[Cite as *State v. Winslow*, 2019-Ohio-2357.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 28178
	:	
v.	:	Trial Court Case No. 2017-CR-2467
	:	
BRYANT D. WINSLOW	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 14th day of June, 2019.

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DONOVAN, J.

{¶ 1} Winslow appeals from the trial court's October 5, 2018 judgment entry of conviction, following his no contest plea, on one count of non-support of dependents, in violation of R.C. 2919.12, a felony of the fifth degree. Winslow was sentenced to community control sanctions for a period not to exceed five years and was ordered to pay restitution in the amount of $5,300.64. We hereby affirm the judgment of the trial court.

{¶ 2} Winslow was indicted on August 30, 2017. He filed a motion to dismiss the indictment on June 11, 2018, asserting that he was not subject to prosecution under R.C. 2919.21(B) for the nonpayment of a court's order to pay a child-support arrearage, because he had no current obligation of support insofar as the child who was the subject of the order was emancipated. Specifically, according to Winslow, the period during which he was alleged not to have provided support to the child, D.K., was between June 1, 2012, and May 31, 2014, and the child was emancipated as of June 8, 2014. Winslow acknowledged that he "still owe[d] support money as an arrearage after the emancipation," and that the juvenile court had ordered him "to continue to make monthly payments of $265.03 plus processing fees until the arrearage is paid in full." Winslow pointed out that he "was not indicted for nonpayment on the arrearages until three years after the child had been emancipated," and that the indictment charged him "with nonsupport for dates that was ordered arrearage [sic] after June 8, 2014." Winslow argued that he "owed no current support after June 8, 2014" (the emancipation), and "any support owed before that date became an arrearage, which [he] is to pay off pursuant to the juvenile court order dated April 10, 2014." Citing *State v. Pittman*, 150 Ohio St.3d 113, 2016-Ohio-8314, 79 N.E.3d 531, Winslow argued that he could not be prosecuted

under R.C. 2919.21(B) for failure to make payments on a child support arrearage if the child for whom he owed support had been emancipated and there was no current obligation to support the child.

{¶ 3} The State opposed Winslow's motion to dismiss, arguing that "*Pittman* dealt solely with the question of 'whether, pursuant to R.C. 2919.21(B), the state may prosecute a person who failed to make the payments set forth *in an arrearage-only order* issued after the date of his children's emancipation." (Emphasis sic.) The State distinguished *Pittman*, pointing out that "Pittman's children were emancipated on August 31, 2006, after which he was not legally obligated to pay support," but the charges against him applied to his "non-payment of an arrearage-only order between July 1, 2007, through June 30, 2009; a time during which Pittman did not have a current child support obligation due to the previous emancipation of his children."

{¶ 4} The State argued that, although the emancipation of a child may terminate a support order, it does not absolve the obligor-defendant of his prior failure to make support payments while the support order was still in effect. The State asserted that Winslow had been charged "with non-support based on the current court order during the time alleged in the indictment – not on an arrearage-only order." Because the time frame specified in the indictment was prior to the child's emancipation and dealt directly "with a period of time when Defendant was required, pursuant to a non-arrearage court order, to support his non-emancipated child," the State asserted that *Pittman* did not apply to the facts of Winslow's case.

{¶ 5} The trial court held a hearing on the motion to dismiss on August 3, 2018, and took the matter under advisement. On September 4, 2018, the court held a hearing

"for the reading of the oral decision of the motion to dismiss." The court announced its decision as follows:

> This matter is similar to that in *Pittman* in that the child for whom the support order is for the benefit of, specifically DK, is emancipated and was emancipated on June 8th of 2014 by order of the Montgomery County Juvenile Court which was submitted as State's Exhibit 2. It is further similar to *Pittman* in that Mr. Winslow was indicted after the child's emancipation on August 30th of 2017[sic], though that is where the similarities end.
>
> Mr. Winslow's indictment for his alleged failure to pay support for his child, DK, between the dates of June 1, 2012, and May 31 of 2014 - - that time period is clearly before the emancipation of June 8th, 2014. While Mr. Winslow has an arrearage built up for the indicted period * * * that does not weigh upon this dismissal as he is not being charged with failure to pay that arrearage.
>
> The Court cannot read the statute in light of *Pittman* to eviscerate the six-year statute of limitations and impose a statute limitation of the day of emancipation. To do so would * * * only reward and exacerbate the behavior of failing to provide supports [sic] but also to ignore and violate court orders. Based upon the evidence presented to the Court, the Court finds that during the indicted periods defendant was under a current obligation to support his child as alleged. However, that finding is only bearing upon this dismissal and not upon proof of the ultimate issue at trial. The defendant's motion for dismissal is therefore denied.

