

ORIGINAL

IN THE SUPREME COURT OF OHIO
2014

STATE OF OHIO,

Case No. 14-1409

Plaintiff-Appellee,

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

-vs-

KARI MERCIER,

Court of Appeals
Case No. 13AP-906

Defendant-Appellant.

MEMORANDUM OF PLAINTIFF-APPELLEE REGARDING JURISDICTION

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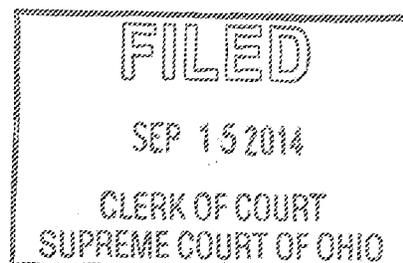


TABLE OF CONTENTS

EXPLANATION REGARDING JURISDICTION..... 2

STATEMENT OF THE FACTS 5

ARGUMENT..... 6

RESPONSE TO PROPOSITION OF LAW NO. ONE:..... 6

 A PRISON TERM FOR A THIRD-DEGREE FELONY OVI OFFENSE
 IS IMPOSED PURSUANT TO R.C. 4511.19(G)(1)(e)(i), NOT R.C.
 2929.14(A)(3)(b)..... 6

CONCLUSION..... 13

CERTIFICATE OF SERVICE 13

EXPLANATION REGARDING JURISDICTION

Without question, the prison term available to a sentencing court for third-degree felony OVI offenders is an important issue, requiring resolution by this Court. At present, the appellate districts are split on the issue of whether R.C. 2929.14(A)(3)(b) and R.C. 4511.19(G)(1) are in conflict. Two districts hold that the statutes do conflict, two hold that the statutes do not conflict, while one district holds that one statute prevailed over the other without first recognizing a conflict.

The Eleventh District held that the OVI statute and the general sentencing statute are in conflict. *State v. Owen*, 11th Dist. No. 2012-L-102, 2013-Ohio-2824. Further, the *Owen* court held that both are specific statutes and that the general sentencing statute controls, as it was most recently enacted. *Id.* ¶¶28-29.

The Ninth District, in echoing *Owen*, held that R.C. 2929.14(A)(3)(b) limits third-degree felony OVI offenses to a maximum prison term of 36 months. *State v. South*, 9th Dist. No. 26967, 2014-Ohio-374, conflict recognized, 05/28/2014 Case Announcements, 2014-Ohio-2245. However, the *Owen* court did not engage in any analysis of R.C. 4511.19(G)(1) or even mention the conflict explored by its sister appellate courts. The *South* court ultimately certified a conflict on the following question:

When a defendant is convicted of a R.C. 2941.1413 specification, does Ohio's OVI statute, R.C. 4511.19 prevail so that a five year sentence can be imposed for a third degree felony OVI or does R.C. 2929.14(A) require that the maximum sentence that can be imposed is three years?

The Second District also followed *Owen*, in determining that R.C. 2929.14(A)(3)(b) was in conflict with, and prevailed over, R.C. 4511.19(G)(1). *State v. May*, 2nd Dist. No. 25359, 2014-Ohio-1542.

The Twelfth District held that the OVI statute and general sentencing statute are not in conflict, as R.C. 2929.14(A)(3)(b) applies “only where no other specific provision of the general sentencing statute reserved sentencing for a third-degree felony.” *State v. Sturgill*, 12th Dist. Nos. CA2013-01-002/003, 2013-Ohio-4648, ¶42.

Finally, the Tenth District held in the instant matter that R.C. 2929.14(A)(3)(b) and R.C. 4511.19(G)(1) are not in conflict and that “R.C. 4511.19(G)(1) explicitly allows for a court to sentence a defendant for violations of R.C. 4511.19(A)(1)(a) to the exclusion of R.C. Chapter 2929.” *State v. Mercier*, 10th Dist. No. 13AP-906, 2014-Ohio-2910, ¶14.

The Tenth District subsequently certified the following question as in conflict with *May*:

When a defendant is convicted of an OVI as a felony of the third degree, does Ohio’s OVI statute, R.C. 4511.19, prevail such that a sentence up to five years can be imposed or does R.C. 2929.14(A) require that the sentence be limited to a maximum of 36 months incarceration?

State v. Mercier, 10th Dist. No. 13AP-906 (Memo Decision – Aug. 5, 2014). However, the question assumes that the Tenth District held that a conflict exists between R.C. 2929.14(A)(3)(b) and R.C. 4511.19(G)(1). Review of the *Mercier* decision reveals that the Tenth District concluded that no such conflict existed. Therefore, the question certified does not accurately represent a conflict with the *May* decision.

