

IN THE SUPREME COURT OF OHIO

State of Ohio)	Case Number: 2014-1062
)	
PLAINTIFF/APPELLANT)	On Appeal from
)	The Lucas County Court of Appeals
)	Sixth Appellate District
vs.)	Certified Conflict
)	
Walter Polus,)	Court of Appeals
)	Case Nos.: L-13-1119
DEFENDANT/APPELLEE)	L 13-1120

MERIT BRIEF OF APPELLEE

Tim A. Dugan #0082115
GROTH & ASSOCIATES
416 N. Erie St., Suite 100
Toledo, OH 43604
PH: (567) 249-6427
FAX: (419) 930-3032
Email: TimADugan@gmail.com
Counsel for the Appellee

Evvy M. Jarrett
Lucas County Prosecutor's Office
Lucas County Courthouse
Toledo, OH 43604
PH: (419) 213-2001
FAX: (419) 213-2011
Email: ejarrett@co.lucas.oh.us
Counsel for Appellant

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INTRODUCTION

This case involves every criminal defendant throughout Ohio who receives a jail term for a misdemeanor and a prison term for a felony sentence through interpretation of R.C. §2929.41.

The Sixth District applied R.C. §2901.04(A) to resolve an obvious ambiguity between R.C. §2929.41(A) and (B)(1). In doing so, the Sixth District held that jail terms for misdemeanors must be run concurrently to felony prison sentences. Finding their decision in conflict with the Fifth and Eighth District Courts, the Sixth District certified a conflict to this Court.

Appellant, The State of Ohio, argues that the Sixth District ignored “other principles of statutory construction,” in making its decision. However, in reviewing R.C. §2929.41, and the history of the statute, and R.C. §2901.04, there is no other rule of construction that apply. The Ohio General Assembly specifically codified the “Rule of Lenity” in R.C. §2901.04(A). It is not some legal doctrine that must be applied along with other doctrines; it is the codified law of the State of Ohio.

Revised Code section 2929.41 is ambiguous as to whether a sentencing court is allowed to run jail terms for a misdemeanor conviction consecutive to felony prison terms. Despite the argument from Appellant, there is reasonable doubt as to the intent of the legislature. Since the intent of the legislature is not plain and obvious, and since R.C. §2901.04(A) demands that criminal statutes be construed strictly against the State and liberally in favor of the accused, this Court should answer the certified question in the negative and affirm the decision from the Sixth District.

STATEMENT OF THE FACTS

According to the State of Ohio, on or about February 2 to February 3, 2013, the home of Nick and Marcia Styacich was burglarized. (Plea Trans May 14, 2013 at p. 32). A day later, Appellee Walter Polus was seen attempting to cash a paycheck belonging to Nick Styacich in the drive-thru of a bank. *Id.* at p. 33. Later, a search warrant executed on Appellee's residence revealed that Appellee had other items belonging to the Styaciches in his possession that were taken the night of the burglary.

On or about February 4, the home of Bill Haun was also burglarized. *Id.* at p. 33. Less than an hour after the burglary, Mr. Haun's girlfriend's debit card was attempted to be used by "a suspect." *Id.* at p. 33-34. Police operated a sting operation on Appellee's residence, having information that Appellee was trafficking in stolen goods. *Id.* at p. 34. During the operation, police recovered two of Mr. Haun's chainsaws. *Id.* at p. 34. According to the State, these offenses took place in Lucas County, Ohio. *Id.* at p. 37.

According to Appellee, on or about January 28, he met an unnamed man in a bar in Waterville, Lucas County, Ohio. *Id.* at p. 39-40. Appellee agreed to \$1,000 worth of tools from this man for \$100. *Id.* at p. 40. This was the first time Appellee had ever met this person. *Id.* at p. 41. Appellee stated that he had reason to believe that the tools were obtained through a theft offense. *Id.* at p. 44.

Appellee stated that after this first incident, he purchased tools from the same man for a second time. *Id.* at p. 46. In both incidents, Appellee sold the tools to another person. *Id.* at p. 48.

STATEMENT OF THE CASE

The Lucas County Grand Jury indicted Appellee with two counts of Receiving Stolen Property in February 2013 in case number CR 13-1275, and a week later, also indicted Appellee on three counts of Burglary in case number CR 13-1430. After a number of pretrial and continued trial dates, the State of Ohio filed two counts of Receiving Stolen Property by way of information.

