[Cite as *State v. Hill*, 2015-Ohio-2389.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101633

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

VICTOR HILL

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-578181-A

BEFORE: E.T. Gallagher, J., Celebrezze, A.J., and Keough, J.

RELEASED AND JOURNALIZED: June 18, 2015

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EILEEN T. GALLAGHER, J.:

{¶1} Defendant-appellant, Victor Hill ("Hill"), appeals his sentence and the denial of his motion to dismiss the indictment. He assigns two errors for our review:

> 1. The trial court erred in imposing a sentence under the statutory sentencing scheme in effect at the time of the offense in 1993.
>
> 2. The trial court erred in not granting appellant's motion to dismiss the indictment.

{¶2} We find some merit to the appeal, affirm the denial of Hill's motion to dismiss, and remand the case to the trial court for resentencing.

I. Facts and Procedural History

{¶3} Hill was charged with two counts of rape, in violation of R.C. 2907.02, and one count of kidnapping in violation of R.C. 2905.01. The victim ("C.G.") testified at trial that, on September 24, 1993, she was raped on the campus of John Adams High School as she was walking home from a bus stop on East 116th Street. C.G. called the police and went to a hospital where a rape kit was collected. She was unable to provide any information to police about the assailant, and with no leads, C.G.'s case went cold.

{¶4} On April 8, 2013, Robert Surgenor ("Surgenor"), a detective at the Ohio Bureau of Criminal Investigation ("BCI"), received a "CODIS letter"[1] from the BCI lab

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[1] "CODIS" stands for the Combined DNA Index System ("CODIS") database. (Tr. at 362.) The CODIS is a searchable database used to collect and store DNA profiles from convicted offenders. *Id.* DNA from rape kits are entered into the system to search for a matching profile. When the

unit informing him that they had identified a suspect in C.G.'s case. Surgenor interviewed C.G. and presented her with a photo array of suspects, but she was unable to identify the perpetrator. Surgenor also met with Hill and, pursuant to a search warrant, extracted buccal swabs that he submitted to the BCI lab for confirmation of the CODIS hit. Meanwhile, on September 20, 2013, four days prior to the expiration of the statute of limitations period, the grand jury returned a true bill indictment charging Hill with two counts of rape and one count of kidnapping. Ten days later, on September 30, 2013, the results of the DNA test confirmed that Hill's DNA matched the DNA found in C.G.'s rape kit.

{¶5} During discovery, Hill's counsel filed a motion requesting the production of the grand jury transcript. Over the state's objection, the court granted the motion, but limited the disclosure to an in camera inspection. Hill subsequently filed, under seal, a motion to dismiss the indictment, arguing the grand jury was misled by improper evidence when it made its probable cause finding. The trial court denied Hill's motion to dismiss and stated, on the record, that it had no authority to question the quality of the evidence submitted to the grand jury. The court was concerned with "how was the evidence presented and not that it was enough." After reviewing the transcript, the court concluded:

> [W]hen I look at what the attorney general provides to the detective in the letter regarding the DNA of Mr. Hill, and then I look at what was said during the grand jury presentation by Prosecutor McDonough, I don't find

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DNA profiles match, there is a "CODIS hit". *Id.*

> that he ever reached across the line of saying or even presenting to the grand jury evidence that would have been misleading.

Finally, the court concluded:

> [T]his Court will not then take the next step of deciding, while I don't believe I have the place to even decide, if the grand jury could or * * * could not find probable cause, that's their choice in their decisions and their discussions regarding evidence that was presented by the State of Ohio.

{¶6} Hill's case proceeded to trial, and a jury found him guilty of one count of rape and one count of kidnapping. The trial court merged the convictions and sentenced Hill to an indefinite prison term of 10-25 years for rape, pursuant to the sentencing provisions in effect at the time the offense was committed. The court also classified him as a sexual predator pursuant to Megan's Law.

II. Law and Analysis

A. Sentencing

{¶7} In the first assignment of error, Hill argues the trial court erred by sentencing him to an indefinite prison term pursuant to the sentencing provisions in effect at the time the rape was committed. He contends the trial court should have sentenced him pursuant to H.B. 86. We agree.

