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IN THE SUPREME COURT OF OHIO
2015

STATE OF OHIO, Plaintiff-Appellant, -vs- JERMAIN THOMAS, Defendant-Appellee.	Case No. 15-473 On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals No. 101202

BRIEF OF AMICUS CURIAE FRANKLIN COUNTY PROSECUTOR RON O'BRIEN IN SUPPORT OF APPELLANT STATE OF OHIO

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STATEMENT OF AMICUS INTEREST

The Office of the Franklin County Prosecutor prosecutes thousands of cases every year, and some of these cases involve "cold case" situations in which the crime was not prosecuted until several years later, including crimes occurring before the advent of the Senate Bill 2 sentencing scheme. Current Franklin County Prosecutor Ron O'Brien therefore has a strong interest in the proper sentencing of such defendants in light of the General Assembly's intent that pre-Senate Bill 2 crimes would receive pre-Senate Bill 2 sentencing. Accordingly, in the interest of aiding this Court's review of the present appeal, Franklin County Prosecutor Ron O'Brien offers the following amicus brief in support of the State.

STATEMENT OF FACTS

Amicus Franklin County Prosecutor Ron O'Brien adopts by reference the procedural and factual history of the case as set forth in the Eighth District's opinion and as set forth in the merit brief of plaintiff-appellant State of Ohio.

ARGUMENT

> **Proposition of Law**: When an offender is sentenced after July 1, 1996, for an offense committed before that date, the offender shall be sentenced pursuant to the sentencing law in effect at the time of the offense, rather than pursuant to the sentencing law in effect at the time of sentencing.

Effective July 1, 1996, the General Assembly made sweeping changes to Ohio's sentencing laws. The new sentencing scheme is often referred to as "Senate Bill 2" sentencing or "SB 2" sentencing. Given the sweeping nature of the changes wrought by

the new SB 2 scheme, the General Assembly expressly chose to make the changes applicable only to new crimes occurring on or after July 1, 1996.

The Eighth District contends that House Bill 86, as effective in September 2011, countered this legislative intent, so that "reduced" penalties in "HB 86" must now be applied to pre-SB 2 offenders because of R.C. 1.58(B), which generally provides that an amendment reducing the punishment for an offense will apply to cases in which sentence is imposed after the effective date of such amendment. But the Eighth District's approach represents a misapplication of both "HB 86" and R.C. 1.58(B), since sentencing under "HB 86" is still sentencing under the sentencing scheme as created by SB 2, and the original legislative intent still controls so that the SB 2 sentencing scheme does not apply to prior offenders.

A. The Language of Senate Bill 2 and Senate Bill 269 Explicitly Precluded the New Sentencing Scheme from Applying to Old-Law Offenses.

Effective on January 3, 1972, Ohio adopted in substantial part the Model Statutory Construction Act. See, also, *Uniform Laws Annotated*, Appendix II. In R.C. 1.41 through R.C. 1.59, the Act provides guidelines to courts and lawmakers regarding recurring issues of statutory construction.

The Prefatory Note to the Model Act indicates that the purpose of the Model Act is "to set forth and clarify the common situations which arise in the preparation of legislative bills where a general statement by the legislature of its purpose may aid and assist in ascertaining the legislative intent." See id. Since rules of statutory construction are merely guides to the legislature's intent, the General Assembly can deviate from those rules when it desires to do so. After all, rules of statutory construction are not ends

in themselves. "[T]he purpose in every instance is to ascertain and give effect to the legislative intent." *Carter v. Youngstown*, 146 Ohio St. 203, 65 N.E.2d 63 (1946), paragraph one of the syllabus.

R.C. 1.58 represents one of the statutory guides to legislative intent set forth in Ohio's version of the Model Act. R.C. 1.58(A) generally provides that a reenactment, amendment, or repeal has no effect on the ability to prosecute offenses occurring before the effective date of the change and generally has no effect on the ability to impose the penalty as it existed at the time of the offense. This is also consistent with the principle that statutes are presumed to have only prospective application. R.C. 1.48. "In order to overcome the presumption that a statute applies prospectively, a statute must 'clearly proclaim' its retroactive application." *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, 882 N.E.2d 899, ¶ 10.

These principles are subject to a very narrow exception in R.C. 1.58(B), which addresses the effect of a statutory reenactment or amendment that reduces the punishment for a criminal offense. Paragraph (B) states, as follows:

> (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.

In order to benefit from R.C. 1.58(B), a defendant must show: (1) a "reenactment or amendment of a statute"; (2) "reduced"; (3) "the penalty, forfeiture, or punishment"; (4) for the "offense"; and, (5) the penalty was "not already imposed".

