

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	CASE NO. 11-1882
	:	
Plaintiff-Appellee,	:	On Appeal from the Guernsey
	:	County Court of Appeals
v.	:	Fifth Appellate District
	:	
CLARENCE D. ROBERTS,	:	
	:	Court of Appeals
Defendant-Appellant.	:	Case No. 10 CA 47

MEMORANDUM IN OPPOSITION OF JURISDICTION
OF PLAINTIFF-APPELLEE, THE STATE OF OHIO

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**EXPLANATION OF WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST
AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION**

Defendant-Appellant, Clarence D. (Skip) Roberts, (hereinafter, "Appellant") challenges the ruling of the Fifth District Court of Appeals holding that ORC 2933.82 should not be applied retroactively. The Ohio Constitution and Ohio law are clear with regard to the retroactive application of laws.

ORC 2933.82, as effective on July 6, 2010 was not clearly intended to be retroactive in its application; therefore, this Court should not accept jurisdiction in this case as it is not of great interest and does not involve a substantial Constitutional question.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

In September 1997, Appellant was convicted of Aggravated Murder and Aggravated Robbery by a jury of his peers in the Guernsey County Court of Common Pleas. He was sentenced to a term of life imprisonment. Appellant filed a direct appeal and the judgment of the Trial Court was affirmed.

Since that time, Appellant has filed numerous motions and appeals with the Trial Court, the Court of Appeals, and this Court.

On September 30, 2010, Appellant filed a Motion to Order Preservation and Listing of Evidence in the Guernsey County Court of Common Pleas. The stated basis of Appellant's request was ORC 2933.82. By Entry dated November 30, 2010, the Trial Court denied Appellant's Motion.

Appellant filed a timely Notice of Appeal. By a decision and Entry dated September 22, 2011, the Fifth District Court of Appeals affirmed the decision of the Trial Court.

Appellant filed a timely Notice of Appeal to this Court.

ARGUMENT IN OPPOSITION TO PROPOSITION OF LAW

The obligations to preserve and catalog criminal offense-related biological evidence, imposed upon certain government entities by ORC 2933.82, do not apply to evidence in the possession of those entities from cases closed at the time of the statute's effective date.

On July 6, 2010, ORC 2933.82 went into effect, laying out specific requirements for the preservation of biological evidence in criminal cases in the State of Ohio. Appellant argues that it should apply retroactively to any evidence from his 1997 criminal case.

Article II, Section 28 of the Ohio Constitution provides, "The general assembly shall have no power to pass retroactive laws[.]" ORC 1.48 further provides, "A statute is presumed to be prospective in its operation unless expressly made retrospective." (Emphasis added.)

This principle has been affirmed by the courts of Ohio, including this Court.

Section 28, Article II of the Ohio Constitution prohibits the General Assembly from passing retroactive laws that, when applied, act to impair vested rights. *Vogel v. Wells* (1991), 57 Ohio St. 3d 91, 99. A statutory enactment is repugnant to Section 28, Article II if it is expressly retroactive and is substantive, as opposed to merely remedial. *Cincinnati School Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Revision* (2001), 91 Ohio St. 3d 308, 315-16; *Bielat v. Bielat* (2000), 87 Ohio St. 3d 350, 352-53. We have established in a line of cases dating as far back as *Kiser v. Coleman* (1986), 28 Ohio St. 3d 259, and recently in *Rubbermaid, Inc. v. Wayne Cty. Aud.*, 95 Ohio St. 3d 358, an analysis that a court should follow to determine whether a law is unconstitutionally retroactive.

In *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St. 3d 100, paragraphs one and two of the syllabus, we set forth a two-step analysis. Step one requires an initial determination of legislative intent. Intent is determined by construing, then applying, R.C. 1.48. R.C. 1.48 provides, "A statute is presumed to be prospective in its operation unless expressly made retrospective." The *Van Fossen* court held that R.C. 1.48 establishes a threshold analysis that must be undertaken prior to any inquiry under Section 28, Article II of the Ohio Constitution. *Van Fossen*, 36 Ohio St. 3d 100, paragraph one of the syllabus. Inquiry into whether a statute may be constitutionally applied retrospectively continues only after an initial finding that the General Assembly expressly intended that the statute be applied retrospectively. *Id.*, paragraph two of the syllabus. See, also, *Bielat*, 87 Ohio St. 3d at 353, and *State ex rel. Kilbane v. Indus. Comm.* (2001), 91 Ohio St. 2d 258, 259. Thus, ***absent a clear pronouncement by the General Assembly that a statute is to be applied retrospectively, a statute may be applied prospectively only.*** R.C. 1.48.

State v. Lasalle (2002), 96 Ohio St. 3d 178, 180-81. (Emphasis added.)