{¶8} "The General Assembly * * * enacted Am.Sub.H.B. No. 86 ("H.B. 86") * * * with a legislative purpose to reduce the state's prison population and to save the associated costs of incarceration by diverting certain offenders from prison and by shortening the terms of other offenders sentenced to prison." *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 20, citing Ohio Legislative Service

Commission, Fiscal Note & Local Impact Statement to Am.Sub.H.B. 86, at 3 (Sept. 30, 2011), available at www.legislature.state.oh.us/fiscalnotes.cfm?ID=129_HB_86&ACT=As%20Enrolled (accessed July 18, 2014). *See also State v. Limoli*, 140 Ohio St.3d 188, 2014-Ohio-3072, 16 N.E.3d 641, ¶ 10; *State v. Taylor*, 138 Ohio St.3d 194, 2014-Ohio-460, 5 N.E.3d 612, ¶ 17.

{¶9} H.B. 86 states that it applies to "persons penalized * * * under [R.C. 2929.14] on or after the effective date" of H.B. 86. Am.Sub.H.B. 86, Section 4. *See also State v. Jackson*, 8th Dist. Cuyahoga No. 100877, 2014-Ohio-5137, ¶ 31, *appeal not accepted*, 2015-Ohio-1896, 30 N.E. 3d 974; *State v. Girts*, 8th Dist. Cuyahoga No. 101075, 2014-Ohio-5545, ¶ 13; *State v. Thomas*, 8th Dist. Cuyahoga No. 101202, 2015-Ohio-415, ¶ 43.

{¶10} Additionally, Section 4 of H.B. 86 states that H.B. 86 amendments apply "to a person to whom division (B) of section 1.58 of the Revised Code makes the amendments applicable." The state contends that pursuant to *State v. Rush*, 83 Ohio St.3d 53, 697 N.E.2d 634 (1998), Hill is not entitled to the benefit of the reduced sentence provided by R.C. 1.58(B). *Rush* was decided in 1998 and applied the sentencing provisions of Am.Sub.S.B. 2 ("S.B. 2"), which became effective on July 1, 1996. Section 5 of S.B. 2 specifically excluded application of R.C. 1.58 from its provisions. However, Section 4 of H.B. 86, whose goal is to reduce prison terms, expressly provides that R.C. 1.58 applies to sentences imposed under H.B. 86 if the conditions outlined in R.C. 1.58(B) are applicable. R.C. 1.58 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.

Thus, Section 4 of H.B. 86 provides that where its sentencing provisions provide a more lenient sentence than previous sentencing statutes, then R.C. 1.58(B) makes the H.B. 86 amendments applicable. *Jackson* at ¶ 36, citing Sections 3 and 4 of H.B. 86.

{¶11} R.C. 2929.14(A), as amended by H.B. 86, governs basic prison terms and states, in relevant part:

> [I]f the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender pursuant to this chapter, the court shall impose a definite prison term that shall be one of the following:
>
> (1) For a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, ten, or eleven years.

{¶12} Hill was convicted of rape, in violation of R.C. 2907.02(A)(2), which is a first-degree felony. R.C. 2907.02(B). Under H.B. 86, the maximum prison term Hill could receive for his rape conviction is 11 years. R.C. 2828.14(A). The maximum prison term Hill could receive under the sentencing statutes in effect in 1993 was 25 years. Thus, Hill was entitled to the more lenient sentencing provisions of H.B. 86 by virtue of its express language and R.C. 1.58. *Jackson*, 8th Dist. Cuyahoga No. 100877, 2014-Ohio-5137, at ¶ 37.

{¶13} Hill committed the rape offense on September 24, 1993, but was not convicted and sentenced until June 5, 2014. H.B. 86 became effective on September 30, 2011. *Bonnell,* 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, at ¶ 20. Because

Hill was sentenced after the effective date of H.B. 86, the trial court should have imposed a definite prison term for a first-degree felony as provided in R.C. 2929.14(A) instead of the indefinite term it imposed pursuant to the law in effect in 1993. Therefore, the indefinite sentence imposed by the trial court was not authorized by law.

