

**ORIGINAL**

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :  
Appellee : Case No. 10-0465  
vs. : On Appeal from the Delaware County  
GARY L. ADKINS, : Court of Appeals  
Appellant : Case No 09 CAA 02 0012

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MOTION FOR RECONSIDERATION BY APPELLANT, GARY L. ADKINS

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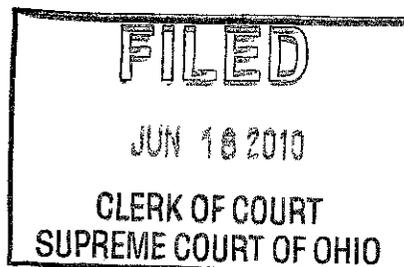


TABLE OF CONTENTS

TABLE OF CONTENTS . . . . .	i.
MOTION FOR RECONSIDERATION . . . . .	1.
MEMORANDUM IN SUPPORT . . . . .	1.
CONCLUSION . . . . .	6.
CERTIFICATE OF SERVICE . . . . .	6

TABLE OF AUTHORITIES

**OHIO CONSTITUTION**

Section 28, Article II, Ohio Constitution . . . . .	4
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**OHIO REVISED CODE:**

R.C. Section 2901.08 . . . . .	1, 2,4,5,
R.C. Section 4511.19(A)(1))(a) . . . . .	1
R.C. Section 1.48 . . . . .	3

**CASES:**

<i>In Re Anderson</i> , 92 Ohio St.3 <sup>rd</sup> 63; 2001 Ohio 131; 748 N.E.2 <sup>nd</sup> 67; 2001 Ohio LEXIS 1541. . . . .	2, 3
<i>Bielat vs. Bielat</i> , 87 Ohio St.3 <sup>rd</sup> 350; 721 N.E.2 <sup>nd</sup> 28 (Ohio 2000) , . . . .	3,4
<i>VanFossen vs. Babcock &amp; Wilcox Co.</i> 36 Ohio St.3 <sup>rd</sup> 100, 106, 107; 522 N.E.2 <sup>nd</sup> 489 . . . . .	4

**RULES:**

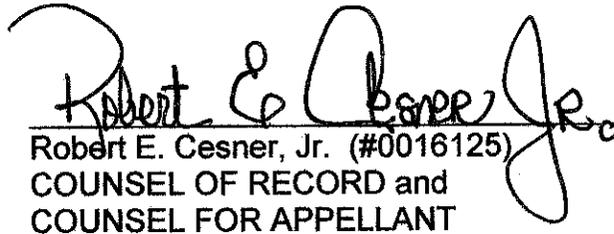
Rule XI, Section 2(A) Supreme Court Practice Rules . . . . .	1
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**REVIEWS:**

<i>Reforming America's Juvenile Injustice System</i> , (1995) 22 Pepperdine L.Rev 907,911 ..	2,3
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MOTION FOR RECONSIDERATION

Now comes the Appellant, Gary L. Adkins, and respectfully moves the Court to reconsider his appeal and Memorandum in Support of Jurisdiction in this case and, upon reconsideration, to accept Appellant's discretionary appeal on the merits.

  
Robert E. Cesner, Jr. (#0016125)  
COUNSEL OF RECORD and  
COUNSEL FOR APPELLANT

MEMORANDUM IN SUPPORT

On March 12, 2010, Appellant perfected his discretionary appeal by filing a timely Notice of Appeal and Memorandum in Support of Jurisdiction.

By Entry filed on June 9, 2010, this Court denied leave to appeal and dismissed the appeal. This Motion for Reconsideration is respectfully filed and submitted in accordance with Rule XI, Section 2(A) of the Supreme Court Practice Rules.

According to information on the Supreme Court's website, three Justices of this Court voted to accept this case on the merits as to Proposition of Law II as set forth in Appellant's Memorandum in Support. Proposition of Law II is as follows:

R.C. 2901.08, effective January 1, 1996, is not retroactive for purposes of classifying a finding in juvenile court that a child is a juvenile traffic offender for purposes of establishing a prior OVI conviction under R.C. 4511.19(A)(1)(a).

This proposition raises two separate and independent issues. The first issue is general in nature and involves the question of whether a legislative enactment is to be applied retroactively when the legislature is silent as to its application. The second issue, which more directly involves the facts in this case, is whether the **consequences** of an adjudication involving a minor child in juvenile court can be retroactively enhanced by judicial interpretation in the absence of any express legislative intent to do so.

