IN THE SUPREME COURT OF OHIO

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

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STATEMENT OF THE CASE AND FACTS

On April 11, 2005, Appellee and several other Defendants were indicted in a multi-count Indictment. Appellee was specifically indicted and charged with Count One, Engaging in a Pattern of Corrupt Activities, in violation of O.R.C. §2923.32(A)(1), a felony of the first degree; Count Fifteen, Aggravated Trafficking in Drugs, in violation of O.R.C. §2925.03(A)(1), a felony of the fourth degree; Count Twenty-Three, Receiving Stolen Property, in violation of O.R.C. §2913.51, a felony of the fourth degree; and Count Thirty-Three, Deception to Obtain Dangerous Drugs, in violation of O.R.C. §2925.22, a felony of the fifth degree.

On April 11, 2006, Appellant filed a motion to amend Count Fifteen from a felony of the fourth degree to a felony of the second degree. Without objection from Appellee's trial counsel, the Court granted Appellant's motion to amend the Indictment. Appellee was subsequently convicted on Count Fifteen, Aggravated Trafficking in Drugs and sentenced to a mandatory two years of incarceration. Appellee was also convicted on County Thirty-Three, Deception to Obtain Dangerous Drugs, and sentenced to one year of incarceration. The sentences were ordered to run concurrently. Appellee was found not guilty of the remaining counts. On May 5, 2006, Appellee filed a motion for acquittal which was denied by the trial court.

Appellee filed his notice of appeal to the Fourth District Court of Appeals on June 28, 2006. By decision dated April 27, 2007, the Fourth District Court of Appeals reversed the conviction on Count Fifteen and remanded the case back to the trial court. On May 2, 2007, Appellant filed a Motion to Certify the Conflict which was denied by the Court of Appeals by entry dated May 17, 2007. Appellant is now presenting this appeal to this Court.

The entire factual scenario, involving numerous other defendants and numerous other

charges, is too complicated to recite herein. To summarize, as a result of an undercover drug investigation involving Charlie Davis Motor Sales, Inc., Charles "Bobby" Davis, Appellee, and other numerous defendants, these individuals were presented to the Highland County Grand Jury, which returned a multi-count Indictment alleging Engaging in a Pattern of Corrupt Activity with the underlying crimes of Aggravated Trafficking in Drugs, Trafficking in Drugs, Possession of Drugs, Aggravated Possession of Drugs, and Receiving Stolen Property. The basic facts relative to Appellee's case concern the charges of Aggravated Trafficking in Drugs (Oxycontin), in which on or about February 21, 2005 and February 26, 2005, Appellee sold or offered to sell Oxycontin at the dealership, and the charge of Deception to Obtain Dangerous Drugs (Percocet), that on or about January 1, 2005 through February 26, 2005, Appellee did, by deception, procure the administration of a prescription for, or the dispensing of Oxycodone (Percocet).

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW NO. 1

PROPOSITION OF LAW NO.1: CRIM.R. 7(D) PERMITS THE AMENDMENT OF AN INDICTMENT CHANGING THE LEVEL OF OFFENSE BECAUSE THAT AMENDMENT DOES NOT CHANGE THE NAME OR IDENTITY OF THE CRIME CHARGED.

Crim.R. 7 governs the sufficiency of and amendments to criminal indictments. Crim.R. 7(B) deals with the sufficiency of indictments. Crim.R. 7(D) sets forth the procedure for amending indictments. Crim.R. 7(D) states:

> The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill or particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment is made to the substance of the indictment, information, or complaint, or to cure a variance between the indictment, information, or complaint and the proof, the defendant is entitled to a discharge of the jury on the defendant's motion, if a jury has been impaneled, and to a reasonable continuance, unless it clearly appears from the whole proceedings that the defendant has been mislead or prejudiced by the defect or variance in respect to which the amendment is made, or that the defendant's rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury....

In its decision in this matter, the Fourth District Court of Appeals has interpreted this language to mean that the name and identity of a crime charged is changed when an amendment to an indictment changes the level of the charge. That conclusion is inconsistent with the expressed terms of the rule and lacks authority from this Court.