In Section 5 of SB 2, the General Assembly expressly provided that the new sentencing laws would not apply to offenses occurring before July 1, 1996. Section 5

provided, 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.

Prior to July 1, 1996, this language in SB 2 was amended by SB 269. Section 3 of SB 269 provided, as follows:

> SECTION 3. That Section 5 of Am. Sub. S.B. 2 of the 121st General Assembly be amended to read as follows:
>
> "Sec. 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, NOTWITHSTANDING DIVISION (B) OF SECTION 1.58 OF THE REVISED CODE, 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~~ IMPOSES 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."

These uncodified sections rendered R.C. 1.58(B) altogether inapplicable to the new sentencing laws adopted by SB 2 and SB 269. Defendants cannot invoke any "reduced" punishment they would receive under the new sentencing laws.

In *State v. Rush*, 83 Ohio St.3d 53, 697 N.E.2d 634 (1998), this Court affirmed that old-law offenders receive old-law sentences, not sentences under the SB 2

sentencing scheme. As stated in paragraph two of the syllabus of *Rush*:

> Because the General Assembly has expressly stated that the amended sentencing provisions of Am.Sub.S.B. No. 2 are applicable only to those crimes committed on or after its effective date, R.C. 1.58(B) is inapplicable. The amended sentencing provisions of Am.Sub.S.B. No. 2 apply only to those crimes committed on or after July 1, 1996.

B. Strong Reasons Existed to Limit the New Sentencing Scheme to New Offenses

There were obvious practical reasons for the General Assembly to prevent the application of the new sentencing scheme to old offenders and to categorically preclude application of R.C. 1.58(B) in such cases. The main reason was judicial economy. R.C. 1.58(B) requires that a court determine whether a reenactment or amendment "reduces" the punishment for an offense. Given the sweeping nature of the changes made by the SB 2 scheme, it often would have been very difficult or impossible to determine whether a punishment had been "reduced."

It remains far from clear that defendants sentenced under SB 2 would face a "reduced" penalty in comparison to pre-SB 2 law. As noted in *Rush*, although the available definite prison terms under SB 2 "ostensibly" appear to be shorter than the indefinite prison terms imposed under pre-SB 2 law, there are countervailing considerations pointing in the opposite direction.

> The state contends that the provisions of S.B. 2 do not necessarily result in reduced sentences. While under the old sentencing scheme, a defendant might receive a longer term of incarceration, that longer term was often *indefinite* and could be reduced by "good time" credit. See, *e.g.*, former R.C. 2929.11 (143 Ohio Laws, Part I, 1433). See, also, former R.C. 2929.01(C) (145 Ohio Laws, Part II, 2088-2089) and 2967.19(A) (145 Ohio Laws, Part IV, 6437) (reduction for good behavior). Under the new provisions, although a defendant's sentence may be shorter

> than the maximum indefinite sentence under the former scheme, it is a period of *actual* incarceration not subject to reduction for "good time" and subject to extension for bad behavior. See, *e.g.*, R.C. 2929.14 (extension for bad behavior). See, also, R.C. 2929.01(B) and 2967.11(B), as enacted by S.B. 2; R.C. 2967.19, repealed by S.B. 2 (reduction for good behavior). Thus, the state persuasively asserts that these variables will in many instances make it difficult, if not impossible, to calculate whether a defendant's sentence would truly be reduced under the terms of S.B. 2.

Rush, 83 Ohio St.3d at 56 n. 2.

Other changes were detrimental to defendants. Under the SB 2 scheme, offenders committing first-degree felonies and felony sex offenses face a mandatory five-year period of post-release control. R.C. 2967.28(B)(1). Violations of such post-release control can result in additional prison time up to one-half of the stated prison term. R.C. 2967.28(F)(3). Thus, a current-day rapist receiving a maximum eleven-year sentence is receiving what amounts to an 11-to-16 year sentence, and although he gets out of prison after 11 years, he is released with the additional possibility during his PRC supervision of facing up to 5.5 years of prison time being added for PRC violations. In addition, a court sentencing for a new felony committed while on PRC can impose additional prison time on the offender based on the PRC violation. Former R.C. 2967.28(F)(4); see current R.C. 2929.141.

Consecutive sentencing is also dramatically different under SB 2. Although SB 2 imposed finding requirements for consecutive sentencing, it also removed the 15-year cap on the aggregate minimum that applied to indefinite sentencing under prior law. See former 2929.41(E)(2); *State v. White*, 18 Ohio St.3d 340, 481 N.E.2d 596 (1985), syllabus ("automatically operating to limit the aggregate minimum sentencing term to

fifteen years”). Because of this cap, an old-law offender receiving consecutive indefinite sentences totaling, say, 30 to 75 years, would still receive good-time credits (see former R.C. 2967.19), and would still reach the parole board in roughly 10.5 years, although three-year firearm terms could add more to this number. Under SB 2 sentencing, however, there is no cap, and so consecutive sentences totaling 30 years are served largely day for day with no parole before then and with mandatory PRC supervision after release.

The amount of possible fines were also increased in the SB 2 scheme. The monetary fine imposable on a rapist went from $10,000, see former R.C. 2929.11(C)(1), to $20,000 under SB 2. R.C. 2929.18(A)(3)(a).

Potential ex post facto concerns also could have played a role in the General Assembly’s decision. For ex post facto purposes, the issue is not whether a defendant would actually receive a lighter sentence, but rather whether, as a whole, the sentencing scheme is more onerous or less onerous than the one imposed by prior law. See *Miller v. Florida*, 482 U.S. 423, 432, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987). By making the SB 2 sentencing scheme apply only to new offenses, the General Assembly avoided the time and expense of the judicial system needing to engage in these kinds of difficult assessments regarding whether one scheme was more harsh than the other.

The decision in *Rush* was correct. It oftentimes would be too difficult to determine whether a “reduction” has occurred. Moreover, a defendant should not be allowed to cherry-pick by focusing on ostensibly favorable provisions to the exclusion of other provisions that would make the overall available sentencing harsher under the new scheme. The General Assembly certainly was not required to allow the old-law

offenders to cherry-pick on a case-by-case basis, and such a result would have undercut the legislative intent to have the entire old-law scheme apply to old offenders and the entire SB 2 scheme apply to new offenders.

Part of the argument against pre-SB 2 sentencing is that defendants do not want to be subject to parole-board discretion because the parole board tends to keep defendants in prison well past their initial parole-eligibility date. But any such reliance on the parole board's policies or tendencies merely points up the inherent impossibility of comparing "old law" and "new law" under these circumstances. Under R.C. 1.58(B), the court would be required to determine *at the time of sentencing* whether the statutory amendment "reduced" the punishment for the offense. Because the amendment does not set parole-board policy or discretion, there would be no way to consider exactly how the parole board might assess the individual defendant. Whatever the parole board might do in any particular defendant's case, there is simply no method by which a sentencing court can determine at the time of sentencing whether the defendant is better off under the old system of parole or whether he would be better off under the new system of non-parolable day-for-day definite sentences.

The General Assembly could have had other reasons for refusing to make these sentencing-law changes retroactive to prior offenses. There would be an inherent difficulty in applying the new sentencing laws in cases indicted under the old statutory scheme. For example, the SB 2 scheme provides for the increased use of specifications as a sentencing mechanism. See, *e.g.*, R.C. 2941.146 (drive-by specification); R.C. 2941.149 (repeat violent offender); R.C. 2941.1410 (major drug offender). The concept of sexually-violent predator specifications was later folded into the SB 2 scheme, see

R.C. 2941.148, as were other specifications. Such specifications must be included in the indictment; yet, for cases commenced under prior law, the prosecution could not have foreseen the need to include these new or different specifications. If new law would apply, the prosecution would lose the opportunity to seek a greater sentence because the indictment did not include a specification. And even for indictments brought after July 1, 1996, it would often be impossible for the prosecutor to foretell at the time of indictment whether the case should be brought under old law or new law. Given the importance of the indictment in determining punishment, it would have been confusing and unfair to place the prosecutor and the grand jury in the position of attempting to foretell whether old law or new law should be applied.

In the final analysis, given the sweeping nature of the changes wrought by the new SB 2 sentencing scheme effective on July 1, 1996, it would have been folly for the General Assembly to allow R.C. 1.58(B) to apply. The issue of "reduction" would often lay beyond objective resolution, since courts would often be comparing apples and oranges in trying to determine whether "old law" was more severe than "new law." The General Assembly wisely chose a clear-cut demarcation and thereby avoided such extensive litigation.

C. House Bill 86 did not Countermand this Legislative Intent

The Eighth District cases have focused the following uncodified part of HB 86 as countermanding what the General Assembly had intended with the passage of SB 2.

> SECTION 4. The amendments to sections * * * 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.

Reliance on this uncodified language is flawed for several reasons.

