

ORIGINAL

IN THE SUPREME COURT OF OHIO

12-2136

STATE OF OHIO,
Appellee,

vs.

LUCIOUS TAYLOR,
Appellant,

On Appeal from the
Summit County Court of Appeals,
Ninth Appellate District

Court of Appeals
Case No.: CA-26279

NOTICE OF CERTIFIED CONFLICT, S.C.T.R. IV
BY APPELLANT, LUCIOUS TAYLOR

Neil P. Agarwal, Esq.
(0065921)
Attorney for Appellant Lucious Taylor
3766 Fishcreek Rd., #289
Stow, Ohio 44224-4379
(330) 554-7700 Phone
(330) 688-2268 Fax
Neil@AgarwalLaw.com

Richard S. Kasay, Esq.
(0013952)
Attorney for Appellee State of Ohio
53 University Ave.
Akron, Ohio 44308
(330) 643-7459 Phone
(330) 643-2137 Fax

RECEIVED
DEC 20 2012
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
DEC 20 2012
CLERK OF COURT
SUPREME COURT OF OHIO

Notice of Certified Conflict by Appellant, Lucious Taylor

Appellant, Lucious Taylor, hereby give notice, pursuant to S. Ct. R. IV, §3(B)(4), of a certified conflict to the Supreme Court of Ohio from the judgment of the Summit County Court of Appeals, Ninth Appellate District. The December 17, 2012 Journal Entry certifying the conflict is attached and marked as Exhibit 1. The Ninth District Court's opinion in *State v. Taylor*, 9th Dist. No. 26279, 2012-Ohio-5403, decided November 21, 2012, is attached and marked as Exhibit 2.

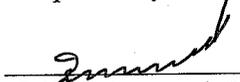
The cases in conflict are *State v. Gillespie*, 5th Dist. No. 2012-CA-6, 2012-Ohio-3485, decided July 30, 2012, and is attached and marked as Exhibit 3; and *State v. David*, 5th Dist. No. 11-CA-110, 2012-Ohio-3984 decided August 28, 2012, and is attached and marked as Exhibit 4.

Pursuant to Art. IV, §3(B)(4) of the Ohio Constitution, the Ninth Appellate District has certified a conflict as to the following issue:

May a defendant benefit from a decrease in a classification and penalty of an offense by the General Assembly that becomes effective between the time that the defendant committed the offense and the time of his sentencing on that offense.

Wherefore, Appellant respectfully requests this Court to determine that a conflict exists, and order briefing in this matter to resolve said conflict.

Respectfully Submitted,

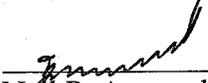


Neil P. Agarwal, Esq. (0065921)
Attorney for Appellant
3766 Fishcreek Rd., #289
Stow, Ohio 44224-4379
(330) 554-7700 Phone
(330) 688-2268 Fax
Neil@AgarwalLaw.com

CERTIFICATE OF SERVICE

I, Neil P. Agarwal, Attorney-At-Law, certify that a true and correct copy of the foregoing was sent by First Class United States Mail to Appellee's attorney, Richard S. Kasay, Esq. at the Summit County Prosecutor's Office, 53 University Ave., Akron, Ohio 44308, on December 19, 2012.

Respectfully Submitted,



Neil P. Agarwal, Esq. (0065921)
Attorney for Appellant
3766 Fishcreek Rd., #289
Stow, Ohio 44224-4379
(330) 554-7700 Phone
(330) 688-2268 Fax
Neil@AgarwalLaw.com

COURT OF APPEALS
DANIEL L. HARRIS

STATE OF OHIO)
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
ss: 2012 DEC 17 AM 9:40

SUMMIT COUNTY
CLERK OF COURTS

STATE OF OHIO

C.A. No. 26279

Appellant

v.

LUCIOUS TAYLOR

JOURNAL ENTRY

Appellee

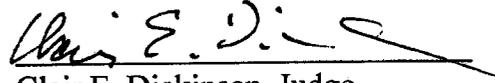
Mr. Taylor has moved this Court to certify a conflict between its judgment in this case and the judgments of the Fifth District Court of Appeals in *State v. Gillespie*, 5th Dist. No. 2012-CA-6, 2012-Ohio-3485 and *State v. David*, 5th Dist. No. 11-CA-110, 2012-Ohio-3984. The State has not responded in opposition.

Section 3(B)(4) of Article IV of the Ohio Constitution provides that, whenever the judges of a court of appeals determine that a judgment upon which they have agreed conflicts with a judgment of another court of appeals, they shall certify that conflict to the Ohio Supreme Court. When certifying a conflict, an appellate court must: 1) determine that its judgment is in conflict with a judgment of another court of appeals on the same question; 2) determine that the conflict is on a rule of law, not on the facts of the cases; and 3) clearly set forth in its opinion or its journal entry the rule of law believed to be in conflict with that of another district. *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St. 3d 594, 596 (1993).

