Supreme Court of Ohio Clerk of Court - Filed December 15, 2014 - Case No. 2014-1062

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	*	Case No. 2014-1062
Plaintiff-Appellant,	*	On Appeal from the Lucas County Court of Appeals, Sixth Appellate District
-vs-	*	
		Court of Appeals Nos. L-13-1119 L-13-1120
WALTER POLUS,	*	
Defendant-Appellee.	*	
	*	

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INTRODUCTION

Appellee's argument depends on two fundamental assumptions. First, he assumes that the rule of lenity is the only rule of construction Ohio courts may apply to criminal statutes. Second, he assumes that due to the convoluted statutory history of R.C. 2929.41, "it is not possible to ascertain the true intent" of the statute and as a result the rule of lenity applies. *See* Brief of Appellee at pp. 10, 13.

Neither assumption is correct. First, in both civil and criminal cases, this court and Ohio's lower appellate courts have applied rules of statutory construction set forth in Ohio's Revised Code, as well as various common law doctrines of statutory construction.

Second, the intent of R.C. 2929.41, as enacted by 2011 Am.Sub.H.B. No. 86 ("H.B. 86"), is readily discernible. H.B. 86 was intended to grant trial courts the authority to override a presumption of concurrent sentencing through certain factual findings. That legislative intent extended to permit consecutive service of felony and misdemeanor sentences. H.B. 86 was adopted during a time period when courts interpreted R.C. 2929.41(B)(1) to permit courts to order a felony sentence to be served consecutive to a misdemeanor, and the General Assembly did not alter any portion of the language in R.C. 2929.41(B)(1). Of course, if the legislature had intended to override the prevailing interpretations of (B)(1), it could have done so by eliminating the provision or by explicitly restricting the provision to permit misdemeanor sentences to be served consecutively.

In addition to the legislative intent specific to H.B. 86, the General Assembly has established various presumptions of legislative intent which are contrary to the position advocated by appellee. For example, the Revised Code establishes a presumption that "[t]he entire statute is intended to be effective." R.C. 1.47(B). Giving effect to R.C. 2929.41(A) without giving effect to R.C. 2929.41(B)(1) undermines this presumption of statutory intent.

Likewise, the General Assembly has established a presumption that "[a] result feasible of execution is intended." R.C. 1.47(D). But giving effect to both R.C. 2929.41(A) and (B)(1) as written results in a direct conflict, as appellee has conceded. *See, e.g.*, Brief of Appellee at p. 10; Brief of Amicus Curiae at p. 3. Pursuant to R.C. 2929.41(A), with only a few exceptions, "a jail term or sentence of imprisonment for misdemeanor shall be served concurrently with a prison term or sentence of imprisonment for felony." Pursuant to R.C. 2929.41(B)(1), "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 . . ." It is impossible on the one hand to require concurrent service, but on the other hand to permit the trial court to order consecutive service.

In determining statutory intent, this court should consider both the lower appellate courts' analysis of R.C. 2929.41(B)(1) at the time the General Assembly adopted H.B. 86, as well as the presumptions of statutory intent set forth in R.C. 1.47. Appellee's interpretation of the statute is inconsistent with both the existing body of case law as well as the presumptions of statutory intent.

In contrast, application of the common law scrivener's error doctrine gives effect to both (A) and (B)(1). Moreover, application of the scrivener's error doctrine is consistent with previous case law from this court governing both the correction of errors within statutes and the application of the rule of lenity.

ARGUMENT

First Proposition of Law: The rule of lenity applies only when a statute remains ambiguous after application of other rules of construction.

I. Ohio's statutes and case law contemplate application of rules of construction in addition to R.C. 2901.04 when construing criminal statutes.

