

[Cite as *State v. White*, 2009-Ohio-3869.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellant

-vs-

MAXWELL D. WHITE, JR.

Defendant-Appellee

JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. W. Scott Gwin, J.

Hon. William B. Hoffman, J.

Case No. 07-COA-037;
07-COA-038

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Ashland County Court of
Common Pleas, Case No. 96-CRI-07366

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

August 3, 2009

APPEARANCES:

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For Defendant-Appellee

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Hoffman, J.

{¶1} Plaintiff-appellant State of Ohio appeals the July 12, 2007 Judgment Entry entered by the Ashland County Court of Common Pleas, which found R.C. 2929.06, effective March 23, 2005, unconstitutional as applicable to defendant-appellee Maxwell D. White, Jr., and ordered Appellee be sentenced under the provisions of R.C. 2929.06, in effect as of January 19, 1996, the date of the offenses.

STATEMENT OF THE CASE¹

{¶2} On January 25, 1996, the Ashland County Grand Jury indicted Appellant on one count of aggravated murder with two death penalty specifications; one count of having weapons while under disability; and one count of abduction. Appellee appeared before the trial court on January 29, 1996, and entered a plea of not guilty to all counts and specifications contained within the Indictment. Following a jury trial, Appellee was convicted of all three counts and attendant specifications, and was sentenced to death. The Ohio Supreme Court affirmed Appellee's convictions and sentence. *State v. White*, 82 Ohio St.3d 16, 1998-Ohio-363. Appellee filed a petition for certiorari with the United States Supreme Court which was denied. *White v. Ohio* (1998) 525 U.S. 1057, 119 S.Ct. 623.

{¶3} On May 5, 1997, Appellee filed a petition for post-conviction relief pursuant to R.C. 2953.21. The trial court dismissed the petition via Judgment Entry filed August 18, 1997. Appellee appealed the dismissal to this Court which affirmed. *State*

¹ A thorough rendition of the facts underlying Appellee's conviction and sentence is set forth in *White v. Mitchell* (C.A. 6, 2005), 431 F3d 517.

v. White (August 7, 1998), Ashland App. No. 97COA01229. The Ohio Supreme Court denied jurisdiction. *State v. White* (1998) 84 Ohio St.3d 1445. Subsequently, Appellant filed an application to reopen his direct appeal with the Ohio Supreme Court. The Ohio Supreme Court denied the application on August 2, 2000. *State v. White* (2000) 89 Ohio St.3d 1467. After exhausting all of his State court remedies, Appellee filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Ohio. Following the denial of the petition by the District Court, Appellee filed an appeal in the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit affirmed the District Court's denial of Appellee's petition with respect to the issues raised regarding his convictions, but reversed the decision and remanded the matter to the District Court with instructions to issue a writ of habeas corpus vacating Appellee's death sentence. *White v. Mitchell* (Sixth Circuit 2005), 431 F3d 517.

{¶14} After the District Court's granted Appellee's writ of habeas corpus which vacated his death sentence, the State filed a motion with the trial court requesting the matter be scheduled for a new penalty phase proceeding. Appellee filed a motion to prohibit the State from seeking the death penalty. Therein, Appellee asserted R.C. 2929.06, in effect at the time of the offense and his trial, did not permit the State to seek the death penalty a second time. Appellee further argued the application of current R.C. 2929.06 violated his constitutional right to due process and the constitutional prohibition against ex post facto laws. The State filed a memorandum in opposition thereto. On June 25, 2007, the trial court conducted a hearing on Appellee's motion. Via Judgment Entry filed July 12, 2007, the trial court sustained Appellee's motion, finding current R.C. 2929.06 was unconstitutional as applied to Appellee.

{¶15} It is from this judgment entry the State appeals, raising as its sole assignment of error:

{¶16} “I. THE TRIAL COURT ERRED IN HOLDING THE AMENDMENT TO OHIO REVISED CODE 2929.06 THAT WOULD ALLOW DEATH TO BE CONSIDERED AS A POSSIBLE PENALTY AT A RESENTENCING HEARING UNCONSTITUTIONAL AS APPLIED TO APPELLEE, UNDER THE OHIO CONSTITUTION ARTICLE II, SECTION 28.”

I

{¶17} Herein, the State contends the trial court erred in finding the current version of R.C. 2929.06 to be unconstitutional as applied to Appellee, thereby prohibiting the State from seeking the death penalty again.

{¶18} Section 28, Article II of the Ohio Constitution prohibits the General Assembly from passing retroactive laws and protects vested rights from new legislative encroachments. *Vogel v. Wells* (1991), 57 Ohio St.3d 91, 99, 566 N.E.2d 154, 162. The retroactivity clause nullifies new laws which “reach back and create new burdens, new duties, new obligations, or new liabilities not existing at the time [the statute becomes effective].” *Miller v. Hixson* (1901), 64 Ohio St. 39, 51, 59 N.E. 749, 752.

