Supreme Court of Ohio Clerk of Court - Filed February 07, 2023 - Case No. 2022-1037

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	
Plaintiff- Appellee,	:	Case No. 2022-1037
	:	
v.	:	Appeal from the Cuyahoga
	:	County Court of Appeals,
DARNELL HURT,	:	Eighth Appellate District
	:	Case No. CA 21-110732
Defendant-Appellant.		

BRIEF OF AMICUS CURIAE CUYAHOGA COUNTY PUBLIC DEFENDER AND AMICUS CURIAE OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (OACDL) IN SUPPORT OF APPELLANT DARNELL HURT

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STATEMENT OF INTEREST OF AMICI CURIAE

The Office of the Cuyahoga County Public Defender was created in 1977 to provide legal services to indigent adults and children charged with violations of the Ohio Revised Code, and is currently responsible for representing approximately one-third of all indigent felony defendants in Cuyahoga County (the remaining are represented by appointed counsel). The Office's responsibilities now also include the representation of almost all indigent defendants in the Cleveland Municipal Court charged with misdemeanor offenses punishable by incarceration. The Office's Appellate and Post Conviction Division represents defendants in State and federal courts, particularly in the Eighth District Court of Appeals and this Court.

The Ohio Association of Criminal Defense Lawyers is an organization of approximately 700 dues-paying attorney members. Its mission is to defend the rights secured bv law of persons accused of the commission of a criminal offense; to foster, maintain and encourage the integrity, independence and expertise of criminal defense lawyers through the presentation of accredited Continuing Legal Education programs; to educate the public as to the role of the criminal defense lawyer in the justice system, as it relates to the protection of the Bill of Rights and individual liberties; and to provide periodic meetings for the exchange of information and research regarding the administration of criminal justice.

Because of their shared concerns, the amici are submitting a joint brief in support of Appellant.

STATEMENT OF THE CASE AND FACTS

Amici adopt the statements of the Appellant.

ARGUMENT

IN SUPPORT OF PROPOSITION OF LAW I:

> **2020 S.B. 175 which eliminated the duty to retreat for self-defense applies to all trials held after the effective date of the act regardless of the date of offense.**

The General Assembly wanted to accomplish two goals when it amended R.C. 2901.09 via S.B. 175. First, it wanted Ohio to be a "stand your ground" state where a person was not required to retreat before defending themself. Second, it wanted to ensure that trial factfinders (judge or jury) would no longer consider the possibility of retreat when evaluating whether a defendant reasonably believed themself to be in sufficient danger that force was needed for self-defense or defense of others or one's residence.

The question raised in this proposition is whether R.C. 2901.09, as amended to remove consideration at trial of a duty to retreat, should be the law applied in all trials, regardless of the date of incidence, or whether Ohio should, at least for a while, have two different types of trial when self-defense is involved: One for persons who claim self-defense for incidents that occurred before the effective date of S.B. 175 (and for which the factfinder would consider a duty to retreat) and another for those who claim self-defense for an incident that occurred after the effective date of S.B. 175 (and for which the factfinder could not consider a duty to retreat).

As this Court is well aware, any statutory interpretation must be guided, inter alia, by the following two canons of statutory construction:

(1) Look at the plain meaning of the statute

(2) Ensure that all words of the statute are meaningful.

When these two canons are applied to R.C. 2901.09, it becomes apparent that the General Assembly, by including subsection (C) in R.C. 2901.09, intended to ensure that factfinders would no longer consider a duty to retreat in trials involving self-defense, regardless of the date of incidence. Subsection (C) draws no distinction based on when the alleged offense occurred.

A. Statutory Interpretation of Subsection (C)

R.C. 2901.09(C) provides:

> A trier of fact shall not consider the possibility of retreat as a factor in determining whether or not a person who used force in self-defense, defense of another, or defense of that person's residence reasonably believed that the force was necessary to prevent injury, loss, or risk to life or safety.