This Court has reviewed amendments to indictments pursuant to Crim.R. 7(D) over a dozen times in the last 25 years. The foundation case on Crim.R. 7(D) was addressed by this Court in 1983. In State v Headley (1983), 6 Ohio St.3d 475, 453 N.E.2d 716, this Court reviewed a case in which the trial court permitted the amendment of the indictment to include the specific substance omitted from the indictment charging trafficking in drugs, a violation of

O.R.C. §2925.03. In the syllabus, this Court held that the type of controlled substance involved in an aggravated trafficking case is an essential element of the crime that must be included in the indictment and cannot be added by amendment. The Court's analysis was that the trafficking statute contains more than one criminal offense thereby requiring the type of controlled substance as an essential element of the crime, i.e., trafficking in cocaine; trafficking in heroin; trafficking in marijuana. Arguably then, the name and identity of the crime changes with the type of controlled substance involved.

The Headley analysis is consistent with Appellant's position. This Court focused on the amendment as an essential element of the crime. "Where one of the vital elements identifying the crime is omitted from the indictment, it is defective and cannot be cured by the court as such a procedure would permit the court to convict the accused on a charge different from that found by the grand jury." Headley, 6 Ohio St.3d at 478-479. The weight of the drug, therefore, is not an essential element in a trafficking charge.

A couple of years later, this Court decided State v. O'Brien (1987), 30 Ohio St.3d 122, 508 N.E.2d 144. In O'Brien, this Court reviewed an amendment to an endangering children indictment in which the mental element was added later by amendment approved by the trial court. O'Brien modified Headley on the issue of the amendment of an essential element of the crime. "An indictment, which does not contain all the essential elements of an offense, may be amended to include the omitted element, if the name or the identity of the crime is not changed, and the accused has not been misled or prejudiced by the omission of such element from the indictment." O'Brien, 30 Ohio St.3d at syllabus. O'Brien also established a two part review for amendments to indictments. "The rule [Crim.R. 7(D)] clearly permits errors of omission to be

corrected during the course of *or even after* the trial, as long as such amendment makes no change in the name or identity of the crime charged. Crim.R. 7(D). Accordingly, provided that appellant's amendment herein changed neither the name or identity of the crime charged, such amendment will have passed the first stage of our Crim.R. 7(D) analysis." O'Brien, 30 Ohio St.3d at 125-126 (emphasis in original). This Court focused in O'Brien on the actual charge as opposed to the elements of the charge and concluded that adding the mental element to the charge did not change the name or identity of the crime charged.

This Court then considered whether the amendment was a change in the substance of the indictment. "We believe the addition of an essential element to an indictment necessarily amends the substance of the indictment." Id., 30 Ohio St.3d at 147-148. This Court looked at the notice to the defendant as it related to the name and identity of the crime as indicted. "Even had appellee done so, we find that it would have been proper for the trial court to overrule the motion as appellee would have been unable to show that he had been misled or prejudiced by the permitted amendment. Appellee had notice of both the offense and the applicable statute." Id., 30 Ohio St.3d at 148.[1]

Applying the O'Brien two part test to this case again demonstrates that the amendment was proper. First, the Appellee was charged with trafficking in oxycontin. That charge never changed pre or post amendment. Second, Appellee was clearly advised of both the offense and the statute at issue. Appellee knew that he was defending a trafficking in oxycontin charge.

The Court next considered State v. Dilley (1989), 47 Ohio St.3d 20, 546 N.E. 2d 937. In

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[1] This Court did note, in dicta, the amendment in O'Brien did not alter the severity of the offense charged. Id.

Dilley, the issue for review was whether a statutory specification could be added to an indictment by amendment pursuant to Crim.R. 7(D). In finding that the State did not comply with the requirements in the specification statute, the Court held that Crim.R. 7(D) was not applicable.[2]

The Court then reviewed a case involving a clerical error that was corrected by amendment to the indictment. In State v Spirko (1991), 59 Ohio St.3d 1, 570 N.E. 2d 229, the Court approved an amendment to an indictment that merely corrected the statutory section number. The language of the indictment was not changed. Finding that the amendment was proper, the Court held that the Defendant was not surprised in any way and that the amendment made no change in the name or identity of the offense. Spirko, 59 Ohio St.3d at 54.

The Court next reviewed an amendment to an indictment that occurred post-trial but pre-verdict. The amendment dealt with a narrowing of the death penalty specification based on the evidence produced at trial.[3] This Court noted that Crim.R. 7(D) permits an amendment that does not change the name or identity of the offense charged. State v. Brooks (1996), 75 Ohio St.3d 148, 159, 1996 Ohio 134, 661 N.E.2d 1030.[4] The Court further explained that the Defendant was not misled or prejudiced by the omission in the indictment.

The next opportunity for the Court to review an actual amendment was State v. Campbell

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[2]The Court noted, again in dicta, that an amendment to the indictment adding the gun specification would "indeed change the identity or *nature* of the offense. Dilley, 47 Ohio St.3d at 21 (emphasis added). There is no reference to the "nature" of an offense in Crim.R. 7(D).

[3]State v. Leonard (2004), 104 Ohio St.3d 54, 2004 Ohio 6235, 818 N.E.2d 229, also involved a death sentence specification that was amended after trial to reflect the facts produced at trial.

[4]The Court did note that the amendment did not change the specification's name, identity, *nature* or applicable code section. Id. (emphasis added).

(2003), 100 Ohio St.3d 361, 2003 Ohio 6804, 800 N.E. 2d 356. In Campbell, the Court approved the amendment of an indictment setting forth a different subparagraph of the DUI statute. Holding that the amendment was proper, the Court, citing Spirko, supra, found that there was no prejudice or surprise to the Defendant. "The amendment of a criminal charge from one subparagraph of R.C. §4511.19(A) to another subparagraph of the same subsection does not change the name and identity of the charged offense within the meaning of Crim.R. 7(D)." Campbell, 100 Ohio St.3d at syllabus.

Last year the Court reviewed the amendment of a bill of particulars at the close of the state's evidence. Upholding the amendment as permissible pursuant to Crim.R. 7(D), the Court held that since complicity can be charged separately or as part of the principal charge, the name and identity of the offense was not changed by the amendment. State v. Hand (2006), 107 Ohio St.3d 378, 403-404, 2006 Ohio 18, 840 N.E.2d 151.

This history indicates that the Court has focused on the actual offense and the Defendant's notice of the offense. Whether the offense involves a different section of the DUI statute, a clerical correction of a statutory cite, the possibility of a complicity instruction or different theories on the death penalty specification, this Court has repeatedly focused on notice to the defendant of the offense charged. In cases when a new charge is possible, i.e. the drug trafficking statute, amendment does change the name and identity of the offense because trafficking in oxycontin is a different offense then trafficking in heroin. This distinction is consistent with this Court's decision in Campbell when a different section of the DUI statute was amended. The original charge in Campbell was still DUI, irrespective of the proof of the manner in which the Defendant committed the offense. Likewise, in this case, the original charge of

Aggravated Trafficking in Drugs (Oxycontin) did not change based on the amendment. Appellee was fully advised that he was defending a charge of trafficking in oxycontin. There was no change in the name or identity of the offense charged.

The basic rules of word construction and meaning require that this Court reverse Fourth District. The pertinent part of Crim.R. 7(D) states: "...provided no change is made in the name or identity of the crime charged." While this Court in a couple of earlier decisions inserted the word "nature" in reviewing Crim.R. 7(D), it is clear that the term "nature" exists in Crim.R. 7(B) which refers to the sufficiency of an indictment. In reviewing statutory and administrative rule interpretation, this Court has focused on ordinary meaning, rules of grammar and common usage. "Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." O.R.C. §1.42.

> We further stated that "in order to determine this intent, we must "'read words and phrases in context according to the rules of grammar and common usage.'"" Id., quoting State v ex rel. Cincinnati Bell Tel. Co. v. Pub. Util. Comm., 105 Ohio St.3d 177, 2005 Ohio 1150, 824 N.E.2d 68, P 27, quoting State ex rel. Lee v. Karnes, 103 Ohio St.3d 559, 2004 Ohio 5718, 817 N.E.2d 76 P 23; see also O.R.C. §1.42. This Court also explained in Sharp v. Union Carbide Corp. (1988), 38 Ohio St.3d 69, 70, 525 N.E.2d 1386, that "where a particular term employed in a statute is not defined, it will be accorded its plain, everyday meaning." Id. (citations omitted).
> Furthermore, in State v Lowe, 112 Ohio St.3d 507, 2007 Ohio 606, 861 N.E.2d 512, P15, we affirmed that a court may not add words to an unambiguous statute, but must apply the statute as written." Id. citing Portage Cty. Bd. Of Commrs. v. Akron, 109 Ohio St.3d 106, 2006 Ohio 954, 846 N.E.2d 478; see also Columbus-Suburban Coach Lines, Inc. v. Public Utilities Comm. (1969), 20 Ohio St.2d 125, 127, 49 Ohio Op. 2d 445, 254 N.E.2d 8. ("It is the duty of this court to give effect to the words used, not to delete words used or to insert words not used.").

Davis v. Davis (2007), 115 Ohio St.3d 180, 183, 2007 Ohio 5049, 873 N.E.2d 1305.