{¶19} The Ohio Supreme Court has articulated the procedure this Court should follow in order to determine when a law is *unconstitutionally* retroactive. *State v. Cook* (1998), 83 Ohio St.3d 404, 410, 700 N.E.2d 570, 576, citing *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 522 N.E.2d 489, paragraph one of the syllabus. We emphasize the phrase “*unconstitutionally* retroactive” to confirm that retroactivity itself is not always forbidden by Ohio law. Although the language of Section 28, Article II

of the Ohio Constitution provides the General Assembly “shall have no power to pass retroactive laws,” Ohio courts have long recognized there is a crucial distinction between statutes which merely apply retroactively (or “retrospectively”) and those that do so in a manner which offends our Constitution. See, *e.g.*, *Rairden v. Holden* (1864), 15 Ohio St. 207, 210-211; *State v. Cook*, *supra*, at 410. We also note the words “retroactive” and “retrospective” have been used interchangeably in the constitutional analysis for more than a century. *Id.* Both terms describe a law which is “made to affect acts or facts occurring, or rights accruing, before it came into force.” Black's Law Dictionary (6 Ed.1990) 1317.

{¶10} The test for unconstitutional retroactivity requires this Court first to determine whether the General Assembly expressly intended the statute to apply retroactively. R.C. 1.48; *State v. Cook*, *supra* at 410, citing *Van Fossen*, *supra*. If such intent is found, this Court then determines whether the statute is substantive, rendering it *unconstitutionally* retroactive, as opposed to merely remedial. *Cook supra*, at 410-411.

{¶11} The current version of R.C. 2929.06, which became effective March 23, 2005, provides, in pertinent part:

{¶12} “(B) Whenever any court of this state or any federal court sets aside, nullifies, or vacates a sentence of death imposed upon an offender because of error that occurred in the sentencing phase of the trial and if division (A) of this section does not apply, the trial court that sentenced the offender shall conduct a new hearing to resentence the offender. If the offender was tried by a jury, the trial court shall impanel a new jury for the hearing. * * * At the hearing, the court or panel shall follow the procedure set forth in division (D) of section 2929.03 of the Revised Code in

determining whether to impose upon the offender a sentence of death, a sentence of life imprisonment, or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment. * * *

{¶13} The trial court in the case sub judice found, and we agree, the current version of R.C. 2929.06 clearly expresses the Ohio Legislature's intent the statute be applied retroactively. See, R.C. 2929.06(E). Having found such intent, we must now determine whether R.C. 2929.06 is remedial or substantive.

{¶14} Remedial legislation affects "the methods and procedure by which rights are recognized, protected and enforced, not * * * the rights themselves." *Weil v. Taxicabs of Cincinnati, Inc.* (1942), 139 Ohio St. 198, 205. Furthermore, as stated in *Bielat v. Bielat*, 87 Ohio St.3d at 354, 2000-Ohio-451, remedial laws " 'merely substitute a new or more appropriate remedy for the enforcement of an existing right.' " *Id.*, quoting *Cook*, supra at 411. A purely remedial statute does not violate Section 28, Article II of the Ohio Constitution, even if applied retroactively. *Van Fossen*, supra at 107. And, while the retroactive application of a remedial statute may have the occasional substantive effect, generally laws which relate to procedures are ordinarily remedial in nature. *Id.*, supra at 107-108, citing *Wellston Iron Furnace Co. v. Rinehart* (1923), 108 Ohio St. 117, 140 N.E. 623, paragraph one of the syllabus.

{¶15} Conversely, a statute is "substantive" if it impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligation, or liabilities as to a past transaction, or creates a new right. *Van Fossen*, supra at 107.

{¶16} In *State ex rel. Matz v. Brown* (1988), 37 Ohio St.3d 279, 281, the Ohio Supreme Court explained “a later enactment will not burden or attach a new disability to a past transaction or consideration in the constitutional sense, unless the past transaction or consideration, if it did not create a vested right, created at least a reasonable expectation of finality.” *Id.* at 281.

{¶17} The trial court found current R.C. 2929.06 was unconstitutional as applied to Appellee because the statute created a right which did not exist under the version of R.C. 2929.06, in effect at the time Appellee committed the offenses. The trial court also found under former R.C. 2929.06 there was no existing right to impanel a new jury for death penalty resentencing. The trial court added the creation of that right resulted in a burden being placed upon Appellee to defend a second death penalty proceeding when no such obligation existed under the prior law. Having made such findings, the trial court ordered Appellee be sentenced under the provisions of R.C. 2929.06, in effect as of January 19, 1996, the date of the offenses, thereby, precluding the State from seeking the death penalty again. We respectfully disagree with the trial court’s findings and order.