Appellee assumes that the only rule of statutory construction applicable to criminal statutes is the rule of lenity set forth in R.C. 2901.04(A). *See* Brief of Appellee at p. 10. Similarly, his amicus assumes that the rule of lenity is not a "canon of statutory construction" but a law "which by statute must be applied here," with the effect of overriding any competing rules of construction. *See* Brief of Amicus at p. 3. Both assumptions are contrary to the Revised Code as well as case law from this court and Ohio's lower appellate courts.

First, the General Assembly has explicitly directed that rules of construction other than the rule of lenity will apply to criminal statute. R.C. 1.41 provides that the rules of construction codified in the Revised Code are applicable "**to all statutes**, subject to the conditions stated in section 1.51[1] of the Revised Code, and to rules adopted under

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[1]R.C. 1.51 provides:

> If 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

them." No exception is made for criminal statutes.

Consistent with this statutory directive, this court has frequently applied the rules of construction set forth in R.C. 1.41 through 1.59 without application of the rule of lenity. For example, this court has relied on R.C. 1.47 and 1.50 in presuming that compliance with the United States and Ohio Constitutions is intended and that an entire statute is intended to be effective. *See State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶63.

But this court has not restricted itself to reliance on the rules of construction offered by the Revised Code. This court has observed that a court's interpretation of a statute "cannot pick out one sentence and disassociate it from the context, but must look to the four corners of the enactment to determine the intent of the enacting body." *State v. Wilson*, 77 Ohio St.3d 334, 336, 1997-Ohio-35, 673 N.E.2d 1347, citing *MacDonald v. Bernard*, 1 Ohio St.3d 85, 89, 438 N.E.2d 410, 413 (1982). This court has also applied the rule that "[c]ourts must avoid statutory interpretations that create absurd or unreasonable results," without reliance on the rules of construction articulated in the Revised Code. *See State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, ¶20.

Finally, and most significantly for purposes of this case, this court and the lower

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> provision is the later adoption and the manifest intent is that the general provision prevail.

Appellee has properly not argued that R.C. 1.51 has any relevance to this case. Because R.C. 2929.41(A) and (B)(1) both relate to the question of whether a sentence for a misdemeanor may be served consecutively to another sentence, neither can be said to be "general" or "specific."

appellate courts have refused to apply the rule of lenity reflexively and without regard to its consequences: "The canon in favor of strict construction of criminal statutes is not an obstinate rule which overrides common sense and evident statutory purpose." *State v. Sway*, 15 Ohio St.3d 112, 115, 472 N.E.2d 1065, 1068 (1984). R.C. 2901.04 "does not require a construction of a statute that leads to an absurd, and therefore obviously unintended result, if there is a reasonable construction that does not produce an absurd result." *State v. Brodie*, 165 Ohio App.3d 668, 847 N.E.2d 1268 (2nd Dist.), ¶23.

II. This court has permitted correction of obvious error in statutes.

Contrary to the representations of appellee's amicus, one recognized rule of construction is the "well-settled rule that courts will not permit a statute to be defeated on account of a mistake or error, where the intention of the Legislature can be collected from the whole statute, or where one word has been erroneously used for another, and where the context affords means of correction." In such circumstances, "[t]he strict letter of a statute must yield to the obvious intent." *Stanton v. Frankel Bros. Realty Co.*, 117 Ohio St. 345, 350-351, 158 N.E. 868 (1927).

In *Stanton*, a statute's use of the word "of" resulted in giving the county auditor a right to appeal, while denying a right of appeal to anyone complaining of the auditor's action. *Stanton* concluded that the use of the word "of" was "changed by interpretation" to the word "or."

Stanton was decided before the adoption of the rules of construction outlined in R.C. 1.41 through 1.59 or the rule of lenity articulated in R.C. 2901.04. But none of those statutes provides that it supplants all common law doctrines of construction. Of

course, any abrogation of the common law requires an explicit statement of intent to do so.[2] "[T]he General Assembly will not be presumed to have intended to abrogate a common-law rule unless the language used in the statute clearly shows that intent." *Carrel v. Allied Products Corp.*, 78 Ohio St.3d 284, 287, 1997-Ohio-12, 677 N.E.2d 795. "There is no repeal of the common law by mere implication." *Id.*

III. The rule of lenity applies only after application of other rules of construction does not resolve ambiguous provisions.

