

**IN THE SUPREME COURT OF OHIO**

**STATE OF OHIO**

**CASE NO. 2013-**

**13-0485**

Plaintiff-Appellant,

**ON APPEAL FROM THE  
MONTGOMERY COUNTY COURT  
OF APPEALS, SECOND  
APPELLATE DISTRICT**

**vs.**

**DWIGHT ANDERSON**

**COURT OF APPEALS  
CASE NO: 25114**

Defendant-Appellee.

**NOTICE OF CERTIFIED CONFLICT**

**MATHIAS H. HECK, JR.**

**PROSECUTING ATTORNEY**

By **KIRSTEN A. BRANDT (COUNSEL OF RECORD)**

REG. NO. 0070162

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**COUNSEL FOR APPELLANT, STATE OF OHIO**

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Dayton, Ohio 45422

**COUNSEL FOR APPELLEE, DWIGHT ANDERSON**

<b>FILED</b>
<b>MAR 26 2013</b>
<b>CLERK OF COURT SUPREME COURT OF OHIO</b>

<b>RECEIVED</b>
<b>MAR 26 2013</b>
<b>CLERK OF COURT SUPREME COURT OF OHIO</b>

**NOTICE OF CERTIFIED CONFLICT**

Appellant, the State of Ohio, through the Office of the Prosecuting Attorney for Montgomery County, hereby gives notice, in accordance with S.Ct.Prac.R. 8.01, of a certified conflict to the Supreme Court of Ohio of the judgment of the Montgomery County Court of Appeals, Second Appellate District, entered in *State of Ohio v. Dwight Anderson*, Case No. 25114. The court of appeals order certifying a conflict was filed on March 6, 2013 pursuant to Article-IV, Sec. 3(B)(4) of the Ohio Constitution. The issue certified by the court of appeals is:

As a result of R.C. 1.58, is the degree of the offense reduced for a defendant who commits the offense before the effective date of Am.Sub.H.B. 86, 2011 Ohio Laws 29, but who is sentenced after that effective date?

Respectfully submitted,

**MATHIAS H. HECK, JR.**  
PROSECUTING ATTORNEY

By   
**KIRSTEN A. BRANDT**  
REG NO. 0070162  
Assistant Prosecuting Attorney  
APPELLATE DIVISION

COUNSEL FOR APPELLANT,  
STATE OF OHIO

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Notice of Certified Conflict was sent by first class mail on or before this 25 day of March, 2013, to the following: Adelina E. Hamilton, Law Office of the Public Defender, 117 South Main Street, Suite 400, Dayton, OH 45422 and Timothy Young, Ohio Public Defender Commission, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.



**KIRSTEN A. BRANDT**

REG NO. 0070162

Assistant Prosecuting Attorney

APPELLATE DIVISION



FILED  
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GREVILLE J. BRUSH  
CLERK OF COURTS  
MONTGOMERY CO. OHIO  
36

IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 25114
Plaintiff-Appellant	:	
	:	Trial Court Case No. 11-CR-1118
v.	:	
	:	(Criminal Appeal from
DWIGHT ANDERSON	:	(Common Pleas Court)
	:	
Defendant-Appellee	:	

DECISION AND ENTRY

Rendered on the 6th day of March, 2013

PER CURIAM:

This matter comes before the court upon the motion of the State of Ohio to certify a conflict, pursuant to App.R. 25(A). Defendant-appellant Dwight Anderson has not responded to the motion. The State contends that our judgment, rendered herein on February 1, 2013, is in conflict with the judgments of the Ninth and Eighth District Courts of Appeals in *State v. Taylor*, 9th Dist. Summit No. 26279, 2012-Ohio-5403; *State v. Steinfurth*, 8th Dist. Cuyahoga No. 97549, 2012-Ohio-3257; and *State v. Saplak*, 8th Dist. Cuyahoga No. 97825, 2012-Ohio-4281. We agree.

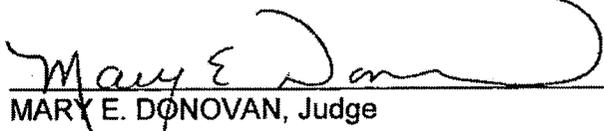
The question certified is:

As a result of R.C. 1.58, is the degree of an offense reduced for a defendant who commits the offense before the effective date of Am.Sub.H.B.86, 2011 Ohio Laws 29, but who is sentenced after that effective date?

