

ORIGINAL

IN THE SUPREME COURT OF OHIO
2013 TERM

STATE OF OHIO,	:	Case No. 2013-0403
	:	
Plaintiff-Appellant/Cross-Appellee,	:	On Appeal from the Franklin County
vs.	:	Court of Appeals, Tenth Appellate District
	:	
AMBER M. LIMOLI,	:	
	:	Court of Appeals
Defendant-Appellee/Cross-Appellant.:	:	Case No. 11AP-924

**COMBINED MEMORANDUM OF DEFENDANT-APPELLANT/CROSS-APPELLEE
AMBER M. LIMOLI IN RESPONSE TO APPELLANT/CROSS-APPELLEE'S
MEMORANDUM AND IN SUPPORT OF JURISDICTION FOR THE CROSS-APPEAL**

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JURISDICTION OVER PLAINTIFF-APPELLANT/CROSS-APPELLEE'S APPEAL**

On a summer afternoon in 2010, Amber Limoli and her cousin exited their apartment in Columbus and began walking in the alley in the back of the building. This alley is an irregular, one-way road about 16 to 20 feet in width. It does not have a shoulder or sidewalk. It is used infrequently by motor vehicles. The sole purpose of the alley is to provide access to the rear of the residences on either side. Limoli was wearing sandals. She was afraid to walk in the grassy area next to the alley due to the presence of needles left by drug users. The women therefore stayed on the pavement.

A City of Columbus ordinance provides that “[w]hen neither a sidewalk nor a shoulder is available, any pedestrian walking along and upon a street or highway shall walk as near as practicable to an outside edge of the roadway[.]” A police officer on bicycle patrol stopped and detained Limoli ostensibly for violating this ordinance. A subsequent body search resulted in the seizure of a small quantity of crack cocaine hidden in her bra.

During a suppression hearing, the officer admitted there was no vehicle traffic in the alley. When asked to justify the stop, he insisted the ordinance required Limoli and her cousin to walk in single file along the outer edge of the alley. He admitted using this alleged “jaywalking” infraction as his excuse to detain Limoli for the purpose of searching her for drugs. The trial judge accepted the officer’s explanation and denied Limoli’s motion to suppress the crack cocaine.

In *Whren v. United States*, 517 U.S. 806, 811-13, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), the United States Supreme Court ruled that the temporary detention of an individual upon probable cause to believe she has violated a traffic law does not violate the Fourth Amendment’s prohibition against unreasonable seizures even if the traffic violation is a pretext to investigate some other crime. Although *Whren* provides police officers leeway to detain persons regardless

of whether their subjective intent corresponds to the legal justification for the stop, “the flip side of that leeway is that the legal justification must be objectively grounded.” *United States v. Miller*, 146 F.3d 274, 279 (5th Cir. 1998).

On appeal from the adverse suppression ruling, Limoli emphasized that an individual’s “right to remove from one place to another according to inclination” is “an attribute of personal liberty” protected by the Fourteenth Amendment. *Chicago v. Morales*, 527 U.S. 41, 53, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999). She argued that the arresting officer’s decision to stop and detain her ostensibly for a “jaywalking” violation” infringed on this right as well as her Fourth Amendment rights and amounted to an objectively unreasonable interpretation of the Columbus ordinance. Her detention and the ensuing search were therefore illegal.

The court of appeals relied on *Illinois v. Krull*, 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987) to reject Limoli’s challenge to the legality of her detention. *State v. Limoli*, 10th Dist. No. 11AP-924, 2012-Ohio-4502, ¶33. In *Krull*, the Supreme Court held that “[u]nless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law.” *Id.* 480 U.S. at 350, 107 S.Ct. at 1167.

