

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	*	Supreme Court Case No.: 2015-0947
	*	
Appellant,	*	On Appeal from the
	*	Cuyahoga County Court of
vs.	*	Appeals, Eighth Appellate
	*	District
RALPH KENT,	*	
	*	Court of Appeals
Appellee.	*	Case No. 101853

MEMORANDUM IN RESPONSE OPPOSING JURISDICTION

JEFFREY M. GAMSO
(0043869)
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, OH 44113
Phone: (216) 443-7583
FAX: (216) 443-3632
e-mail: jgamso@cuyahogacounty.us
COUNSEL FOR APPELLEE,
RALPH KENT

TIMOTHY J. McGINTY (0024626)
Cuyahoga County Prosecutor

DANIEL VAN (0084614)
Counsel of Record
Assistant County Prosecutor
The Justice Center – 9th Floor
1200 Ontario Street
Cleveland, OH 44113
(216) 443-7800
COUNSEL FOR APPELLANT,
STATE OF OHIO

TABLE OF CONTENTS

	<u>Page</u>
WHY THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION AND WHY LEAVE TO APPEAL SHOULD BE DENIED	1
STATEMENT OF THE CASE AND FACTS	2
ARGUMENT IN OPPOSITION TO PROPOSED PROPOSITION OF LAW	2
CONCLUSION	6
PROOF OF SERVICE	6

**EXPLANATION OF WHY THIS IS NOT A CASE OF PUBLIC OR GREAT
GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL
CONSTITUTIONAL QUESTION AND WHY LEAVE TO APPEAL
SHOULD BE DENIED**

This is but another in a string of cases from the Eighth District in which the Cuyahoga County Prosecutor asks this Court to review a ruling that defendants sentenced after the effective date of H.B. 86 must be sentenced in accord with H.B. 86 even if the crime at issue occurred before the July 1, 1996 effective date of S.B. 2. The prosecutor wants this Court to reverse the Eighth District on that issue and, therefore, routinely files appeals from those decisions. See, e.g., *State v. Jackson*, No. 2014-2052, jurisdiction declined, Case Announcements, 2015-Ohio-1896; *State v. Steele*, No. 2014-2222, jurisdiction declined, Case Announcements, 2015-Ohio-1591; *State v. Bryan*, No. 2015-0994; *State v. Jackson*, 2015-0557; *State v. Thomas*, 2015-0473; *State v. Girts*, 2015-0297. When this Court has declined jurisdiction, as it did in *Jackson* and *Steele*, the prosecutor has filed for reconsideration.¹

This Court must accept this appeal, the prosecutor argues, because the Eighth District simply refuses to adopt his position on the matter. Mr. Kent concedes that must be frustrating for the prosecutor. But the prosecutor's frustration raises neither a substantial constitutional question nor an issue of public or great general interest. See Article IV, Section 2(B)(2)(b) and 2(B)(2)(e); Sup.Ct.Prac.R. 7.01(B)(1)(d). But the prosecutor offers nothing else. There is in the prosecutor's memorandum not even a pretense of suggesting why this case matters except that the prosecutor didn't get its way.

The law in this case is clear, and the court of appeals correctly understood that law. Insofar as appellant wishes the law were otherwise, its remedy is a legislative fix, not an appeal to this Court.

Ralph Kent was charged with, found guilty of, and sentenced for a crime that occurred in 1994. In 2014, he entered a guilty plea and the trial court imposed an indefinite sentence on him under the law as it before the July 1, 1996 effective date of S.B. 2. The court of appeals looking at

¹ Jurisdiction in the other cases is pending as of this writing.

its precedent and at the language of H.B. 86 and concluded, as it had in other cases, that the trial court applied the wrong law. *State v. Kent*, 8th Dist. Cuyahoga No. 101853, 2015-Ohio-1546.

There is, for the state's complaint and if the legislature is so inclined, a simple remedy. The General Assembly can amend H.B. 86 to provide, as Section 5 of S.B. 2 does, that that the law will not apply to pre-S.B. 2 cases "notwithstanding" R.C. 1.58(B). Unless and until such an amendment should be enacted, R.C. 1.58(B) applies.

This case is simple and straightforward. The court of appeals was right. Nonetheless, the prosecutor want this Court to become a super-legislature and rewrite H.B. 86 to its specifications as that would ease his disappointment and frustration. Where, as here, that is all there is, the Court should deny jurisdiction.

STATEMENT OF THE CASE AND RELEVANT FACTS

For purposes of this memorandum, Mr. Kent accepts appellant's Statement of the Case and Facts.

ARGUMENT IN OPPOSITION TO PROPOSITION OF LAW

Appellant's Proposition of Law (Restated): 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.

The trial court sentenced Ralph Kent to an indefinite term of 15-25 years in prison based on the law as it existed in 1994, the time of the offense in this case. As the court of appeals rightly held, that was error. The proper sentence should have been a definite term of 3, 4, 5, 6, 7, 8, 9, 10, or 11 years under the law as it is now and was at the time of his sentencing, the law as enacted by H.B. 86.

