[Cite as *State v. Cefalo*, 2012-Ohio-5594.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-L-163**
- vs -	:	
JAMES J. CEFALO,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 11 CR 000372.

Judgment: Reversed and remanded.

Charles E. Coulson, Lake County Prosecutor, and *Karen A. Sheppert*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

R. Paul LaPlante, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} Appellant, James J. Cefalo, appeals from a judgment of the Lake County Court of Common Pleas. Appellant challenges the trial court's denial of his motion to dismiss or amend the information and its finding that he was guilty of a fifth-degree felony theft offense.

{¶2} On June 29, 2011, appellant stole certain items from the Wal-Mart Store in Eastlake, Ohio valued at $666.48. An information was filed against him on August 4, 2011, alleging one count of theft in violation of R.C. 2913.02(A)(1), which at the time was a felony of the fifth degree. On September 30, 2011, House Bill 86 ("H.B. 86") went into effect and changed the classification of theft offenses by increasing the threshold value of property or services stolen for each level of offense. At the time appellant stole the items from Wal-Mart, the theft thresholds for a fifth-degree felony per R.C. 2913.02 were $500 to $5,000. However, H.B. 86 changed the theft thresholds for a fifth-degree felony to $1,000 to $7,500, which brought appellant's crime into the range of a first-degree misdemeanor because he stole less than $1,000 worth of items. R.C. 2913.02(B)(2).

{¶3} Based on the statutory reclassification of his offense as a first-degree misdemeanor, appellant filed a motion to dismiss or amend the information and the State responded. On November 22, 2011, the trial court held a hearing on the motion. Following the trial court's denial of the motion, appellant waived his right to indictment and pled "no contest" to the fifth-degree felony charge in the information. Appellant was sentenced to 147 days in jail, for which he received credit for time served, and was immediately released from jail.

{¶4} In its November 22, 2011 judgment entry, the court stated that it was permitting appellant "to plead 'No Contest' solely to allow [him] to vacate his plea to a felony of the fifth degree and immediately enter a plea to a misdemeanor of the first degree should it be determined that House Bill 86 requires that the offense be modified in that regard." The court proceeded to retain jurisdiction in order to re-address the plea

issue should it become necessary in the future. Essentially, the trial court applied H.B.86 to the limited extent that appellant received the benefit of a misdemeanor sentence, but it did not agree that appellant qualified for a misdemeanor conviction. Thus, the trial court found appellant guilty of a fifth-degree felony, but imposed a misdemeanor sentence. Appellant timely filed the present appeal, asserting the following assignment of error:

{¶5} "The trial court erred in finding that House Bill 86 reduced only the defendant-appellant's potential sentence but not the level of seriousness of his theft offense."

{¶6} In his single assignment of error, appellant argues the trial court erred in finding him guilty of a fifth degree felony theft when H.B. 86 retroactively altered the threshold levels for misdemeanor thefts to $1,000 or less. We agree that the reforms in H.B. 86 with respect to R.C. 2913.02 and the reclassification of theft offenses apply retroactively under the narrow exception present in this case whereby appellant is entitled to a reduced penalty or punishment as a result of the amendments. Accordingly, we find that appellant's argument has merit.

{¶7} Addressing the effective date, H.B. 86 states the following in Section 4:

{¶8} "The amendments to sections ***2913.02 *** of the Revised Code that are made in this act apply to a person who commits an offense specified or penalized under those sections on or after the effective date of this section and to a person to whom division (B) of section 1.58 of the Revised Code makes the amendments applicable."

{¶9} Accordingly, the amendments apply to two classes of people: (1) a person who committed an offense after the effective date of the new act, and (2) a person to

whom R.C. 1.58 applies. Appellant committed the subject offense before the effective date, so the pivotal question is whether appellant qualifies under R.C. 1.58(B).

{¶10} R.C. 1.58(B) states that "[i]f the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended."