The limited amendment to R.C. 2929.14(A) merely deleted the word "or" and then added a comma and the words "or eleven" so that the maximum sentence for "a felony of the first degree" would now be eleven years instead of ten years. But this amendment only addressed those offenses treated as a "felony of the first degree" under the SB 2 sentencing scheme. Because of the specific language in SB 2 and SB 269, old offenses are not treated as offenses under the new scheme. Defendant Thomas' rape offense remained "an aggravated felony of the first degree" under the rape statute as it existed under prior law (former R.C. 2907.02(B)); defendant's old crime never transitioned into a "felony of the first degree" to be sentenced under the new SB 2 sentencing scheme for which HB 86 now was providing for the availability of a new maximum eleven-year sentence.

In addition, Section 4 under HB 86 focuses on the "amendment," and, similarly, R.C. 1.58(B) focuses on the "amendment" and whether the "amendment" reduces the penalty for the offense. The amendment *itself* must reduce the penalty, and here the amendment *increased* the maximum sentence to eleven years; it was not a reduction. Even if Section 4 required that R.C. 1.58(B) be used here in an attempt to override the legislative intent of SB 2, R.C. 1.58(B) does not accomplish that feat. Only penalty-reducing amendments could apply to old offenses, and, by definition, a maximum-increasing amendment does not "reduce."

Overall, it is a misnomer to say that a defendant would be sentenced under "HB

86." Current-day offenders are sentenced under the SB 2 sentencing scheme, as amended in the several years since 1996. HB 86 included amendments that built on the SB 2 sentencing scheme. But the vast majority of the current sentencing scheme is still what SB 2 created and provided. It was SB 2 that changed from the previous indefinite sentencing scheme for aggravated felonies into a day-for-day definite sentencing scheme. It was SB 2 that decided that the definite sentencing in the new scheme would not apply to old-law offenders.

To be sure, when HB 86 amended R.C. 2929.14(A) to add the "eleven" language, it also repeated the already-existing language in that statute. But the repetition of pre-existing statutory language in an Act amending the statute in other respects does not constitute a reenactment of the pre-existing language. *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768, ¶ 27 & n. 7, citing *Stevens v. Ackman*, 91 Ohio St.3d 182, 193-95, 743 N.E.2d 901 (2001).

The already-existing language was enacted by SB 2, not by HB 86. "[W]here an act is amended, the part of the original act which remains unchanged is to be considered as having continued in force as the law from the time of its original enactment". *Stevens*, 91 Ohio St.3d at 194 (quoting another case). "A statute which is reenacted or amended is intended to be a continuation of the prior statute and not a new enactment, so far as it is the same as the prior statute." R.C. 1.54.

The "eleven" language added to R.C. 2929.14(A) by HB 86 is a mere statutory stub unto itself, and no one could be sentenced under it without all of the other language directly traceable to SB 2 . No current offender today is sentenced under "HB 86" but rather under the SB 2 sentencing framework as amended through the years. The vast

majority of the operative pieces of current sentencing law are still "SB 2" pieces dating from July 1, 1996. As a result, the original language enacted by SB 2 should still be controlled by the original legislative intent that such provisions would not apply to prior offenders. The addition of "eleven" made by HB 86 does not overcome that original legislative intent that SB 2's definite-sentencing requirement would not apply to old offenders.

Finally, it must be emphasized that R.C. 1.58(B) would only apply sentencing reductions to old offenders when those reductions result from a "reenactment" or an "amendment." When SB 2 created R.C. 2929.14(A) and its requirement of definite prison sentences, this was an *enactment*. See SB 2, Sec. 1 ("and new sections * * * 2929.14 * * * be enacted to read as follows"); see, also, SB 2, Preamble ("to enact new sections * * * 2929.14"). The new definite-sentencing requirement was neither a "reenactment" nor an "amendment." Even if the new definite-sentencing requirement were a "reduction," it would not apply to old offenders under R.C. 1.58(B) because it was not adopted by "reenactment" or "amendment" but rather only by enactment and therefore was not cognizable as a change that could be retroactively applied to old offenders under R.C. 1.58(B).

CONCLUSION

For the foregoing reasons, amicus curiae Franklin County Prosecutor Ron O'Brien supports the State's appeal here and urges that this Court reverse the judgment of the Eighth District Court of Appeals as to sentence and thereby affirm the sentence as imposed by the common pleas court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was e-mailed on December 21, 2015, to Daniel Van, dvan@prosecutor.cuyahogacounty.us, The Justice Center, 8th Floor, 1200 Ontario Street, Cleveland, Ohio 44113, counsel for the State, and to Russell Bensing, rbensing@ameritech.net , 1360 East Ninth Street, 600 IMG Building Cleveland, Ohio 44114, counsel for defendant.

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