

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case Nos. 2013-1129 and 2013-1319
Plaintiff-Appellant,	:	
	:	On Appeal from the
vs.	:	Montgomery County Court of Appeals
	:	Second Appellate District
DE'ARGO GRIFFIN,	:	
	:	C.A. Case No. 24001
Defendant-Appellee.	:	

MERIT BRIEF OF AMICUS CURIAE, OFFICE OF THE OHIO PUBLIC DEFENDER,
IN SUPPORT OF DE'ARGO GRIFFIN

MATHIAS H. HECK, JR. #0021982
Montgomery County Prosecutor
KRISTEN A. BRANDT #0070162
(COUNSEL OF RECORD)

DARRELL L. HECKMAN #0002389
(COUNSEL OF RECORD)

Montgomery County Prosecutor's Office
Appellate Division
P.O. Box 972
301 West Third Street, 5th Floor
Dayton, Ohio 45422
(937) 225-5027

Harris, Meyer, Heckman, and Denkewalter
1 Monument Square, Suite 200
Urbana, Ohio 43078
(937) 653-7186

COUNSEL FOR STATE OF OHIO

COUNSEL FOR DE'ARGO GRIFFIN

PETER GALYARDT #0085439
Assistant State Public Defender

Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 - Fax
E-mail: peter.galyardt@opd.ohio.gov

FILED
JAN 08 2014
CLERK OF COURT
SUPREME COURT OF OHIO

COUNSEL FOR AMICUS CURIAE,
OFFICE OF THE OHIO PUBLIC DEFENDER

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES..... ii

INTRODUCTION.....1

STATEMENT OF THE CASE AND FACTS.....1

STATEMENT OF INTEREST OF AMICUS CURIAE OFFICE OF THE
OHIO PUBLIC DEFENDER1

ARGUMENT.....2

CERTIFIED QUESTION:2

In a trial for engaging in a pattern of corrupt activity under R.C.
2923.32, is an instruction sufficient to convey the law on the
element of "enterprise" when the instruction states the elements
of the offense, provides the statutory definitions of "enterprise"
and "pattern of corrupt activity," and informs the jury that it has
to find both beyond a reasonable doubt2

STATE'S PROPOSITION OF LAW:2

In a trial for engaging in a pattern of corrupt activity under R.C.
2923.32, a jury instruction which states the elements of the
offense, provides the statutory definitions of the elements, and
informs the jury that it has to find both an "enterprise" and a
"pattern of corrupt activity" beyond a reasonable doubt is
sufficient to convey the law on the element of "enterprise." The
court is not required to instruct the jury using language from
federal case law on the element of "enterprise."2

CONCLUSION.....3

CERTIFICATE OF SERVICE.....4

APPENDIX:

R.C. 2923.32..... A-1

App.R. 26..... A-4

TABLE OF AUTHORITIES

	<u>Page No.</u>
CASES:	
<i>State v. Franklin</i> , 2d Dist. Montgomery Nos. 24011 and 24012, 2011-Ohio-6802	1
<i>State v. Franklin</i> , 2d Dist. Montgomery No. 25125, 2012-Ohio-6223	3
<i>State v. Griffin</i> , 2d Dist. No. 24001, 2012-Ohio-503	1
<i>State v. Griffin</i> , 2d Dist. Montgomery No. 24001, 2013-Ohio-2230	1
<i>Teague v. Lane</i> , 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)	2
STATUTES:	
R.C. 2923.32	2
RULES:	
App.R. 26	1

INTRODUCTION

The court below treated codefendants equally. That treatment was appropriate and consistent with this country's longstanding tradition of fundamental fairness. Fundamental fairness requires that De' Argo Griffin and his codefendant, Anthony Franklin, be treated the same. Accordingly, both the certified conflict and discretionary appeal should be dismissed as improvidently accepted.