This court has previously held that the rule of lenity does not apply unless ambiguity exists in a statute or unless multiple statutes conflict. *State v. Arnold*, 61 Ohio St.3d 175, 178, 573 N.E.2d 1079 (1991). That rule is consistent with federal case law reserving lenity "for those situations in which a reasonable doubt persists about a statute's intended scope even after resort to the "language and structure, legislative history, and motivating policies" of the statute. *Moskal v. United States*, 498 U.S. 103, 108, 112 L.Ed.2d 449, 111 S.Ct. 461 (1990), quoting *Bifulco v. United States*, 447 U.S. 381, 387, 65 L.Ed.2d 205, 100 S.Ct. 2247 (1980).

The result is no different when considering application of the scrivener's error doctrine. Ohio's lower courts have rejected efforts to apply the rule of lenity when the statute contained an obvious typographical error which could be cured through application of the scrivener's error doctrine. *See, e.g., State v. Williams*, 8th Dist. No.

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[2] Case law related to abrogation of common law provides yet another example of the use of common law principles in the construction of statutes. The rule of statutory construction disfavoring the abrogation of common law does not appear in R.C. 1.41 through 1.59. Nevertheless, the absence of the rule from the Revised Code has not hindered its application, even in criminal cases. *See, e.g., State v. Yarger*, 181 Ohio App.3d 132, 2009-Ohio-543, ¶9 (3d Dist.) (applying common law principles of calculating age of determine whether defendant was 18).

98261, 2013-Ohio-1026, ¶20-22; *State v. O'Bryan*, 181 Ohio App.3d 247, 2009-Ohio-753 (10th Dist.), ¶10-11.

IV. H.B. 86 was intended to restore trial courts' authority to make factual findings to override a presumption of concurrent sentences.

The original version of R.C. 2929.41 contained no exceptions to the general rule in division (A) that "[a] misdemeanor sentence is always served concurrently with a penitentiary or reformatory sentence for felony." *See* 1974 Committee Comment to H.B. 511. Language allowing a trial court to order consecutive service of a "sentence of imprisonment for a misdemeanor" to "any other sentence of imprisonment" was effective in 1997. However, in 2006, this court invalidated R.C. 2929.41(A) on the theory that it required unconstitutional judicial factfinding. *See State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, paragraphs three and four of the syllabus. H.B. 86 was intended to revive statutory fact-finding provisions that existed prior to their invalidation by this court:

> SECTION 11. In amending division (E)(4) of section 2929.14 and division (A) of section 2929.41 of the Revised Code in this act, it is the intent of the General Assembly to simultaneously repeal and revive the amended language in those divisions that was invalidated and severed by the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1. The amended language in those divisions is subject to reenactment under the United States Supreme Court's decision in *Oregon v. Ice* (2009), 555 U.S. 160, and the Ohio Supreme Court's decision in *State v. Hodge* (2010), ___ Ohio St.3d ____, Slip Opinion No. 2010-Ohio-6320 and although constitutional under *Hodge*, supra, that language is not enforceable until deliberately revived by the General Assembly.

2011 Am.Sub. H.B. No. 86, §11. *See also State v. Wells*, 8th Dist. No. 98428, 2013-Ohio-1179, ¶11.

Nothing in Section 11 of H.B. 86 specifically addresses the provisions of R.C.

2929.41(B)(1), and neither appellee nor his amicus offers any authority suggesting that there was a specific legislative intent to preclude consecutive sentences for felonies and misdemeanors. Of course, any intent drawn from the statute itself must account for the provision of (B)(1), which acts as an apparent exception to the former rule requiring concurrent service of terms for misdemeanors with terms for other offenses.

