Supreme Court of Ohio Clerk of Court - Filed December 14, 2015 - Case No. 2015-0384

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case Nos. 2015-0384; 2015-0385
	:	
Plaintiff-Appellant,	:	On Appeal from the
	:	Wood County
v.	:	Court of Appeals,
	:	Sixth Appellate District
RAFAEL GONZALES,	:	
	:	Court of Appeals
Defendant-Appellee.	:	Case No. WD-13-086
	:	

REPLY BRIEF OF PLAINTIFF-APPELLANT STATE OF OHIO

PAUL A. DOBSON (0064126)
Wood County Prosecutor
DAVID T. HAROLD* (0072338)
GWEN K. HOWE-GEBERS (0041521)
Assistant Prosecutors
**Counsel of Record*
One Courthouse Square, Annex
Bowling Green, Ohio 43402
419-354-9250
419-353-2904 fax
dharold@co.wood.oh.us

Counsel for Appellant
State of Ohio

ANDREW R. MAYLE* (0075622)
**Counsel of Record*
JEREMIAH S. RAY (0074655)
RONALD J. MAYLE (0030820)
Mayle Ray & Mayle LLC
210 South Front Street
Fremont, Ohio 43420
419-334-8377
419-355-9698 fax
amayle@mayleraymayle.com

Counsel for Appellee
Rafael Gonzales

TIMOTHY J. McGINTY (0024626)
Cuyahoga County Prosecutor
DANIEL T. VAN* (0084614)
Assistant Prosecutor
**Counsel of Record*
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

Counsel for *Amicus Curiae*
Ohio Prosecuting Attorney's Association

CARRIE WOOD (0087091)
Assistant State Public Defender

Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 (fax)
carrie.wood@opd.ohio.gov

Counsel for *Amicus Curiae*
Office of the Ohio Public Defender

MICHAEL DEWINE (0009181)
Attorney General of Ohio

ERIC E. MURPHY* (0083284)
State Solicitor
**Counsel of Record*
MICHAEL J. HENDERSHOT (0081842)
Chief Deputy Solicitor
HANNAH C. WILSON (0093100)
Deputy Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
eric.murphy@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
Ohio Attorney General Michael DeWine

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..... ii

ARGUMENT..... 1

RESTATEMENT OF CERTIFIED CONFLICT: Must the state, in prosecuting cocaine offenses involving mixed substances under R.C. 2925.11(C)(4)(a) through (f), prove that the weight of the cocaine meets the statutory threshold, excluding the weight of any filler materials used in the mixture?..... 1

RESTATEMENT OF PROPOSITION OF LAW: In a prosecution Under R.C. 2925.11(A) and (C)(4), the prosecution does not need To prove that the drug involved was pure cocaine; instead, the prosecution need only prove that the drug involved was "cocaine or a compound, mixture, preparation, or substance containing cocaine." The offense level, furthermore, is determined by the total weight of the drug involved (the compound, mixture, preparation, or substance containing cocaine), not just the weight of actual cocaine contained therein. 1

A. Introduction..... 1

B. This Court should answer "no" to the question raised by the certified conflict..... 1

C. The intent of the legislature should prevail over an absurdly narrow reading of the drug trafficking and drug possession statutes..... 3

D. Conclusion..... 5

CERTIFICATION..... 7

TABLE OF AUTHORITIES

Cases

Arlington Central School Dist. Bd. of Ed. v. Murphy, 548 U.S. 291, 126 S.Ct. 2455, 165 L.Ed.2d 526 (2006)..... 4

Carr v. United States, 560 U.S. 438, 130 S.Ct. 2229, 176 L.Ed.2d 1152 (2010)..... 4

Chickasaw Nation v. United States, 534 U.S. 84, 122 S.Ct. 528, 151 L.Ed.2d 474 (2001)..... 5

Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 122 S.Ct. 1146, 117 L.Ed.2d 391 (1992)..... 3

Garr v. Warden, Madison Corr. Inst., 126 Ohio St.3d 334, 2010-Ohio-2449, 933 N.E.2d 1063..... 6

Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000)..... 4

Miller v. Fairly, 141 Ohio St. 327, 48 N.E.2d 217, 25 O.O. 459 (1943). 4

State v. Chandler, 109 Ohio St.3d 223, 2006-Ohio-2285, 846 N.E.2d 1234..... 6

State v. Ferguson, 10th Dist. Franklin No. 13AP-891, 2014-Ohio-3153... 2

State v. Gilliam, 192 Ohio App.3d 145, 2011-Ohio-26, 948 N.E.2d 482 (2nd Dist.)..... 6

State v. Gonzales, 6th Dist. Wood No. WD-13-086, 2015-Ohio-461..... 1

State v. Hess, 2nd Dist. Montgomery No. 25144, 2013-Ohio-10..... 5

State v. Ryan, 8th Dist. Cuyahoga No. 98005, 2012-Ohio-5070..... 4-5

State v. Smith, 2nd Dist. Greene No. 2010-CA-36, 2011-Ohio-2568..... 1, 2

United States v. Kirby, 74 U.S. 482, 19 L.Ed. 278, 7 Wall. 482 (1869)... 3

Utah Junk Co. v. Porter, 328 U.S. 39, 66 S.Ct. 889, 90 L.Ed. 1071 (1946) 3

Vance v. St. Vincent Hospital & Medical Center, 64 Ohio St.2d 36, 39, 414 N.E.2d 406, 18 O.O.3d 216 (1980)..... 4

Statutes

R.C. 2925.03..... 1, 2, 3, 5

R.C. 2925.11..... 1, 2, 3, 5

Miscellaneous

Concise Oxford Dictionary (10th Edition)..... 2

Restatement of the Certified Conflict: Must the state, in prosecuting cocaine offenses involving mixed substances under R.C. 2925.11(C)(4)(a) through (f), prove that the weight of the cocaine meets the statutory threshold, excluding the weight of any filler materials used in the mixture?

Restatement of the Proposition of Law: In a prosecution under R.C. 2925.11(A) and (C)(4), the prosecution does not need to prove that the drug involved was pure cocaine; instead, the prosecution need only prove that the drug involved was "cocaine or a compound, mixture, preparation, or substance containing cocaine." The offense level, furthermore, is determined by the total weight of the drug involved (the compound, mixture, preparation, or substance containing cocaine), not just the weight of actual cocaine contained therein.

A. Introduction

This Court has a choice. The options are to follow either the clear intent of the legislature or read one word in isolation, which was a holdover from a previous form of the statute. The State submits that viewing the case law in Ohio and viewing this statute comparatively on a national level that it was not the will of the legislature to make Ohio "a purity state" as it relates to cocaine prosecutions. This is precisely what the Second District Court of Appeals recognized in *State v. Smith*, 2nd Dist. Greene No. 2010-CA-36, 2011-Ohio-2568, ¶ 4-16, and which the Sixth District Court of Appeals recognized that it was in direct conflict with in *State v. Gonzales*, 6th Dist. Wood No. WD-13-086, 2015-Ohio-461, ¶ 58. It is time for this Court to align the Sixth District with the eleven other appellate districts in Ohio that have ruled on this issue, and for this Court to definitively hold that Ohio is an aggregate weight state, just as 47 other states are.

B. This Court should answer "no" to the question raised by the certified conflict.

The Sixth District fully recognized that it was departing from well-settled precedent when it announced its holding in this case. *Id.* This Court, however, can right the ship by endorsing the analysis of the Second District and holding that R.C. 2925.03 and R.C. 2925.11 do not demand that purity testing of cocaine take place before the weight of the drug involved is determined. The Revised Code does not contain a definition for "filler materials"—as Gonzales wishes for,

and there is no need to create one in the common law. The trafficking and possession statues recognize that the drug involved is "cocaine or a compound, mixture, preparation, or substance containing cocaine." *See*, R.C. 2925.03(C)(4) and R.C. 2925.11(C)(4). And a mixture, by its nature, is "a combination of different things in which the components are individually distinct"[1]; therefore, it is expected that the drug involved will have other things in it, whether it is a "food item" or a cutting agent. *See State v. Smith*, 2nd Dist. Greene No. 2010-CA-36, 2011-Ohio-2568, ¶ 11. Additionally, "it [is] enough that the substance [***] tested as a whole, satisfied the weight requirement"; it need not be "pure cocaine equal to or exceeding the statutory amount." *Id.*, ¶ 15. *See also*, *State v. Ferguson*, 10th Dist. Franklin No. 13AP-891, 2014-Ohio-3153, ¶ 16, 18, 23-26 (Purity weight of crack cocaine not required and was treated identically to how the purity of powder cocaine is treated because there is no statutory distinction between them.) This analysis of aggregate weight stretches back to at least S.B. 2 in 1995, when an amount "of cocaine" was specified in the statute, originally to differentiate powder cocaine from crack cocaine.