Mr. Taylor has argued that this Court's decision conflicts with those of the Fifth District regarding whether "a defendant [may] benefit from a decrease in a classification and penalty of an offense by the General Assembly [that becomes effective] between the time the defendant committed the offense and the time of his sentencing on that offense[.]" Each of the cited cases presented a question about the effect of the 2011 amendment to Section 2913.02 of the Ohio Revised Code, which decreased the offense level for theft of property valued between \$500 and \$999 from a fifth-degree felony to a first-degree misdemeanor. In each case, the Court was asked to determine whether a defendant who had committed the crime before the amendment took effect, but was not sentenced until after the effective date, should receive the benefit of the decrease in both punishment and offense level.

In this case, this Court held that the General Assembly intended to give defendants who had committed crimes, but had not yet been sentenced at the time of enactment, the benefit of the decreased penalty without giving them the benefit of the decreased offense level. *State v. Taylor*, 9th Dist. No. 26279, 2012-Ohio-5403, ¶ 7. Thus, we held that "the trial court should have convicted Mr. Taylor of a fifth-degree felony according to Section 2913.02 as codified at the time of the offense," but also "correctly sentenced [him] within the first-degree misdemeanor guidelines as dictated by the version of Section 2913.02 in effect at the time of the sentencing hearing." *Id.* at ¶ 8. In contrast, the Fifth District has held that the General Assembly intended for a defendant in Mr. Taylor's position to receive the benefit of the decreased penalty, which it defined as "a misdemeanor offense with a misdemeanor sentence not a felony

offense with a misdemeanor sentence.” *State v. Gillespie*, 5th Dist. No. 2012-CA-6, 2012-Ohio-3485, ¶ 15. Mr. Taylor has demonstrated that a conflict exists between the districts on this rule of law. Accordingly, his motion to certify a conflict is granted.


Clair E. Dickinson, Judge

Concur:
Whitmore, P.J.
Belfance, J.

Slip Copy, 2012 WL 5872747 (Ohio App. 9 Dist.), 2012 -Ohio- 5403
(Cite as: 2012 WL 5872747 (Ohio App. 9 Dist.))

CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio,
Ninth District, Summit County.
STATE of Ohio, Appellant
v.
Lucious TAYLOR, Appellee.

No. 26279.
Decided Nov. 21, 2012.

Appeal from Judgment Entered in the Court of
Common Pleas, County of Summit, Ohio, Case No.
CR 11 07 2033.

Sherri Bevan Walsh, Prosecuting Attorney, and
Richard S. Kasay, Assistant Prosecuting Attorney,
for appellant.

Candace Kim-Knox, Attorney at Law, for appellee.

DICKINSON, Judge.

INTRODUCTION

*1 ¶ 1 After he was caught stealing \$550 worth of cologne from a Sears store, Lucious Taylor pleaded no contest to theft. Although the State had charged him with felony theft under the law as it was codified at the time of the offense, the trial court convicted Mr. Taylor of a first-degree misdemeanor because it applied the new version of the statute that had become effective before Mr. Taylor was sentenced. The State has appealed the ruling that led to the misdemeanor conviction, arguing that the old version of the statute applies to Mr. Taylor, although he should receive the benefit of the reduction in penalty that became effective before he was sentenced. This Court sustains the State's assignment of error and reverses the trial court's decision, although that reversal does not affect Mr. Taylor's misdemeanor conviction. *See* R.C.

2945.67(A).

BACKGROUND

¶ 2 The grand jury indicted Mr. Taylor for a felony theft offense in violation of Section 2913.02(A) of the Ohio Revised Code. The offense occurred on July 23, 2011, but Mr. Taylor was not convicted and sentenced until December 19, 2011, after the General Assembly had amended the theft statute to reduce the classification of a theft of \$550 worth of property from a felony to a misdemeanor. In December 2011, the trial court applied the amended version of Section 2913.02 and convicted Mr. Taylor of a first-degree misdemeanor rather than a felony. It sentenced him to serve two years of probation.

¶ 3 The State sought leave to appeal the substantive legal ruling that led to Mr. Taylor's misdemeanor conviction, but acknowledged that, due to the application of Section 2945.67(A), the appeal will not affect Mr. Taylor. This Court granted the State leave to appeal that limited issue.

APPLICATION OF THE AMENDMENTS

¶ 4 The State has noted that the General Assembly amended Section 2913.02 of the Ohio Revised Code to decrease the penalty and offense level for a theft of property valued between \$500 and \$999 from a fifth-degree felony to a first-degree misdemeanor. Am. Sub. H.B. No. 86, 2011 Ohio Laws 29. The State's assignment of error is that the trial court incorrectly convicted Mr. Taylor of a misdemeanor rather than a felony as required by the version of the statute in effect on the date of the offense. The State has argued that, although Mr. Taylor should have received the benefit of the decreased potential penalty that the amendments instituted, he was not entitled to a misdemeanor conviction because the amended version of the statute does not apply to defendants who committed the crime before the amendments' effective date.

