

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

v.

IVA J. BROWNING,

Defendant-Appellant.

Case No. **10-2196**

On Appeal from the Highland
County Court of Appeals
Fourth Appellate District

Court of Appeals
Case No. 09CA36

**MEMORANDUM IN SUPPORT OF JURISDICTION OF AMICUS CURIAE OFFICE
OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF
APPELLANT IVA J. BROWNING**

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FILED
DEC 17 2010
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

Page No.

EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION1

STATEMENT OF THE CASE AND FACTS2

STATEMENT OF INTEREST OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER.....5

PROPOSITION OF LAW6

Under R.C. 2901.05(B), a defendant is entitled to a rebuttable presumption that he or she acted in self-defense when using force against any individual who has unlawfully entered the defendant’s residence. As a result, *Columbus v. Fraley* (1975), 41 Ohio St.2d 173, is limited by R.C. 2901.05(B).

CONCLUSION9

CERTIFICATE OF SERVICE10

EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This Court should accept jurisdiction in the present case because it affords this Court an opportunity to determine the outcome of the collision between R.C. 2901.05(B), Ohio's "castle doctrine," and this Court's holding in *Columbus v. Fraley* (1975), 41 Ohio St.2d 173. Thirty-three years after this Court held that absent the use of excessive force, an individual may not use force to resist a police officer, Ohio's General Assembly amended R.C. 2901.05(B). That statute now entitles a criminal defendant to a rebuttable presumption that he or she acted in self-defense when using force against *any* individual who unlawfully enters the residence or vehicle of the defendant. And R.C. 2901.05(B) contains no exception for the unlawful entry of police officers.

Ohio Revised Code Section 2901.05(B) was enacted in 2008. As a result, the present case appears to be the first to present this Court with an opportunity to examine the impact of Ohio's "castle doctrine" when the individual who has unlawfully entered a residence is a police officer. Finally, by effectively rewriting R.C. 2901.05(B) to contain an exception not in the plain text of the statute, based upon the identity of an unlawful intruder, the court of appeals in the present case usurped the legislative authority of the General Assembly.

STATEMENT OF THE CASE AND FACTS

The Fourth District Court of Appeals recounted the facts in the present case as follows:

Late in the evening on April 24, 2009, someone notified the Highland County Sheriff's Office that a lady was "getting" assaulted with a pair of scissors" at the Hickory Hills campground. Deputy Ronnie Hughes arrived at the scene and met with the alleged victim, Dorothy Ellis. Ellis identified appellant as the perpetrator, but said that she did not want to press charges. Deputy Hughes went to the appellant's camper to speak with her and warn her that if he had to return to the campground that night, someone would be going to jail.

Less than an hour after the first call, the Sheriff's Department received a second call indicating that appellant was driving up and down a campground road and threatening people. When Deputy Hughes returned to the scene, appellant was in her camper. Deputy Hughes told appellant that she was under arrest, but she refused to exit the camper or let him inside. After a short argument, Deputy Hughes called for back-up.

A short time later, Deputy Michael Gaines arrived on the scene. When appellant still refused to come out, the deputies used a crow-bar to open the camper door. Once the door came open, Deputy Hughes attempted to grab appellant's wrist, but she escaped his grasp and ran to a back bedroom and locked the door. After the deputies broke down the bedroom door and attempted to enter the bedroom, appellant threw bleach into their faces and forced them to retreat. Outside, various bystanders brought water to them to wash their eyes. Deputy Hughes eventually subdued and arrested appellant. She was later transferred to the local jail and accused the deputies of sexual assault.

The Highland County Grand Jury returned an indictment charging appellant with two counts of assault on a peace officer. She pled not guilty to both charges and filed a motion to suppress (1) the statements she made to Sheriff's deputies during custodial interrogation, and (2) any evidence of the assault. Appellant argued that the deputies unlawfully entered appellant's camper and, thus, any evidence of the assault should be suppressed.

The trial court partially sustained her motion. The court suppressed a recorded statement, but allowed other statements to be admitted into evidence. Concerning to the suppression of the evidence of the assaults, the court ruled that exigent circumstances justified the forced entry. Moreover, the court concluded that even

if entry was unlawful, appellant “had no right to commit an assault against the Deputies by throwing bleach in their faces and eyes.”

