

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellant,	:	CASE NO. CA2011-08-088
- vs -	:	<u>OPINION</u> 3/5/2012
TIMOTHY RAY BAKER,	:	
Defendant-Appellee.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 11 CR 27173

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellant

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PIPER, J.

{¶ 1} Plaintiff-appellant, the state of Ohio, appeals a decision of the Warren County Court of Common Pleas, to apply a certain test when determining if defendant-appellee, Timothy Baker, engaged in a pattern of corrupt activity. While we agree with the state that the trial court's decision was erroneous, principles of double jeopardy preclude retrial so that the decision of the trial court is affirmed.

{¶ 2} Baker was indicted and charged with illegal manufacture of drugs, illegal assembly or possession of chemicals for the manufacture of drugs, aggravated possession of drugs, endangering children, and engaging in a pattern of corrupt activity. The charges stemmed from Baker's involvement in the storage and manufacture of methamphetamines in his home.

{¶ 3} Through an undercover operation, police learned that Baker permitted others to manufacture methamphetamines in his garage, purchased pseudoephedrine on several occasions for the manufacturing, helped crush the pseudoephedrine pills to aid in the manufacturing, and helped to modify otherwise legal equipment for use in the manufacturing process. The manufacture and storage of the methamphetamines occurred while a child was living in the house, within 100 feet of the narcotics.

{¶ 4} Baker waived his right to a jury trial, and elected instead to have a bench trial. The trial court heard the case, and found Baker guilty of all counts except engaging in a pattern of corrupt activity. In its written decision, the trial court cited *United States v. Riccobene*, 709 F.2d 214 (3rd Cir.1983), as the standard for determining whether an enterprise existed to fulfill the elements of engaging in a pattern of corrupt activity. The state now appeals that decision, asserting the following assignment of error.

{¶ 5} THE WARREN COUNTY COURT OF COMMON PLEAS ERRED AS A MATTER OF LAW WHEN IT APPLIED THE DEFINITION OF ENTERPRISE FOUND IN *U.S. V. RICCOBENE* (7th Cir. 1983) [sic], 709 F.2d 214, TO THE EVIDENCE IN THIS CASE REGARDING THE OFFENSE OF ENGAGING IN A PATTERN OF CORRUPT ACTIVITY BECAUSE A REVIEW OF THE CASE LAW IN OHIO REVEALS THAT THE VAST MAJORITY OF THE APPELLATE DISTRICTS HAVE EITHER REJECTED OR IGNORED THE *RICCOBENE* DEFINITION OF ENTERPRISE.

{¶ 6} The state argues in its assignment of error that the trial court erred in applying

the test set forth in *Riccobene*. The state, however, does not appeal Baker's acquittal.

{¶ 7} Although this decision has no effect on Baker's acquittal because of double jeopardy, we nevertheless exercise our discretion to consider the merits of this appeal, and have granted leave to the state to appeal the substantive legal issue concerning the proper definition of enterprise. *State v. Edmondson*, 92 Ohio St.3d 393, 2001-Ohio-210. We therefore take this opportunity to further pronounce the law of the district, and hold that *Riccobene* does not set forth the proper test when deciding whether an enterprise exists for purposes of engaging in a pattern of corrupt activity.

{¶ 8} According to R.C. 2923.32(A)(1), "no person employed by, or associated with, any enterprise shall conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity or the collection of an unlawful debt." R.C. 2923.31(C) defines enterprise as "any individual, sole proprietorship, partnership, limited partnership, corporation, trust, union, government agency, or other legal entity, or any organization, association, or group of persons associated in fact although not a legal entity. 'Enterprise' includes illicit as well as licit enterprises." While the trial court noted these statutory provisions, it went on to cite *Riccobene*, and analyzed whether Baker was involved in an enterprise based on the factors set forth by the Third Circuit.

{¶ 9} The court in *Riccobene* set forth a three-part test to define enterprise: (1) the "ongoing organization" requirement relates to the superstructure or framework of the group; (2) "the various associates function as a continuing unit"; and (3) the organization must be "an entity separate and apart from the pattern of activity in which it engages." 709 F.2d at 221-223. This test was adopted by the Tenth District in *State v. Teasley*, 10th Dist. Nos. 00AP-1322, 00AP1323, 2002 WL 977278 (May 14, 2002).¹

1. The appellant in *Teasley* relied on a United States Supreme Court case, *United States v. Turkette*, 452 U.S. 576, 101 S.Ct. 2524 (1981), for the proposition that the state must prove that the alleged enterprise must be a

{¶ 10} However, *Riccobene* has been essentially overruled by the United States Supreme Court in *Boyle v. United States*, 556 U.S. 938, 129 S.Ct. 2237 (2009). *Boyle* streamlined the definition for enterprise, and stated,

an association-in-fact enterprise is simply a continuing unit that functions with a common purpose. Such a group need not have a hierarchical structure or a "chain of command"; decisions may be made on an ad hoc basis and by any number of methods—by majority vote, consensus, a show of strength, etc. Members of the group need not have fixed roles; different members may perform different roles at different times. The group need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies. While the group must function as a continuing unit and remain in existence long enough to pursue a course of conduct, nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence. Nor is the statute limited to groups whose crimes are sophisticated, diverse, complex, or unique; for example, a group that does nothing but engage in extortion through old-fashioned, unsophisticated, and brutal means may fall squarely within the statute's reach. *Id.* at 2245-2246.

{¶ 11} The definition provided by the court in *Boyle* is more in harmony with Ohio's version of the federal RICO statute, and eliminates the third factor set forth in *Riccobene*. While both the federal and Ohio statutes require proof of an "enterprise," the statutes employ slightly different definitions of enterprise. Nevertheless, we find that the definition set forth in *Boyle* offers greater congruence with Ohio's statutory scheme, than does the test in *Riccobene*, which has been effectively overruled.

{¶ 12} This court specifically addressed whether it would apply the three-part test, or pair Ohio's statutory scheme with a more fluid definition of enterprise as set forth in *Boyle*. *State v. Dodson*, 12th Dist. No. CA2010-08-191, 2011-Ohio-6222. In *Dodson*, we specifically

separate entity and apart from the pattern of activity in which it engages. However, *Turkette* does not set forth the three-part test as expressly as *Riccobene* does.

rejected the appellant's argument that in order to be an enterprise, the organization must be a structure separate and distinct from the pattern of activity in which it engages. We further noted in *Dodson* that by and through *Boyle*, the United States Supreme Court had set forth a more fluid definition of "enterprise." We then discussed the applicability of *Boyle*, and declined to use the test as referenced by the Tenth District in *Teasley*. Therefore, this court has expressly rejected the notion that the state must prove that the enterprise is an entity separate and apart from the pattern of activity in which it engages.

{¶ 13} Neither the state nor Baker cite to *Boyle* or *Dodson*, or argue that *Boyle* or *Dodson* help to explain Ohio's definition of enterprise. Therefore, we take this opportunity to reiterate that this court rejects the three-part test of *Riccobene*, and instead, looks to the definition set forth in *Boyle*, to better understand Ohio's RICO statute.

{¶ 14} In accordance with the foregoing, the trial court erred to the extent it incorrectly applied the test set forth in *Riccobene*. The state's assignment of error is therefore sustained. However, pursuant to *State v. Edmondson*, 92 Ohio St.3d 393, 2001-Ohio-210, and notwithstanding the trial court's erroneous application of the law, Baker's acquittal for engaging in a pattern of corrupt activity is affirmed inasmuch as he cannot twice be put in jeopardy.

POWELL, P.J., and RINGLAND, J., concur.