ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio,	:	Case No. 2014-1062
Plaintiff-Appellant,	:	Certified Conflict from the Lucas County Court of Appeals, Sixth Appellate District Case Nos. L-13-1119, L-13-1120
vs.	:	
Walter Polus,	:	
Defendant-Appellee.	:	

Merit Brief of Amicus Curiae Office of the Ohio Public Defender
In Support of Appellee Walter Polus

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State of the Case and Facts

Amicus adopts by reference the statement of the case and facts set forth by Appellee Walter Polus.

Statement of Interest of Amicus Curiae Office of the Ohio Public Defender

The Office of the Ohio Public Defender is a state agency, designed to represent criminal defendants and to coordinate criminal defense efforts throughout Ohio. The Ohio Public Defender also plays a key role in the promulgation of Ohio statutory law and procedural rules. One of the primary focuses of the Ohio Public Defender is on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. And the primary mission of the Ohio Public Defender is to protect the individual rights guaranteed by the state and federal constitutions through exemplary legal representation. In addition, the Ohio Public Defender seeks to promote the proper administration of criminal justice by enhancing the quality of criminal defense representation, educating legal practitioners and the public on important defense issues, and supporting study and research in the criminal justice system.

As amicus curiae, the Ohio Public Defender offers this Court the perspective of experienced practitioners who routinely handle significant criminal cases in the Ohio appellate courts. The Ohio Public Defender has an interest in the present case insofar as this Court will address criminal sentencing.

Introduction

As set forth in the State of Ohio's merit brief, this Court has agreed to consider the following certified conflict question:

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

The State asks this Court to apply the scrivener's error doctrine, a statutory interpretation doctrine, instead of applying the rule of lenity to R.C. 2929.41(B)(1). However, this Court's analysis is properly guided by the rule of lenity, codified in the Ohio Revised Code, that requires criminal penalties be strictly construed against the State and liberally construed in favor of the accused. R.C. 2901.04. The ambiguity in Revised Code Section 2929.41 must be resolved in favor of the accused, and thus, the trial court cannot impose consecutive sentences for felony and misdemeanor convictions.

Argument

In enacting the criminal justice reform bill, Am.Sub.H.B. No. 86 ("H.B. 86"), the Ohio General Assembly revived R.C. 2929.41(A) and created a statutory presumption in favor of running multiple sentences concurrently. R.C. 2929.41(A); *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659. The legislature amended 2929.41(A) with the intent "to simultaneously repeal and revive the amended language * * * that was invalidated and severed by the Ohio Supreme Court's decision in *State v. Foster*." 2011 Am.Sub.H.B. No. 86, Section 11; *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

The Ohio Criminal Sentencing Commission issued a summary of the changes to Ohio sentencing after the passage of H.B. 86. Ohio Criminal Sentencing Commission, *H.B. 86 Summary: The 2011 Changes to Criminal and Juvenile Law*, (September 26, 2011), http://www.sconet.state.oh.us/Boards/Sentencing/resources/summaries/HB86Summary.pdf

(accessed November 21, 2014). The summary refers to the consecutive sentencing changes as the "*Foster* Fix." Specifically, the Commission said that through enactment of H.B. 86 the General Assembly "strikes and then "revives" verbatim the presumption of concurrent sentencing in §2929.41(A) and the limit on consecutive terms in §2929.14(C)(4) (prior div. (E)(4))." *Id.* at 10. According to the Commission, the Senate rejected simpler language in the House-passed version in favor of the pre-existing statutory wording. *Id.* The Commission noted that the Senate's reason was "the old language has been tested in the courts since 1996." *Id.*

Thus, the General Assembly intended to return to pre-*Foster* sentencing, and revive a presumption in favor of concurrent sentencing. Here, R.C. 2929.41 is ambiguous because of the conflicting language in subsections (A) and (B)(1). Analysis is properly guided by the rule of lenity, which requires criminal penalties be strictly construed so as to apply the statute to conduct that is clearly proscribed. R.C. 2901.04. *See generally State v. Straley*, 139 Ohio St.3d 339, 2014-Ohio-2139, 11 N.E.3d 1175 ¶ 10.