STATEMENT OF THE CASE AND FACTS

Mr. Griffin and Mr. Franklin were tried together for the same criminal conduct. *State v. Griffin*, 2d Dist. No. 24001, 2012-Ohio-503, ¶ 2-4. The court of appeals reversed Mr. Franklin's engaging-in-a-pattern-of-corrupt-activity conviction. *State v. Franklin*, 2d Dist. Montgomery Nos. 24011 and 24012, 2011-Ohio-6802, ¶ 105-107. The State did not appeal that decision. After Mr. Griffin's appeal was reopened under App.R. 26(B), the court of appeals reversed his engaging-in-a-pattern-of-corrupt-activity conviction for the same reason it did Mr. Franklin's. *State v. Griffin*, 2d Dist. Montgomery No. 24001, 2013-Ohio-2230, ¶ 3, 28. The court below certified a conflict to this Court, and this Court accepted the State's appeal in this case.

STATEMENT OF INTEREST OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER

The Office of the Ohio Public Defender (OPD) is a state agency designed to represent indigent criminal defendants, coordinate criminal defense efforts throughout Ohio, promote the proper administration of criminal justice, ensure equal treatment under the law, and protect the individual rights guaranteed by the state and federal

constitutions. Accordingly, the OPD has an interest in ensuring the equal treatment of similarly situated defendants.

ARGUMENT

CERTIFIED QUESTION AND STATE OF OHIO'S PROPOSITION OF LAW

CERTIFIED QUESTION:

In a trial for engaging in a pattern of corrupt activity under R.C. 2923.32, is an instruction sufficient to convey the law on the element of "enterprise" when the instruction states the elements of the offense, provides the statutory definitions of "enterprise" and "pattern of corrupt activity," and informs the jury that it has to find both beyond a reasonable doubt?

STATE'S PROPOSITION OF LAW:

In a trial for engaging in a pattern of corrupt activity under R.C. 2923.32, a jury instruction which states the elements of the offense, provides the statutory definitions of the elements, and informs the jury that it has to find both an "enterprise" and a "pattern of corrupt activity" beyond a reasonable doubt is sufficient to convey the law on the element of "enterprise." The court is not required to instruct the jury using language from federal case law on the element of "enterprise."

Similarly situated defendants must be treated equally. The Supreme Court of the United States has held that, "[t]he harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated" because "such inequitable treatment hardly comports with the ideal of administration of justice with an even hand." (Citations omitted.) *Teague v. Lane*, 489 U.S. 288, 315, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Mr. Griffin and Mr. Franklin could not be more similarly situated. They were charged and convicted for the same criminal conduct. Accordingly, Mr. Griffin must be treated like Mr. Franklin. Because the State did not appeal Mr. Franklin's case, his engaging-in-a-pattern-of-corrupt-activity conviction has been dismissed without prejudice by the trial

court. *See State v. Franklin*, 2d Dist. Montgomery No. 25125, 2012-Ohio-6223, ¶ 5.

CONCLUSION

Fundamental fairness requires that Mr. Griffin and Mr. Franklin be treated the same. Thus, Mr. Griffin's engaging-in-a-pattern-of-corrupt-activity conviction must remain reversed and must be dismissed without prejudice by the trial court. *See Franklin*, 2012-Ohio-6223, ¶ 5. Accordingly, both the certified conflict and discretionary appeal should be dismissed as improvidently accepted, and this Court should wait for a case that does not involve the fundamental fairness concerns present here to decide the issues presented. Alternatively, if this Court does reverse the decision below, that result should not apply to Mr. Griffin because Mr. Franklin's conviction has been dismissed.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



PETER GALYARDT #0085439
Assistant State Public Defender

250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 - Fax
E-mail: Peter.Galyardt@opd.ohio.gov

COUNSEL FOR AMICUS CURIAE,
OFFICE OF THE OHIO PUBLIC DEFENDER

CERTIFICATE OF SERVICE

A copy of the foregoing **Merit Brief of Amicus Curiae Office of the Ohio Public Defender in Support of De' Argo Griffin** was forwarded by regular U.S. Mail, postage prepaid to the attorneys listed below on this 8th day of January, 2014.