These same principles of construction should be applied in reviewing Crim.R. 7(D). The

wording of the rule is "name and identity of the crime charged." The name of the offense did not change; Aggravated Trafficking in Drugs (Oxycontin). Identity is defined as "the state or fact of being the same one as described." Random House Webster's Unabridged Dictionary 1998. The identity of the crime charged is aggravated trafficking in oxycontin. The amendment did not change the identity of the crime charged. This conclusion is consistent with the Court's decision in Campbell, when the Court upheld an amendment citing a different section of the DUI statute. In Campbell, the type of proof changed but the name and identity of the crime remained the same. The express wording of the rule and the Campbell decision support Appellant's argument and require a reversal of the Fourth District decision.

Finally, Appellee can assert no surprise or prejudice by the amendment in this case. The Appellee was defending an aggravated trafficking in oxycontin charge from the time of indictment through the amendment by the trial court. The second test from O'Brien was satisfied as "Appellee had notice of both the offense and the applicable statute." O'Brien, 30 Ohio St.3d at 148.[5]

PROPOSITION OF LAW NO. 2: THE AMENDMENT OF AN INDICTMENT PURSUANT TO CRIM.R. 7(D) WITHOUT OBJECTION FROM THE DEFENDANT IS NOT REVIEWABLE AS PLAIN ERROR.

The trial court permitted Appellant to amend the indictment in this case setting forth a felony of the second degree instead of a felony of the fourth degree. The Appellee did not object to the amendment. The Fourth District reviewed the issue under the plain error exception.

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[5]There is one additional point of note for the Court to consider. The actual weight and analysis of the substance must be determined by a properly licensed crime lab. That drug analysis often takes several weeks for completion. The state is severely limited in the timing of the indictment based on the availability of the lab report.

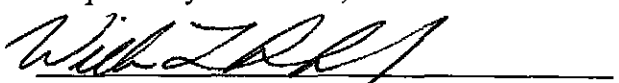
It is Appellant's position that Appellee waived any objection to the amendment by failing to object at the trial court level. Crim.R. 12(H). This Court has held that defendants waive the issue of amendment by not objecting at trial. State v. Brooks, supra,75 Ohio St.3d at 159. See also State v. Leonard (2004) 104 Ohio St.3d 54, 62, 2004 Ohio 6235, 818 N.E.2d 229; State v. Carter (2000), 89 Ohio St.3d 593, 2000 Ohio 172, 734 N.E.2d 345; State v. Biros (1997), 78 Ohio St.3d 426, 436, 1997 Ohio 204, 678 N.E.2d 891; and, State v Joseph (1995), 73 Ohio St.3d 450, 455, 1995 Ohio 288, 653 N.E.2d 285.

Even if the Court does not agree that Appellee waived the issue by failing to object at trial, there was no plain error justifying reversal of the conviction. Plain error does not exist, unless, but for the error, the outcome at trial would have been different. State v. Moreland (1990), 50 Ohio St.3d 58, 62, 552 N.E.2d 894. Appellee's guilt on the charge of aggravated trafficking of oxycontin was clearly proven. The amendment had no bearing on the outcome at trial. The amendment went solely to sentencing. Appellee cannot allege, nor do the facts support, any prejudice to the defense of the case. The jury's finding of guilt would have been the same irrespective of the amendment. Consequently, there is no plain error.

CONCLUSION

Crim.R. 7(D) sets forth the procedure for the amendment of an indictment. The rule establishes that an amendment is proper when the name and identity of the crime charged is not changed and the defendant is on notice of the charge. The amendment in this case was proper because it did not change the name or identity of the crime charged. Further, Appellee waived any defect in the amendment by failing to object at trial. Lastly, plain error does not exist here because the outcome of the trial would not have been different. Therefore, for the reasons expressed above, this Court should reverse the Fourth District decision and reinstate Appellee's conviction for aggravated trafficking in oxycontin.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Appellant's Merit Brief was served by regular mail on Michael Kelly, Attorney for Appellee, at 108 S. High Street, P.O. Box 3740, Mt. Orab, Ohio 45154, this 24th day of December, 2007.

William L. Archer, Jr. (#0039860)
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IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

FILED
COURT OF APPEALS
HIGHLAND COUNTY, OHIO

APR 27 2007

Paulette Donley
HIGHLAND COUNTY CLERK OF COURTS

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 06CA26
vs.	:	
MICHAEL DAVIS,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Michael P. Kelly, Mt. Orab, Ohio, for Appellant.

