

**IN THE
SUPREME COURT OF OHIO**

STATE OF OHIO

CASE NO 2015-0473

Plaintiff-Appellant

ON APPEAL FROM CUYAHOGA
COUNTY COURT OF APPEALS,
EIGHTH APPELLATE DISTRICT

v.

JERMAIN THOMAS

COURT OF APPEALS CASE NO. 101202

Defendant-Appellee

APPELLANT-STATE OF OHIO'S REPLY BRIEF

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STATEMENT OF THE CASE

The State corrects its recitation of the original sentence imposed in this case. On March 24, 2014, Thomas was sentenced as follows, as journalized on March 28, 2014:

DEFENDANT SENTENCED TO 8-25 YEARS PRISON ON COUNT 1, RAPE 2907.02 A(2) F1 WITH FIREARM SPECIFICATION. 3 YEAR FIREARM SPECIFICATION TO BE RUN PRIOR TO AND CONSECUTIVE TO THE BASE CHARGE OF RAPE FOR A TOTAL PRISON TERM OF 11-25 YEARS. DEFENDANT SENTENCED TO 8-25 YEARS PRISON ON COUNT 2, KIDNAPPING 2905.01 A(4) F1 WITH FIREARM SPECIFICATION. COUNTS 1 AND 2 TO RUN CONCURRENT TO EACH OTHER FOR A TOTAL PRISON TERM OF 11-25 YEARS THE COURT DETERMINES THAT THE DEFENDANT IS NOT APPROVED FOR PLACEMENT INTO INTENSIVE PROGRAM PRISON.

On July 21, 2015, Thomas received a sentence of 14 years, which included an 11 year definite sentence on count 1, with a 3-year firearm specification to run prior to and consecutive to the 11 year sentence. He was also sentenced to 11 years on count 2, which was run concurrent to his original sentence.

LAW AND ARGUMENT

PROPOSITION OF LAW: 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.

Introduction and Summary

Under R.C. 1.48, there is a presumption that statutes are prospective in its operation unless expressly made retrospective. Nothing makes S.B. 2's reclassification of Rape from an Aggravated Felony of the First Degree to a Felony of the First Degree, and H.B. 86's sentencing amendments which increased the punishment for a Felony of the First Degree expressly retroactive to a Rape committed prior to September 30, 2011. Section 5 of S.B. 2 and its amendment through Section 3 of S.B. 269 was not expressly repealed by Section 4 of H.B. 86. This Court must follow its interpretation of Section 5 of S.B. 2 in *State v. Rush*, 83 Ohio St.3d 53, 1998-Ohio-423 and hold

that the defendant who commits an offense prior to July 1, 1996 is subject to the law in effect at the time of offense.

The S.B. 2 Wall Was Not Repealed By Section 4 of H.B. 86

Central to the argument in this case is the application of R.C. 1.58(B) with respect to a defendant who committed an offense prior to July 1, 1996. As argued in the State’s merit brief, S.B. 2 created a wall that separated how offenders who committed their offense prior to July 1, 1996 and those who committed their offense after July 1, 1996 were to be treated. Appellee makes no compelling argument as to why this Court should ignore the rule that legislative enactments must be explicitly repealed. None of the arguments advanced by Appellee compels a legal conclusion that the General Assembly implicitly repealed S.B. 2. Further, Section 4 of H.B. 86 makes only certain enumerated amendments retroactive; however, those enumerated amendments relate to S.B. 2 law.

As Appellee points out there are differences between pre S.B. 2 law and the law “ushered” in on July 1, 1996 by S.B. 2. *Appellee’s Brief, pg. 1.* Appellee states that the uncodified provision of Section 5 of S.B. 2, which was later amended by Section 3 of S.B. 269, provided that S.B. 2’s provisions applied only to crimes committed after its effective date, “notwithstanding division (B) of section 1.58 of the Revised Code.” Appellee then delves into a discussion of why R.C. 1.58 (B) should make applicable provisions of H.B. 86 to offenses committed prior to July 1, 1996. However, Appellee’s description of Section 5 of S.B. 2 is not entirely complete and ignores the S.B. 2 wall.

The original, unamended form of Section 5 of S.B. 2, which created the S.B. 2 wall, reads as follows:

Section 5. The provisions of the Revised Code in existence prior to July 1, 1996, shall apply to a person upon whom a court imposed a term of imprisonment prior to that date and to a person upon whom a court, on or after that date and in accordance with the law in existence prior to that date, imposed a term of imprisonment for an offense that was committed prior to that date.

The provisions of the Revised Code in existence on and after July 1, 1996, apply to a person who commits an offense on or after that date.

Section 5 of S.B. 2 (146 Ohio Laws, Part VI, 7810)

In *State v. Rush*, 83 Ohio St.3d 53, 1998-Ohio-423, this Court held that, “the amended sentencing provisions of S.B. 2 apply only to those crimes committed on or after July 1, 1996,” when it discussed the redundant amendments of Section 5 of S.B. 2 through Section 3 of S.B. 269 (146 Ohio Laws, Part VI, 11099). However, the clear and unambiguous language from Section 5 of S.B. 2 made the inverse clear: “The provisions of the Revised Code in existence prior to July 1, 1996 *shall apply* [...] to a person upon whom a court, on or after that date and in *accordance to the law in existence prior to that date*, imposed a term of imprisonment for an offense that was committed *prior to that date*.” Section 5 of S.B. 2 (Emphasis added). The General Assembly reinforced its intent when it made clear that the, “provisions of the Revised Code in existence on or after July 1, 1996, apply to a person who commits an offense *on or after that date*.” *Id.* The language of Section 5 of S.B. 2 is important because it limits the application of S.B. 2’s provisions to those offenses committed on or after its effective date and created the S.B. 2 wall.

The limited application of Section 4 of H.B. 86

The language of Section 4 of H.B. 86 was not a carte blanche invitation to extend every amendment under H.B. 86 retroactively. Instead, Section 4 of H.B. 86 applied to offenses specified

or penalized under those sections mentioned in Section 4 of H.B. 86 committed on or after the effective date of H.B. 86 and to whom R.C. 1.58(B) made those amendments applicable.¹

As applicable in this case, Rape, R.C. 2907.02 is not one of the offenses specified in Section 4 of H.B. 86, nor was the punishment for R.C. 2907.02 amended in favor of the defendant as a result of H.B. 86. Instead, any changes in the sentencing scheme for R.C. 2907.02 were the result of S.B. 2, which transformed a violation of R.C. 2907.02 from an aggravated felony of the first degree to a felony of the first degree. H.B. 86 did not amend R.C. 2929.14(A) to reduce the sentence for a felony of the first degree but rather increased it to include 11 years as an available sentencing option. This amended the sentencing scheme established by S.B. 2.² The same applies for Appellee's Kidnapping conviction in violation of R.C. 2905.01, which is not listed under Section 4 of H.B. 86. In *State v. Towns*, 8th Dist. Cuyahoga No. 102425, 2015-Ohio-4374, agreed that R.C. 1.58(B) did not apply in part because Towns' offense, i.e. sexual battery, was not listed under Section 4 of H.B. 86 as one of the offenses to which R.C. 1.58(B) specifically applies, and noted that H.B. 86 did not amend R.C. 2907.03. In distinguishing *Towns* from *Jackson*, 8th Dist. Cuyahoga No. 100877, 2014-Ohio-5137, the Eighth District appeared to be under the impression that the offenses at issue in *Jackson* were listed in Section 4 of H.B. 86. However, like Thomas,

¹ A large number of the enumerated offenses included theft offense, i.e., R.C. 2913.02, R.C. 2913.03, R.C. 2913.04, R.C. 2913.11, R.C. 2913.21, R.C. 2913.31, R.C. 2913.32, R.C. 2913.34, R.C. 2913.40, R.C. 2913.401, R.C. 2913.42, R.C. 2913.421, R.C. 2913.43, R.C. 2913.45, R.C. 2913.46, R.C. 2913.47, R.C. 2913.48, R.C. 2913.49, R.C. 2913.51, R.C. 2913.61.

² The available punishments for felonies under pre S.B. 2 law was codified under the former version R.C. 2929.13 whereas the current felony sentencing scheme is codified under R.C. 2929.14

the defendant in *Jackson* was found guilty of rape and kidnapping – neither of which are listed in Section 4 of H.B. 86.

It would be wrong for Appellee to argue changes in the threshold levels for theft offenses or changes to felonies of the third degree under R.C. 2929.14(A)(3), through H.B. 86, somehow repeals Section 5 of S.B. 2 by implication. That wall is still in place and it is illogical to apply unrelated amendments in order to take down the S.B. 2 wall. The unambiguous language of Section 4 of H.B. 86 shows that its provisions have limited application and does not affect Appellee's convictions or the S.B. 2 wall.

The General Assembly's intent that the S.B. 2 wall remain in place is manifested in the language of H.B. 86 — or rather the lack of language in H.B. 86. No words in H.B. 86 signify the repeal of Section 5 of S.B. 2 and the General Assembly was not required to insert the language of Section 5 of S.B. 2 to maintain the S.B. 2 wall. Appellee would have this Court insert words where they do not exist and would have this Court further ignore plain and unambiguous uncodified law. This Court in *State v. Craig*, 116 Ohio St.3d 135, 2007-Ohio-5752 reiterated that it is an abuse of discretion for a court of appeals to read words into a statute that do not exist and held that, "Courts neither have the authority to ignore plain and unambiguous statutory language [...], nor may they insert words into a statute that have not been placed there by the General Assembly." *Craig*, ¶14 (internal citations omitted). This same logic must apply to uncodified law, because uncodified law, despite the fact that it is not codified into a statute, is undoubtedly part of the law in Ohio. It would be an abuse of discretion to ignore the plain and unambiguous language of Section 5 of S.B. 2 and it would be a further abuse of discretion to insert language suggesting a repeal of Section 5 of S.B. 2 where it does not exist.

