Supreme Court of Ohio Clerk of Court - Filed June 30, 2015 - Case No. 2014-1557

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	)	CASE NO. 2014-1557
Plaintiff-Appellant	)	
vs.	)	On Appeal from Eighth District Court of Appeals, No. 100068
DEAN KLEMBUS	)	
Defendant-Appellee	)	

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TABLE OF CONTENTS

PAGES

STATEMENT OF THE CASE AND FACTS 1

ARGUMENT 2

In Response to Propositions of Law I and II: *2*

The repeat OVI specification codified in R.C. 2941.1413(A) is facially constitutional under the Equal Protection Clause of both the United States and Ohio Constitution.

When a defendant's conduct violates multiple criminal statutes, the government may prosecute under either, even when the two statutes prohibit the same conduct but provide for different penalties, so long as the government does not discriminate against any class of defendants based upon an unjustifiable standard.

Conclusion 10

Service.....10

CASES

Alston v. State, 433 Md. 275, 71 A.3d 13 (Md. Ct. App. 2005)----------8
Bank of America v. Macho, 8th Dist. App. No. 96124, 2011 -Ohio- 5495, 2011 WL 5118329 (Ohio App. 8 Dist.)---------- 3,5
People v. Marcy, 628 P.2d 69 (Co. S.Ct. 1981) (en banc) ----------6
State v. Campbell, 279 Kan. 1, 106 P.3d 1129 (Kansas S.Ct. 2004) ----------3
State v. Wilson (1979), 58 Ohio St.2d 52----------3
United States v. Batchelder, 442 U.S. 114, 99 S.Ct. 2198 (1979) ---------- pasim
United States v. Percival, 727 F.Supp. 1015 (E.D. Va., 1990)----------8

STATUTES

R.C. 2941.1413----------passim
R.C. 4511.19----------passim

CONSTITUTIONAL PROVISIONS

Section 2, Article I, Ohio Constitution ----------passim
Section 16, Article I, Ohio Constitution----------passim
Fourteenth Amendment, United States Constitution ----------passim

Other Authority

4 LaFave, Israel, and King, *Criminal Procedure*, ----------7, 8, 9,
Comment, Tish, *Duplicative Statutes, Prosecutorial Discretion and the Illinois Armed Violence Statute*, 71 Journal of Crim. Law & Criminology 226 (1980) ----------8

STATEMENT OF THE CASE AND FACTS

Defendant-Appellant Dean Klembus was charged with two counts of operating a motor vehicle under the influence of alcohol – Count One alleged driving under the influence while Count Two alleged driving with an excessive blood alcohol content (as measured by a breath test). *See* Indictment. Counts One and Two, as alleged, each charged fourth-degree felonies. The Counts alleged fourth-degree felonies because each Count carried the following "FURTHERMORE" language:

> FURTHERMORE, and he within twenty years of the offense, previously has been convicted of or pleaded guilty to five or more violations of that nature, to wit: (1) on or about January 2, 2008, 6C06389, in the Bedford Municipal Court, in violation of 4511.19(A)(1); (2) and on or about July 12, 2004, 4C02588, in the Bedford Municipal Court, in violation of 4511.19(A)(1); (3) and on or about October 4, 2000, 0C04081, in the Bedford Municipal Court, in violation of 4511.19(A)(1); (4) and on or about March 17, 1997, 7C00548, in the Bedford Municipal Court, in violation of 4511.19(A)(1); (5) and on or about December 29, 1992, 2 C08595, in the Bedford Municipal Court, in violation of 4511.19(A)(1).

In addition, each Count carried the following "Specification Concerning Prior Felony (sic) OVI Offenses -- §2941.1413(A)" (hereinafter, "Specification"), which, despite its title, did not allege a prior felony conviction but did allege the following:

> the offender, within twenty years of committing the offense, previously had been convicted of or pleaded guilty to five or more equivalent offenses.

Indictment, Counts One and Two.

Prior to trial, Mr. Klembus filed a motion to dismiss the Specification. The arguments set forth in the motion were summarized in oral argument before the trial court. (T. 3-17). The motion was denied. (T. 27).

Following denial of this motion, Mr. Klembus pled no contest to both charges in order to preserve the issue presented prior to trial and herein. (T. 53). The parties agreed that they were

allied offenses and merged for sentencing. (T. 42). Sentencing took place on Count One. The sentence is not being appealed.

On appeal, the Eighth District Court of Appeals held that the statutory scheme violated Equal Protection because it provided prosecutors with unfettered discretion as to whether or not to pursue enhanced penalties via the Specification, without being required to prove any additional facts beyond those already alleged in the Furthermore Clause to support the enhanced penalty.