James B. Grandey and Shari L. Harrell, Hillsboro, Ohio, for Appellee.

Harsha, J.

{¶1} Michael Davis appeals his conviction for second-degree aggravated trafficking in drugs. He asserts that the trial court erred by permitting the state to amend the original indictment from a fourth-degree felony to a second-degree felony as the amendment changed the identity of the offense. We agree. The amendment's increase in the degree of the offense changed its identity in violation of Crim.R. 7(D) because it resulted in Davis not having prior notice of the charge and it violated his right to presentment of the charges to the grand jury. Furthermore, although Davis's trial counsel did not object to the amendment, we have previously recognized Crim.R. 7(D) violations as plain error and do so here, as well.

{¶2} Our disposition of Davis's first assignment of error renders his remaining two assignments of error moot, and we need not address them. See App.R. 12(A)(1)(c). Therefore, we reverse Davis's conviction.

I. FACTS

{¶3} The Highland County grand jury returned a thirty-three count indictment that named eleven defendants, including Davis. The indictment charged Davis with: (1) engaging in a pattern of corrupt activity, in violation of R.C. 2923.32(A)(1); (2) two counts of aggravated trafficking in drugs, in violation of R.C. 2925.03(A)(1), both fourth- degree felonies; (3) two counts of receiving stolen property, in violation of R.C. 2913.51; (4) deception to obtain a dangerous drug, in violation of R.C. 2925.22; and (5) possession of drugs, in violation of R.C. 2925.11.

{¶4} Count Fifteen, one of the aggravated trafficking offenses, charged:

> "On or about February 21, 2005 and February 26, 2005, and in Highland County, Ohio and as part of a course of criminal conduct in Fayette, Ross and other counties, Charles R. Davis, Michael A. Davis and Charles Davis Motor Sales, Inc. did knowingly sell or offer to sell Oxycontin, a schedule II controlled substance in an amount less than the bulk amount, to wit: approximately 7.2 grams, in violation of R.C. 2925.03(A)(1) * * *."

{¶5} The court subsequently granted the state's motion to amend count fifteen of the indictment to read:

> "On or about February 21, 2005 and February 26, 2006, [sic] and in Highland County, Ohio and as a part of a course of criminal conduct, Michael A. Davis and Charles R. Davis and Charles 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, in violation of R.C. 2925.03(A)(1) * * *."

{¶6} The jury found Davis guilty of the amended charge of aggravated trafficking in drugs (count fifteen) and of deception to obtain a dangerous drug. It found him not guilty of the remaining charges.

{¶7} After the jury returned its verdict, Davis filed a motion for acquittal under Crim.R. 29(C). The trial court overruled his motion and sentenced him to a two-year concurrent term of imprisonment for the aggravated trafficking and the deception to obtain a dangerous drug offenses.

II. ASSIGNMENTS OF ERROR

{¶8} In his appeal, Davis raises the following assignments of error.

> First Assignment of Error:
> The trial court erred when it permitted the amendment of Count Fifteen, aggravated trafficking in drugs which elevated the offense from a felony of the fourth degree to a felony of the second degree.
>
> Second Assignment of Error: The trial court erred in overruling defendant-appellant's motion to set aside the jury verdict.
>
> Third Assignment of Error: Appellant was denied effective assistance of counsel under Article I, Sections 10 and 16 of the Ohio Constitution and the Sixth Amendment to the United States Constitution.

III. AMENDMENT OF INDICTMENT

{¶9} We find Davis's first assignment of error dispositive of his appeal. There, Davis argues that the trial court erred by permitting the state to amend count fifteen of the indictment. He asserts that amending the indictment from a fourth-degree felony aggravated trafficking offense to a second-degree felony aggravated trafficking offense violated his Fifth Amendment right to be indicted by a grand jury.

A. PLAIN ERROR

{¶10} Because Davis failed to object to the amendment of the indictment, he has waived all but plain error. See Crim.R. 52(B) (stating that plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court"). The Ohio Supreme Court has cautioned that we are to take notice of plain error under Crim.R. 52(B) "with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice." State v. Long (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus. The plain error doctrine permits 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.

{¶11} We have previously recognized an amendment to an indictment that violates Crim.R. 7(D) as plain error. See State v. Atkins (July 14, 1997), Washington App. No. 96CA34.

