

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	
Appellant,	:	Case No. 2015-0077
v.	:	On Appeal from the
ROBERT PITTMAN	:	Marion County Court of
Appellee.	:	Appeals, Third Appellate
	:	District

MERIT BRIEF OF APPELLANT STATE OF OHIO

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

STATEMENT OF FACTS.....1

ARGUMENT.....3

Proposition of Law No. 1

A person is subject to prosecution under R.C. 2919.21(B) for the nonpayment of an arrearage-only child support order when he or she has no current legal obligation to support the emancipated child because he or she still has a current legal obligation to pay the support owed.....3

CONCLUSION.....8

PROOF OF SERVICE.....9

APPENDIX

Appx. Page

Notice of Certified Conflict to the Ohio Supreme Court
(Jan. 15, 2015).....1

Judgment Entry of the Marion County Court of Appeals, Third Appellate District
(Dec. 19, 2014).....3

Opinion of the Marion County Court of Appeals, Third Appellate District
(Nov. 10, 2014).....5

Judgment Entry of the Marion County Court of Common Pleas
(Nov. 14, 2013).....17

TABLE OF AUTHORITIES

CASES:

State v. Bruno, 2009-Ohio-4772.....5
State v. Dissinger 2002-Ohio-530.....3-5
State v. Partee 2008-Ohio-595

STATUTES

R.C. 2901.13.....6
R.C. 2919.21.....3-8
R.C. 3115.01.....4-5,7
R.C. 2705.....6-7

STATEMENT OF FACTS

On November 15, 1988, Defendant-Appellee, Robert Pittman, (hereinafter referred to as “Mr. Pittman”), was ordered by the Marion County Court of Common Pleas, Juvenile Division, to pay child support for his daughters Sate Douglas and Sade Douglas effective January 6, 1989 until the girls had completed high school or were otherwise emancipated. (Tr.p.3) On November 20, 2006, the Court of Common Pleas of Marion County, Family Division, found that Sate Douglas and Sade Douglas were emancipated due to both children being eighteen (18) years old and graduated from high school. (Tr.p.3) In two Judgment Entries filed on November 20, 2006, the Marion County Court of Common Pleas, Family Division, found that Mr. Pittman owed \$34,313.45 in child support arrears for Sade Douglas, and \$34,303.87 in child support arrears for Sate Douglas. (Tr.p.5, 7) Mr. Pittman was ordered to continue to pay \$236.17 per month per child plus a two percent processing fee towards the arrearages owed to the mother of his children, Alma Douglas. This payment was later modified to \$50.00 per month per child plus a two percent processing fee via a Judgment Entry filed on December 6, 2007. (Tr.p.5,7) On December 6, 2007, Mr. Pittman was found in contempt of court for failure to pay his child support arrears. (Tr.p. 2) Mr. Pittman was ordered to serve thirty (30) days in jail with twenty-five (25) days suspended on the condition that he begin to pay his child support arrears until paid in full. (Tr.p.2) On June 24, 2009, the Marion County Court of Common Pleas addressed a motion to impose sentence on the previous contempt filed December 6, 2007, wherein Mr. Pittman was ordered to serve zero (0) days in jail with twenty-five (25) days of the original sentence to remain suspended. (Tr.p.2) On July 9, 2009, Mr. Pittman was indicted on six (6) counts of Non-Support of Dependents in violation of R.C. 2919.21(B), felonies of the fourth degree, enumerated as counts 1-6, and three counts of

Non-Support of Dependents in violation of R.C. 2919.21(B), felonies of the third degree, enumerated as counts 7-9. (Tr.p.2)

By Judgment Entry filed on August 26, 2013, the Marion County Court of Common Pleas dismissed counts one, two, three, four, seven, eight, and nine. (Tr.p.2) The Court held a hearing on November 5, 2013, to go over the Agreed Stipulations filed by the parties on November 4, 2013, in which the facts articulated herein were stipulated to by counsel for the State and the defense. (Tr.p.2-3) Count 5 of the Indictment alleged that Mr. Pittman, between June 1, 2007 through June 30, 2009, failed to provide support as established by a court order, and that he had previously pled guilty to a felony violation of R.C. 2919.21 on April 3, 2003. Count 6 of the Indictment alleged that Mr. Pittman, between June 1, 2007 through June 30, 2009, failed to provide support as established by a court order, and that he had previously pled guilty to a felony violation of R.C. 2919.21 on April 3, 2003.

By Judgment Entry filed on November 14, 2013, the Court dismissed the remaining counts five and six. On January 17, 2014, the State of Ohio filed its appeal of the trial court's decision to the Third District Court of Appeals. On November 10, 2014, the Third District Court of Appeals affirmed the decision of the Marion County Court of Common Pleas.

On November 18, 2014, the State of Ohio filed a Motion to Certify Conflict Between Appellate Districts. On December 19, 2014, the Third District Court of Appeals filed a Judgment Entry granting the Motion to Certify Conflict Between Appellate Districts. On January 15, 2015, the State of Ohio filed a Notice of Certified Conflict in the Ohio Supreme Court. On March 11, 2015, the Ohio Supreme Court determined that a conflict exists and allowed the appeal.

ARGUMENT

Proposition of Law No. 1

A person is subject to prosecution under R.C. 2919.21(B) for the nonpayment of an arrearage-only child support order when he or she has no current legal obligation to support the emancipated child because he or she still has a current legal obligation to pay the support owed.

