Supreme Court of Ohio Clerk of Court - Filed July 20, 2015 - Case No. 2014-1557

IN THE SUPREME COURT OF OHIO
2015

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

DEAN KLEMBUS,

Defendant-Appellee.

Case No. 2014-1557

On Appeal from the
Cuyahoga County Court
of Appeals, Eighth Appellate District

Court of Appeals
Case No. 100068

REPLY BRIEF OF AMICI CURIAE OHIO PROSECUTING ATTORNEYS ASSOCIATION AND FRANKLIN COUNTY PROSECUTOR RON O'BRIEN IN SUPPORT OF PLAINTIFF-APPELLANT STATE OF OHIO

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PROPOSITION OF LAW I

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 CONSTITUTIONS

PROPOSITION OF LAW II

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

In his brief, defendant made several assertions that must be addressed.

A. Defendant admits no equal protection violation

Initially, it must be noted that defendant has abandoned any argument pertaining to selective prosecution. Appellee Brief, p. 5 ("[This case] 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.") This is significant because, to prove an equal protection violation, the defendant must show that the decision to prosecute was based on "an unjustifiable standard such as race, religion, or other arbitrary classification," *United States v. Armstrong*, 517 U.S. 456, 464, 116 S.Ct. 1480, 134 L.Ed.2d 678 (1996), quoting *Oyler v. Boles*, 368 U.S. 448, 456, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962). *See also State v. Rooney*, 189 Vt. 306, 324-25, 19 A.3d 92 (2011) (adopting the reasoning of *Batchelder* in rejecting constitutional challenge to statutory scheme that allowed prosecutors to proceed against persons charged with drunk driving under criminal or civil statutes with same elements but varying penalties) citing *United States v.*

Batchelder, 442 U.S. 114, 125, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979); *State v. Pickering*, 462 A.2d 1151, 1162 (Maine 1983) ("[I]n the case of duplicative or overlapping criminal statutes, both the state and federal guarantee of equal protection is limited to the defense of a *discriminatory* prosecution.") (emphasis sic). Thus, as defendant admits that the instant prosecution did not involve any discrimination, he has conceded that an equal protection violation is not even a possibility in this case.

B. Specifications cannot stand alone

Second, defendant's reliance upon *State v. Wilson*, 58 Ohio St.2d 52, 388 N.E.2d 745 (1979) is misplaced. Indeed, defendant's argument is predicated on the assumption that the R.C. 2941.1413(A) specification can be prosecuted independent of a charge of OVI. Defendant is obviously mistaken.

In *Wilson*, the defendant was charged with two counts of aggravated burglary, to which he entered a plea of guilty. *Id.* At his sentencing hearing, he contended that he should be sentenced as if he had pled guilty to burglary, as he contended that the offenses of aggravated burglary and burglary could be committed by the same conduct. As a result, Wilson asserted that the Constitution required he be entitled to receive the lesser punishment.

In rejecting his claim, this Court held that "[t]he Equal Protection Clause is not violated when, based upon prosecutorial discretion, a person may be charged *under more than one statute* and thereby receive different penalties." *Id.* at 55 (emphasis added).

Here, defendant could not be charged and prosecuted for only the repeat-offender specification. After all, a specification is not an offense in and of itself. Rather, the very purpose of a specification is to provide notice that the defendant faces an enhanced punishment upon

conviction for an underlying offense. Thus, *Wilson*, in which the defendant argued that he should be punished for a separately-prosecutable offense, is inapposite.

C. *Klembus* and the separation-of-powers problem

It must be noted that prosecutors are not required to add every specification to an underlying charge simply because it is supported by the evidence. There are other considerations when determining what charges to seek against an individual. *United States v. Lovasco*, 431 U.S. 783, 794, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977) ("The decision to file criminal charges, with the awesome consequences it entails, requires consideration of a wide range of factors in addition to the strength of the Government's case, in order to determine whether prosecution would be in the public interest."). Likewise, prosecutors are not prohibited from seeking to attach a specification to an underlying charge merely because it will result in increased punishment. *Batchelder*, 442 U.S. at 125 ("The prosecutor may be influenced by the penalties available upon conviction, but this fact, standing alone, does not give rise to a violation of the Equal Protection or Due Process Clause.").

Moreover, even if there were some legislative command to enforce the R.C. 2941.1413(A) specification with uniformity, which is the approach endorsed by the Eighth District in the instant matter (*see State v. Klembus*, 8th Dist. No. 100068, 2014-Ohio-3227, ¶23), such a command would violate the separation of powers doctrine.

