[Cite as *State v. Irby*, 2015-Ohio-2705.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102263

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

MICHAEL IRBY

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-588105-A

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

RELEASED AND JOURNALIZED: July 2, 2015

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SEAN C. GALLAGHER, J.:

{¶1} Appellant state of Ohio appeals the trial court's imposition of a sentence under Am.Sub.H.B. No. 86 upon appellee Michael Irby for a rape offense that occurred on or about August 10, 1994. Upon review, we affirm the judgment of the trial court.

{¶2} On August 8, 2014, Irby was indicted on multiple charges stemming from a 1994 rape incident. Irby ultimately entered a plea of guilty to an amended count of rape in violation of R.C. 2907.02(A)(2), a felony of the first degree. The remaining counts were nolled. The trial court classified Irby as a sexual predator under Megan's Law.

{¶3} A sentencing hearing was held on November 24, 2014. The trial court imposed a definite term of imprisonment of 11 years pursuant to 2011 Am.Sub.H.B. No. 86 ("H.B. 86"), with five years of mandatory postrelease control, and ordered the sentence to be served consecutive to sentences Irby was already serving in other cases. The state objected to the sentence, arguing that H.B. 86 should not be applied retroactively to offenses committed prior to July 1, 1996. This appeal followed.

{¶4} The state's sole assignment of error claims the trial court "erred when it sentenced Irby under sentencing provisions effective July 1, 1996 and H.B. 86 provisions effective September 30, 2011." The state argues that Irby should have been given an indefinite sentence ranging between 5 to 25 years in prison pursuant to the law in effect on the date the crime was committed. While the state acknowledges that the recent

precedent in this court has rejected its argument, it seeks to preserve the issue for further review.

{¶5} In *State v. Taylor*, 138 Ohio St.3d 194, 2014-Ohio-460, 5 N.E.3d 612, the Ohio Supreme Court held that "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." Guided by *Taylor*, this court has repeatedly concluded that a defendant in Irby's position is to be sentenced under the sentencing provisions of H.B. 86 in effect at the time of sentencing. *See, e.g., State v. Bryan*, 8th Dist. Cuyahoga No. 101209, 2015-Ohio-1635; *State v. Kent*, 8th Dist. Cuyahoga No. 101853, 2015-Ohio-1546; *State v. Thomas*, 8th Dist. Cuyahoga No. 101202, 2015-Ohio-415; *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. Jackson*, 8th Dist. Cuyahoga No. 100877, 2014-Ohio-5137.

{¶6} Although the state presents a tangible argument for adhering to Am.S.B. No. 2, Section 5, and sentencing a defendant who commits an offense prior to July 1, 1996, pursuant to the law in effect at the time of the offense, we are not inclined to adopt this view. Until the Ohio Supreme Court determines otherwise, we shall continue to adhere to the precedent of this court. The sole assignment of error is overruled.

{¶7} Judgment affirmed.

It is ordered that appellee recover from appellant 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.

SEAN C. GALLAGHER, JUDGE

MARY J. BOYLE, J., CONCURS;
KATHLEEN ANN KEOUGH, P.J., CONCURS IN JUDGMENT ONLY WITH SEPARATE OPINION

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

{¶8} Respectfully, I concur in judgment only for the reasons set forth in my concurring opinion in *State v. Bryan*, 8th Dist. Cuyahoga No. 101209, 2015-Ohio-1635.