

ORIGINAL

IN THE SUPREME COURT OF OHIO

Case Number 2009-0825

STATE OF OHIO
Appellant

On Appeal from the
Summit County Court of Appeals
9th Appellate District

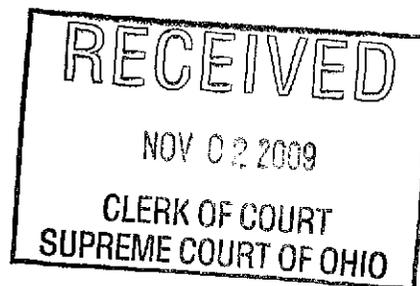
v.

SALLY A. MASSIEN
Appellee

Court of Appeals Case No. 24369

MERIT BRIEF OF APPELLEE - SALLY A. MASSIEN

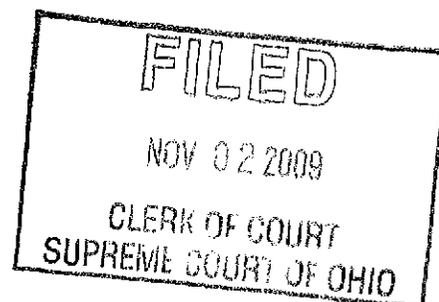
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STATEMENT OF FACTS

Sally A. Massien was charged with two counts of theft of drugs, in violation of R.C. §2913.02(A)(1)/(2), felonies of the fourth degree. Ms. Massien filed her motion for the Intervention in Lieu of Conviction (hereinafter “ILC”) program on June 2, 2008. She had no prior criminal record and had been, until these offenses, a law abiding, productive citizen. Ms. Massien had worked for Summa Health System as a nurse for many years and was considered a valued employee. Ms. Massien indicated she used morphine out of curiosity and to treat her depression. The employer conducted a lengthy investigation and found no evidence that any patient had failed to receive the prescribed medications because of Ms. Massien’s actions.

Additionally, the Ohio Nursing Board investigated the circumstances of the offenses and determined that Ms. Massien’s crime was such that she could be rehabilitated. No evidence was found during their investigation, or the police investigation, that she had caused harm to anyone. Additionally, the employer and the nursing board determined that Ms. Massien was a very good candidate to engage in the lengthy, demanding and aggressive rehabilitative process prior to returning to work for them.

The trial court was advised that Ms. Massien was a nurse and that her offense was job related. The court was advised that the employer, who had known her for many years, was supporting entrance into the ILC program. The trial court referred Ms. Massien for evaluation of her eligibility for the ILC program. On July 10, 2008, the trial court discussed the results of that evaluation with Mr. Randy Viperman (in chambers). Afterward, the court found Ms. Massien eligible for ILC program saying “...he still strongly supports her being in the program and one of his biggest factors is how much St. Thomas wants her to come back and that also impacts the Court.”

The State aggressively stated its objection at the hearing and indicated the intent to appeal, but then failed to file a timely appeal. The Ninth District Court of Appeals granted the State leave to appeal.

The Ninth District Court upheld the lower court's determination that Ms. Massien was eligible for the ILC program. The State appealed the Ninth District's decision to this Court. This case was accepted as a conflict case on July 1, 2009. That order did not arrive at the trial court until July 8, 2009. The trial court sealed and expunged the record of Sally Massien on July 7, 2009.

SUMMARY OF ARGUMENT

The Appellant chiefly contends that a nurse employed by a hospital who in the course of her employment steals drugs from that hospital holds a "position of trust" as defined under R.C. §2929.13(B)(2)(b) and is therefore ineligible for the ILC program. In the case at bar, the Appellant targets only nurses.

Conversely, the Appellee submits the Ohio General Assembly did not mean for the phrase "position of trust" to be parsed out from the section of the sentence where it appears in the statute. The sentence as created by the Ohio General Assembly was divided into three distinct segments. The first segment says "[t]he offender held a public office or position of trust and the offense related to that office or position;..." Appellee submits the legislature intended "position of trust" apply primarily to those holding or working in public office. Further, Appellee submits that parsing out the phrase "position of trust" would require that it be applied far beyond nurses. This result would eviscerate the purpose and intent the Ohio General Assembly had when creating the ILC program.

LAW AND ARGUMENT

Appellant’s Proposition of Law 1: A position of trust under R.C. §2929.13(B)(1)(d) includes persons holding public or private positions.