{¶14} In *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, the Ohio Supreme Court held that "sentences that do not comport with mandatory provisions are subject to total resentencing." *Id*. at ¶ 20, citing *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, ¶ 11. Unauthorized sentences are illegal and void ab initio. *State v. Beasley*, 14 Ohio St.3d 74, 75, 471 N.E.2d 774 (1984). Therefore, Hill's indefinite sentence must be vacated, and Hill should be resentenced under H.B. 86 provisions.

{¶15} The first assignment of error is sustained.

B. Motion to Dismiss

{¶16} In the second assignment of error, Hill argues the trial court should have dismissed the indictment because the grand jury's probable cause determination was based on a preliminary DNA test. Hill was indicted on September 20, 2013, and BCI did not complete the confirmation test verifying the accuracy of the preliminary test until September 30, 2013. Hill contends that due to the preliminary nature of the initial test, there was insufficient evidence to warrant the grand jury's finding of probable cause to issue an indictment.

{¶17} We review a trial court's judgment on a motion to dismiss an indictment de novo. *State v. Cash*, 8th Dist. Cuyahoga No. 95158, 2011-Ohio-938, ¶ 4. A de novo standard of review affords no deference to the trial court's decision, and we independently review the record. *Id*.

{¶18} The Fifth Amendment to the U.S. Constitution and Article I, Section 10 of the Ohio Constitution provide that prosecutions for capital or otherwise infamous crimes (i.e., felonies) must be instituted by grand jury indictments.[2] *Costello v. U.S.*, 350 U.S. 359, 362, 76 S.Ct. 406, 100 L.Ed. 397 (1959); *State v. Jackson*, 141 Ohio St.3d 171, 2014-Ohio-3707, 23 N.E.3d 1023, ¶ 120. Historically, the grand jury has served the "dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions." *Branzburg v. Hayes*, 408 U.S. 665, 686-687, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), citing *Wood v. Georgia*, 370 U.S. 375, 390, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962).

> **{¶19}** The grand jury's ultimate purpose is "not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge". *U.S. v. Williams*, 504 U.S. 36, 56, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992), citing *U.S. v. Calandra*, 414 U.S. 338, 343, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974).[3] The grand jury carries out this task under a

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[2] The Fifth Amendment to the U.S. Constitution provides, in relevant part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." Ohio Constitution, Article I, Section 10, which is identical to its federal counterpart, provides, in relevant part,: "No person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury."

[3] Ohio Courts have followed US Supreme Court precedent in deciding questions regarding grand jury procedure. *State v. Davis*, 38 Ohio St.3d 361, 365, 528 N.E.2d 925 (1988) (following *Calandra*); *State v. Gibson*, 2d Dist. Champaign No. 2006 CA 26, 2007-Ohio-4547, ¶ 17 (following *Davis* and *Calandra*); *In re Grand Jury Investigation*, 61 Ohio Misc.2d 583, 580 N.E.2d 868

> cloak of secrecy. The Ohio Supreme Court has held, in accordance with U.S. Supreme Court precedent, that "[g]rand jury proceedings are secret, and an accused is not entitled to inspect grand jury transcripts either before or during trial unless the ends of justice require it and there is a showing by the defense that a particularized need for disclosure exists which outweighs the need for secrecy."

Davis at 365, quoting *State v. Greer*, 66 Ohio St.2d 139, 420 N.E.2d 982 (1981). *See also Pittsburgh Plate Glass Co. v. U.S.*, 360 U.S. 395, 79 S.Ct.1237, 3 L.Ed.2d 1323 (1959).

