Supreme Court of Ohio Clerk of Court - Filed January 15, 2016 - Case No. 2015-1221

IN THE SUPREME COURT OF OHIO
2016

STATE OF OHIO,	Case No. 2015-1221
Plaintiff-Appellant,	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
-vs-	
[J.M.],	
Defendant-Appellee.	Court of Appeals Case No. 15AP-77

REPLY BRIEF OF PLAINTIFF-APPELLANT STATE OF OHIO

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

Proposition of Law: A violation of R.C. 4503.11, concerning failure to register a motor vehicle, a fourth-degree misdemeanor, must be counted as an offense when determining eligible offender status under R.C. 2953.31. 1

Certified Conflict Question: Whether a violation of R.C. 4503.11, concerning failure to register a motor vehicle, a fourth-degree misdemeanor, must be counted as an offense when determining eligible offender status under R.C. 2953.31?..... 1

CONCLUSION.....3

CERTIFICATE OF SERVICE 4

TABLE OF AUTHORITIES

Cases

Clark v. Scarpelli, 91 Ohio St.3d 271, 275, 2001-Ohio-39, 744 N.E.2d 719 2

Miller Chevrolet v. Willoughby Hills, 38 Ohio St.2d 298, 313 N.E.2d 400 (1974) 3

State v. 1981 Dodge Ram Van, 36 Ohio St.3d 168, 522 N.E.2d 524 (1988) 3

State v. Black, 10th Dist. No. 03AP-862, 2004-Ohio-5258 2

State v. Clark, 4th Dist. No. 11CA8, 2011-Ohio-6354 2

State v. Dominy, 10th Dist. No. 13AP-124, 2013-Ohio-3744 2

State v. LaSalle, 96 Ohio St.3d 178, 2002-Ohio-4009, 772 N.E.2d 1172 1

Statutes

R.C. 1.58(A)(1) 1

R.C. 1.58(A)(3) 1

R.C. 2953.31(A) 2, 3

R.C. 4503.11 1

ARGUMENT

Proposition of Law: A violation of R.C. 4503.11, concerning failure to register a motor vehicle, a fourth-degree misdemeanor, must be counted as an offense when determining eligible offender status under R.C. 2953.31.

Certified Conflict Question: Whether a violation of R.C. 4503.11, concerning failure to register a motor vehicle, a fourth-degree misdemeanor, must be counted as an offense when determining eligible offender status under R.C. 2953.31?

In response to the State's brief, defendant makes two arguments that require a response.

A. The certified conflict was appropriately recognized and should be answered.

First, the General Assembly does not answer certified conflicts. This Court answers certified conflicts. Whether H.B. 83 became effective the day before, the day after, or the day of certification of the conflict by the Tenth District is irrelevant. Initially, the only date that matters is January 10, 2014: the day J.M. filed his application to seal the record of conviction. *See State v. LaSalle*, 96 Ohio St.3d 178, 2002-Ohio-4009, 772 N.E.2d 1172, at paragraph two of the syllabus ("The statutory law in effect at the time of the filing of an R.C. 2953.32 application to seal a record of conviction is controlling.") On that day, a violation of R.C. 4503.11 was classified as a fourth-degree misdemeanor.

But, even if the amendment of R.C. 4503.11 had been effective prior to the date of J.M.'s application, it still would not make a difference. J.M. was convicted of violating R.C. 4503.11 as a fourth-degree misdemeanor. It will always be considered a fourth-degree misdemeanor, because H.B. 53 did not alter or otherwise retroactively-amend his fourth-degree misdemeanor conviction. *See* R.C. 1.58(A)(1) (amendment of a statute does not affect the prior operation of the statute or "any prior action taken thereunder"); *see also* R.C. 1.58(A)(3) (amendment does not affect any violation thereof or penalty incurred in respect thereto).

If J.M. were to be convicted of a R.C. 4503.11 violation on or after July 1, 2015, it would be classified as a minor misdemeanor. Only then would the conviction be exempted by the plain unambiguous language of R.C. 2953.31(A), which exempts all minor misdemeanor convictions. Therefore, the certified conflict question was appropriately recognized by this Court and, at a minimum, remains relevant to J.M. and all other similarly-situated defendants with fourth-degree misdemeanor convictions for violating R.C. 4503.11. Furthermore, a definitive statement from this Court that R.C. 2953.31(A) is plain and unambiguous – and that all convictions that are not specifically exempted must be counted when determining eligibility – will put to rest a flawed precedent in the Tenth District that reaches beyond R.C. 4503.11. *See State v. Black*, 10th Dist. No. 03AP-862, 2004-Ohio-5258 (R.C. 4507.02); *State v. Dominy*, 10th Dist. No. 13AP-124, 2013-Ohio-3744 (R.C. 5577.04).

The opinion of the Tenth District in this case is in direct conflict with the Fourth District's holding in *State v. Clark*, 4th Dist. No. 11CA8, 2011-Ohio-6354. Furthermore, the same question has not been passed upon by this Court in a prior appeal. Accordingly, dismissal of this matter as improvidently certified pursuant to S.Ct.Prac.R. 8.04 would be inappropriate.

B. Plain, unambiguous language is not interpreted; it is applied.

Second, there is no "administrative traffic offenses" exception to R.C. 2953.31(A), as liberal construction can only occur following a determination that a statute is not plain and unambiguous. *See Clark v. Scarpelli*, 91 Ohio St.3d 271, 275, 2001-Ohio-39, 744 N.E.2d 719 ("We are guided by the rule that *when a statute is ambiguous*, the court, in determining the intent of the General Assembly, may consider the objective of the statute and the consequences of any particular construction.") (emphasis added) citing R.C. 1.49(A) and (E). Because there is no ambiguity in R.C. 2953.31(A), it requires no interpretation, liberal or otherwise. Rather, it can

only be applied as written. Although S.B. 337 expanded access to the sealing statutes, the statutes are still not available to J.M., as he has at least three total convictions, which is one more than is allowed by R.C. 2953.31(A). The certified conflict question should be answered in the affirmative.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court reverse the judgment of the Tenth District Court of Appeals affirming the trial court's decision to grant the defendant's application to seal his criminal conviction, when he did not qualify as an "eligible offender" and was therefore ineligible to seal the record of this case.[1]

Respectfully submitted,

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[1] If this Court *sua sponte* contemplates a decision upon an issue not briefed, the State respectfully requests notice of that intention and requests an opportunity to brief the issue before this Court makes its decision. *Miller Chevrolet v. Willoughby Hills*, 38 Ohio St.2d 298, 301 & n. 3, 313 N.E.2d 400 (1974); *State v. 1981 Dodge Ram Van*, 36 Ohio St.3d 168, 170, 522 N.E.2d 524 (1988).

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served by electronic mail upon David L. Strait at dlstrait@franklincountyohio.gov, Counsel for Defendant-Appellee, on January 15, 2016.

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