

[Cite as *State v. Arnold*, 2015-Ohio-2188.]

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 14CA010628

Appellee

v.

JACK ARNOLD

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 13CR086994

Appellant

DECISION AND JOURNAL ENTRY

Dated: June 8, 2015

HENSAL, Presiding Judge.

{¶1} The State of Ohio appeals an order of the Lorain County Court of Common Pleas that held that the repeat operating-a-vehicle-under-the-influence specification set forth in Revised Code Section 2941.1413 violates Jack Arnold’s equal protection rights. For the following reasons, this Court reverses.

I.

{¶2} The Grand Jury indicted Mr. Arnold for two counts of operating a vehicle under the influence: one under Section 4511.19(A)(1)(a) and the other under Section 4511.19(A)(1)(h). It indicated that the offenses were felonies of the fourth degree because Mr. Arnold had five prior equivalent offenses in the last 20 years. *See* R.C. 4511.19(G)(1)(d). For each count, the Grand Jury also included a specification under Section 2941.1413 that repeated that Mr. Arnold had been convicted of or pleaded guilty to five or more equivalent offenses in

the last 20 years. The specification is required in order for Mr. Arnold to be subject to a mandatory additional prison term under Section 2929.13(G)(2).

{¶3} Before his case proceeded to trial, Mr. Arnold moved to dismiss the specifications, arguing that they violate his right to equal protection. Mr. Arnold argued that the conduct covered by the specification is identical to the conduct prohibited by the underlying crime, namely, having five equivalent convictions in the past 20 years. He argued that, because the specifications do not require the State to prove any elements that are not already required for the underlying offenses, he may be subject to a different penalty for the same conduct as other offenders based only on the State's decision to seek the specifications, which is a violation of equal protection under *State v. Wilson*, 58 Ohio St.2d 52 (1979). The trial court granted his motion, concluding that "R.C. 2941.1413 as applied in [this] case * * * violates the equal protection clause of the Ohio and U.S. Constitutions * * *." It, therefore, dismissed the specifications. The State has appealed the trial court's decision, assigning three errors, which this Court has combined for convenience.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED IN DISMISSING THE REPEAT OVI SPECIFICATION BECAUSE R.C. 2941.1413 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES OR OHIO CONSTITUTIONS AS IT IS RATIONALLY RELATED TO A LEGITIMATE GOVERNMENT INTEREST.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED IN DISMISSING THE REPEAT OVI SPECIFICATION BECAUSE R.C. 2941.1413 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES OR OHIO CONSTITUTIONS AS ARNOLD FAILED TO PROVE DISPARATE ENFORCEMENT.

ASSIGNMENT OF ERROR III

THE TRIAL COURT ERRED IN FINDING THAT ARNOLD'S EQUAL PROTECTION AND DUE PROCESS RIGHTS ARE VIOLATED BY R.C. 2941.1413 BECAUSE A SPECIFICATION IS NOT A SEPARATE OFFENSE BUT RATHER A PROCEDURAL REQUIREMENT.

{¶4} The State argues that Section 2941.1413 does not violate Mr. Arnold's equal protection rights because it is rationally related to a legitimate state interest, because the use of prosecutorial discretion does not, in and of itself, violate equal protection, and because the specifications are merely a procedural requirement, not a separate offense. We conclude that the trial court's decision must be reversed for a different reason, however, because Mr. Arnold's constitutional argument was not ripe.

{¶5} The Ohio Supreme Court has held that "[t]he constitutionality of a state statute may not be brought into question by one who is not within the class against whom the operation of the statute is alleged to have been unconstitutionally applied and who has not been injured by its alleged unconstitutional provision." *Palazzi v. Estate of Gardner*, 32 Ohio St.3d 169 (1987), syllabus. Following that principle, courts have determined that a constitutional challenge to a sentencing statute is not ripe until the defendant has been sentenced under it. *See State v. Wood*, 6th Dist. Lucas No. L-05-1420, 2006-Ohio-4910, ¶ 7 (concluding that defendant's ex post facto argument was not ripe because he had not been sentenced yet); *State v. Stroud*, 7th Dist. Mahoning No. 05 MA 179, 2006-Ohio-7079, ¶ 20 (same).

{¶6} Mr. Arnold moved for dismissal of the specification before he pleaded guilty to or was found guilty of the indicted offenses and before he was sentenced for them. If he is acquitted at trial or the charges are otherwise dismissed, his equal protection argument is moot. We, therefore, conclude that his motion to dismiss was premature. Our conclusion is consistent with the Ohio Supreme Court's holding in *Wilson*, which explained that it only "violates the

Equal Protection Clause” to “sentenc[e] a person under the statute with the higher penalty[.]” *Wilson*, 58 Ohio St.2d at 55-56.

{¶7} Because Mr. Arnold is not yet subject to additional prison time because of the repeat operating-a-vehicle-under-the-influence specification, we conclude that the trial court erred when it granted his motion to dismiss. *See State v. Meyer*, 61 Ohio App.3d 673, 676 (1st Dist.1988) (“[It is a] fundamental principle that a court should not rule upon constitutional claims that are not essential to the disposition of a particular controversy.”). The State’s assignments of error are sustained to the extent that they argue that the trial court should not have dismissed the OVI specification. We express no opinion on the merits of the equal protection question.

III.

{¶8} Because Mr. Arnold’s equal protection arguments were not ripe, it was error for the trial court to grant his motion to dismiss. The judgment of the Lorain County Court of Common Pleas is reversed, and this matter is remanded for further proceedings.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the

period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

JENNIFER HENSAL
FOR THE COURT

MOORE, J.
SCHAFFER, J.
CONCUR.

APPEARANCES:

DENNIS P. WILL, Prosecuting Attorney, and NATASHA RUIZ GUERRIERI, Assistant Prosecuting Attorney, for Appellant.

STEPHEN P. HANUDEL, Attorney at Law, for Appellee.