The Tenth District mixed “apples and oranges.” Limoli never asserted that the Columbus ordinance is unconstitutional on its face. This Court has recognized that a facially-valid statute is susceptible to being arbitrarily enforced in a manner that interferes with the constitutional rights of the citizenry. *See e.g. State v. Hoffman*, 57 Ohio St.2d 129, 387 N.E.2d 239 (1979), syllabus (to avoid infringement upon the First Amendment right of free speech, this Court held that “[a] person may not be punished under R.C. 2917.11(A)(2) [the disorderly conduct statute] for ‘recklessly caus(ing) inconvenience, annoyance, or alarm to another,’ by making an ‘offensively coarse utterance’ or ‘communicating unwarranted and grossly abusive language to any person,’ unless the words spoken are likely, by their very utterance, to inflict injury or provoke the average person

to an immediate retaliatory breach of the peace.”). It has consistently been Limoli’s position that the arresting officer enforced the Columbus “jaywalking” ordinance in an objectively unreasonable, and hence unconstitutional, manner.

In *Krull*, the Supreme Court indicated the outcome “might well be different when police officers act outside the scope of a statute, albeit in good faith.” *Id.* 480 U.S. at 360, n. 17, 107 S.Ct. at 1172, n. 17. A majority of the federal appellate circuits “have concluded that an officer's mistake of law, even if made in good faith, cannot provide grounds for reasonable suspicion or probable cause, because an officer's mistake of law can never be objectively reasonable.” *United States v. Gross*, 550 F.3d 578, 585, n. 2 (6th Cir 2008) (collecting cases).

Limoli asks this Court to accept jurisdiction over her appeal for the purpose of deciding whether a police officer’s objectively unreasonable interpretation and enforcement of a pedestrian or vehicle traffic law, even if in good faith, can ever justify a stop and investigative detention? She believes the facts and circumstances of her case present a compelling basis for finding that her detention for “jaywalking” lacked an objectively reasonable basis. *Cf. State v. Patrick*, 153 Ohio Misc.2d 20, 2008-Ohio-7142, 914 N.E.2d 1121(M.C.), ¶24 (stop of bicyclist for impeding traffic was unsupported by probable cause where “[t]here is no requirement in the statute that bicyclists travel in single file in order to allow traffic to pass”).

This question implicates the citizenry’s substantial due process right of travel and the right to not be subject to unreasonable search and seizure under the federal and state constitutions. In light of the potential for abuse by law enforcement in this area, it also qualifies as a question of public or great general interest. *See United States v. Lopez-Valdez*, 178 F.3d 282, 289 (5th Cir. 1999) (“if officers are allowed to stop vehicles based upon their subjective belief that traffic laws have been violated even where no such violation has, in fact, occurred, the potential for abuse of

traffic infractions as pretext for effecting stops seems boundless and the costs to privacy rights excessive.").

In 2010, the United States Congress passed the Fair Sentencing Act ("FSA") which reduced the penalty disparity under federal law for offenses involving crack cocaine and other forms of cocaine. The legislators in Washington did not have the foresight to insert language in the Act regarding applicability of the reduced penalties to pre-FSA offenders still awaiting sentencing. This omission generated a significant and unnecessary amount of litigation in the district and circuit courts regarding the retroactivity of the penalty reductions.

In *Dorsey v. United States*, 567 U.S. ___, 132 S.Ct. 2321, 2326, 183 L.Ed.2d 250 (2012), the Supreme Court granted certiorari to decide "whether the Act's more lenient *penalty* provisions apply to offenders who committed a crack cocaine crime before August 3, 2010, but were not sentenced until after August 3." The *Dorsey* majority answered this question in the affirmative.

Following Congress' lead, the General Assembly enacted Am.Sub. H.B. No. 86 ("H.B.86"). The preamble to H.B. 86 states that the legislature's intent in amending R.C. 2925.03 and R.C. 2925.11, the Ohio trafficking and possession statutes, was "to eliminate the difference in criminal *penalties* for crack cocaine and powder cocaine[.]" (emphasis supplied). The Legislative Service Commission analysis of the Act explains that:

Formerly, two distinct sets of *penalties* were provided for those offenses – one set applied to cocaine that was crack cocaine, and the other applied to cocaine that was not crack cocaine. * * * The act eliminates the *penalty* distinctions provided in the offenses involving the two forms of cocaine, and provides a *penalty* for the offenses involving any type of cocaine that generally has a severity that is between the two current *penalties*. (Emphasis supplied).

