ORIGINAL

In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2013-0827
Plaintiff-Appellant,	:	On Appeal from the Clark County Court of Appeals, Second Appellate District
vs.	:	
JORDAN BEVERLY,	:	
Defendant-Appellee.	:	Court of Appeals Case No. 11-CA-0064

MERIT BRIEF OF APPELLEE JORDAN BEVERLY

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STATEMENT OF THE CASE AND FACTS

Jordan Beverly was convicted after an eight-day jury trial of one count of engaging in a pattern of corrupt activity, eight counts of burglary, six counts of receiving stolen property, two counts of attempted burglary, two counts of fleeing and eluding, and one count of having weapons under disability based on a series of thefts and burglaries that occurred in and around Clark County, Ohio in late 2010 and early 2011. App. Op. ¶4, 6. On appeal, the Second District reversed Mr. Beverly's conviction for engaging in a pattern of corrupt activity, finding that there was insufficient evidence to support Mr. Beverly's conviction on that count. App. Op. ¶13. This Court accepted the appeal on the State's proposition of law that "in order to prove the existence of an 'enterprise' to sustain a conviction for engaging in a pattern of corrupt activity in violation of R.C. 2923.32, the State is not required to prove that the organization is a structure separate and distinct from the pattern of activity in which it engages."

ARGUMENT

RESPONSE TO APPELLANT'S PROPOSITION OF LAW:

> **Though the State may no longer be required to prove that the organization is a structure separate and apart from the pattern of corrupt activity to sustain a violation of R.C. 2923.32, the State must still prove the existence of an enterprise consisting of a continuing unit that functions with a common purpose.**

At issue is whether the State provided sufficient evidence at the trial of this matter to support Mr. Beverly's conviction for engaging in a pattern of corrupt activity in violation of R.C. 2923.32(A)(1). The Second District found that there was insufficient evidence to support Mr. Beverly's conviction for engaging in a pattern of corrupt activity and reversed his conviction on that charge. The State alleges that the Second District reached the conclusion it did based on an

incorrect statement of the existing law requiring the State to prove that the organization is a structure separate and distinct from the patter of activity in which it engages. As will be shown below, though the Second District may have incorrectly defined an enterprise as an organization with a structure separate and apart from the pattern of corrupt activity, the Second District otherwise correctly defined what the State is required to prove to get a conviction for engaging in a pattern of corrupt activity, and correctly determined that there was insufficient evidence to support such a conviction in the case at bar.

R.C. 2923.32(A)(1), provides: "No person employed by, or associated with, any enterprise shall conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity[.]" R.C. 2923.32(A)(1). An "enterprise" includes any individual, association, or group of persons associated in fact. R.C. 2923.31(C). "Corrupt activity" includes aggravated robbery. R.C. 2923.31(I)(2)(a). A "pattern of corrupt activity" requires "two or more incidents of corrupt activity, whether or not there has been a prior conviction, that are related to the affairs of the same enterprise, are not isolated, and are not so closely related to each other and connected in time and place that they constitute a single event." R.C. 2923.31(E). The State argues that the Second District erred in defining "enterprise" as "an ongoing organization with associates that function as a continuing unit with a structure separate and apart from the pattern of corrupt activity." App. Op. ¶29. While there may be some question of whether or not the State must still prove the existence of an enterprise "with a structure separate and apart from the corrupt activity," the law still requires that State to prove the existence of an enterprise, and having failed to do so in the present action, the Second District correctly held that there was insufficient evidence to support Mr. Beverly's conviction for engaging in a pattern of corrupt activity.

As the State has demonstrated in its Brief, there is a long judicial history regarding the definition of "enterprise" in RICO-related activities. In 1981, the United States Supreme Court, in *United States v. Turkette*, 452 U.S. 576, 101 S.Ct. 2524, 69 L.E.2d 246 (1981), held:

> In order to secure a conviction under RICO, the Government must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." The enterprise is an entity, for present purposes, a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. 18 U.S.C. § 1961(1) (1976 ed., Supp. III). The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may, in particular cases, coalesce, proof of one does not necessarily establish the other. The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government. *Id.* at 583.

Following *Turkette*, it was left to other courts to interpret just what structure was required to prove the existence of an enterprise. In *United States v. Smith,* 413 F.3d 1253 (10th Cir. 2005), the 10th Circuit sided with the 3rd Circuit and those courts requiring more rather than less "structure." The *Smith* court held that, to distinguish the RICO enterprise element from the statute's pattern of racketeering activity, the government must prove: (1) the existence of a decision-making framework or mechanism for controlling the group, (2) that various associates functioned as a continuing unit, and (3) that the enterprise had an existence separate and apart from the pattern of racketeering activity. *Id.* at 1266-67.