R.C. 2919.21(B) provides that “No person shall abandon, or fail to provide support as established by a court order to, another person whom, by court order or decree, the person is legally obligated to support.” The Third District Court of Appeals in *State v. Pittman*, 2014-Ohio-5001, ruled that the legislature intended that R.C. 2919.21(B) only be used for the prosecution of persons who are currently obligated to support his or her child. As a result of this conclusion, the court ruled that prosecution for nonpayment of an arrearage only child support order is not allowed under R.C. 2919.21(B). It is undisputed that Mr. Pittman’s only obligation that remained after his two daughters emancipated was his obligation to pay the arrearages that had accumulated while his daughters were minors. (Tr.p.4)

In *State v. Michael A. Dissinger*, 2002-Ohio-530, the Fifth District Court of Appeals found that an “arrearage only” order can be the basis of prosecution under R.C. 2919.21. *Id.* at ¶12. In *Dissinger*, the State appealed the judgment of the trial court which granted defendant’s motion to dismiss the indictment under the theory that it was not the intention of the legislature of the State of Ohio to allow prosecution under R.C. 2919.21(B) for an ‘arrearage only’ child support order. *Id.* at ¶9.

On May 8, 1985, Michael Dissinger and Teresa Kannaird were divorced and Mr. Dissinger was ordered to pay \$30.00 per week as child support for his minor daughter. *Id.* at ¶1. On March 21, 1996, the court issued an order terminating Mr. Dissinger’s child support obligation as his

daughter had reached the age of majority and withdrawn from high school. *Id.* at ¶2. Mr. Dissinger was then ordered to pay \$40.00 per week towards a \$10,982.70 child support arrearage. *Id.*

On October 26, 2001, Mr. Dissinger was indicted on one count of Non-support of Dependents in violation of R.C. 2919.21(B). *Id.* at ¶3. Mr. Dissinger filed a motion to dismiss the indictment, and by Judgment Entry filed on January 31, 2002, the trial court dismissed same, finding the legislature's intent did not provide for prosecution under R.C. 2919.21(B) for nonpayment of an "arrearage only" child support order. *Id.* The State of Ohio then appealed the dismissal. *Id.* at ¶4.

The Fifth District, noting that there was a lack of Ohio case law on this issue, and that it appeared to be a case of first impression, disagreed with Mr. Dissinger's argument. *Id.* at ¶10. Mr. Dissinger argued that an "arrearage only" order does not create a legal obligation of support under R.C. 2919.21(B). *Id.* To make a decision, the Fifth District looked to Chapter 29 of the Ohio Revised Code to discern what constitutes a "support order." *Id.* at ¶11. When it found that Chapter 29 does not define a "support order", the Court then directed its attention to R.C. 3115.01(B) which contains definitions for "child" and "child support order" under the Uniform Interstate Family Support Act. R.C. 3115.01(B) defines "child support order" as "an order for the support of a child that provides for monetary support, whether current or in arrears." R.C. 3115.01(B)(1) further states that a child support order includes "an order under which the child has attained the age of majority under the law of the issuing state and amounts for current support are required to be paid, or arrearages are owed, under the order." While the Fifth District acknowledged that this definition is limited to Sections 3115.01 through 3115.59 of the Ohio Revised Code, it found that the definition demonstrates the legislature's intent of what constitutes a "support order." *Id.* at ¶11. The Fifth District held that based upon the definition of "child support order" under R.C.

3115.01(B), a support order can be defined to include an “arrearage only” order. *Id.* at ¶12. Therefore, an “arrearage only” order can be the basis of prosecution under R.C. 2919.21(B).

In *State v. Bruno*, 2009-Ohio-4772, the Sixth District found the Fifth District’s decision in *State v. Dissinger* persuasive and stated that “It has been held that an arrearage only order can be the basis of prosecution under R.C. 2919.21.” *Id.* at 133. The Court ultimately determined that the trial court’s convictions were not supported by sufficient evidence due to the failure of the State to prove recklessness as a required element of the crime, but specifically referenced *State v. Dissinger* in its decision when conducting an analysis regarding the legality of “arrearage only” order prosecutions. *Id.* at 133-134. In *State v. Partee*, the Fifth District upheld a conviction where evidence was presented that the Defendant did not make any payments towards his “arrearage only” order in violation of R.C. 2919.21(B). *State v. Partee* 2008-Ohio-59 at ¶18. The Court found that although it was agreed upon that the only payments due would have been arrearages, there was an arrearage total due, and a conviction was appropriate because the child support order had not been rescinded. *Id.*

Although the Third District held, in the instant matter, that R.C. 2919.21(B) is unambiguous and therefore must be given effect as to its plain meaning, it is the State’s contention that the Third District’s interpretation of the plain meaning of the statute is incorrect. R.C. 2919.21(B) pertains to any valid court order of support, not simply a current order for minor children. The Fifth District correctly looked to R.C. Chapter 3115 to discern a definition of what constitutes a current order for support under R.C. 2919.21 because R.C. Chapter 29 does not define a “support order.” It appropriately attempted to locate the legislature’s intent as to what constitutes a “support order” in the Ohio Revised Code. In Mr. Pittman’s case, there is a current, enforceable

order for him to pay the arrearages that he owes for his two adult children. He is still legally obligated to pay the support owed under the court order.

Due to the fact that the time frame listed in Counts 5 and 6 of the Indictment is within the Statute of Limitations following the emancipation of the children, and Mr. Pittman has failed to pay the arrears as ordered, prosecution under R.C. 2919.21(B) is permitted. An alternative analysis begs the question, what is the purpose of having a statute of limitations in these cases if the ability to prosecute terminates when the child is emancipated? Under R.C. 2901.13(A)(1), criminal prosecutions for felony nonsupport are barred unless commenced within six years after the offense is committed. Mr. Pittman was under a current court order to pay the arrearages owed after his two daughters reached the age of majority. The State alleges that he failed to do so and prosecution under R.C. 2919.21(B) is appropriate. Furthermore, if this Court is to adopt the reasoning of the Third District, an obligor could potentially escape all of his child support obligations and all potential criminal liability resulting from his or her failure to pay their obligations once the child is emancipated. The State had six years from the emancipation of the children to file criminal charges against Mr. Pittman, and the State was within the Statute of Limitations when it filed its Indictment on July 9, 2009.

