

original

IN THE COMMON PLEAS COURT OF CLARK COUNTY, OHIO

STATE OF OHIO,

CASE NO. 23 -CR-0567

Plaintiff,

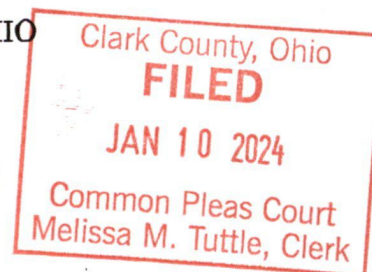
MOTION TO DISMISS

VS

HERMANIO JOSEPH,

JUDGE DOUGLAS M. RASTATTER

Defendant



Now comes the Defendant, Hermanio Joseph, cy and through his counsel, and moves this Court to dismiss the above matter.

On or about August 22, 2023, Defendant was involved in a motor vehicle accident in Clark County, Ohio. The other vehicle involved was a school bus. As a result of that accident, Defendant is charged in this case with two felony counts, to-wit; Involuntary Manslaughter, in violation of R.C. Section 2903.04(A), a felony of the first degree and Vehicular Homicide, in violation of R.C. Section 2903.06(A) (3) (a). A felony of the second degree which contains a specification that the Defendant was driving without a valid driver's license or on a suspended license. The State contends that Defendant caused said accident by driving left of center.

It is uncontested by the State that the Defendant had a valid license issued in Mexico, where he resided prior to arriving in the United States. The State alleges that because the Defendant never converted his license to an Ohio drivers license in a timely manner that Defendant's license became invalid. No evidence that Defendant's license was invalid on the date of the accident has been supplied to defense by the State. Chapter 4510 of the Revised Code provides that a crime of no valid drivers license or an

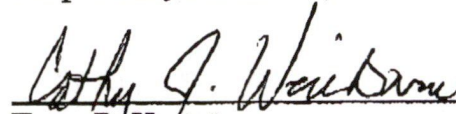
expired license on a first offense is a minor misdemeanor.

Section 2903.06 (A) (4) states that whoever as result of committing a minor misdemeanor under R.C. Section 2903.06 (B) (D) is guilty of vehicular manslaughter, a misdemeanor of the second degree. The statute further provides " If at the time of the offense the offender was driving without a valid drivers license, temporary permit... t" then the defendant is guilty of vehicular manslaughter a misdemeanor of the first degree. In the instant case it is alleged that the defendant committed the underlying offense of driving left of center, a minor misdemeanor traffic offense. See attached Exhibit A.

State v. Volpe, 38 Ohio St. 3d 191 (1988) applies in this matter. In *Volpe* the court held " well established principles of statutory construction require that specific statutory provisions prevail over general statutes. R.C. 1.51 states that "If a general provision conflicts with special or local provision, they shall be construed that the special provision prevail over the general. *Ibid*. See Exhibit B.

Here the Aggravated Vehicular Assault as per statute is either a misdemeanor of the second degree or a misdemeanor of the first degree not the fourth degree felony set forth in the indictment. As the attempt to charge the Aggravated Vehicular Assault fails under *Volpe*, so the charge of Involuntary Manslaughter also fails and must to be dismissed.

Respectfully submitted,



Terry R. Hart #

Cathy J. Weithman #0020889

Attorney for Defendant

Hermanio Joseph

HART & WEITHMAN LAW

548 N. Main Street

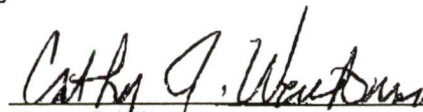
Urbana, Ohio 43078

937-653-3170 Fax 937-653-5558

cweithman@yahoo.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the following Motion to Dismiss was served on the Clark County Prosecutor the same date as filing.



Terry R. Hart

Cathy J. Weithman

Attorney for Defendant

Hermanio Joseph

EXHIBIT A**ORC Ann. 2903.06**

Archived code versions

Current through File 12 of the 135th General Assembly (2023-2024).

§ 2903.06 Aggravated vehicular homicide; vehicular homicide; vehicular manslaughter.

(A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall cause the death of another or the unlawful termination of another's pregnancy in any of the following ways:

(1)

(a) As the proximate result of committing a violation of division (A) of section 4511.19 of the Revised Code or of a substantially equivalent municipal ordinance;

(b) As the proximate result of committing a violation of division (A) of section 1547.11 of the Revised Code or of a substantially equivalent municipal ordinance;

(c) As the proximate result of committing a violation of division (A)(3) of section 4561.15 of the Revised Code or of a substantially equivalent municipal ordinance.

