

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellant,

vs.

DARNELL WHITFIELD,

Defendant-Appellee.

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Case No. 2008-1669

On Appeal from the Cuyahoga
County Court of Appeals
Eighth Appellate District

C.A. Case No. 90244

MERIT BRIEF OF APPELLEE DARNELL WHITFIELD

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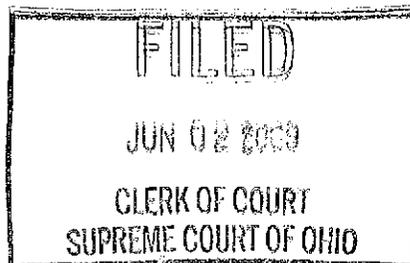


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ARGUMENT

Proposition in Response: Upon finding that one or more counts constitute two or more allied offenses of similar import, dismissal of one count is a proper remedy under R.C. 2941.25(A).

Revised Code Section 2941.25 specifically disallows multiple findings of guilt on allied offenses, unless there is a separate animus as to each. It also requires the State to elect on which charge it will move forward, prior to the jury's determination of guilt. To understand this interpretation of the current R.C. 2941.25, it is critical to understand the development of law in this area. As this Court has noted, from 1869 to 1929 such issues were dealt with as "joinder of offenses" under former Section 7227 of the Revised Statutes.¹ That statute allowed multiple offenses to be brought in a single indictment, but it allowed the jury to convict on only a single offense.² In 1929, the legislature enacted R.C. 2941.24, which stated:

"An indictment or information may contain counts for larceny, for obtaining the same property by false pretenses, for embezzlement thereof, and for buying, receiving or concealing it, knowing it to have been stolen, or any of such counts, and **the jury may convict** of any of such offenses and find any or all of the persons indicted guilty of any of such offenses."³

So, beginning in 1929, the jury was allowed to convict on allied offenses. During that period, this Court held that "it is not error to permit a jury to return verdicts of guilty as to both offenses, if otherwise warranted by the evidence."⁴ That remedy developed from the judicial "merger"

¹ *State v. Botta* (1971), 27 Ohio St.2d 196, 204, 271 N.E.2d 776.

² See *Id.*; 66 Ohio Laws 302.

³ 113 Ohio Laws 168; *Botta* at 204; see, also, former R.C. 2941.04, 113 Ohio Laws 123.

⁴ *Botta* at 204.

doctrine, and required that the trial court only sentence for a single offense.⁵ In 1974, that statute was repealed and R.C. 2941.25 became effective.⁶ Under R.C. 2941.25, an “indictment or information may contain all counts [of allied offenses of similar import], but the defendant may be **convicted** of only one.”⁷

Looking at this pattern of development, we see that initially (1869-1929) the jury was responsible for deciding the offense for which it would convict. The result was the elimination the second or subsequent allied offense, which was similar in effect to the dismissal remedy ordered in Mr. Whitfield’s case. The next change in the statute (1929-1974), perhaps noting the jury’s limited role as a fact finder, allowed multiple convictions. This Court found multiple convictions appropriate, so long as allied offenses were merged for the purposes of sentencing.⁸ The current statute (1974-present), however, removed the authority for multiple convictions on allied offenses unless there was a separate animus for each. That was a significant change from the prior statute, which specifically authorized multiple convictions in all cases.⁹ The Committee Comments to House Bill 511 (Effective Jan. 1, 1974) for R.C. 2941.25 explain the legislature’s purpose in making that change. The comments state that R.C. 2941.25 is aimed at preventing “shotgun” convictions.¹⁰ While providing examples of allied offenses, the comments state that a

⁵ Id. at 201, 203.

⁶ 135 Ohio Laws, H.B. 716; 134 Ohio Laws, H.B. 511.

⁷ R.C. 2941.25 (emphasis added).

⁸ Supra, at fn 5; see, also, former R.C. 2941.04.

⁹ Compare R.C. 2941.25, with former R.C. 2941.24.

¹⁰ Committee Comments to 134 Ohio Laws, House Bill 511 (addressing the purpose behind R.C. 2941.25).

defendant may be charged with both offenses, “but he may be convicted of only one, and the prosecution sooner or later must elect as to which offense it wishes to pursue.”¹¹ Understanding the meaning of the current multicount statute (R.C. 2941.25) and the committee comments requires us to define “conviction.”

The Revised Code’s inconsistent use of the term “conviction,” in addition to differing judicial interpretations, provide insufficient guidance to courts, attorneys, and defendants as to the meaning of the term.

This Court’s historical analysis suggests that “conviction” means the jury’s finding of guilt. But more recent precedent has found that conviction, for the purposes of R.C. 2941.25, means both a finding of guilt and a sentence.¹² This Court has found that multiple findings of guilt with a single merged sentence was appropriate under the prior statute, which specifically authorized the jury to convict on multiple allied offenses.¹³ In so doing, this Court implicitly determined that the jury’s finding of guilt was a conviction for the purposes of the former statute.

This Court’s first significant examination of R.C. 2941.25 occurred in 1976 in *Maumee v. Geiger*.¹⁴ The *Maumee* Court examined a receiving stolen property case in which the defendants

¹¹ *Id.*

¹² *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, at ¶135; *State v. Waddy* (1992), 63 Ohio St.3d 424, 447, 588 N.E.2d 819. ; *State v. Poindexter* (1988), 36 Ohio St.3d 1, 5, 520 N.E.2d 568; *State v. Henderson* (1979), 58 Ohio St. 2d 171, 178, 389 N.E.2d 494

¹³ See *Botta*; Former R.C. 2941.24.

¹⁴ *Maumee v. Geiger* (1979), 45 Ohio St.2d 238, 244, 344 N.E.2d 133.

argued that statements admitting guilt to theft were improperly used against them because they were tried and convicted of receiving stolen property instead of theft.¹⁵ This Court found no error in the conviction and noted that R.C. 2941.25 states that “an accused may be tried for both [offenses] but may be **convicted and sentenced** for only one.”¹⁶ Further, this Court noted that it was the State’s choice which charge it elected to pursue.¹⁷ The *Maumee* decision shows this Court’s separation of the concepts of conviction and sentencing, and the attention paid to the committee comment requiring election on one charge.

This Court has found that conviction, in terms of R.C. 2941.25, occurs when there is both a finding of guilt and a sentence.¹⁸ This Court’s recent decisions in this area cite to the *Poindexter* decision in 1988, which itself cites to the 1979 decision in *Henderson*.¹⁹ The *Henderson* Court examined whether a clause requiring enhanced punishment for prior convictions could be triggered by a finding of guilt or plea when there had not yet been a sentence pronounced. There, this Court found ““that the word 'conviction' as used in statutes providing for increased punishment for persons formerly convicted of crime necessitates the

¹⁵ Id. at 239-40.

¹⁶ Id. at 244.

¹⁷ Id.

¹⁸ *Gapen* at ¶135; *State v. Waddy* at 447.

¹⁹ *Gapen* at ¶135 (citing *Poindexter* at 5); *Waddy* at 447 (citing *Poindexter* at 5); *Poindexter* at 5 (citing to *State v. Henderson* (1979), 58 Ohio St. 2d 171, 178, 389 N.E.2d 494).

pronouncement of sentence.”²⁰ *Henderson* was careful to note that its broader application of the term “conviction” was limited to “statutes providing for increased punishment.”²¹

Henderson has been undermined, or at least limited, by the subsequent decision of this Court in *State v. Cash*.²² There, this Court held that a prior unrelated guilty plea was sufficient to constitute a conviction for the purposes of Evid.R. 609(A), even though the sentence had not yet been entered.²³ In so holding, this Court specifically stated that *Henderson* related to use of a prior conviction for penalty enhancement, and *Cash* concerned use of a prior conviction as impeachment.²⁴ Distinguishing *Henderson* in that manner appears to limit it to the specific situation addressed, which makes it inappropriate to generalize the holding to the treatment of allied offenses. The other cited basis for the Court’s application of the *Henderson* conviction definition to allied offenses, *Poindexter*, contained only a brief few lines of analysis, and provided nothing like the detailed and broad-sweeping analysis utilized in *Henderson*.²⁵ Consequently, *Poindexter* and its progeny have applied “conviction” outside of its traditional use or the legislature’s expressed intent. For these reasons, additional analysis by this Court would assist other courts and parties.

²⁰ *Henderson* at 178 (citing to 5 A.L.R.2d 1080, 1104, Section 16).

²¹ *Id.*

²² *State v. Cash* (1988) 40 Ohio St.3d 116, 532 N.E.2d 111.

²³ *Id.* at 119.

²⁴ *Id.* at 118.

²⁵ Compare *Henderson*, with *Poindexter*.

Direct statutory analysis suggests that “conviction,” in R.C. 2941.25, should be interpreted to mean the judge’s or jury’s finding of guilt.