{¶11} Appellant submits that since he had neither entered a plea nor been sentenced as of September 30, 2011, the effective date of H.B. 86, the amendments to R.C. 2913.02 applied to him because neither his "penalty" nor "punishment" had yet been imposed. Appellant argues that the term "penalty" in R.C. 1.58(B) is equivalent to the level or classification of offense and does not have the same meaning as the term "punishment," and therefore, he should not only be punished with a misdemeanor sentence, but also should only be charged with a misdemeanor theft offense.

{¶12} The state agrees that appellant appropriately received a reduced sentence because the term "punishment" refers to the amount of jail time imposed. However, the state disagrees that the language of R.C. 1.58(B) requires that the classification or level of the offense should also be reduced. Instead, the state reads the terms "penalty" and "punishment" as being synonymous with one another and equivalent only to the sentence received.

{¶13} The language in the second paragraph of Section 4 of H.B. 86 contains a statement of implicit legislative intent to make the amendments retroactive to a person who has committed the offense prior to the effective date, but not sentenced until after the effective date:

{¶14} "The provisions of sections *** 2913.02 *** of the Revised Code in existence prior to the effective date of this section shall apply to a person upon whom a court imposed sentence prior to the effective date of this section for an offense specified or penalized under those sections. The amendments to sections *** 2913.02 *** of the Revised Code that are made in this act do not apply to a person who upon whom a court imposed sentence *prior* to the effective date of this section for an offense specified or penalized under those sections." (Emphasis added.)

{¶15} R.C. 2913.02, the statute defining theft, for which appellant was convicted, is clearly listed within the parameters of H.B. 86. By implication, the above-referenced language of the enacted legislation means that since appellant was sentenced in November, 2011, *after* the effective date of H.B. 86 (September 30, 2011), the amendments to R.C. 2913.02 as a result of H.B. 86, rather than the former version of the statute, apply to him. Those amendments involve a reduction in the classification of offenses due to the increase in value thresholds of property stolen. Accordingly, as appellant correctly maintains, the trial court erred by failing to amend his information and should have reduced his conviction from a fifth-degree felony to a first-degree misdemeanor.

{¶16} This and other Ohio appellate courts have followed suit in their interpretation of the reforms created by H.B. 86. *See State v. Stalnaker*, 11th Dist No. 2011-L-151, 2012-Ohio-3028, ¶15 (amendment to R.C. 2929.14 due to passage of H.B. 86 did not apply to appellant who was sentenced prior to effective date); *see also State v. Terrell*, 4th Dist. No. 10CA39, 2012-Ohio-1926, ¶12; *State v. Du*, 2d Dist. No. 2010-CA-27, 2011-Ohio-6306.

{¶17} This interpretation is further buttressed by the comments by the Ohio Legislative Service Commission's Bill Analysis, p. 19:

{¶18} Under existing law, the *penalties* for many theft-related offenses and for certain other non-theft-related offenses are increased as the value of the victim's loss, or the value of the property or loss that otherwise was the subject of the offense, increases. *Generally, for the offenses, a default penalty (generally a misdemeanor)* is provided and *that penalty* applies unless the value of the property or loss involved in the offense reaches or exceeds a specific threshold. If the specified threshold value is reached or exceeded, an *increased penalty (generally a felony)* is provided." (Emphasis added.)

{¶19} Furthermore, even without a statement of legislative intent, the theft statute itself, R.C, 2913.02, provides clarification as to the meaning of the term "penalty" for purposes of that section. R.C. 2913.02(B)(9) and (10) contain introductory phrases that read as follows: "[i]n addition to the *penalties* described in division (B)(2) of this section ***." Turning to division (B)(2) of R.C. 2913.02 for a description of "penalties," it lists the various classification of offenses and their associated threshold values, e.g. petty theft is a misdemeanor of the first degree, theft is a felony of the fifth degree, grand theft is a felony of the fourth degree and so on. Accordingly, for purposes of R.C. 2913.02, the term "penalty" clearly includes the level of offense.