(2) In one of the following ways:

(a) Recklessly;

(b) As the proximate result of committing, while operating or participating in the operation of a motor vehicle or motorcycle in a construction zone, a reckless operation offense, provided that this division applies only if the person whose death is caused or whose pregnancy is unlawfully terminated is in the construction zone at the time of the offender's commission of the reckless operation offense in the construction zone and does not apply as described in division (F) of this section.

(3) In one of the following ways:

(a) Negligently;

(b) As the proximate result of committing, while operating or participating in the operation of a motor vehicle or motorcycle in a construction zone, a speeding offense, provided that this division applies only if the person whose death is caused or whose pregnancy is unlawfully terminated is in the construction zone at the time of the offender's commission of the speeding offense in the construction zone and does not apply as described in division (F) of this section.

(4) As the proximate result of committing a violation of any provision of any section contained in Title XLV of the Revised Code that is a minor misdemeanor or of a municipal ordinance that, regardless of the penalty set by ordinance for the violation, is substantially equivalent to any provision of any section contained in Title XLV of the Revised Code that is a minor misdemeanor.

(B)

(1) Whoever violates division (A)(1) or (2) of this section is guilty of aggravated vehicular homicide and shall be punished as provided in divisions (B)(2) and (3) of this section.

(2)

2903.06 Aggravated vehicular homicide vehicular homicide vehicular manslaughter.

(a) Except as otherwise provided in division (B)(2)(b) or (c) of this section, aggravated vehicular homicide committed in violation of division (A)(1) of this section is a felony of the second degree and the court shall impose a mandatory prison term on the offender as described in division (E) of this section.

(b) Except as otherwise provided in division (B)(2)(c) of this section, aggravated vehicular homicide committed in violation of division (A)(1) of this section is a felony of the first degree, and the court shall impose a mandatory prison term on the offender as described in division (E) of this section, if any of the following apply:

(i) At the time of the offense, the offender was driving under a suspension or cancellation imposed under Chapter 4510. or any other provision of the Revised Code or was operating a motor vehicle or motorcycle, did not have a valid driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege, and was not eligible for renewal of the offender's driver's license or commercial driver's license without examination under section 4507.10 of the Revised Code.

(ii) The offender previously has been convicted of or pleaded guilty to a violation of this section.

(iii) The offender previously has been convicted of or pleaded guilty to any traffic-related homicide, manslaughter, or assault offense.

(c) Aggravated vehicular homicide committed in violation of division (A)(1) of this section is a felony of the first degree, and the court shall sentence the offender to a mandatory prison term as provided in section 2929.142 of the Revised Code and described in division (E) of this section if any of the following apply:

(i) The offender previously has been convicted of or pleaded guilty to three or more prior violations of division (A) of section 4511.19 of the Revised Code or of a substantially equivalent municipal ordinance within the previous ten years.

(ii) The offender previously has been convicted of or pleaded guilty to three or more prior violations of division (A) of section 1547.11 of the Revised Code or of a substantially equivalent municipal ordinance within the previous ten years.

(iii) The offender previously has been convicted of or pleaded guilty to three or more prior violations of division (A)(3) of section 4561.15 of the Revised Code or of a substantially equivalent municipal ordinance within the previous ten years.

(iv) The offender previously has been convicted of or pleaded guilty to three or more prior violations of division (A)(1) of this section within the previous ten years.

(v) The offender previously has been convicted of or pleaded guilty to three or more prior violations of division (A)(1) of section 2903.08 of the Revised Code within the previous ten years.

(vi) The offender previously has been convicted of or pleaded guilty to three or more prior violations of section 2903.04 of the Revised Code within the previous ten years in circumstances in which division (D) of that section applied regarding the violations.

(vii) The offender previously has been convicted of or pleaded guilty to three or more violations of any combination of the offenses listed in division (B)(2)(c)(i), (ii), (iii), (iv), (v), or (vi) of this section within the previous ten years.

(viii) The offender previously has been convicted of or pleaded guilty to a second or subsequent felony violation of division (A) of section 4511.19 of the Revised Code.

