Supreme Court of Ohio Clerk of Court - Filed April 06, 2015 - Case No. 2015-0462

IN THE SUPREME COURT OF OHIO

STATE OF OHIO Appellant, v. **MICHALE R. WIREBAUGH** Appellee.	)))))))))))	**ON APPEAL FROM THE SUMMIT COUNTY COURT OF APPEALS NINTH APPELLATE DISTRICT** **COURT OF APPEALS CASE NO. 27442**

APPELLEE'S BRIEF IN OPPOSITION TO APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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TABLE OF CONTENTS

EXPLANATION OF WHY LEAVE TO APPEAL SHOULD NOT BE GRANTED 1

STATEMENT OF THE CASE AND FACTS 2

ARGUMENT AGAINST JURISDICTION 3

CONCLUSION..... 4

CERTIFICATE OF SERVICE 5

EXPLANATION OF WHY LEAVE TO APPEAL SHOULD NOT BE GRANTED

Appellant argues this Court should: grant it leave to appeal; stay execution of the Appellate Court's decision; and hold this cause until this Court resolves the certified conflict between *State v. Sturgill* and *State v. South* in Supreme Court Case No. 2014-0563. This Court should deny Appellant's Memorandum in Support of Jurisdiction as the certified question before this Court in Case No. 2014-0563 is different from the question presented by Appellant in this appeal.

STATEMENT OF THE CASE AND FACTS

Appellee pled guilty to a third degree felony OVI **without** a 2941.1413 specification and was sentenced to four years in prison. Appellee subsequently appealed his sentence arguing the four year sentence was contrary to R.C. 2929.14(B)(4) which specifically allows for a maximum 36 month sentence for third degree felony OVIs. The Appellate Court found in Appellee's favor and remanded the matter to the trial court.

Appellant filed its Notice of Appeal and Memorandum in Support of Jurisdiction arguing that since the Appellate Court relied on *South* this Court should: grant it leave to appeal; stay execution of the Appellate Court's decision; and hold this matter until the *South* appeal has been decided ("Appellant's Memo"). This Court should deny Appellant's Memo as the question before this Court in *South* and the question presented here by Appellant, are not the same.

ARGUMENT AGAINST JURISDICTION

The question certified by this Court in *South* is as follows:

> When a defendant is convicted of a R.C. 2941.1413 specification, does Ohio's OVI statute, R.C. 4511.19 prevail so that a five year sentence can be imposed for a third degree felony OVI or does R.C. 2929.14(A) require that the maximum sentence that can be imposed is three years?

The question presented here by Appellant is:

> When a defendant is convicted of a third-degree felony OVI in violation of R.C. 4511.19(A)(1)(a), the trial court authorized to sentence the offender to a maximum of five years of incarceration pursuant to R.C. 4511.19(G)((1), or is it required to sentence the offender to a maximum of three years of incarceration pursuant to R.C. 2929.14(A)(3)(b)?

Noticeably missing from Appellant's question in this matter, which forms the basis of the question certified in *South*, is a conviction under R.C. 2941.1413. Accordingly, since this matter does not include a R.C. 2941.1413 specification conviction, the resolution of this matter does not turn on the exact question presented in *South* and, therefore this Court should deny Appellant's Motion and remand this matter to the trial court to carry out the Appellate Court's decision.

CONCLUSION

For the forgoing reasons, this Court should deny Appellant's Memo and have this matter remanded to the trial court to carry out the Appellate Court's decision.

Respectfully Submitted,

/s/ K. Scott Carter

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CERTIFICATE OF SERVICE

Pursuant to Civ.R. 5(B)(2)(f), a true copy of the foregoing was served by electronic mail, this 6th day of April, 2015 upon:

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