

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No.	14-1255
	:		
Plaintiff-Appellee,	:	On Appeal from the Medina	
	:	County Court of Appeals	
vs.	:	Ninth Appellate District	
	:		
PENNY SHAFFER,	:	C.A. Case Nos.	12CA71-M
	:		12CA77-M
Defendant-Appellant.	:		

PENNY SHAFFER'S MEMORANDUM IN SUPPORT OF JURISDICTION

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SUPREME COURT OF OHIO

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INTRODUCTION

Ohio’s legislature unequivocally declares, “For a felony of the third degree that is not an offense for which division (A)(3)(a) of this section applies, the prison term shall be [9], [12], [18], [24], [30], or [36] months.” R.C. 2929.14(A)(3)(b). That is, except for eight specifically delineated third-degree-felony offenses,¹ the ceiling for *all* other third-degree-felony offenses *must* be a maximum prison sentence of 36 months. *See id.*; *see also* R.C. 2929.14(A)(3)(a).

Despite that absolute statement, other directives on third-degree-felony-sentencing conflict. This Court has accepted a certified-conflict case illustrative of one such class of conflicting directives—OVIs and add-on, penalty specifications. *See State v. South*, Supreme Court Case No. 2014-0563, May 28, 2014 Entry. The conflict cases are *State v. South*, 9th Dist. Summit No. 26967, 2014-Ohio-374, ¶ 16-20 (holding that R.C. 2929.14(A)(3) controls),² and *State v. Sturgill*, 12th Dist. Clermont Nos. CA2013-01-002 and CA2013-01-003, 2013-Ohio-4648, ¶ 40 (holding that R.C. 2941.1413 controls); *see also State v. Owen*, 11th Dist. Lake No. 2012-L-102, 2013-Ohio-2824, ¶ 29-32 (reaching the

¹ *See* R.C. 2929.14(A)(3)(a). The eight third-degree-felony offenses warranting a greater than 36-month maximum sentence are: (1) aggravated vehicular homicide, (2) aggravated vehicular assault, (3) vehicular assault, (4) sexual battery, (5) unlawful sexual conduct with minor, (6) gross sexual imposition, (7) robbery when certain aggravating factors are present, and (8) burglary when certain aggravating factors are present.

² Notably, two concurring judges in *South*, 2014-Ohio-374, which did not reference *Sturgill*, held the exact opposite in this case, which did not reference *South*, 2014-Ohio-374.

same result as *South*, 2014-Ohio-374); *State v. May*, 2d Dist. Montgomery No. 25359, 2014-Ohio-1542, ¶ 29 (same). This case presents a similar conflict involving the sentencing directives for illegal-assembly-or-possession-of-chemicals-for-manufacture-of-drugs offenses. But the conflicting directives here are different.

In *South*, Supreme Court Case No. 2014-0563, the conflict arises through a separately indicted specification, with its own additional sentence. See R.C. 2941.1413 (authorizing an additional, mandatory, 1-5 year sentence for the specification, which can be added to a discretionary sentence for the substantive offense). Here, the conflict arises from the substantive-offense statute itself, and does not contain an additional sentence, but rather, an enhanced sentence. See R.C. 2925.041(C) (increasing the ceiling for a third-degree-felony sentence to 5 years, and mandating that maximum 5-year sentence).

In other words, the OVI context involves a second, add-on sentence for a separately indicted specification that can, in the sentencing court's discretion, make the aggregate maximum for a third-degree-felony offense more than 36 months. See R.C. 2941.1413. But this context involves a single, enhanced sentence that not only makes the maximum for an unidentified-third-degree-felony offense more than 36 months, it requires a 5-year sentence. See R.C. 2925.041(C); see also R.C. 2929.14(A)(3). And at least one other third-degree-felony offense, endangering children, has an enhancement that operates the same way. See R.C. 2919.22(E)(3)(a). As such, this case deserves its own consideration. Alternatively, this Court should accept this case, hold it for *South*, Supreme Court Case No. 2014-0563, and apply that decision.

EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case warrants this Court's review because Ohio's third-degree-felony sentencing directives are conflicted. *See State v. Shaffer*, 9th Dist. Medina Nos. 12CA71-M and 12CA77-M, 2014-Ohio-2461, ¶ 8-11 (explaining that while R.C. 2929.14(A)(3) caps the maximum for all but eight third-degree-felony offenses at 36 months, R.C. 2925.041(C) increases that 36-month ceiling for an unidentified-third-degree-felony offense to a mandatory 5-year sentence). Here, the court below should have applied lenity and interpreted the conflict in Penny Shaffer's favor. *See generally State v. Straley*, Slip Opinion No. 2014-Ohio-2139, ¶ 10; *Abramski v. United States*, 189 L.Ed.2d 262, 292-293 (2014) (Scalia, J., dissenting). Even if the decision below is correct, the ultimate interpretation of this plain statutory conflict should be determined by this Court. Accordingly, this Court should accept this case.

STATEMENT OF THE CASE AND FACTS

Ms. Shaffer was charged with two drug crimes: (1) illegal assembly or possession of chemicals for the manufacture of drugs, a violation of R.C. 2925.041 and third-degree felony, and (2) possession of drugs, a violation of R.C. 2925.11 and fifth-degree felony. *Shaffer* at ¶ 2. She pleaded no contest to both. *Id.* Her sentence was enhanced to 5 years in prison for the illegal-assembly conviction under R.C. 2925.041(C)(1), and she was sentenced to 1 year in prison for the drug-possession conviction. *Id.* The sentences were ordered to run concurrently. *Id.* She timely appealed and challenged the mandated 5-year sentence as contrary to law. *Id.* at ¶ 3-4. The challenge addressed the

conflicting directives of R.C. 2925.041(C) and R.C. 2929.14(A)(3). *Id.* The court below held the enhanced sentence to be lawful, finding that R.C. 2925.041(C) is specific, but R.C. 2929.14(A)(3) is general, and interpreting the former to control. *Id.* at ¶ 14-15.

ARGUMENTS IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW

Enhanced sentences for third-degree-felony convictions are permissible only for the offenses explicitly identified in R.C. 2929.14(A)(3)(a). R.C. 2929.14(A)(3)(a) and (b).

Because R.C. 2929.14(A)(3) and R.C. 2925.041(C) are, at a minimum, equally specific, lenity demands that R.C. 2929.14(A)(3) control. Again, the court below found R.C. 2925.041(C) more specific than R.C. 2929.14(A)(3). *Shaffer* at ¶ 14-15. But, arguably, the exhaustive list of R.C. 2929.14(A)(3)(a) is more specific than the substantive-offense provision in R.C. 2925.041(C).

In R.C. 2929.14(A)(3)(a), the legislature explicitly identified the eight third-degree-felony offenses worthy of punishment greater than 36 months in prison. In doing so, it included two third-degree-felony offenses that are only worthy of greater punishment if prior convictions were proved. *Id.* And, the remainder of that statute limits its exceptions to the specific list of R.C. 2929.14(A)(3)(a). *See* R.C. 2929.14(A)(3)(b) (“For a felony of the third degree that is not an offense for which division (A)(3)(a) of this section applies, the prison term shall be [9], [12], [18], [24], [30], or [36] months.”).

In R.C. 2925.041(C), the legislature enhanced the penalty for an additional third-degree-felony offense when prior convictions were proved. But, again, R.C. 2929.14(A)(3)(b) precludes such action, and R.C. 2929.14(A)(3)(a) identifies the eight

specific offenses that do carry an enhanced sentence. Accordingly, at a minimum, the two directives are equally specific. *See generally Owen* at ¶ 27-28. And, unfortunately, the two statutes were amended at the same time, which excludes the application of R.C. 1.52 to resolve the conflict. *See Shaffer* at ¶ 14; *see also Owen* at ¶ 25-28 (explaining the impact of R.C. 1.51 and R.C. 1.52).

Consequently, a reviewing court is left to guess what the legislature intended, and thus, “reasonable doubt persists.” *Moskal v. United States*, 498 U.S. 103, 108, 111 S.Ct. 461, 112 L.Ed.2d 449 (1990). Under such circumstances, lenity must prevail. *See United States v. Bass*, 404 U.S. 336, 347-349, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971); *State v. Young*, 62 Ohio St.2d 370, 374, 406 N.E.2d 499 (1980); *see also Abramski* at 292-293 (Scalia, J., dissenting). Applying lenity, R.C. 2929.14(A)(3) controls. *See generally Straley* at ¶ 10.

