

IN THE SUPREME COURT OF OHIO

STATE OF OHIO) CASE NO. 07 -2030
)
 PLAINTIFF-APPELLANT) On Appeal from the
)
 v) Crawford County Court
)
 KIRK SESSLER) of Appeals, Third
)
 DEFENDANT-APPELLEE) Appellate district
)
) Court of Appeals
)
) Case No. 3-06-0023

MEMORANDUM IN OPPOSITION TO CLAIMED JURISDICTION OF
APPELLANT STATE OF OHIO

John Spiegel (#0024737)
222 W. Charles St., P O Box 1024
Bucyrus OH 44820
Ph 419 562-6624
COUNSEL FOR APPELLEE, KIRK SESSLER

Stanley Flegm, Clifford Murphy
County Prosecutors
112 E. Mansfield St, 3d Floor
Bucyrus OH 44820
Ph 419 562-9782
COUNSEL FOR APPELLANT, THE STATE OF OHIO

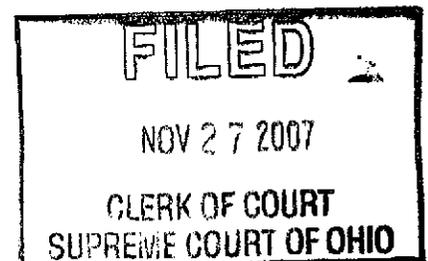


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CLAIMED PROPOSITION OF LAW NO. 1: "A conviction under
a specific sub-part of a charging statute may not be
altered to an uncharged section of the same statute. State
v. Pelfrey is limited to general charging statutes."

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EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT
GENERAL INTEREST AND INVOLVES NO SUBSTANTIAL CONSTITUTIONAL
QUESTION

This Honorable Supreme Court of Ohio must carefully chose the most pressing and important cases for decision. In every area of the law there are some appellate cases that seem to reach different results, or seem to read a decision of this Supreme Court in a different manner. This Supreme Court cannot expend its valuable resources correcting every supposed error. This case presents no unique or unsettled area of the law. It is simply a matter of interpretation of the recent case of State v Pelfrey, 112 Ohio St.3d 422, 2007-Ohio-256.

Two cases have recently interpreted Pelfrey; the instant cause and the case of State v Kepiro, 2007 -Ohio- 4593, Franklin App No. 06AP-1302, Tenth Appellate District, September 6, 2007. The Appellant claims that this case conflicts with the holding in Kepiro and is therefore erroneous. The fact that two appellate level courts have diverged somewhat in their consideration of the Supreme Court's decision is not enough to demand that this Supreme Court of Ohio hear either decision. Not every error or difference of opinion requires the Supreme Court to intervene. These two cases involved the application of Pelfrey to two different statutes. The dicta in the Kepiro case that suggests a conflict is just dicta.

The entire issue could have been easily avoided by careful drafting of the jury verdict form, which is in the entire control of the Appellant.

It is submitted that this case is not an appropriate one for this Honorable Supreme Court to expend its limited judicial resources to hear.

STATEMENT OF THE CASE AND FACTS

The State of Ohio, Appellant, appeals from the judgment of the Crawford County Court of Appeals, Third Appellate District. This judgment ruled that the conviction of the Defendant for two felonies must be reversed and the Defendant be convicted of two misdemeanor intimidation counts. This case involves the interpretation of State v Pelfrey, 112 Ohio St.3d 422, 2007-Ohio-256, (hereinafter "Pelfrey"), and Ohio Revised Code 2945.75.

The Court of Appeals decision was an appropriate and accurate interpretation of Pelfrey based upon the facts presented. Kirk Sessler, the Appellee, (hereinafter, "Defendant") was charged with striking his live-in girlfriend; and in the course of the domestic fracas he is alleged to have intimidated the girlfriend to prevent her from calling authorities, on two occasions. He was found guilty at a trial wherein the jury verdict form stated " * * * in the manner and form charged in the indictment." The jury verdict was drafted solely by the Appellant. Sessler was sentenced to two consecutive counts of incarceration upon the jury verdicts. The Court of Appeals, Third Appellate District, ruled that the jury verdict form did not comply with the requirements of this Supreme Court's decision of Pelfrey, supra, in its application of Ohio Revised Code 2945.75. The State, the Appellant, now wishes that this Court once again revisit Pelfrey rather than carefully draft jury verdict forms.