Appellee’s Response to Proposition of Law 1: The Ohio General Assembly did not intend for the phrase “position of trust” to be parsed out and read independently from its placement in R.C. §2929.13(B)(1)(d), for to apply the phrase to all public and private positions requires too broad an application and would serve to eviscerate the goal and purpose of the ILC statute.

The lower courts of Ohio have ruled in a variety of conflicting ways. In *France*, the Tenth District reversed a lower court based upon its interpretation of the legislative history of the intervention statute and the facts of France’s case. *State v. France*, 10th District No. 04AP-1124, 2006-Ohio-1204 at ¶11-12. France had faced 52 counts of theft from her employer. Additionally, the State had argued two other grounds for reversal in their brief, to wit: (1) “that eligibility for intervention in lieu of conviction requires that the defendant has not yet received a similar opportunity to avoid conviction on a previous occasion, and that appellee was therefore not eligible because she had availed herself of a diversion program in connection with her earlier indictment on separate prior offenses; and (2) that intervention in lieu of conviction may not be applied where it demeans the seriousness of the offense, which the state argues would occur in the present matter.” *France*, at ¶5.

In another Tenth District case, the court upheld the trial court’s denial of the defendant’s motion for ILC where the trial court had noted, as grounds for the denial, that the defendant had previously failed on two attempts at treatment; that granting ILC would demean the seriousness of the offense; and the “trust position” the defendant held as a nurse. *State v. Wiley*, 10th Dist. Nos. 03AP-362 & 03AP-363, 2003-Ohio-6835 at ¶9.

The Seventh and Twelfth Districts have also held that both public and private individuals

can occupy a “position of trust” under §2929.13(B)(1)(d). [*Emphasis added*]. In *State v. Boland*, the Seventh District looked to federal sentencing guidelines to determine how the phrase “position of trust” should be defined at the state level. *State v. Boland*, 7th Dist. No. 00-CA-126, 2002-Ohio-1163, at ¶¶66-69. Similarly, the Twelve District concluded that the statute can be applied to both public or private individuals based upon the “or” found in the phrase “public office or position of trust” and noted that the word “public” does not modify the phrase “position of trust.” *State v. Bolin* (Jan. 12, 1998), 12th Dist. No. CA97-06-056, at *2.

The First District came to a very different conclusion. In *State v. Brewer*, the First District in reversing the court’s prior position remarked “an overall reading of R.C. §2929.13(B)(1)(d) demonstrates that the [position of trust] factor refers only to ‘positions associated with government.’” *State v. Brewer* (2000), 1st Dist. No. C-000148, at *2. It further noted that “unrestrained application of the phrase to every breach of ethical, moral, or filial duty by a private individual may distort the purpose of the new sentencing guidelines” and will result in far too broad an application of the phrase. *Id.* However, the First District refrained from adopting an absolute rule that a private individual could never hold a position of trust. *Id.*

However, the First District generally limits the scope of the phrase “position of trust” to include “public officials and public servants who abuse their positions of public trust.” *State v. Condon*, 1st Dist. No. C-020262, 2003-Ohio-2335, at ¶104 (reaffirming the court’s adherence to the conclusion that the language was generally not intended to include private individuals).

In *State v. Jones*, the Second District concluded the phrase applies only to public servants or public officials, not private persons employed by a private employer. *State v. Jones*, (1998), 2nd Dist. No. 98CA0009, at *2. See also, *State v. Cohen*, 2nd Dist. No. 07-CA-081, 2008-Ohio-4635, at ¶5-16, (concluding that if an offender was charged with a felony offense for which the court could

impose community control, the offender was likewise eligible for ILC, based on its interpretation of RC §2929.13).

A review of R.C. §2929.13 provides in relevant part:

(B)(1) Except as provided in division (B)(2), (E), (F), (G) of this section, in sentencing an offender for a felony of the fourth or fifth degree, the sentencing court shall determine whether any of the following apply:

(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.

(2)(a) If the court *makes a finding* described in division (B)(1)(a), (b), (c), (d), (e), (f), (g), (h), or (i) of this section and if the court, after considering the factors set forth in section 2929.12 of the Revised Code, finds that a prison term is consistent with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code and finds that the offender is not amenable to an available community control sanction, the court shall impose a prison term upon the offender.

