

ORIGINAL

IN THE SUPREME COURT OF OHIO
2013

STATE OF OHIO,

Case No. 13-403

Plaintiff-Appellant,

-vs-

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

AMBER LIMOLI,

Court of Appeals
Case No. 11AP-924

Defendant-Appellee

MERIT BRIEF OF PLAINTIFF-APPELLANT

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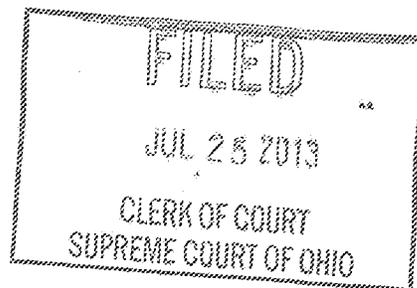


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STATEMENT OF FACTS

The grand jury indicted defendant on one count of possession of crack cocaine in an amount equal to or greater than 5 grams and less than 10 grams. (Trial Rec. 2) The indictment alleged that the offense occurred on July 16, 2010. (Id.)

The defense filed a motion to suppress and a supplemental motion. (Trial Rec. 33, 42) The State filed a memorandum contra. (Trial Rec. 43)

After the court overruled the motion to suppress, (Tr. 145-46), defendant pleaded no contest to the charge as indicted. (Trial Rec. 45; Tr. 157)

Defendant was sentenced on October 14, 2011, after the effective date of H.B. 86. (Tr. 161 et seq.) The parties addressed the question of whether the sentencing law in effect at the time of the offense controlled or whether the law as amended by H.B. 86 applied. (Tr. 161-64) The court sided with the view that the law in effect at the time of the offense controlled and therefore imposed a one-year sentence as a mandatory sentence as provided by pre-H.B. 86 law as to this crack-cocaine offense. (Tr. 165-66, 167-68) The court stayed the sentence pending appeal. (Tr. 166; Trial Rec. 56, 74)

Defendant later prevailed in the Tenth District. (Appeal Rec. 25) Part of the Tenth District's ruling (not raised here) addressed the validity of defendant's consent to search. The Tenth District remanded for further fact-finding on that issue. (Id. at ¶ 49) In later ruling on the State's application for reconsideration, the Tenth District recognized that, if need be, the trial court would be able to entertain the State's contention that the good-faith exception to the federal exclusionary rule applied. (Appeal Rec. 37)

On the issue of sentence, the Tenth District accepted defendant's argument that,

under R.C. 1.58(B), she benefits from H.B. 86 and its “reduction” of her “crack cocaine” offense from a third-degree felony carrying a mandatory prison sentence to a “cocaine” offense constituting a fourth-degree felony without a mandatory sentence. (Appeal Rec. 25, ¶¶ 61-64)

The State timely sought reconsideration, (Appeals Rec. 27), which was denied. (Appeals Rec. 37)

This Court accepted review of the State’s appeal on the sentencing issue. This Court declined review of defendant’s cross-appeal.

ARGUMENT

Proposition of Law. Under R.C. 1.58(B), House Bill 86’s elimination of crack cocaine as a separate unit of prosecution does not benefit a defendant whose crack-cocaine offense occurred before September 30, 2011, even when that defendant is sentenced after that date.

Under the law in existence at the time of defendant’s crack-cocaine offense, the Criminal Code punished crimes involving cocaine and crack cocaine differently. Generally, a crime involving crack cocaine was punished more severely than a crime involving powder cocaine of equivalent weight. At the time defendant committed her offense of possessing 9.18 grams of crack cocaine, (see Tr. 157), the offense was a third-degree felony carrying a mandatory prison term. Former R.C. 2925.11(C)(4)(c).

Effective on September 30, 2011, under House Bill 86, the crime of possessing crack cocaine is eliminated, and now all cocaine offenses, regardless of form as powder or crack, are prosecuted on the same escalating scale based on weight. Under the

amended version of the law, defendant would only be guilty of possession of cocaine, a fourth-degree felony with no mandatory prison. R.C. 2925.11(C)(4)(b).

House Bill 86 provides that the changes as to cocaine will be applicable “to a person to whom division (B) of section 1.58 of the Revised Code makes the amendments applicable.” Section 3 of H.B. 86. Thus, the applicability of the changes to defendant turns on R.C. 1.58(B), which provides:

(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.

It is the State’s position that, under R.C. 1.58(B), defendant does not receive the benefit of the merger of crack and powder cocaine offenses into one form of offense.

A.

Under R.C. 1.58(B), it is only when the penalty for the “offense” has been reduced that the reduced penalty applies at sentencing. In regard to the merger of crack and powder, however, the General Assembly has not merely reduced the penalty for an already-existing offense. Instead, it has eliminated an offense, i.e., crack-cocaine possession, and instead substituted another offense for it, i.e., possession of cocaine. The elimination of crack cocaine as a separate unit of prosecution means that defendant’s offense no longer exists.

When the General Assembly eliminates an offense, such elimination does not affect the viability of existing prosecutions for prior offenses or the punishment therefor. As stated in R.C. 1.58(A):

(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.

In addition, statutes are presumed to have only prospective application. R.C. 1.48.

“In order to overcome the presumption that a statute applies prospectively, a statute must ‘clearly proclaim’ its retroactive application.” *Hyle v. Porter*, 117 Ohio St.3d 165, 882 N.E.2d 899, 2008-Ohio-542, ¶ 10. “Text that supports a mere inference of retroactivity is not sufficient to satisfy this standard; we cannot *infer* retroactivity from suggestive language.” *Id.*

As a result of the foregoing, two major background principles emerge. First, subject to narrow exception under R.C. 1.58(B), a statutory amendment regarding a criminal offense or penalty generally has no effect on the ability to prosecute offenses occurring before the effective date of the amendment and generally has no effect on the ability to impose the penalty as it existed at the time of the offense. Second, the amended

version of a criminal statute is presumed not to retroactively apply to pre-amendment conduct, and only a clear proclamation of retroactivity will overcome the presumption of non-retroactivity.

In light of these background principles, defendant was properly sentenced for crack-cocaine possession as a third-degree felony carrying mandatory prison under the law in effect at the time of her offense. If the General Assembly had merely decided to reduce the penalty for crack-cocaine possession to a F-4 level, defendant would have benefited from the reduced penalty under R.C. 1.58(B). But because the General Assembly eliminated crack cocaine as a separate unit of prosecution, it did more than merely reduce the penalty for the “offense”; it eliminated that “offense” and substituted another offense (possession of cocaine) for it. The end result is that R.C. 1.58(B) does not clearly proclaim that these statutory amendments are applicable to defendant. Defendant was properly sentenced as a third-degree felony crack-cocaine offender and properly received a mandatory prison term by reason of the operation of R.C. 1.58(A) and by reason of the presumption of non-retroactivity in R.C. 1.48.

The Tenth District should have remanded with instructions to reinstate the one-year sentence if defendant’s motion to suppress is denied.

B.

Support for the State’s position can be found in *State v. Kaplowitz*, 100 Ohio St.3d 205, 2003-Ohio-5602, 797 N.E.2d 977, in which the Court addressed whether R.C. 1.58(B) applied to changes made to the aggravated vehicular assault statute. Those amendments split the offense into two forms and applied different degrees to the two

forms of offense. The Court concluded that the defendant did not benefit from the changes, saying that “R.C. 1.58(B) does not apply to give a criminal defendant the benefit of a reduced sentence if, by applying it, the court alters the nature of the offense, including specifications to which the defendant pled guilty or of which he was found guilty.” *Id.* at syllabus.

Kaplowitz supports the State’s view that R.C. 1.58(B) only applies in the narrow circumstance of an amendment that reduces the penalty for the “offense” but otherwise makes no other change to the nature of the offense. When the amendment changes the nature of the offense, then R.C. 1.58(B) does not apply, because the “offense” itself has changed, not just the penalty for an otherwise-unchanged “offense.”

To prove possession of crack cocaine, it was not enough to show that cocaine was present. It was also necessary to show that the controlled substance was “crack cocaine,” which was defined as 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.” Former R.C. 2925.01(GG) (defining “crack cocaine”). “Powder cocaine and crack cocaine are different controlled substances.” *State v. Yslas*, 173 Ohio App.3d 396, 2007-Ohio-5646, 878 N.E.2d 712, ¶ 13 (2nd Dist.). When H.B. 86 deleted the definition of “crack cocaine” and the degrees of offense related specifically to “crack cocaine,” it was eliminating the offense of “crack cocaine” possession. R.C. 1.58(B) does not make such an offense-deleting change applicable to prior offenders. Instead, under R.C. 1.58(A), such offenders are prosecuted and punished solely under the law in effect at the time of the offense.

This “nature of offense” approach from *Kaplowitz* makes good sense. When the offense itself has changed in one or more of its elements, it would be “apples and oranges” to compare the pre-amendment offense, the post-amendment offense, and the changes made in relation to sentencing in regard to such offenses. The reduced penalty in that situation could merely be reflective of the fact that there are now a reduced number of elements in the post-amendment offense and thus a less-serious offense involved. A post-amendment offense with fewer or different elements does not match up with the pre-amendment offense, and so their respective penalties as a practical matter cannot effectively be compared to determine whether the “penalty” for an “offense” truly was “reduced.”

The structure of R.C. 1.58 also demonstrates that there is no injustice in having the defendant suffer the statutory penalty that was applicable at the time of the offense. The statute specifically provides that the penalty extant at the time of the offense will apply. R.C. 1.48 provides that such a statutory amendment is presumed to be prospective only. R.C. 1.58(B) is a narrow exception to these general principles, and it only allows the defendant to benefit from an amendment if she is sentenced after the amendment and if the reduction in penalty related to the same “offense.”

C.

While the Tenth District acknowledged the State’s reliance *Kaplowitz*, the court failed to fully engage the State’s argument under *Kaplowitz*. The Tenth District did not address the specific definition of “crack cocaine” that applied to crack-cocaine offenses. This specific definition shows that the nature of a crack-cocaine prosecution was different

than the nature of a cocaine prosecution. The crack-cocaine prosecution had additional elements that needed to be proved.