CONCLUSION

In one place, Ohio’s legislature states that only eight specified third-degree-felony offenses can receive an enhanced punishment. In at least two others, it mandates an enhanced sentence for a third-degree-felony offense not named in the exhaustive list of eight offenses. Current trends show lower courts deciding the conflict both ways in a related, but independent, context. *See South*, 2014-Ohio-374, at ¶ 16-20; *May* at ¶ 29; *Owen* at ¶ 29-32; *see also Sturgill* at ¶ 40. This Court should resolve the conflict.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing **Penny Shaffer's Memorandum in Support of Jurisdiction** was sent by U.S. mail to Matthew Kern, Assistant Medina County Prosecutor, 72 Public Square, Medina, Ohio 44256, on this 23d day of July, 2014.



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IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No.
	:	
Plaintiff-Appellee,	:	On Appeal from the Medina
	:	County Court of Appeals
vs.	:	Ninth Appellate District
	:	
PENNY SHAFFER,	:	C.A. Case Nos. 12CA71-M
	:	12CA77-M
Defendant-Appellant.	:	

APPENDIX TO

PENNY SHAFFER'S MEMORANDUM IN SUPPORT OF JURISDICTION

STATE OF OHIO
COUNTY OF MEDINA

) COURT OF APPEALS
)ss: IN THE COURT OF APPEALS
) 14 JUN -9 AM 11:13 NINTH JUDICIAL DISTRICT

STATE OF OHIO

FILED
DAVID B. WADSWORTH, Nos. 12CA0071-M
MEDINA COUNTY 12CA0077-M
CLERK OF COURTS

Appellee

v.

PENNY J. SHAFFER

Appellant

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 12 CR 0125

DECISION AND JOURNAL ENTRY

Dated: June 9, 2014

MOORE, Judge.

{¶1} Defendant-Appellant, Penny J. Shaffer, appeals from the May 8, 2012 judgment entry of the Medina County Court of Common Pleas. We affirm.

I.

{¶2} In 2012, Ms. Shaffer was indicted on one count of illegal assembly or possession of chemicals for the manufacture of drugs, in violation of R.C. 2925.041(A), a felony of the third degree, and one count of possession of drugs, in violation of R.C. 2925.11(A)(C)(1)(a), a felony of the fifth degree. Ms. Shaffer initially pleaded not guilty to both charges, but later changed her plea to no contest. The trial court found her guilty and sentenced Ms. Shaffer to five years of mandatory imprisonment for illegal assembly or possession of chemicals for the manufacture of drugs, and one-year of imprisonment for possession of drugs, to be served concurrently. The judgment entry indicates that Ms. Shaffer's sentence was jointly recommended by both parties.

{¶3} Ms. Shaffer appealed¹, and raises one assignment of error for our consideration.

II.

ASSIGNMENT OF ERROR

THE TRIAL COURT COMMITTED PLAIN ERROR AND IMPOSED A SENTENCE CONTRARY TO LAW IN VIOLATION OF R.C. 2953.08 BY SENTENCING [MS. SHAFFER] TO A MANDATORY PRISON TERM OF FIVE YEARS FOR THE THIRD-DEGREE FELONY OFFENSE OF ILLEGAL ASSEMBLY OR POSSESSION OF CHEMICALS FOR THE MANUFACTURE OF DRUGS IN VIOLATION OF R.C. 2925.041(A), WHERE THE MAXIMUM SENTENCE AUTHORIZED UNDER R.C. 2929.14(A)(3) FOR THAT NON-VIOLENT THIRD-DEGREE FELONY OFFENSE WAS ONLY THIRTY-SIX MONTHS OR THREE YEARS.

{¶4} In her sole assignment of error, Ms. Shaffer argues that her sentence of five years' mandatory imprisonment for illegal assembly or possession of chemicals for the manufacture of drugs, pursuant to R.C. 2925.041(C)(1), is excessive and contrary to law. Specifically, Ms. Shaffer argues that she should have been sentenced under R.C. 2929.14(A)(3)(b), which provides a thirty-six month maximum prison term for a third degree felony that is not otherwise listed in R.C. 2929.14(A)(3)(a).

{¶5} The State responded that Ms. Shaffer's argument lacks merit because the trial court properly sentenced her under the "explicit terms of R.C. 2925.041(C)(1) which acts as a specific exception to the otherwise general sentencing scheme under R.C. 2929.14(A)(3)."

{¶6} "When reviewing a trial court's sentence, we apply a two-step approach." *State v. Stoddard*, 9th Dist. Summit No. 26663, 2013-Ohio-4896, ¶ 14, citing *State v. Roper*, 9th Dist.