¶ 5 "A statute is presumed to be prospective

Slip Copy, 2012 WL 5872747 (Ohio App. 9 Dist.), 2012 -Ohio- 5403
 (Cite as: 2012 WL 5872747 (Ohio App. 9 Dist.))

in its operation unless expressly made retrospective.” R.C. 1.48. “Thus, a statute may not be applied retroactively unless the court finds a ‘clearly expressed legislative intent’ that the statute so apply.” *State v. Williams*, 103 Ohio St.3d 112, 2004-Ohio-4747, ¶ 8 (quoting *State v. Cook*, 83 Ohio St.3d 404, 410 (1998)), superseded by statute on other grounds as stated in *State v. White*, 132 Ohio St.3d 344, 2012-Ohio-2583. “Legislation violates the Ex Post Facto Clause if it makes a previously innocent act criminal, increases the punishment for a crime after its commission, or deprives the accused of a defense available at the time the crime was committed.” *State v. Rush*, 83 Ohio St.3d 53, 59 (1998). On the other hand, as a general rule of statutory construction, “[i]f the penalty, forfeiture, or punishment for any offense is reduced by ... amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended.” R.C. 1.58(B). Therefore, although retroactive application of a statute increasing penalties for conduct previously committed will raise ex post facto concerns, a defendant who has committed a crime, but has not yet been sentenced, will generally receive the benefit of any decrease in penalty. *But see State v. Rush*, 83 Ohio St.3d 53, paragraph two of the syllabus (1998) (holding General Assembly may avoid the application of Section 1.58(B) by expressly stating that intent).

*2 {¶ 6} “[T]he General Assembly is lodged with the power to define, classify and prescribe punishment for crimes committed within the state.” *State v. Rush*, 83 Ohio St.3d 53, 57 (1998) (quoting *State v. Young*, 62 Ohio St.2d 370, 392 (1980)). When the General Assembly adopted the amendments to Section 2913.02 in 2011 House Bill 86, it addressed the issue of applicability. “The amendments to section[] ... 2913.02 ... that are made in this act apply to a person who commits an offense specified or penalized under [Section 2913.02] on or after the effective date of this section and to a person to whom division (B) of section 1.58 of the Revised Code makes the amendments applicable.”

Am. Sub. H.B. No. 86, Section 4, 2011 Ohio Laws 29. Mr. Taylor is not “a person who commit[ted] an offense ... on or after the effective date” of House Bill 86. *Id.* Therefore, the new version of Section 2913.02 applies to him only if he is “a person to whom division (B) of section 1.58 of the Revised Code makes the amendments applicable.” *Id.*

{¶ 7} The General Assembly decreased the potential penalty for the crime after Mr. Taylor committed the theft, but before he was convicted and sentenced. Under Section 1.58(B), a defendant in Mr. Taylor's position is entitled to benefit from the decreased penalty enacted by the General Assembly while the case was pending against him, but nothing in that section provides that he is entitled to benefit from any decrease in classification of the crime. *State v. Saplak*, 8th Dist. No. 97825, 2012-Ohio-4281, ¶ 13. The General Assembly did not make the amendments to Section 2913.02 retroactive. It merely emphasized its legislative intent to apply Section 1.58(B) to give defendants who had committed crimes, but had not yet been sentenced at the time of the enactment, the benefit of the decreased penalties.

{¶ 8} Thus, the trial court should have convicted Mr. Taylor of a fifth-degree felony according to Section 2913.02 as codified at the time of the offense. On the other hand, under Section 1.58(B), the trial court correctly sentenced Mr. Taylor within the first-degree misdemeanor guidelines as dictated by the version of Section 2913.02 in effect at the time of the sentencing hearing. The State's assignment of error is sustained. For these reasons, the trial court's substantive legal decision to apply the version of Section 2913.02 that was effective at the time of sentencing to convict Mr. Taylor of a misdemeanor is reversed. The reversal of that decision does not affect the judgment of the trial court, however, because Mr. Taylor's conviction was not at issue in this appeal. R.C. 2945.67(A); *State ex rel. Sawyer v. O'Connor*, 54 Ohio St.2d 380, 382-83 (1978).

CONCLUSION

Slip Copy, 2012 WL 5872747 (Ohio App. 9 Dist.), 2012 -Ohio- 5403
 (Cite as: 2012 WL 5872747 (Ohio App. 9 Dist.))

{¶ 9} The State's assignment of error is sustained because the trial court incorrectly convicted Mr. Taylor of a misdemeanor by applying the amendments to Section 2913.02 that did not become effective until after the date of the offense. Under Section 1.58(B) of the Ohio Revised Code, the trial court correctly gave Mr. Taylor the benefit of the decreased penalty the General Assembly instituted between the date of the offense and the date of the sentencing, but it incorrectly convicted Mr. Taylor of a misdemeanor rather than a felony. The decision of the trial court is reversed on the limited issue of retroactive application of the amended statute, but the reversal does not affect Mr. Taylor. He remains convicted of a first-degree misdemeanor. See R.C. 2945.67(A).

*3 So ordered.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

WHITMORE, P.J., concurs.

BELFANCE, J., dissenting.