At the November 2009 jury trial, Deputies Hughes and Gaines recounted their version of the events. Dr. Thomas Randall, the emergency physician who treated the deputies, testified about the severity of the pain they experienced and the potential for permanent eye damage. Deputies Rob Music and Erica Engle both testified that during their encounters with appellant, she freely admitted the assaults, but claimed that she acted in self-defense and also stated that she had been sexually assaulted.

Appellant testified in her own defense and explained that she refused to exit the camper because outside a crowd of people were calling her “Bitch. Cunt. ***Slut.” and she was frightened. Further, when the deputies entered the camper, she claimed they tasered her breast and called her a “bitch.” Appellant did admit that she threw the bleach at the deputies, but only after she received a “crushing blow to [her] vaginal” area.

Appellant had requested a self-defense instruction, but after she rested her case the trial court refused to give the request and instruction. Subsequently, the jury returned verdicts finding appellant not guilty of felonious assault, but guilty of the lesser offense of attempted felonious assault against the deputies. The trial court sentenced appellant to serve consecutive four year prison terms for each count. *State v. Browning*, 4th Dist. No. 09CA36, 2010-Ohio-5417, at ¶3-10.

The court of appeals discussed the information presented during the suppression hearing:

In the case sub judice, the trial court found that Deputy Hughes arrived at appellant’s camper, knocked on the door, conversed with her through an open window and informed her that she was under arrest. Appellant, however, refused to exit the camper and refused to allow Deputy Hughes to enter. After Deputy Gaines arrived, appellant again refused to exit or to let the deputies enter. However, our review of the record reveals no evidence to indicate that the officers interacted with appellant outside the camper and that she retreated inside the camper. *Browning*, at ¶14.

Addressing Ms. Browning’s assignment of error based upon the trial court’s partial denial of her motion to suppress, the court of appeals noted that the trial court had held that exigent circumstances justified the warrantless, forced entry into the residence. *Browning*, at ¶16. But

the court of appeals disagreed and held that no exception to the warrant requirement applied, based upon the facts of the present case, and that the forced entry into the residence was unlawful. *Browning*, at ¶16-20. Nevertheless, the court of appeals overruled Ms. Browning's assignment of error regarding her motion to suppress. *Browning*, at ¶23.

Ms. Browning also raised an assignment of error based upon the trial court's refusal to provide the jury with an instruction on self-defense. The court of appeals upheld the trial court's denial, citing *Columbus v. Fraley* (1975), 41 Ohio St.2d 173. *Browning*, at ¶26. The court of appeals explained:

We recognize that appellant testified that one of the deputies tasered her and then she felt something hit her in the vaginal area. However, even if we assume that entry into the camper and appellant's arrest was unlawful, the fact remains that the deputies were attempting to subdue a recalcitrant suspect who chose to scuffle with them. After our review, we find nothing excessive or unnecessary concerning the degree of force applied, and, thus, no abuse of discretion by the trial court in determining that the evidence did not warrant a self-defense instruction. *Browning*, at ¶28.

In overruling Ms. Browning's assignments of error, the court of appeals also stated that "sound public policy requires a suspect to submit to arrest, even if law enforcement authorities have unlawfully entered a home." *Browning*, at ¶21. Following the court of appeals' decision, affirming Ms. Browning's convictions, Ms. Browning filed a timely notice of appeal and memorandum in support of jurisdiction in this Court. The Office of the Ohio Public Defender now files this Memorandum in Support of Jurisdiction as amicus curiae and asks that this Court accept the present case for review.

STATEMENT OF INTEREST
OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER

The Office of the Ohio Public Defender (OPD) is a state agency, designed to represent criminal defendants and to coordinate criminal defense efforts throughout Ohio. The OPD also plays a key role in the promulgation of Ohio statutory law and procedural rules. The primary focus of the OPD is on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. The primary mission of the OPD is to protect the individual rights guaranteed by the state and federal constitutions through exemplary legal representation. In addition, the OPD seeks to promote the proper administration of criminal justice by enhancing the quality of criminal defense representation, educating legal practitioners and the public on important defense issues, and supporting study and research in the criminal justice system.