If this Court were to adopt the reasoning of the Third District, then the only potential legal remedy that the State would have to enforce and collect on arrearage-only cases would be to file a civil contempt of court under R.C. 2705. The trial court in this case noted the same, and stated that the dismissal of the criminal charge did not extinguish any child support arrearage that may be owed nor did it prevent the State from taking civil enforcement remedies to attempt to collect the arrearage. Under R.C. 2705.031(C), the accused is to appear at a court hearing upon a summons and order to appear that is issued by the court. They are notified that failure to appear

may result in the issuance of a warrant for their arrest. Such an enforcement remedy is not always a realistic option in cases where the State is interested in pursuing criminal charges against an obligor because chances are that the child support enforcement agency does not have a valid address for the obligor, and serving a summons on them would be next to impossible. Most often, the obligors who are facing criminal charges under R.C. 2919.21(B) are the ones who have effectively hidden from the child support enforcement agency and their obligation to support their children for years, which is why they are the targets of a criminal prosecution.

The Third District's opinion erroneously interprets R.C. 2919.21(B) and over-simplifies how to read and interpret the law when compared with the legislature's intent as evidenced in its definition of "child support order" as contained in R.C. 3115.01(B). As such, its decision must be reversed. This Court should hold that a person is subject to prosecution under R.C. 2919.21(B) for the nonpayment of an arrearage-only child support order when he or she has no current legal obligation to support the emancipated child because he or she still has a current legal obligation to pay the support.

CONCLUSION

The decision of the Third District Court of Appeals is incorrect in its reasoning and has a chilling implication for child support enforcement agencies and prosecutor's offices throughout the State of Ohio. A ruling that R.C. 2919.21(B) only applies to current orders of child support for minor children would establish a system in which an obligor could effectively hide out while their child is growing up, and upon that child's emancipation not be criminally responsible for failing to support them throughout their minority. The Third District's decision must be reversed and this Court should find that prosecutions are permitted under R.C. 2919.21(B).

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of this Merit Brief was served upon Rocky Ratliff, Attorney for Appellee, at 200 West Center Street, Marion, OH 43302, by regular U.S. Mail, postage pre-paid, this 1st day of May, 2015.

Brent W. Yager by MKF

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IN THE
SUPREME COURT OF OHIO

15-0077

STATE OF OHIO

Plaintiff-Appellant,

-vs-

ROBERT PITTMAN

Defendant-Appellee

S.C. Case No. _____

On Appeal from the Marion County
Court of Appeals,
Third Appellate District

Court of Appeals
Case No. 9-13-65

NOTICE OF CERTIFIED CONFLICT OF APPELLANT STATE OF OHIO

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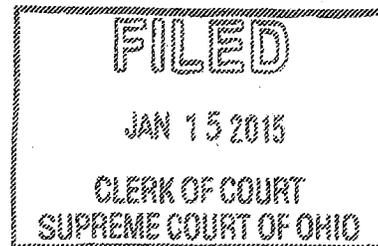
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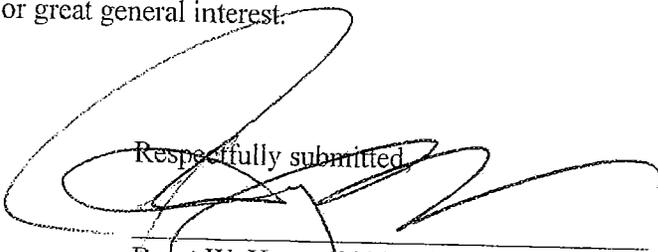


Notice of Certified Conflict of Appellant State of Ohio

Pursuant to Section 8(A) of the Supreme Court Rules of Practice, Plaintiff-Appellant the State of Ohio gives this Court notice that the Marion County Court of Appeals, Third Appellate District, has certified a conflict to this Court (copy attached). Said certification is based on the conflict between the opinions of the Third Appellate District and the Fifth Appellate District (copies attached). The issue for review is: "Is a person subject to prosecution under R.C. 2919.21(B) for the nonpayment of an arrearage-only child support order when he or she has no current legal obligation to support the emancipated child?"

This case is one of public or great general interest.

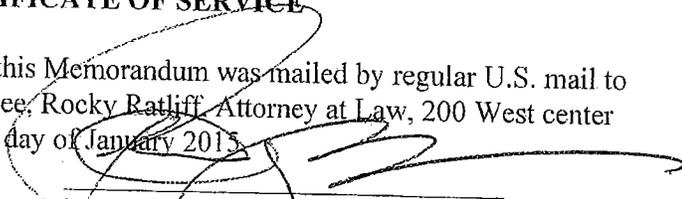
Respectfully submitted,


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CERTIFICATE OF SERVICE

This is to certify that a copy of this Memorandum was mailed by regular U.S. mail to counsel of record for Defendant-Appellee, Rocky Ratliff, Attorney at Law, 200 West center Street, Marion, OH 43302 on this 9th day of January 2015.


Brent W. Yager (0033906)
Prosecuting Attorney, Marion County

FILED
COURT OF APPEALS

DEC 19 2014

MARION COUNTY OHIO
JULIE M. KAGEL, CLERK

**IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
MARION COUNTY**

STATE OF OHIO,

PLAINTIFF-APPELLANT,

CASE NO. 9-13-65

v.