{¶ 10} I respectfully dissent, as I would conclude that the trial court did not err in concluding that the amendments to R.C. 2913.02 applied to Mr. Taylor.

The amendments to section[] * * * 2913.02 * * * of the Revised Code that are made in this act apply to a person who commits an offense specified or penalized under those sections on or after the effective date of this section *and* to a person to whom division (B) of section 1.58 of the Revised Code makes the amendments applicable.

(Emphasis added.) 2011 Am. Sub. H.B. No. 86, Section 4. In other words the entirety of the amendments to R.C. 2913.02 applies in two situations: first to a person who commits the offense on or after the effective date of the statute and second to a person who would meet the criteria of R.C. 1.58(B).

{¶ 11} I would conclude that Mr. Taylor is "a person to whom division (B) of section 1.58 of the Revised Code makes the amendments applicable." R.C. 1.58(B) states that, "[i]f the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended." Thus, because R.C. 1.58(B) applies to Mr. Taylor, so do the amendments to R.C. 2913.02, as expressly stated in Section 4 of House Bill 86. See *State v. Gillespie*, 5th Dist. No.2012-CA-6, 2012-Ohio-3485; see also *State v. Gatewood*, 2d Dist. No.2012-CA-12, 2012-Ohio-4181. But see *State v. Saplak*, 8th Dist. No. 97825, 2012-Ohio-4281, ¶ 13. Section 4 of House Bill 86 does not qualify the applicability of all of the amendments only to those who commit an offense on or after the effective date of the statute. Thus, I conclude that the legislature intended to allow reclassification of an offense as well as the penalties prior to the entry of a final judgment of conviction. It is the province of the legislature to define those acts which constitute criminal offenses, their degree of severity, as well as the corresponding sentence. I can see no reason why it would be contrary to law to reclassify Mr. Taylor's offense as a misdemeanor and sentence him in accordance with the statute. See *Gillespie* at ¶ 13-16. Accordingly, I respect-

Slip Copy, 2012 WL 5872747 (Ohio App. 9 Dist.), 2012 -Ohio- 5403
(Cite as: 2012 WL 5872747 (Ohio App. 9 Dist.))

fully dissent from the judgment of the majority.

Ohio App. 9 Dist., 2012.
State v. Taylor
Slip Copy, 2012 WL 5872747 (Ohio App. 9 Dist.),
2012 -Ohio- 5403

END OF DOCUMENT

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

EXHIBIT 2-P-4

975 N.E.2d 492, 2012 -Ohio- 3485
(Cite as: 975 N.E.2d 492)

Court of Appeals of Ohio,
Fifth District, Tuscarawas County.
STATE of Ohio, Plaintiff-Appellee
v.
Joseph GILLESPIE, Defendant-Appellant.

No. 2012-CA-6.
July 30, 2012.

Background: Defendant pled guilty in the Court of Common Pleas, Tuscarawas County, No. 2011 CR050139, to one count of passing bad checks. Defendant appealed.

Holding: The Court of Appeals, Gwin, P.J., held that amended theft statute applied to entitle defendant to be sentenced to a misdemeanor rather than a felony.

Reversed and remanded.

West Headnotes

[1] Larceny 234 ↪2

234 Larceny
234I Offenses and Responsibility Therefor
234k2 k. Statutory provisions. Most Cited Cases

The amended theft statute, which raised the minimum value of property stolen to constitute a felony theft from \$500 to \$1,000 and was amended after the date of defendant's plea but before sentencing, applied to entitle defendant to be sentenced to a misdemeanor rather than a felony; amendment related only to the penalty imposed. R.C. §§ 1.58, 2913.02(B).

[2] Statutes 361 ↪278.7

361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity
361k278.7 k. Express retroactive provi-

sions. Most Cited Cases

A statute may not be applied retroactively unless the court finds a clearly expressed legislative intent that the statute so apply.

[3] Statutes 361 ↪278.3

361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity
361k278.3 k. Power to enact and validity.
Most Cited Cases

The issue of whether a statute may constitutionally be applied retrospectively does not arise unless there has been a prior determination that the General Assembly has specified that the statute so apply.

[4] Larceny 234 ↪2

234 Larceny
234I Offenses and Responsibility Therefor
234k2 k. Statutory provisions. Most Cited Cases

Amendment to theft statute, which raised the minimum value of property stolen to constitute a felony theft from \$500 to \$1,000, applied retroactively to persons who were sentenced on and after September 30, 2011 unless ex post facto concerns are present. R.C. §§ 1.58, 2913.02(B).

[5] Larceny 234 ↪2

234 Larceny
234I Offenses and Responsibility Therefor
234k2 k. Statutory provisions. Most Cited Cases

Statutes 361 ↪278.29

361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity

975 N.E.2d 492, 2012 -Ohio- 3485
(Cite as: 975 N.E.2d 492)

361k278.24 Validity of Particular Retroactive Statutes

361k278.29 k. Criminal law. Most Cited Cases

Amendment to theft statute, which raised the minimum value of property stolen to constitute a felony theft from \$500 to \$1,000, did not violate the state constitutional ban upon retroactive legislation; the offense of theft did not require the indictment to allege, or the evidence to establish, the value of the property taken, the value of the property taken only applied to determine the penalty to be imposed, and the amendment to the statute reduced the penalty from that prescribed for a felony of the fifth degree to that prescribed for a misdemeanor of the first degree. Const. Art. 2, § 28; R.C. §§ 1.58, 2913.02(B).