1. Plain Language

As mentioned above, the starting point for statutory interpretation is the plain language of the statute. *State ex rel. Bohlen v. Halliday,* 164 Ohio St.3d 121, 172 N.E.3d 114, 2021-Ohio-194. Here the language is plain: From the moment the statute goes into effect, the factfinder "shall not consider the possibility of retreat." The factfinder's consideration of the evidence has not been tethered in any way to the date of the incident vis-à-vis the effective date of the statute.

2. Interpretation so as to avoid surplusage

Moreover, subsection (C) is mere surplusage if it only applies to trials where the incident occurred after the effective date of S.B. 175. "[A] long-standing tenet of statutory interpretation is that courts must avoid statutory interpretations that render any part of a statute 'surplusage or nugatory.'" *State v. Ryan*, 8th Dist. Cuyahoga No. 98005, 980 N.E.2d 553, 2012-Ohio-5070, ¶ 15, quoting *Westgate Ford Truck Sales, Inc. v. Ford Motor Co.,* 2012-

Ohio-1942, 971 N.E.2d 967, ¶ 14, quoting *State Farm Fire & Cas. Co. v. Old Republic Ins. Co.,* 466 Mich. 142, 146, 644 N.W.2d 715 (2002).

Subsection (B) addresses the duty to retreat.

> (B) For purposes of any section of the Revised Code that sets forth a criminal offense, a person has no duty to retreat before using force in self-defense, defense of another, or defense of that person's residence if that person is in a place in which the person lawfully has a right to be.

If the General Assembly wanted to ensure that the factfinder still considered a possibility of retreat where the incident took place before the effective date of S.B. 175, there would have been no need for subsection (C) – once subsection (B) became effective and removed a duty to retreat from all subsequent incidents, any consideration of the possibility of retreat became irrelevant. The factfinder would have no reason to consider the possibility of retreat solely on the basis of subsection (B), at which point subsection (C) is surplusage.

Accordingly, to give meaning to subsection (C), as it must if possible, this Court should hold that (C) applies to all trials following its effective date.

B. Constitutional Issue of Retroactivity.

Discerning legislative intent is not the end of this Court's inquiry as to this proposition. Legislative intent must yield to constitutional prohibitions. The question that arises under this Proposition is whether application of subsection (C) violates Article II, Section 28 of the Ohio Constitution, which provides:

> The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

It should be noted that Article II, Section 28 parallels to some extent Article I, Section 9 of the United States Constitution, commonly known as the Ex Post Facto Clause.

The retroactivity question is easily addressed and disposed in this case. By its plain language, R.C. 2901.09(C), just as the amended portion of R.C. 2901.05 at issue in *State v. Brooks*, Slip Opinion No. 2022-Ohio-2478, is "not retroactive—it applies prospectively to all trials occurring after its effective date, regardless of when the underlying alleged criminal conduct occurred." *Id.* at ¶ 23. The plain language of R.C. 2901.09(C) does not proscribe or legalize any particular conduct. Rather, it establishes that certain evidence may not be considered at trial by a "trier of fact" in evaluating self-defense claims. As such, "[t]he amendment here applies prospectively and, because it does not increase the burden on a criminal defendant, there is no danger of its violating Ohio's Retroactivity Clause or the United States Constitution's Ex Post Facto Clause." *Brooks*, Slip Opinion No. 2022-Ohio-2478 at ¶ 19.

For these reasons, this Court should adopt the first proposition of law.

In Support of Proposition of Law II:

The right to be acquitted of a criminal offense if the conduct is committed while acting in self-defense extends to offenses charged where the indicted conduct is a result of transferred intent of an individual acting in self-defense.

It is understood that self-defense justifies what is otherwise a murder or felonious assault. It is not that the killing or assault is unintentional – the mens rea is present, but the defendant is not held criminally liable by virtue of self-defense as a justification. In some cases, this can even justify the killing of an innocent person, for example, where the defendant sincerely and reasonably perceives a threat from a person who actually had no intentions of harming the defendant. While the victim's death is tragic, it is not criminal.