ROBERT PITTMAN,

**J U D G M E N T
E N T R Y**

DEFENDANT-APPELLEE.

This cause comes on for determination of Appellant's motion to certify a conflict as provided in App.R. 25 and Article IV, Sec. 3(B)(4) of the Ohio Constitution.

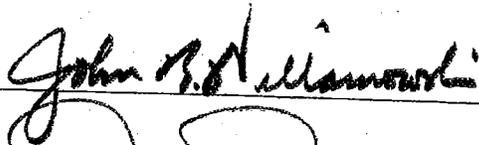
Upon consideration the Court finds that the judgment in the instant case is in conflict with the judgment rendered in *State v. Dissinger*, 5th Dist. Delaware No. 02CA-A-02-010, 2002-Ohio-5301.

Accordingly, the motion to certify is well taken and the following issue should be certified pursuant to App.R. 25:

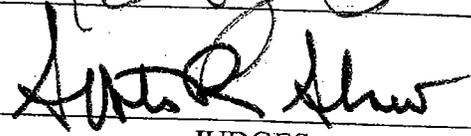
Is a person subject to prosecution under R.C. 2919.21(B) for the nonpayment of an arrearage-only child support order when he or she has no current legal obligation to support the emancipated child?

Case No. 9-13-65

It is therefore **ORDERED** that Appellant's motion to certify a conflict be,
and hereby is, granted on the certified issue set forth hereinabove.







JUDGES

DATED: December 18, 2014
/hlo

[Cite as *State v. Pittman*, 2014-Ohio-5001.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
MARION COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLANT,

CASE NO. 9-13-65

v.

ROBERT PITTMAN,

OPINION

DEFENDANT-APPELLEE.

Appeal from Marion County Common Pleas Court
Trial Court No. 09 CR 0337

Judgment Affirmed

Date of Decision: November 10, 2014

APPEARANCES:

Brent W. Yager and Megan K. Frericks for Appellant

Rocky Ratliff for Appellee

Case No. 9-13-65

ROGERS, J.

{¶1} Plaintiff-Appellant, the State of Ohio, appeals the judgment of the Court of Common Pleas of Marion County granting Defendant-Appellant, Robert Pittman's, motion to dismiss. On appeal, the State argues that the trial court erred by improperly dismissing counts five and six of the indictment because R.C. 2929.21(B) allows for the prosecution of those who violate a court order by failing to pay child support arrearage. For the reasons that follow, we affirm the trial court's judgment.

{¶2} The parties stipulated that on November 15, 1988, the Court of Common Pleas of Marion County, Juvenile Division, ordered Pittman to pay child support for Sate and Sade Douglas beginning January 6, 1989 until the children had completed high school or were otherwise emancipated.

{¶3} On November 20, 2006, the Court of Common Pleas of Marion County, Family Division, declared Sade and Sate Douglas emancipated effective August 31, 2006, due to being 18 years old. At that time, an arrearage order in the amount of \$34,313.45 was entered against Pittman for the child support he had failed to previously pay.¹

{¶4} On January 19, 2007, a contempt motion was filed alleging that Pittman had failed to pay the child support arrears ordered in the November 20,

¹ In that order, Pittman was ordered to pay \$236.16 per month plus a 2% processing fee towards the arrearages owed.

Case No. 9-13-65

2006 judgment entry. On December 6, 2007, Pittman was found in contempt for failing to pay his arrearages. As a result of his contempt, Pittman was ordered to serve 30 days in jail, with 25 suspended on the condition that Pittman begin paying his child support arrears until paid in full.

{¶5} On July 9, 2009, the Marion County Grand Jury indicted Pittman on six counts of nonsupport of dependents in violation of R.C. 2919.21(B), felonies of the fourth degree (counts 1-6), and three counts of nonsupport of dependents in violation of R.C. 2919.21(B), felonies of the third degree (counts 7-9). All of the counts alleged that Pittman had previously been convicted of or pled guilty to a felony violation of R.C. 2919.21 in April of 2003. Revised Code 2919.21(B) reads, "No person shall abandon, or fail to provide support as established by a court order to, another person whom, by court order or decree, the person is legally obligated to support."

{¶6} After the indictment was filed, no proceedings took place in this case until almost four years later, when Pittman learned of the indictment through a background check that was completed as part of his job application. On June 11, 2013, Pittman voluntarily appeared before the court to accept service of the indictment and to be arraigned.

{¶7} On July 29, 2013, Pittman filed a motion to dismiss the indictment for violating his constitutional right to speedy trial due to pre-indictment and post-indictment delay. On August 19, 2013, the State filed a response.

{¶8} According to the record, a hearing was held on Pittman's motion to dismiss on August 20, 2013. No transcript of this hearing was produced. The trial court's judgment entry states that at the hearing, Pittman orally sought amendment of his motion to also seek dismissal of the indictment on the grounds of a violation of the statute of limitations under R.C. 2901.13.

{¶9} On August 26, 2013, the trial court filed its judgment entry on the matter. In its entry, the court analyzed the relevant factors as described in *Barker v. Wingo*, 407 U.S. 514 (1972), to determine whether Pittman's constitutional right to a speedy trial was violated. The trial court reasoned that the delay from the indictment to arraignment was significant, that the delay was caused by the State, that Pittman had no ability to assert a right to speedy trial because he was unaware of the indictment, that when Pittman learned of the indictment he asserted his right to a timely disposition, and that there was "likely to be some prejudice, at least with respect to the oldest charges." (Docket No. 28, p. 6-7). Thus, the trial court concluded that Pittman's "right to a speedy trial would be violated by the prosecution of the offenses alleged in Counts 1, 2, 3, 4, 7, 8, and 9, which are all

Case No. 9-13-65

offenses which allege criminal conduct prior to July 1, 2007.”² (*Id.* at 7). The court further found that Pittman’s speedy trial rights were not violated as to Counts 5 and 6, which alleged conduct after July 1, 2007, as “some civil enforcement action [had] take[n] place in December 2007, and the likelihood of prejudice is less with respect to the more recent allegations.” (*Id.*).