To be clear, the State agrees that there is an apparent conflict between R.C. 2929.14(A)(3)(b) and R.C. 4511.19(G)(1)(e)(i). If this Court chooses to recognize a conflict between *Mercier* and *May*, the proper form of the question should be:

Are R.C. 2929.14(A)(3)(b) and R.C. 4511.19(G)(1) in irreconcilable conflict with one another?

Modifying the question in this manner would accurately reflect the Tenth District’s holding in the instant matter.

The State agrees that, if a conflict is recognized and/or the discretionary appeal accepted, this matter should be held for the decision in *State v. South*, 2014-0563. However, the State does note that the issue in *South* involves a third-degree felony OVI with a repeat-offender specification. No such specification is at issue in this case. Thus, depending upon the scope of this Court's decision in *South*, the State may ask that the present case proceed to full briefing and oral argument.

STATEMENT OF THE FACTS

As in the court below, the State does not object to the “Statement of the Case and Facts” as contained in defendant’s memorandum. However, the State does have one addition.

Despite holding that the *May* decision was distinguishable, in that it did not take into account the plain, unambiguous language of R.C. 4511.19(G)(1) relied upon in *Mercier*, the Tenth District nevertheless certified its decision as in conflict with *May*.

ARGUMENT

RESPONSE TO PROPOSITION OF LAW NO. ONE:

A PRISON TERM FOR A THIRD-DEGREE FELONY OVI OFFENSE IS IMPOSED PURSUANT TO R.C. 4511.19(G)(1)(e)(i), NOT R.C. 2929.14(A)(3)(b)

A.

Felony sentences are reviewed pursuant to R.C. 2953.08. A defendant may appeal an imposed sentence as a matter of right if “[t]he sentence is contrary to law.” R.C. 2953.08(A)(4). The standard of review on appeal is “whether clear and convincing evidence establishes that a felony sentence is contrary to law.” *State v. Davidek*, 10th Dist. Nos. 12AP-1009/1010, 2013-Ohio-3831, ¶6. “A sentence is contrary to law when the trial court failed to apply the appropriate statutory guidelines.” *State v. Worth*, 10th Dist. No. 10AP-1125, 2012-Ohio-666, ¶83 quoting *State v. Burton*, 10th Dist. No. 06AP-690, 2007-Ohio-1941, ¶19.

In this case, defendant appealed from the sentence imposed by the trial court pursuant to R.C. 4511.19. Defendant argued that her sentence was contrary to law, in that it exceeded the statutory maximum for a third-degree felony OVI offense.

Defendant was sentenced pursuant to her plea of guilty to count one of the indictment, which charged a violation of R.C. 4511.19(A)(1)(a). Because defendant had previously been convicted of OVI as a felony, R.C. 4511.19(G)(1)(e) provided that the level of offense was elevated to a third-degree felony.

The central component of defendant’s argument was, and remains, that R.C. 2929.14(A)(3)(b) should have applied and thereby limited the maximum possible prison term to 36 months. Indeed, defendant asserted that the trial court could only impose one of the prison terms authorized by R.C. 2929.14(A)(3)(b) in sentencing her, the maximum term being 36

months. The Tenth District properly rejected defendant's argument in affirming the trial court's sentence.

Revised Code 2929.14(A) *et seq.* is an off-the-rack sentencing statute, in that it contains a tiered system of general prison terms a sentencing court can impose for different felony-level offenses. However, this type of off-the-rack sentencing statute does not apply where a separate, specifically-tailored sentencing statute applies. Such was the case here.

There can be no question that sentencing an OVI offender involves imposition of special and/or enhanced penalties, particularly in the case of a repeat offender. In the case of a third-degree felony OVI offender, these special and/or enhanced penalties are authorized by R.C. 4511.19(G)(1)(e) *et seq.* Felony-level OVI offenders are subjected to increased minimum and mandatory fines, mandatory jail and/or prison sentences, mandatory license suspensions, and specific community control requirements including continuous monitoring for alcohol. *Id.* Revised Code 4511.19 is a specific sentencing statute because it relates to, and authorizes punishments for, only one type of offense: OVI.

In contrast, R.C. 2929.14(A) authorizes prison terms for many different types of felony-level offenses, including theft, burglary, arson, among many others. Therefore, it is a general sentencing statute, applicable to many different criminal offenses. Even if R.C. 2929.14(A)(3)(a) could be considered a specific statute because it references specific third-degree felony offenses eligible for a maximum 5-year prison term, it has no application in this case. Defendant's argument is that OVI is not one of the specific offenses to which it is applicable. Rather, defendant argues that division (A)(3)(b), which does not refer to any specific offenses, should have applied to limit her maximum sentence to 36 months. But, the problem

with defendant's argument is that, because division (A)(3)(b) does not refer to any specific offense, it cannot be considered a specific statute.

Admittedly, R.C. 2929.14(A)(3)(b) and R.C. 4511.19(G)(1)(e)(i) do conflict with one another. However, because the former is a general statute and the latter is specific, the latter prevails. *See* R.C. 1.51.

Naturally, as a specific sentencing statute, R.C. 4511.19(G)(1)(e)(i) is intended to apply only in a limited circumstance. This clear intent is reflected in the plain language of R.C. 4511.19(G)(1), which provides, in relevant part:

[w]hoever violates any provision of divisions (A)(1)(a) to (i) or (A)(2) of this section is guilty of operating a vehicle under the influence of alcohol, a drug of abuse, or a combination of them. * *
* The court shall sentence the offender for either offense under Chapter 2929. of the Revised Code, *except as otherwise authorized or required by divisions (G)(1)(a) to (e) of this section*[.]

R.C. 4511.19(G)(1) (emphasis added). Thus, so long as a punishment is either authorized or required by R.C. 4511.19(G)(1)(e)(i), an OVI offender's sentence is imposed pursuant to the special terms contained therein. Any additional sanctions not specifically authorized by R.C. 4511.19 must be authorized by Chapter 2929. This language is plain and unambiguous. Yet, defendant urges this Court to read R.C. 4511.19(G)(1) in pari materia with several other statutes.

However, it is well-established that resort to principles of statutory interpretation, including reading a statute in pari materia with others, is improper where the language of a statute is plain and unambiguous. *State v. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937, 919 N.E.2d 190, ¶31; *State v. Coburn*, 121 Ohio St.3d 310, 2009-Ohio-834, 903 N.E.2d 1204, ¶13 citing *State ex rel. Herman v. Klopffleisch*, 72 Ohio St.3d 581, 585, 651 N.E.2d 995 (1995). Therefore, defendant's argument must fail.

A court imposing a prison term upon a felony OVI offender is not limited to only the terms authorized by Chapter 2929. of the Revised Code. To be sure, Ohio appellate courts have recognized that the General Assembly has authorized imposition of prison terms for felony-level OVI offenses in excess of the general prison terms defined in R.C. 2929.14(A) for equivalent-level felony offenses. See *State v. Moyar*, 3rd Dist. No. 2-03-37, 2004-Ohio-3017, ¶18 (General Assembly provided for a “substantially longer prison term for fourth degree felony OMVI offenders” than the ordinary maximum defined by R.C. 2929.14); *State v. Carney*, 7th Dist. No. 06 BE 18, 2007-Ohio-3180, ¶19 (same); *State v. McGonnell*, 8th Dist. No. 85058, 2005-Ohio-3157, ¶25 (penalty for felony-four OVI can include a maximum prison term of 30 months); *State v. Puckett*, 4th Dist. No. 03CA2920, 2005-Ohio-1640, ¶¶4, 14 (Puckett’s plea not voluntary where trial court mistakenly advised maximum prison term for felony-four OVI was 18 months, rather than 30 months). Thus, where R.C. 4511.19 specifically authorizes a longer prison term, a sentencing court is not limited to imposing only the prison term defined in R.C. 2929.14.

Here, defendant’s prison sentence was imposed pursuant to R.C. 4511.19(G)(1)(e)(i) and not pursuant to any provision of R.C. 2929.14. See *State v. Keinath*, 6th Dist. No. OT-11-032, 2012-Ohio-5001, ¶17 (repeat OVI offender is sentenced “pursuant to R.C. 4511.19(G)(1), which governs penalties for operating a vehicle under the influence.”); *State v. Hendrix*, 12th Dist. No. CA2012-05-109, 2012-Ohio-5610, ¶¶15-18 (while Hendrix’s sentence exceeded the prison term defined by R.C. 2929.14 for a fourth-degree felony, sentence not contrary to law because the sentence was authorized by R.C. 4511.19(G)(1)(d)(i)).

The specific sentencing provisions of the OVI statute require that, when sentencing an offender for a third-degree felony OVI offense:

[t]he court shall sentence the offender to all of the following:

(i) If the offender is being sentenced for a violation of division (A)(1)(a) * * * of this section, * * * a mandatory prison term of sixty consecutive days in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender is not convicted of a [R.C. 2941.1413] specification * * *. The court may impose a prison term in addition to the mandatory prison term. *The cumulative total of a sixty-day mandatory prison term and the additional prison term for the offense shall not exceed five years.*

R.C. 4511.19(G)(1)(e) (emphasis added). Thus, the plain language of the statute confirms that the prison term for a third-degree felony OVI is not limited to 36 months. In fact, division (G)(1)(e)(i) specifically authorizes a maximum prison term of five years. No reference whatsoever is made to R.C. 2929.14. Indeed, the only reference to any other code section is to R.C. 2929.13(G)(2). Even then, the reference to division (G)(2) is only made with regard to the mandatory 60-day prison term. Division (G)(2) does not, in any way, limit the optional prison term that may be imposed in addition to the mandatory 60-day term.