{¶18} R.C. 2929.06, in effect as of the date Appellee committed the offenses, provided:

{¶19} “If the sentence of death that is imposed upon an offender is vacated upon appeal because the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, or the supreme court, in cases in which the supreme court reviews the sentence upon appeal, could not affirm the sentence of death under the standards imposed by section 2929.05 of the Revised

Code, is vacated upon appeal for the sole reason that the statutory procedure for imposing the sentence of death that is set forth in sections 2929.03 and 2929.04 of the Revised Code is unconstitutional, or is vacated pursuant to division (C) of section 2929.05 of the Revised Code, the trial court that sentenced the offender shall conduct a hearing to resentence the offender. At the resentencing hearing, the court shall sentence the offender to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.”

{¶20} Appellee argues, pursuant to R.C. 2929.06, in effect at the time he committed the offenses, the trial court’s only options for resentencing are life imprisonment with parole eligibility after serving twenty full years of imprisonment, or life imprisonment with parole after serving thirty full years of imprisonment. Although R.C. 2929.06, in effect at the time Appellee committed the offenses, permitted a trial court to resentence an offender whose death sentence had been vacated to only life imprisonment, such sentence was not available to Appellee as his death sentence was not vacated under one of the three situations set forth in the statute. Under former R.C. 2929.06, a trial court resentencing an offender whose death sentence had been vacated was required to impose a life sentence if the death sentence was vacated because 1) the court of appeals or the supreme court could not affirm the death sentence under the standards imposed by R.C. 2929.05; or 2) the death sentence was vacated for the sole reason the statutory procedure for imposing the sentence was unconstitutional; or 3) the

death sentence was vacated pursuant to R.C. 2929.05(C). Appellee's sentence was not vacated based upon the limited circumstances set forth in former R.C. 2929.06.²

{¶21} Accordingly, we find Appellee did not have the right not to face the death penalty again under the former statute.

{¶22} Assuming, arguendo, such right does apply to Appellee, we find while the error causing the death penalty to be vacated occurred at trial, the right to resentencing did not vest until the Sixth Circuit Court of Appeals vacated his sentence in 2007. Thus, we do not find current R.C. 2929.06 to be a substantive law as it did not impair or deprive Appellee of a vested right at the time it was enacted. Nonetheless, current R.C. 2929.06 may be a substantive law if it creates a new right or imposes additional burdens. We believe current R.C. 2929.06 did not create a new right or impose a new burden upon Appellee. Appellee always had a right to have the death penalty determined by a jury and always had the obligation to defend against it. We do not believe the fact current R.C. 2929.06 mandates the impaneling of a new jury renders substantive what is otherwise procedural.

² The Sixth Circuit Court of Appeals did not vacate Appellee's sentence based upon former R.C. 2929.05, which required an appellate court or the supreme court to "review and independently weigh all of the facts and other evidence * * * in the record * * * and consider the offense and the offender to determine whether the aggravating circumstances * * * outweigh the mitigating factors in the case and whether the sentence of death is appropriate." Nor did the Sixth Circuit vacate Appellee's death sentence upon a finding the statutory procedure for imposition of such sentence pursuant to former R.C. 2929.03, which addressed the proof of relevant factors and alternative sentences, or former R.C. 2929.04, which listed the criteria for imposing death or imprisonment, were unconstitutional. Further, the Sixth Circuit did not vacate Appellee's sentence pursuant to former R.C. 2929.05(C), upon a finding he was not 18 years of age or older.

{¶23} In *Ring v. Arizona* (2002), 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed. 2nd 556, the United States Supreme Court held a sentencing judge sitting without a jury, could not find an aggravating circumstance necessary to impose the death penalty because the Sixth Amendment to the U.S. Constitution required aggravated circumstances be found by a jury. *Id.* at 609. Subsequently, the United States Supreme Court explained the holding in *Ring* “did not alter the range of conduct Arizona law subjected to the death penalty”, but rather “altered the range of permissible methods for determining whether a defendant’s conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment.” *Schriro v. Summerlin* (2004) 542 U.S. 348, 353, 124 S.Ct. 2519, 159 L.Ed. 2nd 442. The *Schriro* Court noted “*Ring*’s holding is properly classified as procedural.” *Id.*

{¶24} We find the situation herein is similar to the situation in *Ring*. The amendment to R.C. 2929.06, mandating the impaneling of a new jury for death penalty resentencing, does not alter the range of conduct Ohio law subjects to the death penalty, but instead alters the range of permissible methods for determining whether a defendant’s conduct is punishable by death, requiring a new jury rather than the original jury make the determination of whether a defendant should be resentenced to death. “Rules that allocate decision making authority in this fashion are prototypical procedural rules.” *Id.* Because we find current R.C. 2929.06 to be procedural, we conclude it does not violate the Ohio Constitution against retroactive application of laws. We further find the State may seek the death penalty again during the resentencing of Appellee.

{¶25} The State’s sole assignment of error is sustained.

{¶26} The judgment of the Ashland County Court of Common Pleas is reversed and the matter remanded for further proceedings consistent with this opinion and the law.

By: Hoffman, J.

Farmer, P.J. and

Gwin, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ W. Scott Gwin
HON. W. SCOTT GWIN

