

ORIGINAL

IN THE SUPREME COURT OF OHIO
CASE NO. 2014-1557

STATE OF OHIO	:	
Appellant	:	
-vs-	:	On Appeal from the
DEAN M. KLEMBUS	:	Cuyahoga County Court
Appellee	:	of Appeals, Eighth
		Appellate District Court
		of Appeals
		CA: 14-1557

MEMORANDUM IN OPPOSITION TO JURISDICTION

ROBERT L. TOBIK, ESQ.
 Cuyahoga County Public Defender
 BY: JOHN T. MARTIN (COUNSEL OF RECORD)
 #0020606
 Assistant Public Defender
 310 Lakeside Avenue, Suite 200
 Cleveland, OH 44113
 (216) 443-7583
 (216) 443-3632 FAX

COUNSEL FOR APPELLEE DEAN M. KLEMBUS,

TIMOTHY J. MCGINTY, ESQ.
 Cuyahoga County Prosecutor
 KATHERINE MULLIN (0084122)
 DANIEL T. VAN (0084614)
 The Justice Center – 9th Floor
 1200 Ontario Street
 Cleveland, OH 44113
 (216) 443-7800

COUNSEL FOR APPELLANT, THE STATE OF OHIO

FILED
 OCT 08 2014
 CLERK OF COURT
 SUPREME COURT OF OHIO

TABLE OF CONTENTS

PAGES

EXPLANATION OF WHY THIS SHOULD NOT BE ACCEPTED BY THIS COURT1

STATEMENT OF THE CASE AND FACTS5

ARGUMENT.....6

In Opposition to Propositions of Law I and II:

The repeat OVI specification codified in R.C. 2941.1413(A) is facially constitutional under the Equal Protection Clause of both the United States and Ohio Constitutions

When a defendant’s conduct violates multiple criminal statutes, the government may prosecute under either, even when the two statutes prohibit the same conduct but provide for different penalties, so long as the government does not discriminate against any class of defendants based upon an unjustifiable standard.

CONCLUSION.....9

SERVICE.....9

EXPLANATION OF WHY THIS CASE SHOULD NOT BE ACCEPTED BY THIS COURT

When a case of statutory interpretation – even one which results in a portion of the statute being ruled unconstitutional – is both correct and easily fixed by the General Assembly, this Court need not weigh in. That is precisely what this case is about.

R.C. 4511.19 provides, within this single statute, two radically different sets of penalties for persons who have committed six offenses (including the instant offense) within 20 years. Without a specification, an indictment that alleges six offenses within twenty years is a fourth-degree felony, punishable by either community control sanctions or up to 18 months of non-mandatory prison time (thus, judicial release is available); as part of that sentence, the defendant must serve a mandatory 60 days in either “local incarceration” or in prison, but “local incarceration” can include a halfway house or alternative residential facility. Thus, a judge can choose not to lock up the offender in a jail or prison at all, or can impose some combination of sanctions that can be as severe as 18 months’ imprisonment with the possibility of judicial release after 60 days.

But, with a specification, the defendant faces mandatory prison time of between one and five years and, as part of the sentence, the trial court may also be imprisoned for an additional period of between six and thirty months. Thus, when the specification is added to the charge, the judge has no choice but to imprison the defendant for at least one year, and can impose a combination of sanctions that can be as severe as 7 1/2 years of imprisonment.

Obviously, the “specification” has a great impact on the sentence. The specification ties the judge’s hand and requires a sentence of imprisonment. The specification can increase the maximum punishment by a factor of five -- from 18 months in prison to 90 months (7 1/2 years) in prison.

And everyone agrees that the specification that can so drastically limit a judge's discretion and so drastically affect the offender's life does not place any additional burden on the prosecution – it simply is an extra paragraph that effectively re-iterates the indictment's allegation that there have been five prior offenses in the preceding 20 years. So, if the prosecutor adds the “furthermore” language of the specification to an indictment, the grand jury will necessarily find probable cause for the specification if the grand jury finds probable cause for the main body of the indictment. Similarly, the petit jury's verdict on the specification necessarily follows from its verdict on the body of the indictment. And all of this occurs “without the state calling any additional witnesses or adducing any additional testimony or evidence.” Opinion Below, at ¶ 19.