IT IS SO ORDERED.



MIKE FAIN, Presiding Judge



MARY E. DONOVAN, Judge



JEFFREY E. FROELICH, Judge

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Hon. Timothy N. O'Connell  
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amount equal to or exceeding one gram, but less than five grams, in violation of R.C. 2925.11(A), and sentencing him to six months in prison and a six-month driver's license suspension for a felony of the fifth degree. Anderson committed the offense before the effective date Am.Sub.H.B.86, 2011 Ohio Laws 29, but was sentenced after the effective date of the statute. The State contends that although Anderson was entitled to the reduction in the sentence that could be imposed resulting from the new statute, he was not entitled to a reduction in the degree of the offense, under the new statute, from a fourth-degree felony to a fifth-degree felony.

{¶ 2} We conclude that by reason of R.C. 1.58(B), Anderson was entitled to the new statute's reduction in the degree of the offense from a fourth-degree felony to a fifth-degree felony, in addition to being entitled to the new statute's reduction in the penalty for the offense. Accordingly the trial court did not err in sentencing Anderson for a fifth-degree felony, and the judgment of the trial court is Affirmed.

#### I. The Course of Proceedings

{¶ 3} Anderson was charged by indictment with having possessed between one and five grams of crack cocaine on March 22, 2011. At the time he allegedly committed the offense, and at the time he was indicted, possession of that amount of crack cocaine was a felony of the fourth degree, punishable by a prison term of an integral number of months ranging from six months to eighteen months.

{¶ 4} Anderson pled guilty, and was sentenced, on February 27, 2012, after the effective date of H.B. 86. Under the new law, possession of from one to five grams of crack cocaine was made a felony of the fifth degree, punishable by imprisonment for an

integral number of months ranging from six months to twelve months. R.C. 2925.11(C)(4)(a), R.C. 2929.14(A)(4).

{¶ 5} The trial court, noting that H.B. 86 applied, found Anderson guilty, pursuant to his guilty plea, of Possession of Crack Cocaine in an amount less than five grams, but equal to or exceeding one gram, a felony of the fifth degree, and sentenced him to six months imprisonment.

{¶ 6} From the judgment, the State appeals.

**II. Following *State v. Arnold* and *State v. Wilson*, Two Recent Decisions of this Court, We Conclude that the Trial Court Did Not Err in Sentencing Anderson for a Felony of the Fifth Degree**

{¶ 7} The State's sole assignment of error is as follows:

H.B. 86 ENTITLED ANDERSON TO THE BENEFIT OF A SENTENCE ASSOCIATED WITH A FELONY OF THE FIFTH DEGREE, BUT IT DID NOT ENTITLE HIM TO RECLASSIFICATION OF HIS OFFENSE TO ONE OF A LESSER DEGREE.

{¶ 8} R.C. 1.58(B) provides as follows:

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.

{¶ 9} The State recognizes that R.C. 1.58(B) has the effect in this case of requiring that Anderson receive the benefit of the reduction in the severity of the sentence that could

be imposed for his offense – that is, the length of his incarceration for the offense. Before H.B. 86, the maximum term for which Anderson could be incarcerated was eighteen months; after H.B. 86, that maximum term has been reduced to twelve months. Obviously, the term imposed – six months – is less than either maximum.

{¶ 10} The State contends that R.C. 1.58(B) does not reduce the degree of the offense to which Anderson pled guilty and for which he was sentenced. Before H.B. 86, the degree of the offense was a fourth-degree felony. After H.B. 86, it is a fifth-degree felony. But because Anderson committed his offense before the effective date of H.B. 86, the State argues that he should be sentenced as a fourth-degree felon, for a fourth-degree felony, even though he cannot be sentenced to a term of incarceration longer than that permitted under the new law.

{¶ 11} This same issue was raised and addressed in two recent decisions of this court: *State v. Arnold*, 2d Dist. Montgomery No. 25044, 2012-Ohio-5786; and *State v. Wilson*, 2d Dist. Montgomery No. 25057, 2012-Ohio-5912. In both of those cases, we held that by operation of R.C. 1.58(B), a defendant who commits an offense before the effective date of H.B. 86, but is sentenced after its effective date, is entitled not only to the benefit of the reduction in the sentence that can be imposed as a result of the statute, but also to reduction in the degree of the offense. In other words, if, as here, H.B. 86 reduces the degree of the offense from a fourth-degree felony to a fifth-degree felony, then the defendant, being sentenced after the effective date of H.B. 86, is entitled to be sentenced for a fifth-degree felony.

{¶ 12} We recognize that other appellate districts have decided this issue differently. *State v. Taylor*, 9th Dist. Summit No. 26279, 2012-Ohio-5403; *State v. Steinfurth*, 8th Dist.

Cuyahoga No. 97549, 2012-Ohio-3257; and *State v. Saplak*, 8th Dist. No. 97825, 2012-Ohio-4281. We are not persuaded that we should decline to follow our decisions in *State v. Arnold* and *State v. Wilson*. Accordingly, following our recent jurisprudence, we hold that Anderson was entitled to be sentenced for a fifth-degree felony, and the trial court did not err in doing so.

{¶ 13} The State's sole assignment of error is overruled.

### III. Conclusion

{¶ 14} The State's sole assignment of error having been overruled, the judgment of the trial court is Affirmed.

.....

DONOVAN and FROELICH, JJ., concur.

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Mathias H. Heck  
Kirsten A. Brandt  
Adelina E. Hamilton  
Hon. Timothy N. O'Connell



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GREGORY A. BRUSH  
CLERK OF COURTS  
MONTGOMERY CO. OHIO

IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY

*W*

STATE OF OHIO	:	
	:	Appellate Case No. 25114
Plaintiff-Appellant	:	
	:	Trial Court Case No. 11-CR-1118
v.	:	
	:	(Criminal Appeal from
DWIGHT ANDERSON	:	Common Pleas Court)
	:	
Defendant-Appellee	:	<b>FINAL ENTRY</b>

Pursuant to the opinion of this court rendered on the 1st day  
of February, 2013, the judgment of the trial court is **Affirmed**.

Costs to be paid as stated in App.R. 24.

Pursuant to Ohio App.R. 30(A), it is hereby ordered that the clerk of the Montgomery  
County Court of Appeals shall immediately serve notice of this judgment upon all parties and  
make a note in the docket of the mailing.

*Mike Fain*  
\_\_\_\_\_  
MIKE FAIN, Presiding Judge



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MARY E. DONOVAN, Judge



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JEFFREY E. PROELICH, Judge

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2012 WL 5872747

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.

Attorneys and Law Firms

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

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

Opinion

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 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

¶ 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.

\*3 ¶ 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 respectfully dissent from the judgment of the majority.

**Parallel Citations**

2012 -Ohio- 5403

2012 WL 2928550

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

Court of Appeals of Ohio,  
Eighth District, Cuyahoga County.

STATE of Ohio Plaintiff–Appellee

v.

Joshua STEINFURTH, Defendant–Appellant.

No. 97549. | Decided July 19, 2012.

Criminal Appeal from the Cuyahoga County, Court of Common Pleas, Case No. CR–549953.

**Attorneys and Law Firms**

Timothy Young, Ohio Public Defender by Katherine A. Szudy, Assistant State Public Defender Office, Columbus, OH, Attorneys for Appellant.

William D. Mason, Cuyahoga County Prosecutor by Kristen L. Sobieski, William Leland, Assistant Prosecuting Attorneys, Cleveland, OH, Attorneys for Appellee.

Before: ROCCO, J., SWEENEY, P.J., and KEOUGH, J.

**Opinion**

KENNETH A. ROCCO, J.

\*1 ¶ 1 Defendant-appellant Joshua Steinfurth appeals from his conviction and sentence for theft following the entry of a guilty plea. The trial court found Steinfurth guilty of theft, a fifth-degree felony, and resisting arrest, a second-degree misdemeanor. The trial court imposed a 6-month sentence for theft and a 90-day sentence for resisting arrest. The trial court suspended both sentences, and placed Steinfurth on probation for two years.

¶ 2 Steinfurth presents two assignments of error. He asserts the trial court erred when it convicted him of a fifth-degree felony when the General Assembly intended the theft offense committed by Steinfurth to be categorized as a first-degree misdemeanor, and defense counsel provided ineffective assistance by failing to request Steinfurth's plea hearing occur after the effective date of 2011 Am.Sub.H.B. No. 86 (“H.B.86”).

¶ 3 Upon a review of the record, this court finds Steinfurth's assignments of error have no merit. We affirm Steinfurth's convictions and sentence.

¶ 4 Steinfurth's convictions resulted from his actions on May 4, 2011 when he grabbed a cell phone on display, and fled the Verizon Wireless store located on Ridge Road in Brooklyn. Members of the City of Brooklyn Police Department arrived at the scene following a report of the theft, and chased Steinfurth for approximately 25 minutes. The police eventually caught and detained Steinfurth. The police recovered the cell phone, a Motorola Droid 2 Global with a value of \$589.99.

¶ 5 The Cuyahoga County Grand Jury indicted Steinfurth on June 10, 2011. He was charged with one count of theft in violation of R.C. 2913.02(A)(1); one count of obstructing official business in violation of R.C. 2921.31(A); one count of breaking and entering in violation of R.C. 2911.13(A); and one count of resisting arrest in violation of R.C. 2921.33(A).

¶ 6 By way of a negotiated plea agreement, Steinfurth pled guilty on September 13, 2011 to one count of aggravated theft, a fifth-degree felony, and one count of resisting arrest, a second-degree misdemeanor. The state agreed to dismiss the remaining counts of the indictment in exchange of the plea.

¶ 7 The trial court explained at Steinfurth's sentencing hearing on October 13, 2011 that following his plea hearing, “the sentencing law changed so Count 1 [the theft offense] would not be sentenced as if it were a felony 5, but instead be sentenced as if it were a misdemeanor 1 because that's the new level of the offense.” The trial court ordered Steinfurth to pay restitution in the amount of \$589.99, and imposed a 6-month sentence for the theft offense, and a 90-day sentence for the resisting arrest offense. The trial court suspended both sentences, and placed Steinfurth on probation for two years.

¶ 8 Defense counsel entered the following objection:

I just want to be heard about the felony. I just—your Honor, I would just argue in front of the court that the theft that Mr. Steinfurth plead to is—should be—should reflect that it is a misdemeanor at this point. That's based on the incorporation of Rule 1.58(B) into the new statute. And also a plea is not complete until sentencing. So due to that fact, because he is

sentenced after the new laws have passed, I argue that the theft should reflect that it is a misdemeanor of the first degree.

\*2 {¶ 9} The trial court did not agree with defense counsel, stating:

“My understanding of the new law is that you are incorrect. \* \* \* I imposed the sentence as if under the new law as a misdemeanor but I believe it's still a felony 5. \* \* \* You can appeal if you want.”

{¶ 10} Steinfurth appeals his conviction and sentence for theft and presents two assignments of error for our review:

**“I. The trial court erred when it convicted Mr. Steinfurth of a fifth-degree felony, when the General Assembly intended the offense committed by Mr. Steinfurth to be categorized as a first-degree misdemeanor. Fourteenth Amendment to the United States Constitution; Section 16, Article I of the Ohio Constitution; R.C. 1 .58.**

**II. Trial counsel provided ineffective assistance of counsel, in violation of the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution, by failing to request that Mr. Steinfurth's plea hearing occur after the passage of House Bill 86. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).”**

{¶ 11} In his first assignment of error, Steinfurth argues he was convicted of a fifth-degree felony in contravention of H.B. 86. Because the value of the stolen merchandise, \$589.99, is less than \$1,000.00, he argues that he should have been *convicted and sentenced* for a first-degree misdemeanor under the version of R.C. 2913.02 in effect at the time of sentencing.

{¶ 12} Between the date of Steinfurth's plea hearing, September 13, 2011, and the date of sentencing, October 13, 2011, H.B. 86 went into effect. H.B. 86 made the following relevant changes to the theft statute, R.C. 2913.02, effective September 30, 2011:

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert

control over either the property or services in any of the following ways:

(1) Without the consent of the owner or person authorized to give consent;

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

(3) By deception;

(4) By threat;

(5) By intimidation.