B. GENERAL PRINCIPLES GOVERNING AMENDMENTS OF INDICTMENTS

{¶12} Although Davis frames this as a Fifth Amendment issue under the United States Constitution, the United States Supreme Court has not found that amendment applicable to the states through the Fourteenth Amendment. See Ring v. Arizona (2002), 536 U.S. 584, 597, fn.4, 122 S.Ct. 2428, 153 L.Ed.2d 556 (stating that the Fourteenth Amendment "'has not been construed to include the Fifth Amendment right to "presentment or indictment of a Grand Jury"'"), quoting Apprendi v. New Jersey (2000), 530 U.S. 466, 477, fn.3, 120 S.Ct. 2348, 147

L.Ed.2d 435. Therefore, we construe his argument as being brought under Section 10, Article I of the Ohio Constitution.

{¶13} Section 10, Article I of the Ohio Constitution states: "[N]o person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury." This constitutional provision "guarantees the accused that the essential facts constituting the offense for which he is tried will be found in the indictment of the grand jury. Where one of the vital elements identifying the crime is omitted from the indictment, it is defective and cannot be cured by the court as such a procedure would permit the court to convict the accused on a charge essentially different from that found by the grand jury." State v. Headley (1983), 6 Ohio St.3d 475, 478-79, 453 N.E.2d 716. This rule ensures that a criminal defendant will not be "surprised" by a charge. See In re Reed, 147 Ohio App.3d 182, 2002-Ohio-43, 769 N.E.2d 412, at ¶33.

{¶14} By specifying when a court may permit an amendment to an indictment, Crim.R. 7(D) supplements the constitutional right to presentment and indictment by a grand jury, see id., and State v. Strozier (Oct. 5, 1994), Montgomery App. No. 14021,. The rule states:

> The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment is made to the substance of the indictment, information, or complaint, or to cure a variance between the indictment, information, or complaint and the proof, the defendant is entitled to a discharge of the jury on the defendant's motion, if a jury has been impanelled, and to a reasonable continuance, unless it

> clearly appears from the whole proceedings that the defendant has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that the defendant's rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury. Where a jury is discharged under this division, jeopardy shall not attach to the offense charged in the amended indictment, information, or complaint. No action of the court in refusing a continuance or postponement under this division is reviewable except after motion to grant a new trial therefore is refused by the trial court, and no appeal based upon such action of the court shall be sustained nor reversal had unless, from consideration of the whole proceedings, the reviewing court finds that a failure of justice resulted.

{¶15} Thus, the rule permits most amendments but flatly prohibits amendments that change the name or identity of the crime charged. See State v. Kittle, Athens 04CA41, 2005-Ohio-3198, at ¶12, citing State v. O'Brien (1987), 30 Ohio St.3d 122, 126, 508 N.E.2d 144, which approved an amendment that added an essential element to the charge. But, a trial court commits reversible error when it permits any amendment that changes the name or identity of the offense charged. Kittle; State v. Smith, Franklin App. No. 03AP1157, 2004-Ohio-4786, at ¶10; see also, State v. Headley (1983), 6 Ohio St.3d 475, 478-479, 453 N.E.2d 716. "Whether an amendment changes the name or identity of the crime charged is a matter of law." Kittle; see, also, State v. Cooper (June 25, 1998), Ross App. No. 97CA2326, citing State v. Jackson (1992), 78 Ohio App.3d 479, 605 N.E.2d 426. Hence, we review this question de novo. Kittle.

{¶16} Here, the name of the offense remained the same: aggravated trafficking in drugs. The question we must resolve is whether elevating the degree of the offense from a fourth-degree felony to a second-degree felony changed the identity of the offense. As one court has noted, "[t]he issue is not

free from difficulty." State v. Smith, Clark App. No. 2001-CA-98, 2002-Ohio-4118, at ¶9; see, also, Katz and Gianelli, Ohio Criminal Law (2007), Section 40:7 ("What constitutes a change in the name or identity of the crime charged has been the subject of some controversy."). Our research confirms these assessments.