A prime example of this difference can be found in the Tenth District's prior decision in *State v. Banks*, 182 Ohio App.3d 276, 2009-Ohio-1892, 912 N.E.2d 633 (10th Dist.). In *Banks*, the defendant prevailed on appeal in contending that the prosecution had failed to prove the element of "crack cocaine." The Tenth District quoted the definition of "crack cocaine" twice and noted that "Ohio courts have recognized that there is a distinction between cocaine and crack cocaine, and that there is a rational basis for the distinction made by the legislature." *Id.* at ¶ 14. The Tenth District noted that there was evidence the substance was cocaine but no evidence that the substance was crack cocaine. Accordingly, the court concluded that "the state failed to provide evidence that the substance was crack cocaine, as opposed to cocaine." *Id.* at ¶ 15. "Given that the state provided no evidence that the substance was crack cocaine as defined in R.C. 2925.01(GG), and the indictment specifically charged appellant with possession of crack cocaine, we find that the evidence was insufficient to convict appellant of the crime for which he was indicted." *Id.*

Under the *Banks* analysis, the nature of the drug as "crack cocaine, as opposed to cocaine" made a critical difference, and the evidence was insufficient to support conviction as a result. The Tenth District plainly concluded that the nature of the drug as crack cocaine constituted part of the nature of the offense. If not, there would have been no basis to acquit the defendant based on the failure to prove "crack cocaine."

The *Banks* Court cited with approval the Third District's decision in *State v.*

Crisp, 3rd Dist. No. 1-05-45, 2006-Ohio-2509. In *Crisp*, the defendant had been charged with one count for possession of powder cocaine and with one count for possession of crack cocaine. The Third District upheld the multiple convictions, drawing distinctions between cocaine and crack cocaine:

{¶ 21} * * * Based upon the above definitions, “cocaine” and “crack cocaine” each include the base form of cocaine. However, they are different forms of the same base substance. “There are real differences between the addictive impact of crack cocaine and free-base cocaine, on the one hand, and powder cocaine, on the other. The differences arise from the different way in which the drug is used.” *State v. Bryant* (July 17, 1998), 2d Dist. No. 16809.

{¶ 22} R.C. 2925.11(C)(4)(a) - (e), which are the specific penalty provisions for the possession of cocaine offenses, clearly make a distinction between cocaine that is not crack cocaine and crack cocaine. Essentially, each of the penalty provisions imposes more severe penalties for possession of crack cocaine. Thus, based upon such harsher penalties, we find it is clear that the legislature intended there to be a distinction between cocaine that is not crack and crack cocaine. Additionally, it is been recognized that such harsher penalties for crack cocaine are justified because crack cocaine “is more potent, because of the way it is ingested, than powder cocaine, and therefore is more dangerous to the user, and to society in generally.” *Bryant*, supra.

* * *

{¶ 24} Thus, while we recognize that that there is no distinction between cocaine and crack in the schedule definitions, we find with the specific penalty provisions under R.C. 2925.11(C)(4), the legislature clearly made a distinction. As such, we find that *Crisp*’s convictions for two separate offenses of possession for both powder cocaine and crack cocaine is not error. Accordingly, the third assignment of error is overruled.

The Tenth District accepted the view that a change in the nature of the offense

would mean under *Kaplowitz* that defendant would not benefit under R.C. 1.58(B). The Tenth District even conceded that the pre-amendment offense needed to be the “same offense” as the post-amendment offense in order to compare the two offenses to determine whether the penalty for the “offense” had been “reduced.”

{¶ 58} * * * Because R.C. 1.58(B) applies where “[a] penalty * * * *for any offense*, is reduced” by a statutory change, we must first decide whether the offense of which appellant was convicted was the same offense both before and after the adoption of H.B. 86. (Emphasis added.) If so, we must further compare the penalty, forfeiture, or punishment for that offense under pre-H.B. 86 law to the penalty, forfeiture (sic), or punishment for that offense after H.B. 86. If the offense described in R.C. 2925.11 is the same both before and after H.B. 86, and H.B. 86 reduced the penalty for that offense, then R.C. 1.58(B) applies, requiring application of the reduced penalty.

Despite these important concessions, however, the Tenth District failed to consider and address the specific definition of “crack cocaine,” a definition that necessarily differentiated “crack cocaine” from “cocaine.” As the Tenth District concluded in *Banks*, the involvement of crack cocaine is an essential element of the charge such that a failure of proof results in acquittal. “[T]here is a distinction between cocaine and crack cocaine * * *.” *Banks*, ¶ 14. It is different to prove “crack cocaine, as opposed to cocaine.” *Id.* at ¶ 15.

D.

To be sure, as the Tenth District found below, the involvement of crack cocaine affected the penalty. But, under Ohio law, a fact that increases the degree of the offense is an “additional element” of the greater-degree offense that must be proven at trial. R.C. 2945.75(A). Whenever a fact increases the degree of the offense, the additional fact

“does not simply enhance the penalty but transforms the crime itself by increasing its degree” and “is an essential element of the crime and must be proved by the state.” *State v. Brooke*, 113 Ohio St.3d 199, 863 N.E.2d 1024, 2007-Ohio-1533, ¶ 8 (discussing proof of prior convictions). Moreover, when the statute sets forth multiple drug offenses based on varying named drugs, “the type of controlled substance involved constitutes an essential element of the crime which must be included in the indictment.” *State v. Headley*, 6 Ohio St.3d 475, 479, 453 N.E.2d 716 (1983); cf. *State v. Jackson*, 134 Ohio St.3d 184, 2012-Ohio-5561, 980 N.E.2d 1032 (sufficient to allege schedule classification without naming specific drug when proceeding under schedule-based provision).

There is also a constitutional component to the problem. Because the involvement of “crack cocaine” and its weight increased the maximum sentence faced by defendant, the State was *constitutionally* required to include the “crack cocaine” fact and its weight in the indictment and to prove those matters beyond a reasonable doubt at a trial. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). “[T]he essential Sixth Amendment inquiry is whether a fact is an element of the crime. When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury.” *Alleyne v. United States*, 133 S.Ct. 2151, 2162 (2013). “[B]ecause the fact * * * aggravates the legally prescribed range of allowable sentences, it constitutes an element of a separate, aggravated offense that must be found by the jury * * *.” *Id.*

In light of these statutory and constitutional principles, the involvement of “crack

cocaine” and its weight were “additional elements” necessarily forming a “constituent part” of defendant’s offense. When H.B. 86 eliminated “crack cocaine” as a separate unit of prosecution, it was eliminating elements of the offense defendant had committed and thereby necessarily changing the nature of the offense.

E.

Instead of addressing the specific definition of “crack cocaine,” the Tenth District focused on the structure of R.C. 2925.11. The Tenth District emphasized that, even before H.B. 86, the penalties for “crack cocaine” and “cocaine” were grouped under the umbrella of paragraph (C)(4) of R.C. 2925.11, which referred to the “offense” as “possession of cocaine.” Under the Tenth District’s logic, defendant’s pre-amendment crack-cocaine offense was “possession of cocaine,” and her offense now would be “possession of cocaine,” and so the same “offense” was involved and the penalty for such offense was “reduced” so as make R.C. 1.58(B) apply. As emphasized by the Tenth District, “[b]oth before and after enactment of the bill, the offense created by R.C. 2925.11(C)(4) was ‘possession of cocaine.’” Decision, ¶ 62. According to the Tenth District, “[b]y the express language of the bill, H.B. 86 accomplished only a change in the penalty for that offense.” Id.

The chief problem with this analysis is that it ignores the very real difference between proving a “crack cocaine” charge and proving a “cocaine” charge. In the former, the specific definition of “crack cocaine” must be satisfied. In denying reconsideration, the Tenth District conceded that “the General Assembly has eliminated the *distinction* between crack cocaine and powder cocaine.” Memo Decision, at ¶ 7 (emphasis added).

So, despite the “possession of cocaine” umbrella under in R.C. 2925.11(C)(4), there was a pre-existing distinction between the offenses. The nature of the offenses are different because their pre-amendment and post-amendment elements are different.

The decision in *Kaplowitz* shows that the nature-of-offense approach is driven by the elements and/or specifications that are components of the respective pre-amendment and post-amendment offenses, not by the superficial names of those offenses. In *Kaplowitz*, the Court emphasized that the pre-amendment offense of “aggravated vehicular assault” was different than the post-amendment offense of “vehicular assault” because “vehicular assault” did not refer to the use of drugs or alcohol as part of the offense, while the use of drugs or alcohol was “central to the crime and specification” involved in the defendant’s pre-amendment aggravated vehicular assault offense. *Kaplowitz*, at ¶ 29. The post-amendment “vehicular assault” offense was different because it “ignore[d]” the alcohol/drug use specification that applied to the prior offense. *Id.*

Equally so here, the issue should be controlled by the distinctive elements of the respective offenses. Defendant’s pre-amendment “crack cocaine” offense is different because having a particular weight of “crack cocaine” was an essential element of that offense. The post-amendment “cocaine” offense “ignores” the prior element of “crack cocaine,” an element which had been “central” to defendant’s pre-amendment crime.

The Tenth District’s superficial label-based approach would ultimately disserve some defendants. One can envision the General Assembly renaming an offense and lowering its degree but otherwise leaving its elements unchanged. In such a situation, the

penalty for the “offense” will have been reduced, but the Tenth District would conclude, based solely on the differing names of the offenses, that the offenses are different so that old offenders could not take advantage of the reduced penalty under R.C. 1.58(B). The *Kaplowitz* nature-of-offense analysis should focus on the substantive elements of the offenses, not their superficial labels.

F.

Defendant will seek to rely on the Second District decision in *State v. Gatewood*, 2nd Dist. No. 2012-CA-12, 2012-Ohio-4181. But the *Gatewood* Court never acknowledged the specific definition of “crack cocaine” that had applied in such cases. Given that *Gatewood* was bereft of analysis on this critical point, and given the prosecution’s improvident concession in that case, *Gatewood* is not persuasive here. Of course, such a concession in another case in another county is not binding here.

The Second District asserted that Section 3 of H.B. 86 “evinced an intent on the part of the Ohio General Assembly that the new version of R.C. 2925.11 applies to a person, like Gatewood, who is being sentenced after the effective date of the statute.” But, actually, Section 3 of H.B. 86 only evinced an intent that courts would apply R.C. 1.58(B) to the problem. Section 3 specifically states that the amendments would apply “to a person to whom division (B) of section 1.58 of the Revised Code makes the amendments applicable.” If the General Assembly truly wished to mandate application of the amendments to pre-amendment conduct, it would have specifically said so, rather than requiring courts to engage in an analysis under R.C. 1.58(B).

