

NO.

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 101202

STATE OF OHIO

Plaintiff-Appellant

-vs-

JERMAIN THOMAS

Defendant-Appellee

MEMORANDUM IN SUPPORT OF JURISDICTION

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I. Why this felony case involves a substantial constitutional question or an issue of public or great general interest.

Thomas was convicted of a rape that occurred on June 28, 1993. The victim A.W. was attacked on Dickens Avenue in Cleveland, Ohio. A man followed A.W., holding what was believed to be a gun. A.W. was forced to her knees and she was raped. After the rape A.W. ran home to use the bathroom before running to a neighbor's house. She was taken to a hospital where a rape kit was collected. A.W. was unable to provide a detailed description of the suspect. Without leads the case went cold. In 2013 Thomas was prosecuted and convicted.

The Eighth District's decision in *State v. Jermain Thomas*, 8th Dist. Cuyahoga No. 101202, 2015-Ohio-415 follows the Eighth District's recent decisions in *State v. Jackson*, 8th Dist. Cuyahoga No. 100877, 2014-Ohio-5137, *State v. Steele*, 8th Cuyahoga Nos. 101139-101140, 2014-Ohio-5431 and *State v. Girts*, 8th Dist. Cuyahoga No. 101075, 2014-Ohio-5545. Together, these decisions hold that the S.B. 2 wall which separated crimes committed before July 1, 1996 no longer exists. As implicated in prior memoranda in support of jurisdiction on this issue, this case has tremendous impact on outstanding cold cases, any pre July 1, 1996 case that may be unresolved, or any number of delayed reporting case. The impact changes the landscape of what laws a defendant may be sentenced under when the offense was committed before July 1, 1996.

The State of Ohio respectfully requests that this Court summarily reverse the decision of the Eighth District, which ignores this Court's precedence and the clear intent of the General Assembly in reforming the structure of Ohio's sentencing law. In the alternative, the State asks that this case be accepted, briefed and heard on the merits.

II. Statement of the Case and Facts

On June 27, 2013, Thomas was charged with three counts of rape and one count of kidnapping as a result of conduct he allegedly committed on June 28, 1993. All counts included one- and three-year firearm specifications. Prior to trial, Thomas filed a motion to dismiss the charges, arguing he was prejudiced by the 20-year delay between the alleged incident and the indictment. The trial court denied the motion and the case proceeded to a jury trial.

The victim, A.W., testified that on the evening of June 28, 1993, she left her house on Dickens Avenue in Cleveland to walk to her cousin's house on Manor Avenue, one street over. In the darkness, a man approached her and forced her to walk south on East 97th Street toward Hilgert Drive. The man stayed close behind her holding something into her back that she believed was a gun. They walked up a driveway of a house next to an empty field where the man forced A.W. onto her knees and vaginally raped her. Although it was dark, there was sufficient light for A.W. to see that the man was holding a gun. There were no known witnesses of the crime.

After the rape, A.W. ran home to use the bathroom before running to a neighbor's house where a friend called the police. Later that evening she went by ambulance to St. Luke's Hospital where Dr. Cynthia Boes ("Dr. Boes") collected evidence of the rape in a rape kit. A.W. described the rape in detail to Dr. Boes, who wrote a narrative account of the incident in A.W.'s chart. A few days after the rape, Officer Debra Simmons ("Simmons") of the Cleveland Police Department met with A.W. in her home to investigate the rape. A.W. was unable to provide a detailed description of the suspect because it was dark, and she did not look at his face at any time during the incident. Without any leads, the case went cold.

In 2006, scientists at the Ohio Bureau of Criminal Investigation ("BCI") tested the evidence in A.W.'s rape kit and found DNA that matched Thomas's DNA. A detective contacted A.W. and informed her that BCI had identified a suspect with DNA evidence from the rape kit. A.W. informed the detective that she did not want to prosecute him. She explained she "didn't want to relive that moment again." Accordingly, A.W. signed a "Waiver of Prosecution," and the detective once again closed the investigation.