On November 20, 1987, Appellant was found to be a juvenile traffic offender in the Delaware County Juvenile Court. A copy of the Judgment Entry is set forth in the attached Appendix, not having previously been submitted to this Court. It was not until seven years thereafter the legislature enacted R.C. 2901.08, which authorized the use of juvenile adjudications which were the equivalent of the criminal offense of OVI to be utilized for the purpose of enhancing a criminal OVI charge to felony OVI. The lower court in this case denied Appellant's Motion to Dismiss upon the basis that, as of January 1, 1996, the effective date of RC 2901.08, the 1987 juvenile court judgment could be counted as a criminal conviction, thereby enhancing the OVI charge against Appellant from a misdemeanor to a felony.

In June of 2001, more than five years after the effective date of R.C. 2901.08, the Supreme Court rendered a Decision in the case of *In re Anderson*, 92 Ohio St.3<sup>rd</sup> 63; 2001 Ohio 131; 748 N.E.2<sup>nd</sup> 67; 2001 Ohio LEXIS 1541. The syllabus set forth in *Anderson* is simply the following:

A juvenile court proceeding is a civil action.

In the majority Opinion, Justice Sweeney provides a history of the juvenile court system and its objectives. Quoting from the Law Review article, *Reforming America's "Juvenile*

*Injustice System*" (1995), 22 Pepperdine L.Rev. 907, 911, Justice Sweeney stated the following:

Because reformers "assumed that the interests of the State, delinquent children, and their families were identical, they eliminated the adversarial atmosphere of criminal courts." *id.* "they replaced the cold, objective standards of criminal procedures with informal procedures. *id.* "A specialized vocabulary was developed. "criminal complaints" gave way to "delinquency petitions". Instead of "trials", "hearing" were held. Juveniles were not given "sentences". They received "dispositions". Juveniles were not "found guilty"; they were "adjudicated delinquent." *id.* at 912.

The *Anderson* case, which sets forth the history and character of juvenile proceedings, forms the basis for a legal proposition that a juvenile court proceeding traditionally, and by its very nature is a civil proceeding. By judicially interpreting R.C. 2901.08 as retroactively encompassing a prior juvenile determination for purposes of enhancing a misdemeanor offense into a felony offense, the child, upon reaching adulthood, is burdened with a substantial negative consequence that did not exist at the time of the juvenile disposition. It would violate the historical mission of the juvenile system to convert a civil disposition imposed upon the child into a basis for charging the child with a felony after he reaches the age of majority.

In *Bielat vs. Bielat*, 87 Ohio St.3<sup>rd</sup> 350, 721 N.E.2<sup>nd</sup> 28 (Ohio 2000), the Supreme Court, in its Opinion, discussed at length the test for unconstitutional retroactivity. However, the *instant* case does not reach the constitutional issue involving retroactivity. In *Bielat*, the Court stated the following:

[6] the test for unconstitutional retroactivity requires the court first to determine whether the General Assembly **expressly** intended the statute to apply retroactively [ citing R.C. 1.48 and cases]. . . . [emphasis supplied].

The Opinion then goes on to state the following:

If so, the Court moves on to the question of whether the statute is substantive, rendering it *unconstitutionally* retroactive, as opposed to merely remedial [case citations]. [Emphasis in Opinion].

The General Assembly did not expressly state that R.C. 2901.08 retroactively included juvenile dispositions which occurred prior to January 1, 1996. The logical application of *Bielat* prohibits a judicial interpretation of retroactivity in the absence an express intention within the statute itself that it should be retroactively applied.

At this time, the lower court has presumptively taken the position that retroactive application is not an issue, upon the basis that Appellant in this case was charged with a felony OVI after the effective date of R.C. 2901.08. This ignores the effect of retroactively enhancing the consequences of a 1987 juvenile disposition in 1995, without the express intent of the General Assembly to create this result. Such a judicial interpretation results in a substantive, rather than a remedial retroactive consequence in the prior juvenile disposition.

R.C. 2901.08 is a substantive statute. A substantive statute is one that “impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or **liabilities as to a past transaction.**” [See *Bielat* Id. at 354, 721 N.E.2<sup>nd</sup> 28; *VanFossen vs. Babcock & Wilcox Co.*, 36 Ohio St.3<sup>rd</sup> 100, 106, 107, 522 N.E.2<sup>nd</sup> 489. A statute that applies retroactively to create a substantive liability violates Section 28, Article II of the Ohio Constitution [See *Bielat*, cited *supra*].