And while opposing counsel pillories the State's use of the term "*faux pas*", it is what happened when R.C. 2925.03 and R.C. 2925.11 were amended in 2011 to remove the distinction between powder and crack cocaine. It was a small mistake, an oversight, a false step, to not remove the words "of cocaine" ten times in the two statutes affected. The Second District, as well as other appellate courts, recognized that—the Sixth District did not. And that is why this Court should answer the question raised by the certified conflict in the negative. It would make the law in Ohio uniform, as to the drug trafficking and drug possession statutes, and it would confirm that Ohio stood with the overwhelming number of states in this country that determine the weight of drugs in the aggregate, when it comes to the offenses at issue here.

---

[1] Concise Oxford Dictionary 914 (10th Edition).

C. The intent of the legislature should prevail over an absurdly narrow reading of the drug trafficking and drug possession statutes.

This Court's chosen method of statutory interpretation will determine the result in this case. The State submits that the will of the legislature should prevail. In fact, the words of Justice Frankfurter are quite apt here: "All construction is the ascertainment of meaning. And literalness may strangle meaning." *Utah Junk Co. v. Porter*, 328 U.S. 39, 44, 66 S.Ct. 889, 90 L.Ed. 1071 (1946). Reading "of cocaine" in isolation allows two words—as interpreted by Gonzales and the Sixth District—to strangle the meaning of the drug trafficking and drug possession statutes as well as stymie the ability to appropriately convict people who possess and traffic in drugs (particularly in large amounts), as the legislature intended. Nowhere in R.C. 2925.03 or R.C. 2925.11 is the word "pure" used; however, the words "a compound, mixture, preparation, or substance containing cocaine" are. *See*, R.C. 2925.03(C)(4) and R.C. 2925.11(C)(4). To read into the statute the word "pure" as an implicit modifier of "cocaine" goes against the clear intent of the legislature—punishing people who possess or traffic in illegal drugs.

Both briefs contain a litany of statutory construction cases that either argue for determining the will of the legislature or performing a strict reading of the words of the statute that is devoid of any policy considerations. Both approaches are appropriate in certain situations since the "canons of construction are no more than rules of thumb that help courts determine the meaning of legislation ***." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253, 122 S.Ct. 1146, 117 L.Ed.2d 391 (1992). And the overall goal of the canons of statutory construction is that "[a]ll laws should receive a sensible construction." *United States v. Kirby*, 74 U.S. 482, 486, 19 L.Ed. 278, 7 Wall. 482 (1869). Here, the intent of the legislature should prevail over a reading of the statutes in question that eschews any policy rationale.

Indeed, Gonzales cites to a case that is fairly Solomonic. "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the statutory language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Carr v. United States*, 560 U.S. 438, 458, 130 S.Ct. 2229, 176 L.Ed.2d 1152 (2010), quoting *Arlington Central School Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 296, 126 S.Ct. 2455, 165 L.Ed.2d 526 (2006), quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000). This holds true for two cases that Gonzales highlights from this Court as well. *See Vance v. St. Vincent Hospital & Medical Center*, 64 Ohio St.2d 36, 39, 414 N.E.2d 406, 18 O.O.3d 216 (1980) and *Miller v. Fairly*, 141 Ohio St. 327, 334, 48 N.E.2d 217, 25 O.O. 459 (1943). In fact, the latter case even holds that "Statutes are to be read in the light of attendant circumstances and conditions, and are to be construed as they were to be understood, when they were passed." *Miller v. Fairly*, 141 Ohio St. 327, 48 N.E.2d 217, 25 O.O. 459 (1943), at paragraph two of the syllabus. The State agrees.

Here, the words of the statute when read without an eye toward legislative intent as well as any sense of history and inserting the word "pure" into the drug trafficking and drug possession statutes creates an absurd disposition. That should not happen. And it goes against a wealth of both Ohio Supreme Court and United States Supreme Court precedent on statutory construction that was cataloged in the State's merit brief.

