

[Cite as *State v. Thomas*, 2016-Ohio-8326.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103406

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JERMAINE THOMAS

DEFENDANT-APPELLANT

JUDGMENT:
VACATED; REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-575711-A

BEFORE: Kilbane, P.J., McCormack, J., and Blackmon, J.

RELEASED AND JOURNALIZED: December 22, 2016

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MARY EILEEN KILBANE, P.J.:

{¶1} Defendant-appellant, Jermaine Thomas (“Thomas”), appeals from his July 2015 sentence for rape and kidnapping. In light of the Ohio Supreme Court’s recent decision in *State v. Thomas*, Slip Opinion No. 2016-Ohio-5567 (“*Thomas II*”), we vacate his sentence and remand the matter for a resentencing hearing.

{¶2} The facts giving rise to this appeal have been set forth by the Supreme Court in *Thomas II* as follows:

In 2013, the Cuyahoga County Grand Jury indicted Thomas for multiple offenses stemming from an incident in 1993. The parties tried the case to a jury, which returned guilty verdicts on one rape charge and one kidnapping charge. At the time these offenses were committed, they were both aggravated felonies of the first degree. *See* former R.C. 2907.02(B) (145 Ohio Laws, Part I, 344-345) and former R.C. 2905.01(C) (139 Ohio Laws, Part I, 537). The jury also found Thomas guilty of the three-year firearm specifications attached to each of those counts.

Sentencing took place in 2014. Consistent with the sentencing law in effect at the time of the 1993 offenses, the trial court imposed an 8-to-25-year prison sentence on the rape count and an 8-to-25-year prison sentence on the kidnapping count. The trial court ordered Thomas to serve those sentences concurrently. It also merged the three-year firearm specifications, ordering that Thomas serve them prior to and consecutive to his rape and kidnapping sentences for a total prison sentence of 11 to 25 years.

Thomas appealed the sentence and argued that he should have been sentenced under 2011 Am.Sub.H.B. No. 86 (“H.B. 86”), the law in effect at the time of his 2014 sentencing. [On February 5, 2015, the] Eighth District Court of Appeals agreed, vacated Thomas’s sentence, and remanded for resentencing. [See *State v. Thomas*, 8th Dist. Cuyahoga No. 101202, 2015-Ohio-415 (“*Thomas I*”).]

Id. at ¶ 2-4.

{¶3} On March 23, 2015, the state of Ohio appealed from *Thomas I* to the Ohio Supreme Court in *Thomas II*, presenting a single proposition of law: “[a] defendant who commits an offense prior to July 1, 1996 is subject to law in effect at the time of the offense and not subject to sentencing provisions of S.B. 2 effective July 1, 1996 and H.B. 86 effective September 30, 2011.” *Thomas II* at ¶ 5. The court accepted the state’s appeal on September 16, 2015.

{¶4} In its August 30, 2016 decision, the Ohio Supreme Court held that

[t]he amendments to R.C. 2929.14(A) in H.B. 86 reduced the potential sentences for Thomas’s offenses, rendering H.B. 86 generally applicable to him under its uncoded law and R.C. 1.58. This irreconcilably conflicts with the uncoded law of S.B. 2, amended by S.B. 269, which states that subsequent sentencing law is inapplicable to offenders who committed their crimes prior to July 1, 1996. Applying the appropriate statutory construction provision, we hold that H.B. 86 controls as the later-enacted provision. Consistent with that conclusion, we decline to adopt the state’s proposition of law. We affirm the Eighth District’s judgment and remand the matter to the trial court for further proceedings consistent with this opinion.

Id. at ¶ 18.

{¶5} In the interim, and after the state filed its notice of appeal with the Ohio Supreme Court, the trial court conducted a resentencing based on our decision in *Thomas I*. On July 30, 2015, the trial court sentenced Thomas to 11 years in prison on the rape

count and 11 years in prison on the kidnapping count. The court ordered that the three-year firearm specification be served prior to and consecutive to the rape count. The court further ordered that both counts be served concurrently to each other for a total prison term of 14 years.

{¶6} In August 2015, Thomas appealed from this sentence to our court, which is the basis of this appeal. Thomas assigns the following errors for our review.

Assignment of Error One

The trial court erred in imposing a maximum sentence upon Defendant.

Assignment of Error Two

The trial court violated Defendant's right to due process under the Fourteenth Amendment to the United States Constitution, and Article I, Section 16 of the Ohio Constitution, by imposing a harsher sentence upon Defendant after his successful appeal.

{¶7} At the outset, we must note that on May 12, 2016, we issued a stay pending the Ohio Supreme Court's decision in *Thomas II*. After the stay was lifted, we asked the parties to submit supplemental briefs regarding whether under *State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661, the trial court lacked jurisdiction to issue the July 30, 2015 order that is the subject of this appeal. The state, relying on *State v. Bruce*, 8th Dist. Cuyahoga No. 95064, 2011-Ohio-1240, *discretionary appeal not allowed*, 129 Ohio St.3d 1478, 2011-Ohio-4751, 953 N.E.2d 843, and *State v. Murphy*, 49 Ohio St.3d 293, 551 N.E.2d 1292 (1990), argues the trial court had the ability to conduct

the sentencing hearing prior to the Ohio Supreme Court accepting the appeal. Thomas, on the other hand, argues that under *Washington*, his sentence must be vacated and the matter be remanded to the trial court. We find Thomas’s argument more persuasive.