*492 Ryan Styer, Newcomerstown, OH, for plaintiff-appellee.

Gerald Latanich, Philadelphia, OH, for defendant-appellant.

GWIN, P.J.

{¶ 1} On February 23, 2011, appellant Joseph Gillespie ["Gillespie"] was indicted by the Tuscarawas County Grand Jury on one count of Passing Bad Checks, in violation of R.C. 2913.11(B), a felony of the fifth degree.

{¶ 2} On October 5, 2011, Gillespie pleaded guilty to the charge.

*493 {¶ 3} On January 9, 2012, Gillespie was sentenced to 2 years of Community Control. The trial court reserved a six-month term of local incarceration in the event Gillespie was convicted of violating the terms of his Community Control sanctions.

{¶ 4} Gillespie timely appeals his conviction and sentence raising the following assignment of error:

{¶ 5} "I. THE TRIAL COURT ERRED WHEN IT CONVICTED MR. GILLESPIE OF A FIFTH-DEGREE FELONY, WHEN THE GENERAL ASSEMBLY INTENDED THE OFFENSE COMMITTED BY MR. GILLESPIE TO BE CATEGORIZED AS A FIRST-DEGREE MISDEMEANOR."

I.

[1] {¶ 6} On September 30, 2012, after the date of Gillespie's plea but before the date of his sentencing, R.C. 2913.02 was amended as part of 2011 Am.Sub.H.B. No. 86. R.C. 2913.02(B) was amended to provide that,

(2) Except as otherwise provided in this division or division (B)(3), (4), (5), (6), (7), or (8) of this section, a violation of this section is petty theft, a misdemeanor of the first degree. If the value of the property or services stolen is one thousand dollars or more and is less than seven thousand five hundred dollars or if the property stolen is any of the property listed in section 2913.71 of the Revised Code, a violation of this section is theft, a felony of the fifth degree.

{¶ 7} The effect of this amendment was to raise the minimum value of property stolen to constitute a felony theft from \$500.00 to \$1,000.00. Gillespie argues that since he was sentenced following the effective date of the amended statute, R.C. 1.58 requires that he receive the benefit of the lesser sentence provided for in the amended statute, which reduced the penalty from that prescribed for a felony of the fifth degree to that prescribed for a misdemeanor of the first degree.

{¶ 8} The state argues that Gillespie is correct that the new value provisions for theft became effective on September 30, 2011 and that R.C. 1.58 would appear to indicate that Gillespie is entitled to the "misdemeanor sanctions"; however, the state argues he is not entitled to have the theft offense reclassified as a misdemeanor.

ANALYSIS

975 N.E.2d 492, 2012 -Ohio- 3485
(Cite as: 975 N.E.2d 492)

[2][3] {¶ 9} R.C. 1.48 provides, “A statute is presumed to be prospective in its operation unless expressly made retrospective.” Thus, a statute may not be applied retroactively unless the court finds a “clearly expressed legislative intent” that the statute so apply. *State v. Cook*, 83 Ohio St.3d 404, 410, 700 N.E.2d 570 (1998).

The issue of whether a statute may *constitutionally* be applied retrospectively does not arise unless there has been a prior determination that the General Assembly has specified that the statute so apply. Upon its face, R.C. 1.48 establishes an analytical threshold which must be crossed prior to inquiry under Section 28, Article II. As we pronounced in *Kiser v. Coleman* (1986), 28 Ohio St.3d 259, 262, 28 OBR 337, 339, 503 N.E.2d 753, 756, where “there is no clear indication of retroactive application, then the statute may *only* apply to cases which arise subsequent to its enactment.”

Van Fossen v. Babcock & Wilcox Co. (1988), 36 Ohio St.3d 100, 522 N.E.2d 489 (1988), superseded on other grounds by statute as stated in *Hannah v. Dayton Power & Light Co.*, 82 Ohio St.3d 482, 484, 696 N.E.2d 1044 (1998).

*494 {¶ 10} In the case at bar, 2011 Am.Sub.H.B. No. 86 provided in relevant part,

The amendments to sections ... 2913.02 ... of the Revised Code that are made in this act apply to a person who commits an offense specified or penalized under those sections on or after the effective date of this section *and to a person to whom division (B) of section 1.58 of the Revised Code makes the amendments applicable.*

The provisions of sections ... 2913.02 ... of the Revised Code in existence prior to the effective date of this section *shall apply to a person upon whom a court imposed sentence prior to the effective date of this section* for an offense specified or penalized under those sections. The amendments to sections ... 2913.02 ... that are

made in this act *do not apply* to a person who *upon whom a court imposed sentence prior to the effective date of this section* for an offense specified or penalized under those sections.