Through plea negotiations, the State added the two counts in the information to the indictment, Appellee having waived his right to be charged by indictment, and Appellee entered *Alford* pleas to the two counts of Receiving Stolen Property, in violation of R.C. §2913.51(A) and (C), both felonies of the fifth degree. In exchange, and citing serious evidentiary concerns, the State dismissed the three counts of Robbery. (Plea Trans at p. 10). In case CR 13-1275, Appellee entered guilty pleas to both counts of Receiving Stolen Property, in violation of R.C. §2913.51(A) and (C). Count one remained a felony of the fifth degree, however, the State amended the second count to a misdemeanor of the first degree by deleting any reference to a dollar amount of the stolen items. *Id.* at p. 10.

At sentencing, the Trial Court found that the shortest prison term possible would demean the seriousness of the offenses and not adequately protect the public, and therefore, in case CR 13-1275, ordered Appellee to serve an eleven month prison term on count one, and a six month jail term in count two. (Sentencing Trans. Mya 30, 2013 at p. 28-29). The Trial Court ordered these two sentences to run consecutively to one another after finding that Appellee had served a prior prison term, that the harm caused was great and unusual and that no single prison term would adequately reflect the seriousness of Appellee's conduct, and that consecutive sentences were necessary to protect the public. *Id.* at p. 29-30.

Making identical findings, the Trial Court then sentenced Appellee to a prison term of eleven months for each count in case CR 13-1430 and ordered that each prison term be run consecutively to each other and to the sentence in CR 13-1275.

Appellee appealed to the Sixth District Court of appeals. On appeal, Appellee raised one assignment of error: “[Appellee]’s sentence was contrary to law.” Appellee argued that a sentencing court could not sentence a defendant to a misdemeanor jail term consecutive to a felony prison term. The Sixth District determined that the General Assembly revived R.C. §2929.41(A) as written before this Court’s decision in *State v. Foster*, 109 Ohio St. 3d 1, 2006 Ohio 856. *State v. Polus*, 6th Dist. Nos. L 13-1119, L 13-1120, 2014 Ohio 2321 at P12. Due to this, the Sixth District concluded that treatment of R.C. §2929.41(A) should be taken from pre-*Foster* case law. *Id* at P15. The Sixth District reversed the Lucas County Court of Common pleas and amended Appellee’s sentence to reflect Appellee’s misdemeanor jail sentence to run concurrently to Appellee’s felony prison sentence. *Id.* at P23.¹

Finding itself in conflict with decisions from the Fifth and Eight District Courts, the Sixth District certified a conflict to this Court. Appellant, The State of Ohio, filed a notice of a certified conflict. This Honorable Court found that a conflict existed in the districts and accepted this case for review.

¹ The Sixth District also amended Appellee’s sentence to reflect a sentence of “180 days” instead of the Trial Court’s sentence of “six months.”

CERTIFIED QUESTION

Whether a trial court may impose consecutive sentences for felony and misdemeanor convictions under R.C. §2929.41(B)(1).

ARGUMENT

The Sixth District correctly found that R.C. §2929.41 was ambiguous and therefore must be construed liberally against the State and in favor of criminal defendants.

Revised Code section 2929.41(A) states:

“Except as provided in division (B) of this section, division (C) of section 2929.14, or division (D) or (E) of section 2971.03 of the Revised Code, a prison term, jail term, or sentence of imprisonment shall be served concurrently with any other prison term, jail term, or sentence of imprisonment imposed by a court of this state, another state, or the United States. Except as provided in division (B)(3) of this section, a jail term or sentence of imprisonment for misdemeanor shall be served concurrently with a prison term or sentence of imprisonment for felony served in a state or federal correctional institution.”

Section (B)(3) of the same statute states that jail prison terms for misdemeanor violations of R.C. §4501.11, §4510.14, §4510.16, §4510.21, or §4511.19 shall be served consecutively to felony violations of R.C. §2903.06, §2903.07 (Repealed), §2903.08, or §4511.19 or a felony violation of R.C. §2903.04 involving the operation of a motor vehicle by the offender.

However, R.C. §2929.41(B)(1) states: “A jail term or sentence of imprisonment for a misdemeanor shall be served consecutively to any other prison term, jail term, or sentence of imprisonment when the trial court specifies that it is to be served consecutively...”

The “Rule of Lenity” codified in R.C. §2901.04(A) states “...sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.” The Rule of Lenity applies to ambiguities in criminal

statutes concerning conduct which is clearly prescribed. *State v. Coleman*, 6th Dist. No. S 06-023, 2007 Ohio 0448 at P23.

Under R.C. §2929.16, a sentencing court may sentence a felony offender to a term of up to six months in a jail as a community residential sanction so long as the felony does not require mandatory prison time. R.C. §2929.16(A)(2). If a defendant has been convicted of a felony of the fourth degree OVI, a sentencing court may impose a jail term of one year, less the mandatory time required by the statute, as a community residential sanction. R.C. §2929.16(A)(3).