In that vein, the idea of lenity does not have the result that Gonzales says it does. "To the extent that the appellant's strictly textual reading of [the statute in question] and appellant's rule of lenity argument runs contrary to the legislative intent evinced by [the bill underlying that statute], those arguments cannot be allowed to overcome the intent of the legislature." *State v.*

Ryan, 8th Dist. Cuyahoga No. 98005, 2012-Ohio-5070, ¶ 21. *Accord State v. Hess*, 2nd Dist. Montgomery No. 25144, 2013-Ohio-10, ¶ 17. Indeed, both cases quote *Chickasaw Nation v. United States*, 534 U.S. 84, 122 S.Ct. 528, 151 L.Ed.2d 474 (2001), specifically the holding that "'canons [of statutory interpretation] are not mandatory rules. They are guides that need not be conclusive' and are intended to assist courts in determining the legislative intent underlying a statute. (Internal quotation marks and citation omitted.) *Id.* at 94, 122 S.Ct. 528, 151 L.Ed.2d 474." *State v. Ryan*, 8th Dist. Cuyahoga No. 98005, 2012-Ohio-5070, ¶ 21. *Accord State v. Hess*, 2nd Dist. Montgomery No. 25144, 2013-Ohio-10, ¶ 17. (Add sentence) For that very reason, lenity does not apply in this case as well as the other canons of statutory construction suggested by Gonzales.

D. Conclusion

Hyperbole aside, certain examples given by the State and by Gonzales have some merit. If the Sixth District's decision was to stand (and labs in the State of Ohio continued to not test drugs for purity because the process is not place, and it would be burdensome, costly, and time-consuming to do purity testing), then no matter how much the drug involved containing "cocaine or a compound, mixture, preparation, or substance containing cocaine" weighed, the highest level of offense that the defendant could be convicted of would be a low-level felony (Gonzales's ridiculous attempt solution aside). *See*, R.C. 2925.03(C)(4) and R.C. 2925.11(C)(4). Likewise, if the Second District's analysis—which draws from the logic of the other appellate districts in Ohio, absent the Sixth District—was to stand, then someone who primarily bought "filler material", whatever it may be, that contained a testable amount of cocaine would be subject to conviction and sentence as it relates to the aggregate amount of the drug involved.

The latter scenario, however, is in-line with the precedent of this Court as well as other appellate courts in Ohio. *Accord State v. Gilliam*, 192 Ohio App.3d 145, 150-151, 2011-Ohio-26, 948 N.E.2d 482 (2nd Dist.); *State v. Chandler*, 109 Ohio St.3d 223, 2006-Ohio-2285, 846 N.E.2d 1234, at the syllabus; *Garr v. Warden, Madison Corr. Inst.*, 126 Ohio St.3d 334, 338-339, 2010-Ohio-2449, 933 N.E.2d 1063. It would also reaffirm that Ohio was in concert with the 47 other states that measure the weight of drugs in possession and trafficking cases in the aggregate, as was listed in the State's merit brief.

Again, it boils down to a choice. And the State urges that this Court will take the course of following the intent of the legislature, the vast precedent held by appellate courts in Ohio, and the clear as well as overwhelming national trend, by choosing to answer the question posed by the certified conflict in the negative together with endorsing the State's sole proposition of law.

Respectfully submitted,

/s David T. Harold (0072338)
David T. Harold (0072338)
Assistant Prosecuting Attorney
Counsel of Record
Wood County Prosecutor's Office
One Courthouse Square, Annex
Bowling Green, Ohio 43402
Tel: (419) 354-9250
Fax: (419) 353-2904
Email: dharold@co.wood.oh.us

CERTIFICATE OF SERVICE

The undersigned counsel certifies that a true and accurate copy of the foregoing was served via first class U.S. Mail to counsel for Defendant-Appellee, Attorney Andrew R. Mayle, Mayle Ray & Mayle LLC, 210 South Front Street, Fremont, Ohio 43420, as well as to the following individuals and organizations: Carrie Wood, Assistant State Public Defender, counsel for *amicus curiae* Ohio Public Defender's Office, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215; Eric E. Murphy, State Solicitor, counsel for *amicus curiae* Ohio Attorney General Michael DeWine, Office of Attorney General, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215; Daniel T. Van, Assistant Prosecutor, counsel for *amicus curiae* Ohio Prosecuting Attorney's Association, Cuyahoga County Prosecutor's Office, The Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, on this 14th day of December, 2015.

/s David T. Harold (0072338)
David T. Harold (0072338)
Assistant Prosecuting Attorney