<http://www.lsc.state.oh.us/analyses129/11-hb86-129.pdf>. at pp. 65-66.

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.” Limoli entered her no contest plea to possession of cocaine prior to the effective date of H.B. 86, but she was sentenced afterwards. The pre-H.B. 86 penalty for her offense was a mandatory prison term. The presumptive penalty under H.B. 86 is community control. The Tenth District Court of Appeals concluded that the application of R.C. 1.58(B) entitles her to sentencing under the H.B. 86. *Limoli*, ¶162.

The Franklin County Prosecuting Attorney asserts that it is the “State’s position” that pre-H.B. 86 offenders in Limoli’s position are not entitled to the benefit of its reduced penalties for crack cocaine. A trip down memory lane should persuade this Court that the prosecutor’s position cannot be reconciled with the express legislative intent of the General Assembly when it passed the Act.

This Court will recall that when the General Assembly enacted sweeping changes to the felony sentencing statutes with the passage of Senate Bill 2 in 1996, pre-S.B. 2 offenders asserted a right to “elect” to be sentenced under the new provisions. Because the legislation was silent on this issue, the General Assembly enacted a supplemental bill that “specifically stated that all defendants who committed crimes before July 1, 1996, shall be sentenced under the law in existence at the time of the offense, ‘notwithstanding division (B) of section 1.58 of the Revised Code.’” *State v. Rush*, 83 Ohio St.3d 53, 56, 1998-Ohio-423, 697 N.E.2d 634, 636 (emphasis supplied).

In *Rush*, this Court held that pre-S.B. 2 defendants possessed no right to “elect” sentencing under the new law. The Court reasoned that the “[t]he phrase ‘notwithstanding division (B) of section 1.58 of the Revised Code’ communicates the General Assembly’s *proactive* purpose by arresting R.C. 1.58(B)’s operation in this instance.” *Id.* 83 Ohio St.3d at 58, 697 N.E.2d at 638 (emphasis supplied).

The General Assembly did not insert similar “notwithstanding division (B) of section 1.58” language in H.B. 86. On the contrary, Section 3 of that Act expressly states the provisions of R.C. 1.58(B) apply to pre-H.B. 86 offenders still awaiting sentencing: “[t]he amendments to sections *** 2925.03, *** [and] 2925.11 of the Revised Code *** that are made in this act apply to a person who commits an offense involving *** cocaine *** on or after the effective date of this act and to a person to whom division (B) of section 1.58 of the Revised Code makes the amendments applicable.” (Emphasis supplied). R.C. 2925.01(X)(1) defines “cocaine” broadly as including all forms of cocaine.

Other county prosecutors have conceded that pre-H.B. 86 offenders still awaiting sentencing are eligible for the reduced penalties due to the operation of R.C. 1.58(B). *State v. Gatewood*, 2d Dist. No. 2012-CA-12, 2012-Ohio-4181, ¶12 (Montgomery County Prosecutor); *State v. Solomon*, 1st Dist. No. C-120044, 2012-Ohio-5755, ¶13 (Hamilton County Prosecutor)¹. The Franklin County Prosecutor counters that “the State” is “not bound by another prosecutor’s concession in another county.” But neither should the General Assembly and other counties of the State be bound by the minority position of one prosecutor’s office.

The Revised Code implicitly recognizes the need for the State of Ohio to speak with one voice in this Court with respect to matters of official policy. See R.C. 109.02 (Attorney General is the “chief law officer for the state” and “shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested.”); R.C. 309.08(A) (“*In conjunction with the attorney general, the prosecuting attorney shall prosecute in the supreme court cases arising in the prosecuting attorney’s county[.]*”)

¹The Hamilton County Prosecutor took the position that “R.C. 1.58(B) only applies to give Solomon the benefit of a reduced penalty, not a reduced level of the offense.” *Id.* ¶28.