Section 3 demands that courts faithfully apply R.C. 1.58(B). The Tenth District

has already agreed below that, “if H.B. 86 applies to appellant pursuant to R.C. 1.58(B), then appellant is entitled to the benefits provided by the statutes as amended.” *Limoli*, at ¶ 57 (emphasis added). “We must determine whether R.C. 1.58 applies to appellant * * *.” Id. at ¶ 58. As a result, not even the Tenth District agrees with the *Gatewood* Court’s conclusion that Section 3 guaranteed victory to crack-cocaine defendants on this issue. The Tenth District addressed the State’s arguments under R.C. 1.58(B). It just failed to address a key component of the State’s argument by failing to address the specific definition of “crack cocaine.”

In short, the *Gatewood* Court’s categorical “defendant wins” approach conflicts with the analysis used by the Tenth District in its original decision. Except for its “defendant wins” conclusion, *Gatewood* is not really in “accord” with *Limoli*, despite the *Limoli* panel’s citation to it in denying reconsideration.

In light of the specific definition of “crack cocaine,” this Court should conclude, consistent with *Banks*, that the nature of a crack-cocaine prosecution was different than the nature of a cocaine prosecution and that, under *Kaplowitz*, the H.B. 86 amendments eliminating “crack cocaine” as a distinct unit of prosecution do not apply to pre-amendment crack-cocaine offenders.

G.

When the Tenth District denied the State’s application for reconsideration, the panel found no reason to reconsider, even though the original decision had not fully engaged the State’s argument that the amendments regarding crack cocaine affected the nature of the offense. In denying reconsideration, the *Limoli* panel still did not address

the fact that prosecutions for crack-cocaine possession required proof of “crack cocaine” as defined in former R.C. 2925.01(GG).

In denying reconsideration, the panel merely adhered to its contention that H.B. 86 “did not change the nature of the offense of cocaine possession but only its penalty.”

Limoli, ¶ 8. But this conclusion cannot be squared with *Banks*. If the proof of “crack cocaine, as opposed to cocaine” did not make a difference as to the nature of the offense, then *Banks* should not have been acquitted by the Tenth District. If the “crack cocaine, as opposed to cocaine” only affected the penalty, then at most *Banks* would have been entitled to a reduction in penalty, not acquittal on the offense altogether.

The “only affects penalty” conclusion is also contrary to long-accepted Ohio doctrine recognizing that a fact increasing the degree of the offense “does not simply enhance the penalty but transforms the crime itself by increasing its degree” and “is an essential element of the crime and must be proved by the state.” *Brooke*, ¶ 8; R.C. 2945.75(A). It is no answer to say, as many have said, that the distinction between crack cocaine and cocaine affected the penalty. It affected the degree *and* the penalty and therefore was an essential element of the offense, not just a penalty enhancement.

In short, the Tenth District never addressed the specific definition of “crack cocaine,” never addressed the passages from its own *Banks* decision, and never addressed the long-standing Ohio doctrine treating degree-raising facts as essential elements.

H.

Defendant might contend that the definition of “cocaine” now includes the “base form of cocaine” and therefore the offense of crack-cocaine possession has not been

eliminated but merely rechanneled into “cocaine” prosecutions. But the inclusion of the “base form of cocaine” in the definition of “cocaine” is not new. House Bill 86 did not change the definition of “cocaine.” There is no “amendment” to the “cocaine” definition “reducing the penalty” so as to apply to defendant under R.C. 1.58(B). What matters is the fact that H.B. 86 eliminated the specific definition of “crack cocaine” and eliminated the degree-raising form of “crack cocaine” offense that had as an essential element (per *Banks*) the need to prove “crack cocaine, as opposed to cocaine.” These amendments do not merely reduce the penalty for an offense but eliminate an offense that was separately prosecutable and separately punishable.

This conclusion is supported by *Crisp*, which the *Banks* panel had cited with approval. In *Crisp*, the defendant had been charged with one count for possession of powder cocaine and with one count for possession of crack cocaine. The Third District *upheld* the multiple convictions, drawing distinctions between cocaine and crack cocaine and recognizing that both could be prosecuted, even though the substances were possessed at the same time and the definition of “cocaine” also included the “base form of cocaine.” So prior law allowed separate prosecution for crack-cocaine possession notwithstanding that “crack cocaine” also fit within the definition of “cocaine.” The amendments in H.B. 86 eliminate the crack-cocaine charge, thereby eliminating an offense, not just reducing the penalty for an otherwise-unchanged offense.

I.

It is telling that the Tenth District failed to address the specific definition of “crack cocaine” in its original decision and in its decision denying reconsideration. If

there was a way to explain how R.C. 1.58(B) applied because the nature of the offense was not changed and only the penalty was affected, the Tenth District would have done so. Its failure to explain shows that there is no explanation that will survive scrutiny. Indeed, *no appellate court* applying R.C. 1.58(B) to this issue of crack-cocaine sentencing has explained how the elimination of the specific definition of “crack cocaine” does not affect the nature of the offense. See, e.g., *State v. Anderson*, 2nd Dist. No. 25114, 2013-Ohio-295; *State v. Solomon*, 1st Dist. No. C-120044, 2012-Ohio-5755.

J.

Defendant might argue that the sentencing issue is not ripe because the Tenth District was remanding the case for further fact-finding on the consent-to-search issue and possibly on the good-faith exception to the exclusionary rule. But the issue is not premature, as the Tenth District *did* actually reverse on this basis and *did* remand with instructions to apply the sentencing statutes as amended by H.B. 86. At a minimum, this legally-incorrect remand instruction creates a current live controversy that needs resolution.

In addition, if the sentencing issue is not ripe for resolution now, then the Tenth District itself should not have addressed the issue. “It has been long and well established that it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and to render judgments which can be carried into effect. It has become settled judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon potential controversies.” *Fortner v. Thomas*, 22 Ohio St.2d

13, 14, 257 N.E.2d 371 (1970). Accordingly, courts *at all levels* must refrain from advisory opinions. If the issue is not ripe now, then it was not ripe for the Tenth District to decide either, and the Tenth District's resolution of the sentencing issue would still need to be vacated as an improper advisory ruling.

Another case is pending in this Court presenting the same sentencing issue in *State v. Barclay*, Sup.Ct. No. 13-918. *Barclay* does not have the remanded-search issue that is included in *Limoli*. If the *Limoli* ruling on sentencing was premature, this Court could still accept review of *Barclay* and allow briefing to move forward in that case. Meanwhile, if premature, the Tenth District's ruling on the sentencing issue in the present case would still need to be vacated.

K.

The resolution of other pending cases in this Court involving R.C. 1.58(B) should not control the resolution of the present case. In *State v. Taylor*, Sup. Ct. Case No. 12-2136, the Ninth District 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. The argument in that case is largely over labeling: whether a thief should stand convicted as a fifth-degree felon (with a misdemeanor sentence) or should stand convicted of a first-degree misdemeanor (with a misdemeanor sentence).

The stakes are much higher here, and the issue is different. In this case, the State is contending that the defendant receives no benefit under R.C. 1.58(B) and still should face the same felony level *and* same mandatory prison sentence that applied at the time of

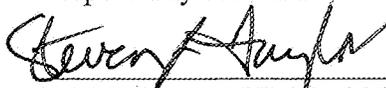
the offense. If this Court determines that the defendant in *Taylor* prevails, it will merely be saying that, when the defendant benefits under R.C. 1.58(B), he gets the benefit of *both* the reduced degree *and* the reduced penalty. In the present case, though, the question is whether the defendant should receive any benefit at all under R.C. 1.58(B). A victory by the defendant in *Taylor* would necessarily be a narrow victory that would not be dispositive of the argument being presented here.

The State's proposition of law warrants relief.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court reverse the Tenth District's judgment as to sentencing and remand the case to the common pleas court with instructions to reinstate the one-year mandatory sentence if defendant's motion to suppress is denied.¹

Respectfully submitted,

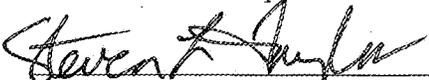


STEVEN L. TAYLOR 0043876 (Counsel of Record)
Chief Counsel, Appellate Division
Counsel for Plaintiff-Appellant

¹ If this Court sua sponte contemplates a decision upon an issue not briefed, the State respectfully requests notice of that intention and requests an opportunity to brief the issue before this Court makes its decision. *Miller Chevrolet v. Willoughby Hills*, 38 Ohio St.2d 298, 301 & n. 3, 313 N.E.2d 400 (1974); *State v. 1981 Dodge Ram Van*, 36 Ohio St.3d 168, 170, 522 N.E.2d 524 (1988).

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail on this 25th day of July, 2013, to Dennis C. Belli, Two Miranova Place, Suite 500, Columbus, Ohio 43215, counsel for defendant-appellee.



STEVEN L. TAYLOR

IN THE SUPREME COURT OF OHIO
2013

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

AMBER LIMOLI,

Defendant-Appellee

Case No.

13-0403

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

Court of Appeals
Case No. 11AP-924

NOTICE OF APPEAL OF PLAINTIFF-APPELLANT STATE OF OHIO

RON O'BRIEN 0017245
Franklin County Prosecuting Attorney
373 South High Street, 13th Floor
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Phone: 614-525-3555
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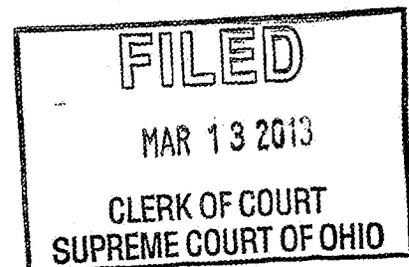
and

STEVEN L. TAYLOR 0043876 (Counsel of Record)
Chief Counsel, Appellate Division

COUNSEL FOR PLAINTIFF-APPELLANT

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NOTICE OF APPEAL OF PLAINTIFF-APPELLANT STATE OF OHIO

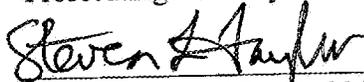
Plaintiff-appellant, the State of Ohio, hereby gives notice of appeal to the Supreme Court of Ohio from the decision and judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in *State v. Limoli*, 10th Dist. No. 11AP-924, which were filed on September 28, 2012, and October 1, 2012, respectively.

This appeal is being timely filed pursuant to S.Ct.Prac.R. 7.01(A)(5). The State timely filed an application for reconsideration in the Tenth District on October 9, 2012, and the Tenth District denied that application by memo decision and journal entry filed on February 5, 2013.