(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 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. \* \* \*

{¶ 13} R.C. 1.58 expressly provides: “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.” (Emphasis added.) When sentencing an offender, Ohio courts must apply the statute in effect at the time the offender committed the offense, unless a statute, enacted after the commission of the offense, but before sentencing, provides for a lesser punishment.

\*3 {¶ 14} Section 3 of H.B. 86 contains the statement of specific legislative intent that the amendments to R.C. 2913.02 apply to a person who commits an offense specified or penalized under this section *on or after* the effective date of H.B. 86. The amendments also apply to a person to whom division (B) of R.C. 1.58 makes the amendments applicable.

{¶ 15} Steinfurth committed a felony offense on May 4, 2011. He entered a plea of guilty to the felony offense on September 13, 2011. H.B. 86 went into effect on September 30, 2011. The trial court sentenced Steinfurth on October 13, 2011. Because Steinfurth committed the offense prior to H.B. 86's effective date, but was sentenced after the effective

date, he was entitled to and received the reduced penalty for a first-degree misdemeanor based on R.C. 1.58 and H.B. 86's amendments to R.C. 2913.02. R.C. 1.58 clearly states that a criminal defendant receives *the benefit of a reduced penalty, forfeiture, or punishment*. Contrary to Steinfurth's argument, R.C. 1.58 makes no mention of a criminal defendant *receiving the benefit of a lesser or reduced offense* itself, here, the benefit of amending Steinfurth's fifth-degree felony conviction to that of a first-degree misdemeanor.

{¶ 16} Steinfurth relies on *State v. Burton*, 11 Ohio App.3d 261, 464 N.E.2d 186 (10th Dist.1983) and *State v. Collier*, 22 Ohio App.3d 25, 488 N.E.2d 887 (3rd Dist.1984) in support of his argument he was entitled to the benefit of amending his conviction from a felony to a misdemeanor. These cases, however, clearly support the conclusion that R.C. 1.58, as applied here, only required the trial court to *sentence* Steinfurth for a first-degree misdemeanor pursuant to the amendments to R.C. 2913.02. The trial court correctly concluded the theft offense conviction remained a fifth-degree felony because Steinfurth committed the offense prior to the effective date of H.B. 86.

{¶ 17} Steinfurth's first assignment of error is overruled.

{¶ 18} In his second assignment of error, Steinfurth argues he was denied the effective assistance of counsel when counsel failed to request the plea hearing occur after the effective date of H.B. 86. He asserts defense counsel's "failure to make such a motion directly resulted in Mr. Steinfurth being convicted of a felony, rather than a misdemeanor."

{¶ 19} In order to successfully assert ineffective assistance of counsel under the Sixth Amendment, a defendant must show not only that the attorney made errors so serious that he was not functioning as "counsel," as guaranteed by the Sixth Amendment, but also that the deficient performance was so serious as to deprive defendant of a fair and reliable trial. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). There are many ways to provide effective assistance in any given case, therefore, scrutiny of counsel's performance must be highly deferential, and there will be a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.*; see also, *Vaughn v. Maxwell*, 2 Ohio St.2d 299, 209 N.E.2d 164 (1965). Counsel, moreover, will not be deemed ineffective for failing to make futile motions. *State v. Parra*, 8th Dist. No. 95619, 2011-Ohio-3977, ¶ 78.

\*4 {¶ 20} As stated earlier, H.B. 86's amendments to R.C. 2913.02 apply to a person who commits an offense specified or penalized under this section *on or after* the effective date of H.B. 86. The amendments also apply to a person to whom division (B) of R.C. 1.58 makes the amendments applicable. Steinfurth would not receive the benefit of a reduced sentence except for the inclusion of R.C. 1.58 in H.B. 86 because he committed the theft on May 4, 2011, and not *on or after* the effective date of H.B. 86, September 30, 2011. Steinfurth received the benefit in sentencing as discussed under his first assignment of error. We, therefore, concluded the trial court correctly convicted Steinfurth of the fifth-degree felony offense of theft. See *State v. Clemons*, 7th Dist. No. 10 BE 7, 2011-Ohio-1177.