The Eighth District's Decision is Correct

The Eighth District Court of Appeals held that it was irrational to have these two radically different sets of penalties depend solely upon words on a piece of paper – as opposed to the enhanced penalties that can legitimately be incurred when the prosecution proves additional elements or sentencing factors as trial. Simply put, it violates Equal Protection to have two potential classes of offenders – those with specifications and those without – without having any way to rationally differentiate between the two. In reaching this conclusion, the Eighth District relied in part on this Court's language in *State v. Wilson*, 58 Ohio St.2d 52, 55-56, 388 N.E.2d 745, which recognized, in the context of two separate statutes “which require identical proof and yet impose different penalties,” that “sentencing a person under the statute with the higher penalty violates Equal Protection.” The Eighth District applied this principle to the even more egregious situation presented in this case – where a single statute contains two different penalties.

It is important to note that the Eighth District did not suggest that it was basing its decision on a theory of selective prosecution – that the prosecutor’s office was discriminating on the basis of individual characteristics of the defendants (such as race, gender, etc.). Nor did the Eighth District draw any legal analysis or test from selective prosecution cases. Thus, there is no merit to the State of Ohio’s selective-prosecution-related argument, including the State’s claim that the Eighth District had created a hybrid standard for analyzing a facial violation of the Equal Protection Clause via the conflation of facial invalidity with selective prosecution. (State’s Memorandum in Support of Jurisdiction, at 2). This has never been a case about selective prosecution.

The State of Ohio relies principally upon *United States v. Batchelder*, 442 U.S. 114, 99 S.Ct. 2198 (1979), which held that two statutes with overlapping elements did not present an Equal Protection problem where one statutory offense carried up to five years of imprisonment while the other statute carried up to two years of imprisonment. *Batchelder* is distinguishable for at least four reasons.

First, *Batchelder* recognized that the difference in penalties between the two statutory offenses (5 years vs. 2 years) was such that a trial judge would still have the discretion to impose a sentence within the lower penalty range. The *Batchelder* Court noted that the statutes were such that, regardless of the charging decision, the prosecution would not be able to “predetermine ultimate criminal sanctions.” *Id.*, at 124-25. As discussed above, the prosecution is predetermining the criminal sanctions with its charging decisions under R.C. 4511.19 – the penalties are radically different and the trial judge cannot give the lesser penalty if the prosecution includes the specification.

Second, *Batchelder* did not deal with identical elements between the two statutes. While the elements were similar, there were distinctions. *Batchelder* acknowledged that it was a case of “partial redundancy” between the statutes, where the requirements of proof under the two statutes were not identical, *id.*, at 118 – 20 (quoted words appear at 118), although *Batchelder* went on to evaluate the Equal Protection claim as if the statutes were identical in their proof requirements. In the instant case, there are no differences in proof.

Third, *Batchelder* dealt with two separate statutes. At least one federal court has recognized that, when the Equal Protection problem presented herein arises within a single statute, *Batchelder* has no application. See, *United States v. Percival*, 727 F.Supp. 1015 (E.D. Va., 1990).

Fourth, *Batchelder* did not address the Ohio Constitutional considerations, which were also a basis for the Eighth District’s decision.

The State also relies upon the Vermont Supreme Court’s decision in *State v. Rooney*, 189 Vt. 306, 19 A.3d 92 (2011). This reliance is misplaced as the Vermont court was evenly split, 2 to 2, on this constitutional question. The deciding vote of the five-justice court was rendered on a rationale that did not reach the Equal Protection issue.