{¶ 6} After the court's oral decision on the motion to dismiss, Winslow entered a no contest plea. (The court's written decision on the motion to dismiss was filed on September 19, 2018.) Sentencing occurred on October 2, 2018, and the judgment entry was filed on October 5, 2018.

{¶ 7} Winslow asserts one assignment of error on appeal, as follows:

> THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO DISMISS THE INDICTMENT.

{¶ 8} Winslow asserts that, according to *Pittman*, 150 Ohio St.3d 113, 2016-Ohio-8314, 79 N.E.3d 531, at ¶ 18, the "legislature's inclusion of the present tense phrase 'is legally obligated to support' " in R.C. 2919.21(B) was determined "to mandate 'that a person charged with a violation must be under a current obligation to provide support' when the indictment is handed down." Therefore, Winslow asserts that that "an individual is not subject to prosecution for failure to pay an arrearage following emancipation," and that his criminal liability for nonpayment of support ended when his child was emancipated. He contends that "the State is left open to its civil options to collect arrearages." Winslow directs our attention to *State v. Hubbard*, 2018-Ohio-3627, 119 N.E.3d 798 (11th Dist.), in support of his interpretation.

{¶ 9} Winslow recognizes that, after his notice of appeal was filed, this Court issued two opinions declining to apply the holding of *Pittman* to preclude prosecution under R.C. 2919.21(B), where current support orders existed during the periods listed in the counts of the indictment, even though the indictment was filed after the dependents were emancipated and the defendant's support obligation was terminated. *See State v. Miles*, 2d Dist. Montgomery No. 27885, 2018-Ohio-4444, and *State v. Ferguson*, 2d Dist.

Montgomery No. 27886, 2018-Ohio-4446. Winslow points out that our holdings, which he views to be in error, are in conflict with the holding in *Hubbard,* and he states his desire to "preserve this singular issue for possible review by the Ohio Supreme Court." He also asserts that, pursuant to R.C. 2901.04(A), "sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused," and that the court must presume that the legislature meant what it said. He further asserts that the court "cannot amend statutes to provide for what it believes to be the logical result," citing *State v. Hess,* 2d Dist. Montgomery No. 25144, 2013-Ohio-10, ¶ 17.

{¶ 10} In a footnote, Winslow also acknowledges that he "is aware of the amendment to R.C. 2919.21(B), effective February 11, 2019, clarifying that a person may be prosecuted for nonsupport of dependents even after an order for support terminates, 2018 Am.Sub.S.B. No. 70," but he contends "that the amended statute is not relevant to interpreting the current statute as written" and that the "applicable, binding law available in *Pittman* states that a person cannot be criminally charged under this section for nonsupport when payment is owed on an arrearage with no current obligation to an emancipated child."

{¶ 11} In response, the State argues that *Pittman* has no application to Winslow's prosecution, because "Winslow was not charged with failing to make child-support payments toward an 'arrearage only' order," and that his arguments should be rejected for the reasons articulated in *Miles* and *Ferguson.* The State reiterates that Winslow was obligated to pay support for D.K. in the amount of $220.86 per month, effective August 7, 2008, and that Winslow "violated the order by failing to make payments from June 1,

2012, through May 31, 2014 – a period that predates D.K.'s emancipation." The State further argues that Winslow "has misread *Pittman's* holding and misapplied its application under the facts of his case," where there is no dispute that he was under a support obligation during the time frames alleged in the indictment and he was charged with failing to pay support before D.K. was emancipated. The State argues that *Pittman* is distinguishable for the reasons set forth in *Miles* and *Ferguson*.