Kristen Brandt
Montgomery County Prosecutor's Office
Appellate Division
P.O. Box 972
301 West Third Street, 5th Floor
Dayton, Ohio 45422

Darrell Heckman
Harris, Meyer, Heckman, and Denkwalter
1 Monument Square, Suite 200
Urbana, Ohio 43078

De'argo Griffin
Inmate No. 626-734
Madison Correctional Institution
P.O. Box 740
London, Ohio 43140



PETER GALYARDT #0085439
Assistant State Public Defender

COUNSEL FOR AMICUS CURIAE,
OFFICE OF THE OHIO PUBLIC DEFENDER

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case Nos. 2013-1129 and 2013-1319
Plaintiff-Appellant,	:	
	:	On Appeal from the
vs.	:	Montgomery County Court of Appeals
	:	Second Appellate District
DE'ARGO GRIFFIN,	:	
	:	C.A. Case No. 24001
Defendant-Appellee.	:	

APPENDIX TO
MERIT BRIEF OF AMICUS CURIAE, OFFICE OF THE OHIO PUBLIC DEFENDER,
IN SUPPORT OF DE'ARGO GRIFFIN

Page's Ohio Revised Code Annotated:
Copyright (c) 2013 by Matthew Bender & Company, Inc., a member of the LexisNexis Group.
All rights reserved.

Current through Legislation passed by the 130th Ohio General Assembly
and filed with the Secretary of State through File 47
*** Annotations current through October 21, 2013 ***

TITLE 29: CRIMES -- PROCEDURE
CHAPTER 2923. CONSPIRACY, ATTEMPT, AND COMPLICITY; WEAPONS CONTROL;
CORRUPT ACTIVITY
CORRUPT ACTIVITY

ORC Ann. 2923.32 (2013)

§ 2923.32. Engaging in pattern of corrupt activity; forfeiture

(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.

(2) No person, through a pattern of corrupt activity or the collection of an unlawful debt, shall acquire or maintain, directly or indirectly, any interest in, or control of, any enterprise or real property.

(3) No person, who knowingly has received any proceeds ~~derived~~, directly or indirectly, from a pattern of corrupt activity or the collection of any unlawful debt, shall use or invest, directly or indirectly, any part of those proceeds, or any proceeds derived from the use or investment of any of those proceeds, in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.

A purchase of securities on the open market with intent to make an investment, without intent to control or participate in the control of the issuer, and without intent to assist another to do so is not a violation of this division, if the securities of the issuer held after the purchase by the purchaser, the members of the purchaser's immediate family, and the purchaser's or the immediate family members' accomplices in any pattern of corrupt activity or the collection of an unlawful debt do not aggregate one per cent of the outstanding securities of any one class of the issuer and do not confer, in law or in fact, the power to elect one or more directors of the issuer.

(B) (1) Whoever violates this section is guilty of engaging in a pattern of corrupt activity. Except as otherwise provided in this division, engaging in corrupt activity is a felony of the second degree. Except as otherwise provided in this division, if at least one of the incidents of corrupt activity is a felony of the first, second, or third degree, aggravated murder, or murder, if at least one of the incidents was a felony under the law of this state that was committed prior to July 1, 1996, and that would constitute a felony of the first, second, or third degree, aggravated murder, or murder if

committed on or after July 1, 1996, or if at least one of the incidents of corrupt activity is a felony under the law of the United States or of another state that, if committed in this state on or after July 1, 1996, would constitute a felony of the first, second, or third degree, aggravated murder, or murder under the law of this state, engaging in a pattern of corrupt activity is a felony of the first degree. If the offender also is convicted of or pleads guilty to a specification as described in *section 2941.1422 of the Revised Code* that was included in the indictment, count in the indictment, or information charging the offense, engaging in a pattern of corrupt activity is a felony of the first degree, and the court shall sentence the offender to a mandatory prison term as provided in division (B)(7) of *section 2929.14 of the Revised Code* and shall order the offender to make restitution as provided in division (B)(8) of *section 2929.18 of the Revised Code*. Notwithstanding any other provision of law, a person may be convicted of violating the provisions of this section as well as of a conspiracy to violate one or more of those provisions under *section 2923.01 of the Revised Code*.