Appellee contends that the intent of H.B. 86 was to reduce prison populations, and certainly this court has previously recognized that purpose of the legislation. *See State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.2d 659, ¶20. But not all of H.B. 86's reforms were likely to reduce prison populations. For example, H.B. 86 also increased the possible prison term for a first degree felony from 10 years to 11 years. Other amendments redefined the offense of burglary; prohibited sexually oriented offenders from possessing a photograph of the victim of the offense during confinement; and removed judges from the membership of a corrections commission. *See* Ohio Legislative Service Commission, Final Analysis Am.Sub.H.B. 86 at 1-7 (Sept. 30, 2011), available at http://www.lsc.state.oh.us/analyses129/11-hb86-129.pdf (accessed Dec.9, 2014).

Appellee also relies on older case law to support the view that the legislature "knew, or should have known" that the pre-*Foster* version of the statute was construed to preclude the consecutive service of misdemeanor and felony sentences. *See* Brief of Appellee at pp. 11-12. Such older authorities are entitled to little weight when they involved a version of R.C. 2929.41 without the relevant language currently included in division (B)(1), or when those authorities relied on previous cases decided under the

older version of the statute. *See, e.g.*, *State v. Butts*, 58 Ohio St.3d 250, 569 N.E.2d 885 (1991). *See also State v. Robinson*, 5th Dist. No. 01COA01446, 2002-Ohio-520; and *State v. Garrett*, 6th Dist. No. E-02-015, 2003-Ohio-5185, ¶27 (both relying on *Butts*). Likewise, older authorities lack persuasive value when they simply concluded, without analysis of the exception provided in current division (B)(1), that division (A) required concurrent service of a jail term for a misdemeanor with a prison term for another offense. *See State v. Guilkey*, 4th Dist. No. 04CA2932, 2005-Ohio-3501, ¶8; and *State v. Pulizzi*, 9th Dist. No. 20729, 2002-Ohio-2209, ¶29 (also relying on *Butts*). Of course, none of those cases contemplated the possible application of the scrivener's error doctrine to clarify that the exception recognized in (A) should have referenced "(B)" instead of "(B)(3)."

The development of the case law after *Foster* further undermines appellee's position related to the older case law somehow informing statutory intent. After *Foster*, several cases permitted felony and misdemeanor sentences to be served consecutively on the theory that (B)(1) applied to felony and misdemeanor sentences. *See State v. Polus*, 6th Dist. Nos. L-13-1119, L-13-1120, 2014-Ohio-2321, ¶11, citing *State v. Hughley*, 8th Dist. Cuyahoga No. 92588, 93070, 2009-Ohio-5824, ¶12; *State v. Walters*, 6th Dist. No. L-08-1238, 2009-Ohio-3198, ¶30-31; *State v. Trainer*, 2d Dist. No. 08-CA-04, 2009-Ohio-906, ¶13; *State v. Farley*, 5th Dist. No. 11-COA-042, 2012-Ohio-3620, ¶30-34; and *State v. Stevens*, 10th Dist. Nos. 10AP-207 and 208, 2010-Ohio-4747, ¶2-4.

H.B. 86 was thus enacted at a time when courts were giving effect to (B)(1) and

permitting felony and misdemeanor sentences to be served consecutively. *See* R.C. 1.49(D) (when determining legislative intent, the court may consider common law). Had the General Assembly really intended for (A) to control, H.B. 86 could have eliminated (B)(1) from the statute or limited its operation to misdemeanors. But the legislature did neither and instead left (B)(1) intact. Provision (B)(1) should therefore be given effect and not implicitly eradicated by application of the rule of lenity. *See also City of Olmsted Falls v. Clifford*, 8th Dist. No. 100375, 2014-Ohio-2397, 12 N.E.3d 515, ¶15 (a municipal court has the authority under R.C. 2929.41(B)(1) to order a misdemeanor sentence to run consecutive to a felony sentence that has been previously imposed by a common pleas court); *State v. Varney*, 5th Dist. No. 13 CA 00002, 2014-Ohio-193, ¶21 ("Pursuant to R.C. §2929.41(B)(1), we find that the trial court had the authority to specify that the misdemeanor and felony sentences herein run consecutively").