As amicus curiae, the OPD offers this Court the perspective of experienced practitioners who routinely handle significant criminal cases in the Ohio appellate courts. The OPD has an interest in the present case insofar as it offers an opportunity to examine the repercussions of Ohio's "castle doctrine," codified in R.C. 2901.05(B) in 2008 by 2007 Ohio SB 184, upon this Court's decision in *Columbus v. Fraley* (1975), 41 Ohio St.2d 173. This case also involves a judicial invasion of the role of the legislature by rewriting a statute to include a provision not contained in the plain text of that statute. Accordingly, this case concerns the OPD's enduring interest in protecting the integrity of the justice system and the fair, just, and correct interpretation and application of Ohio's statutes and case law.

PROPOSITION OF LAW

Under R.C. 2901.05(B), a defendant is entitled to a rebuttable presumption that he or she acted in self-defense when using force against any individual who has unlawfully entered the defendant's residence. As a result, *Columbus v. Fraley* (1975), 41 Ohio St.2d 173, is limited by R.C. 2901.05(B).

In *Columbus v. Fraley* (1975), 41 Ohio St.2d 173, this Court stated that:

In the absence of excessive or unnecessary force by an arresting officer, a private citizen may not use force to resist arrest by one he knows, or has good reason to believe, is an authorized police officer engaged in the performance of his duties, whether or not the arrest is illegal under the circumstances. *Fraley*, at paragraph three of the syllabus.

The fact that *Fraley* did not involve an unlawful entrance into a residence by police officers is an important distinction in the present case. *Fraley*, at 175. More important is the fact that thirty-three years after this Court's decision in *Fraley*, Ohio's General Assembly amended R.C. 2901.05 to include the "castle doctrine." Ohio Revised Code Section 2901.05 now states in pertinent part:

(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

(B)(1) Subject to division (B)(2) of this section, a person is presumed to have acted in self-defense or defense of another when using defensive force that is intended or likely to cause death or great bodily harm to another if the person against whom the defensive force is used is in the process of unlawfully and without privilege to do so entering, or has unlawfully and without privilege to do so entered, the residence or vehicle occupied by the person using the defensive force.

(2)(a) The presumption set forth in division (B)(1) of this section does not apply if the person against whom the defensive force is used has a right to be in, or is a lawful resident of, the residence or vehicle.

(b) The presumption set forth in division (B)(1) of this section does not apply if the person who uses the defensive force uses it while in a residence or vehicle and the person is unlawfully, and without privilege to be, in that residence or vehicle.

(3) The presumption set forth in division (B)(1) of this section is a rebuttable presumption and may be rebutted by a preponderance of the evidence.

Under R.C. 2901.05(A), the burden of proof regarding an affirmative defense, such as self-defense, is on the accused. But 2901.05(B) is an exception to that rule. A person is *presumed* to have acted in self-defense, and is entitled to a jury instruction explaining that presumption, when using force against individuals who have unlawfully entered that person's residence. And the burden shifts to the State to rebut the presumption of self-defense, by a preponderance of the evidence. R.C. 2905.01(B)(3).

The court of appeals in the present case held that the police entry into Ms. Browning's residence was unlawful. *Browning*, at ¶16-20. As a result, she was entitled to an instruction explaining the rebuttable presumption that she had acted in self-defense under R.C. 2901.05(B). The plain language of that statute mandates that result, as it contains no exceptions based upon the identity of the unlawful intruder.

The court of appeals' misplaced reliance upon *Fraley* is echoed in the additional cases cited in support of its position. Each of those cases either predates the adoption of R.C. 2901.05(B) or is factually distinguishable. *Middleburg Heights v. Theiss*, (1985), 28 Ohio app.3d 1; *State v. Trammel* (January 22, 1999), Montgomery App. No. 17196 (predating *Fraley* and not involving unlawful entry into a residence). *State v. McCoy*, 2nd Dist. No. 22479, 2008-Ohio-5648 was issued fifty-two days after R.C. 2901.05(B) became effective. But *McCoy* also relied upon *Theiss*, a case that predates R.C. 2901.05(B) by twenty-three years. *McCoy*, at ¶18-19. And *McCoy* failed to address the significance of R.C. 2901.05(B). Finally, *McCoy* did not involve

unlawful police entry into a residence, but rather a police officer who did not intend to enter the residence without a warrant or consent, and who was pushed by an individual on a front porch. *McCoy*, at ¶2-4. As a result, the court of appeals' reliance upon those cases cannot overcome the impact of R.C. 2901.05(B) upon this Court's holding in *Fraley*.

Statutory Text, Public Policy, and the Roles of the Legislature and the Judiciary.