{¶ 12} We note that this Court very recently considered the issue herein in *State v. Brown*, 2d Dist. Greene No. 2018-CA-29, 2019-Ohio-1666, wherein this Court noted as follows:

> Defendant, Chalmer L. Brown, was charged with two first-degree-misdemeanor counts of failure to pay court-ordered child support for his child, K.M., in violation of R.C. 2919.21(B). K.M., though emancipated when the criminal complaint was filed, was not emancipated during the time period covered by each count. The trial court sustained Brown's motion to dismiss, based upon *State v. Pittman*, 150 Ohio St.3d 113, 2016-Ohio-8314, 79 N.E.3d 531. After the trial court's dismissal, this court decided *State v. Ferguson*, 2018-Ohio 4446 __N.E.3d __ (2d Dist.), and *State v. Miles*, 2018-Ohio-4444, __N.E.3d __ (2d Dist.), wherein we held that *State v. Pittman* does not control when, as here, the child was emancipated when the charges were initiated, but the timeframe of the alleged non-support set forth in the charging document was before the child's emancipation.

Id. at ¶ 1. This Court reversed the judgment of the trial court and remanded the matter for further proceedings. *Id*.

{¶ 13} As set forth in *Brown*, the standard of review for a motion to dismiss is as follows:

> A Crim.R. 12(C) motion to dismiss is a mechanism to test the legal sufficiency of the complaint or indictment. If the allegations set forth in the charging document constitute the criminal offense charged, the motion to dismiss must be overruled. *State v. Patterson*, 63 Ohio App.3d 91, 95, 577 N.E.2d 1165 (2d Dist. 1989). We review a trial court's motion to dismiss de novo. *State v. Cassel*, 2016-Ohio-3479, 66 N.E.3d, ¶ 19 (2d Dist.).

Id. at ¶ 3.

{¶ 14} In *Brown*, this Court conducted the following analysis:

> This case turns on the applicability of *Pittman*, 150 Ohio St.3d 113, 2016-Ohio-8314, 79 N.E.3d 531, to the facts of this case. Pittman's children were emancipated in August 2006 with the emancipation resulting in, quite naturally, the termination of Pittman's child support obligation. Pittman had a child support arrearage which was reduced to a judgment, and Pittman was ordered to pay a monthly amount toward the arrearage until it was eliminated. Three years later, after Pittman failed to pay the arrearage as ordered, he was indicted for a felony violation of R.C. 2919.21(B).
>
> Pittman asserted that, since the children were emancipated, his failure to pay the arrearage, though court-ordered, could not constitute a violation of R.C. 2919.21(B). The Supreme Court agreed stating that "because [R.C. 2919.21(B)] uses the present tense in the phrase 'is legally

obligated to support,' a person charged with a violation must be under a current obligation to provide support." *Pittman* at ¶ 18. The court, therefore, ruled that Pittman, based upon the children's emancipation, "had no current legal obligation to support his * * * children[,]" and as such, he "was not subject to prosecution under R.C. 2919.21(B) for his failure to make payments on the child support arrearage * * *." *Id*. at ¶ 23. The *Pittman* opinion, using very broad language, does state that "Pittman's criminal liability for nonpayment of support ended * * * when the children were emancipated." *Id*. at ¶ 19. This statement, however, is not the holding of the case; the holding, as noted, is confined to the conclusion that a person, after his children are emancipated, has no current child support obligation, and therefore prosecution for a failure to pay a court-ordered arrearage is statutorily prohibited."

Justice Lanzinger concurred in judgment only in *Pittman*, and she wrote a concurring opinion joined by two other justices. The concurring opinion states that she "can accept that [R.C. 2919.21(B)] limits prosecutions based on child support orders with current obligations rather than arrearages. But I disagree with the statement that 'Pittman's criminal liability for nonpayment of support * * * ended when his children were emancipated.' " *Pittman* [at] ¶ 26 (Lanzinger, J., concurring), quoting the majority opinion at ¶ 19.

Id. at ¶ 4-6.

{¶ 15} *Brown* noted that *Ferguson* and *Miles* decided the applicability of *Pittman*.

It noted that the "charging document in each case (an indictment) was filed after the defendant's child support obligation had terminated due to emancipation." *Id*. at ¶ 7. It further noted that "in each case, the nonsupport timeframe set forth in the indictment was before emancipation, and, thus, covered a period when the defendant had been obligated to pay court-ordered child support. We concluded that these facts allowed *Pittman* to be distinguished." *Id*.

