

IN THE SUPREME COURT OF OHIO

State of Ohio : CASE NO. **08-1581**
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 :
 Plaintiff/Appellee :
 :
 : On Appeal from the
 : Summit County Court
 v. : of Appeals, Ninth
 : Judicial District
 :
 :
 Demario M. Brooks :
 :
 : Court of Appeals
 Defendant/Appellant : Case No. 23950
 : 2008-Ohio-3104
 :
 :

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT DEMARIO M. BROOKS

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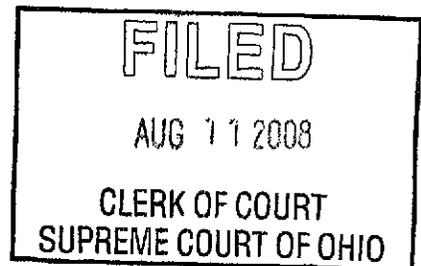


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**A PRIOR CONVICTION FOR TRAFFICKING IN HEROIN CANNOT SERVE
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**THIS CASE INVOLVES A FELONY AND RAISES A SUBSTANTIAL
CONSTITUTIONAL ISSUE**

Recently this Court ruled in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, that the failure of an indictment to allege all the essential elements of the charge (in that case, the mens rea requirement) was a constitutional and “structural” error that required reversal of a conviction. This Court reaffirmed the principle that a defendant must be put on notice of all issues and charges that he must defend against: “* * * it is neither consistent with general principles nor constitutional safeguards, to allow a man to be thus put to trial upon a criminal charge in the dark”. *Id.* at 29, ¶16.

In the present case, the Ninth District Court of Appeals ruling upholding Appellant’s conviction for Engaging in a Pattern of Corrupt Activity on the basis of a prior conviction for trafficking in drugs is completely contrary to these constitutional principles. A review of the indictment will show that Appellant was never given notice that the fact of a prior conviction was going to be used as one of the predicate acts to establish guilt of Engaging in a Pattern of Corrupt Activity. Nowhere in the indictment is a **prior conviction** alleged. Instead, the state realleged the same **conduct** for which he was previously convicted in Predicate Act Three and Count Four of the indictment. As maintained at oral argument, this constituted double jeopardy, and the trial court therefore wisely dismissed that count of the indictment.

A review of the record will further show that the state never argued at any time during the trial that the prior conviction constituted a predicate act. Evidence of the prior conviction for trafficking was used solely for purposes of establishing a disability in support of the charge of Having a Weapon Under Disability, for which Appellant was acquitted. Not until the case was on appeal did the state make this argument. While the Ninth District Court of Appeals has previously

held that a prior conviction can be used to establish a predicate offense for a conviction for Engaging in a Pattern of Corrupt Activity, under *Colon* and the Constitution that can only be if the fact of that prior conviction is alleged in the indictment. In this case, it was not.

Accordingly, this Court should accept this case for review in order to reaffirm the principles the Court established in *Colon*.

STATEMENT OF THE CASE AND FACTS

Appellant Demario M. Brooks was charged by indictment in the Summit County Court of Common Pleas with Engaging in a Pattern of Corrupt Activity, R.C.2923.32(A)(1)/(B)(1), a felony of the first degree, along with multiple counts of Trafficking in Heroin, Possession of Heroin, and one count each of Having a Weapon under Disability, and Tampering with Evidence. After trial to the bench, Appellant was found guilty of one count of Possession of Heroin, R.C.2925.11(A), a felony of the **fifth** degree, Tampering with Evidence, R.C.2921.12, a felony of the third degree, and the count of Engaging in a Pattern of Corrupt Activity. All other charges were resolved by dismissal, Criminal Rule 29 judgment of acquittal, or findings of not guilty. A Criminal Rule 29 motion for acquittal was denied as to Count One, Engaging in a Pattern of Corrupt Activity. Appellant was sentenced to one year imprisonment for Possession of Heroin, five years for Tampering with Evidence, and ten years for Engaging in a Pattern of Corrupt Activity, all sentences to run concurrently with each other.

As relevant herein, the essential facts are as follow. On January 23, 2007, Appellant and Anthony Stoutermire arrived at a house at 169 North Seiberling Street in Akron, Ohio. The house

had been under surveillance on suspicion of drug activity, and Akron police were preparing to raid the house under a search warrant. Stoutermire testified that he saw Appellant with a sandwich bag of white powder, which he was “packaging”. About twenty minutes after their arrival, police raided the house. Appellant was found lying face down in a back bedroom, with what proved to be heroin strewn on the floor and walls, and all over his clothes. While evidence was presented throughout the trial of other raids at other houses in Akron in which friends of Appellant had been arrested for possessing and/or trafficking in heroin, and while Appellant was charged as an accomplice in these crimes, the trial court did not find Appellant guilty of any other counts. In effect, the events of January 23, 2007, and Appellant’s convictions for Possession of Heroin (Count Thirteen of the indictment) and Tampering with Evidence (Count Sixteen) on that date, formed the only predicate acts upon which the trial court found him guilty of Engaging in a Pattern of Corrupt Activity.