This Court provided a more detailed analysis in *Osborne*, which followed shortly after *Maumee*.²⁶ The *Osborne* Court suggested that receiving multiple findings of guilt from the jury after the trial court submitted multiple charges was not the same as conviction on multiple charges.²⁷ It also analyzed statutory use of the term “conviction,” and found that statutes employing the term interchangeably did so in order to describe the time between a finding of guilt and sentencing; between conviction and sentencing.²⁸ Put another way, this *Osborne* Court noted that the Ohio Revised code makes inconsistent use of “conviction,” but stated that usage inconsistent with a conviction occurring after sentence was in the code merely to describe the period between a jury’s finding of guilt and the resulting sentence. On that basis, the *Osborne* Court defined conviction as occurring after sentence.²⁹ But many criminal statutes use conviction to mean a finding of guilt, and do not refer to the time between the finding of guilt and sentencing. Revised Code 2901.07 addresses collection of a DNA specimen and states that:

(B)(1) Regardless of when the conviction occurred or the guilty plea was entered, a person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to a felony offense and who is sentenced to a prison term or to a community residential sanction * * * *

There is a clear delineation between conviction and sentencing in that statute, and it addresses a period after sentencing is complete. Similarly, R.C. 2929.12 addresses the seriousness of a crime

²⁶ *State v. Osborne* (1976), 49 Ohio St. 2d 135, 144, 359 N.E.2d 78.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

and recidivism factors. In addressing recidivism, it lists factors that a sentencing court must consider, which include:

(3) The offender has not been rehabilitated to a satisfactory degree after previously being adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or **the offender has not responded favorably to sanctions previously imposed for criminal convictions.**³⁰

Again this language separates conviction from resulting sanction, and addresses both at a point in time after each has occurred. Jail testing for hepatitis, HIV, and tuberculosis are covered by R.C. 2929.16(E), which states that:

(E) **If a person who has been convicted of or pleaded guilty to a felony is sentenced** to a community residential sanction * * * at the time of reception and at other times * * * the person in charge of the operation of [the facility] may cause the convicted offender to be examined and tested for tuberculosis, HIV infection, hepatitis, including but not limited to hepatitis A, B, and C, and other contagious diseases.³¹

Again, this section contemplates sentencing as a separate event from conviction. The “convicted of or pleaded guilty to” language is used pervasively throughout the Revised Code.

Additionally, many instances of this language are followed by instructions for the period between the finding of guilt and sentencing. One example is R.C. 2929.19, addressing sentencing, which begins with:

(A) The court shall hold a sentencing hearing before imposing a sentence under this chapter upon an offender who was convicted of or pleaded guilty to a felony and before resentencing an offender who was convicted of or pleaded guilty to a felony and whose case was remanded pursuant to section 2953.07 or 2953.08 of the Revised Code.

³⁰ R.C. 2929.12(D)(3) (emphasis added).

³¹ R.C. 2929.16(E) (emphasis added).

This usage of “convicted of or pleaded guilty to” suggests that conviction, much like a guilty plea, occurs prior to sentencing. The same conclusion can be reached in a different way by examining R.C. 2951.041, which allows for intervention in lieu of conviction and states:

(A)(1) If an offender is charged with a criminal offense and the court has reason to believe that drug or alcohol usage by the offender was a factor leading to the offender’s criminal behavior, the court may accept, prior to the entry of a guilty plea, the offender’s request for intervention in lieu of conviction.

Here the statute’s language requires that the request for intervention in lieu of conviction come before the plea, which suggests that the equivalent of a conviction has already taken place when a guilty plea is entered. This, again, supports interpreting “conviction” as a separate act from sentencing.

Most of the statutes cited above were passed into law after this Court’s interpretive decision in *Osborne*. Consequently, they provide this Court with new guidance on the general assembly’s meaning when using “conviction.” Additionally, the *Botta* Court, had previously determined that conviction meant the jury’s finding of guilt. That holding is apparent because *Botta* allowed multiple findings of guilt on allied offenses and merged them for sentencing under the former R.C. 2941.24, **which allowed multiple convictions**. Similarly, the former R.C. 2941.24 stated “the jury may convict,” which clearly illustrated the legislature’s intent that “conviction” relates to the jury’s finding of guilt.³² Currently, the statutory construction rules for offenses, stated in the Revised Code itself, require that statutes shall be “strictly construed against the state, and liberally construed in favor of the accused.”³³ If two or more offenses are allied, that is part of the nature of those offenses, and R.C. 2901.04 applies. For this reason, the

³² See *Botta*.

³³ R.C. 2901.04(A)

interpretive argument previously given should be examined with the legislative mandate for liberal construction in favor of the accused in mind.

Adoption of the State's position carries unintended consequences.

A sentence, in addition to a finding of guilt, is required for an order to be final and appealable.³⁴ Adoption of the State's position would prevent a final appealable order on the merged allied offenses because the merged offenses would have no sentence. Similarly, the State's position would prevent a complete judgment from being entered under Crim.R. 32(C). It would create a special regime for allied offenses in which the first order of the court would not resolve all of the charges. Each allied offense that was merged (not sentenced on) would remain in limbo and ready for the State to revive if the allied offense that it elected was reversed on appeal. Such a regime would undercut finality in decisions. Additionally, it would risk making the trial court and appellate court into a veritable ping-pong table, on which a reversal on appeal would result in a new sentence on a previously unsentenced charge and a fresh appeal. Then a reversal on that appeal would result in the case being remanded and a new sentence entered on another previously unsentenced charge. That pattern could continue, ad nauseum, until every allied offense had been separately charged and appealed. Even if each charge was separately defeated on appeal, the State could still take the defendant back for a new trial on the allied offenses, which is the State's traditional remedy for a reversal on appeal.

³⁴ *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, at ¶15 (citing *State v. Tripodo* (1977), 50 Ohio St.2d 124, 127, 363 N.E.2d 719).

Dismissal remains the appropriate appellate remedy for violation of R.C. 2941.25.

Ohio courts have been dismissing allied offenses since 1869, and likely earlier, as initially noted in the preceding explanation of the legal development of allied offenses. The word “conviction” refers to the jury’s finding of guilt, which former R.C. 2941.24 phrased as “the jury may convict.” The Committee Comments to House Bill 511, which enacted R.C. 2941.25, state that the earlier statute was changed to avoid “shotgun” convictions. By advancing its current argument, the State attempts to receive, through statutory construction, that which it was specifically prohibited by the plain language and explanatory comments to R.C. 2941.25; the State seeks to preserve a “shotgun” jury conviction on allied offenses in case the offense for which the defendant is sentenced should be overturned on appeal. The preceding arguments make clear that the State must elect, as noted in the Committee Comments to R.C. 2941.25, which charge it is preceding upon, prior to jury conviction. For all these reasons, dismissal remains the appropriate appellate remedy for violations of R.C. 2941.25.

CONCLUSION

On these bases, Mr. Whitfield asks that this Court find that “conviction” as used in R.C. 2941.25 applies to the jury’s finding of guilt, and the State must elect a charge (as noted in the committee comments to R.C. 2941.25) before the jury verdict. Consequently, Mr. Whitfield asks this Court to find that there was no error in dismissing one of the allied offenses on remand because that is that same result that would have occurred if the State had made a timely election under R.C. 2941.25.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



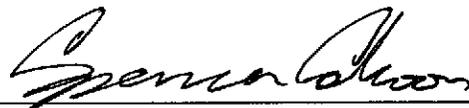
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CERTIFICATE OF SERVICE

The undersigned counsel certifies that a copy of the foregoing MERIT BRIEF OF APPELLEE DARNELL WHITFIELD was served by ordinary U.S. Mail, postage-prepaid, this 2 day of June, 2009 to Lisa Williamson and Mary McGrath, Assistant Prosecuting Attorneys, Cuyahoga County Prosecutor's Office, The Justice Center, 8th Floor, 1200 Ontario Street, Cleveland, Ohio 44113.



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DARNELL WHITFIELD,	:	
	:	C.A. Case No. 90244
Defendant-Appellee.	:	

APPENDIX TO MERIT BRIEF OF APPELLEE DARNELL WHITFIELD

LEXSTAT ORC 2901.04

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED
WITH THE SECRETARY OF STATE THROUGH MAY 1, 2009 ***
*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH APRIL 1, 2009 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2901. GENERAL PROVISIONS
IN GENERAL

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ORC Ann. 2901.04 (2009)

§ 2901.04. Rules of construction; references to previous conviction; interpretation of statutory references that define or specify a criminal offense

(A) Except as otherwise provided in division (C) or (D) of this section, sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.

(B) Rules of criminal procedure and sections of the Revised Code providing for criminal procedure shall be construed so as to effect the fair, impartial, speedy, and sure administration of justice.

(C) Any provision of a section of the Revised Code that refers to a previous conviction of or plea of guilty to a violation of a section of the Revised Code or of a division of a section of the Revised Code shall be construed to also refer to a previous conviction of or plea of guilty to a substantially equivalent offense under an existing or former law of this state, another state, or the United States or under an existing or former municipal ordinance.

(D) Any provision of the Revised Code that refers to a section, or to a division of a section, of the Revised Code that defines or specifies a criminal offense shall be construed to also refer to an existing or former law of this state, another state, or the United States, to an existing or former municipal ordinance, or to an existing or former division of any such existing or former law or ordinance that defines or specifies, or that defined or specified, a substantially equivalent offense.

134 v H 511 (Eff 1-1-74); 148 v S 107. Eff 3-23-2000; 150 v S 146, § 1, eff. 9-23-04.

LEXSTAT O.R.C. 2901.07

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TITLE 29. CRIMES -- PROCEDURE
 CHAPTER 2901. GENERAL PROVISIONS
 IN GENERAL

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ORC Ann. 2901.07 (2009)

§ 2901.07. DNA testing of offenders

(A) As used in this section:

(1) "DNA analysis" and "DNA specimen" have the same meanings as in *section 109.573 [109.57.3] of the Revised Code*.

(2) "Jail" and "community-based correctional facility" have the same meanings as in *section 2929.01 of the Revised Code*.

(3) "Post-release control" has the same meaning as in *section 2967.01 of the Revised Code*.

(B) (1) Regardless of when the conviction occurred or the guilty plea was entered, a person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to a felony offense and who is sentenced to a prison term or to a community residential sanction in a jail or community-based correctional facility for that offense pursuant to *section 2929.16 of the Revised Code*, and a person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to a misdemeanor offense listed in division (D) of this section and who is sentenced to a term of imprisonment for that offense shall submit to a DNA specimen collection procedure administered by the director of rehabilitation and correction or the chief administrative officer of the jail or other detention facility in which the person is serving the term of imprisonment. If the person serves the prison term in a state correctional institution, the director of rehabilitation and correction shall cause the DNA specimen to be collected from the person during the intake process at the reception facility designated by the director. If the person serves the community residential sanction or term of imprisonment in a jail, a community-based correctional facility, or another county, multicounty, municipal, municipal-county, or multicounty-municipal detention facility, the chief administrative officer of the jail, community-based correctional facility, or detention facility shall cause the DNA specimen to be collected from the person during the intake process at the jail, community-based correctional facility, or detention facility. The DNA specimen shall be collected in accordance with division (C) of this section.

(2) Regardless of when the conviction occurred or the guilty plea was entered, if a person has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to a felony offense or a misdemeanor offense listed in division (D) of this section, is serving a prison term, community residential sanction, or term of imprisonment for that offense, and does not provide a DNA specimen pursuant to division (B)(1) of this section, prior to the person's release from the prison term, community residential sanction, or imprisonment, the person shall submit to, and the director of rehabilitation and correction or the chief administrative officer of the jail, community-based correctional facility, or detention facility in which the person is serving the prison term, community residential sanction, or term of imprisonment shall administer, a DNA specimen collection procedure at the state correctional institution, jail, community-based correc-

tional facility, or detention facility in which the person is serving the prison term, community residential sanction, or term of imprisonment. The DNA specimen shall be collected in accordance with division (C) of this section.

(3) (a) Regardless of when the conviction occurred or the guilty plea was entered, if a person has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to a felony offense or a misdemeanor offense listed in division (D) of this section and the person is on probation, released on parole, under transitional control, on community control, on post-release control, or under any other type of supervised release under the supervision of a probation department or the adult parole authority for that offense, the person shall submit to a DNA specimen collection procedure administered by the chief administrative officer of the probation department or the adult parole authority. The DNA specimen shall be collected in accordance with division (C) of this section. If the person refuses to submit to a DNA specimen collection procedure as provided in this division, the person may be subject to the provisions of *section 2967.15 of the Revised Code*.

(b) If a person to whom division (B)(3)(a) of this section applies is sent to jail or is returned to a jail, community-based correctional facility, or state correctional institution for a violation of the terms and conditions of the probation, parole, transitional control, other release, or post-release control, if the person was or will be serving a term of imprisonment, prison term, or community residential sanction for committing a felony offense or for committing a misdemeanor offense listed in division (D) of this section, and if the person did not provide a DNA specimen pursuant to division (B)(1), (2) or (3)(a) of this section, the person shall submit to, and the director of rehabilitation and correction or the chief administrative officer of the jail or community-based correctional facility shall administer, a DNA specimen collection procedure at the jail, community-based correctional facility, or state correctional institution in which the person is serving the term of imprisonment, prison term, or community residential sanction. The DNA specimen shall be collected from the person in accordance with division (C) of this section.

(4) Regardless of when the conviction occurred or the guilty plea was entered, if a person has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to a felony offense or a misdemeanor offense listed in division (D) of this section, the person is not sentenced to a prison term, a community residential sanction in a jail or community-based correctional facility, a term of imprisonment, or any type of supervised release under the supervision of a probation department or the adult parole authority, and the person does not provide a DNA specimen pursuant to division (B)(1), (2), (3)(a), or (3)(b) of this section, the sentencing court shall order the person to report to the county probation department immediately after sentencing to submit to a DNA specimen collection procedure administered by the chief administrative officer of the county probation office. If the person is incarcerated at the time of sentencing, the person shall submit to a DNA specimen collection procedure administered by the director of rehabilitation and correction or the chief administrative officer of the jail or other detention facility in which the person is incarcerated. The DNA specimen shall be collected in accordance with division (C) of this section.

(C) If the DNA specimen is collected by withdrawing blood from the person or a similarly invasive procedure, a physician, registered nurse, licensed practical nurse, duly licensed clinical laboratory technician, or other qualified medical practitioner shall collect in a medically approved manner the DNA specimen required to be collected pursuant to division (B) of this section. If the DNA specimen is collected by swabbing for buccal cells or a similarly noninvasive procedure, this section does not require that the DNA specimen be collected by a qualified medical practitioner of that nature. No later than fifteen days after the date of the collection of the DNA specimen, the director of rehabilitation and correction or the chief administrative officer of the jail, community-based correctional facility, or other county, multi-county, municipal, municipal-county, or multicounty-municipal detention facility, in which the person is serving the prison term, community residential sanction, or term of imprisonment shall cause the DNA specimen to be forwarded to the bureau of criminal identification and investigation in accordance with procedures established by the superintendent of the bureau under division (H) of *section 109.573 [109.57.3] of the Revised Code*. The bureau shall provide the specimen vials, mailing tubes, labels, postage, and instructions needed for the collection and forwarding of the DNA specimen to the bureau.

(D) The director of rehabilitation and correction, the chief administrative officer of the jail, community-based correctional facility, or other county, multicounty, municipal, municipal-county, or multicounty-municipal detention facility, or the chief administrative officer of a county probation department or the adult parole authority shall cause a DNA specimen to be collected in accordance with divisions (B) and (C) of this section from a person in its custody or under its supervision who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to any felony offense or any of the following misdemeanor offenses:

(1) A misdemeanor violation, an attempt to commit a misdemeanor violation, or complicity in committing a misdemeanor violation of *section 2907.04 of the Revised Code*;

(2) A misdemeanor violation of any law that arose out of the same facts and circumstances and same act as did a charge against the person of a violation of *section 2903.01, 2903.02, 2905.01, 2907.02, 2907.03, 2907.04, 2907.05, or 2911.11 of the Revised Code* that previously was dismissed or amended or as did a charge against the person of a violation of *section 2907.12 of the Revised Code* as it existed prior to September 3, 1996, that previously was dismissed or amended;

(3) A misdemeanor violation of *section 2919.23 of the Revised Code* that would have been a violation of *section 2905.04 of the Revised Code* as it existed prior to July 1, 1996, had it been committed prior to that date;

(4) A sexually oriented offense or a child-victim oriented offense, both as defined in *section 2950.01 of the Revised Code*, that is a misdemeanor, if, in relation to that offense, the offender is a tier III sex offender/child-victim offender, as defined in *section 2950.01 of the Revised Code*.

(E) The director of rehabilitation and correction may prescribe rules in accordance with Chapter 119. of the Revised Code to collect a DNA specimen, as provided in this section, from an offender whose supervision is transferred from another state to this state in accordance with the interstate compact for adult offender supervision described in *section 5149.21 of the Revised Code*.

146 v H 5 (Eff 8-30-95); 146 v S 269 (Eff 7-1-96); 146 v H 180 (Eff 1-1-97); 146 v H 124 (Eff 3-31-97); 147 v S 111 (Eff 3-17-98); 147 v H 526 (Eff 9-1-98); 149 v H 427. Eff 8-29-2002; 150 v S 5, § 1, Eff 7-31-03; 150 v H 525, § 1, eff. 5-18-05; 151 v H 66, § 101.01, eff. 6-30-05*; 151 v S 262, § 1, eff. 7-11-06; 152 v S 10, § 1, eff. 1-1-08.

LEXSTAT ORC 2929.12

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ORC Ann. 2929.12 (2009)

§ 2929.12. Seriousness and recidivism factors

(A) Unless otherwise required by *section 2929.13* or *2929.14 of the Revised Code*, a court that imposes a sentence under this chapter upon an offender for a felony has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in *section 2929.11 of the Revised Code*. In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct and the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing.

(B) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is more serious than conduct normally constituting the offense:

- (1) The physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim.
- (2) The victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense.
- (3) The offender held a public office or position of trust in the community, and the offense related to that office or position.
- (4) The offender's occupation, elected office, or profession obliged the offender to prevent the offense or bring others committing it to justice.
- (5) The offender's professional reputation or occupation, elected office, or profession was used to facilitate the offense or is likely to influence the future conduct of others.
- (6) The offender's relationship with the victim facilitated the offense.
- (7) The offender committed the offense for hire or as a part of an organized criminal activity.
- (8) In committing the offense, the offender was motivated by prejudice based on race, ethnic background, gender, sexual orientation, or religion.
- (9) If the offense is a violation of *section 2919.25* or a violation of *section 2903.11, 2903.12, or 2903.13 of the Revised Code* involving a person who was a family or household member at the time of the violation, the offender

committed the offense in the vicinity of one or more children who are not victims of the offense, and the offender or the victim of the offense is a parent, guardian, custodian, or person in loco parentis of one or more of those children.

(C) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is less serious than conduct normally constituting the offense:

- (1) The victim induced or facilitated the offense.
- (2) In committing the offense, the offender acted under strong provocation.
- (3) In committing the offense, the offender did not cause or expect to cause physical harm to any person or property.
- (4) There are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense.

(D) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is likely to commit future crimes:

(1) At the time of committing the offense, the offender was under release from confinement before trial or sentencing, under a sanction imposed pursuant to *section 2929.16, 2929.17, or 2929.18 of the Revised Code*, or under post-release control pursuant to *section 2967.28* or any other provision of the Revised Code for an earlier offense or had been unfavorably terminated from post-release control for a prior offense pursuant to *division (B) of section 2967.16 or section 2929.141 [2929.14.1] of the Revised Code*.

(2) The offender previously was adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has a history of criminal convictions.

(3) The offender has not been rehabilitated to a satisfactory degree after previously being adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has not responded favorably to sanctions previously imposed for criminal convictions.

(4) The offender has demonstrated a pattern of drug or alcohol abuse that is related to the offense, and the offender refuses to acknowledge that the offender has demonstrated that pattern, or the offender refuses treatment for the drug or alcohol abuse.

(5) The offender shows no genuine remorse for the offense.

(E) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is not likely to commit future crimes:

- (1) Prior to committing the offense, the offender had not been adjudicated a delinquent child.
- (2) Prior to committing the offense, the offender had not been convicted of or pleaded guilty to a criminal offense.
- (3) Prior to committing the offense, the offender had led a law-abiding life for a significant number of years.
- (4) The offense was committed under circumstances not likely to recur.
- (5) The offender shows genuine remorse for the offense.

146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 148 v S 9 (Eff 3-8-2000); 148 v S 107 (Eff 3-23-2000); 148 v S 179, § 3 (Eff 1-1-2002); 149 v H 327. Eff 7-8-2002.

LEXSTAT ORC ANN. 2929.16

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ORC Ann. 2929.16 (2009)

§ 2929.16. Residential sanctions

(A) Except as provided in this division, the court imposing a sentence for a felony upon an offender who is not required to serve a mandatory prison term may impose any community residential sanction or combination of community residential sanctions under this section. The court imposing a sentence for a fourth degree felony OVI offense under division (G)(1) or (2) of *section 2929.13 of the Revised Code* or for a third degree felony OVI offense under division (G)(2) of that section may impose upon the offender, in addition to the mandatory term of local incarceration or mandatory prison term imposed under the applicable division, a community residential sanction or combination of community residential sanctions under this section, and the offender shall serve or satisfy the sanction or combination of sanctions after the offender has served the mandatory term of local incarceration or mandatory prison term required for the offense. Community residential sanctions include, but are not limited to, the following:

(1) A term of up to six months at a community-based correctional facility that serves the county;

(2) Except as otherwise provided in division (A)(3) of this section and subject to division (D) of this section, a term of up to six months in a jail;

(3) If the offender is convicted of a fourth degree felony OVI offense and is sentenced under division (G)(1) of *section 2929.13 of the Revised Code*, subject to division (D) of this section, a term of up to one year in a jail less the mandatory term of local incarceration of sixty or one hundred twenty consecutive days of imprisonment imposed pursuant to that division;

(4) A term in a halfway house;

(5) A term in an alternative residential facility.

(B) The court that assigns any offender convicted of a felony to a residential sanction under this section may authorize the offender to be released so that the offender may seek or maintain employment, receive education or training, or receive treatment. A release pursuant to this division shall be only for the duration of time that is needed to fulfill the purpose of the release and for travel that reasonably is necessary to fulfill the purposes of the release.

(C) If the court assigns an offender to a county jail that is not a minimum security misdemeanor jail in a county that has established a county jail industry program pursuant to *section 5147.30 of the Revised Code*, the court shall specify, as part of the sentence, whether the sheriff of that county may consider the offender for participation in the county jail industry program. During the offender's term in the county jail, the court shall retain jurisdiction to modify its specification upon a reassessment of the offender's qualifications for participation in the program.

(D) If a court sentences an offender to a term in jail under division (A)(2) or (3) of this section and if the sentence is imposed for a felony of the fourth or fifth degree that is not an offense of violence, the court may specify that it prefers that the offender serve the term in a minimum security jail established under *section 341.34 or 753.21 of the Revised Code*. If the court includes a specification of that type in the sentence and if the administrator of the appropriate minimum security jail or the designee of that administrator classifies the offender in accordance with *section 341.34 or 753.21 of the Revised Code* as a minimal security risk, the offender shall serve the term in the minimum security jail established under *section 341.34 or 753.21 of the Revised Code*. Absent a specification of that type and a finding of that type, the offender shall serve the term in a jail other than a minimum security jail established under *section 341.34 or 753.21 of the Revised Code*.

(E) If a person who has been convicted of or pleaded guilty to a felony is sentenced to a community residential sanction as described in division (A) of this section, at the time of reception and at other times the person in charge of the operation of the community-based correctional facility, jail, halfway house, alternative residential facility, or other place at which the offender will serve the residential sanction determines to be appropriate, the person in charge of the operation of the community-based correctional facility, jail, halfway house, alternative residential facility, or other place may cause the convicted offender to be examined and tested for tuberculosis, HIV infection, hepatitis, including but not limited to hepatitis A, B, and C, and other contagious diseases. The person in charge of the operation of the community-based correctional facility, jail, halfway house, alternative residential facility, or other place at which the offender will serve the residential sanction may cause a convicted offender in the community-based correctional facility, jail, halfway house, alternative residential facility, or other place who refuses to be tested or treated for tuberculosis, HIV infection, hepatitis, including but not limited to hepatitis A, B, and C, or another contagious disease to be tested and treated involuntarily.

146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v H 480 (Eff 10-16-96); 146 v S 166 (Eff 10-17-96); 146 v H 72 (Eff 3-18-97); 147 v S 111 (Eff 3-17-98); 148 v S 22. Eff 5-17-2000; 149 v S 123, § 1, eff. 1-1-04; 150 v H 163, § 1, eff. 9-23-04.

LEXSTAT ORC ANN. 2929.19

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§ 2929.19. Sentencing hearing

(A) The court shall hold a sentencing hearing before imposing a sentence under this chapter upon an offender who was convicted of or pleaded guilty to a felony and before resentencing an offender who was convicted of or pleaded guilty to a felony and whose case was remanded pursuant to *section 2953.07 or 2953.08 of the Revised Code*. At the hearing, the offender, the prosecuting attorney, the victim or the victim's representative in accordance with *section 2930.14 of the Revised Code*, and, with the approval of the court, any other person may present information relevant to the imposition of sentence in the case. The court shall inform the offender of the verdict of the jury or finding of the court and ask the offender whether the offender has anything to say as to why sentence should not be imposed upon the offender.

(B) (1) At the sentencing hearing, the court, before imposing sentence, shall consider the record, any information presented at the hearing by any person pursuant to division (A) of this section, and, if one was prepared, the presentence investigation report made pursuant to *section 2951.03 of the Revised Code* or *Criminal Rule 32.2*, and any victim impact statement made pursuant to *section 2947.051 [2947.05.1] of the Revised Code*.

(2) The court shall impose a sentence and shall make a finding that gives its reasons for selecting the sentence imposed in any of the following circumstances:

(a) Unless the offense is a violent sex offense or designated homicide, assault, or kidnapping offense for which the court is required to impose sentence pursuant to division (G) of *section 2929.14 of the Revised Code*, if it imposes a prison term for a felony of the fourth or fifth degree or for a felony drug offense that is a violation of a provision of Chapter 2925. of the Revised Code and that is specified as being subject to division (B) of *section 2929.13 of the Revised Code* for purposes of sentencing, its reasons for imposing the prison term, based upon the overriding purposes and principles of felony sentencing set forth in *section 2929.11 of the Revised Code*, and any factors listed in divisions (B)(1)(a) to (i) of *section 2929.13 of the Revised Code* that it found to apply relative to the offender.

(b) If it does not impose a prison term for a felony of the first or second degree or for a felony drug offense that is a violation of a provision of Chapter 2925. of the Revised Code and for which a presumption in favor of a prison term is specified as being applicable, its reasons for not imposing the prison term and for overriding the presumption, based upon the overriding purposes and principles of felony sentencing set forth in *section 2929.11 of the Revised Code*, and the basis of the findings it made under divisions (D)(1) and (2) of *section 2929.13 of the Revised Code*.

(c) If it imposes consecutive sentences under *section 2929.14 of the Revised Code*, its reasons for imposing the consecutive sentences;

(d) If the sentence is for one offense and it imposes a prison term for the offense that is the maximum prison term allowed for that offense by division (A) of *section 2929.14 of the Revised Code* or *section 2929.142 [2929.14.2] of the Revised Code*, its reasons for imposing the maximum prison term;

(e) If the sentence is for two or more offenses arising out of a single incident and it imposes a prison term for those offenses that is the maximum prison term allowed for the offense of the highest degree by division (A) of *section 2929.14 of the Revised Code* or *section 2929.142 [2929.14.2] of the Revised Code*, its reasons for imposing the maximum prison term.

(3) Subject to division (B)(4) of this section, if the sentencing court determines at the sentencing hearing that a prison term is necessary or required, the court shall do all of the following:

(a) Impose a stated prison term and, if the court imposes a mandatory prison term, notify the offender that the prison term is a mandatory prison term;

(b) In addition to any other information, include in the sentencing entry the name and section reference to the offense or offenses, the sentence or sentences imposed and whether the sentence or sentences contain mandatory prison terms, if sentences are imposed for multiple counts whether the sentences are to be served concurrently or consecutively, and the name and section reference of any specification or specifications for which sentence is imposed and the sentence or sentences imposed for the specification or specifications;

(c) Notify the offender that the offender will be supervised under *section 2967.28 of the Revised Code* after the offender leaves prison if the offender is being sentenced for a felony of the first degree or second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person. If a court imposes a sentence including a prison term of a type described in division (B)(3)(c) of this section on or after July 11, 2006, the failure of a court to notify the offender pursuant to division (B)(3)(c) of this section that the offender will be supervised under *section 2967.28 of the Revised Code* after the offender leaves prison or to include in the judgment of conviction entered on the journal a statement to that effect does not negate, limit, or otherwise affect the mandatory period of supervision that is required for the offender under division (B) of *section 2967.28 of the Revised Code*. *Section 2929.191 [2929.19.1] of the Revised Code* applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in division (B)(3)(c) of this section and failed to notify the offender pursuant to division (B)(3)(c) of this section regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence a statement regarding post-release control.

(d) Notify the offender that the offender may be supervised under *section 2967.28 of the Revised Code* after the offender leaves prison if the offender is being sentenced for a felony of the third, fourth, or fifth degree that is not subject to division (B)(3)(c) of this section. *Section 2929.191 [2929.19.1] of the Revised Code* applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in division (B)(3)(d) of this section and failed to notify the offender pursuant to division (B)(3)(d) of this section regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence a statement regarding post-release control.

(e) Notify the offender that, if a period of supervision is imposed following the offender's release from prison, as described in division (B)(3)(c) or (d) of this section, and if the offender violates that supervision or a condition of post-release control imposed under division (B) of *section 2967.131 [2967.13.1] of the Revised Code*, the parole board may impose a prison term, as part of the sentence, of up to one-half of the stated prison term originally imposed upon the offender. If a court imposes a sentence including a prison term on or after July 11, 2006, the failure of a court to notify the offender pursuant to division (B)(3)(e) of this section that the parole board may impose a prison term as described in division (B)(3)(e) of this section for a violation of that supervision or a condition of post-release control imposed under division (B) of *section 2967.131 [2967.13.1] of the Revised Code* or to include in the judgment of conviction entered on the journal a statement to that effect does not negate, limit, or otherwise affect the authority of the parole board to so impose a prison term for a violation of that nature if, pursuant to division (D)(1) of *section 2967.28 of the Revised Code*, the parole board notifies the offender prior to the offender's release of the board's authority to so impose a prison term. *Section 2929.191 [2929.19.1] of the Revised Code* applies if, prior to July 11, 2006, a court imposed a sentence including a prison term and failed to notify the offender pursuant to division (B)(3)(e) of this section regarding the possibility of the parole board imposing a prison term for a violation of supervision or a condition of post-release control.

(f) Require that the offender not ingest or be injected with a drug of abuse and submit to random drug testing as provided in *section 341.26, 753.33, or 5120.63 of the Revised Code*, whichever is applicable to the offender who is serving a prison term, and require that the results of the drug test administered under any of those sections indicate that the offender did not ingest or was not injected with a drug of abuse.

(4) (a) The court shall include in the offender's sentence a statement that the offender is a tier III sex offender/child-victim offender, and the court shall comply with the requirements of *section 2950.03 of the Revised Code* if any of the following apply:

(i) The offender is being sentenced for a violent sex offense or designated homicide, assault, or kidnapping offense that the offender committed on or after January 1, 1997, and the offender is adjudicated a sexually violent predator in relation to that offense.

(ii) The offender is being sentenced for a sexually oriented offense that the offender committed on or after January 1, 1997, and the offender is a tier III sex offender/child-victim offender relative to that offense.

(iii) The offender is being sentenced on or after July 31, 2003, for a child-victim oriented offense, and the offender is a tier III sex offender/child-victim offender relative to that offense.

(iv) The offender is being sentenced under *section 2971.03 of the Revised Code* for a violation of division (A)(1)(b) of *section 2907.02 of the Revised Code* committed on or after January 2, 2007.

(v) The offender is sentenced to a term of life without parole under division (B) of *section 2907.02 of the Revised Code*.

(vi) The offender is being sentenced for attempted rape committed on or after January 2, 2007, and a specification of the type described in *section 2941.1418 [2941.14.18], 2941.1419 [2941.14.19], or 2941.1420 [2941.14.20] of the Revised Code*.

(vii) The offender is being sentenced under division (B)(3)(a), (b), (c), or (d) of *section 2971.03 of the Revised Code* for an offense described in those divisions committed on or after January 1, 2008.

(b) Additionally, if any criterion set forth in divisions (B)(4)(a)(i) to (vii) of this section is satisfied, in the circumstances described in division (G) of *section 2929.14 of the Revised Code*, the court shall impose sentence on the offender as described in that division.

(5) If the sentencing court determines at the sentencing hearing that a community control sanction should be imposed and the court is not prohibited from imposing a community control sanction, the court shall impose a community control sanction. The court shall notify the offender that, if the conditions of the sanction are violated, if the offender commits a violation of any law, or if the offender leaves this state without the permission of the court or the offender's probation officer, the court may impose a longer time under the same sanction, may impose a more restrictive sanction, or may impose a prison term on the offender and shall indicate the specific prison term that may be imposed as a sanction for the violation, as selected by the court from the range of prison terms for the offense pursuant to *section 2929.14 of the Revised Code*.

(6) Before imposing a financial sanction under *section 2929.18 of the Revised Code* or a fine under *section 2929.32 of the Revised Code*, the court shall consider the offender's present and future ability to pay the amount of the sanction or fine.

(7) If the sentencing court sentences the offender to a sanction of confinement pursuant to *section 2929.14 or 2929.16 of the Revised Code* that is to be served in a local detention facility, as defined in *section 2929.36 of the Revised Code*, and if the local detention facility is covered by a policy adopted pursuant to *section 307.93, 341.14, 341.19, 341.21, 341.23, 753.02, 753.04, 753.16, 2301.56, or 2947.19 of the Revised Code* and *section 2929.37 of the Revised Code*, both of the following apply:

(a) The court shall specify both of the following as part of the sentence:

(i) If the offender is presented with an itemized bill pursuant to *section 2929.37 of the Revised Code* for payment of the costs of confinement, the offender is required to pay the bill in accordance with that section.

(ii) If the offender does not dispute the bill described in division (B)(7)(a)(i) of this section and does not pay the bill by the times specified in *section 2929.37 of the Revised Code*, the clerk of the court may issue a certificate of judgment against the offender as described in that section.

