

IN THE SUPREME COURT OF OHIO  
2016

STATE OF OHIO,

Case No. 14-1409

Plaintiff-Appellee,

-vs-

On Appeal from the  
Franklin County Court  
of Appeals, Tenth  
Appellate District

KARI MERCIER,

Court of Appeals  
Case No. 13AP-906

Defendant-Appellant

**MOTION FOR RECONSIDERATION  
OF PLAINTIFF-APPELLEE STATE OF OHIO**

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**MOTION FOR RECONSIDERATION  
OF PLAINTIFF-APPELLANT STATE OF OHIO**

Pursuant to S.Ct.Prac.R. 18.02(B)(4), and for the reasons stated in the attached memorandum in support, plaintiff-appellee State of Ohio respectfully requests this Court to reconsider its January 19, 2016 decision that reversed the decision of the Tenth District on the authority of *State v. South*, Slip Opinion No. 2015-Ohio-3930.

Respectfully submitted,

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/s/ M. Walton  
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## MEMORANDUM IN SUPPORT

The test generally used in ruling on a motion for reconsideration is “whether the motion calls to the attention of the court an obvious error in its decision, or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been.” *Columbus v. Hodge*, 37 Ohio App.3d 68, 68, 523 N.E.2d 515 (10th Dist.1988). Under either alternative the State respectfully submits that reconsideration is warranted in this case.

### A.

Under the first alternative, it was obvious error to apply the holding in *South* in order to reverse the decision of the Tenth District’s decision in *Mercier* for two reasons. First, the defendant in *Mercier* was not convicted of a repeat-offender specification as defined by R.C. 2941.1413. *State v. Mercier*, 10<sup>th</sup> Dist. No. 13AP-906, 2014-Ohio-2910, ¶17. Rather, she was convicted only of OVI as a third-degree felony. As noted by the majority opinion in *South*, its scope was limited to circumstances where a defendant was convicted of OVI as a third-degree felony *and* the repeat-offender specification. *South*, ¶1 (“[W]e consider how multiple sentencing statutes interact when a defendant is convicted of an operating-a-vehicle-while-under-the-influence (‘OVI’) offense as a third-degree felony, as well as a repeat-offender specification.”). Because the repeat-offender specification is not at issue in *Mercier*, *South* could not control. Therefore, it should not have been applied as if it did control when *Mercier* is factually distinguishable.

Second, the Tenth District’s decision in *Mercier* relied upon specific statutory language that was not addressed by the *South* decision. Indeed, in affirming the trial

court's sentence of 54 months for Mercier's third-degree felony conviction for OVI, the Tenth District held that a defendant convicted for OVI as a third-degree felony, without specification, is sentenced pursuant to R.C. 4511.19(G)(1) and not pursuant to R.C. 2929.14(A)(3). *See Mercier*, ¶8 (“Under the plain and unambiguous language of R.C. 4511.19(G)(1), the sentencing provisions in R.C. 4511.19(G)(1)(e) controls here rather than any provision in R.C. Chapter 2929.”).

In reaching this conclusion, the Tenth District relied upon R.C. 4511.19(G)(1), which provides, in relevant part:

Whoever violates any provision of divisions (A)(1)(a) to (i) \* \* \* is guilty of operating a vehicle under the influence of alcohol \* \* \*. *The court shall sentence the offender for either offense under Chapter 2929. of the Revised Code, except as otherwise authorized or required by divisions (G)(1)(a) to (e) of this section.*

(Emphasis added.)

Revised Code 4511.19(G)(1)(e)(i) requires a court to impose a mandatory 60-day prison term and authorizes a court to impose a prison term in addition to the mandatory prison term. However, “[t]he cumulative total of a sixty-day mandatory prison term and the additional prison term for the offense shall not exceed five years.” R.C. 4511.19(G)(1)(e)(i). Thus, the Tenth District concluded that this statutory language authorized the trial court to impose a prison term of up to five years, obviating the need to consult Chapter 2929. *Mercier*, ¶11.

Significantly, *South* itself supports a grant of reconsideration in this case. This Court recognized in *South* that, “[w]hen we construe statutes relating to the same subject matter, we consider them together to determine the General Assembly’s intent – even when the various provisions were enacted separately and make no reference to each

other.” *South*, ¶ 8. “This requires us to harmonize provisions unless they irreconcilably conflict.” *Id.* “In doing so, ‘we must arrive at a reasonable construction giving the proper force and effect, if possible, to each statute.’” *Id.* The Tenth District’s decision in *Mercier* gave effect to express statutory language in R.C. 4511.19(G)(1)(e)(i) that specifically authorizes a maximum sentence of five years for a third-degree felony OVI offense when unaccompanied by a repeat-offender specification. The State submits that allowing the Tenth District’s analysis and conclusion to go unaddressed constitutes an obvious error, thus supporting a grant of reconsideration. The same reasoning supports a grant of reconsideration under the second alternative, as outlined below.

B.

Regarding the second alternative for reconsideration, applying *South* to reverse the Tenth District’s decision would leave unaddressed statutory language that should be fully considered. Revised Code 4511.19(G)(1), in plain and unambiguous language, provides that a defendant convicted for a third-degree felony OVI offense is sentenced pursuant to the OVI statute, not the general sentencing statutes contained in Chapter 2929. *See Mercier*, ¶14 (“R.C. 4511.19(G)(1) explicitly allows for a court to sentence a defendant for violations of R.C. 4511.19(A)(1)(a) to the exclusion of R.C. Chapter 2929.”). The Tenth District also noted that none of the other appellate courts confronted with this issue had addressed this specific statutory language in reaching their conclusions. *Id.* at ¶¶14, 17 citing *State v. Owen*, 11<sup>th</sup> Dist. No. 2012-L-102, 2013-Ohio-2824; *State v. May*, 2<sup>nd</sup> Dist. No. 25359, 2014-Ohio-1542; *State v. Sturgill*, 12<sup>th</sup> Dist. Nos. CA2013-01-002/003, 2013-Ohio-4648, overruled by *State v. Burkhead*, 12<sup>th</sup> Dist. No. CA2014-02-028, 2015-Ohio-1085; and *State v. South*, 9<sup>th</sup>

Dist. No. 26967, 2014-Ohio-374, affirmed in part and reversed in part by *South*, 2015-Ohio-3930.

The Tenth District should not be reversed when the specific statutory language relied upon by the court has not been fully considered. In addition to rising to the level of an obvious error as noted above, applying *South* to reverse the Tenth District precludes full consideration of plain and unambiguous statutory language which expressly authorizes a maximum sentence of five years for a third-degree felony OVI offense. This statutory language should be fully considered by this Court prior to deciding *Mercier*. This Court's decision in *South* cannot be considered dispositive on this point because *South* did not address this express statutory language. Since *South* did not fully consider it, it is improvident to dispose of the present case based on *South*, and reconsideration is therefore warranted.

Based upon the foregoing, the State respectfully requests that the Court grant reconsideration. Upon reconsideration, this Court should order that the case proceed to briefing and argument.

Respectfully submitted,

/s/ M.Walton  
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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing was sent by e-mail on January 29, 2016, to Timothy E. Pierce, tepierce@franklincountyohio.gov, Counsel for Defendant-Appellant.

/s/ M.Walton  
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