Supreme Court of Ohio Clerk of Court - Filed April 01, 2016 - Case No. 2014-1557

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellant

v.

DEAN KLEMBUS,

Defendant-Appellee

CASE NO 2014-1557

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

COURT OF APPEALS CASE NO. 100068

APPELLANT'S MOTION FOR RECONSIDERATION

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APPELLANT'S MOTION FOR RECONSIDERATION

Pursuant to S.Ct.Prac.R. 18.02(B), Appellee moves this Court for reconsideration of its decision of March 22, 2016 in the instant case. Slip Opinion 2016-1092.

At the outset, undersigned counsel of record notes that he is cognizant of this Court's prohibition on simply re-arguing a decision not to his liking. Undersigned counsel of record also notes that he is cognizant of the fact that all members of this Court have concurred in the decision.

But counsel believes that this Court's distinction between elements of an offense and sentencing considerations, which this Court used to distinguish *State v. Wilson*, 58 Ohio St.2d 52 388 N.E.2d 745, is a distinction that makes no difference. To make matters worse a review of the oral argument in this case suggests that undersigned counsel's reference to the proof of elements of the offense -- as opposed to focusing on sentencing factors -- may have contributed to this error.

There is no question that the General Assembly had a right to impose a system of gradually increasing punishment for repeat OVI offenders. There is no question that the General Assembly did, in fact, impose such a system.

But the General Assembly's system creates two different punishments for persons who have committed six OVIs in 20 years. All such offenders are guilty of fourth-degree felonies. But some can receive a maximum of 30 months in prison while others can receive a maximum of 7 ½ years in prison. And, equal protection dictates that there has to be a reason why Smith can only go to prison for 30 months and Jones can go for three times as long.

And that reason cannot be that Jones' indictment included a few extra words at the bottom – words that simply repeated the base charge. That reason makes no sense. That reason is irrational.

If those words at the bottom of the indictment that caused Jones to go to prison for 7 ½ years were words that alleged an additional sentencing factor that applies to Jones and not to Smith – for example, that Jones' 5 priors included 3 in the past decade – then that would square with Equal Protection. Because then someone could look at the two indictments and see a meaningful difference – a rational distinction.

But that is not the law in Ohio. And that is why the law is unconstitutional. And that is why this Court should reconsider.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing has been sent this 1st day of April, 2016, to the following parties via electronic mail:

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