{¶20} Further, the grand jury acts as an independent body subject to minimal oversight by the judiciary. In *Williams*, the court observed that the right to a grand jury is not provided in the body of the U.S. Constitution; it is included in the Fifth Amendment as part of the Bill of Rights. *Id.* at 47. The court reasoned that because the grand jury is not "textually assigned" to any of the three branches of government created in the body of the constitution, it is a wholly independent body that should remain unfettered from judicially-imposed procedural rules. *Id.* "In fact the whole theory of its function is that it belongs to no branch of the institutional government, serving as a kind of buffer or referee between the Government and the people." *Id.*, citing *Stirone v. U.S.*, 361 U.S. 212, 218, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960), and *Hale v. Henkel*, 201 U.S. 43, 61, 26 S.Ct. 370, 50 L.Ed. 652 (1906). "And in its day to day functioning, the grand jury generally operates without the interference of a presiding judge." *Id.* at 48. The grand

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(C.P.1991).

jury swears in its own witnesses and deliberates in total secrecy, without even the presence of a prosecutor. *Id.*; Crim.R. 6(D).

{¶21} Undoubtedly, the prosecutor can greatly influence the grand jury because he or she directs the proceedings and controls the flow of information in private sessions. The influence can be so strong that critics have characterized the grand jury as a "rubber stamp" of the prosecutor. Niki Kuckes, *Article: The Useful Dangerous Fiction of Grand Jury Independence*, 41 Am.Crim.L.Rev. 1, 3 (2004), citing *In re Grand Jury Subpoena of Stewart*, 144 Misc.2d 1012, 545 N.Y.S.2d 974, 977 (1989).

{¶22} To prevent abuses, a trial court may invoke its supervisory power to review the grand jury proceedings, but only to prevent "fundamental unfairness." *Bank of Nova Scotia v. U.S.*, 487 U.S. 250, 256-257, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988). An error is "fundamental" when "the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice." *Id.*

{¶23} The court in *Bank of Nova Scotia* provided little guidance to courts charged with deciding whether grand jury proceedings were "fundamentally unfair." The court simply explained that absent a constitutional error, a court may not exercise its supervisory power to dismiss an indictment unless "it is established that the violation substantially influenced the grand jury's decision to indict," or if there is "grave doubt" that the decision to indict was free from the substantial influence of such violations. *Id.*

{¶24} Other courts have held that "systemic flaws" in the charging process jeopardize the protections guaranteed by the Fifth Amendment and may be fundamentally unfair. For example, in *Vasquez v. Hillery*, 474 U.S. 254, 264, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986), the court held that evidence of racial discrimination in the grand jury selection process undermines the structural protections promised by the grand jury because it leaves the reviewing court incapable of determining if a "properly constituted" grand jury would have indicted the defendant. *Id.*[4]

{¶25} However, as relevant here, the presentation of improper evidence to the grand jury is not a "fundamental error." In *Calandra*, 414 U.S. at 343, 94 S.Ct. 613, 38 L.Ed.2d 561, the court held that "the validity of an indictment is not affected by the character of the evidence considered." Therefore, an indictment, fair upon its face, and returned by a properly constituted grand jury, conclusively determines the existence of probable cause to believe the defendant perpetrated the offense alleged therein. *Gerstein v. Pugh*, 420 U.S. 103, 117, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975); *Davis*, 38 Ohio St.3d at 365, 528 N.E.2d 925.

{¶26} Most recently, the U.S. Supreme Court held that defendants are not constitutionally entitled to a judicial redetermination of the grand jury's finding that

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[4] Although violation of the grand jury's secrecy requirements could be considered a "systemic flaw," the U.S. Supreme Court has held that is not the case. *See Midland Asphalt Corp. v. U.S.*, 489 U.S. 794, 802, 109 S.Ct. 1494, 103 L.Ed.2d 879 (1989) (holding that prosecutor's violation of rule prohibiting public disclosure by government attorneys of matters occurring before the grand jury did not constitute fundamental defect in grand jury proceedings warranting dismissal of indictment).

probable cause justifies criminal prosecution. *Kaley v. U.S.*, 571 U.S.__ , 134 S.Ct. 1090, 188 L.Ed.2d 46 (2014), syllabus. In an earlier case, the court explained the rationale for this rule:

> If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment.