Some differences between pre S.B. 2 and S.B. 2 & H.B. 86 illustrates that current law will not always be considered a reduction

Although unnecessary, the State briefly addresses some of differences between current law and pre-S.B. 2 to illustrate the uncertainty of whether current law will be considered a reduction. Some of these issues have arisen since the Eighth District's decision in *State v. Jackson*, 8th Dist. Cuyahoga No. 100877, 2014-Ohio-5137. The law in effect prior to July 1, 1996 and the law in effect after July 1, 1996 (which would include S.B. 2 and H.B. 86) encompass two separate, distinct and non-interchangeable sentencing schemes. The State could explain each and every difference between pre S.B. 2 and S.B. 2, but such a recitation would unnecessarily compound the issue in this case and as this Court noted in footnote 2 of *Rush*, "While under the old sentencing scheme, a defendant might receive a longer term of incarceration, that longer term was often indefinite and could be reduced by "good time" credit [...] Under [S.B. 2 and H.B. 86], although a defendant's sentence may be shorter than the maximum indefinite sentence under the former scheme, it is a period of *actual* incarceration not subject to reduction for "good time" [...] these variables will in many instances make it difficult, if not impossible, to calculate whether a defendant's sentence would truly be reduced under the terms of S.B. 2." *Rush*, footnote 2.

Before July 1, 1996, felonies were classified as follows: Repeated aggravated F-1, Aggravated F-1, F-1, Repeat Aggravated F-2, Aggravated F-2, F-2, Repeat Aggravated F-3, F-3, Non-violent F-3, F-4, Non-Violent F-4. *See* former R.C. 2929.13 in effect prior to July 1, 1996. After July 1, 1996, felonies were classified as follows: F-1, F-2, F-3, F-4 and F-5. These are codified under current R.C. 2929.14 as opposed to the former R.C. 2929.13. In addition, parole was replaced by post-release control, but as indicated in *State v. Towns*, 8th Dist. Cuyahoga No. 102425, 2015-Ohio-4374, one trial court has determined that postrelease control could not be imposed. *Towns*, ¶ 3. The defendant in *Towns* also argued that H.B. 86 should not apply to him

because the penalties contained in H.B. 86 *increased* what he would have been subject to at the time of his offense. *Id.* at ¶11.

Prior to July 1, 1996, the Revised Code contained a three year mandatory sentence if the offender was convicted of a specification charging him with having a firearm on or about his person or under his control while committing the offense. If there were multiple firearm specifications, which were committed as part of the same act or transaction, only one three-year term of actual incarceration could be imposed. *See* former R.C. 2929.71, eff. 10-6-1994. Current law distinguishes between one-year firearm specifications and three-year firearm specifications based upon whether the offender possessed the firearm and whether the firearm was used or brandished. *See* R.C. 2929.14(B)(1)(A)(ii)-(iii), R.C. 2941.141, R.C. 2941.145.³ Current law further permits the imposition of two firearm specifications if a defendant is convicted of two or more counts of rape. *See* R.C. 2929.14 (B)(1)(g).

Appellee cannot make the assertion that H.B. 86 will always be favorable to him. In fact, when Appellee was re-sentenced under the provisions of H.B. 86, under the assumption that his original sentence was void, he argued that the firearm specifications under current law was more severe and that instead, he should be sentenced under the firearm specification in effect at the time of his offense. Appellee convinced the trial court to impose the firearm specification consistent with the law in effect at the time of his offense. *See Motion to Withdraw Motion to Stay as Moot, Filed August 3, 2015.* It must also be noted that Appellee now challenges his re-sentencing as

³ In this case, interestingly, Appellee argued at re-sentencing, that he should receive a sentence for the firearm specification as it existed prior to July 1, 1996.

being vindictive under the argument that the trial court imposed a more severe sentence under H.B. 86 than he had originally received under pre S.B. 2 law.⁴

As this case shows, the Eighth District's holding creates unnecessary comparisons between pre S.B. 1 law and current law. This Court need not go further than the plain and unambiguous language of S.B. 2's uncodified law and the lack of any language of repeal to find that the S.B. 2 wall is still intact.

⁴ Thomas' arguments are currently under appeal in Eighth District Case No. CA-15-103406.

CONCLUSION

The uncodified language of Section 5 of S.B. 2 has not been repealed. That language specifically provides, “The provisions of the Revised Code in existence prior to July 1, 1996, shall apply [...] to a person upon whom a court, on or after [July 1, 1996] and in accordance with the law in existence prior to [July 1, 1996], imposed a term of imprisonment for an offense that was committed prior to [July 1, 1996].” The General Assembly was not required to repeat that language in H.B. 86 to ensure its continued enforcement. Accordingly, this Court must reverse the Eighth District’s decision, determine that the Court of Appeals had no authority to mandate a sentence be imposed under H.B. 86 and overrule the precedence established by *State v. Jackson*, 8th Dist. Cuyahoga No. 100877, 2014-Ohio-5137.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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