(2) Notwithstanding the financial sanctions authorized by *section 2929.18 of the Revised Code*, the court may do all of the following with respect to any person who derives pecuniary value or causes property damage, personal injury other than pain and suffering, or other loss through or by the violation of this section:

(a) In lieu of the fine authorized by that section, impose a fine not exceeding the greater of three times the gross value gained or three times the gross loss caused and order the clerk of the court to pay the fine into the state treasury to the credit of the corrupt activity investigation and prosecution fund, which is hereby created;

(b) In addition to the fine described in division (B)(2)(a) of this section and the financial sanctions authorized by *section 2929.18 of the Revised Code*, order the person to pay court costs;

(c) In addition to the fine described in division (B)(2)(a) of this section and the financial sanctions authorized by *section 2929.18 of the Revised Code*, order the person to pay to the state, municipal, or county law enforcement agencies that handled the investigation and prosecution the costs of investigation and prosecution that are reasonably incurred.

The court shall hold a hearing to determine the amount of fine, court costs, and other costs to be imposed under this division.

(3) In addition to any other penalty or disposition authorized or required by law, the court shall order any person who is convicted of or pleads guilty to a violation of this section or who is adjudicated delinquent by reason of a violation of this section to criminally forfeit to the state under Chapter 2981. of the Revised Code any personal or real property in which the person has an interest and that was used in the course of or intended for use in the course of a violation of this section, or that was derived from or realized through conduct in violation of this section, including any property constituting an interest in, means of control over, or influence over the enterprise involved in the violation and any property constituting proceeds derived from the violation, including all of the following:

(a) Any position, office, appointment, tenure, commission, or employment contract of any kind acquired or maintained by the person in violation of this section, through which the person, in violation of this section, conducted or participated in the conduct of an enterprise, or that afforded the person a source of influence or control over an enterprise that the person exercised in violation of this section;

(b) Any compensation, right, or benefit derived from a position, office, appointment, tenure, commission, or employment contract described in division (B)(3)(a) of this section that accrued to the person in violation of this section during the period of the pattern of corrupt activity;

(c) Any interest in, security of, claim against, or property or contractual right affording the person a source of influence or control over the affairs of an enterprise that the person exercised in violation of this section;

(d) Any amount payable or paid under any contract for goods or services that was awarded or performed in violation of this section.

HISTORY:

141 v H 5 (Eff 1-1-86); 141 v S 74 (Eff 9-3-86); 142 v H 708 (Eff 4-19-88); 143 v H 215 (Eff 4-11-90); 143 v H 266 (Eff 9-6-90); 146 v S 2 (Eff 7-1-96); 147 v S 164 (Eff 1-15-98); 148 v S 179, § 3. Eff 1-1-2002; 151 v H 241, § 1, eff. 7-1-07; 152 v H 280, § 1, eff. 4-7-09; 2011 HB 86, § 1, eff. Sept. 30, 2011.

OHIO RULES OF COURT SERVICE
Copyright © 2013 by Matthew Bender & Company, Inc.
a member of the LexisNexis Group.
All rights reserved.

*** Rules current through rule amendments received through November 1, 2013 ***
*** Annotations current through October 21, 2013 ***

Ohio Rules Of Appellate Procedure
Title III. General provisions

Ohio App. Rule 26 (2013)

Review Court Orders which may amend this Rule.

Rule 26. Application for reconsideration; Application for en banc consideration; Application for reopening.

(A) Application for reconsideration and en banc consideration.

(1) Reconsideration.

(a) Application for reconsideration of any cause or motion submitted on appeal shall be made in writing no later than ten days after the clerk has both mailed to the parties the judgment or order in question and made a note on the docket of the mailing as required by *App.R. 30(A)*.

(b) Parties opposing the application shall answer in writing within ten days of service of the application. The party making the application may file a reply brief within seven days of service of the answer brief in opposition. Copies of the application, answer brief in opposition, and reply brief shall be served in the manner prescribed for the service and filing of briefs in the initial action. Oral argument of an application for reconsideration shall not be permitted except at the request of the court.

(c) The application for reconsideration shall be considered by the panel that issued the original decision.

(2) En banc consideration.

