Supreme Court of Ohio Clerk of Court - Filed December 21, 2015 - Case No. 2015-0473

IN THE

SUPREME COURT OF OHIO

STATE OF OHIO	:	NO. 2015-0473
Plaintiff-Appellant	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District
vs.	:	
JERMAINE THOMAS	:	Court of Appeals Case Number 101202
Defendant-Appellee	:	

BRIEF OF AMICUS CURIAE, THE OHIO PROSECUTING ATTORNEYS ASSOCIATION, IN SUPPORT OF STATE OF OHIO'S MERIT BRIEF

John Murphy
Executive Director of the Ohio Prosecuting Attorneys Association
196 East State Street, Suite 200
Columbus, Ohio 43215
(614) 221-1266

Joseph T. Deters (0012084P)
Hamilton County Prosecuting Attorney

Rachel Lipman Curran (0078850P)
Assistant Prosecuting Attorney

Hamilton County Prosecutor's Office
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
(513) 946-3091
Fax No. (513) 946-3021

COUNSEL FOR AMICUS CURIAE,
THE OHIO PROSECUTING ATTORNEYS ASSOCIATION

RUSSELL S. BENSING
Attorney at Law
1350 Standard Building
1370 Ontario Street
Cleveland, OH 44113
(216) 241-6650

COUNSEL FOR DEFENDANT-APPELLEE, JERMAINE THOMAS

Timothy J. McGinty (0024626**)**
Cuyahoga County Prosecutor

Daniel T. Van (0084614)
Assistant Prosecuting Attorney
Cuyahoga County Prosecutor's Office
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

ATTORNEYS FOR APPELLANT,
STATE OF OHIO

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

STATE OF AMICUS INTEREST 1

STATEMENT OF THE CASE AND FACTS 1

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: 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 S.B. 2 EFFECTIVE JULY 1, 1996 AND H.B. 86 EFFECTIVE SEPTEMBER 30, 2011. 2

CONCLUSION 6

PROOF OF SERVICE 6

TABLE OF AUTHORITIES

PAGE

CASES:

Stevens v. Ackman, 91 Ohio St.3d 182, 2001-Ohio-249, 743 N.E.2d 901 (2001) 4-5
State v. Hodge, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768 4-5
State v. Limoli, 140 Ohio St.3d 188, 2014-Ohio-3072, 16 N.E.3d 641 2
State v. Rush, 83 Ohio St.3d 53, 1998-Ohio-423, 697 N.E.2d 634 2
State v. Taylor, 138 Ohio St.3d 194, 2014-Ohio-460, 5 N.E.3d 612 2
State v. Thomas, 8th Dist. Cuyahoga No. 101202, 2015-Ohio-415 1-3

BILLS:

S.B. 2 1-5
H.B. 86 2-6

STATUTES:

R.C. 1.47 5
R.C. 1.48 3
R.C. 1.49 4
R.C. 1.54 4
R.C. 1.58 3-4
R.C. 2929.14 3-4
R.C. 2941.148 3
R.C. 2971.03 3,5

STATE OF AMICUS INTEREST

The Ohio Prosecuting Attorneys Association ("OPAA") offers this amicus brief in support of the State of Ohio's Merit Brief on Proposition of Law 1 in its Appeal.

The Ohio Prosecuting Attorneys Association is a private non-profit membership organization that was founded for the benefit of the 88 elected county prosecutors. The founding attorneys developed the original mission statement, which is still adhered to, and reads: "To increase the efficiency of its members in the pursuit of their profession; to broaden their interest in government; to provide cooperation and concerted action on policies which affect the office of Prosecuting Attorney, and to aid in the furtherance of justice. Further, the association promotes the study of law, the diffusion of knowledge, and the continuing education of its members."

Amicus has a great interest that Ohio Courts impose proper sentences for crimes committed in the past, and that legislative acts be consistently and uniformly interpreted and enforced in all districts of the State of Ohio. In *State v. Thomas*, 8th Dist. Cuyahoga No. 101202, 2015-Ohio-415, the Eighth District Court of Appeals held that defendants are entitled to application of the current sentencing statutes, no matter when their crimes were committed – all of the current felony sentencing maximum periods of incarceration are shorter than they were before the passage of S.B. 2. As a result, defendants who have long avoided prosecution have now enjoyed a windfall in addition to their many years of pre-trial freedom.

