



LEXSEE 38 OHIO ST3D 191

THE STATE OF OHIO, APPELLEE, v. VOLPE, APPELLANT; THE STATE OF OHIO, APPELLEE, v. CHISHOLM, APPELLANT

Nos. 87-1043, 87-1044

Supreme Court of Ohio

38 Ohio St. 3d 191; 527 N.E.2d 818; 1988 Ohio LEXIS 273

August 17, 1988, Decided

PRIOR HISTORY: [***1] CERTIFIED by the Court of Appeals for Stark County, Nos. CA-7016 and CA-7017.

These two cases arise from the same stipulated facts. On July 29, 1985, two officers from the Stark County Sheriff's Department and two officers from the Canton Police Department went to a game room at the Hillbilly Haven in Stark County and began playing pinball. While they were there, appellant, Anthony J. Volpe, told Lt. Tom Thomas, one of the officers, that he (Volpe) "had some good machines in [the] back room." The officers entered the back room where they found two Castle machines. Volpe gave instructions on how to play the machines and said "they" paid money for the number of credits earned. Three of the officers played the machines for over one half of an hour and obtained a number of credits for which they received money from an employee. One of the officers then applied stickum paper to the machines to mark them.

One of the officers then arranged for a search warrant. On July 30, 1985, three officers (two deputies and one police officer) returned to the game room where they again played the Castle machines. One of the officers received a payoff from appellant, Chester R. Chisholm, for [***2] the credits he accumulated. One of the officers was wired with a body mike and notified nearby officers that the job was completed and that the search warrant could be served. Other officers then arrived to serve the search warrant. The officers seized

the two Castle machines and arrested appellants. Volpe was indicted on three counts of gambling in violation of R.C. 2915.02, one count of operating a gambling house in violation of R.C. 2915.03, and two counts of possession of criminal tools in violation of R.C. 2923.24. Chisholm was indicted on two counts of gambling in violation of R.C. 2915.02, one count of operating a gambling house in violation of R.C. 2915.03, and two counts of possession of criminal tools in violation of R.C. 2923.24.

Appellants each filed a motion to dismiss and a motion to suppress evidence illegally obtained by the state which, after an evidentiary hearing, were overruled by the trial court. Appellants then entered no contest pleas to the respective indictments. Because appellants were apparently first-time gambling offenders, the court found them each guilty of misdemeanor counts of gambling and operating a gambling house and a felony count for [***3] possession of criminal tools. Judgment was entered accordingly. The court suspended appellants' sentences and placed each appellant on probation. Appellants appealed, challenging the constitutionality of R.C. 2923.24, as applied to them, and on its face. The court of appeals affirmed the convictions, essentially finding R.C. 2923.24 constitutional on its face. However, finding its judgment to be in conflict with the judgment of the Court of Appeals for Jefferson County in *State v. McDonald* (July 3, 1986), App. Nos. 85-J-12, 85-J-13, 85-J-14, 85-J-16 and 85-J-17, unreported, the Court of Appeals for Stark

County certified the record of each case to this court for review and final determination of the consolidated cases.

DISPOSITION: *Judgment reversed and cause remanded.*

HEADNOTES

Statutory construction -- Specific legislation prevails over general -- Criminal law -- Possession of gambling devices governed by R.C. 2915.02, not R.C. 2923.24.

SYLLABUS

1. Where there is no manifest legislative intent that a general provision of the Revised Code prevail over a special provision, the special provision takes precedence. (*State v. Frost* [1979], 57 Ohio St. 2d 11 O.O. 3d 294, 387 N.E. 2d 235, [***4] paragraph one of the syllabus, approved and followed.)

2. Because R.C. 2915.02(A)(5) clearly was enacted to reach criminal possession and control of a gambling device and such conduct is classified as a misdemeanor of the first degree under R.C. 2915.02(F), R.C. 2923.24, a general statute prohibiting possession and control of criminal tools and classifying such conduct as a fourth degree felony, cannot be used to charge and convict a person for possession and control of a gambling device.

