio Association of Criminal Defense Lawyers
330 South High Street
Columbus, Ohio 43215

William D. Mason
Matthew E. Meyer
Counsel for *amicus curiae* Cuyahoga County Prosecutor's Office
The Justice Center, Courts Tower
1200 Ontario Street, 9th Floor
Cleveland, Ohio 44113

Carrie L. Davis
Counsel for *amicus curiae* American Civil Liberties Union of Ohio Foundation
Max Wohl Civil Liberties Center
4506 Chester Avenue
Cleveland, Ohio 44103

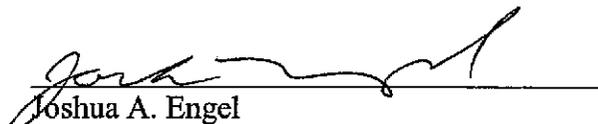
Alphonse A. Gerhardstein
Counsel for *amicus curiae* Lambda Legal Defense and Education Fund
Gerhardstein, Branch & Laufman
617 Vine Street, Suite 1406
Cincinnati, Ohio 45202

Michael Smalz
Counsel for *amici curiae* Action Ohio Coalition of Battered Women et al
Ohio State Legal Services Association
555 Buttles Avenue
Columbus, Ohio 43215

Alexandria Ruden
Counsel for *amici curiae* Action Ohio Coalition of Battered Women et al
Legal Aid Society of Cleveland
1223 West Sixth Street
Cleveland, Ohio 44113

Ron O'Brien
Steven Taylor
Counsel for *amicus curiae* Ohio Prosecuting Attorney's Association
Franklin County Prosecuting Attorney's Office
373 South High Street, 13th Floor
Columbus, Ohio 43215

Natalie Christine Trishman
Counsel for *amici curiae* National Network to End Domestic Violence et al
Bricker & Eckler LLP
100 S. 3rd Street
Columbus, OH 43215


Joshua A. Engel
Assistant Prosecuting Attorney