The focus should not be upon the OVI felony statute, but rather on the disposition in Appellant’s juvenile case of November 20, 1987. The constitutional issue thus raised

involves the juvenile case, and the unforeseen consequences of liability imposed upon the Appellant long after the juvenile proceedings have terminated. Not only has the lower court misapplied RC. 2901.08 in the absence of any expressed intent of the General Assembly that this statute should be applied retroactively, but, in addition, the lower court failed to taken into account such interpretation retroactively burdened the child with a consequence in later life that did not exist at the time of the juvenile disposition.

This Court should accept Appellant's appeal on the merits in order to protect the historical integrity of the juvenile justice system.

The decision of the lower courts in this case challenges the integrity of the juvenile justice system by creating a precedent whereby the rights afforded to a child in a *civil* proceeding can be detrimentally modified after the child reaches adulthood, particularly in the absence of any legislative intent to do so. The issue is whether subsequent legislation or judicial decisions can be utilized to diminish the protection which a child is guaranteed in the juvenile justice system. In this case, the substantial activity and strict interpretation regarding enforcement of OVI law as a matter of public policy, has had the regrettable result of compromising the historical philosophy and principles upon which our juvenile justice system is based. Such a precedent opens the door to future consequences which will only serve to diminish the juvenile justice system.

Juvenile courts were historically established to protect and rehabilitate children. These children, their parents and the general public, must have confidence that what happens in juvenile court will stay in juvenile court.

By accepting this case on the merits, the Supreme Court of Ohio can draw boundaries which will protect the basic historical and constitutional integrity of the juvenile justice system, which is quite obviously a matter of great and general public concern.

CONCLUSION

It is respectfully requested Appellant's Motion for Reconsideration be granted, and his appeal be considered on the merits.

  
Robert E. Cesner, Jr. (#0016125)  
COUNSEL OF RECORD and  
COUNSEL FOR APPELLANT

CERTIFICATION OF SERVICE

I hereby certify that a copy of this Motion and Memorandum in Support was sent by ordinary U.S. mail, postage prepaid, to counsel for Appellee, Alison M. Skinner Peters, Delaware County Prosecutor's Office, 140 N. Sandusky St., 3<sup>rd</sup> Floor, Delaware, OH 43015, this 18<sup>th</sup> day of June, 2010.

  
Robert E. Cesner, Jr. (#0016125)  
COUNSEL FOR APPELLANT

EXHIBIT TO  
DEF. REPLY  
MEMO

JUVENILE DIVISION

IN THE MATTER OF:

Gary Adkins	:	Case No. : 14,073	14,077
1461 Golf Course Road	:		14,078
Sunbury, OH 43074	:		14,079
A juvenile traffic offender	:		14,076

JUDGMENT ENTRY - TRAFFIC OFFENSES

Case Numbers 14,073 through 14,079 came on for disposition on November 19, 1987. Present in Court were Gary and Mr. Adkins and John Elliot, Attorney for the defendant.

The Court adjudicates Gary Adkins to be a juvenile traffic offender as a result of a violation of Alcohol Concentration, Fleeing an Officer and Failure to Maintain Assured Distance.

The Court ORDERS:

A period of indefinite probation. The youth shall report to Nancy Nicolosi, Probation Counselor. The first reporting date is to be determined.

Court costs \$120.00, Fines \$110.00, Sheriff Fees \$18.10, Witness Costs \$25.40, for a total of \$273.50 in costs. Restitution to be made on both damaged vehicles before Court Costs and fines paid. One hundred and ten dollars (\$110.00) in fines will be suspended if restitution and other costs paid and probation successfully completed.

EXHIBIT A-2

MICRO-FILMED

Sup Ct A-1 A-18

Gary Adkins

Case No. 14,073 - 14,079

Driver's license is suspended to the date of March 10, 1993 or as later modified.

Review may occur after September 10, 1988.

Youth, and family, are required to participate in an assessment for chemical abuse/dependency and in any treatment recommended by qualified assessor.

Youth will submit to random urinalysis at his expense.

Youth will maintain grades of C or better with no unexcused absences from school or violation of school rules.

Case Numbers 14,073, 14,074, 14,076, 14,078 are dismissed.

  
THOMAS E. LOUDON, JUDGE

DELAWARE COUNTY  
JUVENILE COURT  
251 AVENUE, OHIO

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- PC Gary and Mr. and Mrs. Adkins
- John Elliot, Attorney for Gary
- Steven Laudon, M.S., Central Ohio Counseling, 4100 No. High St. Suite 201, Columbus, OH 4
- Nancy Nicolosi, Probation Counselor
- Stuart M. Berry, M.S.W., L.I.S.W., Director of Court Services

11-20-87

EXHIBIT A-3  
MICRO FILMED

SUPG A-2

A-19