The State argues that applying the rule of lenity is improper because in doing so, the court is "leapfrogging over other principles of statutory construction." State's Brief at 1-2. Instead, the State argues, the ambiguity should be resolved through application of the scrivener's error doctrine. The State asks this Court fix a "drafting error" that directly conflicts with the intent to restore the statutory presumption in favor of concurrent sentencing that this Court has already recognized. *Bonnell* at 216. This argument fails recognize that in Ohio, the rule of lenity is not a "canon of statutory construction that may be applied" it is the law which by statute must be applied here.

The scrivener's error doctrine is not found in the Revised Code and has only been referenced by this Court three times in published opinions. *Houdek v. Thyssenkrupp Materials*

N.A., 134 Ohio St.3d 491, 2012-Ohio-5685, 984 N.E.2d 1253; *Taylor v. Standard Brick Co.*, 66 Ohio St. 360, 64 N.E. 428 (1902), *State v. Jacobozzi*, 6 Ohio St.3d 59, 451 N.E.2d 744 (1983). Only one of the three cases dealt directly with statutory ambiguity, and this Court said that the appellate court erroneously held that the statutory issue resulted from a scrivener's error in a civil case. *See generally Houdek.*

Federal courts have more frequently found scrivener's errors in statutory interpretation cases, yet application of the doctrine is not without hesitation. State's Brief at 7-8. For example, in a bankruptcy code interpretation case, the United States Supreme Court said the statutory language was "awkward, and even ungrammatical" yet held that it could not determine a clear legislative intent for a supposed erroneous deletion in the code and would not interfere with the text. *Lamie v. United States Tr.*, 540 U.S. 526, 534-536, 124 S. Ct. 1023, 157 L.Ed.2d 1024 (2003). The supreme court said if "Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent" *Id.* at 541. By not interfering with the language, the supreme court allowed the judicial and legislative branch "to adhere to our respected, and respective constitutional roles." *Id.* As Justice Scalia described, the essential condition of any scrivener's error doctrine application "is that the meaning genuinely intended but inadequately expressed must be absolutely clear; otherwise [the judiciary] might be rewriting the statute than correcting a technical mistake." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 82, 115 S. Ct. 464, 130 L.Ed.2d 372 (Scalia, J., dissenting) (1994).

Here, the General Assembly not only intended to revive the statutory presumption in favor of concurrent sentencing but has made clear how a criminal law should be interpreted by the judiciary – through application of the rule of lenity. R.C. 2901.04. Despite this, the State

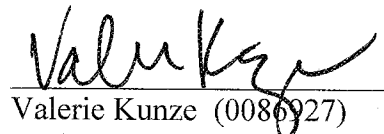
asks this Court to depart from its role as interpreter of the law to rewrite R.C. 2929.41 to allow for more discretion in sentencing. If the General Assembly would like to provide more discretion in sentencing a criminal defendant on a misdemeanor and felony, it must amend the statute. It is not this Court's role to do so. This Court must follow the General Assembly's rule of lenity directive and construe R.C. 2929.41 liberally in favor of the accused, with the presumption for concurrent sentencing.

Conclusion

Revised Code Section 2929.41 creates a presumption in favor of concurrent sentencing for felony and misdemeanor convictions and any ambiguity must be resolved through the application of the rule of lenity. Accordingly, the Sixth District properly found that Walter Polus's sentences should have been ordered to be served concurrently. The Office of the Ohio Public Defender, as amicus curiae, urges this Court to affirm the judgment of the court below.

Respectfully submitted,

Office of the Ohio Public Defender



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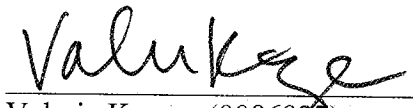
Certificate of Service

I certify that a copy this document was forwarded by regular U.S. Mail, postage prepaid to Evy M. Jarrett, Lucas County Assistant Prosecuting Attorney, Lucas County Courthouse, 700 Adams Street, Toledo, Ohio 43604 and Tim A. Dugan, Attorney at Law, Groth & Associates, 416 N. Erie Street, Suite 100, Toledo, Ohio 43604, on this 24th day of November, 2014.



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