IN THE SUPREME COURT OF OHIO

ORIGINAL

State of Ohio,	:	
	:	
Plaintiff-Appellant,	:	Case No. 2013-0544
	:	
v.	:	On appeal from the Clark
	:	County Court of Appeals,
Amanda Straley,	:	Second Appellate District
	:	Case No. 12-CA-0034
Defendant-Appellee.	:	

Merit Brief of Appellee Amanda Straley

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Statement of the Case and Facts

Two police detectives spotted Amanda Straley drive left-of-center while they were on an unrelated patrol in an unmarked car. T.pp. 103-105. Because they felt the erratic driving was a safety issue, the detectives pulled Ms. Straley over into a nearby parking lot. *Id.* Despite their belief that Ms. Straley was intoxicated, and she was driving without a license, detectives did not arrest her and instead, attempted to find her a safe ride home. T.p. 112-113.

Ms. Straley told officers she had to use the restroom and they asked her to wait. T.p. 114. According to one detective, Ms. Straley then began to unbutton her pants and said "I have got to pee. I have got to urinate." T.p. 114. The officer explained that she could not do that here, and all the nearby buildings were closed so there were no accessible restrooms. T.p. 114. Ms. Straley then started to "kind of trot away" from the officers, and said, "I'm not running; I just gotta pee. I don't care if you have to arrest me, I gotta pee." T.pp. 114-115. Ms. Straley went under a staircase, pulled down her pants, and urinated. T.p. 116. The officer only watched Ms. Straley in his periphery; he did not observe her too closely because he had no reason to watch her urinate. T.p. 116. Once she finished, the officer went over to where she urinated and noticed a small baggie that appeared to have crack cocaine in it, covered in urine. T.p. 120. Ms. Straley admitted to the officers that the baggie belonged to her. T.p. 125. Ms. Straley was not charged with any offense related to her urination.

Ms. Straley pleaded no contest to one count of trafficking in drugs with a forfeiture specification and one count of possession of cocaine. T.p. 50-51. She proceeded to a jury trial on the third count in the indictment, tampering with evidence in violation of R.C. 2921.12(A)(1), and was found guilty. On appeal, Ms. Straley argued that her conviction was

not supported by sufficient evidence and that it was against the manifest weight of the evidence. *State v. Straley*, 2d Dist. Clark No.2012-CA-34, 2013-Ohio-510.

Upon review, the Second District reversed holding that the conviction for tampering with evidence was not supported by sufficient evidence. *Id.* at ¶ 17. The Second District believed that the weight of the evidence supported the factual finding that Ms. Straley concealed or removed the baggie of drugs. *Straley* at ¶¶ 13-14. And the court of appeals held that a jury could reasonably conclude that Ms. Straley knew some investigation into her urination was likely. *Id.* However, there was no evidence to support a finding that Straley acted with purpose to impair the baggie's availability as evidence in any ongoing or likely investigation related to the baggie, because there was no drug-related investigation. *Id.* at ¶¶ 15-16. The court explained:

> In addition to Straley concealing or removing the baggie with knowledge that an investigation was likely, R.C. 2921.12(A)(1) obligated the State to prove that she acted 'with purpose to impair its * * * availability as evidence in such * * * investigation[.]" (Emphasis added). Here the record does not support a finding that Straley discarded the baggie to impair its availability as evidence in an investigation of her public urination—or, for that matter, an investigation of her driving under the influence of alcohol or driving without a license.

(Emphasis sic.) *Id.* at ¶ 14.

This Court certified that the Second District opinion was in conflict with a Ninth District opinion and ordered briefing on whether a tampering conviction requires proof that the defendant impaired evidence in an investigation by tampering with evidence related to that investigation. *State v. Skorvanek*, 182 Ohio App. 3d 615, 2009-Ohio-1709, 914 N.E.2d 418 (9th Dist.).