The law does not punish the killer who acted in a justifiable manner, even though the killing of an innocent person is anything but a just result. *See, e.g., State v. Fry,* 9th Dist. Medina No. 16CA0057-M, 2017-Ohio-9077, ¶ 22, 2017 WL 6459869 ("For the purposes of self-defense, it matters not whether a defendant's honest belief that she was in imminent danger of bodily harm was a mistaken belief or an accurate one.").

Similarly, here, Mr. Hurt acted with justification when he fired at his armed assailant. Yet the jury was not allowed to consider that justification when it came to their evaluation of whether that shot also constituted felonious assault (to wit: attempted physical harm with a deadly weapon) on another person present at the scene. In effect, with respect to the felonious assault count, the trial court took away from Mr. Hurt the ability to defend himself if firing a shot placed another in danger of being wounded. In the process, the justification of self-defense was lost.

This Court should adopt the substance of Appellant's second proposition of law. In so doing, this Court will find itself in accord with other cases in Ohio and throughout the United States. *See, e.g, State v. Clifton,* 32 Ohio App.2d 284, 287, 290 N.E.2d 921 (1st Dist. Hamilton 1972) ("The inquiry must be whether the killing would have been justifiable if the accused had killed the person whom he intended to kill, as the unintended act derives its character from the intended."); *People v. Matthews,* 91 Cal.App.3d 1018, 1024, 154 Cal.Rptr. 628, 631-32 (Cal. App. 3rd Dist. 1979) ("[T]he doctrine of self-defense is available to insulate one from criminal responsibility where his act, justifiably in self-defense, inadvertently results in the injury of an innocent bystander."); *People v. Koper,* 488 P.3d 409, 2018 COA 137 (Col. App. Div. I) (collecting cases).

While case law often characterizes the notion of extending the justification of self-defense to bystanders as one of "transferred intent," Amici believe the better phrase is "transferred justification." As discussed above, self-defense is not unintentional, as the mens rea for the assault is present in the mind of the person acting in self-defense. Rather, self-defense negates illegality because, despite the requisite mens rea, there is a justification for the assault.

Put a different way, "transferred intent" explains why, in defining a crime, shooting at A with intent to kill but missing and killing B is still murder – the mens rea for murder transfers from A to B. One does not avoid criminal liability by being a bad shot.

Similarly, shooting at A with intent to kill in self-defense but missing and killing B is still self-defense – the justification for the shooting transfers from A to B. One does not become a murderer on the basis of their marksmanship.

In Support of Proposition of Law III:

> **Where a defendant proves mitigating elements to a jury at trial leading to a conviction of an inferior offense double jeopardy and collateral estoppel require that the mitigating element finding be effective at a retrial precluding the defendant from having to prove the elements again**

Appeals are not a game of "gotcha" where dispositive issues decided in a defendant's favor at a first trial can be resurrected in a retrial.

This fundamental concept is manifested, first and foremost, in the Double Jeopardy Clause. If a defendant is found not guilty of the greater offense, and guilty of the lesser included offense, then a new trial can be ordered on appeal as to the lesser offense (assuming there was a reversible trial error) but not the greater. This is settled law. *Green v. United States*, 355 U.S. 184, 190–191, 78 S.Ct. 221, 2 L.Ed.2d 199 (1975).

The same reasoning applies to offenses deemed inferior. If the defendant is charged with murder and the jury returns a verdict of voluntary manslaughter because it believed the defendant acted under sudden passion or rage brought on by the victim and sufficient to cause a reasonable person to use deadly force (hereinafter "sudden passion"), then a new trial can be ordered on appeal on the inferior offense (again, assuming there was a reversible trial error) but not the greater. This makes sense – the defendant prevailed with respect to the mitigating element at the first trial and, under the Double Jeopardy Clause, should not be required to have to prove that mitigating element a second time. And, because the verdict form in these single-count situations, where the jury is instructed on the inferior offense as part of its consideration of the greater offense, will reflect a "not guilty" of the greater offense and "guilty" of the inferior offense, courts have little trouble in recognizing that a new trial is confined to the inferior offense.