(a) Upon a determination that two or more decisions of the court on which they sit are in conflict, a majority of the en banc court may order that an appeal or other proceeding be considered en banc. The en banc court shall consist of all full-time judges of the appellate district who have not recused themselves or otherwise been disqualified from the case. Consideration en banc is not favored and will not be ordered unless necessary to secure or maintain uniformity of decisions within the district on an issue that is dispositive in the case in which the application is filed.

(b) The en banc court may order en banc consideration sua sponte. A party may also make an application for en banc consideration. An application for en banc consideration must explain how

the panel's decision conflicts with a prior panel's decision on a dispositive issue and why consideration by the court en banc is necessary to secure and maintain uniformity of the court's decisions.

(c) The rules applicable to applications for reconsideration set forth in division (A)(1) of this rule, including the timing requirements, govern applications for en banc consideration. Any sua sponte order designating a case for en banc consideration must be entered no later than ten days after the clerk has both mailed the judgment or order in question and made a note on the docket of the mailing as required by *App.R. 30(A)*. In addition, a party may file an application for en banc consideration, or the court may order it sua sponte, within ten days of the date the clerk has both mailed to the parties the judgment or order of the court ruling on a timely filed application for reconsideration under division (A)(1) of this rule if an intra-district conflict first arises as a result of that judgment or order and made a note on the docket of the mailing, as required by *App.R. 30(A)*. A party filing both an application for reconsideration and an application for en banc consideration simultaneously shall do so in a single document.

(d) The decision of the en banc court shall become the decision of the court. In the event a majority of the full-time judges of the appellate district is unable to concur in a decision, the decision of the original panel shall remain the decision in the case unless vacated under *App.R. 26(A)(2)(c)* and, if so vacated, shall be reentered.

(e) Other procedures governing the initiation, filing, briefing, rehearing, reconsideration, and determination of en banc proceedings may be prescribed by local rule or as otherwise ordered by the court.

(B) Application for reopening.

(1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.

(2) An application for reopening shall contain all of the following:

(a) The appellate case number in which reopening is sought and the trial court case number or numbers from which the appeal was taken;

(b) A showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment.

(c) One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation;

(d) A sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error or arguments raised pursuant to division (B)(2)(c) of this rule and the manner in which the deficiency prejudicially affected the outcome of the appeal, which may include citations to applicable authorities and references to the record;

(e) Any parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies.

(3) The applicant shall furnish an additional copy of the application to the clerk of the court of appeals who shall serve it on the attorney for the prosecution. The attorney for the prosecution, within thirty days from the filing of the application, may file and serve affidavits, parts of the record, and a memorandum of law in opposition to the application.

(4) An application for reopening and an opposing memorandum shall not exceed ten pages, exclusive of affidavits and parts of the record. Oral argument of an application for reopening shall not be permitted except at the request of the court.

(5) An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.

(6) If the court denies the application, it shall state in the entry the reasons for denial. If the court grants the application, it shall do both of the following:

(a) appoint counsel to represent the applicant if the applicant is indigent and not currently represented;

(b) impose conditions, if any, necessary to preserve the status quo during pendency of the reopened appeal.

The clerk shall serve notice of journalization of the entry on the parties and, if the application is granted, on the clerk of the trial court.

(7) If the application is granted, the case shall proceed as on an initial appeal in accordance with these rules except that the court may limit its review to those assignments of error and arguments not previously considered. The time limits for preparation and transmission of the record pursuant to *App.R. 9* and *10* shall run from journalization of the entry granting the application. The parties shall address in their briefs the claim that representation by prior appellate counsel was deficient and that the applicant was prejudiced by that deficiency.

(8) If the court of appeals determines that an evidentiary hearing is necessary, the evidentiary hearing may be conducted by the court or referred to a magistrate.

(9) If the court finds that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency, the court shall vacate its prior judgment and enter the appropriate judgment. If the court does not so find, the court shall issue an order confirming its prior judgment.

HISTORY: Amended, eff 7-1-75; 7-1-93; 7-1-94; 7-1-97; 7-1-10; 7-1-11; 7-1-12.