COUNSEL: *Robert D. Horowitz*, prosecuting attorney, and *Paul A. Mastriacovo*, for appellee.

Lambert & MacDonald Co., L.P.A., Ida L. MacDonald and *John A. Connor II*, for appellants.

JUDGES: MOYER, C.J., SWEENEY, LOCHER, HOLMES, DOUGLAS, WRIGHT and H. BROWN, JJ., concur.

OPINION BY: MOYER

OPINION

[*192] [**819] MOYER, C.J. Since these cases were certified to this court, we have decided *State v. McDonald* (1987), 31 Ohio St. 3d 47, 31 OBR 155, 509 N.E. 2d 57, in which we held that " R.C. 2923.24, prohibiting the possession of criminal tools, is constitutional on its face." *Id.* at syllabus. We note:

"Certification of the record of the case to the Supreme Court, because of a conflict between judgments of the Courts [***5] of Appeals upon any question, brings the entire case, not merely the certified question, before this court for review. * * *" *Brown v. Borchers Ford, Inc.* (1977), 50 Ohio St. 2d 38, 39, 4 O.O. 3d 89, 90, 361 N.E. 2d 1063, 1064. See, also, *Couk v. Ocean Accident & Guarantee Corp.* (1941), 138 Ohio St. 110, 20 O.O. 65, 33 N.E. 2d 9, paragraph one of the syllabus; *Pettibone v. McKinnon* (1932), 125 Ohio St. 605, 183 N.E. 786, paragraph one of the syllabus. Since appellants, however, also challenge the constitutionality of R.C. 2923.24 as applied to them, we therefore consider that issue today.

Appellants were charged with violations of R.C. 2915.02 (gambling), R.C. 2915.03 (operation of a gambling house), and R.C. 2923.24 (possession of criminal tools).

R.C. 2915.02 states in relevant part:

"(A) No person shall:

" [**820] (1) Engage in bookmaking, or knowingly engage in conduct that facilitates bookmaking;

"(2) Establish, promote, or operate, or knowingly engage in conduct that facilitates any scheme or game of chance conducted for profit;

"(3) Knowingly procure, transmit, exchange, or engage in conduct that facilitates the procurement, transmission, or exchange [***6] of, information for use in establishing odds or determining winners in connection with bookmaking or with any scheme or game of chance conducted for profit;

[*193] "(4) Engage in betting or in playing any scheme or game of chance, except a charitable bingo game, as a substantial source of income or livelihood;

"(5) With purpose to violate division (A)(1), (2), (3), or (4) of this section, acquire, *possess*, control, or operate *any gambling device*.

* * *

"(F) Whoever violates this section is guilty of gambling, a misdemeanor of the first degree. If the offender has previously been convicted of any gambling offense, gambling is a felony of the fourth degree."

(Emphasis added.)

The complete text of R.C. 2923.24 is as follows:

"(A) No person shall possess or have under his control any substance, device, instrument, or article, with purpose to use it criminally.

"(B) Each of the following constitutes prima-facie evidence of criminal purpose:

"(1) Possession or control of any dangerous ordinance, or the materials or parts for making dangerous ordinance, in the absence of circumstances indicating such dangerous ordinance, materials, or parts are intended for legitimate [***7] use;

"(2) Possession or control of any substance, device, instrument, or article designed or specially adapted for criminal use;

"(3) Possession or control of any substance, device, instrument, or article commonly used for criminal purposes, under circumstances indicating such item is intended for criminal use.

"(C) Whoever violates this section is guilty of possessing criminal tools, a felony of the fourth degree."

Appellants challenge R.C. 2923.24 on the grounds that in enacting R.C. 2915.02, the General Assembly clearly stated a specific intent to charge with a misdemeanor, not a felony, first-time gambling offenders who engage or use a tool in gambling. Therefore, appellants argue that they were improperly convicted of violating R.C. 2923.24. We agree and accordingly reverse the judgment of the court of appeals.

