

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO, )  
 )  
 Plaintiff-Appellant, )  
 )  
 v. )  
 )  
 JOSEPH PEPKA, )  
 )  
 Defendant-Appellee. )

Case No. 2009-0678  
On Appeal from the  
Lake County Court of Appeals,  
Eleventh Appellate District  
  
Court of Appeals Case No. 2008-L-016

**NOTICE OF COURT OF APPEALS' DECISION  
ON STATE'S APPLICATION FOR RECONSIDERATION**

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LAKE COUNTY, OHIO

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FILED  
MAY 19 2009  
CLERK OF COURT  
SUPREME COURT OF OHIO

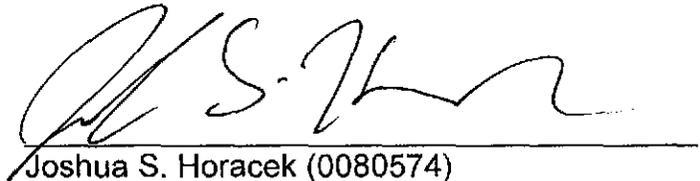
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SUPREME COURT OF OHIO

Now comes the State of Ohio, by and through Charles E. Coulson, Lake County Prosecuting Attorney, and Joshua S. Horacek, Assistant Prosecuting Attorney, and respectfully informs this Court that the state's application for reconsideration filed with the Eleventh District Court of Appeals, and noted as pending in the state's memorandum in support of jurisdiction, has been denied by a two-to-one majority. A copy of the judgment entry is attached hereto.

Respectfully submitted,

CHARLES E. COULSON (0008667)  
PROSECUTING ATTORNEY

A handwritten signature in black ink, appearing to read 'J.S. Horacek', written over a horizontal line.

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JSH/klb

PROOF OF SERVICE

A copy of the foregoing Notice of Court of Appeals' Decision on State's Application for Reconsideration, was sent by regular U.S. Mail, postage prepaid, to counsel for the appellee, Mr. Albert L. Purola, Esquire, 38108 Third Street, Willoughby, Ohio 44094, on this 18<sup>th</sup> day of May, 2009.



Joshua S. Horacek (0080574)  
Assistant Prosecuting Attorney

JSH/klb

STATE OF OHIO  
COUNTY OF LAKE

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)SS.  
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IN THE COURT OF APPEALS  
ELEVENTH DISTRICT

STATE OF OHIO,

Plaintiff-Appellee, FILED  
COURT OF APPEALS

- vs -

JOSEPH PEPKA,

Defendant-Appellant.

MAY 14 2009

MAUREEN G. KELLY  
CLERK OF COURT  
LAKE COUNTY, OHIO

JUDGMENT ENTRY

CASE NO. 2008-L-016

This court released its opinion in this matter on March 27, 2009. *State v. Pepka*, 11th Dist. No. 2008-L-016 2009-Ohio-1440. The state has timely filed an application for reconsideration, pursuant to App.R. 26(A). Pepka has filed a memorandum in opposition to the state's application for reconsideration.

"The test generally applied [in App.R. 26(A) applications] is whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been." *Matthews v. Matthews* (1981), 5 Ohio App.3d 140, 143.

The state claims this court failed to consider the Supreme Court of Ohio's decision in *State v. Smith*, Slip. Op. No. 2009-Ohio-787.

In *State v. Smith*, the defendant was indicted on one count of robbery. *State v. Smith*, 117 Ohio St.3d 447, 2008-Ohio-1260, at ¶5. The matter proceeded to a bench trial, where the court found the defendant not guilty of robbery, but guilty of the lesser-included offense of fifth-degree felony theft. *Id.*

In the Supreme Court of Ohio's original opinion, the court affirmed the conviction and held that theft is a lesser-included offense of robbery. *Id.* at paragraph two of the syllabus.

After the Supreme Court of Ohio's initial decision was released, Smith filed a motion for reconsideration. Therein, she argued that the value of the stolen property is an essential element of theft and, therefore, it was required to have been charged in the indictment. *State v. Smith*, Slip. Op. No. 2009-Ohio-787, at ¶1. The court noted that Smith was indicted for robbery, not theft. *Id.* at ¶14. Thus, the court held "when an indictment charges a greater offense, 'the indictment or count necessarily and simultaneously charges the defendant with lesser included offenses as well.'" *Id.*, quoting *State v. Lytle* (1990), 49 Ohio St.3d 154, 157.