(Emphasis added).

{¶ 11} R.C. 1.58 effect of reenactment, amendment, or repeal of statute on existing conditions provides,

(A) The reenactment, amendment, or repeal of a statute does not, except as provided in division (B) of this section:

(1) Affect the prior operation of the statute or any prior action taken thereunder;

(2) Affect any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder;

(3) Affect any violation thereof or penalty, forfeiture, or punishment incurred in respect thereto, prior to the amendment or repeal;

(4) Affect any investigation, proceeding, or remedy in respect of any such privilege, obligation, liability, penalty, forfeiture, or punishment; and the investigation, proceeding, or remedy may be instituted, continued, or enforced, and the penalty, forfeiture, or punishment imposed, as if the statute had not been repealed or amended.

(B) If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended.

[4] {¶ 12} When reading 2011 Am.Sub.H.B. No. 86 and its specific reference to division (B) of R.C. 1.58 we conclude that the legislature expressed its intention that the amended version of R.C. 2913.02 apply to a person who is sentenced on and after September 30, 2011 unless ex post facto concerns are present. Although the Constitution's

975 N.E.2d 492, 2012 -Ohio- 3485
(Cite as: 975 N.E.2d 492)

Ex Post Facto Clause prohibits applying a new Act's higher penalties to pre-Act conduct, it does not prohibit applying lower penalties. See *Dorsey v. United States*, 567 U.S. —, 132 S.Ct. 2321, 2332, 183 L.Ed.2d 250 (2012).

[5] {¶ 13} Having determined that the statute at issue meets the threshold test for retroactive application contained in R.C. 1.48, we must now inquire whether it contravenes the ban upon retroactive legislation set forth in Section 28, Article II of the Ohio Constitution. *Van Fossen*, 36 Ohio St.3d at 106, 522 N.E.2d 489.

{¶ 14} In its simplest form, to constitute a theft offense it need only be proven that some property of value has been taken. R.C. 2913.02 does not require the indictment to allege, or the evidence to establish, any particular value of the property taken. The offense of theft therein defined is complete and the offender becomes guilty of theft without respect to the value of the property or services involved. However, it becomes necessary to prove the *495 value of the property taken, and likewise necessary that the jury find the value and state it in the verdict in order to measure the penalty. "Therefore, in such case, the verdict must find the value to enable the court to administer the appropriate penalty." *State v. Whitten*, 82 Ohio St. 174, 182, 92 N.E. 79 (1910). (Emphasis added).

{¶ 15} The amendment to R.C. 2913.02 raising the line of demarcation from five hundred dollars to one thousand dollars relates only to the penalty. 2011 Am.Sub.H.B. No. 86 operates, when the value of the property stolen falls between these two limitations, to reduce the penalty from that prescribed for a felony of the fifth degree to that prescribed for a misdemeanor of the first degree. Accordingly, the amendment comes within the provisions of R.C. 1.58(B), requiring, in the instant case, that the amendment be applied, and that the penalty be imposed according to the amendment. That penalty is a misdemeanor offense with a misdemeanor sentence not a felony offense with a misdemeanor sentence. Several cases have applied R.C. 1.58(B) to

situations in which the defendants committed theft offenses prior to, but were sentenced after, the effective date of legislation which reduced their offenses from felonies to misdemeanors. *State v. Collier*, 22 Ohio App.3d 25, 27, 488 N.E.2d 887 (1984); *State v. Coffman*, 16 Ohio App.3d 200, 475 N.E.2d 139 (1984); *State v. Burton*, 11 Ohio App.3d 261, 464 N.E.2d 186 (1983).

{¶ 16} Recently, the United States Supreme Court held that the more lenient penalties of the Fair Sentencing Act, which reduced the crack-to-powder cocaine disparity, applied to those offenders whose crimes preceded the effective date of the Act, but who were sentenced after that date. *Dorsey v. United States*, 567 U.S. —, 132 S.Ct. 2321, 2332, 183 L.Ed.2d 250 (2012). Although the Court interpreted the federal statutory scheme, which is somewhat different from the one presently under consideration in the case at bar, we share the Court's concern that,

[A]pplying the 1986 Drug Act's old mandatory minimums to the post-August 3 sentencing of pre-August 3 offenders would create disparities of a kind that Congress enacted the Sentencing Reform Act and the Fair Sentencing Act to prevent. Two individuals with the same number of prior offenses who each engaged in the same criminal conduct involving the same amount of crack and were sentenced at the same time would receive radically different sentences.

* * *

Moreover, unlike many prechange/postchange discrepancies, the imposition of these disparate sentences involves roughly contemporaneous sentencing, *i.e.*, the same time, the same place, and even the same judge, thereby highlighting a kind of unfairness that modern sentencing statutes typically seek to combat ...