The United States Supreme Court revisited the issue in 2009 in the case of *Boyle v. United States*, 556 U.S. 938, 129 S.Ct. 2237, 173 L.E.2d 1265 (2009). In *Boyle*, the Court addressed the level of structure required to show the existence of an enterprise. Though only clarifying and not overruling *Turkette*, the *Boyle* Court, addressing arguments by Boyle that a

RICO enterprise must have some structural features, such as a hierarchy, role differentiation, etc., stated:

> We see no basis in the language of RICO for the structural requirements that petitioner asks us to recognize. As we said in *Turkette*, an association-in-fact enterprise is simply a continuing unit that functions with a common purpose. Such a group need not have a hierarchical structure or a "chain of command"; decisions may be made on an ad hoc basis and by any number of methods—by majority vote, consensus, a show of strength, etc. Members of the group need not have fixed roles; different members may perform different roles at different times. The group need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies. While the group must function as a continuing unit and remain in existence long enough to pursue a course of conduct, nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence. Nor is the statute limited to groups whose crimes are sophisticated, diverse, complex, or unique; for example, a group that does nothing but engage in extortion through old-fashioned, unsophisticated, and brutal means may fall squarely within the statute's reach. *Id.* at 948.

Ultimately, the *Boyle* Court held that "the trial judge did not err in instructing the jury that 'the existence of an association-in-fact is oftentimes more readily proven by what it does, rather than by abstract analysis of its structure.'" *Id.*, at 951. The *Boyle* Court made clear, however, that the existence of an enterprise is a separate element that must be proved, and the existence of an enterprise is an element distinct from the pattern of racketeering activity and proof of one does not necessarily establish the other. *Id.*, at 947.

Subsequent to *Boyle*, it has been noted that "the world now looks very different after the Supreme Court's recent decision in *Boyle*." *United States v. Hutchinson*, 573 F.3d 1011, 1021 (10th Cir. 2009). Courts like *Hutchinson* have adopted a new test expounded upon in *Boyle* to determine whether a group has sufficient structure to qualify as an association-in-fact enterprise. Under this test, a group must have [1] a purpose, [2] relationships among those associated with the enterprise, and [3] longevity sufficient to permit these associates to pursue the enterprise's purpose. *Id.*, citing *Boyle*, 556 U.S. at 945.

In Ohio, the Twelfth District has recently held that "in order to establish that a defendant engaged in a pattern of corrupt activity, the state must show that the defendant was 'associated with' an 'enterprise.' Merely committing successive or related crimes is not sufficient to rise to the level of a RICO violation. Both the federal and Ohio RICO statutes require an 'enterprise.'" *State v. Sparks*, 12th Dist. Warren Nos. CA2013-02-010, CA2013-02-015, 2014-Ohio-1130, ¶23, citing *State v. Campbell,* 5th Dist. Delaware No. 07-CA-A-08-0041, 2008-Ohio-2143, ¶ 23, and *State v. Schlosser,* 79 Ohio St.3d 329, 333 (1997).

Similarly, the Second District addressed this issue in *State v. Franklin*, 2011-Ohio-6802, holding that "we agree with Franklin that the trial court should have instructed the jury, consistent with the federal law on 'enterprise' outlined in *Turkette* and *Boyle.* We have never specifically rejected the application of federal law, and, in fact, have both impliedly and expressly applied federal law to Ohio RICO cases when deciding questions of sufficiency of the evidence." *Id.,* at ¶105. The *Franklin* court also correctly noted that the *Boyle* Court "concluded that an association must have at least three structural features: "a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purposes." *Id.,* at ¶96, citing *Boyle*, 556 U.S. at 945. Despite this analysis that was again followed by the Second District in its opinion below, the Second District continued to define "enterprise" as "an ongoing organization with associates that function as a continuing unit with a structure separate and apart from the pattern of corrupt activity." App. Op. ¶29. From this one statement, the State goes on to argue that "federal law has resolved this question opposite to the Second District's view" of what constitutes an enterprise. While it may be questionable to what degree the requirement that an enterprise have a structure separate and apart from the pattern of corrupt activity survives *Boyle*, the remainder of the Second District's

analysis regarding the three-part inquiry into the structure of the enterprise is accurate, and its reliance on the "separate and apart" language in no way undermines the totality of its holding.