V. The plain wording of R.C. 2929.41 does not support reading (A) as limited to misdemeanors running concurrently with felony sentences while (B)(1) is limited to misdemeanor sentences running concurrently.

Appellee argues that the application of the scrivener's error doctrine is unnecessary to give effect to both R.C. 2929.41(A) and (B)(1), based on the view that division (A) requires a misdemeanor sentence to be run concurrently with a felony sentence, while (B) permits a court to order consecutive service of more than one misdemeanor sentence. But division (B) clearly permits the court to specify consecutive service of a misdemeanor sentence to "**any other** prison term, jail term, or sentence of imprisonment." The term "any other prison term" certainly includes a prison term for a felony offense. That analysis is supported by the post-*Foster*, pre-

H.B. 86 case law interpreting (B)(1) to permit the consecutive service of felony and misdemeanor sentences.

Appellee supports his argument by reference to R.C. 2929.16(A)(2), which allows a "jail term" to be imposed in conjunction with residential sanctions for a felony. But that statute actually uses the phrase "a term of up to six months in jail." R.C. 2929.41, on the other hand, uses the phrase "jail term," which is statutorily defined as "the term in a jail that a sentencing court imposes or is authorized to impose pursuant to section 2929.24 or 2929.25 of the Revised Code or pursuant to any other provision of the Revised Code that authorizes a term in a jail for a misdemeanor conviction." *See* R.C. 2929.01(S). The use of the phrase "jail term" in R.C. 2929.41(A) thus offers no support for the view that division (A) is limited to concurrent sentencing of felonies and misdemeanors.

Appellee also focuses on the second sentence of R.C. 2929.41(B)(1), which states "[w]hen 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." The second sentence merely limits the consecutive service of sentences involving misdemeanors to 18 months. That cap does not undercut the broad language of the preceding sentence that permits a trial court to specify that a sentence for a misdemeanor must be served consecutively "to any other prison term, jail term, or sentence of imprisonment."

Of course, the second sentence of division (B)(1) was present during the post-*Foster*, pre-H.B. 86 time period. During that time period, several courts failed to give the second sentence the construction advocated by appellee. *See Polus, supra,* 2014-

Ohio-2321, ¶11. *See also State v. Trainer, supra*, 2009-Ohio-906, ¶15 (construing the second sentence of R.C. 2929.41(B)(1) not to apply to consecutive sentences for multiple felonies and one misdemeanor).

CONCLUSION

Ohio's statutes and common law require the application of rules of construction to criminal statutes prior to the application of the rule of lenity. Those rules of construction include the scrivener's error doctrine, which permits the court to give effect to R.C. 2929.41(B)(1). The Sixth District's decision should therefore be reversed and the certified question should be answered in the affirmative.

Respectfully submitted,

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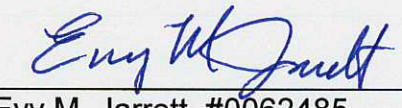
By: 

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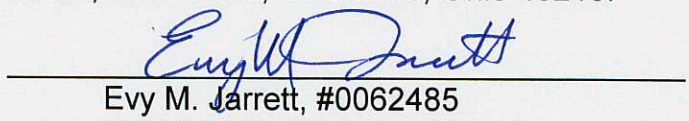
CERTIFICATION

I certify that a copy of the foregoing was sent via email on December 15th, 2014 to Tim A. Dugan, Groth & Associates, 416 N. Erie Street, Suite 100, Toledo, Ohio 43604, Counsel for Appellee, Walter Polus, and Valerie Kunze, Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.



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