Costell, 350 U.S. at 363, 76 S.Ct. 406, 100 L.Ed. 397.[5]

{¶27} Hill contends the CODIS hit notification letter was insufficient to warrant an indictment because it was based on a preliminary DNA test. He does not argue that his constitutional rights have been violated by an improperly impaneled jury or by prosecutorial misconduct. Nor does he allege that the structural protections of the grand jury were compromised or that the proceedings were fundamentally unfair. Hill's argument relates solely to the quality of the evidence presented to the grand jury, which is not subject to judicial review. *Davis* at 365; *Costello* at 362; *Calandra* at 344-345; *Williams*, 504 U.S. 36, 112 S.Ct. 1735, 118 L.Ed.2d 352.

{¶28} Therefore, we agree with the trial court's judgment denying Hill's motion to dismiss the indictment.

{¶29} The second assignment of error is overruled.

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[5] In *Costello* at 363, the Supreme Court held that an indictment based solely on hearsay evidence does not violate the Fifth Amendment. *See also U.S. v. Sherlock*, 887 F.2d 971, 972-973 (9th Cir.1989) (Government witness's alleged intentional misstatement of evidence and failure to disclose exculpatory evidence was not a "fundamental error.").

III. Conclusion

{¶30} The trial court erred in sentencing Hill pursuant to the sentencing statutes in effect at the time the rape was committed. The court should have applied the sentencing provisions enacted by H.B. 86. However, the trial court properly overruled Hill's motion to dismiss the indictment where there was no evidence that the grand jury proceedings were fundamentally unfair.

{¶31} Accordingly, we overrule the second assignment of error.

{¶32} Judgment affirmed in part, reversed in part, and remanded to the trial court for resentencing.

It is ordered that appellee and appellant share 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

EILEEN T. GALLAGHER, JUDGE

FRANK D. CELEBREZZE, JR., A.J., CONCURS;
KATHLEEN ANN KEOUGH, J., CONCURS WITH ASSIGNMENT OF ERROR NUMBER TWO, AND CONCURS IN JUDGMENT ONLY AS TO ASSIGNMENT OF ERROR NUMBER ONE (WITH SEPARATE OPINION ATTACHED)

KATHLEEN ANN KEOUGH, CONCURRING WITH ASSIGNMENT OF ERROR NUMBER TWO, AND CONCURRING IN JUDGMENT ONLY AS TO ASSIGNMENT OF ERROR NUMBER ONE :

{¶33} I fully concur with the majority's resolution of the second assignment of error, but respectfully concur in judgment only regarding the first assignment of error. I am constrained to concur with the majority's resolution of the first assignment of error because of this court's prior precedent on the H.B. 86 sentencing issue.[6] 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 Senate Bill 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 Senate Bill 2 or H.B. 86.

{¶34} 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."

{¶35} In 1996, Senate Bill 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

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[6] *See, e.g.*, *State v. Quisi Bryan*, 8th Dist. Cuyahoga No. 101209. 2015-Ohio-1635; *Jackson*, 8th Dist. Cuyahoga No. 100877, 2014-Ohio-5137; *Girts*, 8th Dist. Cuyahoga No. 101075; *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 Senate Bill 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 Senate Bill 2 in *Rush*, the Ohio Supreme Court held that R.C. 1.58(B) was inapplicable, and the amended sentencing provisions of Senate Bill 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.

{¶36} 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."

{¶37} 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 Senate Bill 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 Senate Bill 2, and the Secretary's publication contains no mention that Section 5 of Senate Bill 2 was affected by any legislative act of the 129th General Assembly. In the absence of any express language repealing Section 5 of Senate Bill 2, it is still the law in Ohio.

{¶38} Nor can it be assumed that Section 4 of H.B. 86 repealed Section 5 of Senate Bill 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).

{¶39} Here, Section 4 of H.B. 86 and Section 5 of Senate Bill 2 can be reconciled: Section 5 of Senate Bill 2 makes offenses committed prior to Senate Bill 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.

{¶40} Furthermore, I would find that the Ohio Supreme Court's decisions in *Taylor*, 138 Ohio St.3d 194, 2014-Ohio-460, 5 N.E.2d 612, and *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-Senate Bill 2 offenses, and the court did not address whether Section 5 of Senate Bill 2 still applies to offenses committed before July 1, 1996.

{¶41} 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 Senate Bill 2 is applicable to defendants who committed offenses prior to July 1, 1996; H.B. 86 applies to offenses committed after that date.