But what happens when, as here, the mitigating element was proven as to one count but the trial court's error as to other counts (for which guilty verdicts were returned) was the failure to give the mitigating element instruction? Here, the jury was instructed that, in order to find the defendant guilty of voluntary manslaughter (which it did), it had to find beyond a reasonable doubt that Mr. Hurt acted under sudden passion:

> Before you can find the defendant guilty of voluntary manslaughter, you must find beyond a reasonable doubt that on or about the 4th day of April, 2020, and in Cuyahoga County, Ohio, the defendant was under the influence of sudden passion or in a sudden fit of rage, either of which was brought on by serious provocation occasioned by the victim, that was reasonably sufficient to incite Darnelle Hurt into using deadly force, and did knowingly cause the death -- which did knowingly cause the death of Melvin Dobson.

As this trial transcript excerpt demonstrates, the trial court actually misstated the law regarding mitigation to the defendant's detriment insofar as the trial court indicated the

mitigation finding needed to be made beyond a reasonable doubt and not just by a preponderance of the evidence. Yet, the jury still found the mitigation element was proven.

Moreover, the Eighth District acknowledged that the jury made the "sudden passion" finding, noting that the jury "apparently concluded that he met his burden" to "demonstrate the mitigating circumstances for voluntary manslaughter." Opinion Below at ¶ 26 n. 1.

Finally, the Eighth District acknowledged that the defense requested the mitigating element instruction on every count. *Id.,* at ¶¶ 31-32, 40 (noting the defense's request for such instructions).[1] Accordingly, this Court need not be concerned about forfeited issues or other procedural barriers before deciding the merits of the issue presented.

So, why should the defendant have to prove the mitigating element of "sudden passion" again, simply because the trial court, over defense objection, failed to give the jury the opportunity to apply that mitigatory finding to every count as opposed to only one count? The answer is that he shouldn't.

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[1] The unfairness of the Eighth District's decision becomes more apparent if one considers its converse. Had the jury's verdict rejected the conclusion that Mr. Hurt acted under "sudden passion," then the Eighth District would have been justified in holding that the failure to instruct on the mitigating element as to the other counts was harmless error. Why? Because the jury's verdict would have demonstrated that there was no way the jury would ever have found the mitigating element in the other counts. Yet, Mr. Hurt receives no benefit at retrial from the jury's having found "sudden passion" beyond a reasonable doubt in a situation where that verdict also demonstrates that the jury would have similarly found "sudden passion" on every other count.

In essence, the flip side of "harmless error" in this case should be collateral estoppel – here, there is no way the jury would not ever have found the mitigating element in the other counts. Mr. Hurt deserves the abiding protection of that jury finding.

This conclusion is controlled by the United States Supreme Court's decision in *Ashe v. Swenson*. 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). In *Ashe*, the defendant was charged with robbing six different people at the same time. Tried for the robbery of one of the victims, the defendant was acquitted. He was then tried for the robbery of a second victim and was convicted. On appeal the United States Supreme Court held that the Double Jeopardy Clause embodies the concept of collateral estoppel to prevent the prosecution from relitigating "an issue of ultimate fact [that] has once been determined by a valid and final judgment." While *Ashe* involved a second trial after acquittal, as opposed to a second trial after remand on appeal, the principle is the same. Indeed, *Ashe*, at 445-46, saw itself as connected to *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), the latter case involving the defendant's right not to be punished by more severe consequences following remand after an appeal.

CONCLUSION

For the foregoing reasons *Amicus* respectfully requests that this Court reverse the decision of the Eighth District Court of Appeals and adopt as syllabus law the substance of the three propositions presented in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of February, 2023, the foregoing Brief of *Amicus Curiae* the Office of the Cuyahoga County Public Defender in Support Of Appellant Darnelle Hurt was served by email to Kristen Sobieski, Appellate Supervisor, Office of Michael C. O'Malley Cuyahoga County Prosecutor, at ksobieski@prosecutor.cuyahogacounty.us; and to Eric Levy, counsel for Defendant-Appellant, at Law@GetLevy.com .

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