It is true that R.C. 2953.14 permits the “either the prosecuting attorney or the attorney general” to appeal an adverse ruling of the court of appeals in a criminal matter to this Court. But this statute must be read in para materia with §§109.02 and 309.08(A) and in light of the recent opinion in *State v. Billingsley*, 133 Ohio St.3d 277, 2012-Ohio-4307, 978 N.E.2d 135, ¶¶29-30, wherein this Court ruled that a county prosecutor may not bind the State with respect to prosecutions outside the borders of his own county.

When the statutes are read in this matter, the Franklin County Prosecutor’s legal challenge to the applicability of the reduced penalties under H.B. 86 to pre-Act offenders may only be asserted “in conjunction with the Attorney General.” That requirement has not been met here.

H.B. 86 went into effect on September 30, 2011. In the ensuing eighteen months, the question of the applicability of the crack cocaine penalty reductions to pre-H.B. 86 offenders has surfaced in only two other appellate districts. It is a non-issue in those districts due to the county prosecutors’ concession that the reduced penalties apply. The apparent absence of appellate litigation in the other districts suggests that similarly-situated offenders in the remaining counties have been receiving the benefit of the reduced penalties at the trial court level without opposition by the prosecutor. Section 3’s transitional language has largely been successful in conveying the legislative intent of the General Assembly. In the final analysis, the absence of any controversy in the appellate districts on this issue indicates this appeal falls short of presenting a question of public or great general interest.

Under the circumstances, acceptance of jurisdiction in Limoli’s case would not serve the public’s interest, nor would it result in an opinion having precedential value for other prosecutions. For these reasons, this Court should decline jurisdiction over the prosecutor’s appeal.

STATEMENT OF THE CASE AND FACTS

Following the police stop for “jaywalking” and the seizure of crack cocaine from her undergarment, Limoli was indicted for possession of cocaine in violation of R.C. 2925.11. Because the indictment alleged that she possessed five or more grams, but less than ten grams, of the crack form of cocaine, the offense was classified as a third-degree felony and required a mandatory prison term.

After the trial court held a hearing and denied her motion to suppress, Limoli entered a plea of no contest to the offense, thereby preserving her right to appeal the suppression ruling. The trial court scheduled a sentencing hearing after the H.B. 86 amendments went into effect. Defense counsel argued that the new legislation reclassified his client’s crime as a fourth degree felony and that “this Court is free to place Ms. Limoli under community control.” The trial court declined to apply the H.B. 86 amendments, imposed a “mandatory” one-year prison term, but agreed to continue Limoli’s bond pending appeal.

The court of appeals concluded that the police officer “did not illegally stop and detain appellant for the purpose of issuing a jaywalking violation,” *Limoli*, ¶134, that “the trial court failed to discuss the totality of the circumstances in arriving at its conclusion concerning the voluntariness of appellant’s consent to be searched,” *id.* ¶143, and that the reduced penalties under H.B. 86 apply to Limoli. *Id.* ¶164.

The appeals panel remanded Limoli’s case to the trial court “with instructions to make additional findings relative to the voluntariness of appellant’s consent to be searched, so as to allow meaningful appellate review of the court’s ultimate disposition of appellant’s motion to suppress. Should the trial court determine on remand, and in light of the totality of the circumstances, that appellant’s consent was voluntarily given, resulting in conviction and

resentencing, the trial court shall sentence appellant pursuant to the provisions of R.C. 2929.11 and 2929.13 as amended by H.B. 86." *Id.* ¶166.

The prosecuting attorney appeals the sentencing issue. Limoli cross-appeals the issue of the legality of her stop for "jaywalking."

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1:

A police officer's objectively unreasonable interpretation and enforcement of a vehicular or pedestrian traffic law, even if in good faith, cannot justify a stop and investigative detention.

The United States Supreme Court has declared that "people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks." *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S.Ct. 1391, 1401, 59 L.Ed.2d 660 (1979). Any effort by a police officer to stop a pedestrian and restrain her freedom to simply walk away is a "seizure" subject to the limitations of the Fourth Amendment. *Terry v. Ohio*, 392 U.S. 1, 16, 88 S.Ct. 1868, 1877, 20 L.Ed.2d 889 (1968).

Under the majority rule in the federal courts, a police officer's objectively unreasonable interpretation and enforcement of a vehicular or pedestrian traffic law, even if in good faith, cannot justify a stop and investigative detention. *See Lopez-Valdez*, *supra*; *Gross*, 550 F.3d at 583 ("The district court erred in finding that [the sheriff's deputy] had probable cause to stop the vehicle, because, viewing the facts in the light most favorable to the government, [the deputy] could not have reasonably believed that the defendants' conduct amounted to a violation of [the changing lanes statute]); *United States v. Tyler*, 512 F.3d 405, 411 (7th Cir. 2008) ("[A] mistake of law (as opposed to a mistake of fact) cannot justify an investigative detention."); *United States v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000) ("To create an exception here would defeat the

purpose of the exclusionary rule, for it would remove the incentive for police to make certain that they properly understand the law that they are entrusted to enforce and obey”); *United States v. Twilley*, 222 F.3d 1092, 1096 (9th Cir. 2000) (“a belief based on a mistaken understanding of the law cannot constitute the reasonable suspicion required for a constitutional traffic stop”); *United States v. Tibbetts*, 396 F.3d 1132, 1138 (10th Cir. 2005)(“we have also held that failure to understand the law by the very person charged with enforcing it is not objectively reasonable”); *United States v. Chanthasouvat*, 342 F.3d 1271, 1279 (11th Cir. 2003) (“a mistake of law cannot provide reasonable suspicion or probable cause to justify a traffic stop.”).

In *United States v. Holmes*, No. 99-3622, 210 F.3d 376 (Table), 2000 U.S. App. LEXIS 7508, 2000 WL 52891 (7th Cir. Apr. 4, 2000), the court addressed the legality of a search following a jaywalking stop similar to the one in Limoli’s case. The record showed that Mr. Holmes retreated when he saw a police car and walked diagonally across the street in the opposite direction. The officer drove his vehicle in Holmes’ path and stopped him for jaywalking “even though there was absolutely no traffic in the area.” After running a computer check, the officer learned Holmes had an active warrant and arrested him. He found a firearm on his person during a search incident to arrest. Holmes was charged with being a felon-in-possession of a firearm.

After the federal district court denied his motion to suppress, Holmes conditionally pled guilty, reserving his right to appeal the suppression ruling. The Seventh Circuit Court of Appeals reversed his conviction on Fourth Amendment grounds. The appellate panel explained:

There [was] no evidence of any other moving vehicle * * *. Thus, Holmes was not interfering with traffic at the time the officers decided to stop him for ‘jaywalking’; he did not obstruct any vehicle until [the arresting officer] pulled forward and turned her patrol car into his path with the specific purpose of stopping him for violating the jaywalking ordinance. * * * Given these circumstances, we are not persuaded that the police had an objectively reasonable belief that Holmes was violating the jaywalking ordinance[.]

Id. at * 13-14.

The Tenth District in Limoli's appeal attempted to distinguish *Holmes* on the basis that unlike the Columbus ordinance, the ordinance at issue in *Holmes* included language that standing on a public roadway is an offense "if such act interferes with the lawful movement of traffic." *Id.*, ¶29. But this is really a distinction without a difference. A reasonably objective police officer should know that walking on the pavement of a sidewalk-less alley is not "jaywalking," at least not in the absence of vehicular traffic.

