IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT
WARREN COUNTY, OHIO

STATE OF OHIO,	:	**App. Case No. CA 2016 11 094**
PLAINTIFF-APPELLEE,	:	
-VS-	:	
VALERIE BRADLEY,	:	
DEFENDANT-APPELLANT.	:	

REPLY BRIEF OF APPELLANT, VALERIE BRADLEY

APPEAL FROM THE WARREN COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Trial Court Case No. 15-N001046

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I. ARGUMENT

First Assignment of Error

THE COURT OF COMMON PLEAS ERRED BECAUSE THE STATE'S PROSECUTION OF APPELLANT WAS PROCEDURALLY FORECLOSED AS A MATTER OF LAW

Issue Number One

A parent who receives notice of a child's non-attendance and promptly corrects it cannot be criminally prosecuted under R.C. 3321.38 or R.C. 2919.24(A)(2).

Mrs. Bradley's first assignment of error poses a simple issue: when the legislature says that "A," "B," "C," and "D" *must* occur before an attendance officer may file a complaint in court, and that any complaint filed by an attendance officer *must* comply with "W," "X," "Y," and "Z," can the state prosecute under that complaint if "A," "B," "C," or "D" have not occurred, and if the complaint does not comply with "W," "X," "Y," or "Z"?

Mrs. Bradley contends that the legislature has promulgated explicit instructions for how cases of suspected absences from school are to be handled. (Brief of Appellant, pp. 5-9). The State's response concedes these statutory directives by reprinting them in full. If a suspected attendance issue comes to his attention, the "attendance officer ... shall examine into any case of supposed truancy within the district [***"A"***]." (Brief of Appellee, pp. 8-9, *quoting* R.C. 3321.19(C)). Then, he "shall warn the child, if found truant, and the child's parent ... in writing, of the legal consequences of being an habitual or chronic truant [***"B"***]." (Brief of Appellee, p. 9, *quoting* R.C. 3321.19(C)). Then, the State is to provide the parent with an opportunity to "cause the child's attendance at school [***"C"***]." (Brief of Appellee, p. 9, *quoting* R.C. 3321.19(C)).

If the parent causes attendance, the matter is at an end; if not, then "[u]pon the failure of the parent ... the attendance officer ... shall send notice requiring the attendance of that parent ... at a parental education program established pursuant to [R.C. 3321.19(B)] [***"D"***], and, subject to

division[] ... (E) of this section, may file a complaint against the parent...." (Brief of Appellee, p. 9, *quoting* R.C. 3321.19(C)). The attendance officer "shall" do all this, with the notable exception of filing a complaint, which "may" be done but is not mandatory. But if a complaint is filed, it must be filed "jointly against the child and the parent [***"W"***]," and "shall allege that the child is a delinquent child for being a chronic truant [***"X"***] and that the parent ... has violated section 3321.38 of the Revised Code [***"Y"***]." (Brief of Appellee, pp. 9-10, *quoting* R.C. 3321.19(E)).

The State says "[i]t is readily apparent from a review of the plain language of those sections that they do not apply to this case." (Brief of Appellee, p. 10). But the plain language permits no other inference. R.C. 3321.19(C) triggers when the attendance officer learns of "any case of supposed truancy within the district." (Brief of Appellee, pp. 8-9, *quoting* R.C. 3321.19(C)). By the State's own admission, that is precisely how this matter began. (Brief of Appellee, p. 4).

The State argues Mr. Malone gave notice to Mrs. Bradley. (Brief of Appellee, pp. 11-13). But this misses the point of Mrs. Bradley's appeal. While the attendance officer probably conducted an initial investigation (***"A"***) and provided initial written notice (***"B"***), (Brief of Appellant, p. 7), that does not end his statutory obligations. Having triggered R.C. 3321.19(C) through its initial investigation, Mr. Malone was obliged by law to follow that procedure to the end. Instead, he *deviated* from state law. R.C. 3321.19(C) says a parent is to receive a meaningful opportunity to cause her child's attendance at school (***"C"***), and if she fails to do so, the district is to call a mandatory parental education program (***"D"***). Mr. Malone summoned Mrs. Bradley to court *after* she caused her child's attendance at school. (Brief of Appellant, pp. 2-3, 7-9, 12).