{¶ 21} Defense counsel's request to schedule Steinfurth's plea hearing after the effective date of H.B. 86 would have been futile. The result would have been the same if the plea hearing occurred after H.B. 86's effective date—a conviction for a fifth-degree felony and sentence for a first-degree misdemeanor. The controlling date is the date of the offense, and not the date of the plea hearing. Steinfurth was, therefore, not denied the effective assistance of counsel. *Strickland; Parra*.

{¶ 22} Steinfurth's second assignment of error is overruled.

{¶ 23} Steinfurth's convictions and sentence are affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's convictions having been affirmed, any bail pending appeal is terminated.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, P.J. and KATHLEEN ANN KEOUGH, J., CONCUR.

**Parallel Citations**

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2012 WL 4243789

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

Court of Appeals of Ohio,  
Eighth District, Cuyahoga County.

STATE of Ohio, Plaintiff–Appellee

v.

John J. SAPLAK, Defendant–Appellant.

No. 97825. | Decided Sept. 20, 2012.

Criminal Appeal from the Cuyahoga County, Court of Common Pleas, Case No. CR–554377.

**Attorneys and Law Firms**

Mark R. Marshall, Westlake, OH, for Appellant.

William D. Mason, Cuyahoga County Prosecutor Erin Stone, Assistant County Prosecutor, Cleveland, OH, for Appellee.

**Opinion**

MARY EILEEN KILBANE, J.

\*1 ¶1 Defendant-appellant, John Saplak, appeals from his conviction for a felony violation of R.C. 2913.02(A)(1). For the reasons set forth below, we affirm the conviction, vacate his sentence, and remand for resentencing.

¶2 On September 27, 2011, defendant was indicted by information in connection with events occurring from August 9, 2011 to September 9, 2011. He was charged with one count of theft of property valued between \$500 and \$5000, in violation of R.C. 2913.02, which was a fifth degree felony at the time the theft occurred, and one count of possessing criminal tools, all with a forfeiture specification.

¶3 On October 18, 2011, shortly after the effective date of H.B. 86, defendant pled guilty to the theft charge and the remaining charges were dismissed. At this time, the stolen property was identified as \$665.20 “worth of beer at Marc's.” The matter was set for sentencing on November 17, 2011. Defendant did not appear on this date and a capias was issued. On January 5, 2012, the trial court sentenced defendant to six months of imprisonment and up to three years of postrelease control sanctions. He was also ordered to make restitution.

¶4 Defendant now appeals, assigning two errors for our review:

**ASSIGNMENT OF ERROR ONE**

The trial court erred in accepting appellant's guilty plea for theft, a felony of the fifth degree, [because] after the effective date of H.B. 86 the underlying offense [became] misdemeanor.

**ASSIGNMENT OF ERROR TWO**

The trial court erred in sentencing appellant to a term of incarceration pursuant to a finding of guilt for F–5 theft that includes a potential for postrelease control pursuant to R.C. 2967.28.

¶5 In these assignments of error, defendant notes that H.B. 86 amended R.C. 2913.02, and under the current version of the statute, if the value of the stolen merchandise is less than \$1,000, then the offense is no longer a fifth degree felony, but instead is a first degree misdemeanor. Since this amendment went into effect before the date of defendant's guilty plea and sentence, defendant argues that he should have been convicted of the first degree misdemeanor offense and not a fifth degree felony, and that the trial court erred in imposing sentence on the fifth degree felony.

¶5 At the time of the offense to which defendant pled guilty, R.C. 2913.02 provided:

(A)(1) No person, with purpose to deprive the owner of property \* \* \*, shall knowingly obtain or exert control over \* \* \* the property \* \* \* [w]ithout the consent of the owner or person authorized to give consent.

\* \* \*

(B)(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 five hundred dollars or more and is less than five thousand dollars \* \* \*, a violation of this section is theft, a felony of the fifth degree. \* \* \*.

\*2 ¶7 Effective September 30, 2011, H.B. 86 amended R.C. 2913.02 as follows:

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

(1) Without the consent of the owner or person authorized to give consent;

\* \* \*

(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.

\* \* \*

{¶ 8} Section 4 of the enacted legislation provides in pertinent part as follows:

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.