(b) The sentence automatically includes any certificate of judgment issued as described in division (B)(7)(a)(ii) of this section.

(8) The failure of the court to notify the offender that a prison term is a mandatory prison term pursuant to division (B)(3)(a) of this section or to include in the sentencing entry any information required by division (B)(3)(b) of this section does not affect the validity of the imposed sentence or sentences. If the sentencing court notifies the offender at the sentencing hearing that a prison term is mandatory but the sentencing entry does not specify that the prison term is mandatory, the court may complete a corrected journal entry and send copies of the corrected entry to the offender and the department of rehabilitation and correction, or, at the request of the state, the court shall complete a corrected journal entry and send copies of the corrected entry to the offender and department of rehabilitation and correction.

(C) (1) If the offender is being sentenced for a fourth degree felony OVI offense under division (G)(1) of *section 2929.13 of the Revised Code*, the court shall impose the mandatory term of local incarceration in accordance with that division, shall impose a mandatory fine in accordance with division (B)(3) of *section 2929.18 of the Revised Code*, and, in addition, may impose additional sanctions as specified in *sections 2929.15, 2929.16, 2929.17, and 2929.18 of the Revised Code*. The court shall not impose a prison term on the offender except that the court may impose a prison term upon the offender as provided in division (A)(1) of *section 2929.13 of the Revised Code*.

(2) If the offender is being sentenced for a third or fourth degree felony OVI offense under division (G)(2) of *section 2929.13 of the Revised Code*, the court shall impose the mandatory prison term in accordance with that division, shall impose a mandatory fine in accordance with division (B)(3) of *section 2929.18 of the Revised Code*, and, in addition, may impose an additional prison term as specified in *section 2929.14 of the Revised Code*. In addition to the mandatory prison term or mandatory prison term and additional prison term the court imposes, the court also may impose a community control sanction on the offender, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

(D) The sentencing court, pursuant to division (K) of *section 2929.14 of the Revised Code*, may recommend placement of the offender in a program of shock incarceration under *section 5120.031 [5120.03.1] of the Revised Code* or an intensive program prison under *section 5120.032 [5120.03.2] of the Revised Code*, disapprove placement of the offender in a program or prison of that nature, or make no recommendation. If the court recommends or disapproves placement, it shall make a finding that gives its reasons for its recommendation or disapproval.

146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v S 166 (Eff 10-17-96); 146 v H 180 (Eff 1-1-97); 148 v S 107 (Eff 3-23-2000); 148 v S 22 (Eff 5-17-2000); 148 v H 349 (Eff 9-22-2000); 149 v H 485 (Eff 6-13-2002); 149 v H 327 (Eff 7-8-2002); 149 v H 170. Eff 9-6-2002; 149 v H 490, § 1, eff. 1-1-04; 149 v S 123, § 1, eff. 1-1-04; 150 v S 5, § 1, Eff 7-31-03; 150 v S 5, § 3, eff. 1-1-04; 150 v H 163, § 1, eff. 9-23-04; 150 v H 473, § 1, eff. 4-29-05; 151 v H 137, § 1, eff. 7-11-06; 151 v S 260, § 1, eff. 1-2-07; 151 v H 461, § 1, eff. 4-4-07; 152 v S 10, § 1, eff. 1-1-08; 152 v H 130, § 1, eff. 4-7-09.

LEXSTAT ORC ANN. 2951.041

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED
 WITH THE SECRETARY OF STATE THROUGH MAY 1, 2009 ***
 *** ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 ***
 *** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH APRIL 1, 2009 ***

TITLE 29. CRIMES -- PROCEDURE
 CHAPTER 2951. PROBATION

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ORC Ann. 2951.041 (2009)

§ 2951.041. Intervention in lieu of conviction

(A) (1) If an offender is charged with a criminal offense and the court has reason to believe that drug or alcohol usage by the offender was a factor leading to the offender's criminal behavior, the court may accept, prior to the entry of a guilty plea, the offender's request for intervention in lieu of conviction. The request shall include a waiver of the defendant's right to a speedy trial, the preliminary hearing, the time period within which the grand jury may consider an indictment against the offender, and arraignment, unless the hearing, indictment, or arraignment has already occurred. The court may reject an offender's request without a hearing. If the court elects to consider an offender's request, the court shall conduct a hearing to determine whether the offender is eligible under this section for intervention in lieu of conviction and shall stay all criminal proceedings pending the outcome of the hearing. If the court schedules a hearing, the court shall order an assessment of the offender for the purpose of determining the offender's eligibility for intervention in lieu of conviction and recommending an appropriate intervention plan.

(2) The victim notification provisions of division (C) of *section 2930.08 of the Revised Code* apply in relation to any hearing held under division (A) (1) of this section.

(B) An offender is eligible for intervention in lieu of conviction if the court finds all of the following:

(1) The offender previously has not been convicted of or pleaded guilty to a felony, previously has not been through intervention in lieu of conviction under this section or any similar regimen, and is charged with a felony for which the court, upon conviction, would impose sentence under division (B) (2) (b) of *section 2929.13 of the Revised Code* or with a misdemeanor.

(2) The offense is not a felony of the first, second, or third degree, is not an offense of violence, is not a violation of division (A) (1) or (2) of *section 2903.06 of the Revised Code*, is not a violation of division (A) (1) of *section 2903.08 of the Revised Code*, is not a violation of division (A) of *section 4511.19 of the Revised Code* or a municipal ordinance that is substantially similar to that division, and is not an offense for which a sentencing court is required to impose a mandatory prison term, a mandatory term of local incarceration, or a mandatory term of imprisonment in a jail.

(3) The offender is not charged with a violation of *section 2925.02, 2925.03, 2925.04, or 2925.06 of the Revised Code* and is not charged with a violation of *section 2925.11 of the Revised Code* that is a felony of the first, second, or third degree.

(4) The offender is not charged with a violation of *section 2925.11 of the Revised Code* that is a felony of the fourth degree, or the offender is charged with a violation of that section that is a felony of the fourth degree and the prosecutor in the case has recommended that the offender be classified as being eligible for intervention in lieu of conviction under this section.

(5) The offender has been assessed by an appropriately licensed provider, certified facility, or licensed and credentialed professional, including, but not limited to, a program licensed by the department of alcohol and drug addiction services pursuant to *section 3793.11 of the Revised Code*, a program certified by that department pursuant to *section 3793.06 of the Revised Code*, a public or private hospital, the United States department of veterans affairs, another appropriate agency of the government of the United States, or a licensed physician, psychiatrist, psychologist, independent social worker, professional counselor, or chemical dependency counselor for the purpose of determining the offender's eligibility for intervention in lieu of conviction and recommending an appropriate intervention plan.

(6) The offender's drug or alcohol usage was a factor leading to the criminal offense with which the offender is charged, intervention in lieu of conviction would not demean the seriousness of the offense, and intervention would substantially reduce the likelihood of any future criminal activity.

(7) The alleged victim of the offense was not sixty-five years of age or older, permanently and totally disabled, under thirteen years of age, or a peace officer engaged in the officer's official duties at the time of the alleged offense.

(8) If the offender is charged with a violation of *section 2925.24 of the Revised Code*, the alleged violation did not result in physical harm to any person, and the offender previously has not been treated for drug abuse.

(9) The offender is willing to comply with all terms and conditions imposed by the court pursuant to division (D) of this section.

(C) At the conclusion of a hearing held pursuant to division (A) of this section, the court shall enter its determination as to whether the offender is eligible for intervention in lieu of conviction and as to whether to grant the offender's request. If the court finds under division (B) of this section that the offender is eligible for intervention in lieu of conviction and grants the offender's request, the court shall accept the offender's plea of guilty and waiver of the defendant's right to a speedy trial, the preliminary hearing, the time period within which the grand jury may consider an indictment against the offender, and arraignment, unless the hearing, indictment, or arraignment has already occurred. In addition, the court then may stay all criminal proceedings and order the offender to comply with all terms and conditions imposed by the court pursuant to division (D) of this section. If the court finds that the offender is not eligible or does not grant the offender's request, the criminal proceedings against the offender shall proceed as if the offender's request for intervention in lieu of conviction had not been made.

(D) If the court grants an offender's request for intervention in lieu of conviction, the court shall place the offender under the general control and supervision of the county probation department, the adult parole authority, or another appropriate local probation or court services agency, if one exists, as if the offender was subject to a community control sanction imposed under *section 2929.15, 2929.18, or 2929.25 of the Revised Code*. The court shall establish an intervention plan for the offender. The terms and conditions of the intervention plan shall require the offender, for at least one year from the date on which the court grants the order of intervention in lieu of conviction, to abstain from the use of illegal drugs and alcohol, to participate in treatment and recovery support services, and to submit to regular random testing for drug and alcohol use and may include any other treatment terms and conditions, or terms and conditions similar to community control sanctions, which may include community service or restitution, that are ordered by the court.