{¶10} Subsequently, on September 24, 2013, Pittman filed a second motion to dismiss the remaining counts of the indictment (counts 5 and 6), arguing that he was being prosecuted for failing to pay an “arrearage only” order, rather than failing to pay a child support order, and that such an order could not be the basis of prosecution under R.C. 2919.21(B). To support his assertion, Pittman cited the dissenting opinion in *State v. Dissinger*, 5th Dist. Delaware No. 02CA-A-02-010, 2002-Ohio-5301. In *Dissinger*, a 2-1 majority found that an “arrearage only” order could be the basis of prosecution under R.C. 2919.21(B). *Id.* at ¶ 12. However, the dissent contended that the wording of the statute seemed to preclude prosecution where there was no current legal support obligation for the children. *Id.* at ¶ 17-19.

{¶11} On October 16, 2013, the State filed a Bill of Particulars clarifying the allegations contained in Counts 5 and 6, which stated that “on or about July 1, 2007 through June 30, 2009, [Pittman] did fail to provide support as established by

² The court also found that Counts 1, 2, 7, 8, and 9, which alleged conduct prior to June 11, 2007, were barred by the statute of limitations.

Case No. 9-13-65

a court order * * * [.] [Pittman] failed to provide support for a total accumulated period of 101 weeks out of 104 consecutive weeks.” (Docket No. 35, p. 1). The wording is the same in the Bill of Particulars for Counts 5 and 6 except for the fact that Count 5 refers to Pittman’s failure to pay his arrears to Alma Douglas for Sate Douglas, while Count 6 refers to Pittman’s failure to pay his arrears for Sade Douglas. On November 4, 2013, the parties filed agreed factual stipulations so that the court could make a pre-trial ruling on whether Pittman could be prosecuted under R.C. 2919.21(B) for failing to pay an “arrearages only order.” (Docket No. 37).

{¶12} On November 5, 2013, a hearing was held on Pittman’s second motion to dismiss. At the hearing, the parties clarified the stipulated facts and presented the question to the court of whether R.C. 2919.21(B) criminalized failure to pay an “arrearage only” order. Nov. 5, 2013 Tr., p. 15.

{¶13} On November 14, 2013, the trial court filed its entry granting Pittman’s second motion to dismiss. In the entry, the trial court agreed with the dissent in *Dissinger*. The trial court reasoned that words in a statute should “be construed according to the rules of grammar and common usage,” and that offenses “shall be strictly construed against the state, and liberally construed in favor of the accused.” (Docket No. 39, p. 6). The trial court found that “some meaning must be given to the phrase in R.C. 2919.21, “to another person whom ...

Case No. 9-13-65

the person is legally obligated to support.” (Emphasis sic.) (*Id.*). The trial court read this to mean that “at the time of the commission of the criminal offense, there must be a current obligation of support.” (*Id.* at 7). As Pittman’s “current” obligation concluded with the children’s emancipation in 2006, the trial court agreed with the dissent in *Dissinger* and granted Pittman’s second motion to dismiss Counts 5 and 6 of the indictment. (*Id.*).

{¶14} It is from this judgment that the State appeals, asserting the following assignment of error for our review.

Assignment of Error

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT IMPROPERLY DISMISSED COUNTS FIVE AND SIX OF THE INDICTMENT FILED AGAINST THE DEFENDANT-APPELLEE BECAUSE O.R.C. 2919.21(B) ALLOWS FOR THE PROSECUTION OF THOSE WHO VIOLATE A COURT ORDER BY FAILING TO PAY A CHILD SUPPORT ARREARAGE.

{¶15} In its sole assignment of error, the State argues that the trial court erred in granting Pittman’s second motion to dismiss. Specifically, the State urges this court to follow the majority opinion in *Dissinger*, and reverse the trial court’s ruling. We decline to do so.

{¶16} We review a trial court’s dismissal of an indictment, pursuant to Crim.R. 48, under an abuse of discretion standard. See *State v. Busch*, 76 Ohio St.3d 613, 616 (1996); *State v. Bales*, 9th Dist. Lorain No. 11CA010126, 2012-

Case No. 9-13-65

Ohio-4426, ¶ 12. A trial court will be found to have abused its discretion when its decision is contrary to law, unreasonable, not supported by the evidence, or grossly unsound. *State v. Boles*, 187 Ohio App.3d 345, 2010-Ohio-278, ¶ 16-18 (2d Dist.). When applying the abuse of discretion standard, a reviewing court may not simply substitute its judgment for that of the trial court. *State v. Slappey*, 3d Dist. Marion No. 9-12-58, 2013-Ohio-1939, ¶ 12.

{¶17} Pursuant to R.C. 2919.21(B), “No person shall abandon, or fail to provide support as established by a court order to, another person whom, by court order or decree, the person is legally obligated to support.” It is undisputed that Pittman’s children are emancipated and his only obligation, currently, is to pay the arrearages that have accumulated while his daughters were minors.