That result is compelled by R.C. 1.58(B) which provides that when a later enacted version of a statute reduces the available punishment, that statute will control future sentences.

(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.

Under the law as it existed at the time of the offense in this case, a first degree felony with its accompanying aggravated felony specification permitted an indefinite sentence of 15 to 25 years in prison, the sentence imposed by the trial court. Under H.B. 86, on the other hand, Mr. Kent may be sentenced to a definite term of 3, 4, 5, 6, 7, 8, 9, 10, or 11 years. On its face, then, R.C. 1.58(B) requires that Mr. Kent receive an H.B. 86 sentence as the maximum sentence under H.B. 86 is less than the sentence under the old law.

Moreover, H.B. 86 explicitly states that it applies to persons sentenced on or after its effective date and to whom R.C. 1.58(B) applies:

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.*

(Emphasis added)

In spite of the clear mandates of the statute and the Revised Code, the state argues that H.B. 86 does not apply. The state's argument, it appears, is that despite the language of H.B. 86, Section 4, and despite the mandate of R.C. 1.58(B), the choice of sentencing law in this case is controlled by Section 5 of the 1996 amendments to Ohio's felony sentencing law. Am.S.B. 2 (S.B. 2).

S.B. 2, as this Court held in *State v. Rush*, 83 Ohio St.3d 53, 697 N.E.2d 634 (1998),

did not apply to offenses that occurred before its effective date, July 1, 1996. R.C. 1.58(B), *Rush* said, was inapplicable to S.B. 2 sentencing because

Prior to its effective date, the General Assembly amended Section 5 of S.B. 2 to emphasize that its provisions apply only to crimes committed on or after July 1, 1996, "notwithstanding division (B) of section 1.58 of the Revised Code[.]" Section 3, Am.Sub.S.B. No. 269, 146 Ohio Laws Part VI, 11099 ("S.B. 269").

Id. at 57.

Because H.B. 86 was enacted after S.B. 2, the state argues, it only affects sentences that would otherwise be imposed under S.B. 2. In support of that argument it cites nothing but a case from 1930 setting forth the altogether unexceptionable proposition that the General Assembly is presumed not to repeal laws by accident. Mr. Kent does not disagree. But application of the current sentencing law to current sentences repeals nothing. It simply applies the law as written, "to a person to whom division (B) of section 1.58 of the Revised Code makes the amendments applicable."

Moreover, H.B. 86 did, in fact, specifically repeal R.C. 2929.14 and its penalties for first degree felonies and replace it with a new section setting forth the new first degree felony sentencing range.

What the state actually wants is for this Court either to write out of the law as enacted that part of Section 4 saying that R.C. 1.58(B) applies or to write into the law a section that says that pre-S.B. 2 law will apply to cases based on offenses occurring before its effective date "notwithstanding Division (B) of Section 1.58 of the Revised Code." That exclusionary provision, explicitly made part of S.B. 2 by an amendment to that law enacted before its effective date by S.B. 269, was not written into H.B. 86. And as this Court observed in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, ¶ 100, "[W]e are constrained by the principle of separation of powers and cannot rewrite the

statutes.”

Ultimately, the state’s position amounts to little more than hoping that if it claims something forcefully enough and consistently enough, the claim will be accepted as true. But this is a case where the emperor has no clothes.

The legislature clearly knows how to write language making R.C. 1.58(B) inapplicable to a sentencing law. It did that in S.B. 2 (at least, as amended by the “notwithstanding” language of S.B. 269). It precisely did *not* do that in H.B. 86. Rather, it explicitly said that R.C. 1.58(B) would apply. The court of appeals recognized that. This Court should also.

Accordingly, on these facts, and on the law, the trial court’s decision to sentence Mr. Kent pursuant to the law as it existed at the time of the offense rather than under H.B. 86, the law as it existed at the time of sentencing, was error.

Because Mr. Kent was sentenced well after the effective date of H.B. 86, the trial court’s imposition of an indefinite sentence under pre-S.B. 2 law is not authorized by law, the trial court had no jurisdiction to impose that sentence, and the sentence is a nullity. See *State v. Beasley*, 14 Ohio St. 3d 74, 471 NE 2d 774 (1984).

CONCLUSION

For the reasons set forth above, this Court should deny jurisdiction and dismiss this appeal.

Respectfully submitted,

/s/ Jeffrey M. Gamso
JEFFREY M. GAMSO (0043869)
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, Ohio 44113
Phone: (216) 443-7583
FAX: (216) 443-3632
e-mail: jgamso@cuyahogacounty.us
COUNSEL FOR APPELLANT,
RALPH KENT

PROOF OF SERVICE

This is to certify that a copy of the foregoing was served on Daniel T. Van, Counsel of Record for Appellant, by e-mail and regular U.S. Mail, at The Justice Center – 8th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 by regular U.S. Mail, postage prepaid, this 2nd day of July, 2015.

/s/ Jeffrey M. Gamso
JEFFREY M. GAMSO
Counsel for Appellant
Ralph Kent