C. INCREASE IN DEGREE OR SEVERITY

{¶17} The Supreme Court of Ohio has indicated an amendment that changes neither the degree nor the severity of an offense does not change the identity of the offense. See State v. O'Brien (1987), 30 Ohio St.3d 122, 126-127, 508 N.E.2d 144, which concluded that amending indictment to include the essential mens rea element of "recklessness" did not change the identity of the offense. The court held "the identity of this crime was not changed by the addition * * * to the indictment. Neither the penalty nor the degree of the offense was changed as a result of the amendment." See, generally, State v. Martin, Brown App. No. CA2003-09-011, 2004-Ohio-4309, at ¶24; State v. Smith, Franklin App. No. 03AP-1157, 2004-Ohio-4786, at ¶11; State v. Daughenbaugh, Seneca App. No. 13-04-11, 2004-Ohio-4528, at 9; State v. Hickman, Summit App. No. 20883, 2002-Ohio-3406, at ¶43; State v. Waites (Dec. 20, 1996), Lake App. No. 93-L-009; State v. Finn (Apr. 29, 1994), Montgomery App. No. 14096; State v. Head (Nov. 21, 1991), Cuyahoga App. No. 59367 (all noting that the amendment did not increase the degree of the offense).

{¶18} While the court in O'Brien stated its conclusion in the negative, we believe it can fairly be construed to mean an amendment that increases the

degree of the offense does run afoul of Crim.R. 7(D). This conclusion is bolstered by State v. Headley (1983), 6 Ohio St.3d 475, 453 N.E.2d 716. There, the court held that amending a trafficking in drugs indictment to describe the controlled substance involved changed the name and identity of the offense by increasing the severity of the offense from "trafficking in drugs" to "aggravated trafficking in drugs." The court thus held that Crim.R. 7(D) prohibited the amendment. In its analysis the court stated:

> "In this case, [the defendant] was charged under R.C. 2925.03, relating to trafficking in drugs. Generally, that statute prohibits the selling, distribution, production or possession of certain controlled substances, or drugs, for certain purposes. The severity of the offense is dependent upon the type of drug involved. Under R.C. 2925.03(C), the offense is aggravated trafficking if the substance involved is a Schedule I drug, with the exception of marijuana, or a Schedule II drug. Under R.C. 2925.03(D), if the substance involved is a Schedule III, IV or V drug, the offense is the lesser one of trafficking in drugs.
>
> Under this analysis, it is evident that R.C. 2925.03 sets forth more than one criminal offense with the identity of each being determined by the type of controlled substance involved. As such, the type of controlled substance involved constitutes an essential element of the crime which must be included in the indictment. The omission of that information cannot be cured by amendment, as to do so would change the very identity of the offense charged." (Emphasis supplied)

Id. at 479.

{¶19} However, in a case somewhat analogous to ours, one appellate court determined that amending the indictment to change the amount of drugs involved did not change the identity of the offense. See State v. Durr (July 28, 2000), Sandusky S-97-056, where the original indictment charged:

> "On or about December 13, 1996, in the vicinity of North Front and Milton Streets, Fremont, Sandusky County, Ohio, the

> defendant did knowingly obtain, possess or use a controlled substance, to wit: 5.2 grams of Crack Cocaine, a Schedule II drug."

The indictment further alleged that the offense was in violation of R.C. 2925.11 and that it was a third degree felony because the amount alleged was more than five and less than ten grams. The evidence at trial prompted the state to amend the indictment to allege that an additional two grams of crack cocaine were involved. The appellate court concluded that the amendment did not change the name or identity of the crime charged because the defendant still was charged "with possession of more than five and less than ten grams of crack cocaine and still charged appellant with a third degree felony." Thus, the amendment did not change the degree of the offense.

{¶20} Here, the state changed the indictment to charge a greater amount of drugs was involved, which consequently elevated the degree of the offense from a fourth-degree felony to a second-degree felony. Generally, a violation of R.C. 2925.03(A)(1) involving a schedule II drug, i.e., aggravated drug trafficking, is a fourth-degree felony. See R.C. 2925.03(C)(1)(a). However, R.C. 2925.03(C)(1)(d) states that aggravated drug trafficking is a second-degree felony if the amount involved equals or exceeds five times the "bulk amount" but is less than fifty times the "bulk amount." The original indictment charged only a fourth degree felony and stated the amount involved was 7.2 grams. The caption of the indictment stated that the offense was a fourth-degree felony. The indictment did not specify the amount in terms of "bulk amount." The amendment ultimately changed the offense from a fourth-degree felony to a second-degree felony. This increase in the severity of the offense changes the identity of the

offense because of the lack of notice to the accused and the violation of his right of presentment of the charges to the grand jury. Headley, supra, O'Brien, supra. Thus, Crim.R. 7(D) flatly prohibits the amendment and the trial court erred by permitting the state to do so.