{¶ 9} Therefore, H.B. 86 contains the statement of specific legislative intent that the amendments to R.C. 2913.02 apply to a person who commits an offense specified or penalized under this section on or after the effective date of H.B. 86. *State v. Steinfurth*, 8th Dist. No. 97549, 2012-Ohio-3257, ¶ 14. The amendments also apply to a person to whom division (B) of R.C. 1.58 makes the amendments applicable. *Id.*

{¶ 10} R.C. 1.58(B) states:

*"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."* (Emphasis added.)

{¶ 11} Therefore "[w]hen sentencing an offender, Ohio courts must apply the statute in effect at the time the offender committed the offense, unless a statute, enacted after the commission of the offense, but before sentencing, provides for a lesser punishment." *Steinfurth*, ¶ 13.

{¶ 12} In this matter, defendant committed the offense during the time period of August 9, 2011 to September 9, 2011, or before the effective date of the changes to R.C. 2913.02. He entered a guilty plea on October 18, 2011 and was sentenced on January 5, 2012, or after the effective date of H.B. 86. The new statutory provisions amended R.C. 2913.02 to reduce the offense itself such that it amended the "fifth-degree felony conviction to that of a first-degree misdemeanor." *Steinfurth*, ¶ 15. The *Steinfurth* court explained:

*Steinfurth* committed a felony offense on May 4, 2011. He entered a plea of guilty to the felony offense on September 13, 2011. H.B. 86 went into effect on September 30, 2011. The trial court sentenced *Steinfurth* on October 13, 2011. Because *Steinfurth* committed the offense prior to H.B. 86's effective date, but was sentenced after the effective date, he was entitled to and received the reduced penalty for a first-degree misdemeanor based on R.C. 1.58 and H.B. 86's amendments to R.C. 2913.02. R.C. 1.58 clearly states that a criminal defendant receives the benefit of a reduced penalty, forfeiture, or punishment. Contrary to *Steinfurth's* argument, R.C. 1.58 makes no mention of a criminal defendant receiving the benefit of a lesser or reduced offense itself, here, the benefit of amending *Steinfurth's* fifth-degree felony conviction to that of a first-degree misdemeanor.

\*3 *Steinfurth* relies on *State v. Burton*, 11 Ohio App.3d 261, 11 Ohio B. 388, 464 N.E.2d 186 (10th Dist.1983) and *State v. Collier*, 22 Ohio App.3d 25, 22 Ohio B. 100, 488 N.E.2d 887 (3rd Dist.1984) in support of his argument he was entitled to the benefit of amending his conviction from a felony to a misdemeanor. These cases, however, clearly support the conclusion that R.C. 1.58, as applied here, only required the trial court to sentence *Steinfurth* for a first-degree misdemeanor pursuant to the amendments to R.C. 2913.02. The trial court correctly concluded the theft offense conviction remained a fifth-degree felony because *Steinfurth* committed the offense prior to the effective date of H.B. 86.

{¶ 13} That reasoning is fully applicable herein. In this matter, defendant committed the offense prior to H.B. 86's effective date, but he entered his guilty plea and was sentenced after the effective date. Therefore, under H.B. 86's amendments to R.C. 2913.02, the legislature stated its intent that the amendments to R.C. 2913.02 apply to a person who commits an offense specified or penalized under this section on or after the effective date of H.B. 86. Further, R.C. 1.58 does not provide for a defendant to receive the benefit of a

lesser or reduced offense, so the defendant is not entitled to the amendment of the fifth degree felony conviction to a first degree misdemeanor. The first assignment of error is therefore without merit.

{¶ 14} Nonetheless, in accordance with the principles outlined above, the penalty, forfeiture, or punishment for the offense has changed because theft in this matter is now a first degree misdemeanor and not a fifth degree felony. Under R.C. 1.58, defendant is entitled to receive the reduced penalty for a first degree misdemeanor based on R.C. 1.58 and H.B. 86's amendments to R.C. 2913.02. *Steinfurth*. Defendant, therefore, is not subject to postrelease control, which applies to felony convictions. *See* R.C. 2967.28. Accordingly, the trial court erred by imposing a term of postrelease control in this matter. The second assignment of error is well taken.

{¶ 15} Defendant's conviction is affirmed, but we vacate his sentence and remand for resentencing.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, P.J., and KATHLEEN ANN KEOUGH, J., concur.

**Parallel Citations**

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