Well-established principles of statutory construction require that specific statutory provisions prevail over conflicting general statutes. R.C. 1.51 states that:

"If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, [***8] the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail."

R.C. 2915.02(A)(5) and 2923.24 are irreconcilable.

R.C. 2915.02(A)(5), in conjunction with R.C. 2915.02(F), treats possession of a gambling device as a first degree misdemeanor. As such, a person convicted of violating R.C. 2915.02(A)(5) could receive no prison sentence or a prison sentence of up to six months. See R.C. 2929.21. R.C. 2923.24 makes possession of criminal tools, arguably such instruments as gambling devices, a fourth degree felony, carrying a minimum prison sentence of six months and a maximum prison sentence of five years. See R.C. 2929.11. Therefore, since R.C. 2915.02 and 2923.24 provide for different penalties for the same conduct, they cannot be construed to give effect to both. R.C. 2915.02¹ and 2923.24 were enacted [**821] effective January 1, 1974, as part of the [*194] modern Ohio Criminal Code. Therefore, under R.C. 1.51, the general law, R.C. 2923.24, does not prevail as being the "later adoption." Further, the fact that the General Assembly enacted R.C. [***9] 2915.02(A)(5) to reach possession and control of gambling devices indicates that it did not intend for R.C. 2923.24 to reach possession and control of such devices.

1 R.C. 2915.02 was amended several times after its enactment, but none of those amendments is relevant herein.

Although it was dicta, we observed in *State v. McDonald, supra*, at 50, 31 OBR at 157, 509 N.E. 2d at 60, fn. 1, that "there are statutes prohibiting possession of specific articles, such as R.C. 2915.02(A)(5) (gambling devices) and R.C. 2925.12 (drug abuse instruments). The General Assembly has manifested a specific intent to classify possession of those articles as misdemeanors. These specific provisions would control over the general provision in R.C. 2923.24, R.C. 1.51."

In *State v. Frost* (1979), 57 Ohio St. 2d 121, 11 O.O. 3d 294, 387 N.E. 2d 235, this court was presented with the issue of whether the enactment of R.C. 2901.05(A), placing the burden of going forward with evidence of an affirmative defense upon the accused, impliedly repealed R.C. 1707.45, which placed the burden of proving an exemption from compliance with the Ohio Securities Act on the party claiming the exemption. [***10] Noting that repeals by implication are not favored and will not be found unless the subsequent legislation clearly requires that holding, the court also cited R.C. 1.51 and held that "[w]here there is no manifest legislative intent that a general provision of the Revised Code prevail over a special provision, the

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special provision takes precedence. * * *" *State v. Frost, supra*, paragraph one of the syllabus. See, also, *State, ex rel. Myers, v. Chiaramonte* (1976), 46 Ohio St. 2d 230, 75 O.O. 2d 283, 348 N.E. 2d 323, paragraph one of the syllabus; *Cincinnati v. Thomas Soft Ice Cream, Inc.* (1977), 52 Ohio St. 2d 76, 6 O.O. 3d 277, 369 N.E. 2d 778, paragraph one of the syllabus; and *Leach v. Collins* (1931), 123 Ohio St. 530, 533, 176 N.E. 77, 78, citing *Rodgers v. United States* (1902), 185 U.S. 83.

Given that the General Assembly clearly enacted R.C. 2915.02(A)(5) to reach criminal possession and

control of a gambling device and classified such conduct as a misdemeanor of the first degree under R.C. 2915.02(F), we hold that R.C. 2923.24, a general statute prohibiting possession and control of criminal tools and classifying such conduct as a fourth [***11] degree felony, cannot be used to charge and convict a person of possessing and controlling a gambling device. Accordingly, we reverse the judgment of the court of appeals and remand these two cases to the trial court for disposition consistent with this opinion.