

NO.

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellant

vs.

KEITH BROWN

Defendant-Appellee

MEMORANDUM IN OPPOSITION TO JURISDICTION

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

Senate Bill 2 (“S.B. 2”), the ‘truth in sentencing’ statute, which was made effective July 1, 1996, is only applicable to offenses committed after July 1, 1996. *See generally State v. Rush*, 83 Ohio St.3d 53, 1998-Ohio 423, 697 N.E.2d 634. Specifically, Section 5 of S.B. 2 provides:

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 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 Laws, part VI, 7810).

Therefore, a defendant who commits an offense prior to July 1, 1996 is subject to the sentencing law in effect at the time of the offense. In turn, a defendant who commits an offense after July 1, 1996, is subject to sentencing under the statutory scheme enacted under S.B. 2 and H.B. 86, which was effective September 30, 2011.

This decision by the Eighth District in *State v. Keith Brown*, 8th Dist. Cuyahoga No. 102377, 2015-Ohio-4372, much like many other decisions before is a dramatic change in sentencing law. See also *State v. Wheeler*, 8th Dist. Cuyahoga No. 102375, 2015-Ohio-3768, *State v. Stearns*, 8th Dist. Cuyahoga No. 102463, 2015-Ohio-3239, *State v. Bryan*, 8th Dist. Cuyahoga No. 101209, 2015-Ohio-1635, *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, *State v. Jackson*, 8th Dist. Cuyahoga No. 100877, 2014-Ohio-5137, *State v. Owens*, 8th Dist. Cuyahoga No. 102276, 2015-Ohio-3881 and *State v. Kevin Bell*, 8th Dist. Cuyahoga No. 102141, 2015-Ohio-4178. Together, these decisions hold that the

S.B. 2 wall which separated crimes committed before July 1, 1996 no longer exists. The body of case law has tremendous impact on outstanding cold cases, any pre July 1, 1996 case that may be unresolved, or any number of delayed reporting case. The impact changes the landscape of what laws a defendant may be sentenced under when the offense was committed before July 1, 1996. The State of Ohio respectfully requests that this Court accept this case for review and to hold this case for the decision in *State v. Jermain Thomas*, Case No. 2015-0473, and to ultimately reverse the decision of the Eighth District, which fails to account for this Court's precedent and the intent of the General Assembly in reforming the structure of Ohio's sentencing law.

II. Statement of the Case and Facts

In late July and early 1993, a young girl was raped by several men that included Keith Brown over several days. In early 2013, the rape kit was tested and found several DNA matches including Keith Brown. In July 2013, Brown was charged with one count of each rape and kidnapping along with six counts of complicity. He pleaded guilty to an amended count of rape. Brown was sentenced under S.B. 2 sentence to a definite term of four years. The State appealed Brown's sentence as it has done so in other cases.

III. Law and Argument

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 uncodified 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 uncodified 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 December 7, 2015). No express language in H.B. 86 repeals Section 5 of 1995 S.B. 2, and as a result that uncodified 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. 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.

IV. Conclusion

The State of Ohio respectfully requests that this Court accept this case for review and to hold this case for the decision in *State v. Jermain Thomas*, Case No. 2015-0473 and ultimately asks this Court to reverse the decision of the Eighth District Court of Appeals with respect to the sentencing issue.

Respectfully Submitted,

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