1. The history of R.C. §2929.41

On July 1, 1996, for the first time R.C. §2929.41's language was amended to include language similar to the current R.C. §2929.41(B)(1). *See* 1995 Ohio SB 2. At the time, R.C. §2929.41(A) read, in part: "*In any case*, a sentence of imprisonment for misdemeanor shall be served concurrently with a sentence of imprisonment for felony served in a state or federal correctional institution." (emphasis added). *Id.*

It was not until the year 2000 that the General Assembly amended R.C. 2929.41(A) to remove the phrase "In any case" and replace it with "EXCEPT AS PROVIDED IN DIVISION (B)(2) OF THIS SECTION." *See* 1999 Ohio SB 22. Effective in 2004, the General Assembly amended the language of R.C. §2929.41(A) and (B)(1) to mostly reflect the language that is in the current version of the statute. *See* 2001 Ohio HB 490. The General Assembly also specifically amended §2929.41(A) to change the reference to "(B)(2)" to refer to "(B)(3)" after reorganizing the statute. *See* 2001 Ohio SB 123.

This statute was not touched again until this Court exercised division (A) from the statute in *State v. Foster*, 109 Ohio St. 3d 1, 2006 Ohio 856. After this Court's decision in

State v. Hodge, 128 Ohio St. 3d 1, 2010 Ohio 6320, the General Assembly reenacted R.C. §2929.41(A) as it was written pre-*Foster*. See 2011 Ohio HB 86. In 2012, the General Assembly amended division (A) to reflect a reference to §2929.14(C) instead of the erroneous reference to §2929.14(E). See 2011 Ohio SB 337, *State v. Simpson*, 2nd Dist. No 25202, 2013 Ohio 1695.

2. R.C. §2901.04 applies in this case as R.C. §2929.41 is ambiguous.

Appellant has argued that this Court should invoke the doctrine of a scrivener's error to R.C. §2929.41(A) to remove the reference to division "(B)(3)" and change it to simply reference division (B). However, in Ohio law, the only rule of construction that applies to sections of the revised code defining criminal offenses or penalties is §2901.04(A). Ohio has specifically codified the legal doctrine of the Rule of Lenity.

This Court has stated that the Rule of Lenity requires that a court not interpret a criminal statute so as to increase the penalty it imposes on a defendant if the intended scope of the statute is ambiguous." *State v. Stevens*, 139 Ohio St. 3d 247, 2014 Ohio 1932, P12. "Ambiguity" is defined as "the condition of admitting of two or more meanings, of being understood in more than one way, or of referring to two or more things at the same time." *State v. Willan*, 136 Ohio St. 3d 222, 2013-Ohio-2405, at P19 (Lanzinger, J. dissenting).

For the past eighteen years, R.C. §2929.41(A) and (B)(1) have contradicted themselves by referring to two different outcomes. A plain reading of the two statutes does not show the intended meaning of the statute since one section allows something that the other section prohibits.

Appellant argues that to read divisions (A) and (B)(1) as written would lead to an absurd result that one part of a statute negates the other, and suggests that the error could be

fixed by reading the reference to “(B)(3)” in division (A) to simply be “(B).” Appellant argues that this would be consistent with the intent of the legislators. While Appellant is correct that the Sixth District stated that the legislative intent of House Bill 86 “was to vest trial judges with discretion in fashioning appropriate criminal sentences,” Appellant leaves out the key portion of the Sixth District’s words. (See Appellant’s brief at p. 8). The Sixth District stated:

We believe that the legislature, through H.B. 86, has evidenced its intent to vest trial judges with discretion in fashioning appropriate criminal sentences. To that end, we see no reason that the trial courts should have any less discretion when imposing sentences for offenders who commit both felonies and misdemeanors.

Polus at P15. (emphasis added). The Sixth District *believes* this is what the intension of the legislators are. This, however, is not the holding of the case, and is simply dicta of the Court. Based on the history of R.C. §2929.41, and on its current draft, the intent of the General Assembly is not clear.