(E) If the court grants an offender's request for intervention in lieu of conviction and the court finds that the offender has successfully completed the intervention plan for the offender, including the requirement that the offender abstain from using drugs and alcohol for a period of at least one year from the date on which the court granted the order of intervention in lieu of conviction and all other terms and conditions ordered by the court, the court shall dismiss the proceedings against the offender. Successful completion of the intervention plan and period of abstinence under this section shall be without adjudication of guilt and is not a criminal conviction for purposes of any disqualification or disability imposed by law and upon conviction of a crime, and the court may order the sealing of records related to the offense in question in the manner provided in *sections 2953.31 to 2953.36 of the Revised Code*.

(F) If the court grants an offender's request for intervention in lieu of conviction and the offender fails to comply with any term or condition imposed as part of the intervention plan for the offender, the supervising authority for the offender promptly shall advise the court of this failure, and the court shall hold a hearing to determine whether the offender failed to comply with any term or condition imposed as part of the plan. If the court determines that the offender has failed to comply with any of those terms and conditions, it shall enter a finding of guilty and shall impose an appropriate sanction under Chapter 2929. of the Revised Code. If the court sentences the offender to a prison term, the court, after consulting with the department of rehabilitation and correction regarding the availability of services, may order continued court-supervised activity and treatment of the offender during the prison term and, upon consideration of re-

ports received from the department concerning the offender's progress in the program of activity and treatment, may consider judicial release under *section 2929.20 of the Revised Code*.

(G) As used in this section:

- (1) "Community control sanction" has the same meaning as in *section 2929.01 of the Revised Code*.
- (2) "Intervention in lieu of conviction" means any court-supervised activity that complies with this section.
- (3) "Peace officer" has the same meaning as in *section 2935.01 of the Revised Code*.

148 v H 202 (Eff 2-9-2000); 148 v S 107 (Eff 3-23-2000); 149 v H 327. Eff 7-8-2002; 149 v H 490, § 1, eff. 1-1-04; 152 v H 130, § 1, eff. 4-7-09.

true name is unknown to the jury or prosecuting attorney, but no name shall be stated in addition to one necessary to identify the accused;

(D) That an offense was committed at some place within the jurisdiction of the court, except where the act, though done without the local jurisdiction of the county, is triable therein;

(E) That the offense was committed at some time prior to the time of finding of the indictment or filing of the information.

HISTORY: GC § 13437-2; 113 v 123 (162), ch.16, § 2. Eff 10-1-53.

Cross-References to Related Sections

Sufficiency of indictment under act defining trusts, RC § 1331.09.

Comparative Legislation

Sufficiency of indictment:

- Cal.—Deering, Penal Code, § 959
- Ind.—Burns' Stat, 1942 Repl, § 9-1126
- Mass.—Ann Laws, ch 277, § 33
- Mich.—Stats Ann, § 28.985
- N.Y.—Consol Laws, Crim, § 284
- Penn.—Purdon's Stat, tit 19, § 261
- Tenn.—Williams' Code, § 11624

Construction of words used in an indictment or affidavit:

- Cal.—Deering, Penal Code, § 957
- Ind.—Burns' Stat, 1942 Repl, § 9-1125
- Ky.—Carroll's Cr Code 1948, § 137
- Mass.—Ann Laws, ch 277, § 39
- Mich.—Stats Ann, § 28.985
- N.Y.—Consol Laws, Crim, § 282
- Penn.—Purdon's Stat, tit 19, § 261

Forms

General form of indictment. Schneider No.512.

Research Aids

Formal requisites:

- Page: Indictment § 5 et seq
- O-Jur: Indictment § 18 et seq
- Am-Jur: Indictment § 35 et seq

Sufficiency:

- Page: Indictment § 15 et seq
- O-Jur: Indictment § 27 et seq
- Am-Jur: Indictment § 51 et seq

Necessity of alleging in information or indictment that act was unlawful. 169 ALR 166.

Necessity of alleging specific facts or means in charging one as accessory before or after the fact. 116 ALR 1104.

Sufficiency of charging in words of statute offense relating to operation of automobile. 115 ALR 357.

CASE NOTES

1. Where an indictment for embezzlement does not show jurisdiction in the court under subsec. 4 [now (D)] of this section, an amendment may be allowed under GC § 13437-29 (RC § 2941.30) showing the proper venue, and such interpretation does not violate Art. I, § 10 of the constitution: *Breinig v. State*, 124 OS 39, 176 NE 39.

2. An unsigned affidavit is without legal effect and cannot be the basis of a criminal prosecution: *State v. Williams*, 14 OLA 637.

3. The omission of a jurat from the affidavit is not fatal to its validity unless made so by statute, where it appears that the affidavit was properly sworn to before a proper officer: *Taxis v. Oakwood*, 19 OLA 498.

§ 2941.04 Two or more offenses in one indictment. (GC § 13437-3)

An indictment or information may charge two or more different offenses connected together in their commission, or different statements of the same offense, or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more indictments or informations are filed in such cases the court may order them to be consolidated.

The prosecution is not required to elect between the different offenses or counts set forth in the indictment or information, but the defendant may be convicted of any number of the offenses charged, and each offense upon which the defendant is convicted must be stated in the verdict. The court in the interest of justice and for good cause shown, may order different offenses or counts set forth in the indictment or information tried separately or divided into two or more groups and each of said groups tried separately. A verdict of acquittal of one or more counts is not an acquittal of any other count.

HISTORY: GC § 13437-3; 113 v 123 (162), ch.16, § 3. Eff 10-1-53.

Cross-References to Related Sections

Proceedings when two indictments pending, RC § 2941.32.

Comparative Legislation

Joinder of offenses:

- Cal.—Deering, Penal Code, § 954
- Ind.—Burns' Stat, 1942 Repl, § 9-1113
- Ky.—Carroll's Crim Code, 1948, § 127
- Mass.—Ann Laws, ch 277, § 46
- Mich.—Stats Ann, § 28.1008 et seq
- N.Y.—Consol Laws, Crim, § 295-a
- Penn.—Purdon's Stat, tit 19, §§ 411, 412
- Tenn.—Williams' Code, § 11641
- W.Va.—Code 1949, § 6188

Research Aids

Joinder of counts:

- Page: Indictment § 47
- O-Jur: Indictment § 96 et seq
- Am-Jur: Indictment § 129 et seq

Joint or separate trials and consolidation:

- Page: Crim. Law § 315
- O-Jur: Crim. Law § 907, Indictment § 101a, Larceny § 43, Rec. Stolen Goods § 18
- Am-Jur: Appeal & Error § 1043, Indictment §§ 7, 136

Election between counts:

- Page: Indictment § 48
- O-Jur: Crim. Law § 908, Indictment §§ 102, 103, Larceny § 46
- Am-Jur: Appeal & Error § 1043, Indictment §§ 133 to 135, Larceny § 102

Verdict where indictment contains more than one count:

- Page: Crim. Law § 399
- O-Jur: Crim. Law § 612
- Am-Jur: Trial §§ 1044, 1045

INDEX TO CASE NOTES

Consolidation of indictments, 1 et seq
Two or more offenses, 1-4

and for buying, receiving, or concealing it, knowing it to have been stolen, or any of such counts, and the jury may convict of any of such offenses and find any or all of the persons indicted guilty of any of such offenses.

HISTORY: GC § 13437-23; 113 v 123 (168), ch.16, § 23. Eff 10-1-53. Analogous to former GC § 13594.

Cross-References to Related Sections

Embezzlement, RC §§ 2907.34 et seq, 2919.01 et seq.
False pretenses, RC § 2911.01.
Larceny, RC § 2907.20.
Receiving stolen property, RC § 2907.30.

Comparative Legislation

Joinder of counts in an indictment for larceny:
Cal.—Deering, Penal Code, § 987
Ind.—Burns' Stat, 1942 Repl, § 9-1114
Ky.—Carroll's Cr Code 1948, § 127
Mass.—Ann Laws, ch 277, § 41
Mich.—Stats Ann, § 28.1009
Penn.—Purdon's Stat, tit 19, § 411
Tenn.—Williams' Code, § 11641
W.Va.—Code 1949, § 6188

Research Aids

Joinder of counts:
Page: Embezzlement § 16, False Pre. § 6, Indictment §§ 47, 48, Larceny § 12, Rec. Stolen Prop. § 5
O-Jur: Embezzlement §§ 14, 42, False Pre. § 43, Indictment §§ 98, 100, Larceny §§ 45, 46, Rec. Stolen Goods § 15
Am-Jur: Embezzlement §§ 42 to 55, False Pre. §§ 90 to 98, Indictment §§ 129, 130, Larceny § 102, Rec. Stolen Goods § 13

CASE NOTES

1. Where, in an indictment for larceny, a count is added under the provisions of this section for receiving stolen property, knowing it to have been stolen, without an averment that it is the same property, the state cannot be required to elect on which count it will proceed, where it appears from the description to be the same property, and no motion has been made to quash upon that specific ground: *Whiting v. State*, 48 OS 220, 27 NE 96.