The State of Ohio invokes the jurisdiction of the Supreme Court on the grounds that the case presents questions of public or great general interest and involves a felony and warrants the granting of leave to appeal.

Respectfully submitted,

RON O'BRIEN 0017245
Prosecuting Attorney



STEVEN L. TAYLOR 0043876

(Counsel of Record)

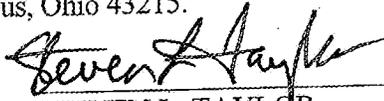
Chief Counsel, Appellate Division

Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail on this 13th day of Mar., 2013, to Dennis C. Belli, Two Miranova Place, Suite 71, Columbus, Ohio 43215, counsel for defendant-appellee.

Pursuant to S.Ct.Prac.R. 3.11(A)(3), a copy was also sent by regular U.S. mail on this 13th day of Mar., 2013, to the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.



STEVEN L. TAYLOR
Chief Counsel, Appellate Division

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	No. 11AP-924
	:	(C.P.C. No. 10CR-6678)
v.	:	
	:	(REGULAR CALENDAR)
Amber M. Limoli,	:	
	:	
Defendant-Appellant.	:	

JUDGMENT ENTRY

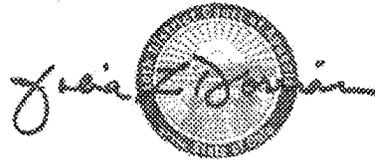
For the reasons stated in the decision of this court rendered herein on September 28, 2012, we sustain appellant's first assignment of error in part and also sustain appellant's second assignment of error. It is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is reversed, and this matter is remanded to that 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 re-sentencing, the trial court shall sentence appellant pursuant to the provisions of R.C. 2929.11 and 2929.13 as amended by H.B. 86. Costs shall be assessed against appellee.

DORRIAN, J., BROWN, P.J., & BRYANT, J.

/S/ JUDGE_____

Date: 10-01-2012
Case Title: STATE OF OHIO -VS- AMBER M LIMOLI
Case Number: 11AP000924
Type: JEJ TRIAL COURT JUDGMENT REVERSED AND REMANDED

So Ordered

A handwritten signature in cursive script, "Julia L. Dorrian", is written over a circular official seal. The seal features a central emblem and text around its perimeter, though the details are somewhat faded.

/s/ Judge Julia L. Dorrian

Electronically signed on 2012-Oct-01 page 2 of 2

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 11AP-924
v.	:	(C.P.C. No. 10CR-6678)
	:	
Amber M. Limoli,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 28, 2012

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

Dennis C. Belli, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶ 1} Defendant-appellant, Amber M. Limoli ("appellant"), appeals from her conviction and sentencing after entering a no-contest plea in the Franklin County Court of Common Pleas to a charge of possession of cocaine in violation of R.C. 2925.11. Appellant entered her plea of no contest following the denial of her motion to suppress evidence based on her contention that the cocaine was discovered during an illegal search and seizure. For the reasons that follow, we remand the case to the trial court for further proceedings.

I. Facts and Procedural Background

{¶ 2} On July 16, 2010, at approximately 4:00 or 5:00 p.m. in the afternoon, officers of the Columbus Police Department stopped appellant to cite her for jaywalking in Cherry Alley, an alley behind appellant's apartment on the west side of Columbus, Ohio. The police consider the area to be a high-crime neighborhood with a high incidence of drug activity. After the initial stop, Officer Brandon Harmon ("Officer Harmon") summoned a female officer, Officer April Redick ("Officer Redick"), to search appellant.

During the search, a rock of crack cocaine fell from underneath appellant's shirt. Although there is no dispute as to these facts, appellant and the police officers provided different accounts as to the circumstances surrounding the event. Most significantly, the police testified that appellant consented to a search of her person. Appellant denied giving consent to be searched.

{¶ 3} On November 16, 2010, the Grand Jury of the Franklin County Court of Common Pleas indicted appellant on one count of possession of cocaine in violation of R.C. 2925.11. The indictment charged that, on July 16, 2010, appellant "did knowingly obtain, possess, or use a controlled substance included in Schedule II, to wit: methylbenzoylecgonine, commonly known as crack cocaine, in an amount equal to or exceeding five (5) but less than ten (10) grams of crack cocaine as defined in section 2925.01 of the Ohio Revised Code."

{¶ 4} On July 15, 2011, appellant filed a motion to suppress evidence alleging that she had been illegally searched and, on July 20, 2011, the trial court conducted the first day of an evidentiary hearing on that motion. The court heard additional testimony on July 26 and August 17, 2011.

{¶ 5} In describing the events of July 16, 2010, Officer Harmon testified that the police had received information that there was possible drug trafficking going on in the area and that appellant's name "was being thrown out there" in connection with the report. (Tr. 120.) He and two other officers were patrolling the neighborhood on bicycles and riding north on Davis Avenue "in the area where we had heard that [appellant] was selling crack cocaine." (Tr. 43.) He testified that he looked down the alley and saw appellant and another woman walking towards Davis Avenue, side by side, "directly down the middle" of Cherry Alley. (Tr. 43.) He observed appellant immediately turn around and walk away from the officers at a fast pace. He testified that, when people immediately change their course of direction after seeing police, it usually means that there is a possibility that criminal activity is occurring.

{¶ 6} Officer Harmon made contact with appellant in the parking lot to the rear of appellant's apartment building. He testified that he had dealt with appellant on several prior occasions and that she "wasn't acting her normal self," but was acting "nervous"—as though she wanted the police encounter to be over as quickly as possible. (Tr. 38.) He informed appellant that he had observed her jaywalking and "immediately" asked her if

she had anything on her person of which he should be aware, i.e., weapons or narcotics. He testified that appellant responded "no" and that he then asked her if she would give consent to search her person, at which point appellant replied, "Sure. Call up a female officer."¹ (Tr. 39.) Appellant then summoned Officer Redick. There was no evidence that any of the police officers conducted a patdown search to ensure their personal safety and, in fact, Officer Harmon testified that, in his approximately eight to ten prior encounters with appellant, "it's always been an officer relationship when everything is pretty docile. There has not been much conflict." (Tr. 118-19.)

{¶ 7} Officer Harmon testified that appellant was not free to leave while the officers were waiting for Officer Redick but, rather, that she was being detained by the three officers present. In addition, Officer Harmon testified that, at the time he observed appellant walking in the alley, he knew "that there could possibly be some narcotics related to this too." (Tr. 120.) He testified that appellant received the jaywalking ticket "[s]ometime during the incident" and estimated that 15 minutes at most passed between the time of the initial stop and the search and arrest. (Tr. 40.) During the encounter, several people came out from the apartment building, including appellant's friends and family members, and gathered in the parking lot to observe.

{¶ 8} In addition, Officer Harmon testified that he had previously arrested appellant for possession of cocaine. He stated that he had encountered appellant on approximately eight to ten prior occasions, including traffic stops, pedestrian violations, and the execution of search warrants of suspected drug houses. He stated that, on these previous occasions, he had asked appellant if she would consent to be searched and that she had always responded "absolutely no." (Tr. 119.) He testified that he had no doubt that appellant had given her consent to be searched when stopped for the jaywalking offense and that he did not hear appellant say or do anything before or during the search indicating that she was withdrawing her consent.

{¶ 9} A second bicycle patrol officer at the scene, Mark Denner ("Officer Denner"), testified that it was his "understanding" that appellant had consented to the search but that he could not recall any words that she may have used. He testified that

¹ Later in his testimony, Officer Harmon described her response to his question whether she would consent to be searched as "call up a female and go ahead." (Tr. 119.) Still later in the testimony the officer characterized the exchange as him asking the question "do you mind if we check," and her answering "no, go ahead and call a female and you can search." (Tr. 121.)

No. 11AP-924

4

"there was no indication that she wasn't saying yes" and that her demeanor indicated that she was "okay" with having a female officer come and search. (Tr. 28.)

{¶ 10} The third bicycle patrol officer, Jeffrey Beine ("Officer Beine"), also testified. He stated that appellant and another female were both "in the middle of the alley" and that, when appellant saw the officers, she turned directly around and went the other way. (Tr. 108.) He could not testify that he heard appellant affirmatively consent to a search and had only a "very vague" recollection of the entire encounter.

{¶ 11} Officer Redick, who conducted the search, also testified at the suppression hearing. She testified that she arrived at the parking lot a few minutes after receiving the request that she conduct a search of appellant. Officer Harmon informed Officer Redick that appellant had consented to be searched. She conducted the search and felt a hard, solid object underneath appellant's breast area about the size of one-half to three-quarters of a golf ball. The officer was able to manipulate the object, causing the object to fall. She stated that appellant did not ask her at any time to stop the search nor indicate to her in any other way that she was not consenting to the search.

{¶ 12} Appellant also testified at the suppression hearing. She testified that she was just beginning to enter Cherry Alley from the parking lot of her apartment building and was with her cousin who was walking "way ahead" of her. (Tr. 84.) She testified that she did not enter the roadway at Cherry Alley when she saw the three officers on bicycles but instead turned around towards her apartment. In the parking lot behind the apartment building, she approached another individual she identified as "Q." By the time the officers arrived in the parking lot on their bicycles, she was hugging "Q," at which point the police officers stopped both of them. She testified that Officer Harmon approached her and asked her why she was acting "weird" and where she was going. She asked him whether she was "wanted or not." (Tr. 88.) She further testified that Officer Harmon then told her she was jaywalking and that she was going to get a ticket. He asked both appellant and "Q" for identification and ran an inquiry to determine if either had outstanding warrants. When appellant asked if any warrants had been disclosed, Officer Harmon answered that none had. She testified that she then tried to walk away and that Officer Harmon told her to come back and that the police were about to "search you all." (Tr. 90.) Appellant denied that the officer asked her whether she would consent to a search and denied that she ever gave consent. She testified that she repeatedly told him

"Write the ticket, write the ticket," but that Officer Harmon replied, "I'm about to have a female officer." (Tr. 132.) She further testified that the officers conducted a search of the individual called "Q" but let him go. She testified that "I never said they could search me or anything. I didn't say nothing. I tried to walk away. I just kept telling them to write the ticket." (Tr. 133.)

{¶ 13} Appellant testified that she felt intimidated by the officers because "they always stop me * * * [and] try to figure out a way to give me a ticket * * * and find out stuff." (Tr. 95.) She stated that, because of this, she felt she didn't have a choice as to whether the search was going to happen. Consistent with Officer Harmon's testimony, appellant stated that the two did have prior encounters with each other and that she had always previously refused to give Officer Harmon voluntary permission to be searched. She testified, however, that he had in the past nevertheless summoned female officers who then searched her. She testified that this had happened on three to four occasions. She identified one occasion as being a traffic stop involving a police canine unit, at which time she told Officer Harmon that she did not want to be searched, and he said "since the dog tapped on the car I had to be searched." (Tr. 131.) She testified that another incident had occurred while she was a pedestrian and was carrying a "little taser" that the officer may have thought was a gun. (Tr. 131.)

{¶ 14} On August 12, 2011, before the third and final day of the evidentiary hearing on the motion, appellant filed a supplemental memorandum regarding her motion to suppress. In that memorandum, appellant more specifically addressed the question whether she had provided voluntary consent to the search and argued that "whether a citizen has voluntarily consented to a search is determined by reviewing the totality of the circumstances." (Supplemental Memorandum to Motion to Suppress, at 4-5.)

{¶ 15} On August 16, 2011, the state filed a memorandum in response to appellant's supplemental memorandum, again emphasizing its position that appellant had voluntarily consented to be searched. (Memorandum Contra, at 5.) The state acknowledged that, "[w]hen a person is lawfully detained by police and consents to a search, the state must show by clear and convincing evidence that the consent was freely and voluntarily given." (Memorandum Contra, at 5.) It argued, inter alia, that the officers had made no promise nor threats; that appellant was not placed in the police cruiser or

handcuffed prior to the search; that the officers' guns were not drawn; and that appellant was not detained.

{¶ 16} On August 17, 2011, at the conclusion of the suppression hearing, the court denied appellant's motion to suppress, stating:

[A]s far as duress is concerned, the officer said she consented. She said she did not consent. Nobody suggested there was evidence to show she did consent, but it was because she was afraid or under duress, so duress is not a[n] issue.

* * *

There were multiple officers that said she consented, some said directly, there were words spoken. Others through their testimony, obviously a female officer was called, brought to the scene and searched her.

* * * I think it's important that there is testimony that a crowd gathered here. * * * And Ms. Limoli does not seem to be a shy young lady, she seems to speak her mind, she did just fine on the witness stand, and if she was not consenting to this search it would seem to me that there would be other people that witnessed all of this that would have been able to testify to that. I heard no one else.

So the issue on the consent comes down to a credibility question. The officers say she consented, she said she did not. And I find in favor of the officers on that issue.

So there was probable cause to write the ticket, there was probable cause to detain her. They asked for consent and she gave it. So the motion to suppress is denied.

(Emphasis added.) (Tr. 145-46.)

{¶ 17} The trial court judge was not asked to—nor did he—issue any written findings of fact or conclusions of law, or any other written decision in connection with his denial of appellant's motion to suppress. Accordingly, his statement quoted above constitutes the entirety of the court's findings of essential facts concerning the voluntariness of appellant's consent.

{¶ 18} Appellant has timely appealed and raises two assignments of error for our consideration.

II. Validity of Search

{¶ 19} Appellant's first assignment of error states:

The trial court committed reversible error when it denied Defendant-Appellant's motion to suppress physical evidence obtained by the police in violation of her rights under the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 14 of the Ohio Constitution.

{¶ 20} It is axiomatic that the Fourth and Fourteenth Amendments to the United States Constitution and the Ohio Constitution protect individuals against unreasonable searches by agents of the government. "The Fourth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, and Section 14, Article I of the Ohio Constitution, protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." " *State v. Broughton*, 10th Dist. No. 11AP-620, 2012-Ohio-2526, ¶ 15, quoting *State v. Ford*, 10th Dist. No. 07AP-803, 2008-Ohio-4373, ¶ 19. The Fourth Amendment to the United States Constitution generally prohibits the government from conducting warrantless searches and seizures. *State v. Fowler*, 10th Dist. No. 10AP-658, 2011-Ohio-3156, ¶ 11-12. ("Searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment unless an exception applies." [Citation omitted.]). One exception permits police to conduct warrantless searches with the voluntary consent of the individual. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973) (stating "a search conducted pursuant to a valid consent is constitutionally permissible"). *Columbus v. Bickis*, 10th Dist. No. 09AP-898, 2010-Ohio-3208, ¶ 19.

{¶ 21} In reviewing the trial court's denial of appellant's motion to suppress, we are guided by the following principles:

Appellate review of a motion to suppress involves mixed questions of law and fact and, therefore, is subject to a twofold standard of review. *State v. Humberto*, 10th Dist. No. 10AP-527, 2011-Ohio-3080, ¶ 46. "Because the trial court is in the best position to weigh the credibility of the witnesses, we must uphold the trial court's findings of fact if competent, credible evidence supports them. We nonetheless must independently determine, as a matter of law, whether the facts meet the applicable legal standard." *Id.*, citing *State v. Reedy*, 10th Dist. No. 05AP-501, 2006-Ohio-1212, ¶ 5 (internal citations omitted).

State v. Griffin, 10th Dist. No. 10AP-902, 2011-Ohio-4250, ¶ 49.

{¶ 22} In determining the voluntariness of consent to a search, a court must apply a different standard when a consent is given during a lawful police detention as opposed to an unlawful detention. "[W]hen a person is *lawfully detained* by police and consents to a search, the state must show by clear and convincing evidence that the consent was freely and voluntarily given.' * * * Important factors in determining the voluntariness of consent are: (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse to consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found. * * * *In re Parks*, 10th Dist. No. 04AP-355, 2004-Ohio-6449, ¶ 22." (Citation omitted; emphasis added.) *Fowler* at ¶ 16; see also *Schneckloth*.

{¶ 23} When a person is unlawfully detained by police and consents to a search, the state must meet a more stringent standard. When consent is "obtained during an illegal detention, the consent is negated 'even though voluntarily given if [the consent is] the product of the illegal detention and not the result of an independent act of free will.' * * * In 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.' [*State v.*] *Robinette* [80 Ohio St.3d 234 (1997)], paragraph three of the syllabus. The state 'bears the burden of proving, by "clear and positive" evidence, that consent was freely and voluntarily given.' " (Citations omitted.) *State v. Spain*, 10th Dist. No. 09AP-331, 2009-Ohio-6664, ¶ 26.

{¶ 24} Notably, irrespective of whether consent is given during a lawful or unlawful detention, a court must examine the totality of the circumstances in determining the voluntariness of a consent to be searched. See *State v. Lattimore*, 10th Dist. No. 03AP-467, 2003-Ohio-6829, ¶ 9 (determining that totality of circumstances demonstrated the appellant's consent was voluntary where officers lawfully detained appellant, officers made no promises or threats to obtain consent, and the appellant initially cooperated with the officers). Compare, *State v. Robinette*, 80 Ohio St.3d 234 (1997), at paragraphs two and three of the syllabus ("Under Section 14, Article I of the Ohio Constitution, the

totality-of-the-circumstances test is controlling in an unlawful detention to determine whether permission to search a vehicle is voluntary.").

A. Legality of Detention for Jaywalking.

{¶ 25} When ruling on a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to resolve factual questions and evaluate witness credibility. *State v. Hogan*, 10th Dist. No. 11AP-644, 2012-Ohio-1421, ¶ 17, citing *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. In the case before us, the trial court expressly found Officer Harmon to be more credible than appellant as to two central questions of fact: (1) whether appellant was, in fact, walking down the center of Cherry Alley at the time the police first observed her, and (2) whether appellant gave express verbal consent to be searched. The trial court in this case accepted Officer Harmon's testimony as true and that his testimony constituted competent, credible evidence to support the trial court's conclusion that the answer to both of these questions is "yes." We therefore accept as fact that appellant was walking down the center of the alley prior to being stopped by the officers and that, during the initial few minutes of her encounter with police officers, appellant verbally consented to be searched.

{¶ 26} As previously discussed, at ¶ 22-24, in determining whether a verbal expression of consent was voluntary, we apply a different analysis when the consent was expressed during a legal detention as opposed to an illegal detention. We must therefore initially determine whether appellant's detention was legal or illegal.

{¶ 27} Appellant argues that her detention was unlawful and that the state was therefore required to meet the enhanced burden established in *Robinette*, i.e., to demonstrate that the totality of the circumstances clearly demonstrated that a reasonable person in appellant's circumstances would have believed that he or she had the freedom to refuse to answer further questions. Appellant contends that Officer Harmon could not reasonably have believed that her act of walking in the middle of Cherry Alley violated the jaywalking ordinance as there were no vehicles in the vicinity at the time, and she therefore did not interfere, or pose a reasonable possibility of interfering, with vehicular or pedestrian traffic, or public safety. Appellant contends that Officer Harmon lacked probable cause or reasonable suspicion to believe that she had committed a violation of the Columbus jaywalking ordinance and therefore had no legal basis to stop her. We reject appellant's argument that her detention was illegal.

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{¶ 28} Appellant was cited for violating Columbus Traffic Code 2171.05(c), which provides: "Where neither a sidewalk nor a shoulder is available, any pedestrian walking along or upon a street or highway shall walk as near as practicable to an outside edge of the roadway, and, if on a two (2) way roadway, should walk only on the left side of the roadway." Accordingly, here, as no sidewalk or shoulder was available, Officer Harmon had the authority to stop appellant for the purpose of issuing her a jaywalking citation if he had reason to suspect that appellant had failed to "walk as near as practicable to an outside edge of the roadway." The ordinance does not include as an element of the offense proof that a pedestrian's failure to walk as near as practicable to the outside edge of a roadway posed a risk of interfering with traffic.

{¶ 29} In support of her argument, appellant cites a Seventh Circuit case sustaining the grant of a motion to suppress filed by a person stopped for jaywalking. In *United States v. Holmes*, 210 F.3d 376 (7th Cir.2000), the court held that police detention of the pedestrian was unlawful because "when the officers decided to stop Holmes, they could not reasonably believe he was violating the jaywalking ordinance" in light of the fact that he was not interfering with traffic at the time of the stop. *Id.* But the underlying ordinance in *Holmes*, unlike the Columbus ordinance, specifically provided that "[n]o person shall stand or loiter on any roadway other than in a safety zone *if such act interferes with the lawful movement of traffic.*" (Emphasis added.) *Id.* at fn. 2. This court will not rewrite the Columbus jaywalking ordinance to add as an element of the offense that the pedestrian's location in the street interfered with traffic.