(b) Except as provided in division (E), (F), or (G) of this section, if the court *does not make a finding* described in division (B)(1)(a), (b), (c), (d), (e), (f), (g), (h), or (i) of this section and if the court, after considering the factors set forth in section 2929.12 of the Revised Code, finds that a community control sanction or combination of community control sanctions is consistent with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code, the court shall impose a community control sanction or combination of community control sanctions upon the offender. [*Emphasis added*].

A de novo standard of review is applied when evaluating a trial court's interpretation and application of a statute. *Red Ferris Chevrolet, Inc. v. Aylsworth*, 9th Dist. No. 07CA0072, 2008-Ohio-4950, at ¶4. "[W]here the language of a statute is clear and unambiguous, it is the duty of the court to enforce the statute as written, making neither additions to the statute, nor subtractions therefrom." *State v. Knoble*, 9th Dist. No. 08CA009359, 2008-Ohio-5004. at ¶12, quoting *Hubbard v. Canton City School Bd. Of Edn.*, 97 Ohio St. 3d 451, 2002-Ohio-6718, at ¶14. "If it is ambiguous, we must then interpret the statute to determine the General Assembly's intent. If it is not ambiguous, then we need not interpret it; we must simply apply it." *State v. Hairston*, 101 Ohio

St.3d 308, 2004-Ohio-969, at ¶13. In interpreting a statute, a court's paramount concern is legislative intent. *State ex. Rel. United States Steel Corp. v. Zaleski*, 98 Ohio St.3d 395, 2003-Ohio-1630, at ¶12. In *Hedges v. Nationwide Mutual Insurance*, this Court said, “[t]o determine this intent, we read words and phrases in context and construe them in accordance with the rules of grammar and common usage. R.C. §1.42; *Hedges v. Nationwide Mut. Ins. Co.*, 109 Ohio St.3d 70, 2006-Ohio-1926, at ¶24.

Additionally, R.C. §1.49 provides that “[i]f a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

- (A) The objective sought to be attained;
- (B) The circumstances under which the statute was enacted;
- (C) The legislative history;
- (D) The common law or former statutory provisions,
- (E) Including laws upon the same or similar subjects;
- (F) The consequences of a particular construction; and
- (G) The administrative construction of the statute.

Considering the list set forth in R.C. §1.49, the Appellant completely ignores the purpose of the statute and the intent of the legislature. Additionally, the Appellant ignores the consequences of their proposed construction and the broad interpretation it would require.

In creating the ILC program, the Ohio General Assembly sought to give first time offenders a second chance by offering an opportunity for treatment of their drug addiction rather than a criminal conviction. The legislature specifically chose to limit the program to offenders whose offense was a fourth or fifth degree felony and for which the offender would receive a community control sanction.

The potential risk to the offender is high as they must plead guilty to the charges faced to gain entrance into the ILC program. Insincere or unmotivated individuals will ultimately fail and be sentenced for their criminal offense.

Here, the State erroneously claims “[w]hat the majority opinion did was adopt a rule that medical professionals are always eligible for ILC. *Massien*, ¶19. The State argues “In other words, nurses and other licensed medical professionals never occupy a position of trust and are eligible for ILC regardless of the offense they commit.” Appellant Brief at p. 10. This is patently untrue and a misstatement of the Ninth District’s position on ILC eligibility. Appellee submits the legislature provided judges with the power and the discretion to deny any defendant entrance to the ILC program, without a hearing, particularly when required by the circumstances of the underlying criminal offense. See R.C. §2951.041(A)(1).

Here, the Ninth District in upholding the lower court determined that the Appellee did not hold a position of trust as it was intended by the legislature. *Massien*, ¶17. The court said “[g]iven the ambiguity abounding from the statute, we must analyze the legislative intent of the General Assembly when enacting the intervention statute, as well as its use of the phrase “position of trust” throughout the Revised Code. *Massien*, ¶14.

The Ninth District quoting from *State v. Geraci* said, “[i]ntervention provides an alternative to prison if the trial court has reason to believe that drug or alcohol usage by the offender was a factor leading to the offender’s criminal behavior. Intervention reflects the legislature’s determination that when drug abuse is the cause or precipitating factor in the commission of an offense, it may be more beneficial to the individual and to the community as a whole to treat the cause rather than punish the crime. If an offender satisfies all of the statutory requirements for intervention, the trial court has discretion to determine whether a particular offender is a good

candidate for intervention.” *Massien*, ¶14, quoting *State v. Geraci*, 2nd Dist. No. 04AP-26, 2004-Ohio-6128, ¶5.