(d) In addition to any other sanctions imposed pursuant to division (B)(2)(a), (b), or (c) of this section for aggravated vehicular homicide committed in violation of division (A)(1) of this section,

2903.06 Aggravated vehicular homicide vehicular homicide vehicular manslaughter.

the court shall impose upon the offender a class one suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(1) of section 4510.02 of the Revised Code.

Divisions (A)(1) to (3) of section 4510.54 of the Revised Code apply to a suspension imposed under division (B)(2)(d) of this section.

(3) Except as otherwise provided in this division, aggravated vehicular homicide committed in violation of division (A)(2) of this section is a felony of the third degree. Aggravated vehicular homicide committed in violation of division (A)(2) of this section is a felony of the second degree if, at the time of the offense, the offender was driving under a suspension or cancellation imposed under Chapter 4510, or any other provision of the Revised Code or was operating a motor vehicle or motorcycle, did not have a valid driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege, and was not eligible for renewal of the offender's driver's license or commercial driver's license without examination under section 4507.10 of the Revised Code or if the offender previously has been convicted of or pleaded guilty to a violation of this section or any traffic-related homicide, manslaughter, or assault offense. The court shall impose a mandatory prison term on the offender when required by division (E) of this section.

In addition to any other sanctions imposed pursuant to this division for a violation of division (A)(2) of this section, the court shall impose upon the offender a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(2) of section 4510.02 of the Revised Code or, if the offender previously has been convicted of or pleaded guilty to a traffic-related murder, felonious assault, or attempted murder offense, a class one suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(1) of that section.

(C) Whoever violates division (A)(3) of this section is guilty of vehicular homicide. Except as otherwise provided in this division, vehicular homicide is a misdemeanor of the first degree. Vehicular homicide committed in violation of division (A)(3) of this section is a felony of the fourth degree if, at the time of the offense, the offender was driving under a suspension or cancellation imposed under Chapter 4510, or any other provision of the Revised Code or was operating a motor vehicle or motorcycle, did not have a valid driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege, and was not eligible for renewal of the offender's driver's license or commercial driver's license without examination under section 4507.10 of the Revised Code or if the offender previously has been convicted of or pleaded guilty to a violation of this section or any traffic-related homicide, manslaughter, or assault offense. The court shall impose a mandatory jail term or a mandatory prison term on the offender when required by division (E) of this section.

In addition to any other sanctions imposed pursuant to this division, the court shall impose upon the offender a class four suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(4) of section 4510.02 of the Revised Code, or, if the offender previously has been convicted of or pleaded guilty to a violation of this section or any traffic-related homicide, manslaughter, or assault offense, a class three suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(3) of that section, or, if the offender previously has been convicted of or pleaded guilty to a traffic-related murder, felonious assault, or attempted murder offense, a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(2) of that section.

(D) Whoever violates division (A)(4) of this section is guilty of vehicular manslaughter. Except as otherwise provided in this division, vehicular manslaughter is a misdemeanor of the second degree. Vehicular manslaughter is a misdemeanor of the first degree if, at the time of the offense, the offender was driving

2903.06 Aggravated vehicular homicide vehicular homicide vehicular manslaughter.

under a suspension or cancellation imposed under Chapter 4510. or any other provision of the Revised Code or was operating a motor vehicle or motorcycle, did not have a valid driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege, and was not eligible for renewal of the offender's driver's license or commercial driver's license without examination under section 4507.10 of the Revised Code or if the offender previously has been convicted of or pleaded guilty to a violation of this section or any traffic-related homicide, manslaughter, or assault offense.

In addition to any other sanctions imposed pursuant to this division, the court shall impose upon the offender a class six suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(6) of section 4510.02 of the Revised Code or, if the offender previously has been convicted of or pleaded guilty to a violation of this section, any traffic-related homicide, manslaughter, or assault offense, or a traffic-related murder, felonious assault, or attempted murder offense, a class four suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(4) of that section.

(E)

(1) The court shall impose a mandatory prison term on an offender who is convicted of or pleads guilty to a violation of division (A)(1) of this section. Except as otherwise provided in this division, the mandatory prison term shall be a definite term from the range of prison terms provided in division (A)(1)(b) of section 2929.14 of the Revised Code for a felony of the first degree or from division (A)(2)(b) of that section for a felony of the second degree, whichever is applicable, except that if the violation is committed on or after March 22, 2019, the court shall impose as the minimum prison term for the offense a mandatory prison term that is one of the minimum terms prescribed for a felony of the first degree in division (A)(1)(a) of section 2929.14 of the Revised Code or one of the terms prescribed for a felony of the second degree in division (A)(2)(a) of that section, whichever is applicable. If division (B)(2)(c)(i), (ii), (iii), (iv), (v), (vi), (vii), or (viii) of this section applies to an offender who is convicted of or pleads guilty to the violation of division (A)(1) of this section, the court shall impose the mandatory prison term pursuant to division (B) of section 2929.142 of the Revised Code. The court shall impose a mandatory jail term of at least fifteen days on an offender who is convicted of or pleads guilty to a misdemeanor violation of division (A)(3)(b) of this section and may impose upon the offender a longer jail term as authorized pursuant to section 2929.24 of the Revised Code.

(2) The court shall impose a mandatory prison term on an offender who is convicted of or pleads guilty to a violation of division (A)(2) or (3)(a) of this section or a felony violation of division (A)(3)(b) of this section if either division (E)(2)(a) or (b) of this section applies. The mandatory prison term shall be a definite term from the range of prison terms provided in division (A)(3)(a) of section 2929.14 of the Revised Code for a felony of the third degree or from division (A)(4) of that section for a felony of the fourth degree, whichever is applicable. The court shall impose a mandatory prison term on an offender in a category described in this division if either of the following applies:

(a) The offender previously has been convicted of or pleaded guilty to a violation of this section or section 2903.08 of the Revised Code.

(b) At the time of the offense, the offender was driving under suspension or cancellation under Chapter 4510. or any other provision of the Revised Code or was operating a motor vehicle or motorcycle, did not have a valid driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege, and was not eligible for renewal of the offender's driver's license or commercial driver's license without examination under section 4507.10 of the Revised Code.

(F) Divisions (A)(2)(b) and (3)(b) of this section do not apply in a particular construction zone unless signs of the type described in section 2903.081 of the Revised Code are erected in that construction zone in accordance with the guidelines and design specifications established by the director of transportation under

2903.06 Aggravated vehicular homicide vehicular homicide vehicular manslaughter.

section 5501.27 of the Revised Code. The failure to erect signs of the type described in section 2903.081 of the Revised Code in a particular construction zone in accordance with those guidelines and design specifications does not limit or affect the application of division (A)(1), (A)(2)(a), (A)(3)(a), or (A)(4) of this section in that construction zone or the prosecution of any person who violates any of those divisions in that construction zone.

(G)

(1) As used in this section:

(a) "Mandatory prison term" and "mandatory jail term" have the same meanings as in section 2929.01 of the Revised Code.

(b) "Traffic-related homicide, manslaughter, or assault offense" means a violation of section 2903.04 of the Revised Code in circumstances in which division (D) of that section applies, a violation of section 2903.06 or 2903.08 of the Revised Code, or a violation of section 2903.06, 2903.07, or 2903.08 of the Revised Code as they existed prior to March 23, 2000.

(c) "Construction zone" has the same meaning as in section 5501.27 of the Revised Code.

(d) "Reckless operation offense" means a violation of section 4511.20 of the Revised Code or a municipal ordinance substantially equivalent to section 4511.20 of the Revised Code.

(e) "Speeding offense" means a violation of section 4511.21 of the Revised Code or a municipal ordinance pertaining to speed.

(f) "Traffic-related murder, felonious assault, or attempted murder offense" means a violation of section 2903.01 or 2903.02 of the Revised Code in circumstances in which the offender used a motor vehicle as the means to commit the violation, a violation of division (A)(2) of section 2903.11 of the Revised Code in circumstances in which the deadly weapon used in the commission of the violation is a motor vehicle, or an attempt to commit aggravated murder or murder in violation of section 2923.02 of the Revised Code in circumstances in which the offender used a motor vehicle as the means to attempt to commit the aggravated murder or murder.

(g) "Motor vehicle" has the same meaning as in section 4501.01 of the Revised Code.

(2) For the purposes of this section, when a penalty or suspension is enhanced because of a prior or current violation of a specified law or a prior or current specified offense, the reference to the violation of the specified law or the specified offense includes any violation of any substantially equivalent municipal ordinance, former law of this state, or current or former law of another state or the United States.

History

134 v H 511 (Eff 1-1-74); 135 v H 716 (Eff 1-1-74); 139 v S 432 (Eff 3-16-83); 141 v H 265 (Eff 7-24-86); 141 v S 356 (Eff 9-24-86); 141 v S 262 (Eff 3-20-87); 141 v H 428 (Eff 12-23-86); 143 v H 381 (Eff 7-1-89); 143 v S 49 (Eff 11-3-89); 143 v S 131 (Eff 7-25-90); 144 v S 275 (Eff 7-1-93); 146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v S 239 (Eff 9-6-96); 148 v S 107. Eff 3-23-2000; 149 v S 123, § 1, eff. 1-1-04; 150 v H 50, § 1, eff. 10-21-03; 150 v H 50, § 4, eff. 1-1-04; 150 v H 52, § 1, eff. 6-1-04; 151 v H 461, § 1, eff. 4-4-07; 152 v H 215, § 1, eff. 4-7-09; 2016 hb300, § 1, effective March 14, 2017; 2016 hb388, § 1, effective April 6, 2017; 2018 sb201, § 1, effective March 22, 2019; 2022 sb288, § 1, effective April 4, 2023.

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EXHIBIT B

As of: January 5, 2024 2:00 AM Z

State v. Volpe

Supreme Court of Ohio

August 17, 1988, Decided

Nos. 87-1043, 87-1044

Reporter

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

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

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

Disposition: *Judgment reversed and cause remanded.*

Core Terms

gambling device, gambling, general provision,
 misdemeanor, violates, prevail, felony, tools, prison
 sentence, fourth degree, court of appeals, game of
 chance, first degree, facilitates, bookmaking, classified,
 provisions, knowingly, ordinance, manifest, prohibition
 of possession, possession and control, reverse a
 judgment, special provision, criminal purpose, general
 statute, specific intent, criminal use, for profit,
 irreconcilable

Case Summary**Procedural Posture**

Defendants were found guilty of misdemeanor counts of
 gambling and operating a gambling house (*Ohio Rev.
 Code Ann. §§ 2915.02 and 2915.03*) and a felony count
 for possession of criminal tools (*Ohio Rev. Code Ann. §
 2923.24*). After determining that *§ 2923.24* was
 constitutional on its face and as applied, the Court of
 Appeals of Stark County (Ohio) certified defendants'
 cases to the court in order to resolve a conflict among
 the appellate courts.

Overview

Defendants appealed their convictions, challenging the
 constitutionality of *Ohio Rev. Code Ann. § 2923.24*. The
 appeals court found the statute constitutional, but

certified the record of the cases to the court to settle a
 conflict between its decision and the decision of another
 appeals court finding the statute unconstitutional. Upon
 review, the court reversed the decision and remanded
 the case to the trial court. The court found that the clear
 intent of the legislature in enacting *Ohio Rev. Code Ann.
 § 2915.02* was to punish the possession of a gambling
 device as a misdemeanor and that *Ohio Rev. Code
 Ann. § 2923.24*, a general statute prohibiting possession
 of criminal tools and classifying such activity as a felony,
 could not be applied to possession of a gambling
 device.

Outcome

The court reversed and remanded the case to the trial
 court for disposition consistent with the court's opinion.

LexisNexis® Headnotes

Criminal Law & Procedure > Criminal
 Offenses > Criminal Instruments & Tools > General
 Overview

HN1 Criminal Offenses, Criminal Instruments &
 Tools

Ohio Rev. Code Ann. § 2923.24, prohibiting the
 possession of criminal tools, is constitutional on its face.

Civil Procedure > Appeals > Appellate
 Jurisdiction > Certified Questions

Criminal Law & Procedure > Appeals > Appellate
 Jurisdiction > Certified Questions

HN2 Appellate Jurisdiction, Certified Questions

38 Ohio St. 3d 191, *191; 527 N.E.2d 818, **818; 1988 Ohio LEXIS 273, ***1

Certification of the record of the case to the Ohio Supreme Court, because of a conflict between judgments of the courts of appeals upon any question, brings the entire case, not merely the certified question, before the supreme court for review.

Criminal Law & Procedure > ... > Criminal
Instruments & Tools > Document Making
Equipment > Elements

Criminal Law & Procedure > Criminal
Offenses > Criminal Instruments & Tools > General
Overview

Criminal Law & Procedure > ... > Miscellaneous
Offenses > Gambling > General Overview

HN3 Document Making Equipment, Elements

Ohio Rev. Code Ann. § 2915.02 states in part: (A) No person shall: (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 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; (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.