Summary of Argument

Amanda Straley drove erratically without a license, provoked suspicion that she was under the influence, and urinated in public over police objection. Each circumstance prompted a related investigation by police. When she dropped drugs, there was no drug-related investigation in progress or on the horizon. Despite this, she was charged and convicted at trial for evidence-tampering. The evidence-tampering statute, however, requires a link between the facts of the police investigation and the evidence-tampering conviction – and in Ms. Straley's case, there isn't one.

A plain reading of Ohio's evidence-tampering statute, with proper application of the rule of lenity, necessitates a link between a police investigation and the tampered-with-evidence. The State's interpretation, however, does not require that link. The State instead asks this Court to breathe space into the law to allow a tampering conviction based on impairment of anything that can be defined as evidence, at any time, regardless of the nature of the actual or likely investigation, and including after-the-fact.

To be properly convicted of tampering with evidence a defendant must impair evidence in an investigation that is actually ongoing, or likely to occur, by tampering in some way with evidence related to that investigation. Ms. Straley cannot be properly convicted of tampering with evidence because the evidence was not related to any investigation in progress or likely to occur.

Argument

Certified Conflict Issue

Whether a tampering conviction requires proof that the defendant impaired evidence in an investigation by tampering with evidence related to the investigation.

Ohio's evidence-tampering statute makes it a third-degree felony to (1) know that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, and (2) alter, destroy, conceal, or remove any thing, with the purpose to impair its value or availability as evidence in such a proceeding or investigation. (Emphasis added.) R.C. 2921.12(A)(1). The certified conflict question requires this Court to consider the link between the "proceeding or investigation" and the "thing" that is impaired. The State argues that the link should be expansive, and allow for evidence-tampering to include whatever might come up in "a process of inquiry into what happened and what, if any, laws have been broken." State's Brief, p. 5. That is an overly broad construction in favor of the State.

Analysis of the statute, however, is properly guided by the rule of lenity that requires criminal offenses be strictly construed against the State and liberally construed in favor of the accused. R.C. 2901.04. Despite the State's assertion, a statute does not have to be ambiguous for the rule of lenity to apply. *See, e.g., State v. Malone*, 121 Ohio St.3d 244, 2009-Ohio-310, 903 N.E.2d 614, ¶ 13; State's Brief, p. 6. The rule of lenity, codified as part of Revised Code Title 29 governing crimes, addresses the method of construction for all criminal statutes. R.C. 2901.04. The State cites two irrelevant civil cases that do not involve the rule of lenity. *State ex rel. Pennington v. Gundler*, 75 Ohio St. 3d 171, 173, 661 N.E.2d 1049 (2002); *State ex rel. Toledo Edison Co. v. Clyde*, 76 Ohio St.3d 508, 513, 688 N.E.2d (1996); State's Brief, p. 6.

In a recent criminal statutory interpretation case, *Malone*, this Court was guided by the rule of lenity to limit the scope of Ohio's witness intimidation statute, R.C. 2921.04(B). *Malone* at ¶ 13. The defendant was charged with witness intimidation for threatening to kill someone if they told police what happened, before any crime was reported, investigated, or prosecuted. *Id.* at ¶ 14. However, the intimidation statute makes it a criminal offense to attempt to influence, intimidate, or hinder a witness involved in a criminal action or proceeding in their ability to serve as a witness in that action. (Emphasis added.) R.C. 2921.04(B). Because threats were made before the crime was reported, investigated, or prosecuted, the potential witness was not actually involved in a criminal action or proceeding for purposes of the statute. *Id.* at ¶ 19. In essence, before a criminal action or proceeding begins, there could not be a witness involved in such a criminal action or proceeding to intimidate.

Similarly, before an investigation or a likely investigation of a particular crime exists, a person cannot tamper with evidence in such an investigation. Ohio Revised Code Section 2921.12 references the proceeding or investigation twice for that purpose—to link the evidence to the investigation. Specifically, the statute requires (1) that the offender knows "an official investigation or proceeding is in progress, or is about to be or likely to be instituted" and requires (2) that the offender's purpose is "to impair [the altered or destroyed thing's] value or availability as evidence in such proceeding or investigation." (Emphasis added.) R.C. 2921.12(A)(1). If the General Assembly intended the State's expansive reading, the statute would not include "in such" in the second reference to a proceeding or investigation, and it would require that the offender's purpose be to impair the value or availability of the thing in *any* proceeding or investigation.

In the 1974 Committee Comment to House Bill 511, the bill that enacted R.C. 2921.12, the General Assembly drew a similar comparison between evidence-tampering and perjury: "[i]n some respects, this section complements the section on perjury, in that it deals with the falsification of physical evidence while perjury deals with the falsification of testimony." Perjury is not possible without an official proceeding, and similarly, there is no evidentiary value in a "thing" until there is an investigation in progress or likely to be instituted. Both statutes protect the integrity of the evidence of a crime, related to an official proceeding or investigation, whether it be physical or testimonial. The Committee noted that that purview of the evidence-tampering statute is broader than perjury, in part because it includes tampering with evidence not only in an official proceeding, but also during an investigation. However, the Committee's comparison still points to the importance of the link between the "proceeding or investigation" and the evidentiary value of the "thing" that is impaired.

The evidence-tampering statute hinges on protecting the availability of evidence and during an investigation related to that evidence. It cannot be so broadly interpreted as to make it a third-degree felony to discard contraband when there is no investigation or potential prosecution related to that contraband. In *Malone*, this Court made it clear that a threat to hurt someone before a criminal proceeding is punishable by a criminal statute, aggravated menacing, but it is not punishable by the witness intimidation statute. *Id.* at ¶ 27. Similarly, Ms. Straley's possession of crack cocaine is punishable and was punished by criminal statute. It is just not punishable by the evidence-tampering statute. This Court, as it was in *Malone*, is limited by the language chosen by the General Assembly to define the crime and cannot apply that language to conduct outside the statute. *State v. Davis*, 132 Ohio St.3d 25, 2012-Ohio-1654, 968 N.E.2d 466, ¶ 18.

Conclusion

This Court should answer the certified question in the affirmative and uphold the Second District's decision. A tampering conviction requires proof that the defendant impaired evidence in an investigation by tampering with evidence related to the investigation.

Respectfully submitted,

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Certificate of Service

I certify that a copy of this document was sent by regular U.S. mail to D. Andrew Wilson, Prosecuting Attorney, Clark County Prosecutor's Office, 50 East Columbia Street, 4th Floor, P.O. Box 1608, Springfield, OH 45501, this 10th day of September, 2013.

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Appendix to

Merit Brief of Appellee Amanda Straley

Current through Legislation passed by the 130th Ohio General Assembly
and filed with the Secretary of State through File 24, 26-37
*** Annotations current through April 22, 2013 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2901. GENERAL PROVISIONS
IN GENERAL

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ORC Ann. 2901.04 (2013)

§ 2901.04. Rules of construction; references to previous conviction; interpretation of statutory references that define or specify a criminal offense

(A) Except as otherwise provided in division (C) or (D) of this section, sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.

(B) Rules of criminal procedure and sections of the Revised Code providing for criminal procedure shall be construed so as to effect the fair, impartial, speedy, and sure administration of justice.

(C) Any provision of a section of the Revised Code that refers to a previous conviction of or plea of guilty to a violation of a section of the Revised Code or of a division of a section of the Revised Code shall be construed to also refer to a previous conviction of or plea of guilty to a substantially equivalent offense under an existing or former law of this state, another state, or the United States or under an existing or former municipal ordinance.