The Ninth District explained additional support for its decision by saying: “Furthermore, it is illogical to think that the General Assembly intended that nurses be categorically ineligible for ILC because they hold a “position of trust” at their place of employment, yet simultaneously incorporate a provision that references their participation in ILC into the statute governing their licensure. Additionally, we note that the Revised Code is replete with references that contemplate licensed medical professionals receiving ILC, further supporting our belief that the legislature intended for such professionals, who commit criminal offenses against their employers, to, if appropriate, receive treatment, not punishment. See, e.g., R.C. §4715.30(F) (addressing the effect of ILC eligibility on dentists’ and dental hygienists’ licensing); R.C. §4730.25(B)/(C)/(H)/(I) (addressing the effect of ILC eligibility on physician assistants’ licensing); R.C. §4731.22(B)/(C)/(E) (addressing the effect of ILC eligibility on physicians’ licensing); R.C. §4734.31(C)/(F) (addressing the effect of ILC eligibility on chiropractors’ licensing); R.C. §4760.13(B)/(C)/(H)/(I) (addressing the effect of ILC eligibility on anesthesiologist assistants’ licensing); R.C. §4761.09(A) (addressing the effect of ILC eligibility on respiratory care providers’ licensing); R.C. §4762.13(B)/(E)/(H)/(I) (addressing the effect of ILC eligibility on acupuncturists’ licensing). Thus, when read in the context with the rest of the Revised Code, we conclude that the legislature intended for nurses and other licensed medical professionals to be eligible for ILC.” *Massien*, ¶19.

This Court should avoid a brightline rule that defines persons in a “position of trust” to specifically include all public and private individuals. This very slippery slope has the potential to eliminate virtually anyone in any position of trust from consideration for the ILC program. For example, a waitress is in a “position of trust” with her employer to not steal from the cash register.

Using the State’s analysis, if the waitress took money from the employer’s cash register to buy drugs from a customer, she would be categorically ineligible for the ILC program. Similarly, parents are in a position of trust with their children. A parent charged with a drug offense could be denied access to ILC upon an allegation that their offense was some how related to that “position of trust.” It is impossible to believe that this is what the Ohio General Assembly intended by the phrase “position of trust.”

Appellant’s Proposition of Law 2: A nurse with access to narcotic drugs at her place of employment holds a position of trust under R.C. §2929.13(b)(1)(d) and if in the course of her employment she steals those drugs she is ineligible for Intervention in Lieu of Conviction under R.C. §2951.041(B)(1).

Appellee’s Response to Proposition of Law 2: The Ohio General Assembly did not intend for the phrase “position of trust” to be parsed out and applied to nurses which is supported by the fact that the Ohio General Assembly provides that the Ohio Nursing Board has the right to consider the finding of eligibility for intervention in lieu of conviction to deny, revoke, suspend or place restrictions on a nursing license.

The Ohio General Assembly does not appear to believe that nurses are categorically ineligible for ILC. The language of R.C. §4723.28(B) provides that the Ohio Nursing Board may deny, revoke, suspend, or place restrictions on [a] nursing license” when any number of circumstances occur. R.C. §4723.28(B)(5) lists one such set of circumstances saying:

(5) Selling, giving away, or administering drugs or therapeutic devices for other than legal and legitimate therapeutic purposes; or conviction of, a plea of guilty to, a judicial finding of guilt of, a judicial finding of guilt resulting from a plea of no contest to, *or a judicial finding of eligibility for intervention in lieu of conviction for, violating any municipal, state, county, or federal drug law*[.] (Emphasis added).

Had nurses been categorically ineligible for ILC because they were intended to be included in the R.C. §2929.13(B)(2)(b) definition of a “position of trust” there would have been no reason for the Ohio General Assembly to include in R.C. §4723.28(B) that “eligibility for intervention in lieu of conviction” was grounds for sanctions against a nursing license.

In *Massien*, the Ninth District was persuaded by the incongruity created by the conflicting statutes. The Ninth District stated, “In light of this provision [R.C. §4723.28(B)(1)(5)], we are convinced that legislature intended ILC to apply to offender’s just like *Massien*; that is, medical professionals who have ready access to drugs at their place of employment, who ultimately take and use those drugs, but who would benefit more from treatment for their offense, than being subject to criminal punishment for it.” *Massien*, ¶18.