In fact, the State concedes that when the minimal structure needed to prove an enterprise is lacking, a conviction under the Act is inappropriate. As an example, the State cites an instance where a federal court dismissed a RICO count where the plaintiffs did no more than allege that a group had committed numerous predicate acts listed in the statute, holding that the plaintiff must assert that those individuals were organized together in some way, and that there was a structure to the association. *Doe I v. State of Israel*, 400 F. Supp.2d 86, 119 (D.D.C. 2005).

Likewise, there was simply no evidence offered at the trial of this matter to support a conviction under Ohio's engaging in a pattern of corrupt activity statute. In fact, the State's own Brief demonstrates this fact by failing to point to any evidence to support the existence of an association-in-fact in this matter. Using words in its Brief like "scheme," "pattern," and "criminal team" does not turn this into an enterprise. In its Statement of Facts and Procedure, the State, citing the State's opening statement, states that "the prosecutor described Beverly's role in the criminal scheme as one of two "worker bees" in an ongoing pattern of thefts and sales of the fruits of home burglaries." While it is conceivable that just two individuals could constitute an enterprise under *Boyle*, by referring to the two defendants in this matter as "worker bees" suggests that others were involved with these two defendants, an inference not supported any evidence presented at trial. Further, the State claims that Beverly and the co-defendant would get rides from Clark County to other counties where they would steal vehicles. In support of this claim, the State again cites the opening statement and points to other references in the record where there was testimony about stolen vehicles. There was no evidence, however, that either defendant stole these vehicles, in fact they were only charged with receiving stolen property, and

that they were in any way involved with those individuals who did. The State goes on to claim that the defendants would return to Clark County and case houses while pretending to work for a tree-cutting service, again citing the opening statement and one witness on one occasion who identified the defendants as claiming to work for a tree-cutting service. The State then claims that the evidence showed that if someone answered the door, the defendants claimed to be selling firewood; if no one answered they broke in and removed items like TVs, guns, and jewelry, again citing the opening statement.

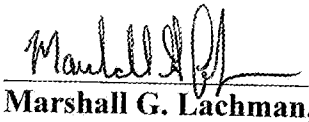
Applying such a recitation of the "evidence" to the existing law regarding the definition of an enterprise, the State concludes that "the prosecution proved that Beverly and his associate were the brute force in an enterprise that repeatedly stole cars from other counties, cased homes in Clark County, burgled those houses while owners were at work, and quickly fenced the stolen items for cash. And, in contrast with a 'temporary criminal alliance,' Beverly's crimes comprised a structured plan involving out-of-county vehicle thefts, coordinated house burglaries, and hasty fencing of the property for cash. Beverly and his associate were part of an enterprise with the minimal structure needed to sustain a conviction under Ohio's Corrupt Practices Act." The reality is, however, that there is simply no evidence in the record to support these conclusions, other than the fact that Beverly was convicted of burglarizing a number of homes in Clark County and elsewhere. There was no evidence presented at the trial that the "out-of-county vehicle thefts" were part of any structured plan, that the "coordinated house burglaries" were anything more than knocking on the door to see if anyone was home, and the "hasty fencing of property for cash" was anything more than the defendants making a quick buck on stolen property. Further, there was no evidence offered at trial to establish in any way that Beverly and the co-defendant "were part of an enterprise." Like in *Doe I* cited above, the State in the present

action has done nothing more than allege that the two defendants herein committed a number of criminal acts in violation of Ohio law; the State having completely failed to establish that these two defendants were part of any kind continuing association-in-fact enterprise that functioned with a common purpose.

CONCLUSION

This Court should affirm the decision below because the Second District Court of Appeals, though it may have incorrectly stated that an enterprise must have a structure separate and apart from the pattern of corrupt activity, otherwise accurately applied existing law and properly identified what was required for the State to establish the existence of an association's structure, and correctly held that there was insufficient evidence to prove the existence of an enterprise consisting of a continuing unit that functioned with a common purpose.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Merit Brief of Appellee Jordan Beverly was served by regular U.S. Mail upon Michael J. Hendershot, Chief Deputy Solicitor, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, and upon Andrew R. Picek, Assistant Prosecuting Attorney, 50 East Columbia Street, 4th Floor, P.O. Box 1608, Springfield, Ohio 45501, on this 15th day of April, 2014.

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