The decision of the Eighth District below should be reversed.

STATEMENT OF THE CASE AND FACTS

Amicus adopts by reference the statement of case and facts contained in the State of Ohio's Merit Brief.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: 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 S.B. 2 EFFECTIVE JULY 1, 1996 AND H.B. 86 EFFECTIVE SEPTEMBER 30, 2011.

This Court has previously held that the definite sentences passed into law under S.B. 2, which drastically changed the sentencing landscape in Ohio, did not apply to defendants who committed their crimes before the bill's effective date. *State v. Rush*, 83 Ohio St.3d 53, 1998-Ohio-423, 697 N.E.2d 634. But the Eighth District believes that the passage of H.B. 86 changed this Court's holding, and that defendants like Thomas, who committed crimes before the passage of S.B. 2, are subject to current sentencing guidelines. Because the Eighth District's decision lacks sound reasoning, this Court should overrule *State v. Thomas*, 8th Dist. Cuyahoga No. 101202, 2015-Ohio-415.

In *State v. Rush*, this Court determined the proper sentencing provisions to be applied to crimes committed before, but sentenced after, the effective date of S.B. 2. Because S.B. 2 explicitly said that defendants who committed crimes before July 1, 1996, were to be sentenced under the law in existence at the time of the offense, there was no difficulty in determining the legislature's intent. The Court decisively held that "the sentencing terms of S.B. 2 would apply only to crimes committed on or after its effective date." *Id*. at 58, 697 N.E.2d 634, 638.

State v. Limoli, 140 Ohio St.3d 188, 2014-Ohio-3072, 16 N.E.3d 641, and *State v. Taylor*, 138 Ohio St.3d 194, 2014-Ohio-460, 5 N.E.3d 612, have no application to this case. Both *Limoli* and *Taylor* were concerned with whether the amended portions of H.B. 86 lessened the punishments and penalties enumerated under S.B. 2 – these amendments were *explicitly* made applicable to defendants whose sentences had not been imposed upon the effective date of H.B. 86. H.B. 86 is not so clearly applicable to punishments for crimes committed before S.B. 2.

Statutes are presumed to be prospective unless they are "expressly made retroactive." R.C. 1.48. In deciding this case, the Court must determine whether the legislature expressly made H.B. 86 retroactive to 1993, and whether the legislature intended H.B. 86 to alter the prospective application of S.B. 2.

In pertinent part, Section 4 of H.B. 86 states that the amendments to R.C. 2929.14(A) apply to a person penalized under the section on or after its effective date if R.C. 1.58(B) makes the amendment applicable. R.C. 1.58(B) says that when the penalty or punishment for an offense is reduced by an amendment of a statute, the penalty or punishment shall be imposed according to the amendment.

Felonies in the first degree currently have a lower maximum sentence than the potential maximum sentence for the same crimes sentenced in 1993. This was the extent of the Eighth District's analysis in determining the applicability of R.C. 1.58(B) in *State v. Thomas*, 8th Dist. Cuyahoga No. 101202, 2015-Ohio-415. But the Ohio statutes governing definite sentencing were part of a statutory scheme. In deciding whether R.C. 1.58(B) entitles the defendant to sentencing under the current guidelines, this Court should not isolate only one portion of Thomas' potential sentence.

When the legislature enacted the definite sentencing provisions under S.B. 2, it also created the sexually violent offender predator specification under R.C. 2971.03, which *increased* the potential sentence for offenders such as Thomas. Under R.C. 2971.03(A)(3) if the defendant had been convicted of kidnapping and rape, each with a sexually violent offender specification (a likely event, had R.C. 2941.148 existed in 1993), he would have been sentenced to an indefinite term of ten years' to life imprisonment for his kidnapping offense, and an identical term of imprisonment for his rape offense. R.C. 2971.03(A)(3)(b)(ii) and (d)(ii). This sentence is no

shorter than the penalty for rape and kidnapping in 1993, when Thomas committed his crimes. Considering this possible penalty, Thomas' punishment is not reduced under current law, so R.C. 1.58 does not apply to him, and Section 4 of H.B. 86 does not make him subject to the current sentencing statutes.