(D) Any provision of the Revised Code that refers to a section, or to a division of a section, of the Revised Code that defines or specifies a criminal offense shall be construed to also refer to an existing or former law of this state, another state, or the United States, to an existing or former municipal ordinance, or to an existing or former division of any such existing or former law or ordinance that defines or specifies, or that defined or specified, a substantially equivalent offense.

HISTORY:

134 v H 511 (Eff 1-1-74); 148 v S 107. Eff 3-23-2000; 150 v S 146, § 1, eff. 9-23-04.

Current through Legislation passed by the 130th Ohio General Assembly
and filed with the Secretary of State through File 24, 26-37
*** Annotations current through April 22, 2013 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2921. OFFENSES AGAINST JUSTICE AND PUBLIC ADMINISTRATION
BRIBERY AND INTIMIDATION

Go to the Ohio Code Archive Directory

ORC Ann. 2921.04 (2013)

§ 2921.04. Intimidation of attorney, victim or witness in criminal case

(A) No person shall knowingly attempt to intimidate or hinder the victim of a crime or delinquent act in the filing or prosecution of criminal charges or a delinquent child action or proceeding, and no person shall knowingly attempt to intimidate a witness to a criminal or delinquent act by reason of the person being a witness to that act.

(B) No person, knowingly and by force or by unlawful threat of harm to any person or property or by unlawful threat to commit any offense or calumny against any person, shall attempt to influence, intimidate, or hinder any of the following persons:

(1) The victim of a crime or delinquent act in the filing or prosecution of criminal charges or a delinquent child action or proceeding;

(2) A witness to a criminal or delinquent act by reason of the person being a witness to that act;

(3) An attorney by reason of the attorney's involvement in any criminal or delinquent child action or proceeding.

(C) Division (A) of this section does not apply to any person who is attempting to resolve a dispute pertaining to the alleged commission of a criminal offense, either prior to or subsequent to the filing of a complaint, indictment, or information, by participating in the arbitration, mediation, compromise, settlement, or conciliation of that dispute pursuant to an authorization for arbitration, mediation, compromise, settlement, or conciliation of a dispute of that nature that is conferred by any of the following:

(1) A section of the Revised Code;

(2) The Rules of Criminal Procedure, the Rules of Superintendence for Municipal Courts and County Courts, the Rules of Superintendence for Courts of Common Pleas, or another rule adopted by the supreme court in accordance with section 5 of Article IV, Ohio Constitution;

(3) A local rule of court, including, but not limited to, a local rule of court that relates to alternative dispute resolution or other case management programs and that authorizes the referral of disputes pertaining to the alleged commission of certain types of criminal offenses to appropriate and available arbitration, mediation, compromise, settlement, or other conciliation programs;

(4) The order of a judge of a municipal court, county court, or court of common pleas.

(D) Whoever violates this section is guilty of intimidation of an attorney, victim, or witness in a criminal case. A violation of division (A) of this section is a misdemeanor of the first degree. A violation of division (B) of this section is a felony of the third degree.

(E) As used in this section, "witness" means any person who has or claims to have knowledge concerning a fact or facts concerning a criminal or delinquent act, whether or not criminal or delinquent child charges are actually filed.

HISTORY:

140 v S 172 (Eff 9-26-84); 146 v H 88. Eff 9-3-96; 2012 HB 20, § 1, eff. June 4, 2012.

Current through Legislation passed by the 130th Ohio General Assembly
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*** Annotations current through April 22, 2013 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2921. OFFENSES AGAINST JUSTICE AND PUBLIC ADMINISTRATION
PERJURY

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ORC Ann. 2921.12 (2013)

§ 2921.12. Tampering with evidence

(A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:

(1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation;

(2) Make, present, or use any record, document, or thing, knowing it to be false and with purpose to mislead a public official who is or may be engaged in such proceeding or investigation, or with purpose to corrupt the outcome of any such proceeding or investigation.

(B) Whoever violates this section is guilty of tampering with evidence, a felony of the third degree.

HISTORY:

134 v H 511. Eff 1-1-74.