

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio, :
 Plaintiff-Appellee, :
 vs. :
 Edward South, :
 Defendant-Appellant. :

Case No. 2014-0563
 Certified Conflict from the Summit County
 Court of Appeals, Ninth Appellate
 District Case No. 26967

**Merit Brief of Amicus Curiae Office of the Ohio Public Defender
 In Support of Appellee Edward South**

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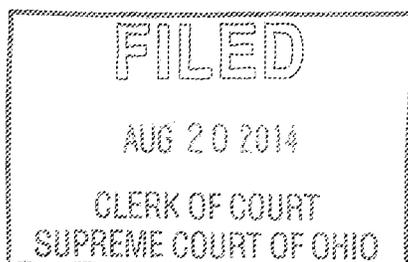


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State of the Case and Facts

Amicus adopts by reference the statement of the case and facts set forth by Appellee Edward South.

Statement of Interest of Amicus Curiae Office of the Ohio Public Defender

The Office of the Ohio Public Defender is a state agency, designed to represent criminal defendants and to coordinate criminal defense efforts throughout Ohio. The Ohio Public Defender also plays a key role in the promulgation of Ohio statutory law and procedural rules. One of the primary focuses of the Ohio Public Defender is on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. And the primary mission of the Ohio Public Defender is to protect the individual rights guaranteed by the state and federal constitutions through exemplary legal representation. In addition, the Ohio Public Defender seeks to promote the proper administration of criminal justice by enhancing the quality of criminal defense representation, educating legal practitioners and the public on important defense issues, and supporting study and research in the criminal justice system.

As amicus curiae, the Ohio Public Defender offers this Court the perspective of experienced practitioners who routinely handle significant criminal cases in the Ohio appellate courts. The Ohio Public Defender has an interest in the present case insofar as this Court will address criminal sentencing.

Introduction

As set forth in the State of Ohio's merit brief, this Court has agreed to consider the following certified conflict question:

When a defendant is convicted of a R.C. 2941.1413 specification, does Ohio's OVI statute, R.C. 4511.19 prevail so that a five year sentence can be imposed for a third degree felony OVI or does R.C. 2929.14(A) require that the maximum sentence that can be imposed is three years?

The State asks this Court to overlook the legislature's intention to reduce the maximum prison sentence available for third-degree felony offenders. However, it is clear that R.C. 2929.14(A) only allows for sentences to exceed three years for eight enumerated exceptions. Ohio's OVI enhancement statute, R.C. 2941.1413 was not included by the legislature and thus a five-year sentence is contrary law.

Argument

In enacting the criminal justice reform bill, Am.Sub.H.B. No. 86 ("H.B. 86"), the Ohio General Assembly made clear that the appropriate sentence for third-degree felony offenders cannot exceed three years, with the exception of eight enumerated offenses. Because the legislature did not include the OVI-enhancement statute (R.C. 2941.1413) that previously allowed for higher maximum sentences for second-time, felony OVI offenders, the three-year maximum on third-degree felonies controls and a five-year sentence is contrary to law. R.C. 2929.14(A)(3).

The legislature amended the criminal code with the intent "to change the sentencing structure for felonies of the first degree and for felonies of the third degree that are not specified types of offenses." 2011 Am.Sub.H.B. No. 86. The legislature summarily reduced the maximum sentence for third-degree felonies to three years. R.C. 2929.14(A)(3)(b). Specifically, for a "felony of the third degree that is not an offense for which division (A)(3)(a)

of this section applies, the prison term shall be [9], [12], [18], [24], [30], or [36] months.” R.C. 2929.14(A)(3)(b).

Additionally, R.C. 2929.14(A)(3)(a) explicitly identified the eight third-degree felony offenses worthy of punishment greater than 36 months in prison. Six of the enumerated exceptions are aggravated vehicular homicide, aggravated vehicular assault, vehicular assault when driving under suspension, sexual battery, unlawful sexual conduct with a minor, and gross sexual imposition. R.C. 2929.14(A)(3)(a). The remaining two, robbery and burglary, are made eligible for higher punishment thresholds when it is established that the offender had two or more prior convictions. *Id.* The legislature made no other exceptions.

The specificity of the legislature’s exceptions makes clear that the legislature considered all third-degree felonies prior to the enactment of H.B. 86, and determined the eight circumstances in which the penalty could exceed three years in prison. The legislature also considered prior-conviction based enhancements, and limited increased penalties to only repeat offenders in robberies and burglaries.

The judiciary issued comments to the General Assembly pursuant to R.C. 105.911 prior to H.B. 86’s enactment. And the comments demonstrate that the legislature was exposed to the felonies that would be impacted by the sentencing reform, including a second felony OVI offense. Ohio Judicial Conference, *Judicial Impact Statement: Felony Sentencing and Juvenile Justice Reform*, (June 3, 2011), <http://www.ohiojudges.org/Document.ashx?DocGuid=d71deb56-9a3e-4ada-94fe-527b9600e340> (accessed August 18, 2014). Specifically, the judiciary warned the legislature that it should consider proportionality when reducing the penalty for some third-degree felonies. *Id.* at 6. The judiciary listed the following serious, third-degree felonies:

There are serious offenses that are classified as felonies of the third degree such as unlawful sexual conduct where there is a 10 or more year age difference, sexual

battery, a second felony OVI offense, child endangerment where there is serious physical harm cause to the victim resulting from the violation of a duty of care or protection, aggravated vehicular assault, abduction, robbery, burglary, aggravated involuntary manslaughter, and third offense domestic violence. These offenses are predominantly crimes of violence and bear more similarity to first and second degree felonies in terms of sheer gravity, than to fourth and fifth degree felonies.

(Emphasis added.) *Id.* The judges recommended that the legislature retain the ability for a judge to impose a four- or five-year penalty for felonies of the third degree. *Id.* Despite this, the legislature chose only eight third-degree felonies for felony enhancement, with proportionality in mind. The legislature did not select a second felony OVI offense as one of the exceptions. R.C. 2929.14(A)(3).

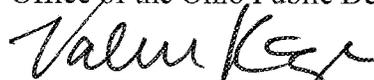
Further, because R.C. 2929.14(A)(3) and R.C. 2941.1413 are in conflict, lenity demands that R.C. 2929.14(A)(3) control. Analysis is properly guided by the rule of lenity that requires criminal offenses be strictly construed against the State and liberally construed in favor of the accused. R.C. 2901.04. *See generally State v. Straley*, Slip Opinion No. 2014-Ohio-2139, ¶ 10. If the General Assembly intended for a higher penalty threshold for second-time, felony OVI offenders, R.C. 2929.14(A)(3)(a) would include R.C. 2941.1413.

Conclusion

Revised Code Section 2929.14(A)(3) requires that the maximum penalty for a third-degree felony OVI be three years in prison. Accordingly, the Ninth District properly found that Edward South's five-year sentence was contrary to law. The Office of the Ohio Public Defender, as amicus curiae, urges this Court to affirm the judgment of the court below.

Respectfully submitted,

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Certificate of Service

I certify that a copy this document was forwarded by regular U.S. Mail, postage prepaid to Heaven DiMartino, Summit County Assistant Prosecuting Attorney, Summit County Safety Building, 53 University Avenue, Akron, Ohio 44308 and Lawrence J. Whitney, Attorney at Law, 137 S. Main Street, Suite 201, Akron, Ohio 44308, on this 20th day of August, 2014.



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