[Cite as *State v. Bryan*, 2015-Ohio-1635.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101209

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

QUISI BRYAN

DEFENDANT-APPELLANT

JUDGMENT:
SENTENCE REVERSED; CASE REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-576687-A

BEFORE: McCormack, J., S. Gallagher, P.J., and Keough, J.

RELEASED AND JOURNALIZED: April 30, 2015

ATTORNEY FOR APPELLANT

Russell S. Bensing
1350 Standard Building
1370 Ontario Street
Cleveland, OH 44113

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor

By: Jeffrey S. Schnatter
Assistant County Prosecutor
9th Floor, Justice Center
1200 Ontario Street
Cleveland, OH 44113

TIM McCORMACK, J.:

{¶1} Defendant-appellant, Quisi Bryan ("appellant"), who had been sentenced to death in an unrelated murder case, was indicted in 2013 for two counts of rape and one count of kidnapping, after DNA matched him to a rape kit collected from a 1994 rape incident. Following a jury trial, appellant was found guilty of kidnapping and one count of rape. At sentencing, the trial court applied the sentencing law in effect at the time of his offenses and sentenced him to an indefinite term of ten to 25 years each on kidnapping and rape. The court further ordered the terms to be served consecutively.

{¶2} On appeal, appellant raises two assignments of error. Both relate to his sentence. He argues he should be sentenced under the sentencing law in effect at the time his sentence was pronounced. He further argues that the trial court erred in imposing consecutive sentences without making the requisite statutory findings. Finding both claims to be legally sustainable, we are required to remand this matter to the trial court for further proceedings.

{¶3} Appellant contends that the trial court improperly sentenced him under the pre-S.B. 2 law in effect at the time of his offenses. He argues the court should have instead sentenced him under the sentencing law amended by H.B. 86, which became effective on September 2011. At the time of appellant's offenses, the penalty for first-degree offenses such as rape and kidnapping was an indefinite term of a minimum of five, six, seven, eight, nine, and ten years, and a maximum of 25 years. In 1996, S.B. 2 amended the sentencing statutes. Under the amended statutes, the penalty for a

first-degree felony was a definite term of between three and ten years. In 2011, H.B. 86 amended the sentencing statutes again. Under H.B. 86, the penalty for a first-degree felony is a definite term of between three and 11 years. Appellant committed his offenses in 1993 but was indicted 19 years later. He was sentenced in December 2013.

{¶4} The issue presented in this appeal is whether appellant must be sentenced under the sentencing law in effect at the time of his offense, or the revised law under H.B. 86 in effect at the time of his sentence. As the Supreme Court of Ohio stated in *State v. Taylor*, 138 Ohio St.3d 194, 2014-Ohio-460, 5 N.E.3d 612, ¶ 19:

> R.C. 1.58(B) provides that if the penalty or punishment for an offense is reduced by amendment of a statute and if sentence has not already been imposed, then the amended reduced penalty or punishment shall be imposed. Thus, in accordance with R.C. 1.58(B) and the uncodified portion of Section 4 of H.B. 86, the determining factor on whether the provisions of H.B. 86 apply to an offender is not the date of the commission of the offense but rather whether sentence has been imposed.

{¶5} This court has entertained this issue on several prior occasions and, guided by *Taylor*, has concluded that a defendant in appellant's position is to be sentenced under sentencing provisions of H.B. 86 in effect at the time of sentencing. *State v. Jackson*, 8th Dist. Cuyahoga No. 100877, 2014-Ohio-5137; *State v. Girts*, 8th Dist. Cuyahoga No. 101075, 2014-Ohio-5545; *State v. Steele*, 8th Dist. Cuyahoga Nos. 101139 and 101140, 2014-Ohio-5431; *State v. Thomas*, 8th Dist. Cuyahoga No. 101202, 2015-Ohio-415.[1] In accordance with precedents from this court, therefore, we vacate

[1]The state relied on *State v. Bonneau*, 8th Dist. Cuyahoga No. 99437, 2013-Ohio-5021, arguing this court has implicitly adopted the state's position that H.B. 86 does not apply to offenses that occurred prior to the enactment of S.B. 2. The state's reliance on *Bonneau* is misplaced. In

appellant's sentence and remand the case to the trial court for the limited purpose of applying H.B. 86's sentencing provisions in a new sentencing hearing.

{¶6} H.B. 86 also revived a presumption of concurrent sentences: consecutive sentences can be imposed only if the trial court makes the required findings pursuant to R.C. 2929.14(C)(4). *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659; *State v. Trotter*, 8th Dist. Cuyahoga No. 100617, 2014-Ohio-3588, ¶ 18. In this case, the record reflects that the trial court did not make any requisite findings before imposing the consecutive sentences. Its sentence therefore is contrary to law and must be vacated.

{¶7} The first and second assignments of error are sustained. Appellant's sentence is reversed, and the matter is remanded to the trial court for the limited purpose of a new sentencing hearing to apply H.B. 86's sentencing provisions.