{¶8} In *Washington*, which was decided in 2013, the Ohio Supreme Court accepted a discretionary appeal by the state regarding the merger of multiple offenses and sentencing. As a preliminary matter, the court addressed Washington’s motion to dismiss the appeal. The court stated:

On August 31, 2012, after the state filed its notice of appeal in the present case, the trial court resentenced Washington in response to the court of appeals’ remand, merging the two counts at issue. Washington asks this court to dismiss the instant appeal, alleging that the trial court’s resentencing renders the appeal moot. The state responded, arguing that the trial court lost jurisdiction to act when the state filed its notice of appeal to this court.

“An appeal is perfected upon the filing of a written notice of appeal. R.C. 2505.04. Once a case has been appealed, the trial court loses jurisdiction except to take action in aid of the appeal. *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas* (1978), 55 Ohio St.2d 94, 97, 9 O.O.3d 88, 378 N.E.2d 162.”

In re S.J., 106 Ohio St.3d 11, 2005-Ohio-3215, 829 N.E.2d 1207, ¶ 9. Thus, the trial court in this case had no jurisdiction to resentence the defendant once the state had filed its notice of appeal. The motion to dismiss is denied.

Id. at ¶ 8.

{¶9} In *Bruce*, which was decided in 2011, Bruce was resentenced by the trial court following our decision in his direct appeal. *Id.* at ¶ 1. Bruce then appealed from his resentencing, arguing that the trial court lacked jurisdiction to resentence him because he had an appeal pending before the Ohio Supreme Court. *Id.* We found the trial court

had jurisdiction to resentence Bruce because he did not have an appeal pending before the Supreme Court at the time of his resentencing. *Id.* at ¶ 3. Rather, Bruce had a pending motion to certify the record. *Id.* Relying on a previous decision from this court, we stated:

In *State v. Brown* (Dec. 15, 1988), 8th Dist. No. 54765, 1988 Ohio App. LEXIS 5037, we noted that the filing of a memorandum in support of jurisdiction to the supreme court does not divest the trial court of jurisdiction to resentence a defendant as mandated by this court. Unlike a direct criminal appeal to the court of appeals in which jurisdiction is vested with this court upon the filing of a notice of appeal, an appeal to the supreme court is not an appeal of right and jurisdiction does not vest with the supreme court until it accepts an appeal for review. *State v. Thomas* (1996), 111 Ohio App.3d 510, 515, 676 N.E.2d 903.¹

{¶10} As a result, we concluded that since the Supreme Court had not accepted Bruce’s appeal for review at the time the court resentenced him, jurisdiction had not vested exclusively with the Supreme Court. *Id.*

{¶11} In *Murphy*, 49 Ohio St.3d 293, 551 N.E.2d 1292, which was decided in 1990, the Ohio Supreme Court held that “[a] court of appeals retains jurisdiction to render a determination in a felony case upon an application for reconsideration unless and until the Ohio Supreme Court exercises its discretionary and exclusive jurisdiction to hear such case pursuant to Section 2(B)(2)(b), Article IV of the Ohio Constitution.” *Id.* at syllabus.

The state contends that *Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661, conflicts with *Murphy*.

¹ In *Thomas*, the Ohio Supreme Court concluded that it only assumes jurisdiction when it expressly exercises its discretion to hear felony cases. *Id.* at 515.

{¶12} We recognize that when Supreme Court cases are in apparent conflict, the court of appeals is bound by the Supreme Court's most recent decision, regardless of its previous decision. *Milkovich v. News-Herald*, 46 Ohio App.3d 20, 23, 545 N.E.2d 1320 (11th Dist.1989); *rev'd on other grounds, Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990). This holds true even when the most recent Supreme Court decision is rendered while an appeal is pending in the court of appeals. *Id.* "The general rule is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former was bad law, but that it never was the law." *Peerless Elec. Co. v. Bowers*, 164 Ohio St. 209, 210, 129 N.E.2d 467 (1955). Moreover, it is a fundamental principle of stare decisis that a court is bound by and must follow decisions of a reviewing court that have decided the issue involved. *Clark v. Southview Hosp. & Family Health Ctr.*, 68 Ohio St.3d 435, 438, 628 N.E.2d 46 (1994).

{¶13} In applying the foregoing principles to the matter before us, we must follow *Washington*, because it is the most recent Supreme Court case to apply the rule regarding jurisdiction and the filing of a notice of appeal. In doing so, we find that the trial court did not have jurisdiction to resentence Thomas in July 2015, after the state had filed its notice of appeal in March 2015.

{¶14} Accordingly, we vacate the trial court's July 30, 2015 sentence and remand the matter for a resentencing hearing in accordance with the Ohio Supreme Court's decision in *Thomas II*.

It is ordered that appellant recover of 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.

MARY EILEEN KILBANE, PRESIDING JUDGE

TIM McCORMACK, J., and
PATRICIA A. BLACKMON, J., CONCUR