The illegality of the detention impacts the voluntariness of Limoli's alleged consent to the body search. As noted by the court of appeals, "[w]hen a person is unlawfully detained by police and consents to a search, the state must meet a more stringent standard." *Id.* ¶23. Quoting from this Court's decision in *State v. Robinette*, 80 Ohio St.3d 234, 1997-Ohio-343, 685 N.E.2d 762, the Tenth District stated that "[i]n order for consent to be considered an independent act of free will, 'the totality of the circumstances must clearly demonstrate that a reasonable person would believe that he or she had the freedom to refuse to answer further questions and could in fact leave.'" *Id.*

For these reasons, the court of appeals erred in overruling Limoli's first assignment of error. She asks this Court to accept jurisdiction to resolve the question of whether her stop and detention were objectively unreasonable and a violation of her constitutional rights.

Proposition of Law No. 2:

The reduced penalties under 2011 Am. Sub. H.B. No. 86 apply to an offender who committed a trafficking or possession offense involving crack cocaine prior to September 30, 2011, but is sentenced on or after that date.

The county prosecutor argues that H.B. 86 "eliminated an offense, *i.e.* crack-cocaine possession, and instead substituted another offense for it, *i.e.* possession of cocaine." Ergo, says the prosecutor, citing *State v. Kaplowitz*, 100 Ohio St.3d 205, 2003-Ohio-5602, 797 N.E. 2d 977,

the penalty for Limoli's offense was not reduced by the legislation, and she is not entitled to the remedial provisions of R.C. 1.58(B).

The prosecutor's position relies on flawed science. In *Kimbrough v. United States*, 552 U.S. 85, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007), the Supreme Court took judicial notice that "[c]rack and powder cocaine are two forms of the *same* drug." *Id.* 552 U.S. at 94, 128 S.Ct. at 566 (emphasis supplied). Justice Ginsberg's opinion points out that the "active ingredient in powder and crack cocaine is the same" and "[t]he two forms of the drug also have the same physiological and psychotropic effects." *Id.*

The prosecutor's position also rests on a misreading of the statutes. The pre- and post-H.B. 86 versions of R.C. 2925.01(X)(1) define "cocaine" broadly as including "[a] cocaine salt, isomer, or derivative, a salt of a cocaine isomer or derivative, or the base form of cocaine." The pre-H.B. 86 definition of "crack cocaine" did not require the prosecution to prove that the substance possessed or sold by the defendant was chemically different in any respect from powder cocaine. *State v. Wilson*, 156 Ohio App.3d 1, 2004-Ohio-144, 804 N.E.2d 61 (8th Dist.), ¶126.

In *Wilson*, the court explained: "Ohio defines crack cocaine as 'a compound, mixture, preparation, or substance that is or contains any amount of cocaine that is analytically identified as the base form of cocaine or that is in a form that resembles rocks or pebbles generally intended for individual use.' The state, therefore, does not have to prove that the cocaine found in the sample is in the base form, only that the substance contains cocaine and in a form that looks like 'individual use' rocks or pebbles." *Id.*

The Tenth District correctly observed that "both before and after the enactment of H.B. 86, R.C. 2925.11(C)(4) provided that a person who violated R.C. 2925.11(A) by possessing cocaine (without distinguishing between the powdered or solid form of cocaine) was 'guilty of possession of cocaine.'" *Limoli*, ¶161. It therefore properly rejected "the state's assertion that H.B. 86

eliminated the offense of 'possession of crack cocaine' and created a new offense of 'possession of either powdered or crack cocaine.'" *Id.* ¶162.

CONCLUSION

For all the foregoing reasons, Limoli prays that this Court will accept jurisdiction over her cross-appeal and allow full briefing and oral arguments on the merits, and decline jurisdiction over the prosecuting attorney's appeal.

Respectfully submitted,

DENNIS C. BELLI, Counsel of Record



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CERTIFICATE OF SERVICE

A copy of the foregoing Combined Jurisdictional Memorandum of Defendant-Appellee/Cross-Appellant Amber M. Limoli was served upon Ron O'Brien, Prosecuting Attorney, Franklin County, Ohio, and Steven L. Taylor, Assistant Prosecuting Attorney, Attorneys for Plaintiff-Appellant/Cross-Appellee State of Ohio, by hand-delivery this 11th day of April, 2013.



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