The State says this is irrelevant because Mrs. Bradley was originally *charged* with contributing (R.C. 2919.24(A)(2)). (Brief of Appellee, p. 10) If anything, this *confirms* the complaint did not allege a violation of R.C. 3321.38 (***"Y"***), contrary to R.C. 3321.19(E). Further, it does not

alter the fact that the complaint was not filed jointly against Mrs. Bradley and her child (*"W"*) and did not allege that J.B. was a delinquent child (*"X"*). If R.C. 3321.19(C) and (E) impose mandatory requirements on the State (and they do), one deviation (subsequently corrected by the court below) cannot justify other, more substantive deviations that remain uncorrected.

Sticking with the original complaint, the State says "any mention or reference to R.C. 2919.24(A)(2)" is "[c]onspicuously absent from R.C. 3321.19(C) and (E)." (Brief of Appellees, p. 11). In other words, they are separate and unrelated statutes because neither references the other. But the State has already admitted that R.C. 2919.24 and R.C. 3321.19 should be read *in pari materia*. (Dock. 24, p. 7). Nor is the presence or absence of statutory cross-references the test for whether two statutes are *in pari materia*. The test is whether the statutes "relate to the same general subject matter." (Brief of Appellants, p. 8, *quoting State v. Patterson*, 1998-Ohio-611, 81 Ohio St.3d 524, 525-26 (Ohio 1998)). Again, the State previously conceded that R.C. 2919.24 and R.C. 3321.19 govern the same subject matter: chronic truancy. (Dock. 24, p. 7).

Moreover, the State's references to R.C. 2919.24 do not account for the fact that the complaint has since been amended to charge a violation of R.C. 3321.38. Such amendment is permissible only when there is no substantive change in the nature of the offenses. OHIO CRIM. R. 7(D). Since Appellant was convicted of failing to send a child to school, the proof must conform to *that charge*. And *that charge* can only be brought—and sustained—if the statutory prerequisites in 3321.19(C) and (E) are followed. The charge in the original complaint does not justify the State's departure from R.C. 3321.19, or prove that the conviction now before this Court is defensible.

And in any event, while there may not be an explicit textual cross-reference between R.C. 2919.24 and R.C. 3321.19, there *is* between R.C. 2919.24 and R.C. 3321.38. R.C. 3321.19(C)

and (E) say a joint complaint may be filed against a parent and child after other statutory prerequisites are met, and that if a complaint is filed, it *must* allege (among other things) that the parent violated R.C. 3321.38. In R.C. 3321.38(A), the legislature again picks up the procedure for addressing chronic truancy, declaring that "[i]f the juvenile court adjudicates the child as an unruly or delinquent child for being an habitual truant ... the court shall warn the parent ... that any subsequent adjudication of that nature involving the child may result in a criminal charge against the parent ... for a violation of ... section 2919.24 of the Revised Code." In other words, criminal prosecution under R.C. 2919.24 is only appropriate if the child has first been adjudicated a delinquent ***and*** the parents allow the child to be adjudicated truant a second time [***"Z"***].

When read *in pari materia*, R.C. 3321.19, R.C. 3321.38, and R.C. 2919.24 are discrete yet related steps in a path created by the legislature for addressing chronic truancy. "First the State must follow the truancy procedure. 3321.19(C). Then it may file a petition alleging non-attendance. 3321.19(D), 3321.38(A). Finally, 'upon further violation' of 3321.19, the State may file contributing charges against the child's parent. 3321.38(A) and (B)." (Dock. 22, pp. 7-8) (emphasis removed). Instead of following that path, the district blazed its own trail.

Finally, the State attempts to divert this Court's attention from this procedure by referencing R.C. 3321.16, .17, and .18, which it claims empower the attendance officer with "the discretion to perform all duties that are necessary to enforce the compulsory attendance laws." (Brief of Appellees, p. 8). But these statutes are misrepresented. True, R.C. 3321.16 gives the attendance officer discretion, but only "in the absence of specific direction." The statutes cited above *are* specific direction of the highest order. R.C. 3321.17 says an attendance officer may "do whatever is necessary in the way of investigation," but recourse to the courts is circumscribed by statute. And R.C. 3321.18 tasks attendance officers with "discharge[ing] the duties described in

sections 3321.14 to 3321.21," which necessarily include the "duties" described in R.C. 3321.19. In the end, nothing contradicts the legislature's clear policy for chronic truancy, except the district's decision to abandon its duties in its dealings with Mrs. Bradley.

Issue Number Two

There was no assessment "deadline" for Mrs. Bradley to "miss" or "disregard."

The State claims Mrs. Bradley did not act promptly to correct her child's attendance because she "fail[ed] to send in the application and the necessary materials by the August 1, 2015 deadline [in Mr. Malone's May 2015 letter]." (Brief of Appellees, p. 19). But this assertion—which again implies one statutory deviation can justify another—does not hold up.

First, neither Ohio's compulsory attendance statutes nor its homeschool regulations impose any deadline on assessments. It specifies *how* those tests are to be administered, but not *when*. (Brief of Appellants, p. 6, *citing* OAC 3301-34-04). And even if there was a "when," the section immediately preceding it lays out a detailed procedure for what to do if homeschool "information is incomplete." (Brief of Appellants, p. 7, *quoting* OAC 3301-34-03(C)(2)). The State quotes portions of this procedure on page 7 of its brief, but neglects to mention that if the district believes the homeschool "information is incomplete," the district is required to give parents "an option within fourteen calendar days to supply additional information in writing, or arrange a conference at which the requested information can be supplied." (Brief of Appellants, p. 7, *quoting* OAC 3301-34-03(C)(2)). They are not fast-tracked for prosecution.

Nor is there a deadline in the May 2015 letter relied upon—but never quoted—by the State. It says: "It is *requested* that you return the completed form to my office by August 1, 2015." (Brief of Appellants, p. 2, Dock. 21, Exh. 1) (emphasis added). A request is not a deadline. Paired with the uncontested fact that Mrs. Bradley *called* the ESC about this "request[]" in

June, and was told there was "no deadline," (Brief of Appellants, pp. 2, *citing* Dock. 21, p. 43:1-5), no reasonable trier of fact could find there was a deadline for Mrs. Bradley to "miss" or "disregard."

The State seems to imply that to cause a child's attendance at school—and avoid prosecution under R.C. 3321.19(C)—a parent must provide all the information requested by school officials at the first point of contact. If there is any delay, no matter the reason (or the culprit), the State can move directly from notice to prosecution. But the law is not so unforgiving. R.C. 3321.19(C), (E), and Ohio's homeschool regulations all urge parents to correct nonattendance themselves. (Brief of Appellants, pp. 5-6, 14-15). This goal can be realized only if parents have the time they need—the homeschool regulations say 14 days—to "cause" their child's attendance at school. The State's theory of the case—predicated on instant compliance with a "request," not a "deadline"—runs afoul of these provisions and of R.C. 2901.04(A), which commands they "be strictly construed against the state, and liberally construed in favor of the accused."

Second Assignment of Error

THE COURT COMMITTED REVERSIBLE ERROR BECAUSE THE RECORD DOES NOT CONTAIN EVIDENCE PROVING AN ESSENTIAL ELEMENT OF THE STATE'S CASE

Issue Number One

There is no record evidence that Mrs. Bradley acted recklessly.

The State concedes "R.C. 3321.38 does not designate a mental state" (Brief of State, p. 17) and does not argue the legislature intended R.C. 3321.38 to create a strict liability offense. Thus, the mens rea is recklessness. R.C. 2901.21(C)(1); *State v. Moody*, 104 Ohio St. 3d 244, 246, 2004-Ohio-6395 ¶ 6. The State says there is sufficient evidence of recklessness, (Brief of Appellees, p. 17) but its analysis is perfunctory, not detailed as it was in *Anderson v. Massillon*,

134 Ohio St. 3d 380, 388, 2012-Ohio-5711, ¶ 34. Subjected to detailed review, the State's claim falls short.

The State conceded below that Mrs. Bradley's actions caused no "harm" to J.B.'s education, as did Mr. Malone, the Magistrate, and the Court of Common Pleas. (Brief of Appellants, pp. 10-11). Indeed, no other conclusion is possible given that J.B.'s much sought after evaluation showed academic achievement in the 97th percentile. (Brief of Appellant, p. 3). The State tries to shift the Court's attention from the absence of "harm" to a "risk" that J.B. was "truant." (Brief of Appellees, pp. 17-18). But "recklessness" requires not only a "risk" but a "substantial and unjustifiable" one that the defendant "disregard[s]" with "indifferen[ce] to the consequences." (Brief of Appellees, p. 17, *quoting* R.C. 2901.22(C)). The state has not argued or proven that the "risk" of "truancy" was "substantial." Can a risk be "substantial" if it poses no harm? Or is it illusory?

The State tries to claim Mrs. Bradley's "late" filing of J.B.'s exemplary assessment was unjustifiable. (Brief of Appellees, p. 19). But all the objections raised to this claim previously apply with at least equal force here. There was no "deadline" in Ohio law or the May letter for Mrs. Bradley to "disregard," no matter how leniently one reads the State's evidence. And even if there had been, the State concedes that the only information Mrs. Bradley *did not* submit on September 28th—J.B.'s assessment—was information she *could not* have submitted because "J.B. did not even take the test until October 12, 2015." (Brief of Appellee, p. 13). No reasonable trier of fact would find it "unjustifiable" if a parent claimed she could not submit test results that did not yet exist.

As for "indifference to the consequences," its only appearance in the State's brief is in the quoted text of R.C. 2901.22(C). (Brief of Appellees, p. 17). The State's lack of argument on this point conforms to the evidence. Both parties agree Mrs. Bradley submitted the materials she had

in her possession on September 28, 2015. (Brief of Appellee, p. 4). The date of Mr. Malone's initial call was never proven, but the State concedes it was sometime in "late September 2015," and there is no evidence Mrs. Bradley dallied after receiving that call. (Brief of Appellee, p. 4).

The State says J.B.'s assessment could have been completed quicker had he been tested privately instead of through the school district scheduled testing program. (Brief of Appellee, p. 14). But in actual fact, J.B. *was* privately tested through Seton. (Brief of Appellants, p. 3, *citing* Dock 21, Exh. 4). In fact, Mrs. Bradley went beyond the State's suggestion by paying to expedite both the test's shipping and scoring. (Brief of Appellants, pp. 3, 12). The State's argument overlooks that Ohio regulates how standardized tests—public or private—are administered. (Brief of Appellants, p. 6, *citing* OAC 3301-34-04). Those regulations prevent testing from being done in a day. The publisher of the test must forward it to the authorized administrator. The child has to take the test (which usually takes several days), then it is returned to the publisher who scores it and sends the results to the parent. For her part, Mrs. Bradley went above and beyond the State's plan. She should not be convicted of a crime because standardized testing takes time.

Finally, the State says Mrs. Bradley's actions were "misleading at best" because she checked a box saying her assessment was included with this initial filing. (Brief of Appellees, p. 13). While Mrs. Bradley concedes she checked that box, the State in no way proves this meant she took an "unjustifiable risk" or that she was "indifferent to the consequences" of her actions. Contrary to the state's inference, there is no evidence her box checking "misled" the ESC. The evidentiary record overwhelmingly shows Mrs. Bradley was a brand new homeschooler who was unfamiliar with the paperwork the ESC was sending her. As such, she was in *constant communication* with the ESC about the status of her paperwork (most of which was one-sided on her part). (Brief of Appellant, pp. 2-3; Brief of Appellee, pp. 4-5). When she did receive responses

from the district, their value was decidedly mixed. (Brief of Appellant, pp. 2-3, 6, 9, 12). Moreover, Mrs. Bradley called Mr. Malone and left two voicemails for him—one before October 7th, one after—updating him on the status of the Seton assessments. (Brief of Appellants, p. 3). Mrs. Bradley was not "failing" to correct her child's attendance or "misleading" school officials. She was addressing her son's attendance as fast as circumstances would allow, and advising the ESC of her progress.

If Mrs. Bradley's box checking has any bearing on this case, it is merely evidence of mistake. The Magistrate read the State's evidence this way (Brief of Appellant, p. 12, *quoting* T.p. 62:5-12), as did the Court of Common Pleas, which found Mrs. Bradley guilty of no more than a "technical violation" of "the process to homeschool." (Brief of Appellant, p. 4, *quoting* Dock 28, p. 2). That is the worst finding against Mrs. Bradley the evidentiary record will permit. "Mistakes" and "technical violations" are not even acts of negligence under R.C. 2901.22(D). They cannot be acts of recklessness.

Issue Number Two

The amendment of the charge does not "moot" the need for proof of recklessness.

In finding that Mrs. Bradley acted recklessly, the Court of Common Pleas consulted *State v. Boren*, 2000 Ohio App. LEXIS 109, 2000 WL 36091 (12th Dist. 2000). The State argues that Mrs. Bradley's discussion of *Boren* in her opening brief is "moot" because the Court of Common Pleas vacated the conviction for contributing. (Brief of Appellees, p. 17). The point of Mrs. Bradley's argument, however, was to emphasize that the Court of Common Pleas' decision on "recklessness" failed to go through the proper analysis. (Brief of Appellants, pp. 13-14). *Boren* uses strict liability analysis, not recklessness analysis. By relying on *Boren*, the court erred.

Moreover, the State's brief repeats the same error found in both *Boren* and the decision of the Court of Common Pleas. Rather than going through the rigorous "recklessness" analysis required by *Anderson* and R.C. 2901.22(C), the State's argument boils down to this: Mrs. Bradley "recklessly" failed to send her child to school because her child was supposed to be in school, he was not, and her homeschool paperwork was late. (Brief of Appellees, pp. 17-19). That is not "recklessness" under *Anderson* or R.C. 2901.22(C). That is not even negligence, defined in RC. 2901.22(D) as a "fail[ure] to perceive or avoid a risk that the person's conduct may cause a certain result or may be of a certain nature" because of "a substantial lapse from due care." The State's argument, like the Court of Common Pleas' conviction, rests on strict liability. That argument might have survived under *Boren* and its progeny, had they not been abrogated by the Ohio Supreme Court. That court's decision cannot be mooted by amending a complaint.

II. CONCLUSION

The State abandoned the legislature's explicit, sequential policy for chronic truancy. If R.C. 3321.19 and R.C. 3321.38 mean what they say, Mrs. Bradley's prosecution was premature. From Mr. Malone's first contact, Mrs. Bradley corrected her son's attendance as fast as circumstances would allow. If *Anderson v. Massillon* and R.C. 2901.22(C) set the standard for recklessness, Mrs. Bradley's conviction cannot stand. The decision below should be reversed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing brief was served upon the following persons by regular U.S. Mail, postage prepaid, this 20th day of April, 2017:

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