{¶20} Moreover, to interpret this provision otherwise, as the trial court did, would render the term "penalty" mere surplusage, a result that violates the rules of statutory construction. There is a general presumption that the legislature intends a difference in meaning from its use of different language. *Huntington National Bank v. 199 South Fifth*

Street Co., LLC, 10th Dist. No. 10AP-1082, 2011-Ohio-3707, ¶18; *see also D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health,* 96 Ohio St. 3d 250, 2002-Ohio-4172, ¶26 (stating basic rule of statutory construction requires that words in statutes should not be construed to be redundant, nor should any words be ignored so that no part is treated as superfluous).

{¶21} In support of its position, the dissenting opinion relies in part on two cases emanating from the Eighth Appellate District, *State v. Steinfurth*, 8th Dist. No. 97549, 2012-Ohio-3257, and *State v. Saplak*, 8th Dist. No. 97825, 2012-Ohio-4281. Specifically the Eighth District found that:

{¶22} "R.C. 1.58 clearly states that a criminal defendant receives *the benefit of a reduced penalty, forfeiture, or punishment.* * * * R.C. 1.58 makes no mention of a criminal defendant *receiving the benefit of a lesser or reduced offense* itself, here, the benefit of amending [his] fifth-degree felony conviction to that of a first degree misdemeanor." (Emphasis sic.) *Steinfurth*, at ¶15; *Saplak*, at ¶12.

{¶23} However, the Eighth District's opinions do not discuss the statutory language considered in this opinion at paragraph 16, supra, regarding the meaning of "penalty" as set forth in R.C. 2913.02(B). Moreover, based on the Eighth District's analysis in *Steinfurth* and *Saplak* regarding R.C. 1.58, the court recognized there is a benefit to being convicted of a misdemeanor instead of a felony.

{¶24} This court agrees there is a benefit to being convicted of a misdemeanor instead of a felony because there are increased collateral penalties associated with a felony conviction by way of forfeiture of certain rights and priviledges, i.e., to vote; to be a juror; to hold an office of honor, trust, or profit; circulate or serve as a witness for the

signing of any declaration of candidacy and petition, voter registration application, or nominating, initiative referendum or recall position, R.C. 2961.01, and having a weapon while under disability, R.C. 2923.13. By acknowledging the existence of a benefit of being convicted of only a misdemeanor, one must also acknowledge an additional penalty to conviction of a felony as previously stated. If it is an additional penalty, R.C. 1.58 dictates conviction of a misdemeanor only.

{¶25} All of the above supports the view that the terms "penalty" and "punishment" mean two different things for purposes of R.C. 1.58 here and that appellant can only be convicted of a misdemeanor theft offense.

{¶26} For the foregoing reasons, appellant's sole assignment of error is well-taken. The judgment of the Lake County Court of Common Pleas is reversed and remanded for further proceedings consistent with this opinion.

TIMOTHY P. CANNON, P.J., concurs,

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

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{¶27} I dissent from the majority's conclusion that the trial court erred by failing to reduce Cefalo's conviction from a fifth-degree felony to a first-degree misdemeanor, based on its finding that R.C. 1.58's definition of "penalty" includes the level of the offense.

{¶28} Cefalo argued that since he was sentenced after the effective date of H.B. 86, which changed the dollar amount required for a theft offense to be classified as a

fifth- degree felony, he was entitled to the reduction of the level of the offense for which he was charged from a felony to a misdemeanor. Pursuant to R.C. 1.58(B): "If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended." At issue in the present matter is the meaning of the word "penalty." Since the word "penalty" should be interpreted to include a defendant's sentence and not the level of the offense for which he is convicted, the trial court properly gave Cefalo a reduced sentence without reducing the level of the offense.

{¶29} As it relates to the amendment of theft offenses, H.B. 86 did two things. First, it changed the offense level for future thefts, depending on the value of the items stolen. It did not state that the offense level for crimes committed prior to its effective date should be changed or reduced. Second, it allowed for a corresponding reduction in penalties for thefts committed prior to the statute's effective date, through the application of R.C. 1.58, which applies to sentences only, not offense levels.

{¶30} Several sources provide support for this contention. The Eighth District, in considering the meaning of the word "penalty" in similar circumstances, has determined that it does not include the level of the offense. That court found that while "R.C. 1.58 clearly states that a criminal defendant receives the benefit of a reduced penalty, forfeiture, or punishment. * * * R.C. 1.58 makes no mention of a criminal defendant receiving the benefit of a lesser or reduced offense itself," which, in that case and the present case, would allow the appellant to receive "the benefit of amending [his] fifth-degree felony conviction to that of a first-degree misdemeanor." (Emphasis deleted.)

State v. Steinfurth, 8th Dist. No. 97549, 2012-Ohio-3257, ¶ 15; *State v. Saplak*, 8th Dist. No. 97825, 2012-Ohio-4281, ¶ 11. This is a correct statement, as there is no language in R.C. 1.58 regarding offense levels. The Eighth District properly held that, since R.C. 1.58 allows for a change in the benefit of only the punishment, i.e., the sentence, the trial court acted properly in giving the defendant a reduced sentence but not changing the level of the charged offense. *Steinfurth* at ¶ 16.

{¶31} The majority notes that the Eighth District cases do not address the argument that "penalty" means level of offense under R.C. 2913.02. However, there is no indication that such an argument was before that court and its failure to address this issue does not affect the validity of its finding that R.C. 1.58 does not include a reference to reduced offense levels. As will be discussed further, the majority's argument related to R.C. 2913.02 also lacks merit and, therefore, has no bearing on the soundness or applicability of the Eighth District cases.

{¶32} The majority also asserts that since the Eighth District recognized a reduced offense level as a "benefit," it must also acknowledge that a felony conviction is a "penalty" under R.C. 1.58. However, the recognition that convicting a defendant of a misdemeanor instead of a felony is beneficial to that defendant does not require the conclusion that offense levels are "penalties" under R.C. 1.58. The issue is not whether there are negative consequences associated with being convicted of a felony instead of a misdemeanor, but whether R.C. 1.58 was intended to apply to offense levels. Nothing related to this discussion of the word "benefit" lends support to the position that "penalty" was intended by the Legislature to mean offense level under the statute.

{¶33} Another source of support for the conclusion that the term "penalty" should not be equated with the level of offense is R.C. 2901.02, entitled "Classification of Offenses." R.C. 2901.02(D) states the following: "Regardless of the penalty that may be imposed, any offense specifically classified as a felony is a felony, and any offense specifically classified as a misdemeanor is a misdemeanor." This discusses the term "penalty" in a manner that appears to support the contention that a "penalty" is something separate from the classification of the offense as a felony or misdemeanor. It also supports the State's proposition that even if a reduced sentence, or penalty, is imposed by the trial court, a corresponding reduction in the offense level is not mandated.

{¶34} Although the majority asserts that R.C. 2913.02(B)(9) and (10) use the word "penalty" to refer to the level of the offense, there is no further support provided for the proposition that the Legislature which enacted R.C. 1.58 three decades prior to these sections intended for "penalty" to have such a meaning. The word "penalty," as used in R.C. 2913.02, should not be applied to determine what "penalty" was intended to mean under R.C. 1.58. It is not controlling in the matter regarding the applicability of R.C. 1.58 or the determination as to whether a reduced sentence can be given while still classifying a crime as a felony, as is allowed under R.C. 2901.02. *See State v. Wilson*, 77 Ohio St.3d 334, 336, 673 N.E.2d 1347 (1997) (a court reviewing a statute must determine the "intent of the enacting body"). Similarly, the statements in the Legislative Service Commission's Bill Analysis for H.B. 86 also cannot be used to determine the intent of the Legislature which enacted R.C. 1.58.

{¶35} For the foregoing reasons, I respectfully dissent and would affirm the trial court's decision to give Cefalo a reduced sentence, but to also classify his offense as a fifth-degree felony rather than a first-degree misdemeanor.