In 2013, an investigator from the Cuyahoga County Prosecutor' Office notified A.W. that the prosecutor's office was proceeding with the prosecution of the suspect in her rape case. The investigator discussed the incident with A.W. and presented a photograph lineup of suspects. A.W. was unable to identify the perpetrator from the lineup but agreed to assist in the prosecution.

At the conclusion of the trial, the jury found Thomas guilty of one count of rape and one count of kidnapping, with the attendant one- and three-year firearm specifications. The court sentenced Thomas to concurrent indefinite prison terms of 8-25 years on the rape and kidnapping convictions, plus three years on the firearm specifications to be served consecutive to the underlying offenses. The trial court also classified Thomas a sexual predator pursuant to H.B. 180.

III. Law and Argument

PROPOSITION OF LAW: A DEFENDANT WHO COMMITS AN OFFENSE PRIOR TO JULY 1, 1996 IS SUBJECT TO LAW IN EFFECT AT THE TIME OF THE OFFENSE AND NOT SUBJECT TO SENTENCING PROVISIONS OF S.B. 2 EFFECTIVE JULY 1, 1996 AND H.B. 86 EFFECTIVE SEPTEMBER 30, 2011

A defendant who commits an offense prior to July 1, 1996 is subject to the law in effect at the time of the offense. This rule is contained in Section 5 of S.B. 2, which is uncodified law. Statements included in legislation but not placed in the code are “uncodified law,” and are part of the law in Ohio. See *Maynard v. Eaton Corporation*, 119 Ohio St.3d 443, 2008-Ohio-4542, 895 N.E.2d 145, ¶7. The original, unamended form of Section 5 of S.B. 2 reads as follows:

Section 5. The provisions of the Revised Code in existence prior to July 1, 1996, shall apply to a person upon whom a court imposed a term of imprisonment prior to that date and to a person upon whom a court, on or after that date and in accordance with the law in existence prior to that date, imposed a term of imprisonment for an offense that was committed prior to that date.

The provisions of the Revised Code in existence on and after July 1, 1996, apply to a person who commits an offense on or after that date.

Section 5 of S.B. 2 (146 Ohio Laws, Part VI, 7810)

This was later redundantly amended through Section 3 of S.B. 269 (146 Ohio Laws, Part VI, 11099) to emphasize that S.B. 2’s provisions apply only to crimes committed on or after July 1, 1996 “notwithstanding division (B) of section 1.58 of the Revised Code.” *State v. Rush*, 83 Ohio St.3d 53, 57. *Rush* and Section 5 of S.B. 2 make clear that R.C. 1.58(B) do not apply to a person who committed their offense prior to July 1, 1996 and is sentenced after that date.

“Acts of the General Assembly (and the codified and uncodified statutes they contain) are compiled and published in Ohio’s ‘session laws,’ the *Laws of Ohio*.” A Guidebook for Ohio Legislators, *Appendix C*, pg. 169-170, <http://www.lsc.state.oh.us/guidebook/guidebook13.pdf> (accessed November 24, 2014). 2011 Am. Sub. H.B. 86 was then enacted by the 129th General

Assembly and is published with the Secretary of State. Laws of Ohio, 129th General Assembly, <http://www.sos.state.oh.us/SOS/historicaldocuments/LawsOfOhio/historical/129th.aspx> (accessed November 24, 2014). Also published are uncodified laws affected by the acts of the 129th General Assembly. This publication does not include Section 5 of S.B. 2 of the 121st General Assembly as being affected by any legislative act of the 129th General Assembly. <http://www.sos.state.oh.us/sos/upload/laws/129/11-uncodified-affected.pdf> (accessed November 24, 2014). No express language in H.B. 86 repeals Section 5 of 1995 S.B. 2, and as a result that uncodified provision is still the law in Ohio.

In its analysis, the Eighth District interpreted Section 4 of H.B. 86 to make H.B. 86 retroactively applicable to offenses committed prior to July 1, 1996. See *Thomas*, 8th Dist. Cuyahoga No. 101202, 2015-Ohio-415, ¶43. Section 4 of H.B. 86 states:

SECTION 4. The amendments to sections 926.99, 1333.99, 1707.99, 1716.99, 2909.03, 2909.05, 2909.11, 2913.02, 2913.03, 2913.04, 2913.11, 2913.21, 2913.31, 2913.32, 2913.34, 2913.40, 2913.401, 2913.42, 2913.421, 2913.43, 2913.45, 2913.46, 2913.47, 2913.48, 2913.49, 2913.51, 2913.61, 2915.05, 2917.21, 2917.31, 2917.32, 2921.13, 2921.41, 2923.31, and 2981.07, division (B) of section 2929.13, and division (A) of section 2929.14 of the Revised Code that are made in this act apply to a person who commits an offense specified or penalized under those sections on or after the effective date of this section and to a person to whom division (B) of section 1.58 of the Revised Code makes the amendments applicable.

Section 4 of H.B. 86 provides that the amendments “apply to a person who commits an offense specified or penalized under those sections on or after the effective date of this section and to a person to whom division (B) of section 1.58 of the Revised Code makes the amendments applicable.” Thus, H.B. 86 applies in only two circumstances: (1) where an offense is committed on or after September 30, 2011 or (2) where a person is sentenced after September 30, 2011 **and** R.C. 1.58 applies (emphasis added). Neither condition is met with regard to pre S.B. 2 offenders. The Eighth District reasoned that the lack of limiting language in Section 4 of H.B. 86, like the

limiting in Section 5 of S.B. 2, should be read to mean that H.B. 86 applies retroactively to offenses committed prior to July 1, 1996.

Even though an offender such as Appellee is sentenced after September 30, 2011, R.C. 1.58(B) has not been made applicable to him due to S.B. 2's uncodified provisions, which have not been expressly repealed. *Rush*, 83 Ohio St.3d 53, 57. The absence of limiting language in H.B. 86 does not expressly repeal Section 5 of S.B. 2. Nor should Section 4 of H.B. 86 be interpreted as a repeal by implication. As a general rule "repeals by implication are not favored, and the presumption obtains that the legislature in passing a statute did not intended to interfere with or abrogate any former law relating to the same matter unless the [differences] between the two is irreconcilable." *State ex rel. Fleisher Engineering & Construction Co. v. State Office Building Commission et al.*, 123 Ohio St. 70, 74 174 N.E. 8. The more recent amendments to H.B. 86 are not irreconcilable with S.B. 2 where a brick wall had been built on July 1, 1996. Therefore, Section 5 of S.B. 2 must be given full effect.

To the extent that the Appellee would rely upon this Court's recent decisions in *State v. Taylor*, 138 Ohio St.3d 194, 2014-Ohio-460, 5 N.E.3d 612 and *State v. Limoli*, 140 Ohio St.3d 188, 2014-Ohio-3072, 16 N.E.3d 641, both cases are distinguishable and do not address the question posed here. In *Taylor* and *Limoli*, both defendants committed their offenses well after S.B. 2's effective date of July 1, 1996 (July 23, 2011 and July 16, 2010). *Taylor*, ¶2 and *Limoli*, ¶5. Therefore, this Court in holding that the determining factor "is not the date of the commission of the offense but rather whether sentence has been imposed," was not faced with the commission of a pre S.B. 2 crime. *Taylor* and *Limoli* should not be read to eviscerate Section 5 of S.B. 2's clear mandate that, provisions of the Revised Code in existence prior to July 1, 1996 applies to an offense committed prior to that date.

IV. Conclusion

The State respectfully asks this Court to accept this appeal, summarily reverse to resolve the application of H.B. 86 to persons who committed their offense prior to July 1, 1996. In the alternative, this case should accept this case to review a decision that dramatically alters sentencing law in Ohio.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing has been sent this 23rd day of March, 2015 to Russell S. Bensing,
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