{¶ 30} Officer Harmon observed appellant walking down the middle of Cherry Alley and that observation alone justified appellant's initial detention, as an officer who observes the commission of a minor misdemeanor has reasonable suspicion to believe a criminal offense has occurred and may stop and briefly detain the offender. *State v. Dillon*, 10th Dist. No. 04AP-1211, 2005-Ohio-4124, ¶ 27-28, 38 ("[T]he officers possessed an independent reason to stop appellant because they witnessed him commit the offense of jaywalking."). Police may detain an individual when there is a reasonable suspicion to believe that a traffic violation has been committed regardless of the officer's motives in making the stop. *See State v. Stokes*, 10th Dist. No. 07AP-960, 2008-Ohio-5222, ¶ 29 ("In *Whren [v. United States]*, 517 U.S. 806 (1996)], the United States Supreme Court held that a pretextual traffic stop was not unconstitutional where the officer had an objectively

reasonable basis for making the stop. And, in [*City of Dayton v. Erickson* [76 Ohio St.3d 3 (1996)]] the Supreme Court of Ohio held that a police officer's stop of a vehicle based on probable cause that a traffic violation has occurred or was occurring does not violate constitutional restrictions 'even if the officer had some ulterior motive for making the stop, such as a suspicion that the violator was engaging in more nefarious criminal activity.' *Id.* at syllabus.").

{¶ 31} Appellant further observes that this court in 1983 found unconstitutional a Columbus ordinance directing that pedestrians "shall move, whenever practicable, upon the right half of crosswalks." *Columbus v. Truax*, 7 Ohio App.3d 49 (10th Dist.1983). We held that an ordinance that "requires pedestrians to walk on the right side of a crosswalk even though no other pedestrian may be in the crosswalk," *id.* at 52, was an arbitrary and unreasonable exercise of the city's police power; that the ordinance was unconstitutional; and that Truax therefore could not be found guilty of violating it.

{¶ 32} The holding in *Truax* does not avail the appellant in this case. First, *Truax* is distinguishable. The issue in that case was whether a pedestrian could be found guilty of the misdemeanor offense of jaywalking for failing to walk on the right side of a crosswalk. In the case at bar, the issue before the trial court was not whether appellant was guilty of the misdemeanor offense of jaywalking. Rather, the issue was whether Officer Harmon had reasonable suspicion to believe appellant had violated the ordinance. Based on the text of the ordinance and his observation of appellant walking in the middle of the alley, he clearly did.

{¶ 33} Second, assuming, arguendo, that the jaywalking ordinance in the case at bar was arbitrary or unreasonable, either on its face or as applied to appellant, that circumstance does not compel the conclusion that Officer Harmon acted inappropriately in detaining appellant in order to issue her a citation for jaywalking. The officer observed appellant walking down the middle of the alley—in violation of the ordinance as written. "Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law. If the statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written." *Illinois v. Krull*, 480 U.S. 340, 350 (1987). See also *United States v. Cardenas-Alatorre*, 485 F.3d 1111, 1115-17

(10th Cir.2007) (holding that, even if a New Mexico traffic law forbidding tinted windows as unconstitutionally vague as applied to the defendant, an officer who relied on the statute to effectuate a traffic stop did not act unreasonably).

{¶ 34} We conclude that Officer Harmon did not illegally stop and detain appellant for the purpose of issuing a jaywalking violation. Where an officer observes a violation of law, lawfully stops that individual in connection with that violation, and, prior to completing the purpose of the stop, asks permission to conduct a search, the request occurs during a lawful detention. *Fowler* at ¶ 16, citing *State v. Riggins*, 1st Dist. No. C-030626, 2004-Ohio-4247, ¶ 21, and *State v. Chiodo*, 10th Dist. No. 01AP-1064, 2002-Ohio-1573. We therefore conclude that appellant had been lawfully detained when Officer Harmon requested appellant's consent to be searched.

B. Trial Court's Finding that Consent was Voluntarily Given

{¶ 35} Having determined that appellant was lawfully detained at the time Officer Harmon requested her consent to be searched, we must ascertain whether the trial court correctly determined, in effect, that the state had met its burden of demonstrating by clear and convincing evidence that her consent was freely and voluntarily given. *Spain* at ¶ 26; *Lattimore* at ¶ 14.

{¶ 36} The voluntariness of a consent to a search is a question of fact and will not be reversed on appeal unless clearly erroneous. *Lattimore* at ¶ 9, citing *State v. Clelland*, 83 Ohio App.3d 474 (4th Dist.1992). Appellant argues, however, that the trial court erred in not adequately considering the totality of the circumstances in finding that her consent was valid. She suggests that the court's finding that she uttered words indicating consent was insufficient to justify a finding of voluntariness. She argues that she is therefore entitled to a remand to the trial court for it to make additional findings of fact.

{¶ 37} We agree that it is not enough under the Fourth Amendment that a trial court find that an individual spoke words of consent to search. The court must also determine, under the totality of the circumstances, whether the individual gave consent voluntarily. And that finding must be supported by clear and convincing evidence.

{¶ 38} Moreover, Crim.R. 12(C) and (F) govern the process by which a trial court must adjudicate a pretrial motion to suppress evidence. Specifically, Crim.R. 12(F) provides: "[w]here factual issues are involved in determining a motion, the court shall state its essential findings on the record."

{¶ 39} Based on the record before us, we find that the trial court failed to document in the record that it had addressed the totality of the circumstances and to state on the record its essential facts supporting a finding of voluntariness. We therefore remand the case to the trial court.

{¶ 40} In reaching this conclusion, we are guided by our own precedent. In *Spain*, a 2009 case, we reviewed a case in which police found cocaine on an individual who had been stopped for jaywalking and thereafter gave police consent to be searched. The trial court found that consent had been given under duress. On appeal, we observed that "[t]he question of whether consent to a search was voluntary or the product of *duress or coercion, express or implied*, is a question of fact to be determined from the totality of the circumstances.'" (Emphasis added.) *Id.* at ¶28, quoting *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, ¶ 99. We further found that the trial court had not "discuss[ed] the factual findings it found essential, based upon the totality of the circumstances, in making its finding of duress." *Spain* at ¶ 28. We vacated the trial court's decision and remanded it for the court to make findings as to whether there was consent, and, if so "whether such consent was voluntary under the totality of the circumstances, and/or to further discuss the factual basis in support of its ruling on duress." *Id.* at ¶ 29.

{¶ 41} In *Spain*, we cited *State v. Ogletree*, 8th Dist. No. 86285, 2006-Ohio-448, ¶ 15-17, for the proposition that, under Crim.R. 12(F), a trial court has the responsibility "to make 'essential findings' on the record to provide [an] appellate court with [a] sufficient basis to review assignments of error relating to factual issues in pre-trial motions." *Spain* at ¶ 29. The *Ogletree* court remanded a criminal case to the trial court to make findings necessary to resolve the "fact-intensive" issue of consent. Consistent with the decision in *Ogletree*, we held in *Spain* that the trial court had not made "critical determinations or findings * * * [and] that the record was insufficient for this court to effectively review the trial court's decision to grant the motion to suppress." *Spain* at ¶ 29.

{¶ 42} Similarly, in a 2010 state appeal, this court considered the issue whether a trial court had failed to make the essential findings required by Crim.R. 12(F) so as to allow meaningful appellate review of its ruling to suppress evidence. *State v. Forrest*, 10th Dist. No. 10AP-481, 2010-Ohio-5878. We noted that "essential findings are the fundamental or necessary reasons relied upon by the trial court in reaching its final determination" on an issue and that they "are more than mere conclusions of law" but

"need not be as specific as special findings of fact." *Id.* at ¶ 12. The court cited *Spain* and instructed the court on remand to make findings of fact explaining why the evidence submitted warranted its legal conclusion concerning duress. *Id.* at ¶ 23.

{¶ 43} In the case before us, as in *Spain* and *Forrest*, 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. Rather, the trial court was satisfied that the consent was valid based on its factual determination that appellant had spoken words of consent, and its legal observation that neither party had suggested that appellant in fact consented but did so only because she was afraid or under duress. The trial court therefore concluded that "duress is not an issue." (Tr. 145.)

{¶ 44} We find, in contrast and for reasons stated below, that appellant in this case had raised the issue of the voluntariness of her consent. And determination of voluntariness is the touchstone in determining the validity of an express verbal consent—not an absence of duress. Coercion, express or implied, also precludes a finding of voluntariness. *See State v. Pierce*, 125 Ohio App.3d 592, 599 (10th Dist.1998), quoting *Schneckloth* at 233 ("Proof of voluntariness necessarily includes a demonstration that no coercion was employed and that consent was not granted "only in submission to a claim of lawful authority."'). Moreover, "no matter how subtly the coercion was applied, the resulting "consent" would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed." *State v. Ingram*, 82 Ohio App.3d 341, 347 (10th Dist.1992), quoting *Schneckloth* at 227. And "[c]onsent given only in submission to a claim of lawful authority is not free and voluntary." *State v. Trumbull*, 10th Dist. No. 97APA12-1661 (Sept. 17, 1998), citing *Ingram* at 346.

{¶ 45} Appellant testified that Officer Harmon, accompanied initially by two and thereafter by three other officers, asked her for permission to search her in light of a history of prior encounters in which appellant was searched despite her affirmative refusal of permission to search. She testified that she repeatedly asked the officers to "write the ticket," presumably to end the police detention, and that Officer Harmon replied, "I'm about to have a female officer." (Tr. 132.) Moreover, both appellant and Officer Harmon testified that Officer Harmon specifically advised her that she was not free to leave while they were waiting on Officer Redick to arrive to conduct the search.

{¶ 46} As mentioned above, on August 12, 2011, before the third and final day of

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the evidentiary hearing on her motion to suppress, appellant filed a supplemental memorandum regarding her motion to suppress. In that memorandum, appellant more specifically addressed the question whether she had provided voluntary consent to the search, raised the issue of police coercion, and argued that "whether a citizen has voluntarily consented to a search is determined by reviewing the totality of the circumstances." (Supplemental Memorandum to Motion to Suppress, at 4-5.) She suggested that Officer Harmon conveyed to her an air of inevitability as to the search, justifying the conclusion that her expression of consent was not truly voluntary. She contended that she had been approached by several male, uniformed, armed officers on bicycles, was not free to leave, and was intimidated by their presence. She noted that her testimony had been that she had been stopped and searched by Officer Harmon on several past occasions and that she did not feel that she ever had a choice about whether or not she could refuse a search of her person because, in her experience, she was going to be searched every time officers saw her whether or not she consented. She asserted that "in the totality of the circumstances, this pattern of constantly stopping the defendant and searching her constitutes official harassment and intimidation resulting in coercion to consent to search." (Supplemental Memorandum, at 5.)

{¶ 47} Accordingly, our review of the record discloses that appellant raised the issue as to whether, should the court believe she orally gave consent, she gave that consent voluntarily. Appellant expressly testified that she felt she had no choice but to submit to a search. We cannot determine from the record before us, however, that the trial court evaluated appellant's credibility as to this testimony. Accordingly, we are unable to determine whether the trial court found this portion of appellant's testimony to lack credibility or even considered the question of the voluntariness of appellant's consent.

{¶ 48} Moreover, in this case, neither the defense nor the state presented evidence as to several of the factors relevant to a totality-of-the-circumstances analysis of voluntariness; e.g., the individual's age, experience, and knowledge of right to refuse consent. Nor is the timing clear as to the point in time at which appellant received the jaywalking citation. We note that, generally, where consent to search is given after a detention for the issuance of a traffic citation, but before the citation is issued, that fact weighs in favor of a finding of coercion. *State v. Bickel*, 5th Dist. No. 2006-COA-034,

2007-Ohio-3517, ¶ 26 ("The potentially coercive effect of the roadside detention is far more compelling when the officer requests permission to search *before* completing the citation."(Emphasis sic.)). Moreover, the burden of proving that appellant gave voluntary consent to be searched was on the prosecution, and a factual finding that appellant voluntarily consented must be supported by clear and convincing evidence.

{¶ 49} We therefore sustain appellant's first assignment of error to the extent that we remand this case to the trial court with instructions that it 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.

III. Sentencing—Applicability of Am.Sub.H.B. No.86

{¶ 50} Appellant's second assignment of error states:

The trial court's refusal to apply the 2011 Sub. H.B. 86 amendments to R.C. 2925.11(C) (possession of cocaine) and R.C. 2929.13(B) (sentencing for a fourth or fifth degree felony) resulted in a sentence that is contrary to law.

{¶ 51} On June 29, 2011, the governor signed into law 2011 Am.Sub.H.B. No. 86 ("H.B. 86"). As summarized by the Ohio Legislative Service Commission, H.B. 86 "[e]liminate[d] the distinction between the criminal penalties provided for drug offenses involving crack cocaine and those offenses involving powder cocaine, provide[d] a penalty for all such drug offenses involving any type of cocaine that generally has a severity that is between the two current penalties, and also revise[d], in specified circumstances regarding an offender who is guilty of 'possession of cocaine,' the specified statutory rules to use in determining whether to impose a prison term on the offender." Legislative Service Commission, Final Analysis, Am.Sub.H.B. No. 86, 129th General Assembly, <http://www.lsc.state.oh.us/analyses129/11-hb86-129.pdf> (accessed Sept. 24, 2012), at 8. Specifically, H.B. 86 deleted the term "crack cocaine" from the statutory scheme.

{¶ 52} Prior to the effective date of H.B. 86, a defendant convicted of possessing an amount of crack cocaine exceeding five grams but less than ten grams (as was appellant), was guilty of a felony of the third degree and faced a mandatory prison term. See former R.C. 2925.11(C)(4)(c). H.B. 86 amended R.C. 2925.11(C)(4) to provide:

If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of

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possession of cocaine. The penalty for the offense shall be determined as follows:

* * *

(b) If the amount of the drug involved equals or exceeds five grams but is less than ten grams of cocaine, possession of cocaine is a felony of the fourth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

R.C. 2929.13, as amended by H.B. 86, provides in part:

(B)(1)(a) Except as provided in division (B)(1)(b) of this section, if an offender is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence, the court shall sentence the offender to a community control sanction of at least one year's duration if all of the following apply:

(i) The offender previously has not been convicted of or pleaded guilty to a felony offense or to an offense of violence that is a misdemeanor and that the offender committed within two years prior to the offense for which sentence is being imposed.

(ii) The most serious charge against the offender at the time of sentencing is a felony of the fourth or fifth degree.

(iii) If the court made a request of the department of rehabilitation and correction pursuant to division (B)(1)(c) of this section, the department, within the forty-five-day period specified in that division, provided the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court.

(b) The court has discretion to impose a prison term upon an offender who is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence if any of the following apply:

(i) The offender committed the offense while having a firearm on or about the offender's person or under the offender's control.

(ii) The offender caused physical harm to another person while committing the offense.

(iii) The offender violated a term of the conditions of bond as set by the court.

(iv) The court made a request of the department of rehabilitation and correction pursuant to division (B)(1)(c) of this section, and the department, within the forty-five-day period specified in that division, did not provide the court with the name of, contact information for, and program details of any community control sanction of at least one year's duration that is available for persons sentenced by the court.

(c) If a court that is sentencing an offender who is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence believes that no community control sanctions are available for its use that, if imposed on the offender, will adequately fulfill the overriding principles and purposes of sentencing, the court shall contact the department of rehabilitation and correction and ask the department to provide the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court. Not later than forty-five days after receipt of a request from a court under this division, the department shall provide the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court, if any. Upon making a request under this division that relates to a particular offender, a court shall defer sentencing of that offender until it receives from the department the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court or for forty-five days, whichever is the earlier.

If the department provides the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court within the forty-five-day period specified in this division, the court shall impose upon the offender a community control sanction under division (B)(1)(a) of this section, subject to divisions (B)(1)(b)(i) and (ii) of this section. If the department does not provide the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for

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persons sentenced by the court within the forty-five-day period specified in this division, the court may impose upon the offender a prison term under division (B)(1)(b)(iii) of this section.

{¶ 53} Accordingly, after H.B. 86 amended R.C. 2925.11(C)(4), a convicted defendant matching the outlined criteria may generally expect to receive community control sanctions rather than a prison sentence. *See* R.C. 2929.13(B)(1).

{¶ 54} In the case before us, the court found on August 17, 2011 that appellant was guilty of violating R.C. 2925.11, the cocaine possession statute, in that she possessed crack cocaine weighing more than five grams but less than ten grams. Because H.B. 86 significantly impacted the consequences of being found guilty of that violation, the question arose at the October 2011 sentencing hearing whether appellant was eligible to receive the benefits of the bill. The trial court applied pre-H.B. 86 law by characterizing appellant's offense as a felony of the third degree and sentencing her to a mandatory one-year sentence term.

{¶ 55} In this appeal, appellant argues that the General Assembly expressly provided that the reforms of H.B. 86 should apply to persons such as appellant who had not yet been sentenced as of the September 30, 2011 effective date of the new law and regardless of the date the criminal offense occurred. We agree.

{¶ 56} Section 3 of H.B. 86 specifically addressed the issue whether the sentencing benefits of the bill should be applied to persons convicted of crack cocaine for offenses that occurred prior to sentencing by providing in uncodified law that:

The amendments to section[] * * * 2925.11 of the Revised Code, * * * that are made in this act apply * * * to a person to whom division (B) of section 1.58 of the Revised Code makes the amendments applicable.

{¶ 57} Accordingly, if H.B. 86 applies to appellant pursuant to R.C. 1.58(B), then appellant is entitled to the benefits provided by the statutes as amended.

{¶ 58} R.C. 1.58(B) provides that "[i]f [a] 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." We must determine whether R.C. 1.58 applies to appellant, who had been convicted of possessing cocaine in crack cocaine form but not yet sentenced as of September 30, 2011. Because R.C. 1.58(B) applies where "[a] penalty * * * *for any offense*,

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is reduced" by a statutory change, we must first decide whether the offense of which appellant was convicted was the same offense both before and after the adoption of H.B. 86. (Emphasis added.) If so, we must further compare the penalty, forfeiture, or punishment for that offense under pre-H.B. 86 law to the penalty, forfeiture, or punishment for that offense after H.B. 86. If the offense described in R.C. 2925.11 is the same both before and after H.B. 86, and H.B. 86 reduced the penalty for that offense, then R.C. 1.58(B) applies, requiring application of the reduced penalty.

{¶ 59} The state argues that R.C. 1.58(B) does not apply. It contends that H.B. 86 did not merely reduce the penalty for an existing offense but, rather, that "under H.B. 86, the crime of possessing crack cocaine is eliminated," and that the bill "substituted another offense (possession of cocaine) for it". (Appellee's brief, at 28, 30.) We reject this argument.

{¶ 60} To determine whether H.B. 86 changed or eliminated the offense of which appellant was convicted, we examine the changes made to R.C. 2925.11(C)(4) as reflected in the text of the bill itself. The bill's proposed additions and deletions to existing statutory text were indicated by under lineation of proposed new statutory text and strikethroughs of proposed deletions, as follows:

Sec. 2925.11. (A) No person shall knowingly obtain, possess,
or use a controlled substance.

* * *

(C) Whoever violates division (A) of this section is guilty of
one of the following:

* * *

(4) If the drug involved in the violation is cocaine or a
compound, mixture, preparation, or substance containing
cocaine, whoever violates division (A) of this section is *guilty
of possession of cocaine. The penalty* for the offense shall be
determined as follows:

* * *

(b) If the amount of the drug involved equals or exceeds five
grams but is less than ~~twenty-five~~ ten grams of cocaine ~~that is
not crack cocaine or equals or exceeds one gram but is less
than five grams of crack cocaine,~~ possession of cocaine is a
felony of the fourth degree, and ~~there is a presumption for a~~

prison term for the offense division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) If the amount of the drug involved equals or exceeds ~~twenty-five~~ ten grams but is less than one hundred ~~twenty~~ ten grams of cocaine ~~that is not crack cocaine or equals or exceeds five grams but is less than ten grams of crack cocaine,~~ possession of cocaine is a felony of the third degree, and, except as otherwise provided in this division, there is a presumption for a prison term for the offense. If possession of cocaine is a felony of the third degree under this division and if the offender two or more times previously has been convicted of or pleaded guilty to a felony drug abuse offense, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree.

H.B. 86. (Italicized emphasis added.)

{¶ 61} The text of H.B. 86 is significant for purposes of this appeal in two ways. First, the text illustrates 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." Second, all of the relevant H.B. 86 amendments to R.C. 2925.11 follow the phrase in R.C. 2925.11(C)(4) providing that "[t]he *penalty* for the offense shall be determined as follows: * * *." Construed together, these two phrases require the conclusion that H.B. 86 did not change the elements of the criminal offense of possession of cocaine but only changed the penalty for that offense.