ARGUMENT IN OPPOSITION TO CLAIMED PROPOSITION OF LAW

The Appellant, the State of Ohio, seeks to reverse this case upon the authority of State v Kepiro, 2007 -Ohio- 4593, Franklin App No. 06AP-1302, Tenth Appellate District, September 6, 2007, 2007 WL 2505506. The State argues that the instant Third Appellate decision is in conflict with the Kepiro decision. It is respectfully submitted that the issue should be which case more properly reflects the holding of this Honorable Supreme Court in Pelfrey. It is believed this decision of the Third Appellate District does.

Specifically, Pelfrey held that if the trial court sends incomplete jury forms, such as forms stating "in the manner charged in the indictment", to the jury, then the plain language of Ohio Revised Code 2945.75 states that the Defendant is convicted of solely the lowest degree of offense. "When the General Assembly has written a clear and complete statute, this court will not use additional tools to produce an alternative meaning." Pelfrey, paragraph 12. The Appellant seeks to substitute the decision of Kepiro wherein the clear language of 2945.75 was not applied. In Kepiro the Tenth Appellate District engaged in "mechanical" interpretation of the charging statute, which in Kepiro was Gross Sexual Imposition, Ohio Revised Code 2907.05. Based upon the construction of the gross sexual imposition statute, the Kepiro court justified its decision as not in conflict with Pelfrey. Ohio Revised Code 2907.05 contains two subparagraphs in which one is a higher and another a lower degree of offense.

It is noteworthy that the Kepiro court relied upon the dissent

in Pelfrey more than the actual holding. See paragraph 32 where the court cites the dissent.

However, this Court in Pelfrey had considered both sides of the debate in answering the question as to the applicability of Ohio Revised Code 2945.75. The Honorable Supreme Court had considered the tampering with records statute in Pelfrey. It was argued in Kepiro that the different construction of the gross sexual imposition statute did not require the court to follow Pelfrey, Kepiro held that since the applicable paragraphs in the Code constituted different levels of offenses, therefore the offense statute's construction was the important variable. In fact however, the Supreme Court in Pelfrey considered not only the tampering with records provision, but also considered the case of State v. Woullard, 158 Ohio App.3d 31, 2004-Ohio-3395, a decision upon which the appellate court in Pelfrey had based its decision. See paragraph 5 of Pelfrey. The court in Woullard had considered domestic violence, Ohio Revised Code 2919.25, which is a statute where section (A) says that it is ordinarily a misdemeanor, but may be charged as a felony if section (D) applies. If the Supreme Court in Pelfrey had wanted to distinguish among statutes based upon how they are mechanically constructed, then the Court would have pointed to Woullard as an example of a statute that had a similar construction to the instant intimidation statute, Ohio Revised Code 2921.04.

Another factor that is very important is that Apprendi v. New Jersey (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, and Blakely v. Washington (2004), 542 U.S. 296, 124 S.Ct. 2531, 159

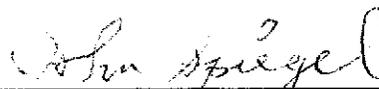
L.Ed.2d 403, have established that the jury must make a finding of each element of the offense for one to be sentenced upon a criminal charge. See State v Lacey, (2006) Richland App. No. 2005-CA-119, 2006 -Ohio- 4290. The Courts must not assume a felony; they must have the jury find one beyond a reasonable doubt. This can only be shown by the jury verdict forms.

The jury verdict form is the specific means for the jury to relate exactly what is its holding. Ohio Revised Code 2945.75 is properly interpreted by Pelfrey. Careful drafting of the jury verdict form as required by Ohio Revised Code 2945.75 will avoid any claimed vagueness and avoid this problem altogether.

CONCLUSION

This case presents no unique or unsettled area of the law. The result in the instant cause naturally flows from the proper interpretation of Pelfrey. The instant situation is easily avoided by proper drafting of the jury verdict form. It is submitted that this case is not an appropriate one for this Honorable Supreme Court to expend its limited judicial resources to hear.

Respectfully submitted,

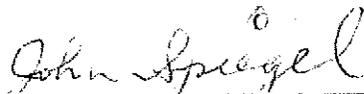


John L. Spiegel (#0024737)
222 West Charles St, P O Box 1024
Bucyrus, Ohio 44820
PH 419-562-6624
Attorney for Appellee

PROOF OF SERVICE

I certify that I mailed a copy of the foregoing Memorandum in Opposition to Claimed Jurisdiction to Appellant's attorneys, Stanley

Flegm and Clifford Murphy, County Prosecutors, at 112 E. Mansfield,
3d floor, Bucyrus, Ohio 44820 by regular US mail this 27th day of
November, 2007.



John L. Spiegel (#0024737)
222 West Charles St, P O Box 1024
Bucyrus, Ohio 44820
PH 419-562-6624
Attorney for Appellee