Prior to *Foster*, courts throughout Ohio were finding that misdemeanor jail terms were required to be run concurrently to felony prison time. *See: State v. Robinson*, 5th Dist. No. 01COA01446, 2002 Ohio 520, P2 (holding that divisions (B)(1) and (A) of R.C. §2929.41 must be construed liberally in favor of the accused); *State v. Pulizzi*, 9th Dist. No. 20729, 2002 Ohio 2209, P29 (finding that the trial court erred in sentencing the defendant to a misdemeanor jail term consecutive to other felony prison terms); *State v. Garrett*, 6th Dist. No. E-02-015, 2003 Ohio 5185, P27 (finding that the trial court erred in ordering a jail sentence for a misdemeanor assault to run consecutively to two felony convictions); *State v. O’Neil*, 8th Dist. No. 2005 Ohio 4999, P41 (finding the trial court erroneously found the defendant guilty of a felony when his charge should have been a misdemeanor, and finding that the reduced misdemeanor charge should have run concurrently to the defendant’s other felony charges);

State v. Guilkey, 4th Dist. No. 04CA2932, 2005 Ohio 3501, P8 (finding that R.C. §2929.41(A) required a jail term for a misdemeanor to be served concurrently with a felony prison term). Once this Court struck R.C. §2929.41(A) in *Foster*, Ohio courts were left only with division (B)(1), allowing for misdemeanor jail time to be run consecutively to felony prison time.

The Ohio General Assembly had the opportunity to address this ambiguity when they reenacted R.C. §2929.41(A) in 2011. There is nothing in this Court’s decision in *Hodge* that would suggest that the legislators were required to revive any of the struck statutes as they were written prior to being struck.

Instead of rewriting the statute to remove any ambiguity, the General Assembly simply reenacted R.C. §2929.41(A) to its pre-*Foster* state as part of House Bill 86. In doing so, the General Assembly stated that its purpose for H.B.86 was “to reduce the state's prison population and to save the associated costs of incarceration by diverting certain offenders from prison and by shortening the terms of other offenders sentenced to prison.” *State v. Bonnell*, 140 Ohio St. 3d. 209, 2014 Ohio 3177, P20.

The Ohio General Assembly knew, or should have known, the case law from the State of Ohio. In reenacting R.C. §2929.41(A), their actions clearly made a statute ambiguous which had been settled during the *Foster* era. Further, since the stated purpose of H.B.86 was to relieve the prison population, it does not make sense that the legislators would want to force jails throughout the State of Ohio to take on an extra burden of more inmates after serving prison time for a felony by transferring inmates to a jail to serve a consecutive misdemeanor term.

Division (B)(1), however, also has a second sentence which has been left out of this discussion. “When consecutive sentences are imposed for misdemeanor under this division,

the term to be served is the aggregate of the consecutive terms imposed, except that the aggregate term to be served shall not exceed eighteen months.” This provision limits the consecutive stacking of misdemeanor sentences to a maximum total of eighteen months.

Taken together, divisions (A) and (B)(1) can easily have a different meaning than Appellant wishes this Court to read into it. The first sentence of division (A) means to talk about felony sentencing, as a “jail term” can still be imposed as part of a residential sanction for a felony conviction. *See* R.C. §2929.16(A)(2). The second sentence of division (A) clearly states “...a jail term of imprisonment for misdemeanor *shall be* served concurrently with a prison term or a sentence of imprisonment for a felony...” (emphasis added). When read in context, division (B)(1) seems to mean to refer exclusively to misdemeanor sentences running consecutive to other misdemeanor sentences. Appellant wishes to have this Court find that the reference to “(B)(3)” in division (A) is in error, but it is just as likely that the legislature simply erred in adding the language “prison term” in division (B)(1). Sadly, it is not beyond the General Assembly to enact poorly worded statutes.

In essence, all of this means that it is not possible to ascertain the true intent of the legislators. Since there is reasonable doubt as to the full intention of what the General Assembly meant in enacting divisions (A) and (B)(1) of R.C. §2929.41, the Rule of Lenity applies in this case. With there being ambiguity in what the legislature intended, the statute must be liberally in favor of the accused.

CONCLUSION

Since it is not clear what the General Assembly intended by enacting a statute that, on its face, contradicts itself, the statute is ambiguous, and must be constructed as prescribed under R.C. §2901.04(A). Construing the statute liberally in favor of persons convicted of felonies and misdemeanors would mean that misdemeanor jail terms must be served concurrently to felony prison terms. Appellee respectfully requests this Honorable Court answer the certified question in the negative, and affirm the decision of the Sixth District Court of Appeals.

Respectfully Submitted,

/s/ Tim A. Dugan
Tim A. Dugan
Counsel for Appellee

SERVICE

This is to certify that a copy of the foregoing was served on Counsel for Appellant, Evy Jarrett, by Personal Delivery to 700 Adams Street, Toledo, Ohio 43604, this 24th day of November, 2014.

/s/ Tim A. Dugan
Tim A. Dugan
Counsel for Appellee