

NO.

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 101209

STATE OF OHIO

Plaintiff-Appellant

-vs-

QUISI BRYAN

Defendant-Appellee

MEMORANDUM IN SUPPORT OF JURISDICTION

Counsel for Plaintiff-Appellant

TIMOTHY J. MCGINTY (0024626)
CUYAHOGA COUNTY PROSECUTOR

DANIEL T. VAN (#0084614)

Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

Counsel for Defendant-Appellee

RUSSELL S. BENSING
1350 Standard Building
1370 Ontario Street
CLEVELAND, OHIO 44113

TABLE OF CONTENTS

WHY THIS FELONY CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION OR AN ISSUE OF PUBLIC OR GREAT INTEREST1

STATEMENT OF THE CASE AND FACTS.....4

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 H.B. 86 EFFECTIVE SEPTEMBER 30, 2011

CONCLUSION.....7

CERTIFICATE OF SERVICE8

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

The Eighth District has reaffirmed the court's position that a defendant such as Ralph Kent, who committed his offense prior to July 1, 1996 is to be sentenced under current law rather than the law in effect at the time of the offense. The holding requires that defendants such as Quisi Bryan must be sentenced under the law in effect at the time of his offense because Section 5 of S.B. 2 (146 Ohio Laws, Part VI, 7810) mandates it. However, even though Section 5 of S.B. 2 was not expressly repealed, the Eighth District has found that it has essentially been implicitly repealed.

The decision in *State v. Bryan*, 8th Dist. Cuyahoga No. 101209, 2015-Ohio-1635 follows its own precedent. *State v. Thomas*, 8th Dist. Cuyahoga No. 101202, 2015-Ohio-415, and *State v. Girts*, 8th Dist. Cuyahoga No. 101075, 2014-Ohio-5545, *State v. Kent*, 8th Dist. Cuyahoga No. 101853, 2015-Ohio-1546 and *State v. Jackson*, 8th Dist. Cuyahoga No. 100877, 2014-Ohio-5137. Together, these decisions hold that the S.B. 2 wall which separated crimes committed before July 1, 1996 no longer exists.

The impact changes the landscape of what laws a defendant may be sentenced under when the offense was committed before July 1, 1996. The Eighth District has made clear that they are not inclined to adopt the State's position or change course until this Court determines otherwise. *State v. Kent*, 8th Dist. Cuyahoga No. 101853, 2015-Ohio-1546, ¶ 5. In *State v. Bryan*, 8th Dist. Cuyahoga No. 101209, 2015-Ohio-1635, the Eighth District reversed Quisi Bryan's indefinite sentence for a 1994 rape incident. The majority in *Bryan* reaffirmed their holding that H.B. 86 applies to pre-1996 offenses:

This court has entertained this issue on several prior occasions and, guided by *Taylor*, has concluded that a defendant in appellant's position is to be sentenced under sentencing provisions of H.B. 86 in effect at the time of sentencing. *State v.*

Jackson, 8th Dist. Cuyahoga No. 100877, 2014-Ohio-5137; *State v. Girts*, 8th Dist. Cuyahoga No. 101075, 2014-Ohio-5545; *State v. Steele*, 8th Dist. Cuyahoga Nos. 101139 and 101140, 2014-Ohio-5431; *State v. Thomas*, 8th Dist. Cuyahoga No. 101202, 2015-Ohio-415.1 In accordance with precedents from this court, therefore, we vacate appellant's sentence and remand the case to the trial court for the limited purpose of applying H.B. 86's sentencing provisions in a new sentencing hearing.

Bryan, ¶ 5.

The concurring judge in *Bryan* agreed with the State's position, essentially adopting many of the legal arguments presented in the State's memorandum support in jurisdiction; however, the concurrence opined that despite any agreement, the court was constrained by Eighth District precedence:

Respectfully, I concur in judgment only. I am constrained to concur because of this court's prior precedent on the H.B. 86 sentencing issue. I write separately, however, because unlike the court's decisions on this issue, I would hold that a defendant who commits an offense prior to July 1, 1996, but is sentenced after September 30, 2011 (the effective dates of S.B. 2 and H.B. 86 respectively), is subject to the law in effect at the time of the offense, and not the sentencing provisions of either S.B. 2 or H.B. 86.

Under R.C. 1.58(B): "If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended."

In 1996, S.B. 2 modified the classifications of criminal offenses and corresponding sentences, "ostensibly" reducing the terms of imprisonment for many offenses from those possible under the former statutory scheme. *State v. Rush*, 83 Ohio St.3d 53, 56, 1998-Ohio-423, 697 N.E.2d 634. But in uncodified Section 5 of S.B. 2, the General Assembly specifically stated that all defendants who committed crimes before July 1, 1996, shall be sentenced under the law in existence at the time of the offense, "notwithstanding division (B) of section 1.58 of the Revised Code." Interpreting Section 5 of S.B. 2 in *Rush*, the Ohio Supreme Court held that R.C. 1.58(B) was inapplicable, and the amended sentencing provisions of S.B. 2 applied only to those crimes committed on or after July 1, 1996. The Supreme Court specifically noted that "R.C. 1.58(B) does not create a vested right to be sentenced according to amended laws: it is a general rule of statutory construction." *Id.* at 56.

In 2011, H.B. 86 amended several sections of the Revised Code to decrease offense classifications and reduce the penalty or punishment for some crimes. Uncodified

Section 4 of H.B. 86 states that the amendments apply "to a person who commits an offense 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."

In reliance on Section 4 of H.B. 86, this court has held that H.B. 86 is retroactively applicable to offenses committed prior to July 1, 1996. Those decisions, however, ignored that H.B. 86 did not expressly repeal Section 5 of S.B. 2. The acts of Ohio's General Assembly and the codified and uncodified statutes they contain are published by the secretary of state in a publication called the "Laws of Ohio." Also published are uncodified laws affected by the acts of the General Assembly. H.B. 86 was enacted by the 129th General Assembly, and thereafter published by the secretary. There is no express language in H.B. 86 repealing Section 5 of S.B. 2, and the secretary's publication contains no mention that Section 5 of S.B. 2 was affected by any legislative act of the 129th General Assembly. In the absence of any express language repealing Section 5 of S.B. 2, it is still the law in Ohio.

Nor can it be assumed that Section 4 of H.B. 86 repealed Section 5 of S.B. 2 by implication. The Ohio Supreme Court has stated that "repeals by implication are disfavored as a matter of judicial policy." *State v. Carswell*, 114 Ohio St. 3d 210, 2007-Ohio-3723, 871 N.E.2d 547, 8. "When two affirmative statutes exist, one is not to be construed to repeal the other by implication, unless they can be reconciled by no mode of interpretation." *Cass v. Dillon*, 2 Ohio St. 607, 611 (1853).

Here, Section 4 of H.B. 86 and Section 5 of S.B. 2 can be reconciled: Section 5 of S.B. 2 makes offenses committed prior to S.B. 2 subject to sentencing under the law in effect at the time of the offense, while Section 4 of H.B. 86 applies to offenses committed after July 1, 1996.

Furthermore, I would find that the Ohio Supreme Court's decisions in *State v. Taylor*, 138 Ohio St.3d 194, 2014-Ohio-460, 5 N.E.2d 612, and *State v. Limoli*, 140 Ohio St.3d 188, 2014-Ohio-3072, 16 N.E.2d 641 (relied on by this court in its H.B. 86 decisions) are distinguishable because neither case involved pre-S.B. 2 offenses, and the court did not address whether Section 5 of S.B. 2 still applies to offenses committed before July 1, 1996.

Accordingly, I would hold that Section 4 of H.B. 86 does not make H.B. 86 retroactively applicable to offenses committed prior to July 1, 1996. Because it is still in effect, Section 5 of S.B. 2 is applicable to defendants who committed offenses prior to July 1, 1996; H.B. 86 applies to offenses committed after that date.

State v. Bryan, 2015-Ohio-1635, ¶ 7-16 (Keough, J., concurring in judgment only.)

The concurring opinion in *Bryan* highlights the major points of the State's argument: that pursuant to *State v. Rush*, 83 Ohio St.3d 53, 56, 1998-Ohio-423, 697 N.E.2d 634 and Section 5

of S.B. 2, that those offenders who committed their offense prior to July 1, 1996 must be sentenced in accordance to the law in effect at the time of their offense, and that despite any goals of H.B. 86, the General Assembly did not expressly repeal Section 5 of S.B. 2.

The State takes this appeal because, the Eighth District has interpreted that a law of Ohio has been inherently repealed. The decisions of the Eighth District affect the sentencing law to be applied to offenses committed prior to July 1, 1996 but for one reason or another may be prosecuted or sentenced today. The State asks that this case be accepted, briefed and heard on the merits.

II. Statement of the Case and Facts

Defendant, Quisi Bryan was indicted in 2013 for two counts of rape and one count of kidnapping, after DNA matched him to a rape kit collected from a rape that occurred in 1994. Following a jury trial, defendant was found guilty of kidnapping and rape. At the time of sentencing, the trial court imposed the pre S.B. 2 indefinite sentence of ten to 25 years on each kidnapping and rape to be served consecutively. On appeal, Bryan raised two assignments of error relating to sentencing. Bryan argued that he should have been sentenced under the law in effect at the time of sentencing and not at the time of his offense. The Eighth District agreed. *State v. Bryan*, 8th Dist. Cuyahoga No. 101209, 2015-Ohio-1635, ¶ 1-2.

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 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 uncoded 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 uncoded 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 uncoded 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 *Kent*, 8th Dist. Cuyahoga No. 101853, 2015-Ohio-1546, ¶¶ 3-4.

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 intend 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.

III. Conclusion

This case should accept this case to review a decision that dramatically alters sentencing law in Ohio.

Respectfully Submitted,

TIMOTHY J. MCGINTY (#0024626)
Cuyahoga County Prosecutor

By: /s/ Daniel T. Van
DANIEL T. VAN (#0084614)
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

CERTIFICATE OF SERVICE

A copy of the foregoing has been sent this 15th day of June, 2015 to RUSSELL S.

BENSING, 1350 Standard Building, 1370 Ontario Street, CLEVELAND, OHIO 44113

By: /s/ Daniel T. Van
DANIEL T. VAN (#0084614)