The General Assembly Can Readily Amend R.C. 4511.19

Moreover, the statute can be fixed, if the General Assembly desires to do so. The General Assembly could simply remove the specification requirement and provide that all of the penalties now available with a specification will be available in every case. Such a legislative fix would remove the discretion from the prosecutors to include or not include the specification and thus would solve the Equal Protection problem by ensuring that everyone who comes before a trial judge with six offenses in 20 years will be sentenced under the same statutory scheme, as

opposed to the two-tiered system that the Eighth District has recognized violates Equal Protection.

The only potential loser if that fix were employed would be those prosecutors who use the threat of a specification to induce guilty pleas to the offense without the specification. And prosecutors could still secure those same guilty pleas by simply agreeing to recommend the lower range of punishment.

In the end, this case should not be accepted.

STATEMENT OF THE CASE AND FACTS

Defendant-Appellant Dean Klembus was charged with two counts of operating a motor vehicle under the influence of alcohol – Count One alleged driving under the influence while Count Two alleged driving with an excessive blood alcohol content (as measured by a breath test). *See* Indictment. Counts One and Two, as alleged, each charged fourth-degree felonies. The Counts alleged fourth-degree felonies because each Count carried the following “FURTHERMORE” language:

FURTHERMORE, and he within twenty years of the offense, previously has been convicted of or pleaded guilty to five or more violations of that nature, to wit: (1) on or about January 2, 2008, 6C06389, in the Bedford Municipal Court, in violation of 4511.19(A)(1); (2) and on or about July 12, 2004, 4C02588, in the Bedford Municipal Court, in violation of 4511.19(A)(1); (3) and on or about October 4, 2000, 0C04081, in the Bedford Municipal Court, in violation of 4511.19(A)(1); (4) and on or about March 17, 1997, 7C00548, in the Bedford Municipal Court, in violation of 4511.19(A)(1); (5) and on or about December 29, 1992, 2C08595, in the Bedford Municipal Court, in violation of 4511.19(A)(1).

In addition, each Count carried the following “Specification Concerning Prior Felony (sic) OVI Offenses -- §2941.1413(A)” (hereinafter, “specification”), which, despite its title, did not allege a prior felony conviction but did allege the following:

the offender, within twenty years of committing the offense, previously had been convicted of or pleaded guilty to five or more equivalent offenses.

Indictment, Counts One and Two.

Prior to trial, Mr. Klembus filed a motion to dismiss the specification. The motion was denied. Following denial of this motion, Mr. Klembus pled no contest to both charges in order to preserve the issue presented prior to trial and herein. The parties agreed that they were allied offenses and merged for sentencing. Sentencing took place on Count One. The sentence is not being appealed.

On appeal, the Eighth District reversed.

ARGUMENT

In opposition to Propositions of Law I and II:

The repeat OVI specification codified in R.C. 2941.1413(A) is facially constitutional under the Equal Protection Clause of both the United States and Ohio Constitutions.

When a defendant's conduct violates multiple criminal statutes, the government may prosecute under either, even when the two statutes prohibit the same conduct but provide for different penalties, so long as the government does not discriminate against any class of defendants based upon an unjustified standard.

Summary

The specification offends the Equal Protection Clause of the United States and Ohio Constitutions because the specification provides the prosecution with the ability to obtain greater punishment for the underlying offense without proof of any additional element, fact or circumstance. Whether Mr. Klembus is subject to between one and five years of mandatory prison time, plus up to an additional thirty months of prison, will not depend upon the government's calling any additional witnesses, or adducing any additional testimony or presenting any additional exhibits. Nor will the increased penalty depend upon the jury finding

any additional facts. Rather, the additional punishment depends solely upon the insertion of the specification in the indictment.