"While Ohio, unlike other jurisdictions, does not have a constitutional provision specifying the concept of separation of powers, this doctrine is implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government." *S. Euclid v. Jemison*, 28 Ohio St.3d 157, 158-59, 503 N.E.2d 136 (1986).

"The essential principle underlying the policy of the division of powers of government into three departments is that powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments, and further that none of them ought to possess directly or indirectly an overruling influence over the others." *State ex rel. Bryant v. Akron Metro. Park Dist. of Summit Cty.*, 120 Ohio St. 464, 473, 166 N.E. 407 (1929).

"The division of governmental authority into separate branches is especially important within the criminal justice system, given the substantial liberty interests at stake and the need for numerous checks against corruption, abuses of power, and other injustices." *State v. Rice*, 174 Wash.2d 884, 901-03, 279 P.3d 849 (2012) (citations omitted).

In *Rice*, a case in which the defendant raised precisely the same argument regarding a prosecutor's discretionary selection of a sentence-enhancing component, the Supreme Court of Washington noted the intersection of all three branches of government in the apprehension, conviction, and sentencing of a criminal suspect. "Separation of powers ensures that individuals are charged and punished as criminals only after a confluence of agreement among multiple governmental authorities, rather than upon the impulses of one central agency." *Id*. at 901.

The reasoning of the Washington Supreme Court is persuasive. It cannot be legitimately disputed that each branch has its role in ensuring that those who commit crimes are punished. First, the legislature defines crimes and the punishment that can be imposed for offenders. Members of the executive branch collect evidence and seek a conviction in a particular case. Finally, the judiciary confirms guilt and imposes a sentence that has been authorized by the legislature. "The state constitution grants inherent powers to each separate branch to undertake

these functions, including the distinct role of prosecuting attorneys within the executive branch." *Id*.

The discretion to select charges, including sentence-enhancing components that are explicitly authorized by the legislature, lies with the prosecutor as a member of the executive branch. The charging decision often involves a complex set of considerations: individual facts and circumstances of a given case, local law enforcement priorities, and management of limited resources, among others. "For these reasons, a prosecutor's inherent charging discretion necessarily is broader than a mere consideration of sufficiency of evidence and likelihood of conviction" and extends to whether to bring a sentence-enhancing specification. *Id.* at 902

"To hold otherwise would allow the legislature to limit the prosecutor's discretion to the sole decision of whether to file *any* charges; the legislature then could require any such filing to include a draconian imposition of all (or the most severe) charges supported by available evidence." *Id*. at 902. The *Rice* court concluded that the constitution "affords prosecuting attorneys much more independent authority than that, including the authority to be merciful and to seek individualized justice." *Id*. at 902-03.

As a result, requiring uniform application of the repeat-OVI offender specification would encroach upon the authority exercised by the executive branch and, thus, violate the separation-of-powers doctrine.

D. Universal rejection of *Klembus* by other appellate courts

In closing, it must be noted that, only two appellate courts have addressed the merits of the repeat-OVI offender specification issue since the Eighth District issued its decision in this case: the Eleventh and Twelfth Districts. *Klembus* was flatly rejected by both courts. *See State v. Wright*, 11th Dist. Lake No. 2013-L-089, 2015-Ohio-2601; *State v. Snowden*, 11th Dist.

Trumbull No. 2014-T-0092, 2015-Ohio-2611; *State v. Hartsook*, 12th Dist. Warren No. CA2014-01-020, 2014-Ohio-4528; *State v. Burkhead*, 12th Dist. Butler No. CA2014-02-028, 2015-Ohio-1085.

Further, although the Third District did not reach the merits of the issue, it severely criticized the reasoning of the *Klembus* majority. *See State v. Stephens*, 3rd Dist. Seneca No. 13-14-28, 2015-Ohio-1078, ¶11 ("At the outset, we note our view that the *Klembus* opinion is *based upon a fundamental misconstruction of the language and operation* of R.C. 4511.19(G)(1)(d) and R.C. 2941.1413 in that case[.]") (emphasis added).

This Court should find the reasoning of the Eleventh and Twelfth Districts persuasive and reverse the Eighth District.

CONCLUSION

For the foregoing reasons, amici curiae Ohio Prosecuting Attorneys Association and Franklin County Prosecutor Ron O'Brien support plaintiff-appellant State of Ohio and urge this Court to reverse the judgment of the Eighth District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, July 20, 2015, to John Martin, Assistant Public Defender 310 Lakeside Ave., Ste 200, Cleveland, Ohio 44113; Counsel for Defendant-Appellee, and to Daniel T. Van, Assistant Prosecuting Attorney, at The Justice Center, 1200 Ontario St., Cleveland, Ohio 44113, counsel for Plaintiff-Appellant.

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