{¶ 16} This Court also recognized in each of our opinions that the Eleventh District, in *Hubbard*, 2018-Ohio-3627, 119 N.E.3d 798, reached a contrary conclusion. *Brown* at ¶ 8; *Miles* at ¶ 15; *Ferguson* at ¶ 19. "Hubbard was indicted under R.C. 2919.21(A)(2) and (B), but, otherwise, the essential facts of the case are the same as in *Ferguson, Miles,* and [*Brown*]." *Brown* at ¶ 8. This Court noted that the "*Hubbard* majority concluded that a fair, accurate reading of *Pittman* requires the 'conclusion that a defendant cannot be charged with criminal nonsupport following the emancipation of his children * * *.' " *Id*., citing *Hubbard* at ¶ 16.

{¶ 17} In *Miles*, we responded to the holding in *Hubbard* as follows:

> While we recognize that *Pittman* could be read to preclude any prosecution under R.C. 2919.21(B) following emancipation, we do not think that reading is required or desired. We note that the dissenting judge in *Hubbard* agreed with our analysis, concluding that *Pittman* did not apply in that case, because unlike *Pittman,* the charges were not based on an arrearage order but on a support order in effect during the time periods alleged in the indictment.

Miles at ¶ 15, citing *Hubbard* at ¶ 28 (O'Toole, J., dissenting); *see also Brown* at ¶ 9.

{¶ 18} In conclusion, we stated in *Brown*:

> We continue to adhere to our conclusion, as expressed in *Ferguson* and *Miles*, that *State v. Pittman* "does not preclude prosecution [under R.C. 2919.219(B)] when a current support order existed during the time periods listed in the individual counts of the indictment [or complaint], even though [the charging instrument] was filed after the dependents were emancipated and the defendant's obligation was terminated." *Miles* at ¶ 16; *Ferguson* at ¶ 19.

Brown at ¶ 10.

{¶ 19} At the hearing on Winslow's motion to dismiss, the parties stipulated to: State's Exhibit 4, the administrative order from the Montgomery County Child Support Enforcement Agency filed in the juvenile court on November 13, 2008; State's Exhibit 1, the juvenile court's adoption of that administrative order imputing the child support order to Winslow; State's Exhibit 2, the emancipation order for the child, which provided that D.K. reached the age of majority on June 8, 2014; and State's Exhibit 3, Winslow's August 30, 2017 indictment. Winslow's indictment stated: "**BRYANT WINSLOW, BETWEEN THE DATES OF JUNE 1, 2012 THROUGH MAY 31, 2014** * * * did recklessly abandon or fail to provide support as established by a court order to, another person, D.K."

{¶ 20} The indictment herein was clearly filed after Winslow's child support obligation was terminated due to D.K.'s emancipation, but the time frame of nonsupport alleged in the indictment was June 1, 2012 through May 31, 2014, before D.K. was emancipated. In other words, the indictment covered a period when Winslow was obligated to pay court-ordered child support. Consistent with *Brown, Miles,* and

Ferguson, Winslow's motion to dismiss was properly overruled.

{¶ 21} Winslow's assignment of error is overruled. The judgment of the trial court is affirmed.

{¶ 22} Because we recognize that our judgment is in conflict with *Hubbard*, 2018-Ohio-3627, 119 N.E.3d 798 (11th Dist.), we sua sponte certify a conflict to the Supreme Court of Ohio pursuant to Article IV, Section 3(B)(4), Ohio Constitution. The certified question is:

> May a child support obligor be prosecuted for failure to pay child support under R.C. 2919.21(B) where a child support order was in place for the time period specified in the charging document, but the charging document was filed after the child for whom support was owed had been emancipated and the child support obligation had terminated?

{¶ 23} We note that our sua sponte decision to certify a conflict does not relieve the parties of the obligation to follow all Supreme Court procedural rules governing the filing of an appeal of right. We also direct the parties to S.Ct.Prac.R. 8.01, which requires "an interested party to the proceeding" to file a notice of the certified conflict in the Supreme Court.

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FROELICH, J. and TUCKER, J., concur.

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