[Cite as *State v. Boltz*, 2013-Ohio-1830.]

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

State of Ohio	Court of Appeals No. WD-12-012
Appellant	Trial Court No. 11 CR 371
v.	
Nicholas Boltz	**DECISION AND JUDGMENT**
Appellee	Decided: May 3, 2013

* * * * *

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

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

* * * * *

PIETRYKOWSKI, J.

{¶ 1} The state appeals a March 9, 2012 judgment of the Wood County Court of Common Pleas in criminal proceedings against Nicholas Boltz, appellee. In the judgment, the trial court accepted a guilty plea by Boltz to two misdemeanors—receiving

stolen property (a violation of R.C. 2913.51(A) and (C) and a first degree misdemeanor) and failure to appear (a violation of R.C. 2937.29 and a first degree misdemeanor), convicted him of the offenses and imposed sentence.

{¶ 2} The criminal charges in the case were brought by indictment. Both indictments were for felonies. An August 18, 2011 indictment charged Boltz with receiving stolen property valued at $500 or more and less than $5,000, a violation of R.C. 2913.51(A) and (C) and a fifth degree felony. A Bill of Particulars filed by the state described the property involved, stating the property consisted of jewelry and Wii video games sold by Boltz for $650. The state has not claimed a higher value of the property in this appeal.

{¶ 3} Boltz failed to appear at a scheduled pretrial on the pending receiving stolen property charge on September 26, 2011, and was consequently charged under an October 20, 2011 indictment with failure to appear, in violation of R.C. 2937.29 and a fourth degree felony.

{¶ 4} H.B. 86 went into effect on September 31, 2011, after the offense dates on both the receiving stolen property and failure to appear charges. On January 23, 2012, the trial court ordered both parties to submit briefs on the issue of how statutory changes made by H.B. 86 applied to the charges against Boltz.

{¶ 5} The trial court issued a judgment on March 5, 2012. The court ruled that changes under H.B. 86 applied to both pending charges against Boltz. The court held that R.C. 2913.51, as amended by H.B. 86, "states that the offense of receiving stolen

property is a misdemeanor of the first degree unless the value of the property is $1,000 or more." The court ruled that, if Boltz pled guilty to the receiving stolen property charge against him, the court would find him guilty of receiving stolen property, a misdemeanor of the first degree, and that upon conviction Boltz would be subject to the penalties for a misdemeanor of the first degree. The court also ruled that the failure to appear charge was also reduced to a first degree misdemeanor by operation of H.B. 86 and the terms of R.C. 2937.99.

{¶ 6} On March 6, 2012, the trial court incorporated these determinations in its Crim.R. 11 plea colloquy with Boltz before accepting his guilty plea to the offenses.

{¶ 7} The state appeals the March 9, 2012 judgment that accepted the guilty plea, convicting Boltz of two first degree misdemeanors, and imposed sentence. The state asserts one assignment of error on appeal:

> Appellant's Assignment of Error
>
> I. The trial court improperly modified Boltz's charges when it reduced his fifth-degree felony actions to a misdemeanor based on the amended theft threshold of H.B. 86.

{¶ 8} H.B. 86 amended R.C. 2913.51 by increasing the threshold dollar amounts necessary to elevate a charge of receiving stolen property to a felony. Prior to the passage of H.B. 86, if a criminal defendant was found guilty of receiving stolen property having value over $500, but less than $5,000, the defendant was charged with a felony of the fifth degree. H.B. 86 amended this threshold amount for a fifth degree felony to over

$1,000 but less than $7,500. R.C. 2913.51(C). Receiving stolen property with value less than $1,000 was amended to be a misdemeanor of the first degree. *Id*.

{¶ 9} H.B. 86, Section 4, expressly provides to whom the amendments are applicable:

> The amendments to sections * * * 2913.51 * * * 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 whom division B of section 1.58 of the Revised Code makes the amendments applicable*.
>
> The provisions of sections * * * 2913.51 * * * 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 * * * 2913.51 * * * 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).

{¶ 10} Section (B) of R.C. 1.58, the Ohio Savings statute, reads:

> 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.

{¶ 11} Appellant concedes appellee is entitled to the lesser sentencing to the receiving stolen property charge under H.B. 86, but disputes the trial court's ruling that classification and sentence both are altered on pending cases after H.B. 86 went into effect. In addition, appellant argues when appellee failed to appear for the pretrial conference on the receiving stolen property charge, that offense was still properly classified as a felony since H.B. 86 was not yet in effect. Failure to appear for a felony charge is a felony in the fourth degree, while failure to appear for a misdemeanor charge is only a misdemeanor offense. R.C. 2937.99. Therefore, appellant asserts that the trial court erred by not finding appellee guilty of receiving stolen property, a felony of the fifth degree, and failure to appear, a felony of the fourth degree, and sentencing appellee under those charges.

{¶ 12} 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*, 2012-Ohio-5755, 983 N.E.2d 872, ¶ 54 (1st Dist.) (classification reduced from fifth degree felony to fourth degree felony due to H.B. 86 amendments); *State v. Arnold*, 2d 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). 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} Appellee undoubtedly falls within the language contained in H.B. 86 since R.C. 1.58 applies to him. When H.B. 86 went into effect on September 30, 2011, no penalty, forfeiture, or punishment had been imposed on appellee, as he was still awaiting the start of his trial. After the effective date of the amendment passed, on January 23, 2012, the court held a change of plea hearing in order for appellee to change his plea to guilty on both charges. Appellee was formally convicted and sentenced on March 9,

2012. The specific amendments to R.C. 2913.51 made in H.B. 86 caused a reduction in the sentence and classification of the receiving stolen property charge against appellee. Therefore, under the specific reference in Section 4 of H.B. 86 to "a person whom division B of section 1.58 of the Revised Code makes the amendments applicable," appellee fell within the clear language of H.B. 86 and entitled to the benefits conferred under the amendments.