567 U.S. —, 132 S.Ct. at 2333, 183 L.Ed.2d 250. The same is true in this case. Two individuals accused of the same conduct could be treated dif-

975 N.E.2d 492, 2012 -Ohio- 3485
(Cite as: 975 N.E.2d 492)

ferently and receive different sentences, one a felony and one a misdemeanor, after the amendments had become effective even though both were sentenced on the same date. We find no strong countervailing considerations between pre-amendment offenders such as Gillespie sentenced after September 30, 2011 and post-amendment offenders that make a critical difference to require them to be treated differently. *Dorsey* at —, 132 S.Ct. at 2335, 183 L.Ed.2d 250.

{¶ 17} Accordingly, Gillespie's sole assignment of error is sustained, the judgment of the Tuscarawas County Court of *496 Common Pleas is reversed, and this case is remanded for proceedings in accordance with our opinion and the law.

GWIN, P.J., WISE and EDWARDS, JJ., concur.

Ohio App. 5 Dist., 2012.
State v. Gillespie
975 N.E.2d 492, 2012 -Ohio- 3485

END OF DOCUMENT

Slip Copy, 2012 WL 3776917 (Ohio App. 5 Dist.), 2012 -Ohio- 3984
(Cite as: 2012 WL 3776917 (Ohio App. 5 Dist.))

CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio,
Fifth District, Licking County.
STATE of Ohio, Plaintiff–Appellant
v.
Chelsea L. DAVID, Defendant–Appellee.

No. 11–CA–110.
Decided Aug. 28, 2012.

Appeal from the Licking County Court of Common
Pleas, Case No. 11 CR 00245.
Kenneth W. Oswalt, Licking County Prosecutor,
Brian T. Waltz, Newark, OH, for appellant.

Kort Gatterdam, Erik P. Henry, Columbus, OH, for
appellee.

DELANEY, P.J.

*1 {¶ 1} Plaintiff–Appellant State of Ohio ap-
peals the October 21, 2011 sentencing entry of the
Licking County Court of Common Pleas.

FACTS AND PROCEDURAL HISTORY

{¶ 2} Between January 22, 2011 and January
25, 2011, Defendant–Appellee Chelsea L. David
deposited three checks into a Park National Bank
account using several ATMs. The checks were
drawn on a closed Chase Bank account. David im-
mediately withdrew the funds from the account.
The total value of the deposited checks was \$947.50.

{¶ 3} On May 20, 2011, David was indicted on
one count of theft in violation of R.C.
2913.02(A)(2) and/or (3) and one count of passing
bad checks in violation of R.C. 2913.11(B). Both
counts alleged the values of the property stolen and
checks transferred were \$500 or more but less than

\$5,000. At the time of the indictment, the statutes
stated both counts were felonies of the fifth degree.
David entered a not guilty plea on June 15, 2011.

{¶ 4} Amended Substitute House Bill 86
("H.B.86") went into effect on September 30, 2011.
H.B. 86 amended R.C. 2913.02 and 2913.11 to
raise the minimum value of the property stolen or
the amount of the check transferred from \$500 to
\$1,000 in order for a violation of the section to con-
stitute a felony of the fifth degree. Otherwise, a vi-
olation of R.C. 2913.02 or 2913.11 for an amount
below \$1,000 was a misdemeanor of the first de-
gree.

{¶ 5} David changed her plea and pleaded
guilty to both counts of the indictment on October
21, 2011. In accepting David's plea and imposing a
sentence, the trial court noted the impact of H.B.
86. The October 21, 2011 sentencing entry states:
"Although Counts 1 and 2 were indicted as felonies
of the fifth degree, HB 86, effective September 30,
2011, increased the valuation threshold for an F–5
from \$500.00 to \$1,000.00. As a result, and in ac-
cordance with R.C. 1.58, these offenses are now
misdemeanors of the first degree." The trial court
imposed community control sanctions for one year
and ordered restitution in the amount of \$947.50 to
Park National Bank.

{¶ 6} It is from this decision the State now ap-
peals.

ASSIGNMENT OF ERROR

{¶ 7} The State raises one Assignment of Er-
ror:

{¶ 8} "THE TRIAL COURT COMMITTED
HARMFUL ERROR IN REDUCING THE AP-
PELLEE'S CHARGES TO MISDEMEANORS."

ANALYSIS

{¶ 9} The State argues in its sole Assignment
of Error the trial court erred in reducing David's
charges for theft and passing bad checks from fifth-

Slip Copy, 2012 WL 3776917 (Ohio App. 5 Dist.), 2012 -Ohio- 3984
 (Cite as: 2012 WL 3776917 (Ohio App. 5 Dist.))

degree felonies to first-degree misdemeanors based on H.B. 86 and R.C. 1.58. We disagree.

{¶ 10} H.B. 86 became effective on September 30, 2011. R.C. 2913.02, as amended by H.B. 86, states:

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or the services in any of the following ways:

* * *

(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;

*2 (3) By deception;

* * *

(B)(1) Whoever violates this section is guilty of theft.