The lack of a reference to R.C. 2929.14 is significant, because an analogous statute shows that the General Assembly knows how to limit prison terms to only those authorized by R.C. 2929.14(A). Similar to the OVI statute, R.C. 2919.25, the domestic violence statute, enhances the level of offense for repeat offenders. *See* R.C. 2919.25(D)(4) (level of offense is third-degree felony where offender has two or more previous convictions for domestic violence). The statute also contains special sentencing provisions, although not as many as the OVI statute. In the case of a third-degree felony domestic violence offense, R.C. 2919.25(D)(6)(d) requires a sentencing court to “impose a mandatory prison term on the offender of either a definite term of six months or *one of the prison terms prescribed in section 2929.14 of the Revised Code for felonies of the third degree.*” (emphasis added)

The emphasized language shows that the General Assembly knows precisely how to limit a prison term for a felony to only those terms authorized by R.C. 2929.14(A). No such reference

is found in R.C. 4511.19(G)(1)(e)(i). In fact, R.C. 4511.19(G)(1) specifically provides that a sentencing court need not resort to Chapter 2929, except where a particular punishment is not specifically authorized by R.C. 4511.19(G)(1).

The plain language of R.C. 4511.19(G)(1)(e)(i) requires a sentencing court to impose a prison term of at least 60 consecutive days. From there, the statute also authorizes an optional prison term that, when combined with the 60 consecutive days, cannot exceed five years. Therefore, a prison term for a third-degree felony OVI offense must be at least 60 days, but cannot exceed five years.

In this case, the trial court could have imposed a total prison term of five years (60 months). There is no dispute that the trial court imposed a 54-month prison term, which was authorized by the specific sentencing provisions contained in R.C. 4511.19(G)(1)(e)(i). Because the court “applied the appropriate statutory guidelines[,]” *Worth* at ¶83, defendant could not show that her sentence was clearly and convincingly contrary to law. Therefore, the Tenth District properly overruled defendant’s assignment of error.

B.

While the State agrees that this is an important issue that should be accepted on a discretionary basis, the State maintains that the question certified by the Tenth District does not represent an actual conflict between the *Mercier* and *May* decisions.

The question certified by the Tenth District necessarily assumes that both the *May* and *Mercier* courts found that R.C. 4511.19(G)(1) and R.C. 2929.14(A)(3) are in irreconcilable conflict with one another. Indeed, the question asks whether R.C. 4511.19(G)(1) “prevails” over R.C. 2929.14(A)(3). Determining which statute would prevail must be preceded by a finding of

irreconcilable conflict. *United Tel. Co. of Ohio v. Limbach*, 71 Ohio St.3d 369, 372, 1994-Ohio-209, 643 N.E.2d 1129.

The *May* court engaged in an analysis of specific versus general statutes, and ultimately concluded that both R.C. 2929.14(A)(3) and R.C. 4511.19(G)(1)(e)(i) are conflicting specific statutes, with the former prevailing based upon date of enactment. *May*, at ¶29 citing *Owen*. The Tenth District did not find such an analysis necessary, given the existence of R.C. 4511.19(G)(1). *Mercier*, 2014-Ohio-2910, ¶14. In fact, the court explicitly held that the two statutes are not in conflict. *Id.* (“However, we disagree the statutes are in conflict.”). A determination of which statute would “prevail” over the other would only have been necessary if the Tenth District had held that the statutes were in irreconcilable conflict. Thus, the certified conflict question cannot represent an actual conflict, as it is premised on a conclusion that the Tenth District did not reach.

Instead, to be properly recognized as embodying an actual conflict between *Mercier* and *May*, the question, if accepted, should be modified as follows:

Are R.C. 2929.14(A)(3)(b) and R.C. 4511.19(G)(1) in irreconcilable conflict with one another?

Modifying the question in this manner would accurately reflect the only potential conflict between the *Mercier* and *May* decisions.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this matter be held for this Court's decision in *South*. Depending upon the decision in *South*, the State may ask this Court to order that this case proceed to full briefing and oral argument.

Respectfully submitted,

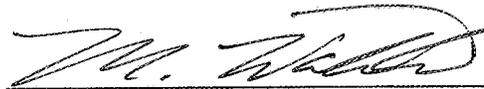
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was hand-delivered this day, September 15, 2014, to TIMOTHY E. PIERCE, 373 South High Street-12th Fl., Columbus, Ohio 43215; Counsel for Defendant-Appellant.



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