As an aside, the court noted, "had the grand jury returned an indictment against Smith for theft, due process would require that the indictment contain notice of the value of the property involved or the degree of the offense alleged." *Id.* at ¶13. The state argues that since the indictment in this matter stated the offense was a third-degree felony, it complied with the Supreme Court's revisited opinion in *State v. Smith*, Slip. Op. No. 2009-Ohio-787. We disagree. This comment from the Supreme Court is not a finding that it is unnecessary for a grand jury to include in an indictment the value of property in a theft offense in order to establish the degree of theft offense. The state has missed the point of our holding concerning the constitutional right to have an indictment by grand jury.

As Pepka notes, the Supreme Court of Ohio did not overrule *State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4537 in its opinion upon reconsideration in *State v. Smith*. In our opinion, we applied the following holding from *Davis*: “Crim.R. 7(D) does not permit the amendment of an indictment when the amendment changes the penalty or degree of the charged offense; amending the indictment to change the penalty or degree changes the identity of the offense.” *State v. Pepka*, 2009-Ohio-1440, at ¶32, quoting *State v. Davis*, 2008-Ohio-4537, syllabus. Further, we held that there was nothing in the record to indicate the grand jury considered whether the victim suffered “serious physical harm” as opposed to merely being exposed to a “substantial risk to [her] health or safety.” *Id.* at ¶37. The difference between these terms is not to be treated with cavalier indifference. The indictment was not silent with respect to the degree of harm. It specifically charged that Pepka only created a substantial risk to the health or safety of the victim, which can only result in conviction of a misdemeanor. While true that there is a conflict between this language and the statement in the indictment that the offense was a felony, this conflict cannot be resolved by assumption. There is a constitutional right at stake. Thus, we held that “the trial court permitted Pepka to be convicted of a charge that was “essentially different from that found by the grand jury.”” *Id.*, quoting *State v. Davis*, 2008-Ohio-4537, at ¶12, quoting *State v. Headley* (1983), 6 Ohio St.3d 475, 478-479.

We reject the state's suggestion that we interpret the Supreme Court of Ohio's dicta language “or the degree of the offense alleged” to negate the long-established principle in Ohio jurisprudence that all essential elements of an offense must be found by the grand jury. See *State v. Colon*, 118 Ohio St.3d 26,

2008-Ohio-1624, at ¶17, quoting *Harris v. State* (1932), 125 Ohio St. 257. In this matter, serious physical harm was an essential element of third-degree felony endangering children. R.C. 2919.22(A) and (E)(2)(c). Adopting the state's position would be akin to assuming the grand jurors understood that they could only return a third-degree felony indictment if they found probable cause that the victim suffered serious physical harm. As this matter concerns Pepka's constitutional rights,<sup>1</sup> we decline to make such an assumption.

Finally, we do not extend the Supreme Court of Ohio's description of the value of the stolen property in a theft offense as a "finding that enhances the penalty" instead of "an essential element of the offense" to the situation in the case sub judice. See *State v. Smith*, Slip. Op. No. 2009-Ohio-787, at ¶12. "Serious physical harm to persons" is statutorily defined as any of five specific findings. R.C. 2901.01(A)(5)(a)-(e). These subsections require independent factual determinations regarding the severity of the victim's injuries. *Id.* As such, we continue to consider a finding of serious physical harm to be an essential element of the case.

Again, the reconsidered opinion by the Supreme Court of Ohio focused on the fact that Smith was indicted with a more serious offense and ultimately convicted of a lesser-included offense. *Id.* at ¶14. In addition, the court did not indicate it was overruling its decision in *State v. Davis*, *supra*.

The dissent has cited *State v. Fairbanks*, 117 Ohio St.3d 543, 2008-Ohio-1470 for the proposition that the enhancement is only a "special finding," and not an element of the offense. However, there are several things that distinguish

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1. See *State v. Colon*, at ¶17, quoting Section 10, Article I, Ohio Constitution.

*Fairbanks*. First, the issue in that case was whether or not it was a lesser included offense, allowing double jeopardy to attach. Second, the language setting forth the "special finding," to wit: that Fairbanks' operation of his vehicle "caused a substantial risk of serious physical harm to persons or property." It is clear this was determined by a grand jury, as the Ohio Constitution requires.