The State argues reference to ILC in the disciplinary statutes cited by the Ninth District does not indicate the legislature contemplated a situation where the ILC was granted for an offense relating to the “position of trust” held by the medical professional. The State supports this position saying “nurses or other professionals can violate drug laws (or any other law) without breaching their position of trust, e.g. a nurse or any medical professional can manufacture meth in her own home or buy drugs on the street. *Massien*, ¶25. Such activity would not relate to the position of trust held by the nurse and the nurse *would be eligible* for ILC.” Appellant Brief at p. 11. [*Emphasis added*].

Appellee would first point out that anyone charged with the manufacture of meth is categorically ineligible for ILC and faces mandatory prison time. Appellee further submits the legislature created the statutes and, as such, the statutes must be strictly construed against the creator. “[W]here the language of a statute is clear and unambiguous, it is the duty of the court to enforce the statute as written, making neither additions to the statute, nor subtractions therefrom.” *State v. Knoble*, 9th Dist. No. 08CA009359, 2008-Ohio-5004 at ¶12, quoting *Hubbard v. Canton City School Bd. Of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718, at ¶14.

Nowhere in the disciplinary statutes does it say that only a nurse caught manufacturing methamphetamine in her home, snorting cocaine at a party, or buying heroin on the street, shall be

considered for acceptance into ILC. R.C. §4723.28(B). Further, had the legislature intended this result it would have been simple enough to specifically state this in R.C. §4723.28(B).

The State's position has the potential to eviscerate the ILC program in the State of Ohio. It has the potential to reach well beyond nurses to include virtually anyone associated in anyway with the medical field including the lowest of support staff. It could also eliminate from consideration for ILC most of the employed, educated, contributing members of society whose sole criminal act was somehow related to their employment. This has the potential to leave only the unemployed, non-contributing, members of society to avail themselves of this valuable program. This cannot have been the goal the Ohio General Assembly had in mind when creating the ILC program.

Quoting Judge Rogers in *State v. Stanovich*, “[t]hus, intervention reflects the legislature’s determination that ‘it may be more beneficial to the individual and the community as a whole to treat the cause rather than to punish the crime.’” *State v. Stanovich*, 173 Ohio App. 3d 304, 878 N.E.2d 641, 2007-Ohio-4234, citing *State v. Shoaf*(2000), 140 Ohio App.3d 75, 77, 746 N.E.2d 674, citing *State v. Baker* (1998), 131 Ohio App.3d 507, 510, 722 N.E.2d 1080.

The ILC program benefits the general population, in that, individuals that would otherwise be become drains on the public coffers through resulting unemployment, imprisonment, and continued drug addiction - are rehabilitated back - to being productive, law abiding, contributing members of society. Some of the individuals seeking to utilize ILC are highly educated and employed. As such, these individuals are the most motivated to succeed in this program. The State asks us to bar these individuals from ever practicing their profession again. It seems illogical and contradictory that the Ohio General Assembly intended for the ILC program to be foreclosed to these individuals.

CONCLUSION

Appellee submits that “position of trust” in R.C. §2929.13(B)(1)(d) is not meant to apply across the board to anyone whose offense related to their employment. Not all nurses or other medical professionals will be, or should be, granted entry into ILC programs. However, nurses should not be categorically denied access to ILC based on the phrase “position of trust.” The ILC statute grants courts the power and the discretion to deny access based upon an analysis of the facts of the individual’s case. The Ninth District was correct to uphold the decision of the trial court as it did not err in finding Massien eligible for ILC. Accordingly, the State’s Propositions of Law are not well taken. As such, Appellee asks that this Court reject the State’s position and uphold the lower court rulings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of Appellee was forwarded to Assistant Prosecutor Richard S. Kasay via U.S. Mail, at Prosecutor Sherri Bevan Walsh, 53 University Avenue, 6th and 7th Floors, Akron, OH 44308 on this 30th day of October, 2009.



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1.42 Common, technical or particular terms.

Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.

Effective Date: 01-03-1972

1.49 Determining legislative intent.

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

- (A) The object sought to be attained;
- (B) The circumstances under which the statute was enacted;
- (C) The legislative history;
- (D) The common law or former statutory provisions, including laws upon the same or similar subjects;
- (E) The consequences of a particular construction;
- (F) The administrative construction of the statute.

Effective Date: 01-03-1972