¹ Ms. Shaffer filed two notices of appeal from the May 8, 2012 judgment entry, along with a motion for delayed appeal. This Court granted Ms. Shaffer's motion for delayed appeal, and consolidated the appeals for purposes of the record, briefing, and decision. The consolidated appeal numbers are C.A. No. 12CA0071-M and 12CA0077-M.

Summit Nos. 26631, 26632, 2013-Ohio-2176, ¶ 5. “The first step is to determine whether the sentence is contrary to law. The second step is to determine whether the court exercised proper discretion in imposing a term of imprisonment.” (Internal citation omitted.) *State v. Smith*, 9th Dist. Medina No. 11CA00115-M, 2012-Ohio-2558, ¶ 3, citing *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 26.

{¶7} Further, “[s]tatutory interpretation involves a question of law; therefore, we review this matter de novo.” *State v. McCorville*, 182 Ohio App.3d 99, 2009-Ohio-1713, ¶ 5 (9th Dist.), citing *State v. Myers*, 9th Dist. Medina Nos. 3260-M, 3261-M, 2002-Ohio-3195, ¶ 14. “The primary goal of statutory construction is to ascertain and give effect to the legislature’s intent in enacting the statute.” *Wetterman v. B.C.*, 9th Dist. Medina No. 12CA0021-M, 2013-Ohio-57, ¶ 8, quoting *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, ¶ 9. “In order to determine legislative intent, it is a cardinal rule of statutory construction that a [C]ourt must first look to the language of the statute itself.” *State v. Owen*, 11th Dist. Lake No. 2012-L-102, 2013-Ohio-2824, ¶ 17, citing *Provident Bank v. Wood*, 36 Ohio St.2d 101, 105 (1973). A court may interpret a statute only where the words of the statute are ambiguous. *State ex rel. Celebrezze v. Allen Cty. Bd. of Commrs.*, 32 Ohio St.3d 24, 27 (1987). Ambiguity exists if the language is susceptible of more than one reasonable interpretation. *State ex rel. Toledo Edison Co. v. Clyde*, 76 Ohio St.3d 508, 513 (1996).

{¶8} In determining whether Ms. Shaffer’s sentence falls within the permissible statutory range, this Court must examine Ohio’s felony sentencing statute, R.C. 2929.14(A), along with R.C. 2925.041(C)(1)’s mandatory sentencing requirement of five years’ imprisonment for repeat felony drug offenders. We note that, on September 30, 2011, both R.C. 2929.14 and R.C. 2925.041 were amended by H.B. 86.

{¶9} R.C. 2929.14(A) provides prison terms for felony sentences, stating:

(3)(a) For a felony of the third degree that is a violation of section 2903.06, 2903.08, 2907.03, 2907.04, or 2907.05 of the Revised Code or that is a violation of section 2911.02 or 2911.12 of the Revised Code if the offender previously has been convicted of or pleaded guilty in two or more separate proceedings to two or more violations of section 2911.01, 2911.02, 2911.11, or 2911.12 of the Revised Code, the prison term shall be twelve, eighteen, twenty-four, thirty, thirty-six, forty-two, forty-eight, fifty-four, or sixty months.

(b) For a felony of the third degree that is not an offense for which division (A)(3)(a) of this section applies, the prison term shall be nine, twelve, eighteen, twenty-four, thirty, or thirty-six months.

{¶10} Pursuant to R.C. 2929.14(A)(3)(a) and (b), Ms. Shaffer's maximum sentence for violating R.C. 2925.041 would be thirty-six months of imprisonment, instead of five-years.

{¶11} R.C. 2925.041, states, in relevant part, that:

(A) No person shall knowingly assemble or possess one or more chemicals that may be used to manufacture a controlled substance in schedule I or II with the intent to manufacture a controlled substance in schedule I or II in violation of section 2925.04 of the Revised Code.

* * *

(C) Whoever violates this section is guilty of illegal assembly or possession of chemicals for the manufacture of drugs. Except as otherwise provided in this division, illegal assembly or possession of chemicals for the manufacture of drugs is a felony of the third degree * * * [.]

(1) Except as otherwise provided in this division, there is a presumption for a prison term for the offense. * * * If the offender two or more times previously has been convicted of or pleaded guilty to a felony drug abuse offense and if at least one of those previous convictions or guilty pleas was to a violation of division (A) of this section, a violation of division (B)(6) of section 2919.22 of the Revised Code, or a violation of division (A) of section 2925.04 of the Revised Code, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree that is not less than five years.