The court of appeals incorrectly placed the burden of proof regarding the issue of self-defense upon Ms. Browning. In doing so, the court of appeals relied upon public policy considerations, stating that “sound public policy requires a suspect to submit to arrest, even if law enforcement authorities have unlawfully entered a home.” *Browning*, at ¶21. But as explained above, R.C. 2901.05(B) contains no exception based upon the identity of the unlawful intruder. Furthermore, the public policy concerns expressed by the court of appeals are protected by the State's ability to rebut the presumption that Ms. Browning was acting in self-defense. Ohio Revised Code Section 2901.05(B) does not provide an absolute right to use force against unlawful intruders, and the State may rebut the presumption with a showing, by a preponderance of the evidence, that self-defense was not warranted. In the present case, the court of appeals rewrote R.C. 2901.05(B) to include an exception that its plain text does not contain.

This Court has held that a court's preeminent concern in construing a statute is the legislative intent in enacting that statute. *State v. Johnson*, 116 Ohio St.3d 541, 2008-Ohio-69, ¶15, citing *State ex rel. Van Dyke v. Pub. Emp. Retirement Bd.*, 99 Ohio St.3d 430, 2003-Ohio-4123, ¶27. And this Court has also held that a court shall apply an unambiguous statute in a manner consistent with the plain meaning of the statutory language and may not add or delete words. *Johnson*, at ¶27, citing *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 2006-Ohio-954, ¶52.

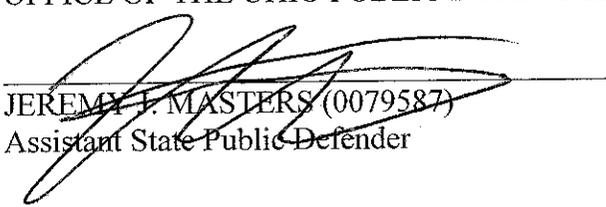
Furthermore, this Court has stated that it cannot, through a court rule, alter the General Assembly's policy preferences on matters of substantive law. *Erwin v. Bryan*, 125 Ohio St.3d 519, 2010-Ohio-2202, ¶30. And a court cannot invade the province of the legislature, and violate the separation of powers, by rewriting a statute to include a provision not contained in the text of that statute. *Pratte v. Stewart*, 125 Ohio St.3d 473, 2010-Ohio-1860 (refusing to judicially rewrite statute to include a tolling provision not present in the text of R.C. 2305.111). "[T]his Court will not engage in such a practice and must leave it to the General Assembly to rewrite the statute if it deems it necessary." *Pratte*, at ¶54. If the General Assembly determines that R.C. 2901.05(B) should contain an exception based upon the identity of the unlawful intruder, it is free to rewrite that statute. However, in the present case, as the statute was written at the time of the unlawful intrusion into her residence, Ms. Browning was entitled to a rebuttable presumption that she was acting in self-defense.

CONCLUSION

Ohio Revised Code Section 2901.05(B) contains no exception based upon the identity of an unlawful intruder. The court of appeals in the present case essentially rewrote that statute to deprive Ms. Browning of the rebuttable presumption of self-defense contained in R.C. 2901.05(B). This Court should accept jurisdiction in this case to address the impact of R.C. 2901.05(B) upon its holding in *Columbus v. Fraley* (1975), 41 Ohio St.2d 173.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER

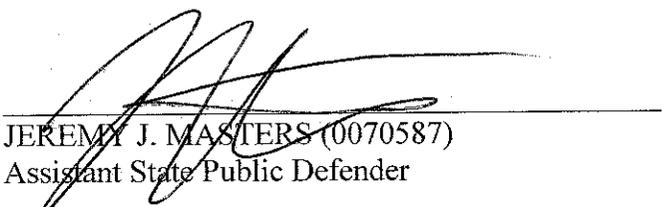

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **MEMORANDUM IN SUPPORT OF JURISDICTION OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLANT IVA J. BROWNING** was forwarded by regular U.S. Mail, postage prepaid to James B. Grandy, Highland County Prosecuting Attorney, Highland County Prosecutor's Office, 112 Governor Foraker Place, Hillsboro, Ohio 45133; Susan M. Zurface Daniels, 225 North West Street, P. O. Box 589, Hillsboro, Ohio 45133; and Iva J. Browning, #W076861, Ohio Reformatory for Women, 1479 Collins Avenue, Marysville, Ohio 43040, on the 17 day of December, 2010.



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