Section 4 of H.B. 86 says *only the amendments* to division (A) of section 2929.14 made in H.B. 86 apply to a person to whom R.C. 1.58(B) makes them applicable. The only relevant portion of R.C. 2929.14(A) that was changed with the passage of H.B. 86 was the increase in potential punishment for a felony of the first degree from ten to eleven years. This amendment is not a decrease in the punishment or penalty for a felony in the first degree over the prior statute.

The defendant may argue that H.B. 86 amended the law in effect at the time of his crimes, but this is not true. "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." *Stevens v. Ackman*, 91 Ohio St.3d 182, 194, 2001-Ohio-249, 743 N.E.2d 901, 910-11 (2001), citing R.C. 1.54. S.B. 2 is the legislative enactment that altered the sentencing scheme in effect in 1993 and changed the potential sentences for rape and kidnapping. The version of R.C. 2929.14 in effect under S.B. 2 was largely unaffected by the passage of H.B. 86, and is only a continuation of the prior version, not a new enactment.

Other legal rules support the argument that this Court should consider the statutory changes of S.B. 2 in conjunction with the amendments of H.B. 86. When a statute is ambiguous, the court should consider the former statutory provisions in determining the intention of the legislature. R.C. 1.49. And, in *State v. Hodge*, this Court said, "We are unable to say that the General Assembly would intend the consecutive-sentencing provisions to be resurrected when the other judicial fact-finding provisions, which supported the overall sentencing framework,

remain constitutionally invalid and excised." *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768, ¶ 27.

In *Stevens v. Ackman*, this Court said:

> The essential goal of statutory construction is to give effect to the intent of the General Assembly. See *Carter v. Youngstown* (1946), 146 Ohio St. 203, 32 O.O. 184, 65 N.E.2d 63, paragraph one of the syllabus. The intent may be inferred from the particular wording the General Assembly has chosen to set forth the substantive terms of a statute. See *Wachendorf v. Shaver* (1948), 149 Ohio St. 231, 36 O.O. 554, 78 N.E.2d 370, paragraph five of the syllabus. Intent may also be revealed in the procedural passage of the legislative act under consideration, when that body passes legislation that enacts, amends, or repeals a statute. See **910 *State v. Wilson* (1997), 77 Ohio St.3d 334, 336–337, 673 N.E.2d 1347, 1350; see, also, *State ex rel. Durr v. Spiegel* (1914), 91 Ohio St. 13, 22, 109 N.E. 523, 525; *In re Hesse* (1915), 93 Ohio St. 230, 235, 112 N.E. 511, 512 (both determining intent of General Assembly by considering the way the statute at issue was amended).

Stevens v. Ackman, 91 Ohio St.3d 182, 193, 2001-Ohio-249, 743 N.E.2d 901, 909-910 (2001).

When it passed H.B. 86, the General Assembly likely did not intend to lessen the punishment for a defendant who commits a sexually violent offense. This Court should not ignore the legislative intent in passing R.C. 2971.03 to increase sentences for sexually violent offenders simply because the legislature lessened other criminal penalties for felonies in the first degree under S.B. 2. Thomas cannot be charged with a crime or specification that was not in existence when he committed his offense, but he likewise should not enjoy a benefit of a shorter sentence that he otherwise would not have received. In enacting a statute, it is presumed that "a just and reasonable result is intended." R.C. 1.47(C).

CONCLUSION

The felony sentences of H.B. 86 were not expressly made retroactive to Thomas' crimes. And legislative intent does not appear to support the application of current sentencing statutes to Thomas' sexually violent offenses. The contrary decision of the Eighth District should be reversed.

Respectfully,

Joseph T. Deters, 0012084P
Prosecuting Attorney

_/s/ Rachel Lipman Curran_____
Rachel Lipman Curran, 0078850P
Assistant Prosecuting Attorney
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
Phone: 946-3091
Attorneys for Plaintiff-Appellant, State of Ohio

PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Brief of Amicus Curiae in Support of State of Ohio's Merit Brief, by United States mail, addressed to Russell S. Bensing, 1350 Standard Building, 1370 Ontario Street, Cleveland, OH 44113, counsel of record, this 21st day of December, 2015.

_/s/ Rachel Lipman Curran_____
Rachel Lipman Curran, 0078850P
Assistant Prosecuting Attorney