2. Where two closely allied offenses arise from the same transaction, and may be established by substantially the same evidence, both may be included in separate counts of the same indictment. Thus, if one count charges the embezzlement of goods, and another the embezzlement of money procured by their sale, the indictment is good and the state cannot be required to elect: *State v. Bailey*, 50 OS 636, 36 NE 233.

3. A prosecution for receiving stolen goods stands in some respects on the same footing as one for larceny, and an allegation of a special property right in a bailee or carrier of the goods which were stolen and received by accused is sufficient: *Kasle v. United States*, 233 Fed 878, 61 Bull 307.

§ 2941.25 Bank bills. (GC § 13437-24)

In an indictment or information in which it is necessary to make an allegation as to money, bank bills, notes, United States treasury notes, postal currency, or other bills, bonds, or notes, issued by lawful authority and intended to pass and circulate as money, it is sufficient to describe

such money, bills, notes, currency, or bonds as money, without specifying a particular coin, note, bill, or bond. Such allegation is sustained by proof of any amount of coin, or any such note, bill, currency, or bond, although the particular species of coin of which such amount was composed or the particular nature of such note, bill, currency, or bond is not proved.

HISTORY: GC § 13437-24; 113 v 123 (168), ch. 16, § 24. Eff 10-1-53. Analogous to former GC § 13595.

Comparative Legislation

Averments as to money in indictment:
Ind.—Burns' Stat, 1942 Repl, § 9-1118
Mass.—Ann Laws, ch 277, § 23
Mich.—Stats Ann, § 28.1001
Tenn.—Williams' Code, § 11644

Research Aids

Description of money:
Page: Counterfeiting § 4, Indictment §§ 31, 78
O-Jur: Counterfeiting § 33, Forgery §§ 19, 33, Indictment § 48
Am-Jur: Counterfeiting § 7, Forgery §§ 47, 48, 53, Indictment § 84

CASE NOTES

1. In an indictment which charges that the accused "unlawfully and feloniously did steal money of the amount and value of fifty-five dollars the property of," etc., the property stolen is sufficiently described under this section, although the indictment does not show what kind of money is charged to have been stolen, or that it was issued by lawful authority, or that it was intended to pass or circulate as money: *McDivit v. State*, 20 OS 231.

§ 2941.26 Variance. (GC § 13437-25)

When, on the trial of an indictment or information, there appears to be a variance between the statement in such indictment or information and the evidence offered in proof thereof, in the Christian name or surname, or other description of a person therein named or described, or in the name or description of a matter or thing therein named or described, such variance is not ground for an acquittal of the defendant unless the court before which the trial is had finds that such variance is material to the merits of the case or may be prejudicial to the defendant.

HISTORY: GC § 13437-25; 113 v 123 (168), ch.16, § 25. Eff 10-1-53. Analogous to former GC § 13582.

Cross-References to Related Sections

Variance between pleadings and proof, RC § 2317.-49 et seq.

Entries

Prisoner discharged for variance, etc. Wild No. 1280.

Research Aids

Variance between allegations and proof:
Page: Burglary § 19, False Pre. § 9, Homicide § 34, Indictment § 68 et seq
O-Jur2d: Arson § 15
O-Jur: Burglary § 37, Crim. Law §§ 854, 889, Embezzlement § 51, Indictment § 139 et seq, Intox. Liq. § 128, Perjury § 26

kind of liquor sold, nor the person by whom bought except that such charge must be sufficient to inform the accused of the particular offense with which he is charged.

HISTORY: GC § 13437-19; 113 v 123 (167), ch.16, § 19. Eff 10-1-53. Analogous to former GC §§ 13588, 13589.

Research Aids

Intoxicating liquor—indictment:

Page: Indictment §§ 28, 29, Intox. Liq. § 87
O-Jur: Indictment §§ 45, 47, Intox. Liq. §§ 118, 119
Am-Jur: Indictment §§ 81 to 85, Intox. Liq. §§ 382, 389

CASE NOTES

See also case notes under RC § 4399.09.

1. In an indictment under RS § 6941 (GC § 13195 [RC §§ 4399.09, 4399.99]), for keeping a place where liquor is unlawfully sold, it is a sufficient description of the unlawful sales to aver that they were made "in violation of section sixty-nine hundred and forty-one, of the Revised Statutes of Ohio," and the reference to the section must be understood as referring to the section then in force: *Oshe v. State*, 37 OS 494.

2. The violation of an ordinance making it a misdemeanor "to disturb the good order and quiet of the city by intoxication or drunkenness," is not charged by an affidavit stating that the accused became intoxicated by drinking intoxicating liquor, and that he was found in a state of intoxication: *Gaughan v. East Cleveland*, 19 OLA 280.

3. Where two persons enter a place within the limits of "dry" territory, and one of them calls for the drinks and intoxicating liquor is served to both and is paid for, the offense is complete and prosecution will lie therefor. Accordingly, if the other person calls for drinks ten minutes later and intoxicating liquor is served to both and is paid for, another offense is committed for which the seller may be punished: *Wheeland v. State*, 14 CC(NS) 334, 31 CD 48.

4. Under former GC § 13588 (see now RC § 2941.-20) the constitution is not violated because the kind of liquor sold or name of the place where the offense is committed need not be designated: *Osborn v. State*, 21 NP(NS) 270, 29 OD 326.

5. The names of persons to whom liquors were sold need not be set forth in an affidavit charging the offense of keeping a place for the sale of intoxicating liquors, in violation of a local option law: *Dalrymple v. State*, 5 CC(NS) 185, 16 CD 562.

§ 2941.21 Averments as to joint ownership. (GC § 13437-20)

In an indictment or information for an offense committed upon, or in relation to, property belonging to partners or joint owners, it is sufficient to allege the ownership of such property to be in such partnership by its firm name, or in one or more of such partners or owners without naming all of them.

HISTORY: GC § 13437-20; 113 v 123 (167), ch.16, § 20. Eff 10-1-53. Analogous to former GC § 13591.

Comparative Legislation

Averments in indictment as to joint ownership of property:

Ind.—Burns' Stat, 1942 Repl, § 9-1121
Penn.—Purdon's Stat, tit 19, § 281
Tenn.—Williams' Code, § 11635

Research Aids

Ownership of property:

Page: Indictment §§ 30, 77
O-Jur: Indictment § 50
Am-Jur: Indictment §§ 86, 89

CASE NOTES

1. Former GC § 13591 (see now RC § 2941.21) was intended to take the case herein provided for out of the operation in the rule prescribed in former GC § 13582 (see now RC § 2941.26) relating to variance: *Mulrooney v. State*, 26 OS 327.

2. The rule prescribed by former GC § 13591 (see now RC § 2941.21) is a rule of pleading and not of substantive law: *Jones v. State*, 70 OS 36, 70 NE 952.

3. Where, in an indictment for larceny, the property stolen is alleged to belong to one A, and the evidence shows that it belongs to A and B as partners, a conviction is proper. This section changes the common law rule on this subject: *Lasure v. State*, 19 OS 43.

§ 2941.22 Averments as to will or codicil. (GC § 13437-21)

In an indictment or information for stealing a will, codicil, or other testamentary instrument, or for forgery thereof, or for a fraudulent purpose, keeping, destroying, or secreting it, whether in relation to real or personal property, or during the life of a testator or after his death, it is not necessary to allege the ownership or value thereof.

HISTORY: GC § 13437-21; 113 v 123 (167), ch.16, § 21. Eff 10-1-53. Analogous to former GC § 13592.

Research Aids

Ownership of property—wills:

O-Jur: Forgery § 18, Indictment § 49, Wills § 864
Am-Jur: Forgery §§ 39 to 50, Indictment §§ 86 to 90

§ 2941.23 Averments as to election. (GC § 13437-22)

In an indictment or information for an offense committed in relation to an election, it is sufficient to allege that such election was authorized by law, without stating the names of the officers holding it or the person voted for or the offices to be filled at the election.

HISTORY: GC § 13437-22; 113 v 123 (167), ch.16, § 22. Eff 10-1-53. Analogous to former GC § 13593.

Comparative Legislation

Averments in indictment for election offense:
Ind.—Burns' Stat, 1949 Repl, § 29-5966

Research Aids

Elections—indictment:

Page: Elections § 107
O-Jur: Elections §§ 131, 138
Am-Jur: Elections §§ 334, 335, 344 to 346

§ 2941.24 Counts for embezzlement and larceny. (GC § 13437-23)

An indictment or information may contain counts for larceny, for obtaining the same property by false pretenses, for embezzlement thereof