On appeal to the Ninth District Court of Appeals, Appellant argued that there was insufficient evidence to support the conviction for Engaging in a Pattern of Corrupt Activity, as Appellant was found guilty of only a fifth degree offense of possession of heroin, and R.C.2923.31(I)(2)(c) cites only “any violation of section 2925.11 of the Revised Code that is a felony of the first, second, third, or fourth degree” as predicate offenses for Engaging in a Pattern of Corrupt Activity.

In response to this argument, the state contended that the introduction of evidence of a prior conviction for trafficking in heroin under R.C.2925.03 constituted the second predicate act. The court of appeals agreed, despite the fact that the prior conviction was never alleged as such in the indictment. Instead, the state realleged the same **conduct** for which Appellant had previously been convicted in Predicate Act Three and Count Four of the indictment. The double jeopardy

implications of this allegation were rendered moot by the fact that the trial court dismissed Count Four of the indictment at trial.

LAW AND ARGUMENT

PROPOSITION OF LAW

A PRIOR CONVICTION FOR TRAFFICKING IN HEROIN CANNOT SERVE AS A PREDICATE OFFENSE UPON WHICH A CONVICTION FOR ENGAGING IN A PATTERN OF CORRUPT ACTIVITY CAN BE SUSTAINED UNLESS SUCH PRIOR CONVICTION WAS EXPRESSLY ALLEGED IN THE INDICTMENT.

This Court ruled in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, that the failure of an indictment to allege all the essential elements of the charge (in that case, the mens rea requirement) was a constitutional and “structural” error that required reversal of a conviction. This Court reaffirmed the principle that a defendant must be put on notice of all issues and charges that he must defend against: “* * * it is neither consistent with general principles nor constitutional safeguards, to allow a man to be thus put to trial upon a criminal charge in the dark”. *Id.* at 29, ¶16.

This Ninth District’s ruling that Appellant’s conviction for Engaging in a Pattern of Corrupt Activity on the basis of a prior conviction for trafficking in drugs is completely contrary to these constitutional principles. A review of the indictment in the present case shows that Appellant was never given notice that the fact of a prior conviction was going to be used as one of the predicate acts to establish guilt of Engaging in a Pattern of Corrupt Activity. Nowhere in the indictment is a **prior conviction** alleged. Instead, the state realleged the same **conduct** for which he was previously convicted in Predicate Act Three and Count Four of the indictment. As maintained at oral argument,

this constituted double jeopardy, and the trial court wisely dismissed that count of the indictment.

A review of the record will further show that the state never argued at any time during the trial that the prior conviction was a predicate act. Not until the appeal did the state make this argument. While the Ninth District noted in its decision that a prior conviction can be used to establish a predicate offense, under *Colon* and the Constitution that can only be if the fact of that prior conviction is alleged in the indictment.

Accordingly, this Court should accept this case for review and reverse Appellant's conviction for Engaging in a Pattern of Corrupt Activity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum was sent by regular U.S. mail to: Summit County Prosecutor, 53 University Ave., Akron, OH 44308, this _____ day of _____, 2008.

NICHOLAS SWYRYDENKO
Attorney for Defendant/Appellant

COURT OF APPEALS
DANIEL M. HERRIGAN

STATE OF OHIO

COUNTY OF SUMMIT

STATE OF OHIO

Appellee

v.

DEMARIO M. BROOKS
aka YO-YO

Appellant

2008 JUN 25 AM 9:37
ss:

SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

C. A. No. 23950

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 07 01 0299(B)

DECISION AND JOURNAL ENTRY

Dated: June 25, 2008

CARR, Presiding Judge.

{¶1} Appellant, DeMario Brooks, appeals his conviction for engaging in a pattern of corrupt activity. This Court affirms.

I.

{¶2} The Summit County Grand Jury indicted Brooks on one count of engaging in a pattern of corrupt activity, in violation of R.C. 2923.32(A)(1), multiple drug offenses involving possessing or trafficking cocaine, heroin, and marijuana; one count of weapon under disability; and one count of tampering with evidence. Prior to trial, the State dismissed several duplicate counts. The State also dismissed two counts – trafficking in cocaine and possession of heroin – because Brooks had pled guilty to those offenses in an earlier case. After a bench trial, the trial court granted Brooks' motion to dismiss six counts and the state dismissed two additional counts.

{¶3} The trial court found Brooks guilty of engaging in a pattern of corrupt activity, a first degree felony; tampering with evidence, a third degree felony; and possession of heroin, a

fifth degree felony. The trial court sentenced Brooks to ten years in prison on the corrupt activity count and concurrent five year and twelve month sentences on the other two counts. Brooks timely appealed, raising one assignment of error.

