



LEXSEE 14 OHIO ST3D 74

THE STATE OF OHIO, APPELLEE, v. BEASLEY, APPELLANT

No. 83-1340

Supreme Court of Ohio

14 Ohio St. 3d 74; 471 N.E.2d 774; 1984 Ohio LEXIS 1246; 14 Ohio B. Rep. 511

December 12, 1984, Decided

PRIOR HISTORY: [***1] APPEAL from the Court of Appeals for Hamilton County.

This appeal arose from the conviction and sentencing of appellant, Barbara Beasley, a.k.a. Barbara Christian, on two counts of felonious assault.

The trial judge fined appellant \$ 500 for each count, pursuant to a plea bargaining agreement. When imposing this sentence, the judge disregarded R.C. 2929.11(A) which requires that a person convicted of felonious assault be imprisoned for a minimum of two years.

The state instituted a mandamus proceeding in the court of appeals seeking an order requiring the trial judge to impose the statutorily correct sentence. The court of appeals issued the requested writ of mandamus. In accordance with that writ, the trial judge resentenced Beasley to serve two to fifteen years in prison and imposed a fine of \$ 500 for each count of felonious assault, the prison terms to be served concurrently.

On the same day the new sentence was issued, the trial judge appealed to this court alleging that the state's mandamus action was improper. This court reversed on the ground that the state had an adequate remedy at law by way of appeal pursuant to R.C. 2945.67(A), *State, ex rel. Leis, v. [***2]* . *Outcalt* (1980), 62 Ohio St. 2d 331 [16 O.O.3d 392], and the cause was remanded to the court of appeals.

While the appeal of the mandamus action was in

progress, appellant filed a direct appeal to the court of appeals alleging that the trial court's resentencing violated her right to be free from double jeopardy. The court of appeals granted appellant's motion to remand in accordance with this court's pronouncements in *State, ex rel. Leis, v. Outcald, supra*. The state then filed a motion for leave to appeal and a complaint for a writ of mandamus with this court (case Nos. 80-1401 and 1400), alleging that the court of appeal's remand was improper. This court granted appellant's motion to dismiss the mandamus action and overruled the motion for leave to appeal.

Upon remand the trial judge reaffirmed the concurrent two to fifteen year prison terms and the \$ 500 fines. Appellant appealed and the court of appeals affirmed her resentencing.

The cause is now before this court pursuant to the allowance of a motion for leave to appeal.

DISPOSITION: *Judgment affirmed.*

HEADNOTES

*Criminal law -- Imposition of sentence less than statutory minimum -- Correction of sentence not violative [***3] of Double Jeopardy Clause.*

COUNSEL: *Mr. Arthur M. Ney, Jr., prosecuting attorney, and Mr. Leonard Kirschner, for appellee.*

Mr. William D. Cunningham, for appellant.

JUDGES: CELEBREZZE, C.J., SWEENEY, LOCHER, HOLMES, C. BROWN and J.P. CELEBREZZE, JJ., concur. W. BROWN, J., concurs in judgment only.

OPINION BY: PER CURIAM

OPINION

[*75] [**775] The question before this court is whether the trial court's erroneous imposition of a sentence less severe than the statutory minimum, and later correction of that sentence, violated the defendant's constitutional guarantee against double jeopardy. This guarantee serves an individual's interest in the finality of his sentence and protects against multiple punishments, as well as multiple prosecutions, for the same offense. *Benton v. Maryland* (1969), 395 U.S. 784. For the following reasons, however, we hold that jeopardy has not attached in this case, and that society's interest in enforcing the law, and in meting out the punishment the legislature has deemed just, must be served.

The function and duty of a court is to apply the law as written. R.C. 5145.01 states that the court shall impose no term of imprisonment " * [***4] * * less than the minimum term provided [by statute] for such felony."

This court in *Colegrove v. Burns* (1964), 175 Ohio St. 437, 438 [25 O.O.2d 447], described the role of a trial judge in sentencing a convicted criminal:

"* * * Crimes are statutory, as are the penalties therefor, and the only sentence which a trial judge may impose is that provided for by statute * * *. A court has no power to substitute a different sentence for that provided for by law."

Any attempt by a court to disregard statutory

requirements when imposing a sentence renders the attempted sentence a nullity or void. The applicable sentencing statute in this case, R.C. 2929.11, mandates a two to fifteen year prison term and an optional fine for felonious assault. The trial court disregarded the statute and imposed only a fine. In doing so the trial court exceeded its authority and this sentence must be considered void. Jeopardy did not attach to the void sentence, and, therefore, the court's imposition of the correct sentence did not constitute double jeopardy.

[*76] The United States Supreme Court addressed a question similar to the one posed in the case at bar in *Ex parte United States* (1916), 242 U.S. 27. In that case the court denied a trial judge the power to indefinitely suspend a mandatory prison sentence. The court reasoned that it is the function of a court to construe statutes, not to defeat them. Clemency is a function of the Executive branch and the courts are without authority to free guilty defendants absent a specific legislative enactment. *Id.* at 29.

We recognize that the suspension of a correctly imposed sentence is different from the failure to impose a required sentence; however, the end results are the same. Both actions circumvent statutory sentencing requirements. Just as the United States Supreme Court has prohibited circumvention of statutory sentencing requirements by indefinitely suspending a sentence, we feel that that court would prohibit circumvention of a statutory sentencing requirement by a trial court's failure to originally impose a correct sentence. We therefore hold that the trial court's correction of a statutorily incorrect sentence did not violate appellant's right to be free from double [***6] jeopardy.

The judgment of the court of appeals is affirmed.

Judgment affirmed.