Supreme Court of Ohio Clerk of Court - Filed February 22, 2016 - Case No. 2015-0473

IN THE SUPREME COURT OF OHIO
2016

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

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

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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.

Amicus Franklin County Prosecutor Ron O'Brien stands by the amicus brief he filed on December 21, 2015, and offers the following response to defendant's brief.

A.

Defendant mainly argues that the current Parole Board is stingy in granting parole and therefore that indefinite sentencing under the pre-SB 2 sentencing scheme will invariably result in the longer service of sentences. At least three problems arise from this argument, however.

First, even if R.C. 1.58(B) applied in assessing this problem, it only takes into account whether the "reenactment" or "amendment" itself reduces the penalty for the offense. A sentencing court cannot predict what Parole Board practices and tendencies will be several years from the time of sentencing. Defendant concedes that such practices and tendencies have changed and can change. Defendant even posits that it is now the policy position of the State that prison sentences be shortened and prisoners be released sooner. If so, one would expect that such policies will eventually be reflected in the Parole Board's approach toward the parole of old-law offenders receiving indefinite sentences.

Second, the statistics cited by defendant are misleading. The old-law offenders who reasonably could be released on parole in fact have been released, leaving a group of old-law offenders who are largely being denied parole because they committed the worst

offenses and therefore could be expected to be consistently denied parole. *Columbus Dispatch*, May 16, 2015, Editorial, Keep Parole Board Resolute ("as Mausser has said, these old-law inmates are serving time for the worst of crime; that's why their parole petitions generally are rejected. Of the 4,421 longtime inmates still in Ohio prisons — roughly 1 in 11 prisoners — half are murderers and a third committed sex offenses."; "The Ohio Parole Board already has released about everyone it can, including some pretty frightening people. That alone should make Ohioans leery to second-guess this board when it says no."); *Dayton Daily News*, October 20, 2015, Parole Releases Decline Substantially in Ohio ("Inmates sentenced under the old law continue to be parole-eligible, but officials say most nonviolent criminals have been paroled or otherwise released since 1996, leaving only the worst cases."); *Correctional Institution Inspection Committee*, DRC Parole Population, October 20, 2015 ("DRC staff clarified that the higher average times are not due to stricter Parole Board decision-making, but simply the higher severity offenses of the current parole eligible population.").

The statistics cited by defendant do not reflect how the Parole Board would approach newly-convicted old-law offenders that would now be entering into their newly-imposed pre-SB 2 indefinite sentences.

Third, defendant does not address at all the differences in consecutive sentencing under pre-SB 2 law that allowed the old-law offenders to reach Parole Board consideration in as little as 10.5 years even though receiving very long aggregate sentences. An old-law offender receiving, say, a 30-to-75 indefinite sentence would reach the Parole Board in 10.5 years; a new-law offender receiving a 30-year aggregate sentence serves the sentence nearly day-for-day with no parole consideration.

To be sure, old-law offenders having long consecutive sentences very well may be denied parole a number of times, owing to the number and seriousness of their offenses. But such parole consideration still favors them in comparison to consecutively-sentenced new-law offenders who could serve decades of time largely day-for-day without parole consideration.

As recognized in *State v. Rush*, 83 Ohio St.3d 53, 697 N.E.2d 634 (1998), all of the variables "in many instances [will] make it difficult, if not impossible, to calculate whether a defendant's sentence would truly be reduced under the terms of S.B. 2." Id. at 56 n. 2.

In the end, however, it does not matter whether courts might eventually be able to untie the Gordian knot of whether new-law definite sentencing under SB 2 scheme would amount to a "reduction" in comparison to old-law indefinite sentencing under the pre-SB 2 scheme. The General Assembly wisely chose not to saddle the courts with that difficult judgment. Instead, the General Assembly chose to set forth a clear demarcation applying pre-SB 2 sentencing to old-law crimes and applying SB 2 sentencing to new-law crimes. This categorical approach saves judicial resources, avoids protracted litigation, and prevents any possibility of defendants being subject to a confusing mixture of pre-SB 2 and post-SB 2 sentencing provisions at the same time.

B.

Defendant claims that *State v. Taylor* and *State v. Limoli* establish an overarching legislative intent to reduce prison populations and shorten prison sentences. *State v. Limoli*, 140 Ohio St.3d 188, 2014-Ohio-3072, 16 N.E.3d 641; *State v. Taylor*, 138 Ohio St.3d 194, 2014-Ohio-460, 5 N.E.3d 612. From this, defendant argues that the General

Assembly must have intended override its earlier intent to limit SB 2 sentencing to offenders committing offenses on or after July 1, 1996.

But *Taylor* and *Limoli* only establish an intent to reduce sentences in some respects for offenders who were already subject to SB 2 sentencing because their offenses occurred after July 1, 1996. *Limoli*, ¶ 5 (offense date July 16, 2010); *Taylor*, ¶ 2 (offense date July 23, 2011). In other words, these cases only address the transition from one version of the SB 2 sentencing scheme to another version of the SB 2 scheme as amended by HB 86. These cases do not recognize any legislative intent to reach further back to eliminate the clear demarcation between old-law and new-law offenders set forth in the uncodified provisions of SB 2 and SB 269. In fact, *Limoli* favorably cites *Rush* for the proposition that "the General Assembly's expression of its intent must control." *Limoli*, ¶ 13, citing *Rush*, 83 Ohio St.3d at 57. Therefore, the expression of the General Assembly's intent in SB 2 and SB 269 controls, and no language in HB 86 repeals or countermands that intent.

In addition, *Taylor* and *Limoli* only address the penalty-reducing intent of the amendments of HB 86 as to the crimes of theft and crack-cocaine possession. No such similar intent can be drawn from the HB 86 amendment to R.C. 2929.14(A)(1), which *increased* the maximum sentence to eleven years for felonies of the first degree under SB 2. The increasing of the maximum penalty cannot be taken as any sign of legislative intent to shorten prison sentences.

C.

Defendant fails to address a number of nuts-and-bolts problems with his claim that he must be sentenced pursuant to "HB 86." He does not explain how the HB 86

amendment to R.C. 2929.14(A)(1) *increasing* the maximum sentence for a "felony of the first degree" to eleven years would be an amendment "reducing" the penalty for the offense.

Defendant also fails to address the fact that "HB 86" is not a sentencing scheme unto itself and that the major operative pieces of the current sentencing scheme were adopted by SB 2, not by HB 86. It was SB 2 that changed from the previous indefinite-sentencing scheme for aggravated felonies into a day-for-day definite sentencing scheme, not HB 86. It was SB 2 that provided for the definite-sentencing range of 3, 4, 5, 6, 7, 8, 9, or 10 years for a "felony of the first degree," not HB 86.

The defense ironically highlights this problem by stating that "Even one unversed in higher mathematics can figure out that 3 to 11 years is less than 5 to 25 years." (Defendant's Brief, at 10) This passage ignores the fact that it was SB 2 that eliminated the indefinite sentencing that would allow an indefinite sentence of "5 to 25 years." In addition, it was SB 2 that created the definite-sentence options ranging from 3 to 10 years for felonies of the first degree. Such changes would *still* be controlled by the uncodified provisions in SB 2 and SB 269 from back in 1996, which provide that the old-law offenders receive pre-SB 2 sentences.

Again, the only change made by HB 86 as to R.C. 2929.14(A)(1) was to increase the maximum to 11 years, an amendment which did not reduce the penalty and therefore would not potentially implicate R.C. 1.58(B).

D.

Finally, defendant does not address the problem that R.C. 1.58(B) would only apply sentencing reductions to prior offenders when those reductions result from a

"reenactment" or an "amendment." As effective in 1996 up to today, the definite-sentencing requirement set forth in R.C. 2929.14(A) was neither a "reenactment" nor an "amendment" but rather an "enactment." 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

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