II.

ASSIGNMENT OF ERROR

“APPELLANT’S CONVICTION FOR ENGAGING IN A PATTERN OF CORRUPT ACTIVITY WAS BASED UPON INSUFFICIENT EVIDENCE, AS A MATTER OF LAW.”

{¶4} Brooks argues that his conviction for engaging in a pattern of corrupt activity was not supported by sufficient evidence. We do not agree.

{¶5} When reviewing the sufficiency of the evidence, this Court must review the evidence in a light most favorable to the prosecution to determine whether the evidence before the trial court was sufficient to sustain a conviction. *State v. Jenks* (1991), 61 Ohio St.3d 259, 279. We examine the evidence to determine whether, if believed, it would convince the average mind of Brook’s guilt beyond a reasonable doubt. *Id.*

{¶6} Brooks challenges only the sufficiency of the evidence for his conviction for engaging in a pattern of corrupt activity. Specifically, Brooks argues the State failed to prove a pattern of corrupt activity because it proved only one incident, not a pattern. The State indicted Brooks, and several other individuals, on one count of engaging in a pattern of corrupt activity, trafficking in heroin, possession of heroin and marijuana, and having weapons while under disability. According to the evidence offered at trial – which Brooks has not challenged on appeal – Brooks and the other defendants were involved in the sale of narcotics from various homes in the Akron area over an extended period of time.

{¶7} The elements of engaging in a pattern of corrupt activity are found in R.C. 2923.32(A)(1): “No person * * * associated with[] any enterprise shall conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity * * *.” “Enterprise” includes an association or group of persons associated although not a legal entity. R.C. 2923.31(C). “Corrupt activity” means “engaging in, attempting to engage in, conspiring to engage in, or soliciting, coercing, or intimidating another person to engage in” any of a series of listed criminal offenses. R.C. 2923.31(I). “Pattern of corrupt activity” is defined as “two or more incidents of corrupt activity, whether or not there has been a prior conviction, that are related to the affairs of the same enterprise, are not isolated, and are not so closely related to each other and connected in time and place that they constitute a single event.” R.C. 2923.31(E).

{¶8} Brooks argues that the State failed to prove a pattern of corrupt activity because, he asserts, the State failed to prove “two or more incidents of corrupt activity.” He concedes the State proved one incident of corrupt activity – tampering with evidence. He argues that the State failed to gain a conviction on another offense that could serve as a second incident. On appeal, Brooks did not challenge the State’s proof on any other element of the offense and, therefore, we consider only the element he contests.

{¶9} The indictment charged Brooks with fifteen specific predicate acts and one additional category of “further incidents” that included all of the other counts in the indictment. Brooks concedes that the State proved Predicate Act Fifteen, tampering with evidence in January 2007. We conclude the State proved at least one additional incident – Predicate Act Three, trafficking in heroin in February 2006.

{¶10} Predicate Act Three charged that Brooks trafficked in heroin on February 15, 2006. Detective Wahl testified for the State about this incident. He said that a controlled buy

took place and that, after his arrest, Brooks admitted to selling heroin. The State introduced a certified copy of Brooks' conviction for trafficking in heroin in violation of R.C. 2925.03. Pursuant to the definition of corrupt activity in R.C. 2923.31(I)(2)(c), trafficking in heroin in violation of R.C. 2925.03 is a corrupt activity.

{¶11} The use of a prior conviction to serve as a prior incident is well settled. In *State v. Smith* (June 28, 2000), 9th Dist.No. 99CA007387, this Court held that the use of a prior federal conviction to serve as a predicate act was "proper as a matter of statutory law." We have also held that the use of prior convictions does not offend the Double Jeopardy Clause. *State v. Yeager* (Sept. 6, 2000), 9th Dist.No. 19593 ("Yeager's convictions that stemmed from his guilty pleas in an earlier case are not lesser included offenses of engaging in a pattern of corrupt activity * * *. Therefore, Yeager's convictions in the case at bar do not violate the Double Jeopardy Clause on those grounds."). See, also, *Garrett v. United States* (1985), 471 U.S. 773.

{¶12} The State presented sufficient evidence to prove two incidents of corrupt activity. Therefore, Brooks' conviction for engaging in a corrupt activity is supported by sufficient evidence.

III.

{¶13} Brooks' assignment of error is overruled. The judgment of the trial court is affirmed.

Judgment affirmed.

The Court finds that 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 Summit, 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(E). 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 Appellant.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
DICKINSON, J.
CONCUR

APPEARANCES:

NICHOLAS SWYRYDENKO, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and PHILIP D. BOGDANOFF, Assistant Prosecuting Attorney, for Appellee.