ARGUMENT

In Response to Propositions of Law I and II (as set forth by Appellant State of Ohio):

> **The repeat OVI specification codified in R.C. 2941.1413(A) is facially constitutional under the Equal Protection Clause of both the United States and Ohio Constitution.**
>
> **When a defendant's conduct violates multiple criminal statutes, the government may prosecute under either, even when the two statutes prohibit the same conduct but provide for different penalties, so long as the government does not discriminate against any class of defendants based upon an unjustifiable standard.**

The Specification offends the Equal Protection and Due Process Clauses of the United States and Ohio Constitutions because the Specification provides the prosecution with the ability to obtain greater punishment for the underlying offense without proof of any additional element, fact or circumstance. Whether Mr. Klembus is subject to between one and five years of mandatory prison time will not depend upon the government's calling any additional witnesses, or adducing any additional testimony or presenting any additional exhibits. Nor will the increased penalty depend upon the jury finding any additional facts. Rather, the additional punishment depends solely upon the insertion of the Specification in the indictment.

Applicable Law: the Equal Protection Clause

Both the Ohio and United State Constitution provide that no person shall be deprived of life, liberty or property without due process of law or be denied the equal protection of the law. §§ 2 and 16, Article I, Ohio Constitution; Fourteenth Amendment, United States Constitution.

Equal protection is violated when a statutory scheme is such that two different applications of the criminal law can prescribe different penalties while still requiring the State to prove identical elements. *State v. Wilson* (1979), 58 Ohio St.2d 52, 55. The test to be applied is "whether, if the defendant is charged with the elevated crime, the state has the burden of proving an additional element beyond that required by the lesser offense." *Id.* If not, then a violation of the Equal Protection Clause has occurred. *Id.*

Due Process is violated when a statutory scheme is arbitrary or irrational. *Bank of America v. Macho,* 8th Dist. App. No. 96124, 2011 -Ohio- 5495, 2011 WL 5118329 (Ohio App. 8 Dist.).

The Specification Violates Equal Protection

In the instant case, Mr. Klembus has been charged with a violation of R.C. 4511.19, which provides in pertinent part in subsection (G)(1):

> (d) Except as otherwise provided in division (G)(1)(e) of this section, an offender who, within six years of the offense, previously has been convicted of or pleaded guilty to three or four violations of division (A) or (B) of this section or other equivalent offenses or an offender who, within twenty years of the offense, previously has been convicted of or pleaded guilty to five or more violations of that nature is guilty of a felony of the fourth degree. The court shall sentence the offender to all of the following:
>
> (i) If the sentence is being imposed for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory prison term of one, two, three, four, or five years as required by and in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1413 of the Revised Code or, in the discretion of the court, either a mandatory term of local incarceration of sixty consecutive days in accordance with division (G)(1) of section 2929.13 of the Revised Code or a mandatory prison term of sixty consecutive days in accordance with division (G)(2) of that section if the offender

> is not convicted of and does not plead guilty to a specification of that type. If the court imposes a mandatory term of local incarceration, it may impose a jail term in addition to the sixty-day mandatory term, the cumulative total of the mandatory term and the jail term for the offense shall not exceed one year, and, except as provided in division (A)(1) of section 2929.13 of the Revised Code, no prison term is authorized for the offense. If the court imposes a mandatory prison term, notwithstanding division (A)(4) of section 2929.14 of the Revised Code, it also may sentence the offender to a definite prison term that shall be not less than six months and not more than thirty months and the prison terms shall be imposed as described in division (G)(2) of section 2929.13 of the Revised Code. If the court imposes a mandatory prison term or mandatory prison term and additional prison term, in addition to the term or terms so imposed, the court also may sentence the offender to a community control sanction for the offense, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

Thus, the statute is clear on its face that the specification is what triggers the additional punishment. Accordingly, to comply with *Wilson*, the Specification must require proof of something above and beyond that required to trigger the penalties that flow from the Furthermore clause, alone,, *i.e.*, the Specification must require proof of something more than simply five prior offenses.

A review of R.C. 2941.1413 reveals that the specification does not require proof of anything more than what is required to prove the underlying crime:

> (A) Imposition of a mandatory additional prison term of one, two, three, four, or five years upon an offender under division (G)(2) of section 2929.13 of the Revised Code is precluded unless the indictment, count in the indictment, or information charging a felony violation of division (A) of section 4511.19 of the Revised Code specifies that the offender, within twenty years of the offense, previously has been convicted of or pleaded guilty to five or more equivalent offenses. The specification shall be stated at the end of the body of the indictment, count, or information and shall be stated in substantially the following form:
>
> "SPECIFICATION (or, SPECIFICATION TO THE FIRST COUNT).
>
> The Grand Jurors (or insert the person's or the prosecuting attorney's name when appropriate) further find and specify that (set forth that the offender, within twenty years of committing the offense, previously had been convicted of or pleaded guilty to five or more equivalent offenses)." [emphasis added].
>
> (B) As used in division (A) of this section, "equivalent offense" has the same meaning as in section 4511.181 of the Revised Code.