{¶ 62} Accordingly, we reject 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."² Both before and after enactment of the bill, the offense created by R.C. 2925.11(C)(4) was "possession of cocaine." By the express language of the bill, H.B. 86 accomplished only a change in the penalty for that offense. Accordingly, R.C. 1.58(B) applies, and the trial court was required to impose the penalty for that offense "according to the statute as amended" by H.B. 86. *Accord State v. Sullivan*, 10th Dist. No.

² We note that the state's argument, if accepted, might additionally create significant double jeopardy and other issues should the state hereafter attempt to prosecute appellant for violation of what it characterizes as a "new" offense subsequent to H.B. 86.

11AP-414, 2012-Ohio-2737, ¶ 23, citing *State v. Banks*, 10th Dist. No. 11AP-1134, 2012-Ohio-2328, ¶ 8 (holding that inmates sentenced prior to the September 30, 2011 effective date of H.B. 86 do not benefit from its changes, but observing that "R.C. 1.58(B) allows those upon whom a sentence has not yet been imposed to benefit from the statutory changes").

{¶ 63} The state additionally argues that the amended penalty provisions implemented by H.B. 86 should not be applied to appellant pursuant to the holding in *State v. Kaplowitz*, 100 Ohio St.3d 205, 2003-Ohio-5602. In that case, the Supreme Court of Ohio held that "R.C. 1.58(B) does not apply to give a criminal defendant the benefit of a reduced sentence if, by applying it, the court alters the nature of the offense, including specifications to which the defendant pled guilty or of which he was found guilty." *Id.* at syllabus. This argument hinges on the state's characterization of possession of crack cocaine as constituting a different offense than possession of powder cocaine. But, as previously discussed, H.B. 86 did not change the nature of the offense of which appellant was found guilty but only changed the penalty for that offense. *Kaplowitz* therefore is inapposite. Compare *State v. Jones*, 5th Dist. No. 2011CA00284, 2012-Ohio-2900, ¶ 19 (H.B. 86 did not substantively alter the nature of the offense of which defendant was convicted, i.e., escape in violation of R.C. 2921.34(A)(1); *Kaplowitz* is distinguishable, and the trial court erred in not imposing a sentence consistent with the provisions of H.B. 86 even though the defendant committed the crime 16 days before the effective date of H.B. 86.).

{¶ 64} Finally, the state directs us to R.C. 1.58(A), which establishes that the repeal of a statute does not affect the prior operation of the statute and that the amendment of a statute does not affect the enforcement of any proceeding, or the penalty or punishment that may be imposed, if the statute had not been repealed or amended. The state argues that R.C. 1.58(A) thereby preserves the availability of pre-H.B. 86 sanctions for appellant. But the state's argument fails because R.C. 1.58(A) is applicable only "except as provided in division (B)" of R.C. 1.58. Accordingly, R.C. 1.58(A) is only of relevance if R.C. 1.58(B) does not apply. We have determined, however, that R.C. 1.58(B) does apply to appellant, and the state's reliance on R.C. 1.58(A) is therefore misplaced.

{¶ 65} Appellant's second assignment of error is also sustained.

IV. Disposition

{¶ 66} For the foregoing reasons, we sustain appellant's first assignment of error in part and also sustain appellant's second assignment of error. We reverse the judgment of the Franklin County Court of Common Pleas and remand this case to that 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.

Judgment reversed and cause remanded with instructions.

BROWN, P.J., and BRYANT, J., concur.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 11AP-924
v.	:	(C.P.C. No. 10CR-6678)
	:	
Amber M. Limoli,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

JOURNAL ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on February 5, 2013, it is the order of this court that appellee's application for reconsideration is denied. Costs are assessed against appellee.

DORRIAN, BRYANT & BROWN, JJ.

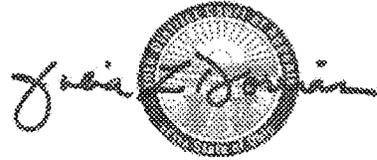
/S/ JUDGE_____

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Tenth District Court of Appeals

Date: 02-05-2013
Case Title: STATE OF OHIO -VS- AMBER M LIMOLI
Case Number: 11AP000924
Type: JOURNAL ENTRY

So Ordered

A handwritten signature in cursive script, reading "Julia L. Dorrian", is written over a circular official seal. The seal features a sunburst design in the center and text around the perimeter, though the text is not clearly legible.

/s/ Judge Julia L. Dorrian

Electronically signed on 2013-Feb-05 page 2 of 2

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 11AP-924
v.	:	(C.P.C. No. 10CR-6678)
	:	
Amber M. Limoli,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

MEMORANDUM DECISION

Rendered on February 5, 2013

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

Dennis C. Belli, for appellant.

ON APPLICATION FOR RECONSIDERATION

DORRIAN, J.

{¶ 1} Plaintiff-appellee, State of Ohio ("the state"), has filed an application for reconsideration of our decision of September 28, 2012, in *State v. Limoli*, 10th Dist. No. 11AP-924, 2012-Ohio-4502. For the reasons that follow, we deny the application

{¶ 2} "Applications for reconsideration are governed by App.R. 26. The test we generally apply to applications for reconsideration is whether the application calls our attention to an obvious error in the decision, or raises an issue that we did not properly consider in the first instance." *Fleisher v. Ford Motor Co.*, 10th Dist. No. 09AP-139, 2009-Ohio-4847, ¶ 2. "App.R. 26(A) was not designed for use in instances where a party simply disagrees with the conclusions and logic of the appellate court." *Hudson v. Guarantee*

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Title and Trust Co., 10th Dist. No. 08AP-1047, 2009-Ohio-5545, ¶ 2. Rather, "App.R. 26 provides a mechanism by which a party may prevent miscarriages of justice that could arise when an appellate court makes an obvious error or renders an unsupportable decision under the law." *State v. Owens*, 112 Ohio App.3d 334, 336 (11th Dist.1996).

{¶ 3} Moreover, App.R. 26 does not mandate that a court of appeals affirmatively discuss in a written decision every argument presented by a party in an appellate brief. That is, the fact that an appellate court does not address in its written decision each and every argument presented in a brief does not mean that the court failed to consider the issue raised in the appeal. *See In re Estate of Phelps*, 7th Dist. No. 05 JE 19, 2006-Ohio-1471 (appellate court had no reason to discuss a case cited as precedent in a brief where the case failed to shed any light on the issue raised in the appeal). Nevertheless, we will briefly address the merits of the state's application for reconsideration.

{¶ 4} In our decision in *Limoli*, we held that defendant-appellant, Amber M. Limoli ("appellant"), had been legally detained while jaywalking but that the trial court had failed to make and include in the record findings of essential facts concerning whether, under the totality of the circumstances, appellant's consent to be searched had been given voluntarily. The state first argues that we failed to address in our decision the state's argument that, even if appellant involuntarily gave consent to be searched, the evidence produced as a result of the search should nevertheless have been deemed admissible based on what the state characterizes as a "good-faith exception to the federal exclusionary rule." (Application at 4.) It urges us to amend our decision by changing the final paragraph to read:

We reverse the judgment of the Franklin County Court of Common Pleas and remand this case to that 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, *or should the trial court deny the motion to suppress based on the good-faith exception*, resulting in conviction and resentencing, the trial court shall sentence appellant pursuant

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to the provisions of R.C. 2929.11 and 2929.13 as amended by [Am.Sub.]H.B. 86.

Limoli at ¶ 66. (Additional proposed text in italics.)

{¶ 5} In response, appellant argues that, if the trial court finds that she consented to be searched based on police duress or coercion, express or implied, then the police necessarily could not have had an objectively reasonable good-faith belief that their conduct was lawful.

{¶ 6} Regardless of the merits of the parties' arguments on this substantive issue, nothing in our decision precludes the trial court, on remand, from entertaining the state's argument concerning application of a good-faith exception to the federal exclusionary rule if it first concludes that appellant's consent was the product of coercion or duress, express or implied. As noted in our decision, the trial court has not expressly made that determination and must do so on remand. It would be premature and advisory in nature for this court, in the absence first of a conclusion by the trial court that appellant's consent was not voluntary, to determine that a good-faith exception to the federal exclusionary rule should be applied in this case as urged by the state. *Accord State v. Alihassan*, 10th Dist. No. 11AP-578 (July 17, 2012) (Memorandum Decision).

{¶ 7} The state additionally argues that we should reconsider our holding relative to appellant's sentencing. We found in our original decision that the trial court should have sentenced appellant in accord with the statutory scheme as amended by Am.Sub.H.B. No. 86 because the court sentenced appellant after the effective date of that bill. The state suggests in its application for reconsideration that this court failed to consider and address its arguments regarding the effect of R.C. 1.58(B) as to appellant's sentencing. It contends that we failed to recognize that "the nature of a crack-cocaine prosecution [is] different than the nature of a cocaine prosecution." (Application, at 14.) But, as we stated in our decision, the General Assembly has eliminated the distinction between crack cocaine and powder cocaine. Am.Sub.H.B. No. 86.

{¶ 8} In addition, in its application for reconsideration, the state reiterates an additional argument it first made in its original brief. The state again argues that appellant should have been sentenced pursuant to pre-Am.Sub.H.B. No. 86 law pursuant to precedent established in *State v. Kaplowitz*, 100 Ohio St.3d 205, 2003-Ohio-5602. We

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considered *Kaplowitz*, however, in our original decision. We found it to be inapplicable based on the fact that Am.Sub.H.B. No. 86 did not change the nature of the offense of cocaine possession but only its penalty. See *Limoli* at ¶ 63 ("*Kaplowitz* therefore is inapposite.") Accord *State v. Gatewood*, 2d Dist. No. 2012-CA-12, 2012-Ohio-4181.

{¶ 9} The state has not called attention to an obvious error in our decision, nor has it raised an issue that we did not consider in the first instance. Accordingly, we deny the state's application for reconsideration.

Application for reconsideration denied.

BRYANT and BROWN, JJ., concur.

1.48 Presumption that statute is prospective.

A statute is presumed to be prospective in its operation unless expressly made retrospective.

Effective Date: 01-03-1972

1.58 Reenactment, amendment, or repeal of statute.

(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.

Effective Date: 01-03-1972