It is ordered that appellant recover of said appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Bonneau, this court did not address the issue of whether H.B. 86 could be applied to pre-S.B. 2 crimes, because that issue was not raised in Bonneau's appeal. The *Bonneau* opinion's reference to sentencing statutes was merely a recitation of the facts of the case. *Jackson* at ¶ 16.

TIM McCORMACK, JUDGE

SEAN C. GALLAGHER, P.J., CONCURS;
KATHLEEN ANN KEOUGH, J., CONCURS IN JUDGMENT ONLY (WITH SEPARATE OPINION ATTACHED)

KATHLEEN ANN KEOUGH, J., CONCURRING IN JUDGMENT ONLY:

{¶8} Respectfully, I concur in judgment only. I am constrained to concur because of this court's prior precedent on the H.B. 86 sentencing issue.[2] I write separately, however, because unlike the court's decisions on this issue, I would hold that a defendant who commits an offense prior to July 1, 1996, but is sentenced after September 30, 2011 (the effective dates of S.B. 2 and H.B. 86 respectively), is subject to the law in effect at the time of the offense, and not the sentencing provisions of either S.B. 2 or H.B. 86.

{¶9} Under 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."

{¶10} In 1996, S.B. 2 modified the classifications of criminal offenses and corresponding sentences, "ostensibly" reducing the terms of imprisonment for many offenses from those possible under the former statutory scheme. *State v. Rush*, 83 Ohio

[2] *See, e.g.*, *State v. Jackson*, 8th Dist. Cuyahoga No. 100877, 2014-Ohio-5137; *State v. Girts*, 8th Dist. Cuyahoga No. 101075, 2014-Ohio-5545; *State v. Steele*, 8th Dist. Cuyahoga Nos. 101139 and 101140, 2014-Ohio-5431.

St.3d 53, 56, 1998-Ohio-423, 697 N.E.2d 634. But in uncodified Section 5 of S.B. 2, the General Assembly specifically stated that all defendants who committed crimes before July 1, 1996, shall be sentenced under the law in existence at the time of the offense, "notwithstanding division (B) of section 1.58 of the Revised Code." Interpreting Section 5 of S.B. 2 in *Rush*, the Ohio Supreme Court held that R.C. 1.58(B) was inapplicable, and the amended sentencing provisions of S.B. 2 applied only to those crimes committed on or after July 1, 1996. The Supreme Court specifically noted that "R.C. 1.58(B) does not create a vested right to be sentenced according to amended laws: it is a general rule of statutory construction." *Id.* at 56.

{¶11} In 2011, H.B. 86 amended several sections of the Revised Code to decrease offense classifications and reduce the penalty or punishment for some crimes. Uncodified Section 4 of H.B. 86 states that the amendments apply "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."

{¶12} In reliance on Section 4 of H.B. 86, this court has held that H.B. 86 is retroactively applicable to offenses committed prior to July 1, 1996. Those decisions, however, ignored that H.B. 86 did not expressly repeal Section 5 of S.B. 2. The acts of Ohio's General Assembly and the codified and uncodified statutes they contain are published by the secretary of state in a publication called the "Laws of Ohio." Also published are uncodified laws affected by the acts of the General Assembly. H.B. 86 was enacted by the 129th General Assembly, and thereafter published by the secretary.

There is no express language in H.B. 86 repealing Section 5 of S.B. 2, and the secretary's publication contains no mention that Section 5 of S.B. 2 was affected by any legislative act of the 129th General Assembly. In the absence of any express language repealing Section 5 of S.B. 2, it is still the law in Ohio.

{¶13} Nor can it be assumed that Section 4 of H.B. 86 repealed Section 5 of S.B. 2 by implication. The Ohio Supreme Court has stated that "repeals by implication are disfavored as a matter of judicial policy." *State v. Carswell*, 114 Ohio St.3d 210, 2007-Ohio-3723, 871 N.E.2d 547, ¶ 8. "When two affirmative statutes exist, one is not to be construed to repeal the other by implication, unless they can be reconciled by no mode of interpretation." *Cass v. Dillon*, 2 Ohio St. 607, 611 (1853).

{¶14} Here, Section 4 of H.B. 86 and Section 5 of S.B. 2 can be reconciled: Section 5 of S.B. 2 makes offenses committed prior to S.B. 2 subject to sentencing under the law in effect at the time of the offense, while Section 4 of H.B. 86 applies to offenses committed after July 1, 1996.

{¶15} Furthermore, I would find that the Ohio Supreme Court's decisions in *State v. Taylor*, 138 Ohio St.3d 194, 2014-Ohio-460, 5 N.E.2d 612, and *State v. Limoli*, 140 Ohio St.3d 188, 2014-Ohio-3072, 16 N.E.2d 641 (relied on by this court in its H.B. 86 decisions) are distinguishable because neither case involved pre-S.B. 2 offenses, and the court did not address whether Section 5 of S.B. 2 still applies to offenses committed before July 1, 1996.

{¶16} Accordingly, I would hold that Section 4 of H.B. 86 does not make H.B. 86 retroactively applicable to offenses committed prior to July 1, 1996. Because it is still in effect, Section 5 of S.B. 2 is applicable to defendants who committed offenses prior to July 1, 1996; H.B. 86 applies to offenses committed after that date.