As is clear from the statutory language, as well as from a review of the indictment in the instant case, the specification adds no additional burden of proof, it simply increases the penalty. This violates *Wilson.*

The Specification Violates Due Process

In addition, because the statute arbitrarily and irrationally creates two different punishment schemes for the same conduct, it is also violative of due process under the federal and State constitutions. *Bank of America v. Macho,* 8th Dist. App. No. 96124, 2011 -Ohio- 5495, 2011 WL 5118329 (Ohio App. 8 Dist.). The arbitrariness of the statute is underscored by the unfettered discretion given to prosecutors to pick and choose between prosecuting or not prosecuting the Specification, without any guidance as to how to make this distinction on the basis of a rational criteria.

This is Not a Case About Selective Prosecution

It is important to recognize what this case is not about. It is not about whether the State of Ohio is invidiously discriminating against Mr. Klembus, either personally or because he is a member of a class of individuals. Arguments in this regard miss the point. The issue in this case is whether, on its face, the statute is unconstitutional.

***Batchelder* is Inapposite**

The State of Ohio relies principally upon *United States v. Batchelder,* 442 U.S. 114, 99 S.Ct. 2198 (179), which held that two statutes with overlapping elements did not present an Equal Protection problem where one statutory offense carried up to five years of imprisonment while the other statute carried up to two years of imprisonnaent. *Batchelder* is distinguishable for at least four reasons.

Difference in penalties in Batchelder did not force judge to higher sentencing range

First, *Batchelder* recognized that the difference in penalties between the two statutory offenses (5 years vs. 2 years) was such that a trial judge would still have the discretion to impose a sentence within the lower penalty range. *The Batchelder* Court noted that the statutes were such that, regardless of the charging decision, the prosecution would not be able to `predetermine ultimate criminal sanctions." *Id.*, at 124-25. As discussed above, the prosecution is predetermining the criminal sanctions with its charging decisions under R.C. 4511.19 because the penalties are radically different, and the trial judge cannot give the lesser penalty if the prosecution includes the specification. Without a specification, the defendant faces as little as 60 days in jail and no more than 32 months (30 months plus 60 days) in prison. With a specification, the defendant faces at least 14 months in prison and up to 7 1/2 years in prison. By adding the Specification, the prosecutor forecloses a jail sentence and assures that the defendant is sent to prison, whether the trial judge wants to do so or not.

This type of prosecutorial power to manipulate the sentence offends Equal Protection and Due Process. *See, People v. Marcy*, 628 P.2d 69, 74 n.5 (Co. S.Ct. 1981) (en banc) (declining to follow *Batchelder* under State constitution where penalties for two different offenses were markedly different).

Only partial overlap of elements in Batchelder

Second, *Batchelder* did not deal with identical elements between the two statutes. While the elements were similar, there were distinctions. *Batchelder* acknowledged that it was a case of "partial redundancy" between the statutes, where the requirements of proof under the two statutes were not identical, *id.*, at 118 - 20 (quoted words appear at 118), although *Batchelder* went on to

evaluate the Equal Protection claim as if the statutes were identical in their proof requirements. In the instant case, there are no differences in proof.

This distinction between a partial and total overlap has been the subject of both legal commentary and State court decisions. *State v. Campbell*, 279 Kan.1, 13-15, 106 P.3d 1129 (2004) (where elements are identical, greater offense must be vacated; *Batchelder* reasoning rejected, citing 4 LaFave, Criminal Procedure § 13.7[a], p.99); *State v. Schondel*, 22 Utah 2d 343, 453 P.2d 146 (1969).

> In assaying the *Batchelder* reasoning, it is useful to think about three types of situations in which a defendant's conduct may fall within two statutes. They are: (1) where one statute defines a lesser included offense of the other and they carry different penalties (e.g., whoever carries a concealed weapon is guilty of a misdemeanor; a convicted felon who carries a concealed weapon is guilty of a felony); (2) where the statutes overlap and carry different penalties (e.g., possession of a gun by a convicted felon, illegal alien or dishonorably discharged serviceman is a misdemeanor; possession of a gun by a convicted felon, fugitive from justice, or unlawful user of narcotics is a felony); (3) where the statutes are identical (e.g., possession of a gun by a convicted felon is a misdemeanor; possession of a gun by a convicted felon is a felony). The Court in *Batchelder* had before it a situation falling into the second category, but seems to have concluded that the three statutory schemes are indistinguishable for purposes of constitutional analysis. But in terms of either the difficulties which are confronted at the legislative level in drafting statutes or in the guidance which is given to a prosecutor by the legislation, the three schemes are markedly different.
>
> The first of the three is certainly unobjectionable. Such provisions are quite common (robbery-armed robbery; battery-aggravated battery; joyriding-theft; housebreaking-burglary), and usually are a consequence of a deliberate attempt by the legislature to identify one or more aggravating characteristics which in the judgment of the legislature should ordinarily be viewed as making the lesser crime more serious. They afford guidance to the prosecutor, but—as noted in *Batchedler* —do not foreclose the prosecutor from deciding in a particular case that, notwithstanding the presence of one of the aggravating facts, the defendant will still be prosecuted for the lesser offense.
>
> By contrast, the third of the three is highly objectionable. It is likely to be a consequence of legislative carelessness, and even if it is not such a

> scheme serves no legitimate purpose. There is nothing at all rational about this kind of statutory scheme, as it provides for different penalties without any effort whatsoever to explain a basis for the difference. It cannot be explained in terms of giving assistance to the prosecutor. "Where statutes are identical except for punishment, the prosecutor finds not the slightest shred of guidance." It confers discretion which is totally unfettered and which is totally unnecessary. And thus the Court in *Batchelder* is less than convincing in reasoning that this third category is unobjectionable simply because in other instances, falling into the first category, the need for discretionary judgments by the prosecutor has not been and cannot be totally eliminated.
>
> As for the second of the three categories, it clearly presents a harder case. Here as well, the dilemma is likely to have been created by legislative carelessness ... overlapping statutes are very common at both the federal and state level, and it can hardly be said that in every instance they are a consequence of poor research or inept drafting, Drafting a clear criminal statute and still ensuring that in ***no*** instance could it cover conduct embraced within any existing criminal statute in that jurisdiction can be a formidable task. (This fact alone may make courts somewhat reluctant to find overlap per se unconstitutional, although the consequence of such a finding, limiting punishment to that under the lesser of the two statutes until such time as the legislature decides what to do about the now-identified overlap, is hardly a cause for alarm.) Moreover, in the overlap scheme the two statutes will at least ***sometimes*** assist the prosecutor in deciding how to exercise his charging discretion.

4 Wayne R. LaFave, Jerold H. Israel, and Nancy J. King, *Criminal Procedure* § 13.7(a), 95–97 (1999 and Supp.2002) (emphasis in original). *Accord,* Comment, Tish, *Duplicative Statutes, Prosecutorial Discretion, and the Illinois Armed Violence Statute,* 71 Journal of Crim. Law & Criminology 226 (1980).

Batchelder dealt with two statutes, not one

Third, *Batchelder* dealt with two separate statutes, which the Court characterized as being independent of one another. At least one federal court has recognized that, when the Equal Protection problem presented herein arises within a single statute, *Batchelder* has no application. *See, United States v. Percival,* 727 F.Supp. 1015 (E.D. Va., 1990). *Accord, Alston v. State,* 433 Md. 275, 71 A.3d 13 (Md. Ct. App. 2005).

Ohio's Equal Protection Clause can provide greater protection

Fourth, *Batchelder* did not address the Ohio Constitutional considerations, which were also a basis for the Eighth District's decision, As this Court is well aware, the Ohio Constitution's Equal Protection Clause can provide additional protection beyond the constitutional floor established by the United States Constitution.

> Notwithstanding *Batchelder,* a state might well conclude as a matter of state constitutional law that "equal protection of the laws requires that statutory classification of crimes be based on differences that are real in fact and reasonably related to the general purposes of criminal legislation," and that such protection is lacking "if different statutes proscribe the same criminal conduct with disparate criminal sanctions." And of course there remains open the possibility that a court will be able to avoid the problem entirely by utilizing canons of statutory construction, such as that a later statute should prevail over the earlier one with which it would otherwise overlap, or that the more specific statute should prevail over the more general one with which it would otherwise overlap.

LaFave, Criminal Procedure, *supra.*

In the end, a person's sentence should turn on the evidence proven to a factfinder beyond a reasonable doubt – not on the addition of extra typewritten words on the bottom of an indictment, couched as a "Specification." If the General Assembly wants to distinguish between offenders who have committed six OVI offenses in 20 years, there are ways to do so. But it should be the General Assembly that makes that distinction by holding the prosecutor to the proof of additional elements. Years in prison should turn on proof of facts and not upon additional typeset.

CONCLUSION

The judgment of the Eighth District Court of Appeals should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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