[Cite as *State v. Cornett*, 2013-Ohio-2367.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio — Court of Appeals No. WD-12-046

Appellee — Trial Court No. 2011CR0142

v.

Zachary Cornett — **DECISION AND JUDGMENT**

Appellant — Decided: June 7, 2013

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney,
Aram M. Ohaniam and David E. Romaker, Jr., Assistant
Prosecuting Attorneys, for appellee.

Timothy Young, State Public Defender, and
Stephen A. Goldmeier, Assistant State Public Defender, for appellant.

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YARBROUGH, J.

I. Introduction

{¶1} Appellant, Zachary Cornett, appeals the judgment of the Wood County Court of Common Pleas, sentencing him to 11 months in prison following a bench trial in which he was found guilty of receiving stolen property. We reverse.

A. Facts and Procedural Background

{¶2} Between November 30, 2010, and December 5, 2010, Cornett stole several items from a Wal-Mart store located in Rossford, Ohio. In the aggregate, the stolen property was valued at $749.48. As a result of the theft, Cornett was indicted on March 17, 2011, on one count of theft in violation of R.C. 2913.02(A)(1), a felony of the fifth degree.

{¶3} At the time of his indictment, Cornett's violation of R.C. 2913.02(A) was punishable as a felony of the fifth degree, because the value of the stolen property was greater than $500. However, on September 30, 2011, House Bill 86 (H.B. 86) went into effect, amending the threshold at which a violation of R.C. 2913.02(A) becomes a felony. Under H.B. 86, theft of property valued at less than $1,000 is a misdemeanor of the first degree.

{¶4} On January 19, 2012, Cornett entered a plea of no contest to theft, which he argued was a plea to a misdemeanor theft offense by operation of H.B. 86. After discussing the appropriate level of the offense with defense counsel, the trial court proceeded to find Cornett guilty of a felony-level theft offense.

{¶5} On August 6, 2012, the trial court conducted Cornett's sentencing hearing. During the hearing, defense counsel objected to Cornett being found guilty of a felony, and argued that H.B. 86 reduced the offense to a misdemeanor by increasing the felony

threshold to $1,000. Nevertheless, the trial court proceeded to impose an 11-month felony prison sentence. Cornett's timely appeal followed.

B. Assignments of Error

{¶6} On appeal, Cornett assigns the following errors for our review:

> **FIRST ASSIGNMENT OF ERROR:** THE TRIAL COURT ERRED BY SENTENCING DEFENDANT-APPELLANT TO A SENTENCE OF IMPRISONMENT.
>
> **SECOND ASSIGNMENT OF ERROR:** THE TRIAL COURT ERRED BY SENTENCING DEFENDANT-APPELLANT TO A TERM OF INCARCERATION THAT EXCEEDS SIX MONTHS.
>
> **THIRD ASSIGNMENT OF ERROR:** THE TRIAL COURT ERRED BY FINDING DEFENDANT-APPELLANT GUILTY OF A FELONY.

{¶7} Because Cornett's assignments are interrelated, we will address them simultaneously.

II. Analysis

{¶8} In each of Cornett's assignments of error, he argues that the trial court erred by finding him guilty of a felony theft offense when H.B. 86 reduced the classification attributable to his offense from a felony of the fifth degree to a misdemeanor of the first degree.

{¶9} As to the retroactive application of the statutory amendments contained in H.B. 86, Section 4 provides that it "appl[ies] to a person who commits an offense * * * 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." R.C. 1.58(B) states: "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."

{¶10} Here, there is no dispute that the theft was committed prior to the effective date of amended R.C. 2913.02. Thus, the issue in this case is whether the amendment to R.C. 2913.02 reduces the "penalty, forfeiture, or punishment" for theft under R.C. 1.58(B). We hold that it does.

{¶11} Numerous trial and appellate courts in Ohio have addressed the question before us in this case since H.B. 86 went into effect on September 30, 2011. The First, Second, Fifth, Tenth, and Eleventh Appellate Districts have found that criminal defendants charged before the effective date of H.B. 86 but sentenced after that date were not only entitled to a reduction in their sentences under H.B. 86, but also to a reduction in the classifications of their crimes. *State v. Solomon*, 1st Dist. No. C-120044, 2012-Ohio-5755, 983 N.E.2d 872, ¶ 54 (classification reduced from fifth degree felony to fourth degree felony due to H.B. 86 amendments); *State v. Arnold*, 2nd Dist. No. 25044, 2012-Ohio-5786, ¶ 13 (charge reduced from felony of the fourth degree to felony of the third

degree); *State v. Gillespie*, 5th Dist. No. 2012-CA-6, 2012-Ohio-3485, 975 N.E.2d 492, ¶ 15 (amendments made by H.B. 86 applied to entitle defendant to be sentenced to a misdemeanor rather than a felony); *State v. Limoli*, 10th Dist. No. 11AP-924, 2012-Ohio-4502, ¶ 66 (reversing trial court conviction in part due to operation of H.B. 86 reducing classification of crime); *State v. Cefalo*, 11th Dist. No. 2011-L-163, 2012-Ohio-5594, ¶ 15 (fifth degree felony conviction reversed due to amendments to threshold levels made in H.B. 86 changing the crime to a misdemeanor of the first degree). Notably, we recently addressed this issue in *State v. Boltz*, 6th Dist. No. WD-12-012, 2013-Ohio-1830. In *Boltz*, we held that "[s]ince appellee's sentencing occurred after H.B. 86 went into effect, he is entitled to the lesser penalties of the amendments made by H.B. 86, regardless of when the crime was committed. Such lesser penalties include the reduced classification of the crime under which the appellee was charged." *Id.* at ¶ 20.

{¶12} On the other hand, the Eighth and Ninth Districts came to the opposite conclusion, holding that H.B. 86 did not require a reduction in the classification of a crime for defendants awaiting sentences for crimes committed before the effective date of H.B. 86. *State v. Steinfurth*, 8th Dist. No. 97549, 2012-Ohio-3257, ¶ 15-16; *State v. Taylor*, 9th Dist. No. 26279, 2012-Ohio-5403, ¶ 8. The Supreme Court of Ohio recently certified the conflict between the Fifth and Ninth District courts and accepted a discretionary appeal on this issue. *State v. Taylor*, 134 Ohio St.3d 1466, 2013-Ohio-553, 983 N.E.2d 366.

{¶13} Citing *State v. Steinfurth*, the state argues that the trial court properly sentenced to Cornett for a felony offense. In *Steinfurth*, the Eight District Court of Appeals held, in part:

> Because Steinfurth committed the offense prior to H.B. 86's effective date, but was sentenced after the effective date, he was entitled to and received the reduced penalty for a first-degree misdemeanor based on R.C. 1.58 and H.B. 86's amendments to R.C. 2913.02. R.C. 1.58 clearly states that a criminal defendant receives *the benefit of a reduced penalty, forfeiture, or punishment*. Contrary to Steinfurth's argument, 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 Steinfurt's fifth-degree felony conviction to that of a first-degree misdemeanor.
>
> Steinfurth relies on *State v. Burton*, 11 Ohio App.3d 261, 464 N.E.2d 186 (10th Dist.1983) and *State v. Collier*, 22 Ohio App.3d 25, 488 N.E.2d 887 (3rd Dist.1984) in support of his argument he was entitled to the benefit of amending his conviction from a felony to a misdemeanor. These cases, however, clearly support the conclusion that R.C. 1.58, as applied here, only required the trial court to *sentence* Steinfurth for a first-degree misdemeanor pursuant to the amendments to R.C. 2913.02. The trial court correctly concluded the theft offense conviction remained a fifth-degree

felony because Steinfurth committed the offense prior to the effective date of H.B. 86. (Emphasis sic.) *Id.* at ¶ 15-16.

{¶14} Following the Eighth District's reasoning in *Steinfurth*, the Ninth District reached the same conclusion in *State v. Taylor*. In *Taylor*, the defendant was convicted of theft for stealing $550 worth of cologne from a Sears store. H.B. 86 went into effect during the time period between Taylor's commission of the offense and his sentencing. Applying R.C. 1.58(B), the trial court determined that Taylor could only be convicted for a first-degree misdemeanor. *Id.* at ¶ 2. On appeal, the Ninth District Court of Appeals reversed the trial court, stating:

> Under Section 1.58(B), a defendant in Mr. Taylor's position is entitled to benefit from the decreased penalty enacted by the General Assembly while the case was pending against him, but nothing in that section provides that he is entitled to benefit from any decrease in classification of the crime. *Id.* at ¶ 7, citing *State v. Saplak*, 8th Dist. No. 97825, 2012-Ohio-4281, ¶ 13 (applying *Steinfurth* and holding that "the defendant is not entitled to the amendment of the fifth degree felony conviction to a first degree misdemeanor").

{¶15} Less than two weeks after the Eighth District decided *Steinfurth*, the Fifth District released its decision in *State v. Gillespie*. In *Gillespie*, the defendant was sentenced for passing bad checks in violation of R.C. 2913.11(B), which at the time the

offense was committed was a felony of the fifth degree. However, as is the case here, Gillespie was sentenced for the offense after the effective date of H.B. 86, which increased the felony threshold beyond the amount for which Gillespie was convicted. *Gillespie* at ¶ 7. While the state acknowledged the fact that Gillespie was entitled to receive the benefit of a reduced sentence, it argued that he was not entitled to receive a reclassification of the offense as a misdemeanor. *Id.* at ¶ 8. The court disagreed, stating:

> In its simplest form, to constitute a theft offense it need only be proven that some property of value has been taken. R.C. 2913.02 does not require the indictment to allege, or the evidence to establish, any particular value of the property taken. The offense of theft therein defined is complete and the offender becomes guilty of theft without respect to the value of the property or services involved. However, it becomes necessary to prove the value of the property taken, and likewise necessary that the jury find the value and state it in the verdict in order to measure the penalty. "Therefore, in such case, the verdict must find the value to enable *the court to administer the appropriate penalty*." *State v. Whitten*, 82 Ohio St. 174, 182, 92 N.E. 79 (1910). (Emphasis added).
>
> The amendment to R.C. 2913.02 raising the line of demarcation from five hundred dollars to one thousand dollars relates only to the penalty. 2011 Am.Sub.H.B. No. 86 operates, when the value of the

> property stolen falls between these two limitations, to reduce the penalty from that prescribed for a felony of the fifth degree to that prescribed for a misdemeanor of the first degree. Accordingly, the amendment comes within the provisions of R.C. 1.58(B), requiring, in the instant case, that the amendment be applied, and that the penalty be imposed according to the amendment. That penalty is a misdemeanor offense with a misdemeanor sentence not a felony offense with a misdemeanor sentence. *Id*. at ¶ 14-15.

{¶16} The Fifth District's decision in *Gillespie* was later embraced by the Second District in *State v. Arnold.* In *Arnold*, the court was tasked with deciding whether the trial court erred in reducing Arnold's theft offense from a third degree felony to a fourth degree felony pursuant to H.B. 86.

{¶17} In its analysis, the court noted that "it would be illogical to sentence a defendant for a felony of the fourth degree while at the same time identifying his offense as a felony of the third degree." *Arnold* at ¶ 13. Further, the court disagreed with the state's argument that the classification of an offense is separate from the punishment for that offense, thus rendering R.C. 1.58(B) inapplicable. In doing so, the court quoted the following language from Judge Dennis Langer's decision in *State v. Knight*, Montgomery C.P. No. 2011-CR-1202 (Oct. 31, 2011):

> The mere classification of an offense may have punitive implications, as can be illustrated by two examples:

> First example: R.C. 2929.13(F)(6) requires a mandatory prison term for an F1 and F2 if the defendant previously was convicted [of] an F1 or F2. Prior to H.B. 86, Possession of Cocaine (10 to 25 grams crack cocaine) was an F2. It now becomes an F3. Thus, the decision to classify this offense as an F2 or F3 is critical, because it will impact in a significant manner the criminal punishment imposed on the defendant in the future in the event he is convicted of another F1 or F2.
>
> Second example: R.C. 2929.13(B)(1)(a), enacted by H.B. 86, mandates community control sanctions ("CCS") for certain nonviolent F4s and F5s if the defendant previously has not been convicted of a felony offense. Prior to H.B. 86, Theft ($500 or more) was an F5. It now becomes a misdemeanor of the first degree (if the amount is less than $1,000). Thus, the decision to classify this offense as felony or a misdemeanor may determine whether the defendant is entitled to CCS in the future in the event he is convicted of a nonviolent F4 or F5. *Arnold* at ¶ 13.

Ultimately, the Second District concluded that the trial court properly applied the amendments made by H.B. 86 in its reduction of the offense.

{¶18} Upon due consideration of the foregoing decisions, we agree with the reasoning contained in *Gillespie* and *Arnold*. Indeed, the elements of theft and the

classification as a misdemeanor or felony are separated in discrete subsections within R.C. 2913.02. As stated in *Gillespie*, the value of the stolen property is only relevant when determining the penalty for the offense. *Gillespie* at ¶14. Thus, an increase in the felony-threshold from $500 to $1,000 amounts to a reduction in penalty, triggering the application of R.C. 1.58(B).

{¶19} Additionally, our conclusion is buttressed by the fact that "sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused." R.C. 2901.04(A). Construing R.C. 1.58(B) in favor of Cornett, we conclude that the trial court erred in finding him guilty of a felony of the fifth degree. Applying R.C. 2913.02(B), as amended by H.B. 86, Cornett should have been convicted of a misdemeanor of the first degree. This decision is consistent with this court's prior holding in *State v. Boltz*.

{¶20} Accordingly, Cornett's assignments of error are well-taken.

III. Conclusion

{¶21} Based on the foregoing, the judgment of the Wood County Court of Common Pleas is reversed and this matter is remanded to the trial court for further proceedings consistent with this decision. Costs are hereby assessed to the state in accordance with App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE