

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	*	Case No.07-1039
Plaintiff-Appellant	*	On Appeal from the Highland County Court of Appeals
-vs-	*	Fourth District
MICHAEL DAVIS	*	Court of Appeals No. 06CA26
Defendant-Appellee	*	

**DEFENDANT-APPELLEE'S MEMORANDUM IN OPPOSITION
TO MOTION FOR LEAVE TO APPEAL**

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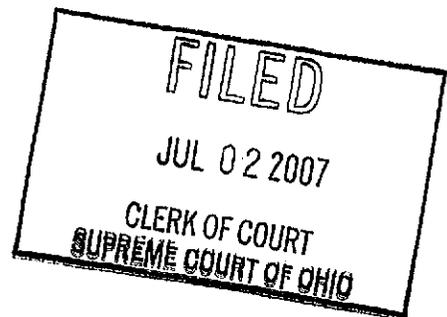


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**APPELLEE'S MEMORANDUM IN OPPOSITION
TO MOTION FOR LEAVE TO APPEAL**

STATEMENT OF THE CASE

1. PROCEDURAL POSTURE

On April 11, 2005, Defendant-Appellee, Michael A. Davis was indicted on numerous Counts, including possession of drugs, receiving stolen property, deception to obtain a dangerous drug, aggravated trafficking in drugs and engaging in a pattern of corrupt activity.

The matter was tried to a jury in the Court of Common Pleas, Highland County, Ohio commencing April 3, 2006 and concluding on April 21, 2006.

On April 21, 2006 the jury reached verdicts on all Counts and found Mr. Davis guilty of Count 15, aggravated trafficking in drugs and Count 33, deception to obtain a dangerous drug.

Count 33, deception to obtain a dangerous drug, is a felony of the fifth degree. Count 15, aggravated trafficking in drugs, was originally charged in the indictment as a felony of the fourth degree. However, by Entry amending indictment filed on April 11, 2006 the offense was amended to a felony of the second degree.

The jury also found Mr. Davis not guilty of Count 1, engaging in a pattern of corrupt activity; Count 18, aggravated trafficking in drugs; and Count 23, receiving stolen property; and Count 24, receiving stolen property.

On June 2, 2006 the Court heard arguments concerning Defendant's motion to set aside the jury verdict. The motion was denied. Mr. Davis was then sentenced to two years in prison on Count 15, aggravated trafficking, and one year on Count 33, deception

to obtain a dangerous drug. The sentences were ordered to run concurrently. He was also fined \$7500.00 plus court costs.

In addition, counsel for Defendant moved the Court for an Order to stay Defendant's sentence while on appeal and the Court granted the motion.

2. STATEMENT OF FACTS

Mr. Davis was convicted of selling or offering to sell oxycontin on or about February 21, 2005 and February 26, 2005 in an amount greater than five times the bulk amount but less than fifty times the bulk amount (Count 15) and to have obtained by deception on or about January 1, 2000 through February 26, 2005 a prescription for, or the dispensing of oxycodone, (Count 33).

The entire scenario, involving numerous other defendants and numerous other charges, is too complicated to recite herein. The basic facts relative to this appeal can be simplified to state that Appellee, Michael Davis, and his brother and co-defendant, Charles R. Davis, were co-owners of a used car business, also named as a co-defendant, Charlie Davis Motor Sales Inc. Appellee's brother, Charles R. Davis, was well known to have a long history of drug addiction. In the course of an undercover drug operation, two drug deals involving oxycontin took place on the premises of Charlie Davis Motor Sales Inc. On April 11, 2005, 10 people were indicted on a total of 33 Counts relating to drugs, receiving stolen property and engaging in a pattern of corrupt activity.

Defendant-Appellee was indicted on 7 Counts and was found not guilty on all Counts but the two recited above.

ARGUMENT

THERE IS NO SUBSTANTIAL QUESTION INVOLVED IN THIS CASE AND
THE CASE IS NOT A MATTER OF PUBLIC OR GREAT GENERAL INTEREST.

REPLY TO PROPOSITION OF LAW

Criminal Rule 7(D) does not permit the amendment of an indictment changing the level of the offense when the amendment changes the name or identity of the crime charged.

The basis of Plaintiff-Appellant's appeal stated very simply, is that an amendment of an indictment from a fourth degree felony aggravated trafficking offense to a second degree aggravated trafficking offense did not change the name or identity of the crime charged.

In the present case, the original indictment alleged as follows:

“On or about February 21, 2005 and February 26, 2005, and in Highland County, Ohio and as a part of a course of criminal conduct in Fayette, Ross and other Counties, Charles R. Davis, Michael A. Davis and Charlie Davis Motor Sales Inc. did knowingly sell or offer to sell oxycontin, a schedule II controlled substance in the amount less than the bulk amount, to wit: approximately 7.2 grams, in violation of Section 2925.03(A)(1) ORC and against the peace and dignity of the State of Ohio.” As charged, the offense was a felony of the fourth degree and was punishable by a maximum of 18 months in prison with no mandatory prison.

In the “Entry Amending Indictment” filed on April 11, 2006, during the course of the trial that had begun on April 3, 2006, Count 15 was amended as follows:

“On or about February 21, 2005 and February 26, 2006 (emphasis added), and in Highland County, Ohio and as a part of a course of criminal conduct, Michael A. Davis and Charles R. Davis and Charlie Davis Motor Sales Inc. did knowingly sell or offer to sell oxycontin, a schedule II controlled substance in an amount greater than five times the bulk amount but less than fifty times the bulk amount, (emphasis added) in violation of Section 2925.03(A)(1) ORC and against the peace and dignity of the State of Ohio. Furthermore, this amendment to the indictment in no way changes the name or identify of the crime charged herein.” (Emphasis added).

The amended charge changes the penalty from an F4 to an F2 and subjects the Defendant to a mandatory minimum sentence of two years in prison plus a mandatory fine of \$7500.00. It furthermore changes the identity of the offense from requiring an amount less than the bulk amount to an amount greater than five times the bulk amount, but less than fifty times the bulk amount. To say that such an amendment does not change the identity of the crime charged simply ignores the facts.

For example, had the amendment not been made and Appellee was found guilty of the original charge, the court would have had it within its discretion to place Appellee on community control instead of being required to impose a mandatory minimum two year sentence, as well as a \$7500.00 fine. The identity of the crime was changed so as to strip the court of the discretion it would have had under the original indictment.

Furthermore, given that Appellee has no prior drug offenses, no prior felony convictions, and that his prior record consists of a DUI in 1985, disorderly conduct in 1992 and a bad check charge in 1997, it would not have been unreasonable to expect that community control sanctions would have been an adequate remedy for the alleged

wrongs for which Appellee was convicted. (Transcript of Sentencing Hearing, June 2, 2006, pp. 14-15).

What occurred in this case is exactly the outcome which was warned against in Russell v. United States, (1962), 369 U.S. 749, and the other cases cited above. Defendant was convicted of a crime for which he was never arraigned, the potential penalties of which he was never advised in open court, and for which no indictment by grand jury had ever been obtained.

The Court District Court of Appeals found this amendment to be plain error, stating “The plain error doctrine permits the correction of judicial proceedings only when error is clearly apparent on the face of the record and is prejudicial to the appellant. See, e.g. State v. Barnes (2002), 94 Ohio St. 3d 21, 27, 759 N.E. 2d 1240.”

The Court then cited State v. Atkins (July 14, 1997), Washington App. No. 96CA34 as an example of a case which recognized an amendment to an indictment that violates Crim. R. 7(D) as plain error.

Appellant cites State v. Headley (1983), 6 O.S. 3d 475, 453 N.E. 2d 716 in support of its argument. Headley, however, does not support Appellant’s proposition and its ruling argues strongly in favor of the prohibition against amending an indictment which changes the name or identity of the crime charged. Appellant herein uses backwards reasoning to try to twist the Headley decision into something that supports its argument. Headley does not even come close to saying what Appellant asserts.

Appellant also attempts to stretch the ruling in State v. O’Brien (1987), 30 O.S. 3d 122, 508 N.E. 2d 144, to support its argument. O’Brien, however, is clearly distinguishable from the matter herein because the amendment to the indictment in that

case did not change the name, identity or severity of the offense charged. In the present matter, the severity of the offense was heightened to a patently prejudicial degree and subjected Defendant-Appellee herein to an entirely new and much more serious menu of penalties. In O'Brien, the amendment changed nothing. It simply added an essential element that had been omitted in the indictment and the Defendant remained accused of, tried for and convicted of the exact same offense he had been originally indicted of. Thus, O'Brien does not support Appellant's argument. It simply and clearly adheres to Crim. R. 7(D) and, therefore, argues against Appellant's claims.

Appellant also cites State v. Childs, (2000), 88 O.S. 3d 558, 728 N.E. 2d 379. Childs, however, stands at least in part for the proposition that the indictment must indicate the severity of the offense and, thus, by extension, any amendment that changes the severity would be prohibited.

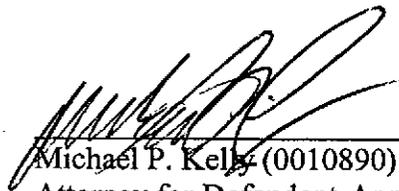
As with the above cases, Childs stands as an example of the application of Crim. R. 7(D) and does not in any way support Appellant's argument.

Appellant's task in this appeal is not envious. It is attempting to argue that an amendment to an indictment which greatly increased the severity of the offense did not increase the severity of the offense. Thus, its own argument disproves its claim. The cases it cites all argue against its claim. The simple fact is that the amendment of the indictment in this matter was not proper because it changed the identity of the offense by increasing the degree and severity of the offense. The Court of Appeals herein provided a thorough review of the relevant case law on this issue. No further review is necessary because this is one of those fortunate situations where the criminal rules, the case law and common sense all reach the same conclusion.

CONCLUSION

Based on all the above, Plaintiff-Appellants appeal to the Supreme Court of Ohio must be denied because the law in this matter is well settled, no further review is necessary, there are no substantial constitutional questions and the matter is not of public or great general interest.

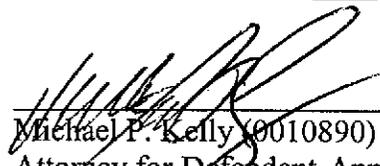
Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and exact copy of the foregoing Memorandum in Opposition to Motion for Leave to Appeal to James B. Grandey, Prosecuting Attorney, 112 Gov. Foraker Place, Hillsboro, Ohio, 45133 this 28 day of JUNE, 2007.



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