{¶18} “In construing statutes, we must read words and phrases in context and construe them in accordance with rules of grammar and common usage.” *Kimber v. Davis*, 10th Dist. Franklin No. 12AP-888, 2013-Ohio-1872, ¶ 12, citing *State ex rel. Russell v. Thornton*, 111 Ohio St.3d 409, 2006-Ohio-5858, ¶ 11. Further, it is the duty of this court “to give effect to the words used in a statute, not to insert words not used.” *State v. S.R.*, 63 Ohio St.3d 590, 595 (1992), citing *Cleveland Elec. Illum. Co. v. City of Cleveland*, 37 Ohio St.3d 50 (1988), paragraph three of the syllabus. If a statute’s language is clear and unambiguous,

Case No. 9-13-65

the court must apply the statute as written. *Cheap Escape Co., Inc. v. Haddox, L.L.C.*, 120 Ohio St.3d 493, 2008-Ohio-6323, ¶ 9.

{¶19} R.C. 2919.21(B) is unambiguous, and thus, we must give effect to its plain meaning. *Slingluff v. Weaver*, 66 Ohio St. 621 (1902), paragraph two of the syllabus. Notably, the legislature used “is” when talking about the defendant’s obligation of support. “ ‘Is’ is the present tense third person singular of the verb ‘to be.’ ” *Ohio Bur. of Workers’ Comp. v. Dernier*, 6th Dist. Lucas No. L-10-1126, 2011-Ohio-150, ¶ 30; see also *Webster’s Third New International Dictionary* 1197 (2002). Therefore, “is” refers to something being in the present, not in the past or in the future. *Dernier* at ¶ 30. Since Pittman’s daughters are emancipated, he was under no current legal obligation to support his children at the time the State filed its indictment.³

{¶20} We also find the majority opinion in *Dissinger* unpersuasive because it relied on R.C. 3115.01’s definition of “child support order,” but that definition only applies to sections 3115.01 to 3115.59 of the Revised Code. It is only appropriate to look at other sections and chapters of the Revised Code when a statute is ambiguous. See *McAtee v. Ottawa Cty. Dept. of Human Servs.*, 111 Ohio App.3d 812, 818 (6th Dist.1996) (applying the in pari materia rule of construction

³ We also note that arrearages are paid to the custodial parents or a state agency as a reimbursement, not as support for the child. See *State v. Sorrell*, 187 Ohio App.3d 286, 2010-Ohio-1618, ¶ 16 (2d Dist.) (“While the object of a support order is clearly the welfare of the dependent child, the child’s claim to any arrearage owed by the offender is secondary to that of the custodial parent or state agency tasked with the responsibility of collecting and distributing the payments made pursuant to the support order fashioned by the court.”). As such, there is a different level of necessity attached to arrearages.

to an ambiguous statute). Here, the statute is clear and unambiguous, and therefore, it is unnecessary to look to other Chapters of the Revised Code to ascertain the legislature's intent.

{¶21} Moreover, the term "child support order" is not even used in R.C. 2919.21(B). Instead, the legislature stated that, "[n]o person shall abandon, or fail to provide *support as established by a court order* to, another person whom, by *court order or decree, the person is legally obligated to support.*" R.C. 2919.21(B). Where the legislature uses different terms between statutes, it should be presumed that the legislature intended different meanings. *State ex rel. Fink v. Registrar, Ohio Bur. of Motor Vehicles*, 12th Dist. Butler No. CA98-02-021, 1998 WL 634707, *2 (Sept. 14, 1998), citing *Metro. Securities Co. v. Warren State Bank*, 117 Ohio St. 69, 76 (1927); *see also State ex rel Cordray v. Court of Claims of Ohio*, 190 Ohio App.3d 161, 2010-Ohio-4437, ¶ 27 (10th Dist.). That a "child support order" may include arrearages in R.C. 3115.01 has little persuasive effect on whether an arrearage only order can create a violation under R.C. 2919.21.

{¶22} If we were to look at other statutes to attempt to discern what the legislature meant when enacting R.C. 2919.21, we should look to R.C. 2705.031, which states that "[t]he court shall have jurisdiction to make a finding of contempt for the failure to pay support and to impose the penalties set forth in section 2705.05 of the Revised Code in all cases in which past due support is at issue *even*

Case No. 9-13-65

*if the duty to pay support has terminated * * *.*” (Emphasis added.) R.C. 2705.05(E). The Ohio Supreme Court determined that because the legislature “*expressly* granted a court the jurisdiction to hold contempt proceedings after the obligation to support a child has ended” such action was proper. (Emphasis added.) *Cramer v. Petrie*, 70 Ohio St.3d 131, 133-134 (1994). R.C. 2919.21 also refers to the duty to pay support, but does not include that same explicit language which would allow the prosecution of an arrearage only support order if the defendant is not under a current legal obligation to support the child.

{¶23} Even if we were to find that the statute is ambiguous, the rule of lenity would require us to affirm the trial court’s judgment. The rule of lenity is codified in R.C. 2901.04 and states that “sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.” R.C. 2901.04(A). “ ‘[T]he ‘touchstone’ of the rule of lenity ‘is statutory ambiguity.’ ” *Bifulco v. United States*, 447 U.S. 381, 387, 100 S.Ct. 2247 (1980), quoting *Lewis v. United States*, 445 U.S. 55, 65, 100 S.Ct. 915 (1980). Therefore, under this rule, ambiguity in a criminal statute “is construed strictly so as to apply the statute only to conduct that is clearly proscribed.” *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, ¶ 38, citing *United States v. Lanier*, 520 U.S. 259, 266, 117 S.Ct. 1219 (1997).

Case No. 9-13-65

{¶24} Arguably, while one interpretation of R.C. 2919.21(B) could allow for the prosecution for nonpayment of an arrearage only child support order, it is just as likely that the legislature intended that the statute only be used for the prosecution of persons who are currently obligated to support his or her child, for the reasons stated above. Without the State demonstrating that R.C. 2919.21 explicitly and unambiguously allows for the prosecution for nonpayment of an arrearage only child support order, we must find in the defendant's favor.

