ORIGINAL

IN THE SUPREME COURT OF OHIO
2013

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

DAMON L. BEVLY,

Defendant-Appellant

Case No. 13-821

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

Court of Appeals Case No. 12AP-471

MEMORANDUM OF PLAINTIFF-APPELLEE IN OPPOSITION TO DEFENDANT'S MOTION FOR RECONSIDERATION

RON O'BRIEN 0017245
Franklin County Prosecuting Attorney
STEVEN L. TAYLOR 0043876 (Counsel of Record)
Chief Counsel, Appellate Division
373 South High Street, 13th Floor
Columbus, Ohio 43215
Phone: 614-525-3555
Fax: 614-525-6103
E-mail: staylor@franklincountyohio.gov

COUNSEL FOR PLAINTIFF-APPELLEE

YEURA R. VENTERS 0014879
Franklin County Public Defender
373 South High Street, 12th Floor
Columbus, Ohio 43215
Phone: 614-525-8872

and

DAVID L. STRAIT 0024103
Assistant Public Defender

COUNSEL FOR DEFENDANT-APPELLANT

FILED
SEP 19 2013
CLERK OF COURT
SUPREME COURT OF OHIO

MEMORANDUM OF PLAINTIFF-APPELLEE IN OPPOSITION TO DEFENDANT'S MOTION FOR RECONSIDERATION

This Court's rule on reconsideration states that a motion for reconsideration "shall not constitute a reargument of the case * * *." S.Ct.Prac.R. 18.02(B). The usual standard for reconsideration is whether the court committed an obvious error or failed to consider an argument or issue it should have considered.

Defendant does not present any new issue to this Court in his motion for reconsideration. The State itself conceded in its 6-18-13 memorandum opposing jurisdiction that the *Alleyne* case had been decided. *Alleyne v. United States*, ___ U.S. ___, 133 S.Ct. 2151 (2013). The State correctly summarized the nature of the *Alleyne* holding. This Court was aware of it and still decided not to accept review. There is no need for reconsideration. Defendant does not point to any obvious error in this Court's decision to decline review. (*Alleyne* is entirely irrelevant to the first proposition of law and therefore could not support reconsideration on that issue anyway)

The State stands by its 6-18-13 memorandum opposing jurisdiction. As stated therein, defendant does not provide any compelling reason for this Court to expend its scarce judicial resources to review the constitutionality of the corroborating-evidence provision in R.C. 2907.05(C)(2)(a). There is no conflict amongst the appellate districts that would warrant granting review. The flawed decision of the trial court now stands reversed, and so there is no imperative to grant review here to correct those flaws.

The decision in *Alleyne* does not require that this Court accept review or grant reconsideration. *Alleyne* built on the prior *Apprendi* and *Blakely* cases. In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the United States

Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. *Apprendi* was reaffirmed in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), which held "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (Emphasis *sic*).

On their face, these holdings in *Apprendi* and *Blakely* did not aid defendant. Based on conviction for the elements of GSI under 13 alone, defendant faced a maximum five-year prison term for each of his offenses as a third-degree felony. The mandatory-sentencing provision in R.C. 2907.05(C)(2)(a) does not increase the maximum penalty but rather only increased the minimum sentence to require prison. Mandatory-minimum sentences were constitutional under *Apprendi* and *Blakely* even if based on a finding of "fact" that was not submitted to the jury. *Harris v. United States*, 536 U.S. 545, 568, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002); *Apprendi*, 530 U.S. at 487; *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986).

In *Alleyne*, the five-justice majority held that a defendant's jury-trial right is violated when a "fact" is not submitted to the jury and that same fact is used to require the imposition of a higher minimum sentence. Under *Harris*, such mandatory-minimum sentences were upheld, as the *Apprendi-Blakely* principle only applied when a fact was used to increase the prescribed statutory *maximum*. Now, *Alleyne* has overruled *Harris*.

But even after *Alleyne*, defendant's jury-trial-right claim *still* fails because no assessment of "fact" is involved in the GSI statute's corroborating-evidence requirement. "*Apprendi* does not apply to every 'determination' that increases a defendant's maximum sentence. Instead it applies only to findings of 'fact' that have that effect." *United States v. Gabrion*, 719 F.3d 511, 532 (6th Cir. 2013) (en banc). The *Alleyne* majority reiterated, over and over again, that the jury-trial right is implicated when a "fact" is used to increase the penalty floor or penalty ceiling. Defendant's short quotation from *Alleyne* merely reinforces this point, as the quotation *five times* refers to the jury-trial right pertaining to "facts" that increase the statutory minimum or maximum.

A corroborating-evidence requirement does not present an issue of "fact." As stated by the syllabus of *State v. Economo*, 76 Ohio St.3d 56, 666 N.E.2d 225 (1996), "[t]he corroborating evidence * * * need not be independently sufficient to convict the accused, and it need not go to every essential element of the crime charged. Slight circumstances or evidence which tends to support the victim's testimony is satisfactory." The *Economo* plurality emphasized that a "corroboration requirement * * * is a threshold inquiry of legal sufficiency to be determined by the trial judge, not a question of proof, which is the province of the factfinder." Id. at 60. Once the court determines that the additional evidence is legally sufficient to corroborate, the evidence satisfies the corroboration requirement regardless of what weight the jury as factfinder would actually give such evidence. As a question of law, the issue of whether other evidence corroborates the violation need not be submitted to a jury.

In his motion for reconsideration, defendant contends that a corroboration requirement "requires a weighing of evidence that is inherently factual." But defendant does not address *Economo* and its contention that corroboration is only an inquiry into legal sufficiency. Of course, it is well settled that questions of legal sufficiency do not involve any weighing of evidence. Defendant's failure to address *Economo* represents a significant omission and confirms that this Court correctly declined review.

In any event, this Court has already factored these matters into the decision to decline review. This Court knew about *Alleyne* and its "fact" requirement. This Court knew about *Economo*. Defendant adds nothing new to the mix so as to justify reconsideration.

For these reasons, and the reasons in the State's 6-18-13 memorandum opposing jurisdiction, the State opposes the motion for reconsideration. The motion should be denied.

Respectfully submitted,

STEVEN L. TAYLOR 0043876
Chief Counsel, Appellate Division
Counsel for Plaintiff-Appellee

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was hand delivered on this 19th day of Sept., 2013, to the office of David L. Strait, 373 South High Street, 12th Floor, Columbus, Ohio 43215, Counsel for Defendant-Appellant.

STEVEN L. TAYLOR