Applicable Law: the Equal Protection Clause

Both the Ohio and United State Constitution provide that no person shall be denied the equal protection of the law. §2, Article I, Ohio Constitution; Fourteenth Amendment, United States Constitution. Equal protection is violated when a statutory scheme is such that two different applications of the criminal law can prescribe different penalties while still requiring the State to prove identical elements. *Wilson*, at 55. The test to be applied is “whether, if the defendant is charged with the elevated crime, the state has the burden of proving an additional element beyond that required by the lesser offense.” *Id.* If not, then a violation of the Equal Protection Clause has occurred. *Id.*

The Specification Violates Equal Protection

In the instant case, Mr. Klembus has been charged with a violation of R.C. 4511.19, which provides in pertinent part in subsection (G)(1):

(d) Except as otherwise provided in division (G)(1)(e) of this section, an offender who, within six years of the offense, previously has been convicted of or pleaded guilty to three or four violations of division (A) or (B) of this section or other equivalent offenses or an offender who, within twenty years of the offense, previously has been convicted of or pleaded guilty to five or more violations of that nature is guilty of a felony of the fourth degree. The court shall sentence the offender to all of the following:

(i) If the sentence is being imposed for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory prison term of one, two, three, four, or five years as required by and in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1413 of the Revised Code or, in the discretion of the court, either a mandatory term of local incarceration of sixty consecutive days in accordance with division (G)(1) of section 2929.13 of the Revised Code or a mandatory prison term of sixty consecutive days in accordance with division (G)(2) of that section if the offender is not convicted of and does not plead guilty to a specification of that type. If the

court imposes a mandatory term of local incarceration, it may impose a jail term in addition to the sixty-day mandatory term, the cumulative total of the mandatory term and the jail term for the offense shall not exceed one year, and, except as provided in division (A)(1) of section 2929.13 of the Revised Code, no prison term is authorized for the offense. If the court imposes a mandatory prison term, notwithstanding division (A)(4) of section 2929.14 of the Revised Code, it also may sentence the offender to a definite prison term that shall be not less than six months and not more than thirty months and the prison terms shall be imposed as described in division (G)(2) of section 2929.13 of the Revised Code. If the court imposes a mandatory prison term or mandatory prison term and additional prison term, in addition to the term or terms so imposed, the court also may sentence the offender to a community control sanction for the offense, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

Thus, the statute is clear on its face that the specification is what triggers the additional punishment. Accordingly, to comply with *Wilson*, the specification must require proof of something above and beyond that required to trigger the fourth-degree felony, *i.e.*, the specification must require proof of something more than simply five prior offenses.

A review of R.C. 2941.1413 reveals that the specification does not require proof of anything more than what is required to prove the underlying crime:

(A) Imposition of a mandatory additional prison term of one, two, three, four, or five years upon an offender under division (G)(2) of section 2929.13 of the Revised Code is precluded unless the indictment, count in the indictment, or information charging a felony violation of division (A) of section 4511.19 of the Revised Code specifies that the offender, within twenty years of the offense, previously has been convicted of or pleaded guilty to five or more equivalent offenses. The specification shall be stated at the end of the body of the indictment, count, or information and shall be stated in substantially the following form:

“SPECIFICATION (or, SPECIFICATION TO THE FIRST COUNT).

The Grand Jurors (or insert the person’s or the prosecuting attorney’s name when appropriate) further find and specify that (set forth that the offender, within twenty years of committing the offense, previously had been convicted of or pleaded guilty to five or more equivalent offenses).” [emphasis added].

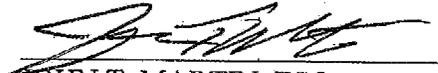
(B) As used in division (A) of this section, “equivalent offense” has the same meaning as in section 4511.181 of the Revised Code.

As is clear from the statutory language – as well as a review of the indictment in the instant case – the specification adds no additional burden of proof, it simply increases the penalty. This violates *Wilson*.

CONCLUSION

Wherefore, this Court should decline to accept this case for plenary review.

Respectfully submitted,



JOHN T. MARTIN, ESQ.
Assistant Public Defender

CERTIFICATE OF SERVICE

I hereby certify that one true copy of the foregoing has been served on Cuyahoga County Prosecutor Timothy J. McGinty, 1200 Ontario Street, Ninth Floor, Cleveland, Ohio 44113 on this 8th day of October, 2014.



JOHN T. MARTIN, ESQ.
Assistant Public Defender