The question really is, what is the better rule? To wink at the constitutional requirement that the grand jury make a finding of probable cause as to every factual allegation necessary to establish a particular degree of offense? Or, to simply require all of the factual allegations to be placed in the indictment? In the first scenario, if all we do is require a statement of the degree of offense, how would we ever know the grand jury actually considered it and found probable cause? To suggest it is fine in some cases to simply list the degree of offense to satisfy the constitutional requirement is to render the constitutional provision meaningless. The typical grand juror has no idea what makes an offense a felony in some cases and a misdemeanor in others. Allowing indictments to cut this corner will encourage abuse, particularly in those cases where the issue is close. If a prosecutor for some reason cannot hold himself or herself to a standard that requires them to recite all factual allegations necessary to establish a particular degree of offense, perhaps they should look for a new line of work. In this case, preserving, protecting, and defending the constitution is easy.

The state has not called to our attention an obvious error in our decision or raised an issue that was not considered, or not fully considered, by this court when it should have been.

The state's application for reconsideration is overruled.

  
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JUDGE TIMOTHY P. CANNON

COLLEEN MARY O'TOOLE, J., concurs,

CYNTHIA WESTCOTT RICE, J., dissents with Dissenting Opinion.

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CYNTHIA WESTCOTT RICE, J., dissents with Dissenting Opinion.

In light of the authority cited by the state, I would hold the issue set forth under appellant's first assignment of error was not entirely explored in the majority's original decision. After careful consideration of this authority, I would therefore grant appellee's application.

In *State v. Smith*, Slip Opinion No. 2007-0268, 2009-Ohio-787, the Supreme Court of Ohio overruled Smith's motion for reconsideration of the Court's previous decision to affirm her conviction for felony five theft. The facts of that case reveal she was originally indicted on a charge of robbery. After trial, she was convicted of the lesser offense of theft based on the trial court's finding of the value of the goods stolen. The appellant asserted on reconsideration that she could not be convicted of theft because the value of stolen property in a theft case is an essential element that had to be charged in the indictment. The Court observed that R.C. 2913.02(A), the theft statute, defines the crime without reference to property value and sets forth all that the state must prove to secure a conviction for a misdemeanor of the first degree. However, Subsection (B) of

the statute provides "If the value of the property or services stolen is five hundred dollars or more and is less than five thousand dollars or if the property stolen is any of the property listed in [R.C.] 2913.71 \*\*\*, a violation of this section is theft, a felony of the fifth degree." *Smith*, supra, at ¶6.

The Court classified subsection (B)(2) of the theft statute as a "special finding" which, even though it "affect[s] the punishment available upon conviction \*\*\*," is "not part of the definition of the crime of theft set forth in R.C. 2913.02(A)." *Smith*, supra, at ¶7. In arriving at its conclusion, the Court cited its decision in *State v. Fairbanks*, 117 Ohio St.3d 543, 2008-Ohio-1470 as authoritative on this issue.

*Fairbanks* concerned an enhancement to a charge of failing to comply with an order or signal of a police officer. The Court pointed out that R.C. 2921.331(B), the relevant section under which Fairbanks was charged for failure to comply, structurally paralleled the theft statute at issue in *Smith*. Specifically, R.C. 2921.331(B) prohibits any person from operating "a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop." R.C. 2921.331(C)(3) classifies the offense as a first degree misdemeanor. However, R.C. 2921.331(C)(5) identifies a "special finding" designed to enhance the degree of the offense from a misdemeanor to a third degree felony, viz., creating a "substantial risk of serious physical harm to persons or property" while committing the offense. See R.C. 2921.331(C)(5)(a)(ii).

The Court in *Fairbanks* pointed out that "one requirement for finding criminal culpability is that the defendant has "the requisite degree of culpability for

each element as to which a culpable mental state is specified by the section defining the offense.” (Emphasis sic.) *Fairbanks*, supra, at 546, quoting R.C. 2901.21(A)(2). By implication, the Court held that a “special finding,” such as causing “a substantial risk of serious physical harm to persons or property” was not an element of the crime because it did not specify a culpable mental state. *Fairbanks*, supra. Rather, the finding is a “penalty enhancement” that is contingent upon a factual finding regarding “*the result or consequence of the defendant’s willful conduct.*” (Emphasis sic.) *Id.* The Court observed that it is irrelevant whether an offender intends a result or consequence. *Id.* Thus, the court concluded:

“If the trier of fact finds beyond a reasonable doubt that a substantial risk of serious physical harm to persons or property actually resulted from defendant’s conduct, then the enhancement is established. This is purely a question of fact concerning the consequences flowing from defendant’s failure to comply.” *Id.*

As the “special finding” / “penalty enhancement” of the offense of failure to comply was determined to be a non-essential element of the offense, the court in *Smith* concluded the “special finding” / “penalty enhancement” relating to the value of stolen property is a non-essential element of theft and need not be charged in the indictment. *Smith*, supra, at ¶12.