Pursuant to R.C. 2925.041(C)(1), the trial court was required to sentence Ms. Shaffer to a mandatory sentence of five years' imprisonment because of her prior convictions for drug related felonies.

{¶12} “It is a well-settled principle of statutory construction that when an irreconcilable conflict exists between two statutes that address the same subject matter, one general and the other special, the special provision prevails as an exception to the general statute.” *State v. Conyers*, 87 Ohio St.3d 246, 248 (1999), citing R.C. 1.51. Further, R.C. 1.51 states “[i]f a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.”

{¶13} For guidance with this matter, we turn to our sister Court’s decision in *State v. Sturgill*, 12th Dist. Clermont Nos. CA2013-01-002, CA2013-01-003, 2013-Ohio-4648. In *Sturgill* at ¶ 2, 12, the appellant was sentenced to thirteen years’ imprisonment, including consecutive sentences of sixty-months each for operating a vehicle while under the influence of alcohol with a prior felony OVI conviction, and a specification for five or more prior OVI offenses in 20 years. *See* R.C. 4511.19; R.C. 2941.1413. Mr. Sturgill challenged the two five-year prison terms for his OVI conviction and accompanying specification as excessive. *Sturgill* at ¶ 35. The Twelfth District Court of Appeals affirmed Mr. Sturgill’s sentence, and, in doing so, disagreed with the Eleventh District’s conclusion that Ohio’s OVI statute (R.C. 4511.19) and general sentencing statute (R.C. 2929.14(A)(3)) are in “irreconcilable” conflict with one another. *Id.* at ¶ 40; *see also State v. Owen*, 11th Dist. Lake No. 2012-L-102, 2013-Ohio-2824, ¶ 2. In reaching a different conclusion from the Eleventh District, the Twelfth District reasoned that the two statutes are not in irreconcilable conflict because Mr. Sturgill was convicted of an R.C.

2941.1413 repeat offender specification, which specifically permits a five-year maximum sentence for a third degree felony OVI. *Sturgill* at ¶ 40.²

{¶14} Here, similar to the facts in *Sturgill*, Ms. Shaffer's sentence for a felony of the third degree was increased from thirty-six months to five-years because R.C. 2925.041(C)(1) *specifically* mandates imprisonment of "not less than five-years" if certain conditions precedent are met. Additionally, as indicated above, both R.C. 2929.14 and R.C. 2925.041 were amended by H.B. 86 on September 30, 2011. As a result, we conclude that if the General Assembly wished to amend R.C. 2925.041(C)(1), in order to remove the penalty enhancement language, it would have done so at that time. Instead, the General Assembly amended R.C. 2925.041(C)(1) to state that the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree that is not less than five years if "*two or more times* previously [the offender] has been convicted of or pleaded guilty to *a felony drug abuse offense and if at least one of those previous convictions or guilty pleas was to a violation of division (A) of this section, a violation of division (B)(6) of section 2919.22 of the Revised Code, or a violation of division (A) of section 2925.04 of the Revised Code[.]*"CA0077-M (Emphasis added.) (Italicized words indicate changes made to R.C. 2925.041(C)(1) in H.B. 86.)

{¶15} Therefore, based upon the foregoing, we conclude that the General Assembly intended R.C. 2925.041(C)(1) to be a specific exception to the general felony sentencing scheme

² We note that after *Sturgill* was decided in 2013, the Second District Court of Appeals also addressed this issue in *State v. May*, 2d Dist. Montgomery No. 25359, 2014-Ohio-1542. In *May* at ¶ 29, the Second District agreed with *Owens*, stating "under 4511.19(G)(1)(e)(i), the trial court has discretion to impose an additional prison term for a third-degree felony OVI offense, with a maximum aggregate sentence of five years. However, under R.C. 2929.13(A) and R.C. 2929.14(B)(4), the maximum aggregate sentence for a third-degree felony OVI offense is 36 months. * * * [T]hese provisions present an irreconcilable conflict and [] the recent changes and more lenient provisions in R.C. 2929.14 must prevail."

set forth in R.C. 2929.14, and Ms. Shaffer's sentence of five-years' mandatory imprisonment is not contrary to law.

{¶16} Accordingly, Ms. Shaffer's assignment of error is overruled.

III.

{¶17} In overruling Ms. Shaffer's sole assignment of error, the judgment of the Medina County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.



CARLA MOORE
FOR THE COURT

HENSAL, P. J.
CARR, J.
CONCUR.

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