

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

v.

LESLIE L. NICKEL,

Defendant-Appellant.

: Case No. 10-2134
:
: On Appeal from the Ottawa
: County Court of Appeals,
: Sixth Appellate District
:
: C.A. Case No. OT-10-004
:
:

APPELLANT'S MOTION TO REMAND

OFFICE OF THE OHIO PUBLIC DEFENDER

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STATE OF OHIO,	:	Case No. 10-2134
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Plaintiff-Appellee,	:	On Appeal from the Ottawa
	:	County Court of Appeals,
v.	:	Sixth Appellate District
	:	
LESLIE L. NICKEL,	:	C.A. Case No. OT-10-004
	:	
Defendant-Appellant.	:	

APPELLANT'S MOTION TO REMAND

Appellant Leslie L. Nickel asks this Court to remand this case to the court of appeals for application of this Court's decision in *State v. Johnson*, __ Ohio St.3d __, 2010-Ohio-5510. A memorandum in support of this motion is attached.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

On January 3, 2011, this Court issued its decision in *State v. Johnson*, __ Ohio St.3d __, 2010-Ohio-5510. That decision effectively overruled this Court's previous ruling in *State v. Rance* (1999), 85 Ohio St.3d 632. In *Johnson*, this Court held:

Given the purpose and language of R.C. 2941.25, and based on the ongoing problems created by *Rance*, we hereby overrule *Rance* to the extent that it calls for a comparison of statutory elements solely in the abstract under R.C. 2941.25. When determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered.

Johnson at ¶44.

Mr. Nickel's case presents the same question that this Court addressed in *Johnson*.

Additionally, the court of appeals' analysis relied heavily on *Rance*.

In *State v. Rance* (1999), 85 Ohio St.3d 632, 1999 Ohio 291, 710 N.E.2d 699, paragraph one of the syllabus, the Ohio Supreme Court held, "Under an R.C. 2941.25(A) analysis, the statutorily defined elements of offenses that are claimed to be of similar import are compared *in the abstract*." (Emphasis sic.) In so holding, the court considered whether to "contrast the statutory elements in the abstract or consider the particular facts of the case" and found that "comparison of the statutory elements in the abstract is the more functional test, producing 'clear legal lines capable of application in particular cases.'" Id. at 636, quoting *Kumho Tire Co., Ltd. v. Carmichael* (1999), 526 U.S. 137, 148, 119 S.Ct. 1167, 143 L.Ed.2d 238.

In *State v. Cabrales*, 118 Ohio St.3d 54, 2008 Ohio 1625, 886 N.E.2d 181, the court clarified that *Rance* had never required an exact alignment of statutory elements for the compared offenses to be considered allied under R.C. 2941.25(A). Rejecting such a "strict textual comparison" of statutory elements, the court held:

In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact

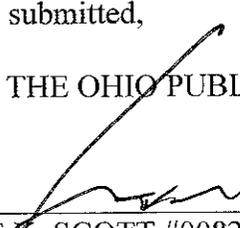
alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import." Id. at paragraph one of the syllabus.

State v. Nickel, Ottawa App. No. OT-10-004, 2010-Ohio-5510 at ¶14.

For the reasons stated above, Mr. Nickel ask that this Court remand this case to the court of appeals for application of this Court's decision in *Johnson*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **APPELLANT'S MOTION TO REMAND** was forwarded by regular U.S. Mail this 13th day of January, 2011, to the office of Mark E. Mulligan, Ottawa County Prosecutor, Ottawa County Courthouse, 2nd Floor, 315 Madison St., Port Clinton, Ohio 43452.



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