Here, the crime of child endangering, pursuant to R.C. 2919.22(A), requires the state to prove that: (1) a person having custody or control over (2) a child under eighteen years of age (3) recklessly created a substantial risk to the health or safety of the child (4) by violating a duty of care, protection, or support.

See, e.g., *State v. McGee* 79 Ohio St.3d 193, syllabus, 1997-Ohio-156. As defined, the crime is a first degree misdemeanor. However, R.C. 2919.22(E)(1)(c) provides that the crime is enhanced to a third degree felony if the violation "results in serious physical harm to the child involved." It is necessary to keep in mind that R.C. 2919.22(A) defines the crime without reference to the potential resulting serious physical harm a child might suffer at the hands of an offender.

Applying the holdings of *Fairbanks* and *Smith* to the crime of child endangering compels the conclusion that the penalty enhancement is contingent upon a factual finding with respect to the "result" or "consequence" of an offender's reckless conduct. The penalty enhancement is purely a question of fact relating to the consequences resulting from an offender's prohibited action of endangering children as defined in R.C. 2919.22(A). Thus, the "serious physical harm" specification is *not* an essential element of the crime of endangering children and therefore need not be submitted to the grand jury.

That being said, the majority maintains the amendment changed the identity, i.e., the penalty or degree, of the crime because there was no way to tell whether the grand jury determined the evidence at issue constituted felony child endangerment or misdemeanor child endangerment. While I understand the majority's point, I believe its conclusion seizes on a technicality and ignores the substantive nature of the evidence at the heart of this case. Because the original indictment specified the degree of the crime *and* the petit jury later found appellant guilty beyond a reasonable doubt on the elements of felony three child

endangering, it seems highly unlikely that the felony three was not the crime for which the grand jury found probable cause to indict.

My analysis should not be construed as a facile dismissal of the significance of the role of the grand jury in the criminal process. To the contrary, my position is premised upon the circumstances of this case, most particularly, the recognition that the grand jury issued its original indictment stating the crime was a third degree felony. There was no ambiguity in the indictment in this regard. I therefore do not believe the amendment affected the identity of the crime because it essentially clarified the elements of the degree of the crime charged by the grand jury.

Finally, I recognize the matter at issue in *Smith* was different than the matter before this court. In *Smith*, the defendant was indicted on robbery and found guilty of the lesser included offense of theft. The court pointed out that *Fairbanks* helped clarify the reasons why value did not need to be charged in the indictment in that case. However, it also made the following, ostensibly inconsistent statement:

“Of course, had the grand jury returned an indictment against Smith for theft, due process would require that the indictment contain notice of the value of the property involved or the degree of the offense alleged.” *Id.* at ¶13.

Evidently, when theft is a lesser-included offense, value is a non-essential penalty enhancement which is a purely factual issue that need not be included in the indictment. However, when the grand jury returns an indictment for theft, “notice of the value of the property involved *or* the degree of the offense alleged”

must be included. (Emphasis added.) *Id.* Regardless of the potential logical tension, this case meets the demands of law under both *Fairbanks* and *Smith*.

It is undisputed that the original indictment gave appellant notice that the degree of the offense was a felony of the third degree. Consequently, the original indictment was sufficient under both *Fairbanks* and *Smith*. In light of this newly considered analysis, the amendment was, at worst, superfluous and could not operate to change the identity, i.e., the penalty or degree, of the crime.

In light of the foregoing analysis, I would hold the amendment did not alter "the penalty or degree of the charged offense," and, pursuant to *Fairbanks* and *Smith*, appellant could not have been misled or prejudiced by the original omission specifying the nature of the resulting harm. See *State v. O'Brien* (1987), 30 Ohio St.3d 122; see, also, *State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4537. In short, even though I believe the amendment was inconsequential, I would hold it was nevertheless permissible under Crim.R. 7(D).

Therefore, I respectfully dissent.