{¶25} Accordingly, we overrule the State's sole assignment of error.⁴

{¶26} Having found no error prejudicial to the State in the particulars assigned and argued, we affirm the trial court's judgment.

Judgment Affirmed

WILLAMOWSKI, P.J., concurs.

/jlr

SHAW, J., concurring separately in Judgment Only.

{¶27} I concur in the judgment of the majority only for the reason that under the factors set forth by the Supreme Court of the United States in *Barker v. Wingo*, 407 U.S. 514 (1972), the unexplained delay of essentially four years between indictment and arraignment in this case was presumptively unreasonable,

⁴ We recognize that our decision is in conflict with *State v. Dissinger*, 5th Dist. Delaware No. 02CA-A-02-010, 2002-Ohio-5301, and may be subject to certification pursuant to App.R. 25.

Case No. 9-13-65

particularly in light of the fact that it appears that the prosecution only ever proceeded at all because Pittman responded to authorities after learning of the indictment while applying for a job. *See also, State v. King*, 8th Dist. Cuyahoga No. 91909, 2009-Ohio-4551; *State v. Stapleton*, 41 Ohio App.2d 219 (3d Dist.1974). As a result, I would find that for the reasons set forth in its judgment entry of August 26, 2013, the trial court's November 14, 2013, judgment dismissing Counts 5 and 6 was warranted on constitutional speedy trial grounds.

COMMON PLEAS COURT
MARION COUNTY, OHIO

IN THE COURT OF COMMON PLEAS OF MARION COUNTY, OHIO
GENERAL DIVISION

STATE OF OHIO,	:	
Plaintiff,	:	Case No. 09-CR-0337
	:	
-vs-	:	JUDGE JIM SLAGLE
	:	
ROBERT PITTMAN,	:	
Defendant.	:	JUDGMENT ENTRY OF DISMISSAL
	:	(RE: COUNTS 5 AND 6)
	:	

This matter comes before the Court on the Defendant's Motion to Dismiss Counts 5 and 6 of the indictment, which Motion was filed on September 24, 2013, and orally renewed on Nov. 5, 2013.

Case History

The Defendant was originally indicted on July 9, 2009 for nine counts of Non-Support of Defendants in violation of R.C. 2919.21(B), each being a felony of the 4th degree. No proceedings took place on this case until June 11, 2013 when the Defendant was arraigned after he learned about the indictment and contacted authorities. The various counts in the indictment alleged criminal conduct which took place during multiple two-year periods between July 1, 2003 and June 30, 2009. In a Judgment Entry filed August 26, 2013, following a hearing on an earlier motion to dismiss filed by the Defendant, the Court dismissed all but Counts 5 and 6 due to

the violation of the Statute of Limitations and the Defendant's Constitutional right to speedy trial.

Legal Issue

The legal issue raised in the Defendant's Motion to Dismiss Counts 5 and 6 is whether R.C. 2919.21(B) criminalizes the non-payment of child support arrearages when an individual no longer has any current duty to pay child support.

Procedural History On Pending Motion

The Court initially heard arguments from counsel at a hearing on October 7, 2013. At that time, the Court denied the motion as being premature, as determination of the motion required resolution of certain factual issues such as the date the children were emancipated, the specifics of the court decree ordering support, and whether the Defendant had any duty to support the children at the time it was alleged he committed the criminal offense. The Court advised the parties that this motion could be raised at the conclusion of the State's evidence at trial pursuant to Crim. R. 29.

Both the Defendant and the Prosecutor requested a pre-trial ruling on this issue and further expressed a desire to stipulate to sufficient facts necessary to put this issue before the Court. All of this was reflected in the Court's Judgment Entry denying the Motion to Dismiss filed on October 25, 2013. Following the Oct. 7 hearing, the State

filed a Bill of Particulars on October 16, 2013 clarifying the allegations contained in Counts 5 and 6. Further, the parties filed agreed stipulations on November 4, 2013. The parties appeared in open court on November 5, 2013 and re-iterated their desire for a pre-trial ruling. The parties clarified that their stipulation included the following facts:

1. The children for whom the Defendant was required to provide support, Sate Douglas (Count 5) and Sade Douglas (Count 6) were emancipated on August 31, 2006 and thereafter the Defendant had no current obligation of support.

2. The dates that the Defendant was alleged to have failed to pay support in Counts 5 and 6 was the time period between July 1, 2007 and June 30, 2009, as stated in the indictment and bill of particulars.

3. Exhibits 3 and 4 attached to the agreed stipulations are the specific judgment entries that the Defendant was accused of violating in Counts 5 and 6¹ and that the specific language in said entries which the Defendant is accused of violating is the following language contained in the fourth paragraph on Page 2 of each entry:

IT IS FURTHER ORDERED that the obligor shall continue to pay \$236.16 per month plus 2% processing fee towards the arrearages owed.

¹ The parties agreed in open court that Exhibit 4 is the relevant judgment entry for Count 5 and Exhibit 3 is the relevant judgment entry for Count 6.

The Prosecutor further agreed that the written stipulation filed with the Court on November 4, 2013 and the clarifications to the stipulation agreed to in open court on November 5, 2013 could be considered as part of the Bill of Particulars and, further, that the State waived any right to amend the Bill of Particulars to conform to evidence presented at trial.

