

**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	:	

REPLY BRIEF OF AMICUS CURIAE, OHIO PROSECUTING ATTORNEYS ASSOCIATION, IN SUPPORT OF APPELLANT STATE OF OHIO
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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.

Amicus here reaffirms that Appellee Jermain Thomas must be sentenced under the law in effect at the time of his offense. In his merit brief, Appellee makes no argument that he is entitled to be sentenced under current law – he merely claims that the intent of the legislature is to free felons from Ohio’s prisons. But Appellee ignores the plain language of applicable statutes, and disregards the legislature’s action increasing the possible penalty for sexual offenders. As such, Thomas fails to show any reasonable grounds on which the Eighth District’s decision in *State v. Thomas*, 8th Dist. Cuyahoga No. 101202, 2015-Ohio-415, lies.

Plain Language

Statutes are presumed to be prospective unless they are “expressly made retroactive.” R.C. 1.48. 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.

Thomas committed only two crimes in this case – kidnapping and rape. H.B. 86 did not amend the sentencing statute, R.C. 2929.14(A), to reduce the penalty or punishments for these crimes; it instead increased the possible punishment for felonies in the first degree from ten to eleven years. Thus, R.C. 1.58(B) does not apply to kidnapping and rape as amended under H.B. 86. The express language of retroactivity included in Section 4 of H.B. 86 does not apply to Thomas.

Moreover, the rest of the sentencing scheme under R.C. 2929.14(A) was only a continuation of the prior statute, which was enacted under S.B. 2. R.C. 1.54. As such, H.B. 86 does not affect the prior operation of the statute. R.C. 1.58(A)(1). Nor does it affect the penalty thereof. R.C. 1.58(A)(3). 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. This Court previously held that “the sentencing terms of S.B. 2 would apply only to crimes committed on or after its effective date.” *State v. Rush*, 83 Ohio St.3d 53, 58, 1998-Ohio-423, 697 N.E.2d 634, 638.

Appellee’s further claim that “nothing compels the conclusion” that “the determination of whether there has been a reduction in penalty has to be done on an individual basis” is mistaken. As R.C. 1.58(B) specifies, if **the penalty** for any offense is reduced by an amendment of a statute, **the penalty** shall be imposed as amended. The fact that the penalty for theft of \$600 was lessened under H.B. 86 has bearing only on the applicability of those punishments to theft offenses, not to rape and kidnapping. See Defendant-Appellee’s brief, p. 10.

Appellee cites no express language in H.B. 86 that makes the current penalty for rape and kidnapping applicable to him. On this basis alone, the Eighth District should have overruled his claim on direct appeal.

Legislative Intent

Appellee claims that the legislative intent in passing H.B. 86 was simply to reduce the prison population. But while this may be true in regards to low-level drug offenders, it cannot be said regarding violent first-degree offenders, such as Thomas. As was previously indicated, H.B. 86 increased the penalty for felonies in the first degree. And, as Appellee pointed out in his brief, the legislature intended a defendant such as Thomas (who lacks a prior sexual offense

conviction) to be classified as a sexually violent predator, and has specifically made the defendant's underlying offense a predicate for the specification. Defendant-Appellee's brief, p. 9, fn. 2. Appellee's claim that the legislature has blindly intended to shorten the sentences of all offenders, without distinction, is unfounded.

Appellee's additional complaint that there are now three groups of defendants – those who committed crimes before S.B. 2 came into effect, those who committed crimes after H.B. 86 came into effect, and those who committed their crimes between those two dates but are entitled to reduction in the penalties thereof (he ignores those who are not entitled to a reduction, but who fall into this time period) – is inane. The legislature changed sentencing laws repeatedly over the last three decades, and it is typical for laws to only be applied prospectively. R.C. 1.48. Appellee fails to show that such a result is so unwieldy that it should not be given effect. See R.C. 1.47(D). Appellee further fails to show that it is unjust or unreasonable to interpret S.B. 2 and H.B. 86 as the State has argued. See R.C. 1.47(C).

CONCLUSION

The felony sentences of H.B. 86 were not expressly made retroactively applicable to Thomas' crimes. The contrary decision of the Eighth District *State v. Thomas*, 8th Dist. Cuyahoga No. 101202, 2015-Ohio-415, should be overruled.

Respectfully,

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PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Reply Brief of Amicus Curiae in Support of State of Ohio's Merit Brief, by United States mail, addressed to Russell S. Bensing, 600 IMG Building, 1360 East Ninth Street, Cleveland, OH 44114, counsel of record, this 29th day of February, 2016.

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