{¶21} The state nevertheless asserts that under State v. Smith (1983), 14 Ohio App.3d 366, 471 N.E.2d 795, the amendment did not change the name or identity of the offense. In that case, the court held that an amendment to an R.C. 2925.03 complicity indictment to include the amount of drugs involved did not change the name or identity of the crime. The original indictment read: "[The defendant] did knowingly aid or abet David Dillon in committing a violation of [R.C. 2925.03], to wit: Trafficking in Marijuana * * *." The trial court subsequently allowed the state to amend the indictment to state the amount of drugs involved.

{¶22} The appellate court framed the issue as whether in a complicity indictment the addition of the amount sold or offered to be sold by the principal constitutes a change in the name or identity of the crime charged. Id. at 368. The court concluded Headley was not controlling because it involved the type of drug, whereas the Smith indictment involved the amount of a previously specified drug. The court stated that "the degree of the offense or severity of the penalty does not necessarily control the question of a change in the name or identity of the crime or whether a material element has been omitted." Id. at 369.

{¶23} We choose not to follow Smith as it pre-dates subsequent Ohio Supreme Court and intermediate appellate court cases interpreting Headley, and in our opinion, it runs counter to those subsequent cases. As O'Brien (decided

after Smith) implied, a change in the identity of the offense occurs when the amendment increases the degree or severity of the offense charged.

E. CONCLUSION

{¶24} Under Crim.7(D), the trial court can approve most amendments to an indictment. It can even approve the addition of some elements that have been overlooked. But, it cannot permit any amendment that results in a change in the name or identity of the charge. Thus, where the indictment omits the mens rea element of a crime, the court can correct the omission by amendment if the name and the identity of the crime do not change. O'Brien, supra. But the State cannot switch the identity of a crime via an amendment. Headley, supra. And when it changes the degree of the offense from a fourth-degree felony to a second-degree felony, the amendment effectively changes the identity of the crime in violation of Crim.R. 7(D). O'Brien, supra. It also runs afoul of constitutional protections requiring notice to the accused and the accused's right to presentment to the grand jury.

{¶25} Because Crim.R. 7(D) flatly forbids amendments changing the identity of a charge, the amendment was unlawful. Thus, the trial court erred by permitting the state to amend the indictment. Because of its constitutional nature, the error is one that merits applying the plain error doctrine. Additionally, given the flat prohibition in Crim.R. 7(D) against amendments changing the identity of charges, Davis need not demonstrate that he suffered any prejudice as a result of the forbidden amendment. See Kittle, supra; Middletown v.

Blevins (1987), 35 Ohio App.3d 65, 67, 519 N.E.2d 846; see, also, State v. Gilleland, Champaign App. No. 2004CA1, 2005-Ohio-659, at ¶15.

{¶26} Accordingly, we reverse the trial court's judgment and remand for further proceedings.

JUDGMENT REVERSED
AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED AND CAUSE REMANDED and that the Appellant recover of Appellee costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Highland County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Ohio Supreme Court an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Ohio Supreme Court in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

McFarland, P.J.: Concurs in Judgment and Opinion.
Kline, J.: Concurs in Judgment and Opinion as to Assignments of Error I & III; Dissents as to Assignment of Error II.

For the Court

BY: William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

IN THE SUPREME COURT OF OHIO

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

NOTICE OF APPEAL OF APPELLANT STATE OF OHIO

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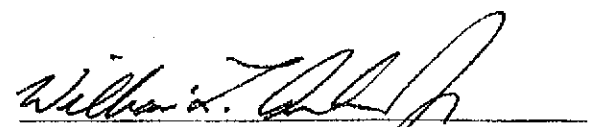
FILED
JUN 08 2007
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANT STATE OF OHIO

Appellant State of Ohio hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Highland County Court of Appeals, Fourth Appellate District, entered in Court of Appeals case no. 06-CA-26 on April 27, 2007.

This case raises a substantial constitutional question and is one of public or great general interest. and involves a felony.

Respectfully submitted,



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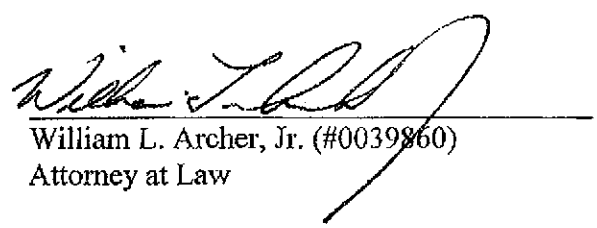
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Notice of Appeal was served on Michael Kelly, Attorney for Appellee, 108 S. High Street, P.O. Box 3740, Mt. Orab, Ohio 45154, this 9th day of June, 2007.



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