With these stipulations and agreements, the Court and the parties agreed that it would in the interest of justice for the Court to rule on the Defendant's Motion to Dismiss in advance of trial. The Motion to Dismiss can be decided without resolving any factual issues which may remain in dispute, such as whether the Defendant did or did not fail to pay arrearages in accordance with the November 20, 2006 judgment entries (Exhibits 3 and 4) or whether the Defendant was unable to provide adequate support but did provide support that was within his ability and means. See R.C. 2919.21(D). Deciding this issue in advance of trial serves judicial economy, as it prevents the necessity of needlessly impaneling a jury and calling witnesses to testify. Further, it gives the State an opportunity to effectively appeal this decision and resolve a legal issue regarding the interpretation of the criminal statute in question.

Authority to Rule on Motion to Dismiss

Crim. R. 48(B) provides:

If the Court over the objection of the State dismisses an indictment, information, or complaint, it shall state on the record its findings of

fact and reasons for the dismissal.

See *State v. Busch* (1996), 76 Ohio St.3d 613 where the Supreme Court discussed the trial court's discretion to dismiss a case pursuant to Crim. R. 48(B). See also *State v. Certain* (2009), 180 Ohio App.3d 457 where the 4th District Court of Appeals found it proper for the parties to stipulate to various facts so that the Court could make a pre-trial ruling as to whether the obstructing official business statute prohibited mere flight from a request for a *Terry* stop. For the same reasons, the procedure used in the instant case allows the Court to make a pre-trial ruling as to whether the non-support statute criminalizes the failure to pay child support arrearages.

Non-Support Statute

In Counts 5 and 6, the Defendant was indicted for an alleged violation of R.C. 2919.21(B), which provides:

No person shall abandon, or fail to provide support as established by a court order to, another person whom, by a court order or decree, the person is legally obligated to support.

It appears that only the 5th Appellate District has addressed the issue of whether R.C. 2919.21(B) permits criminal prosecution for non-payment of arrearages established in a child support order. *State v. Dissinger* (October 1, 2002), 5th App. Dist. Case No. 02CA-A-02-010. In a split decision, the 5th District concluded that R.C. 2919.21(B) did criminalize failure to pay child support arrearages. The

majority relied upon R.C. 3115.01(B) which defines a "child support order" as "an order for the support of a child that provides for monetary support, whether current or in arrears..." The dissent agreed that an order establishing arrearages is a child support order, but pointed out that R.C. 2919.21(B) also requires that the support is due to a person whom the Defendant "is legally obligated to support."

This Court agrees with the dissent for the following reasons:

1. In a criminal case, the State is required to prove every element of an offense. R.C. 2901.05(A).
2. It is a cardinal rule of statutory construction that significance must be given to every word in a statute, if possible. *Wachendorf v. Shaver* (1948), 149 Ohio St. 231; *Dunbar v. State* (2013), 136 Ohio St.3d 181.
3. R.C. 1.42 requires that words in a statute be construed according the rules of grammar and common usage.
4. R.C. 2901.04(A) provides that offenses "shall be strictly construed against the state, and liberally construed in favor of the accused."

With regard to R.C. 2919.21(B), some meaning must be given to the phrase "to another person whom...the person is legally obligated to support." The State's interpretation would restrict the statute to the initial phrase which provides: "No person shall abandon, or fail to provide support as established by a court order."

The additional meaning provided by the phrase “to, another person whom, by court order or decree, the person is legally obligated to support” is that at the time of the commission of the criminal offense, there must be a current obligation of support.

Under English grammar, the word “is” is a present tense verb. If the legislature wished to criminalize non-payment of arrearages, the legislature could have used the past tense verb “was” in place of “is.” To the extent that the meaning of the statute is ambiguous, R.C. 2901.04 requires the statute to be interpreted in favor of the Defendant.

There is a significant policy difference between criminalizing non-payment of current support and non-payment of arrearages when there is no longer a duty to provide support. Non-payment of arrearages is simply a failure to pay a debt, which is generally not a criminal offense. Failing to support a child, for whom there is a current duty to support, potentially causes an ongoing harm to the child, which criminal enforcement may prevent. This is not the case once the child is no longer legally entitled to ongoing support. While many parents continue to financially assist their children after they have reached adulthood, this financial assistance is voluntary.

Moreover, under the State’s interpretation of R.C. 2919.21(B), an individual

could be criminally prosecuted for failing to pay current support obligations and then prosecuted a second time for failing to pay that same amount after it had been adjudged to be arrearages, even though the duty to provide support had ended. The Legislature's decision to include the language "to, another person whom, by a court order or decree, the person is legally obligated to support" demonstrates that the Legislature made the policy decision to only criminalize nonpayment of support when there is a current obligation to pay support.

For all of these reasons, this Court concludes that R.C. 2919.21(B) requires the State to prove that at the time alleged in the indictment:

1. The Defendant failed to provide support;
2. Support was established by a court order;
3. Support is owed to another person whom, by court order, the Defendant is legally obligated to support.

This Court further concludes that R.C. 2919.21(B) is not violated by failing to pay an arrearage when the Defendant is not under a current obligation to provide support. This does not mean that no remedies are available to enforce an arrearage order. There are civil enforcement mechanisms that may be employed as well as contempt of court proceedings. However, not every civil wrong constitutes a criminal offense.

Conclusion

For the reasons set forth herein, the Defendant's Motion to Dismiss Counts 5 and 6 of the indictment is granted. Since the other counts of the indictment were dismissed by previous order of the Court, it is therefore ORDERED that the indictment in this case is dismissed in its entirety. Costs waived.



JUDGE JIM SLAGLE

cc: Brent Yager, Prosecuting Attorney
Megan Frericks, Assistant Prosecuting Attorney
Rocky Ratliff, Attorney for Defendant
Probation Department