A court is required only to examine a statute to determine the *express* intent of the General Assembly in drafting a statute, and is not permitted to resort to other methods of interpretation. *Hobler v. Motorists Mut. Ins. Co.* (1995), 105 Ohio App. 3d 629, 632 (3d Dist.) Only clear and unambiguous indications are permitted to pass the statutory hurdle imposed by ORC 1.48. *Id.* A statute that does not clearly proclaim its own retroactivity will not overcome the presumption of prospective application. *State v. Consilio* (2007), 114, Ohio St. 3d 295, 299. A court is not permitted to make inferences about retroactivity. *Id.*, citing *Kelley v. State* (1916), 94 Ohio St. 331. Further, it is presumed that the General Assembly is cognizant of the fact that it must include expressly retroactive language to create the desired effect. *Consilio*, 114 Ohio St. 3d at 299. It should also be noted that the General Assembly has, in the past, included such express language to establish retroactivity. *Id.*

On occasion, Ohio Courts have upheld the retroactivity of a statute. For example, a 2006 amendment to ORC 2901.07 was upheld because it contained the following, express language in the statute itself and in the section notes containing the purpose of the amendment:

1. "Regardless of when the conviction occurred or when the guilty plea was entered."
2. "[I]t is the General Assembly's intent that, under that section as it existed prior to the effective date of this act," offenders would be subject to DNA collection regardless of the date of the conviction or the guilty plea.

State v. Hawkins, 2006 Ohio 6044, P10 (1st Dist.).

Appellant cites two key passages in support of his argument. First, section (B)(2), which clearly sets out the evidence to which the law applies. It states, in its entirety:

This section applies to evidence likely to contain biological material that was in the possession of any governmental evidence-retention entity during the investigation and prosecution of a criminal case or delinquent child case involving a violation of section 2903.01, 2903.02, or 2903.03, a violation of section 2903.04 or 2903.06 that is a felony of the first or second degree, a violation of section 2907.02 or 2907.03 or of division (A)(4) or (B) of section 2907.05 of the Revised

Code, or an attempt to commit a violation of section 2907.02 of the Revised Code.

Appellant was convicted of Aggravated Murder in violation of ORC 2903.01. He now argues that the use of the word "was" in section (B)(2) indicates that the General Assembly intended the law to be retroactive in its application. However, the section also only refers to the investigation and prosecution of cases and does not make reference to evidence from closed cases.

Appellant next argues that section (C)(1)(b) makes the law retroactive. However, it is important to read the section in the context in which it was written:

(C)(1) The preservation of biological evidence task force established within the bureau of criminal identification and investigation under section 109.561 of the Revised Code shall establish a system regarding the proper preservation of biological evidence in this state. In establishing the system, the task force shall do all of the following:

(a) Devise standards regarding the proper collection, retention, and cataloguing of biological evidence for ongoing investigations and prosecutions;

(b) Recommend practices, protocols, and resources for the cataloguing and accessibility of preserved biological evidence already in the possession of governmental evidence-retention entities.

In reading section (C)(1) in its entirety, it is clear that the General Assembly was making a distinction between evidence in future cases in subsection (a) and evidence from prior cases in subsection (b). It is also notable that the duty of the task force was expressed differently with regard to the different types of evidence. In subsection (a), it appears that the task force was to develop standards for evidence retained in future cases in compliance with this law. The aim of subsection (b) is to develop a plan for any evidence still in the possession of law enforcement from prior cases.

Appellant argues that an affirmation of the Fifth District's opinion will essentially strip all felons convicted prior to July 6, 2010, of any chance they might have to exonerate themselves. This is not the case. Appellant cites the case of Donte Booker in support of this argument; however, Mr. Booker's exoneration was prior to the enactment of ORC 2933.82, and he achieved that end without the benefit now sought by Appellant.

Appellant is attempting to incite fear in this Court's mind while wholly ignoring a long-settled area of Ohio law. It is important to keep in mind that, by presumption established by an explicit statute, Ohio laws are presumed to be prospective in nature unless they contain an express provision otherwise. Ohio courts have interpreted this to mean that no inferences should be made with respect to a law's retroactivity. In fact, the intent for retroactive application must be stated in clear, unambiguous terms.

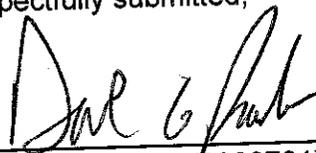
The simple fact in this case is that ORC 2933.82 does not contain any express term that makes the law retroactive in nature. In fact, one of the subsections cited by Appellant in support of his argument, applies only insofar as directing a task force to make a recommendation. The law as written does not "clearly proclaim its retroactivity" as required by law. *See Consilio, supra.*

The Fifth District Court of Appeals correctly applied this Court's line of cases on the issue of statutory retroactivity. Appellant has not demonstrated that ORC 2933.82 clearly expresses a retroactive application; therefore, he is not entitled to the standards of a law passed more than a decade after his conviction.

CONCLUSION

Based on the arguments contained herein, it is clear that Appellant's argument must fail upon an analysis of this Court's holding on retroactivity. Therefore, this case is not one of great public or general interest. The State of Ohio respectfully requests that this Court not disturb the ruling of the Fifth District Court of Appeals and further requests that this Court decline jurisdiction in this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

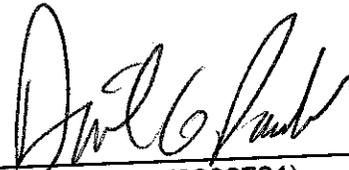
The undersigned hereby certifies that he served a true copy of the foregoing Memorandum in Opposition of Jurisdiction by regular U.S. Mail, postage prepaid, this 21st day of November, 2011, upon the following:

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