(2) Except as otherwise provided in this division or division (B)(3), (4), (5), (6), (7), or (8) of this section, a violation of this section is petty theft, a misdemeanor of the first degree. If the value of the property or services stolen is one thousand dollars or more and is less than seven thousand five hundred dollars or if the property stolen is any property listed in section 2913.71 of the Revised Code, a violation of this section is theft, a felony of the fifth degree. * * *

{¶ 11} R.C. 2913.11, as amended by H.B. 86, states:

* * *

(B) No person, with purpose to defraud, shall issue or transfer or cause to be issued or transferred a check or other negotiable instrument, knowing that it will be dishonored or knowing that a person has ordered or will order stop payment on the check or other negotiable instrument.

* * *

(F) Whoever violates this section is guilty of passing bad checks. Except as otherwise provided in this division, passing bad checks is a misdemeanor of the first degree. If the check or checks or other negotiable instrument or instruments are issued or transferred to a single vendor or single other person for the payment of one thousand dollars or more but less than seven thousand five hundred dollars or if the check or checks or other negotiable instrument or instruments are issued or transferred to multiple vendors or persons for the payment of one thousand five hundred dollars or more but less than seven thousand five hundred dollars, passing bad checks is a felony of the fifth degree. * * *

{¶ 12} The trial court applied R.C. 1.58 to the amended statutes to determine David's charges should be reduced to first-degree misdemeanors. R.C. 1.58 reads:

(A) The reenactment, amendment, or repeal of a statute does not, except as provided in division (B) of this section:

(1) Affect the prior operation of the statute or any prior action taken thereunder;

(2) Affect any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder;

(3) Affect any violation thereof or penalty, forfeiture, or punishment incurred in respect thereto, prior to the amendment or repeal;

(4) Affect any investigation, proceeding, or remedy in respect of any such privilege, obligation, liability, penalty, forfeiture, or punishment; and the investigation, proceeding, or remedy may be instituted, continued, or enforced, and the penalty, forfeiture, or punishment imposed, as if the statute had not been repealed or amended.

(B) If the penalty, forfeiture, or punishment for

Slip Copy, 2012 WL 3776917 (Ohio App. 5 Dist.), 2012 -Ohio- 3984
 (Cite as: 2012 WL 3776917 (Ohio App. 5 Dist.))

any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended.

The State argues R.C. 1.58(B) does not apply to the present case because the amendments to R.C. 2913.02 and 2913.11 do not involve a penalty, forfeiture, or punishment. Specifically, the State argues that by altering the valuation amount of the statutes, H.B. 86 simply amended an element of the offense of theft and passing bad checks, therefore making R.C. 1.58 inapplicable.

*3 {¶ 13} This Court recently analyzed a similar argument raised as to H.B. 86 in the case of *State v. Gillespie*, 5th Dist. No.2012-CA-6, 2012-Ohio-3485. In that case, the defendant was indicted on February 23, 2011 for passing bad checks in violation of R.C. 2913.11(B). The defendant pleaded guilty to the charge on October 5, 2011 and was sentenced on January 9, 2012. The trial court sentenced the defendant to two years of community control sanctions. On appeal, the defendant argued the trial court erred in convicting the defendant of a fifth-degree felony when H.B. 86 categorized the offense committed by the defendant as a first-degree misdemeanor. *Id.* at ¶ 1-5.

{¶ 14} We agreed with the defendant's argument and reversed the decision of the trial court. We first held H.B. 86 specifically referred to R.C. 1.58(B) thereby demonstrating the intention of the General Assembly that the amended version of the statute applies to a person sentenced on and after September 30, 2011. *Id.* at ¶ 12. We next determined in a theft offense, the value of the property stolen is relevant only to the measure of the appropriate penalty. *Id.* at ¶ 14-15. H.B. 86 operated to reduce the penalty from a fifth-degree felony to a first-degree misdemeanor based on the valuation threshold. *Id.* Therefore, R.C. 1.58(B) was applicable to the amended statute because the amended statute functioned to reduce the penalty imposed. *Id.* at ¶ 15.

{¶ 15} In the present case, David was charged with violations of R.C. 2913.02 and 2913.11 based on her passing of bad checks in the amount of \$947.50. David was indicted on May 20, 2011. H.B. 86, which amended the valuation thresholds of R.C. 2913.02 and 2913.11, became effective on September 30, 2011. On October 21, 2011, the trial court found David guilty of violations of R.C. 2913.02 and 2913.11, but reduced David's charges to first-degree misdemeanors pursuant to the amended valuation thresholds established in H.B. 86. In accord with our decision in *State v. Gillespie, supra*, we find no error by the trial court in following the mandates of H.B. 86 and R.C. 1.58(B).

CONCLUSION

{¶ 16} Based on the foregoing, the State's sole Assignment of Error is overruled.

{¶ 17} The judgment of the Licking County Court of Common Pleas is affirmed.

DELANEY, P.J., GWIN, and WISE, JJ., concur.

Ohio App. 5 Dist., 2012.

State v. David

Slip Copy, 2012 WL 3776917 (Ohio App. 5 Dist.),
 2012 -Ohio- 3984

END OF DOCUMENT