Criminal Law & Procedure > ... > Criminal
Instruments & Tools > Document Making
Equipment > Elements

Criminal Law & Procedure > Criminal
Offenses > Criminal Instruments & Tools > General
Overview

HN4 Document Making Equipment, Elements

The complete text of Ohio Rev. Code Ann. § 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 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.

Criminal Law & Procedure > ... > Criminal
Instruments & Tools > Document Making
Equipment > Penalties

Governments > Legislation > Interpretation

Criminal Law & Procedure > Criminal
Offenses > Criminal Instruments & Tools > General
Overview

HN5 Document Making Equipment, Penalties

Well-established principles of statutory construction require that specific statutory provisions prevail over conflicting general statutes. Ohio Rev. Code Ann. 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, 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.

Business & Corporate
Compliance > ... > Governments > State &
Territorial Governments > Gaming & Lotteries

Criminal Law & Procedure > Defenses > Burdens of
Proof

Criminal Law & Procedure > ... > Controlled

38 Ohio St. 3d 191, *191; 527 N.E.2d 818, **818; 1988 Ohio LEXIS 273, ***1

Substances > Drug Paraphernalia > General Overview

Criminal Law &
Procedure > ... > Possession > Simple Possession > General Overview

Criminal Law &
Procedure > ... > Possession > Simple Possession > Elements

Criminal Law & Procedure > Criminal Offenses > Criminal Instruments & Tools > General Overview

Criminal Law & Procedure > ... > Miscellaneous Offenses > Gambling > General Overview

Criminal Law & Procedure > Defenses > General Overview

Governments > Legislation > Interpretation

HN6 State & Territorial Government Licensing, Gaming & Lotteries

There are statutes prohibiting possession of specific articles, such as Ohio Rev. Code Ann. § 2915.02(A)(5) for gambling devices and Ohio Rev. Code Ann. § 2925.12 for 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 Ohio Rev. Code Ann. §§ 2923.24, 1.51.

Governments > Legislation > Interpretation

Securities Law > Blue Sky Laws > Exemptions & Exclusions > Exempt Issuers Transactions

HN7 Legislation, Interpretation

Repeals by implication are not favored and will not be found unless the subsequent legislation clearly requires that holding.

Governments > Legislation > Interpretation

HN8 Legislation, Interpretation

Where there is no manifest legislative intent that a

general provision of the Ohio Revised Code prevail over a special provision, the special provision takes precedence.

Business & Corporate
Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries

Criminal Law & Procedure > ... > Miscellaneous Offenses > Gambling > General Overview

Criminal Law & Procedure > Criminal Offenses > Criminal Instruments & Tools > General Overview

HN9 State & Territorial Government Licensing, Gaming & Lotteries

Given that the General Assembly clearly enacted Ohio Rev. Code Ann. § 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 Ohio Rev. Code Ann. § 2915.02(F), the Supreme Court of Ohio holds that Ohio Rev. Code Ann. § 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 of possessing and controlling a gambling device.

Headnotes/Summary

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

[*191] O.Jur 2d Statutes § 104

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, paragraph one of the syllabus, approved and followed.)

38 Ohio St. 3d 191, *191; 527 N.E.2d 818, **818; 1988 Ohio LEXIS 273, ***1

O.Jur 3d Criminal Law §§ 2339, 2359

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.

These two cases arise from the same stipulated facts. On July 29, 1985, two officers from the Stark County Sheriffs Department and two officers from the Canton Police Department went to a game room at the Hillbilly Haven in Stark County and began [*2] 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 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 [*3] 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 [*192] 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 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 [*4] 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.

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

[*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 " HN1 [↑] R.C. 2923.24, prohibiting the possession of criminal tools, is constitutional on its face." *Id.* at syllabus. We note: "HN2 [↑] Certification of the record of the case to the Supreme Court, because of a conflict between judgments of the Courts 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.

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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. 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.

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 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.

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 "[H]6[↑]" 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."

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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. Noting that HNT[↑] repeals by implication are not favored and will not be found unless the subsequent legislation clearly requires that holding, [***9] the court also cited R.C. 1.51 and held that "[H]8[↑]" 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, 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.

H9[↑] Given that the General Assembly clearly enacted R.C. 2915.02(A)(5) to reach criminal

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