{¶ 14} The relevant question is whether the reference contained in R.C. 1.58 to "penalty, forfeiture, or punishment" includes not only sentencing but also the classification of a crime. Appellant relies exclusively on the Eighth District's holding in *Steinfurth* that "R.C. 1.58 makes no mention of a criminal defendant receiving the benefit of a lesser or reduced offense itself." *Steinfurth* at ¶ 15. We disagree for three reasons.

{¶ 15} First, the legislative intention behind the amendments to H.B. 86 indicates that appellee is entitled to the benefit of a reduced classification of his crime. For instance, the Ohio Legislative Service Commission's Bill Analysis on H.B. 86 stated:

> 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 specific threshold is reached or

exceeded, an *increased penalty (generally a felony)* is provided. Pg. 19. (Emphasis added.)

{¶ 16} R.C. 2913.02, governing theft offenses, contains specific references to the classification of an offense being directly tied to, and part of, its penalty for violation of the statute. *Cefalo*, 11th Dist. No. 2011-L-163, 2012-Ohio-5594, ¶ 15, 19. For the purposes of the theft statutes, then, the penalty for a violation is intrinsically linked to the classification of the crime. A receiving stolen property charge operates in the same manner as a theft charge, as both charges have a default penalty with higher classified offenses as the value of the property loss suffered by the victim increases. Since receiving stolen property charges are classified in a similar manner under the Revised Code, the same link in theft offenses between penalty and classification applies to appellee's conviction for receiving stolen property.

{¶ 17} Second, it would be illogical to sentence appellee according to the amendments made under H.B. 86 making his crime a misdemeanor while simultaneously classifying that crime as a felony. As the Fifth District held in *Gillespie*:

> 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 in original.)

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.* Several cases have applied R.C. 1.58(B) to situations in which the defendants committed theft offenses prior to, but were sentenced after, the effective date of legislation which reduced their offenses from felonies to misdemeanors. *State v. Collier*, 22 Ohio App.3d 25, 27, 488 N.E.2d 887 (1984); *State v. Coffman*, 16 Ohio App.3d 200, 475 N.E.2d 139 (1984); *State v. Burton*, 11

Ohio App.3d 261, 464 N.E.2d 186 (1983). *Gillespie*,5th Dist. No. 2012-CA-6, 2012-Ohio-3485, 975 N.E.2d 492, at ¶ 14-15. (Emphasis added.)

{¶ 18} We find this reasoning to be persuasive and reject the contrary reasoning in *Steinfurth*. It is not reasonable to sentence a criminal defendant under one classification while simultaneously classifying the crime under a different classification. In this case, appellee is clearly entitled under operation of R.C. 1.58 to the lower sentencing of a misdemeanor of the first degree under the amendments made in H.B. 86. It would be illogical to classify his crime as a felony of the fifth degree while sentencing him under a misdemeanor charge.

{¶ 19} Last, we agree with the Eleventh District Court of Appeals that classification of a conviction as a felony rather than a misdemeanor alone imposes additional penalties other than the sentence:

> 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 privileges, 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. *Cefalo*, 11th Dist. No. 2011-L-163, 2012-Ohio-5594, ¶ 24.

{¶ 20} As indicated by R.C. 1.58(B), appellee was entitled to the lesser penalties of being charged with a misdemeanor rather than a felony due to the operation of H.B. 86. These lesser penalties extend not only to the sentencing for that charge but also the collateral penalties associated with a felony charge. Furthermore, it would be illogical to hold that two criminal defendants charged with the same crime and sentenced on the same day could be sentenced on different classifications based only upon whether their crime was committed before or after H.B. 86 went into effect. Since 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.

{¶ 21} For those reasons, we follow the holdings of the First, Second, Fifth, Tenth, and Eleventh Districts and reject the logic of the Eighth and Ninth Districts. Since appellee fell within the statutory language of Section 4 of H.B. 86 and R.C. 1.58(B) operated to entitle appellee to the benefits of the amended R.C. 2913.51, the trial court did not err when it accepted appellee's guilty plea to a first degree misdemeanor.

{¶ 22} Our holding on appellee's receiving stolen property charge also dictates that appellee is entitled to the lesser misdemeanor charge for his failure to appear at the pretrial hearing on September 26, 2011. R.C. 2937.99 states the appropriate penalty for a failure to appear charge is based upon the classification of the underlying crime. For instance, failure to appear "in connection with a felony charge" is a "felony of the fourth degree," while failure to appear "in connection with a misdemeanor charge" is a "misdemeanor of the first degree." R.C. 2937.99(B) and (C). Since we find that appellee was properly charged with receiving stolen property as a misdemeanor of the first degree, the trial court did not err when it charged appellee with failure to appear as a misdemeanor of the first degree as well. It would not follow to find appellee properly convicted of a misdemeanor for his underlying charge while also holding him accountable based upon the felony failure to appear charge.

{¶ 23} For the foregoing reasons, the state's assignment of error is not well-taken. We find that the trial court did not err when it accepted appellee's guilty plea to a first degree misdemeanor of receiving stolen property due to the impact of amendments contained in H.B. 86.

{¶ 24} On consideration whereof, we affirm the judgment of the Wood County Court of Common Pleas. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

Judgment affirmed.

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

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE