

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO
Plaintiff-Appellant,

CASE NUMBERS: 2008-2127
2008-2249

v.

ON APPEAL FROM THE LOGAN
COUNTY COURT OF APPEALS, THIRD
APPELLATE DISTRICT

JOHN ROHRBAUGH,
Defendant-Appellee.

COURT OF APPEALS
CASE NO.: 8-07-28

APPELLANT STATE OF OHIO'S MERIT BRIEF

Eric C. Stewart, Reg. No. 0071094
Chief Assistant Prosecutor

Gerald L. Heaton, Reg. No. 0022094
Logan County Prosecutor
117 E. Columbus Ave., Suite 200
Bellefontaine, Ohio 43311
(937) 599-7272 Phone
(937) 599-7271 FAX
Counsel for the State of Ohio

Marc S. Triplett (0021222)
Attorney at Law
332 S. Main St.
Bellefontaine, Ohio 43311
(937) 593-6591 Phone
(937) 593-2867 FAX
Counsel for John Rohrbaugh

Office of the Ohio Public Defender
Melissa M. Prendergast (0075482)
8 East Long Street - 11th floor
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 FAX

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STATEMENT OF THE CASE

On March 13, 2007 the Defendant was indicted by the Logan County Grand Jury on the following charges:

- Count I: Breaking & Entering, RC §2911.13(A), fifth degree felony
- Count II: Theft, RC §2913.02, fourth degree felony
- Count III: Theft, RC §2913.02, fifth degree felony
- Count IV: Breaking & Entering, RC §2911.13(A), fifth degree felony
- Count V: Theft, RC §2913.02, misdemeanor of the first degree
- Count VI: Theft, RC §2913.02, misdemeanor of the first degree
- Count VII: Theft, RC §2913.02, misdemeanor of the first degree
- Count VIII: Possession of Cocaine, RC §2925.11, felony of the fifth degree

Counts I and II were based on a break-in of a Cash Advance store and theft of the deposit money from the store. The rest of the counts involve a string of thefts and a drug charge unrelated to Counts I and II. The maximum potential penalty if convicted on all counts would have been 66 months in prison on the felonies and 540 days in jail on the misdemeanors.

On July 3, 2007, the Defendant entered a guilty plea to Count I which was amended by agreement of the parties to Receiving Stolen Property in violation of RC §2913.51, a felony of the fifth degree. The Defendant also pled guilty to Count VIII, possession of cocaine, a felony of the fifth degree. The maximum potential penalty for these two charges is 24 months in prison.

On July 30, 2007, the Defendant was sentenced to eleven months in prison on both counts which were ordered to run concurrent. The Defendant was also ordered to pay restitution in the amount of \$4,145.81 to the victim, First Check Cash Advance.

On December 24, 2007, the Defendant filed a notice of appeal along with a motion for leave to file a delayed appeal. On January 10, 2008, the Court of Appeals granted the Defendant's motion to file a delayed appeal. The Defendant's sole assignment of error alleged that the trial court erred in ordering the Defendant to pay the amount of \$4,145.81 in restitution.

On September 22, 2008, the Court of Appeals didn't address the Defendant's sole assignment of error, but instead used a plain error analysis to determine whether the Defendant's plea to the amended charge was proper. The Court of Appeals found that the trial court was without authority to amend the charge the Defendant pled guilty to and remanded the case back to the trial court with an instruction to vacate the Defendant's guilty plea.

On October 31, 2008, the State filed a notice of appeal with the Supreme Court of Ohio.

On November 13, 2008, the Third District Court of Appeals certified a conflict between their decision and *State v. Robinson*, 8th Dist. No. 90411, 2008-Ohio-3972.

STATEMENT OF FACTS

On February 2, 2007, the First Check Cash Advance store in Bellefontaine was broken into in the middle of the night. (Suppr. Tr. at 42). Cash and checks totaling over \$16,000.00 were stolen. (Sent. Tr. at 9). An alarm went off in the store and the alarm company notified the Bellefontaine Police Department at 2:47 AM. (Suppr. Tr. at 45). A witness at the scene told law enforcement that he saw a male suspect flee the scene in a dark colored Ford Mustang. (Suppr. Tr. at 42, 47). Based on evidence found at the scene, Detectives suspected that the perpetrator had some inside knowledge about the business prior to committing the offense. (Suppr. Tr. at 42). The investigation eventually led the Detectives to the Defendant because he had a friend, Heather Pulfer, that worked at the store. (Suppr. Tr. at 42-43).

Detectives continued gathering evidence and then obtained an arrest warrant for the Defendant. (Suppr. Tr. at 47). After filing the arrest warrant with the Bellefontaine Municipal Court on February 2, 2007, the Municipal Court called Detective Sebring and told him that the Defendant was at Municipal Court paying a fine in another case. (Suppr. Tr. at 47). Detective Sebring went back to the Municipal Court and placed the Defendant under arrest. (Suppr. Tr. at 48). During a search incident to arrest, the police found \$1,176 in cash and a National City Bank money wrapper on the Defendant's person. (Suppr. Tr. at 48). The money wrapper was of the same type that First Check Cash Advance has on their bundles of cash.

Detectives learned that the Defendant had driven a friend's Toyota to Municipal Court. (Suppr. Tr. at 50). When the Detectives looked through the driver's side window of the Toyota, they saw a large amount of cash underneath the driver's seat spilling out

onto the floorboard in front of the seat. (Suppr. Tr. at 50-52). The money was also wrapped in National City Bank money wrappers. (Suppr. Tr. at 51, 52). The vehicle was towed and inventoried. (Suppr. Tr. at 51). Officers recovered \$5,227 in cash from inside the vehicle. (Suppr. Tr. at 52). First Check Cash Advance was able to identify the money as theirs, due to the fact that one of their employees had written their initials on one of the \$50.00 dollar bill money wrappers. All of this was money was recovered from the Defendant just hours after the break-in occurred.

Because the Defendant did not dispute that he had the stolen money, he negotiated a plea to Receiving Stolen Property (F5) rather than Breaking and Entering (F5) as charged in Count I.

ARGUMENT

CERTIFIED QUESTION:

"May a defendant consent to a negotiated plea to an offense that was neither indicted, nor a lesser included offense of the indicted offense, without a waiver of indictment pursuant to Criminal Rule 7(A) and Section 10, Article I of the Ohio Constitution?"

APPELLANT'S PROPOSITION OF LAW I:

When the parties agree to amend a charge in an indictment pursuant to a plea agreement and the amendment changes the name or identity of the crime charged, but the defendant has not been misled or prejudiced by the amendment, a plain error analysis does not apply, and if there is error, it is only invited error.

A. When a Defendant does not suffer prejudice by an alleged defect in the indictment the matter does not rise to the level of plain error.

On June 25, 2007, a plea hearing was held in this case. The Defendant negotiated to plead guilty to Receiving Stolen Property (F5) and Possession of Cocaine (F5) and have the remainder of the charges dismissed. By agreement of the parties, the State moved to amend Count I of the indictment from Breaking and Entering to Receiving Stolen Property. The trial court granted the motion to amend the indictment. The Defendant did not object to the amendment, and did not appeal his conviction to the amended charge.

It is the general rule in Ohio that failing to object to a defective indictment constitutes a waiver. It is well-settled that defects in an indictment must be raised prior to trial or be subject to waiver. RC §2941.29 states as follows:

No indictment or information shall be quashed, set aside, or dismissed, or motion to quash be sustained, or any motion for delay of sentence for the purpose of review be granted, nor shall any conviction be set aside or reversed on account of any defect in form or substance of the indictment or information, unless the objection to such indictment or information, specifically stating the defect claimed, is made prior to the commencement of the trial, or at such time thereafter as the court permits.

Similarly, Crim. R. 12(C)(2) states as follows:

Prior to trial, any party may raise by motion any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue. The following must be raised before trial: ... Defenses and objections based on defects in the indictment, information, or complaint (other than failure to show jurisdiction in the court or to charge an offense, which objections shall be noticed by the court at any time during the pendency of the proceeding).

Indeed, this Court has consistently held that the failure to timely object to an allegedly defective indictment constitutes a waiver of the issues involved. *State v. Joseph* (1995), 73 Ohio St.3d 450, 455; *State v. Mills* (1992), 62 Ohio St.3d 357, 363, ("Under Crim.R.12 [B] and 12[G], alleged defects in an indictment must be asserted before trial or they are waived.")

Regardless of the fact that the defendant waived any defects in the amended indictment, the appellate court decided that plain error is committed when a charge in the indictment is amended by agreement of the parties without a grand jury waiver and the amendment changes the name or identity of the crime charged. The appellate court looked at the amended charge and analyzed the procedure using Criminal Rule 7(D). Criminal Rule 7(D) states in pertinent part:

(D) Amendment of indictment, information, or complaint. The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment is made to the substance of the indictment, information, or complaint, or to cure a variance between the indictment, information, or complaint and the proof, the defendant is entitled to a discharge of the jury on the defendant's motion, if a jury has been impanelled, and to a reasonable continuance, unless it clearly appears from the whole proceedings that the defendant has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that the defendant's rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury.

The appellate court found that the trial court was without authority to amend the indictment because amending Count I from breaking and entering to receiving stolen property changed the name and identity of the crime charged. The appellate court did not analyze the rest of the rule which addresses a defendant's right when an amendment does change the name or identity of the crime charged. The rule goes on to state that if an amendment is made to the substance of the indictment, the defendant is entitled to a discharge of the jury on the defendant's motion or to a reasonable continuance, **"unless it clearly appears from the whole proceedings that the defendant has not been misled or prejudiced by the defect or variance in respect to which the amendment is made . . ."** Criminal Rule 7(D) (emphasis added). The rule recognizes the fact that an amendment can be made to an indictment that changes its name or identity and that a trial court does not err in continuing with the proceedings as long as the defendant does not suffer any prejudice from the amendment. If the second sentence of criminal rule 7(D) has no legal meaning or weight, then the rule needs to be amended and the sentence deleted.

In the case at hand, the amendment to the indictment was by agreement of the parties. By agreeing to the amended charge, the Defendant waived his right to have the amended charge considered by the Grand Jury. The Defendant was not misled or prejudiced by the amended indictment. Rather, the Defendant received the benefit of his plea bargain by having some of the charges dismissed. His potential maximum sentence went from 66 months in prison and 540 days in jail to 24 months in prison. The sentence he ultimately received was 10 months in prison on the two counts to be served concurrently. It is clear from the whole proceedings that the Defendant was not misled or prejudiced by the amendment. Where the Defendant has not suffered any prejudice, how can there be a miscarriage of justice?

Criminal Rule 52(B) states: "Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." The United States Supreme Court explained that errors affecting substantial rights means the defendant suffered prejudice. *United States v. Olano*, 507 U.S. 725, 733 (U.S. 1993). Specifically, the Court found that "the error must have been prejudicial: It must have affected the outcome of the district court proceedings." *Id.*

In this case the amendment of the indictment did not affect the outcome of the proceedings. Rather, the defendant waived his right to have the amended charge considered by the Grand Jury by agreeing to the amendment and was benefitted by the amendment, not prejudiced.

In its decision, the Third Appellate District wrote that the amendment to the indictment could have been cured if the defendant had waived his right to have the amended charge considered by the grand jury. This sounds like a practical solution,

however it raises a whole new set of problems. Plea bargains are struck all across the State everyday. Charges are amended, and guilty pleas are entered. Criminal Rule 7 still permits amending the indictment when no change is made to the name or identity of the charge. When do the parties and the court know for an absolute certainty that an amendment does not change the name or identity of the charge? Nobody really knows until the issue has been litigated all the way to the Supreme Court. How will the parties know when they can proceed without a grand jury waiver and when they need a waiver?

In addition, Criminal Rule 7(D) and RC §2945.74 permits the trier of fact to consider and enter a conviction upon a lesser-included offense. Can a defendant enter a plea to a lesser included charge without a waiver of grand jury? To this day, the courts, the prosecutors, and public defenders cannot agree on which charges are lesser included offenses of the original offense.

Conviction of a lesser included offense operates to amend the indictment. Under Crim.R. 7(D), the original indictment can be amended during trial if the amended charge is a lesser included offense of the original charge. *State v. Briscoe* (1992), 84 Ohio App. 3d 569, 572, 617 N.E.2d 747, discretionary appeal not allowed (1993), 66 Ohio St. 3d 1485, 612 N.E.2d 1242. The amendment to a lesser included offense is not prohibited by Crim.R. 7(D) because no change is made in the name or identity of the offense, the lesser offense being included within the greater as a matter of law. *State v. Moore*, 1999 Ohio App. LEXIS 5078 (Ohio Ct. App., Montgomery County Oct. 29, 1999).

In *State v. Deem*, 40 Ohio St. 3d 205 (Ohio 1988). *State v. Walton*, 2005 Ohio App. LEXIS 3181, 2005 Ohio 3430 this court set forth the following rule for determining if an offense is a lesser included offense of another (i) if the offense carries a lesser

penalty than the other; (ii) if the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (iii) if some element of the greater offense is not required to prove the commission of the lesser offense. Does the trial court have to go through this analysis before every plea to a lesser included offense? If a defendant enters a guilty plea to an amended charge without waiving grand jury presentment and the amended charge turns out to not be a lesser included offense, does that mean that he or she was prejudiced by the amendment?

What if the parties agree that the amended charge is a lesser included offense of the original charge and proceed with the plea without a grand jury waiver? A few years later in a different case, another court may determine that the amended charge is not a lesser included offense of the original charge. Does that mean the first defendant was prejudiced?

Finally, defendants are permitted to request jury instructions on charges that they have not been indicted on. For example a defendant could be indicted with Felonious Assault and request an instruction on Aggravated Assault. Does the defendant have to waive his right to a grand jury indictment before requesting the jury instruction?

The Court of Appeals decision will prove to be problematic. "The fact that a decision has proved "unworkable" is a traditional ground for overruling it." *Montejo v. Louisiana*, 173 L. Ed. 2d 955; 2009 U.S. LEXIS 3973 (2009) citing *Payne v. Tennessee*, 501 U. S. 808, 827 (1991).

Plea bargains are struck every day to attain efficient resolution of criminal cases. It is a process that has long been practiced because it exercises no prejudice to either

party, but rather creates a mutually beneficial resolution. During the plea bargaining process, indictments are amended to reduced charges which the grand jury did not consider. Indictments are amended to completely different charges which the grand jury did not consider. However, of utmost consideration in this process is that the defendant does not suffer prejudice by the amendments, rather he or she is benefitted by the amendments. It is not prejudicial to a defendant when the trial court addresses the amendments at the plea hearing, the defendant indicates that he or she understands the changes and the defendant affirmatively states that he or she is entering their plea of their own free will. *State v. Ashipa*, 2007 Ohio 2245; 2007 Ohio App. LEXIS 2098.

A plain error analysis requires a showing that the Defendant suffered actual prejudice, that the prejudice affected the outcome of the entire proceedings. In this case the Defendant agreed to the amended charge to his own benefit. The amended charge contained each and every element that the State would have had to prove if the case had gone to trial. As there was no prejudice to the Defendant, the alleged defect in the indictment does not rise to the level of plain error.

B. *If there is any error in amending the indictment it only amounts to invited error.*

The Third District's decision is in conflict with the Eighth Appellate District's recent decision in *State v. Robinson*, 2008 Ohio 3972. The Eighth District declined to use a plain error analysis when considering the issue of a plea to an amended indictment.

In *State v. Robinson*, 2008 Ohio 3972, the defendant was originally charged in an indictment with murder. Pursuant to a plea agreement and by agreement of the parties, the charge in the indictment was amended to involuntary manslaughter. On appeal, the defendant sought to overturn her conviction arguing that only the grand jury could amend the indictment and that the trial court erred by amending the indictment from murder to involuntary manslaughter. The Eighth Appellate District found that because the parties expressly amended the indictment as part of the plea agreement Crim.R. 7 did not apply. *Id.* Furthermore, the Eighth District found that even had there been error, it was invited by the defendant. The invited error doctrine states that "a party is not entitled to take advantage of an error that he himself invited or induced." *State v. Robinson*, 2008 Ohio 3972, citing *State ex reL Kline v. Carroll*, 96 Ohio St.3d 404, 2002 Ohio 4849, 775 N.E.2d 517; *State v. Smith*, 148 Ohio App.3d 274, 2002 Ohio 3114, P30, 772 N.E.2d 1225. By agreeing to plead to a crime that was not a lesser included offense of the originally-charged crime, the Defendant invited the error she has raised on appeal. *Id.* See also *State v. Keaton* (July 14, 2000), Clark App. No. 98 CA 99 (rejecting argument that plea to robbery which is not a lesser included offense of originally-charged count of aggravated robbery was error on grounds that petitioner's conduct by pleading guilty while represented by counsel constituted a waiver of his right to a corrected indictment).

Accordingly, the Eighth District implicitly found that a plain error analysis does not apply when the parties agree to amend the indictment, even when the amendment changes the name and identity of the charge.

The appellate courts have been consistent in differentiating amendments to indictments pursuant to plea bargains and amendments made prior to actual trials. In fact the Third District made this exact distinction in *State v. Childress*, 91 Ohio App. 3d 258, 261 (Ohio Ct. App., Shelby County 1993). In *Childress* pursuant to a plea agreement with the defendant, the state moved to amend the indictment which charged the offense of Attempted Kidnapping in violation of R.C. 2923.02 and 2905.01, an aggravated felony of the second degree to a charge of Attempted Abduction in violation of R.C. 2923.02 and 2905.02, a fourth degree felony. The Defendant then pled guilty to the amended charge. The Third District upheld the amendment to the indictment without returning the matter to the grand jury reasoning that the amendment was made pursuant to a plea bargain in open court with the defendant's voluntary agreement after full disclosure.

See also *State v. Smith*, 2006 Ohio 1482, (Ohio Ct. App., Pickaway County Mar. 21, 2006) defendant agreed to plead no contest with a stipulation of guilt to an amended count of robbery in exchange for the dismissal of the other charges, kidnapping and theft. By pleading no contest, the defendant waived any deficiencies created by amending the indictment.

See *State v. Moore*, 1999 Ohio App. LEXIS 5078 (Ohio Ct. App., Montgomery County Oct. 29, 1999) an indictment may be amended to include a specification where the amendment was made pursuant to a plea agreement in open court with the defendant's voluntary agreement after full disclosure.

See *State v. Pigg*, 1999 Ohio App. LEXIS 4000 (Ohio Ct. App., Champaign County Aug. 27, 1999) amendment of the indictment was with the consent of defendant

Pigg and his counsel and conditioned upon the agreement of the State, upon Pigg's guilty plea to the amended count, to dismiss the remaining 17 counts, six of which carried life sentences. Although an information was not utilized in this case, the defendant's agreement to the amendment of Count three, together with the State's agreement to dismiss the remaining seventeen counts, is the type of plea bargaining that typically precedes a plea of guilty to an information. The Court found that Pigg waived the protection of R.C. 2941.143 by his consent to the amendment which was so obviously to his own advantage.

See *State v. Theis*, 1997 Ohio App. LEXIS 1773, (Ohio Ct. App., Cuyahoga County May 1, 1997) the defendant in this case waived presentment to the grand jury of a violence specifications by agreeing to the amendment on the record in open court as part of a plea bargain. The transcript of defendant's guilty plea reveals that this matter was discussed at length; defendant stated that he was fully informed as to the terms of the amendment and both understood and voluntarily agreed to it. Consistent with this authority, the court found that the defendant sufficiently waived presentment of the violence specifications to the grand jury.

The record in the case at hand shows that the defendant signed a written petition acknowledging his informed and voluntary choice to enter the guilty plea. The defendant further acknowledged in writing, prior to changing his plea, that he was aware that the maximum punishment was twenty-four months in prison. The defendant attested in writing that he understood that his guilty plea was based on an agreement, pursuant to which the State would amend count I of the indictment to Receiving Stolen Property.

The defendant was not misled, or coerced. He proceeded knowingly, voluntarily, and intelligently.

In cases such as this where no prejudice accrues to the defendant, the only possible error was invited by the parties and should not be a cause for reversal. The decision promotes a workable practice and judicial economy.

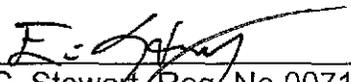
CONCLUSION

For the foregoing reasons, the State respectfully requests the Court to answer the certified question in the affirmative, reverse the decision of the Third District Court of Appeals, and affirm the defendant's conviction.

Respectfully submitted,

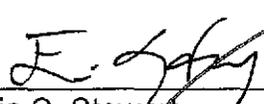
GERALD L. HEATON
Logan County Prosecuting Attorney

By:


Eric C. Stewart, Reg. No 0071094
Chief Assistant Prosecutor
117 Columbus Ave. E.
Bellefontaine, Ohio 43311
(937) 599-7272 Phone
(937) 599-7271 FAX

PROOF OF SERVICE

This is to certify that a copy of this **Merit Brief** was served upon Attorney Marc Triplett counsel for appellee by placing it in the box provided for such service in the Common Pleas Court of Logan County, Ohio and upon Melissa M. Prendergast, Office of the Ohio Public Defender, 8 East Long Street - 11th floor, Columbus, Ohio 43215 by regular U.S. mail on this 24th day of June, 2009.


Eric C. Stewart,
Chief Assistant Prosecutor

APPENDIX

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IN THE SUPREME COURT OF OHIO

08-2127

STATE OF OHIO
Plaintiff-Appellant,

ON APPEAL FROM THE LOGAN
COUNTY COURT OF APPEALS, THIRD
APPELLATE DISTRICT

v.

JOHN ROHRBAUGH,
Defendant-Appellant.

COURT OF APPEALS
CASE NO.: 8-07-28

NOTICE OF APPEAL
S.C.T. PRAC. R. II, § 1(A)(3)

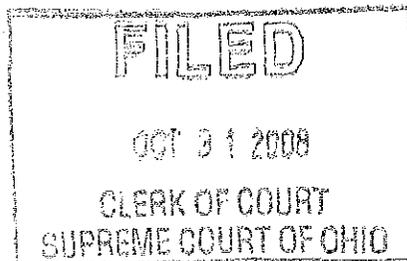
Eric C. Stewart, Reg. No. 0071094
Chief Assistant Prosecutor

Marc S. Triplett
Attorney at Law
332 S. Main St.
Bellefontaine, Ohio 43311
(937) 593-6591 Phone
(937) 593-2867 Fax

Gerald L. Heaton, Reg. No. 0022094
Logan County Prosecutor
117 E. Columbus Ave., Suite 200
Bellefontaine, Ohio 43311
(937) 599-7272 Phone
(937) 599-7271 FAX
Counsel for the State of Ohio

Counsel for John Rohrbaugh

NOV - 4



NOTICE OF APPEAL

Appellant, the State of Ohio, through the Logan County Prosecutor's Office, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Logan County Court of Appeals, Third Appellate District, entered in *State of Ohio v. John Rohrbaugh*, Case No. 8-07-28 on September 22, 2008.

This case involves a felony and presents a question that is of public or great general interest.

Respectfully submitted,

GERALD L. HEATON
Logan County Prosecuting Attorney

By:


Eric C. Stewart, Reg. No 0071094
Chief Assistant Prosecutor
117 Columbus Ave. E.
Bellefontaine, Ohio 43311
(937) 599-7272
(937) 599-7271 FAX

PROOF OF SERVICE

This is to certify that a copy of this Notice of Appeal was served upon Marc S. Triplett, Attorney at Law, 332 S. Main St., Bellefontaine, Ohio 43311, by first class mail on this 31st day of October, 2008.


Eric C. Stewart,
Chief Assistant Prosecutor

COURT OF APPEALS
THIRD APPELLATE DISTRICT
LOGAN COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

v.

JOHN ROHRBAUGH,

DEFENDANT-APPELLANT.

CA
CASE NO. 8-07-28

OPINION

CHARACTER OF PROCEEDINGS: An Appeal from Common Pleas Court

JUDGMENT: Judgment Reversed and Cause Remanded

DATE OF JUDGMENT ENTRY: September 22, 2008

ATTORNEYS:

MARC S. TRIPLETT
Attorney at Law
Reg. #0021222
332 South Main Street
Bellefontaine, Ohio 43311
For Appellant

ERIC S. STEWART
Chief Assistant Prosecuting Attorney
Reg. #0071094
117 East Columbus Avenue, Suite 200
Bellefontaine, Ohio 43311
For Appellee

FILED
COURT OF APPEALS
SEP 24 2008

DOTTIE TUTTLE
CLERK, LOGAN COUNTY, OHIO

ROGERS, J.,

{¶1} Defendant-Appellant, John Rohrbaugh, appeals the judgment of conviction and sentence of the Logan County Court of Common Pleas which, in part, ordered him to pay restitution in conjunction with his conviction for receiving stolen property relative to a theft from First Check Cash Advance. On appeal, Rohrbaugh claims that the trial court wrongly attributed damages to him beyond the scope of his crime when calculating restitution. Based upon the following, Rohrbaugh's guilty plea should be vacated and the matter remanded to the trial court for further proceedings consistent with this opinion.

{¶2} The charges pertinent to this appeal arose out of the theft of over \$16,000 in cash, checks, and money orders from the First Check Cash Advance Store in Bellefontaine, Ohio. In February 2007, someone broke into the store in the middle of the night. A witness told law enforcement that he saw a male suspect leave the scene in a dark colored vehicle. Based on evidence found at the scene, detectives suspected that the perpetrator had inside knowledge about the business prior to committing the offense. The investigation led the detectives to Rohrbaugh, whose girlfriend, Heather Pulfer, worked at the store.

{¶3} The police arrested Rohrbaugh and found \$1,176 on his person and \$5,227 in cash inside his vehicle, along with money wrappers that identified the cash in the vehicle as money that was taken from First Check Cash Advance. Rohrbaugh claimed that Pulfer had given him the \$5,227 and that the \$1,176 was

money he received from cashing his paycheck. Police recovered the \$5,227 and returned it to First Check Cash Advance, and held the \$1,176 in evidence.

{¶4} In March 2007, the Logan County Grand Jury indicted Rohrbaugh on the following: Count One – breaking and entering in violation of R.C. 2911.13(A), a felony of the fifth degree; Count Two -- theft in violation of R.C. 2913.02(A)(1), a felony of the fourth degree; Count Three – theft from the elderly or disabled in violation of R.C. 2913.02(A)(1); Count Four – breaking and entering in violation of R.C. 2911.13(A); Counts Five, Six, Seven – three misdemeanor counts of theft in violation of R.C. 2913.13.02(A)(1); and, Count Eight – possession of cocaine in violation of R.C. 2925.11(A), a felony of the fifth degree. Only Counts One and Two are relative to the break-in and theft at First Check Cash Advance; Counts Three through Eight pertain to unrelated incidents.

{¶5} Subsequently, Rohrbaugh entered a plea of not guilty to all of the counts in the indictment.

{¶6} In July 2007, the State moved to amend the indictment to change Count One from breaking and entering in violation R.C. 2911.13(A), to receiving stolen property in violation of R.C. 2913.51, a felony of the fifth degree, and included language alleging that the value of the property was more than \$500 but less than \$5,000. As part of a plea agreement, Rohrbaugh then entered a guilty plea to the amended count of receiving stolen property in violation of R.C. 2913.51, and to the count of possession of drugs in violation of R.C. 2925.11(A),

also a felony of the fifth degree. The remaining counts in the indictment were dismissed.

{¶7} Thereafter, the trial court held a sentencing hearing and heard testimony from a representative of First Check Cash Advance, Jason Stonerock, concerning the amount of losses the business suffered as a result of the break-in and theft. Stonerock testified that the total losses were \$16,374.79, including cash, checks, and money orders; plus, \$179.70 to repair the broken glass in the front door and a \$5 stop payment fee. After subtracting the \$5,227 cash recovered from Rohrbaugh and the value of some of the checks that were reissued, Stonerock testified that the store's remaining net loss was \$4,733.81, including the cost of repairs.

{¶8} Rohrbaugh then addressed the trial court and apologized for his actions, but claimed that he was only guilty of receiving the stolen property, and that someone else had committed the break-in and theft. Rohrbaugh's attorney objected to the matter of restitution at the hearing, stating that "[w]ith respect to the money that was in the car, it's Mr. Rohrbaugh's position that that is the money that he received, that is the money that he is guilty of receiving, and it is Mr. Rohrbaugh's position that there should not be any restitution beyond those funds for the reasons that I've outlined; that he was not involved in the breaking and entering * * *." (Sent. Tr., p. 4).

{¶9} In August 2007, the trial court sentenced Rohrbaugh to an eleven-month prison term on each of the two remaining counts, receiving stolen property and possession of cocaine. The trial court ordered Rohrbaugh to serve the sentences concurrently, with credit for one hundred eighty-eight days already served.¹ The trial court also ordered Rohrbaugh to pay restitution to First Check Cash Advance in the amount of \$4,733.81.²

{¶10} It is from this judgment that Rohrbaugh appeals,³ presenting the following assignment of error for our review.

THE TRIAL COURT ERRED WHEN IT ORDERED APPELLANT TO MAKE RESTITUTION IN THE AMOUNT OF \$4,733.81.

{¶11} On appeal, Rohrbaugh claims that the trial court made several errors in determining the amount of restitution he should pay. Rohrbaugh maintains that the trial court did not determine his ability to pay restitution; that it failed to limit restitution to the amount of damages caused by the offense; and, that it should

¹ The trial judge noted that Rohrbaugh was subject to community control in Franklin County at the time of his offenses. The trial court stated that, if Franklin County revoked his community control, this current sentence would be consecutive to any sentence imposed by Franklin County. The trial court also informed Rohrbaugh that he would be subject to a three-year period of post release control.

² The State and Rohrbaugh had previously agreed that the \$1,176 found on his person represented the proceeds from his paycheck; that Rohrbaugh would be permitted to retain one half of that money; and, that the other half would be allocated as directed by the trial court. The trial court stated that this half of those funds, \$588, should be applied to the \$4,733.81 restitution, reducing the balance that Rohrbaugh was ordered to pay the victim to \$4,145.81.

³ The original Sentencing Entry was filed on August 6, 2007. On August 21, 2007, this judgment entry was amended to correct a typographical error. Rohrbaugh appealed from the amended judgment entry on September 20, 2007. In October 2007, this Court dismissed this untimely appeal from the nunc pro tunc entry for lack of jurisdiction. Rohrbaugh subsequently filed a motion for leave to file a delayed appeal, which this Court granted in January 2008.

have apportioned the amount of restitution between all of the individuals allegedly involved in the crime

{¶12} Initially, before we review this assignment of error, we must address the issue of whether Rohrbaugh pled to a properly amended indictment, with respect to the receiving stolen property count. On July 3, 2007,⁴ Rohrbaugh changed his plea of not guilty to a plea of guilty to a reduced count.

{¶13} In the Judgment Entry/Change of Plea, the trial court notes that the State moved to amend the indictment to Receiving Stolen Property in violation of R.C. 2913.51(A), a felony of the fifth degree. The language of the amendment itself does not specify what count is being amended. However, later in the Judgment Entry/Change of Plea, after the trial court has informed Rohrbaugh of the rights he is waiving by pleading, the trial court refers to the Receiving Stolen Property count as Count One.

{¶14} Rohrbaugh entered a guilty plea to Count One, Receiving Stolen Property and Count Eight, Possession of Drugs. The trial court accepted the plea and found Rohrbaugh guilty. All remaining charges were dismissed.

{¶15} To determine if the amendment of the indictment was proper, we first turn to a defendant's right to an indictment by a grand jury. The Ohio Constitution provides that "no person shall be held to answer for a capital, or

⁴ This Court was not provided with a transcript of the change of plea hearing.

otherwise infamous, crime, unless on presentment or indictment of a grand jury.”

Section 10, Article I, Ohio Constitution.

The material and essential facts constituting an offense are found by the presentment of the grand jury; and if one of the vital and material elements identifying and characterizing the crime has been omitted from the indictment such defective indictment is insufficient to charge an offense, and cannot be cured by the court, as such a procedure would not only violate the constitutional rights of the accused, but would allow the court to convict him on an indictment essentially different from that found by the grand jury.

State v. Colon, 118 Ohio St.3d 26, 2008-Ohio-1624, at ¶17; *Harris v. State* (1932), 125 Ohio St. 257, 264.

{¶16} Additionally, Criminal Rule 7(D) provides the proper procedure for amendment of an indictment, including when an indictment can be amended without additional involvement of the grand jury, as follows:

The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, *provided no change is made in the name or identity of the crime charged*. If any amendment is made to the substance of the indictment, information, or complaint, or to cure a variance between the indictment, information, or complaint and the proof, the defendant is entitled to a discharge of the jury on the defendant's motion, if a jury has been impaneled, and to a reasonable continuance, unless it clearly appears from the whole proceedings that the defendant has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that the defendant's rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury. Where a jury is discharged under this division, jeopardy shall not attach

to the offense charged in the amended indictment, information, or complaint. No action of the court in refusing a continuance or postponement under this division is reviewable except after motion to grant a new trial therefore is refused by the trial court, and no appeal based upon such action of the court shall be sustained nor reversal had unless, from consideration of the whole proceedings, the reviewing court finds that a failure of justice resulted.

(Emphasis added).

{¶17} “An amendment to the indictment that changes the name or identity of the crime is unlawful whether or not the defendant was granted a continuance to prepare for trial; further, a defendant need not demonstrate that he suffered any prejudice as a result of the forbidden amendment.” *State v. Fairbanks*, 172 Ohio App.3d 766, 771, 2007-Ohio-4117, citing *Middletown v. Blevins* (1987), 35 Ohio App.3d 65, 67. The court in *Fairbanks* continued, finding that “[a] trial court commits reversible error when it permits an amendment that changes the name or identity of the crime charged.” *Fairbanks*, 172 Ohio App.3d at 771, citing *State v. Kittle*, 4th Dist. No. 04CA41, 2005-Ohio-3198, at ¶12; *State v. Headley* (1983), 6 Ohio St.3d 475, 478-479.

{¶18} Finally, this Court has previously held that, where “two offenses contain different elements” requiring independent proof, the identity of the crime has been changed. *State v. Duke*, 3d Dist. Nos. 1-02-64, 1-02-92, 1-02-93, 2003-Ohio-2386, ¶10.

{¶19} In the present case, Rohrbaugh was initially indicted for Breaking and Entering in violation of R.C. 2911.13(A), which provides: “No person by force, stealth, or deception, shall trespass in an unoccupied structure, with purpose to commit therein any theft offense, as defined in section 2913.01 of the Revised Code, or any felony.” This count was amended to Receiving Stolen Property in violation of R.C. 2913.51, which provides: “No person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense.” Not more than a cursory analysis is required to determine that these two counts contain different elements, requiring independent proof.

{¶20} In the present case, we note that Rohrbaugh pled guilty to the counts in the defective indictment. Rohrbaugh did not raise any objection to the validity of the indictment prior to pleading guilty. Where a defendant fails to object to the form of the indictment before trial as required by Crim.R. 12(C), he waives all but plain error. *State v. Frazier* (1995), 73 Ohio St.3d 323, 332, 1995-Ohio-235; *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391.⁵

{¶21} Pursuant to Crim.R. 52(B), “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” *State v. Barnes* (2002), 94 Ohio St.3d 21, 2002-Ohio-68. The Ohio

⁵ We note that these cases were decided under a prior version of Crim.R. 12, citing specifically to Crim.R. 12(B)(2). However, Crim.R. 12(C)(2) now contains a substantially similar provision.

Supreme Court, in *Barnes*, articulated a three part test for the finding of plain error.

First, there must be an error, *i.e.*, a deviation from a legal rule. Second, the error must be plain. To be “plain” within the meaning of Crim.R. 52(B), an error must be an “obvious” defect in the trial proceedings. Third, the error must have affected “substantial rights.” We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial.

Barnes, 94 Ohio St.3d at 27 (internal citations omitted).

{¶22} Thus, “[o]nly extraordinary circumstances and the prevention of a miscarriage of justice warrant a finding of plain error.” *State v. Brown*, 3d Dist. No. 8-02-09, 2002-Ohio-4755, citing *State v. Long* (1978), 53 Ohio St.2d 91, at paragraph three of the syllabus.

{¶23} In the present case, we find that the improper amendment of the indictment rises to the level of an obvious defect. Moreover, we believe that Rohrbaugh had a constitutional right to be indicted by the grand jury. That right was violated by the amendment to the indictment, changing Count One of Breaking and Entering to the completely different offense of Receiving Stolen Property. As stated by the United States Supreme Court:

To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.

Russell v. United States (1962), 369 U.S. 749, 770.

{¶24} Finally, we note that the Judgment Entry/Change of Plea contains no waiver of Rohrbaugh's right to be properly indicted by the grand jury on the Receiving Stolen Property count. Just as a defendant can waive his constitutional rights under Crim.R. 11, a defendant may waive his right to a grand jury indictment. Moreover, we recognize that, had Rohrbaugh pled to a Bill of Information, instead of to an amended indictment, he would have waived his right to be indicted by the grand jury. However, we find no evidence of a waiver in the present case.

{¶25} Accordingly, Rohrbaugh's guilty plea should be vacated and the matter remanded to the trial court for further proceedings consistent with this opinion.

*Judgment Reversed and
Cause Remanded.*

SHAW, P.J., and WILLAMOWSKI, J., concur.

IN THE SUPREME COURT OF OHIO

08-2249

STATE OF OHIO
Plaintiff-Appellant,

ON APPEAL FROM THE LOGAN
COUNTY COURT OF APPEALS, THIRD
APPELLATE DISTRICT

v.

COURT OF APPEALS
CASE NO.: 8-07-28

JOHN ROHRBAUGH,
Defendant-Appellee.

NOTICE OF CERTIFIED CONFLICT
S.C.T. PRAC. R. IV, § 1

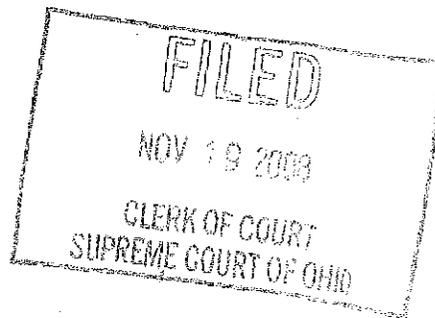
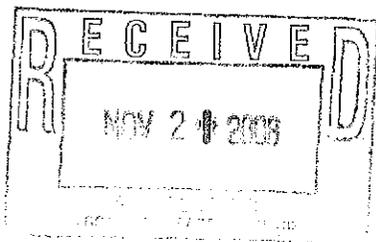
Eric C. Stewart, Reg. No. 0071094
Chief Assistant Prosecutor

Marc S. Triplett
Attorney at Law
332 S. Main St.
Bellefontaine, Ohio 43311
(937) 593-6591 Phone
(937) 593-2867 Fax

Gerald L. Heaton, Reg. No. 0022094
Logan County Prosecutor
117 E. Columbus Ave., Suite 200
Bellefontaine, Ohio 43311
(937) 599-7272 Phone
(937) 599-7271 FAX

Counsel for John Rohrbaugh

Counsel for State of Ohio



NOTICE OF CERTIFIED CONFLICT

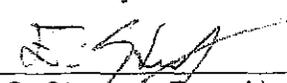
Pursuant to S.Ct. Prac. R. IV., §1, Appellant State of Ohio hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Logan County Court of Appeals, Third Appellate District, entered in *State v. Rohrbaugh*, case number 8-07-28 on November 13, 2008.

The Third Appellate District has certified this case to be in conflict with *State v. Robinson*, 8th Dist. No. 90411, 2008-Ohio-3972. Attached is a copy of the court of appeals order certifying a conflict and copies of the conflicting court of appeals opinions.

Respectfully submitted,

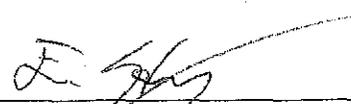
GERALD L. HEATON
Logan County Prosecuting Attorney

By:


Eric C. Stewart, Reg. No 0071094
Chief Assistant Prosecutor
117 Columbus Ave. E.
Bellefontaine, Ohio 43311
(937) 599-7272 Phone

PROOF OF SERVICE

This is to certify that a copy of this Notice of Certified Conflict was served upon Attorney Marc S. Triplett, Counsel for Appellee, by placing it in the box provided for such service in the Common Pleas Court of Logan County, Ohio on November 17, 2008.


Eric C. Stewart,
Chief Assistant Prosecutor

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

LOGAN COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE, COURT OF APPEALS

CX
CASE NO. 8-07-28

v.

FILED
NOV 13 2008

JOHN ROHRBAUGH,

DOTTIE TUTTLE
CLERK, LOGAN COUNTY, OHIO

JUDGMENT
ENTRY

DEFENDANT-APPELLANT.

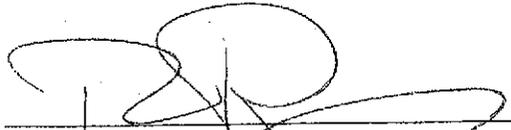
This cause comes on for determination of appellee's motion to certify a conflict as provided in App.R. 25 and Article IV, Sec. 3(B)(4) of the Ohio Constitution, and appellant's memorandum in opposition.

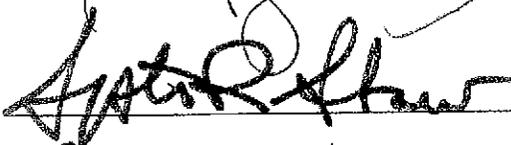
Upon consideration the court finds that the judgment in the instant case is in conflict with the judgment rendered in *State v. Robinson*, 8th Dist. No. 90411, 2008-Ohio-3972.

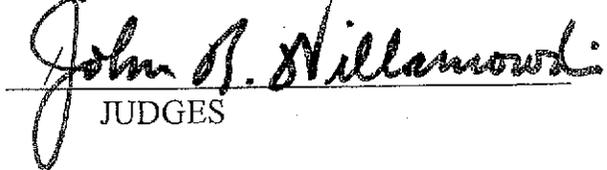
Accordingly, the motion to certify is well taken and the following issue should be certified pursuant to App.R. 25:

May a defendant consent to a negotiated plea to an offense that was neither indicted, nor a lesser included offense of the indicted offense, without a waiver of indictment pursuant to Criminal Rule 7(A) and Section 10, Article I of the Ohio Constitution?

It is therefore **ORDERED** that appellee's motion to certify a conflict be, and hereby is, granted on the certified issue set forth hereinabove.







JUDGES

DATED: November 13, 2008

/jlr

1 of 1 DOCUMENT

STATE OF OHIO, PLAINTIFF-APPELLEE, v. JOHN ROHRBAUGH, DEFENDANT-APPELLANT.

CASE NO. 8-07-28

COURT OF APPEALS OF OHIO, THIRD APPELLATE DISTRICT, LOGAN COUNTY

2008 Ohio 4781; 2008 Ohio App. LEXIS 4020

September 22, 2008, Date of Judgment Entry

PRIOR HISTORY: **[**1]**

CHARACTER OF PROCEEDINGS: An Appeal from Common Pleas Court.

DISPOSITION: Judgment Reversed and Cause Remanded.

COUNSEL: MARC S. TRIPLETT, Attorney at Law, Bellefontaine, Ohio, For Appellant.

ERIC S. STEWART, Chief Assistant Prosecuting Attorney, Bellefontaine, Ohio, For Appellee.

JUDGES: ROGERS, J. SHAW, P.J., and WILLAMOWSKI, J., concur.

OPINION BY: ROGERS

OPINION**ROGERS, J.,**

[*P1] Defendant-Appellant, John Rohrbaugh, appeals the judgment of conviction and sentence of the Logan County Court of Common Pleas which, in part, ordered him to pay restitution in conjunction with his conviction for receiving stolen property relative to a theft from First Check Cash Advance. On appeal, Rohrbaugh claims that the trial court wrongly attributed damages to him beyond the scope of his crime when calculating restitution. Based upon the following, Rohrbaugh's guilty plea should be vacated and the matter remanded to the trial court for further proceedings consistent with this opinion.

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into the store in the middle of the night. A witness told law enforcement **[**2]** that he saw a male suspect leave the scene in a dark colored vehicle. Based on evidence found at the scene, detectives suspected that the perpetrator had inside knowledge about the business prior to committing the offense. The investigation led the detectives to Rohrbaugh, whose girlfriend, Heather Pulfer, worked at the store.

[*P3] The police arrested Rohrbaugh and found \$ 1,176 on his person and \$ 5,227 in cash inside his vehicle, along with money wrappers that identified the cash in the vehicle as money that was taken from First Check Cash Advance. Rohrbaugh claimed that Pulfer had given him the \$ 5,227 and that the \$ 1,176 was money he received from cashing his paycheck. Police recovered the \$ 5,227 and returned it to First Check Cash Advance, and held the \$ 1,176 in evidence.

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riance between the indictment, information, or complaint and the proof, the defendant is entitled to a discharge of the jury on the defendant's motion, if a jury has been impaneled, and to a reasonable continuance, unless it clearly appears from the whole proceedings that the defendant has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that the defendant's rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury. Where a jury is discharged under this division, jeopardy shall not attach to the offense charged in the amended indictment, information, or complaint. No action of the court in refusing a continuance or postponement under this division is reviewable except after motion to grant a new trial therefore is refused by the trial court, and no appeal based upon such action of the court shall be sustained nor reversal had unless, from consideration [*10] of the whole proceedings, the reviewing court finds that a failure of justice resulted.

(Emphasis added).

[*P17] "An amendment to the indictment that changes the name or identity of the crime is unlawful whether or not the defendant was granted a continuance to prepare for trial; further, a defendant need not demonstrate that he suffered any prejudice as a result of the forbidden amendment." *State v. Fairbanks, 172 Ohio App.3d 766, 771, 2007 Ohio 4117, 876 N.E.2d 1293, citing Middletown v. Blevins (1987), 35 Ohio App.3d 65, 67, 519 N.E.2d 846.* The court in *Fairbanks* continued, finding that "[a] trial court commits reversible error when it permits an amendment that changes the name or identity of the crime charged." *Fairbanks, 172 Ohio App.3d at 771, citing State v. Kittle, 4th Dist. No. 04CA41, 2005 Ohio 3198, at P12; State v. Headley (1983), 6 Ohio St.3d 475, 478-479, 6 Ohio B. 526, 453 N.E.2d 716.*

[*P18] Finally, this Court has previously held that, where "two offenses contain different elements" requiring independent proof, the identity of the crime has been changed. *State v. Dukes, 3d Dist. Nos. 1-02-64, 1-02-92, 1-02-93, 2003 Ohio 2386, P10.*

[*P19] In the present case, Rohrbaugh was initially indicted for Breaking and Entering in violation of R.C. 2911.13(A), which [**11] provides: "No person by force, stealth, or deception, shall trespass in an unoccupied structure, with purpose to commit therein any theft offense, as defined in section 2913.01 of the Revised Code, or any felony." This count was amended to Receiving Stolen Property in violation of R.C. 2913.51, which provides: "No person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense." Not more than a cursory analysis is required to determine that these two counts contain different elements, requiring independent proof.

[*P20] In the present case, we note that Rohrbaugh pled guilty to the counts in the defective indictment. Rohrbaugh did not raise any objection to the validity of the indictment prior to pleading guilty. Where a defendant fails to object to the form of the indictment before trial as required by *Crim.R. 12(C)*, he waives all but plain error. *State v. Frazier (1995)*, 73 Ohio St.3d 323, 332, 1995 Ohio 235, 652 N.E.2d 1000; *State v. Skatzes*, 104 Ohio St.3d 195, 2004 Ohio 6391, 819 N.E.2d 215.⁵

⁵ We note that these cases were decided under a prior version of *Crim.R. 12*, citing specifically to *Crim.R. 12(B)(2)*. [**12] However, *Crim.R. 12(C)(2)* now contains a substantially similar provision.

[*P21] Pursuant to *Crim.R. 52(B)*, "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." *State v. Barnes (2002)*, 94 Ohio St.3d 21, 2002 Ohio 68, 759 N.E.2d 1240. The Ohio Supreme Court, in *Barnes*, articulated a three part test for the finding of plain error.

First, there must be an error, *i.e.*, a deviation from a legal rule. Second, the error must be plain. To be "plain" within the meaning of *Crim.R. 52(B)*, an error must be an "obvious" defect in the trial proceedings. Third, the error must have affected "substantial rights." We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial.

Barnes, 94 Ohio St.3d at 27 (internal citations omitted).

[*P22] Thus, "[o]nly extraordinary circumstances and the prevention of a miscarriage of justice warrant a finding of plain error." *State v. Brown*, 3d Dist. No. 8-02-09, 2002 Ohio 4755, citing *State v. Long (1978)*, 53 Ohio St.2d 91, 372 N.E.2d 804, at paragraph three of the syllabus.

[*P23] In the present case, we find that the improper amendment of the indictment rises to the level of [**13] an obvious defect. Moreover, we believe that Rohrbaugh had a constitutional right to be indicted by the grand jury. That right was violated by the amendment to the indictment, changing Count One of Breaking and Entering to the completely different offense of Receiving Stolen Property. As stated by the United States Supreme Court:

To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.

Russell v. United States (1962), 369 U.S. 749, 770, 82 S. Ct. 1038, 8 L. Ed. 2d 240.

[*P24] Finally, we note that the Judgment Entry/Change of Plea contains no waiver of Rohrbaugh's right to be properly indicted by the grand jury on the Receiving Stolen Property count. Just as a defendant can waive his constitutional rights under *Crim.R. 11*, a defendant may waive his right to a grand jury indictment. Moreover, we recognize that, had Rohrbaugh pled to a Bill of Information, instead [**14] of to an amended indictment, he would have waived his right to be indicted by the grand jury. However, we find no evidence of a waiver in the present case.

[*P25] Accordingly, Rohrbaugh's guilty plea should be vacated and the matter remanded to the trial court for further proceedings consistent with this opinion.

Judgment Reversed and Cause Remanded.

SHAW, P.J., and WILLAMOWSKI, J., concur.

10 of 14 DOCUMENTS

STATE OF OHIO, PLAINTIFF-APPELLEE vs. YOLANDA ROBINSON, DEFENDANT-APPELLANT

No. 90411

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

2008 Ohio 3972; 2008 Ohio App. LEXIS 3342

August 7, 2008, Released

PRIOR HISTORY: [**1]

Criminal Appeal from the Cuyahoga County Court of Common Pleas. Case No. CR-489558.

DISPOSITION: Judgement affirmed.

COUNSEL: FOR APPELLANT: John H. Carlin, Lakewood, OH; John P. Parker, Cleveland, OH.

FOR APPELLEE: William D. Mason, Cuyahoga County Prosecutor, BY: Mark J. Mahoney, Assistant County Prosecutor, Cleveland, OH.

JUDGES: BEFORE: Stewart, J., Cooney, P.J., and Gallagher, J. COLLEEN CONWAY COONEY, P.J., and SEAN C. GALLAGHER, J., CONCUR.

OPINION BY: MELODY J. STEWART

OPINION

JOURNAL ENTRY AND OPINION

N.B. This entry is an announcement of the court's decision. See *App.R. 22(B)*, *22(D)* and *26(A)*; *Loc.App.R. 22*. This decision will be journalized and will become the judgment and order of the court pursuant to *App.R. 22(E)* unless a motion for reconsideration with supporting brief, per *App.R. 26(A)*, is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(E)*. See, also, *S.Ct. Prac.R. II, Section 2(A)(1)*.

MELODY J. STEWART, J.:

[*P1] Defendant-appellant Yolanda Robinson appeals from her guilty plea to involuntary manslaughter

and felonious assault. She complains [**2] that the court had no authority to accept a guilty plea to involuntary manslaughter, as amended from the originally charged count of murder, and that the state impermissibly controlled sentencing by insisting that its plea offer was contingent on her serving a minimum eight-year sentence. We find no error and affirm.

[*P2] The grand jury returned a four-count indictment against Robinson in connection with the stabbing death of her boyfriend. Count 1 charged aggravated murder; count 2 charged murder; and counts 3 and 4 charged felonious assault. As part of a plea bargain, the state agreed to amend count 2 to involuntary manslaughter and dismiss counts 1 and 4. The court recognized that manslaughter is not a lesser included offense of murder, but "[i]t is, nevertheless, routinely used as a legal fiction for purposes of facilitating plea agreements." The state told the court that its offer included an "agreed minimum term of eight years with the possibility of the Court to go as high as eighteen years pursuant to the agreement." Robinson accepted the plea, but objected to the state's "negotiating in bad faith." The court accepted the plea and sentenced Robinson to eight years on each count, [**3] both sentences to be served concurrently.

I

[*P3] Robinson first argues that the court erred by amending the indictment from murder to involuntary manslaughter. She claims that because involuntary manslaughter is not a lesser included offense of murder, any attempt to amend the indictment would have been "a legal fiction." She maintains that the indictment for murder could only be amended in writing by the grand jury in conformity with *Crim.R. 7(D)*.

[*P4] *Crim.R. 7(A)* states in part:

[*P5] "(A) Use of Indictment or information. A felony that may be punished by death or life imprison-

ment shall be prosecuted by indictment. All other felonies shall be prosecuted by indictment, except that after a defendant has been advised by the court of the nature of the charge against the defendant and of the defendant's right to indictment, the defendant may waive that right in writing and in open court." (Emphasis sic.)

[*P6] This rule applies to "a waiver of the right to be prosecuted by indictment." See *State v. Williams, Cuyahoga App. No. 88737, 2007 Ohio 5073, P8*. The state prosecuted Robinson by indictment. The parties expressly amended the indictment as part of the plea agreement, so *Crim.R. 7(A)* has no application [**4] to this case. Id.

[*P7] Even had there been error, it would have been invited by Robinson. The invited error doctrine states that "a party is not entitled to take advantage of an error that he himself invited or induced." *State ex rel. Kline v. Carroll, 96 Ohio St.3d 404, 2002 Ohio 4849, 775 N.E.2d 517; State v. Smith, 148 Ohio App.3d 274, 2002 Ohio 3114, P30, 772 N.E.2d 1225*. By agreeing to plead to a crime that was not a lesser included offense of the originally-charged crime, Robinson invited the error she has raised on appeal. See *State v. Keaton* (July 14, 2000), Clark App. No. 98 CA 99 (rejecting argument that plea to robbery which is not a lesser included offense of originally-charged count of aggravated robbery was error on grounds that petitioner's conduct by pleading guilty while represented by counsel constituted a waiver of his right to a corrected indictment).

[*P8] We likewise reject Robinson's assertions that the state improperly insisted on a minimum term of incarceration as part of the plea bargain. A criminal plea bargain has been characterized as a "contract," *State v. Butts (1996), 112 Ohio App.3d 683, 686, 679 N.E.2d 1170*, but the reality is that the parties begin negotiations from very uneven bargaining positions. These unequal [**5] bargaining positions do not, however, affect the conscionability of the negotiations. Even though the state may have held a superior bargaining position by virtue of its ability to offer Robinson the chance to plead to a lower degree of offense, Robinson had the ability to reject the terms of any plea bargain that she thought was inherently unfair to her and go to trial as charged. A plea bargain is not a "right" for a defendant and the state had no obligation to offer a plea deal. *State v. Williams (1993), 89 Ohio App.3d 288, 294, 624 N.E.2d 259*. As in any contract case, the favorability of the terms are dictated in large part by the motivation of each party. Robinson faced the possibility of a life sentence for aggravated murder -- the minimum eight-year sentence offered by the state was a substantial reduction from a life sentence and likely played a substantial part in her agreeing to the plea deal. The state did not force the plea deal on Robinson and her *Crim.R. 11* colloquy with the court

confirms this fact. Robinson cannot take advantage of an alleged error when she was "actively responsible" for it. *State v. Campbell, 90 Ohio St.3d 320, 324, 2000 Ohio 183, 738 N.E.2d 1178*. We find no infirmity with the conditions [**6] of the plea bargain.

II

[*P9] Robinson next complains that the court allowed the state to dictate the terms of the sentence. The state told the court that it would agree to the plea bargain only on condition that Robinson receive an eight-year minimum sentence, with the maximum sentence being left open to the court's discretion. Robinson argues that the court's acceptance of these terms violated the separation of powers because the state, in essence, set her sentence in derogation of the court's statutory responsibility.

[*P10] The record shows that the state expressed the terms of the plea agreement as follows:

[*P11] "The defendant will plead to involuntary manslaughter and the felonious assault. And she would agree that there is a minimum term of eight years, with a possibility of it going to eighteen years.

[*P12] "There would be no judicial release, and the parties, both the defense, and the State could argue at sentencing as to the appropriate sentence.

[*P13] "Meaning the defense could argue that the eight year minimum should be imposed, and the Court -- pardon me. I mean, the State would be free to argue that a higher sentence should be imposed."

[*P14] Robinson agreed with those terms, but with some reservations as [**7] to the open-ended maximum term that could be imposed:

[*P15] "In addition, the prosecutor is indicating that they want eight years as a minimum. Our position is that we would like probation. However, it is my belief under this pattern, they are putting us in an unfair position by the prosecuting attorney to suggest a plea bargain with an open ended sentence for the high end on their behalf. But not on the low end for the defendant.

[*P16] "Should the Court agree, for plea bargaining purposes, and sentencing purposes, we would ask that there be no more than eight years of punishment for the defendant and the family would be amenable to accept the plea."

[*P17] When the parties convened for sentencing, the state did not request a specific prison term above the eight-year minimum, and in fact made no mention of any prison term. The court imposed eight-year terms on each count, to be served concurrently. Robinson therefore received that which she agreed to in the plea bargain -- a minimum eight-year sentence.

~~Judgment affirmed.~~

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of ~~[**8]~~ this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any

~~bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.~~

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

MELODY J. STEWART, JUDGE

COLLEEN CONWAY COONEY, P.J., and

SEAN C. GALLAGHER, J., CONCUR

**CONSTITUTION OF THE STATE OF OHIO
ARTICLE I. BILL OF RIGHTS**

Oh. Const. Art. I, § 10 (2009)

§ 10. Trial of accused persons and their rights; depositions by state and comment on failure of accused to testify in criminal cases

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

History: (As amended September 3, 1912.)

§ 2905.01. Kidnapping.

(A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:

- (1) To hold for ransom, or as a shield or hostage;
- (2) To facilitate the commission of any felony or flight thereafter;
- (3) To terrorize, or to inflict serious physical harm on the victim or another;
- (4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will;
- (5) To hinder, impede, or obstruct a function of government, or to force any action or concession on the part of governmental authority.

(B) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall knowingly do any of the following, under circumstances that create a substantial risk of serious physical harm to the victim or, in the case of a minor victim, under circumstances that either create a substantial risk of serious physical harm to the victim or cause physical harm to the victim:

- (1) Remove another from the place where the other person is found;
- (2) Restrain another of the other person's liberty;
- (3) Hold another in a condition of involuntary servitude.

(C) Whoever violates this section is guilty of kidnapping. Except as otherwise provided in this division, kidnapping is a felony of the first degree. Except as otherwise provided in this division, if the offender releases the victim in a safe place unharmed, kidnapping is a felony of the second degree. If the victim of the offense is less than thirteen years of age and if the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, kidnapping is a felony of the first degree, and, notwithstanding the definite sentence provided for a felony of the first degree in section 2929.14 of the Revised Code, the offender shall be sentenced pursuant to section 2971.03 of the Revised Code as follows:

- (1) Except as otherwise provided in division (C)(2) of this section, the offender shall be sentenced pursuant to that section to an indefinite prison term consisting of a minimum term of fifteen years and a maximum term of life imprisonment.
- (2) If the offender releases the victim in a safe place unharmed, the offender shall be sentenced pursuant to that section to an indefinite term consisting of a minimum term of ten years and a maximum term of life imprisonment.

(D) As used in this section, "sexual motivation specification" has the same meaning as in section 2971.01 of the Revised Code.

HISTORY: 134 v H 511 (Eff 1-1-74); 139 v S 199 (Eff 1-5-83); 146 v S 2. Eff 7-1-96; 152 v S 10, § 1, eff. 1-1-08.

§ 2905.02. Abduction.

(A) No person, without privilege to do so, shall knowingly do any of the following:

- (1) By force or threat, remove another from the place where the other person is found;
- (2) By force or threat, restrain the liberty of another person under circumstances that create a risk of physical harm to the victim or place the other person in fear;
- (3) Hold another in a condition of involuntary servitude.

- (B) No person, with a sexual motivation, shall violate division (A) of this section.
- (C) Whoever violates this section is guilty of abduction, a felony of the third degree.
- (D) As used in this section, "sexual motivation" has the same meaning as in section 2971.01 of the Revised Code.

HISTORY: 134 v H 511 (Eff 1-1-74); 139 v S 199 (Eff 7-1-83); 146 v S 2. Eff 7-1-96; 152 v S 10, § 1, eff. 1-1-08.

§ 2911.13. Breaking and entering.

- (A) No person by force, stealth, or deception, shall trespass in an unoccupied structure, with purpose to commit therein any theft offense, as defined in section 2913.01 of the Revised Code, or any felony.
- (B) No person shall trespass on the land or premises of another, with purpose to commit a felony.
- (C) Whoever violates this section is guilty of breaking and entering, a felony of the fifth degree.

HISTORY: 134 v H 511 (Eff 1-1-74); 146 v S 2. Eff 7-1-96.

§ 2913.02. Theft. (in relevant part)

- (A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:
 - (1) Without the consent of the owner or person authorized to give consent;
 - (2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;
 - (3) By deception;
 - (4) By threat;
 - (5) By intimidation.
- (B) (1) Whoever violates this section is guilty of theft.
- (2) Except as otherwise provided in this division or division (B)(3), (4), (5), (6), (7), or (8) of this section, a violation of this section is petty theft, a misdemeanor of the first degree. 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 section 2913.71 of the Revised Code, a violation of this section is theft, a felony of the fifth degree. If the value of the property or services stolen is five thousand dollars or more and is less than one hundred thousand dollars, a violation of this section is grand theft, a felony of the fourth degree. If the value of the property or services stolen is one hundred thousand dollars or more and is less than five hundred thousand dollars, a violation of this section is aggravated theft, a felony of the third degree. If the value of the property or services is five hundred thousand dollars or more and is less than one million dollars, a violation of this section is aggravated theft, a felony of the second degree. If the value of the property or services stolen is one million dollars or more, a violation of this section is aggravated theft of one million dollars or more, a felony of the first degree.

HISTORY: 134 v H 511 (Eff 1-1-74); 138 v S 191 (Eff 6-20-80); 139 v S 199 (Eff 1-1-83); 140 v H 632

(Eff 3-28-85); 141 v H 49 (Eff 6-26-86); 143 v H 347 (Eff 7-18-90); 143 v S 258 (Eff 11-20-90); 146 v H 4 (Eff 11-9-95); 146 v S 2 (Eff 7-1-96); 147 v S 66 (Eff 7-22-98); 148 v H 2. Eff 11-10-99; 150 v H 7, § 1, eff. 9-16-03; 150 v H 179, § 1, eff. 3-9-04; 150 v H 12, § 1, eff. 4-8-04; 150 v H 369, § 1, eff. 11-26-04; 150 v H 536, § 1, eff. 4-15-05; 151 v H 530, § 101.01, eff. 6-30-06; 151 v H 347, § 1, eff. 3-14-07.

§ 2913.51. Receiving stolen property.

- (A) No person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense.
- (B) It is not a defense to a charge of receiving stolen property in violation of this section that the property was obtained by means other than through the commission of a theft offense if the property was explicitly represented to the accused person as being obtained through the commission of a theft offense.
- (C) Whoever violates this section is guilty of receiving stolen property. Except as otherwise provided in this division, receiving stolen property is a misdemeanor of the first degree. If the value of the property involved is five hundred dollars or more and is less than five thousand dollars, if the property involved is any of the property listed in section 2913.71 of the Revised Code, receiving stolen property is a felony of the fifth degree. If the property involved is a motor vehicle, as defined in section 4501.01 of the Revised Code, if the property involved is a dangerous drug, as defined in section 4729.01 of the Revised Code, if the value of the property involved is five thousand dollars or more and is less than one hundred thousand dollars, or if the property involved is a firearm or dangerous ordnance, as defined in section 2923.11 of the Revised Code, receiving stolen property is a felony of the fourth degree. If the value of the property involved is one hundred thousand dollars or more, receiving stolen property is a felony of the third degree.

HISTORY: 134 v H 511 (Eff 1-1-74); 138 v S 191 (Eff 6-20-80); 139 v S 199 (Eff 1-5-83); 139 v H 269 (Eff 1-5-83); 140 v S 210 (Eff 7-1-83); 141 v H 49 (Eff 6-26-86); 146 v H 4 (Eff 11-9-95); 146 v S 2 (Eff 7-1-96); 147 v S 66 (Eff 7-22-98); 148 v S 64. Eff 10-29-99.

§ 2923.02. Attempt.

- (A) No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense.
- (B) It is no defense to a charge under this section that, in retrospect, commission of the offense that was the object of the attempt was either factually or legally impossible under the attendant circumstances, if that offense could have been committed had the attendant circumstances been as the actor believed them to be.
- (C) No person who is convicted of committing a specific offense, of complicity in the commission of an offense, or of conspiracy to commit an offense shall be convicted of an attempt to commit the same offense in violation of this section.
- (D) It is an affirmative defense to a charge under this section that the actor abandoned the actor's effort to commit the offense or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of the actor's criminal purpose.

(E) (1) Whoever violates this section is guilty of an attempt to commit an offense. An attempt to commit aggravated murder, murder, or an offense for which the maximum penalty is imprisonment for life is a felony of the first degree. An attempt to commit a drug abuse offense for which the penalty is determined by the amount or number of unit doses of the controlled substance involved in the drug abuse offense is an offense of the same degree as the drug abuse offense attempted would be if that drug abuse offense had been committed and had involved an amount or number of unit doses of the controlled substance that is within the next lower range of controlled substance amounts than was involved in the attempt. An attempt to commit any other offense is an offense of the next lesser degree than the offense attempted. In the case of an attempt to commit an offense other than a violation of Chapter 3734. of the Revised Code that is not specifically classified, an attempt is a misdemeanor of the first degree if the offense attempted is a felony, and a misdemeanor of the fourth degree if the offense attempted is a misdemeanor. In the case of an attempt to commit a violation of any provision of Chapter 3734. of the Revised Code, other than section 3734.18 of the Revised Code, that relates to hazardous wastes, an attempt is a felony punishable by a fine of not more than twenty-five thousand dollars or imprisonment for not more than eighteen months, or both. An attempt to commit a minor misdemeanor, or to engage in conspiracy, is not an offense under this section.

(2) If a person is convicted of or pleads guilty to attempted rape and also is convicted of or pleads guilty to 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, the offender shall be sentenced to a prison term or term of life imprisonment pursuant to section 2971.03 of the Revised Code.

(3) In addition to any other sanctions imposed pursuant to division (E)(1) of this section for an attempt to commit aggravated murder or murder in violation of division (A) of this section, if the offender used a motor vehicle as the means to attempt to commit the offense, the court shall impose upon the offender a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(2) of section 4510.02 of the Revised Code.

(F) As used in this section:

(1) "Drug abuse offense" has the same meaning as in section 2925.01 of the Revised Code.

(2) "Motor vehicle" has the same meaning as in section 4501.01 of the Revised Code.

HISTORY: 134 v H 511 (Eff 1-1-74); 140 v S 210 (Eff 7-1-83); 140 v H 651 (Eff 10-1-84); 144 v H 225 (Eff 10-23-91); 146 v S 2 (Eff 7-1-96); 148 v S 107. Eff 3-23-2000; 151 v S 260, § 1, eff. 1-2-07; 151 v H 461, § 1, eff. 4-4-07.

§ 2925.11. Possession of drugs. (in relevant part)

(A) No person shall knowingly obtain, possess, or use a controlled substance.

(B) This section does not apply to any of the following:

(1) Manufacturers, licensed health professionals authorized to prescribe drugs, pharmacists, owners of pharmacies, and other persons whose conduct was in accordance with Chapters 3719., 4715., 4723., 4729., 4730., 4731., and 4741. of the Revised Code;

(2) If the offense involves an anabolic steroid, any person who is conducting or participating in a research project involving the use of an anabolic steroid if the project has been approved by the United States food and drug administration;

(3) Any person who sells, offers for sale, prescribes, dispenses, or administers for livestock or other nonhuman species an anabolic steroid that is expressly intended for administration through implants to livestock or other nonhuman species and approved for that purpose under the "Federal Food, Drug, and

Cosmetic Act," 52 Stat. 1040 (1938), 21 U.S.C.A. § 301, as amended, and is sold, offered for sale, prescribed, dispensed, or administered for that purpose in accordance with that act;

(4) Any person who obtained the controlled substance pursuant to a lawful prescription issued by a licensed health professional authorized to prescribe drugs.

(C) Whoever violates division (A) of this section is guilty of one of the following:

(4) If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of possession of cocaine. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(4)(b), (c), (d), (e), or (f) of this section, possession of cocaine is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

HISTORY: 138 v S 184, § 5 (Eff 6-20-84); 143 v S 258 (Eff 11-20-90); 144 v H 62 (Eff 5-21-91); 144 v H 298 (Eff 7-26-91); 145 v H 377 (Eff 9-30-93); 145 v H 391 (Eff 7-21-94); 146 v H 249 (Eff 7-17-95); 146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 147 v S 2 (Eff 6-20-97); 147 v S 66 (Eff 7-22-98); 148 v S 107 (Eff 3-23-2000); 148 v H 241, Eff 5-17-2000; 149 v H 490, § 1, eff. 1-1-04; 149 v S 123, § 1, eff. 1-1-04; 151 v S 154, § 1, eff. 5-17-06; 152 v H 195, § 1, eff. 9-30-08.

§ 2941.29. Time for objecting to defect in indictment.

No indictment or information shall be quashed, set aside, or dismissed, or motion to quash be sustained, or any motion for delay of sentence for the purpose of review be granted, nor shall any conviction be set aside or reversed on account of any defect in form or substance of the indictment or information, unless the objection to such indictment or information, specifically stating the defect claimed, is made prior to the commencement of the trial, or at such time thereafter as the court permits.

HISTORY: GC § 13437-28; 113 v 123(169), ch 16, § 28; Bureau of Code Revision. Eff 10-1-53.

§ 2945.74. Defendant may be convicted of lesser offense.

The jury may find the defendant not guilty of the offense charged, but guilty of an attempt to commit it if such attempt is an offense at law. When the indictment or information charges an offense, including different degrees, or if other offenses are included within the offense charged, the jury may find the defendant not guilty of the degree charged but guilty of an inferior degree thereof or lesser included offense.

If the offense charged is murder and the accused is convicted by confession in open court, the court shall examine the witnesses, determine the degree of the crime, and pronounce sentence accordingly.

HISTORY: GC § 13448-2; 113 v 123(194), ch 27, § 2; Bureau of Code Revision. Eff 10-1-53.

Rule 7. The Indictment and the Information

(A) Use of indictment or information. A felony that may be punished by death or life imprisonment shall be prosecuted by indictment. All other felonies shall be prosecuted by indictment, except that after a defendant has been advised by the court of the nature of the charge against the defendant and of the defendant's right to indictment, the defendant may waive that right in writing and in open court.

Where an indictment is waived, the offense may be prosecuted by information, unless an indictment is filed within fourteen days after the date of waiver. If an information or indictment is not filed within fourteen days after the date of waiver, the defendant shall be discharged and the complaint dismissed. This division shall not prevent subsequent prosecution by information or indictment for the same offense. A misdemeanor may be prosecuted by indictment or information in the court of common pleas, or by complaint in the juvenile court, as defined in the Rules of Juvenile Procedure, and in courts inferior to the court of common pleas. An information may be filed without leave of court.

(B) Nature and contents. The indictment shall be signed, in accordance with Crim. R. 6 (C) and (F) and contain a statement that the defendant has committed a public offense specified in the indictment. The information shall be signed by the prosecuting attorney or in the name of the prosecuting attorney by an assistant prosecuting attorney and shall contain a statement that the defendant has committed a public offense specified in the information. The statement may be made in ordinary and concise language without technical averments or allegations not essential to be proved. The statement may be in the words of the applicable section of the statute, provided the words of that statute charge an offense, or in words sufficient to give the defendant notice of all the elements of the offense with which the defendant is charged. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. Each count of the indictment or information shall state the numerical designation of the statute that the defendant is alleged to have violated. Error in the numerical designation or omission of the numerical designation shall not be ground for dismissal of the indictment or information, or for reversal of a conviction, if the error or omission did not prejudicially mislead the defendant.

(C) Surplusage. The court on motion of the defendant or the prosecuting attorney may strike surplusage from the indictment or information.

(D) Amendment of indictment, information, or complaint. The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment is made to the substance of the indictment, information, or complaint, or to cure a variance between the indictment, information, or complaint and the proof, the defendant is entitled to a discharge of the jury on the defendant's motion, if a jury has been impanelled, and to a reasonable continuance, unless it clearly appears from the whole proceedings that the defendant has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that the defendant's rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury. Where a jury is discharged under this division, jeopardy shall not attach to the offense charged in the amended indictment, information, or complaint. No action of the court in refusing a continuance or postponement under this division is reviewable except after motion to grant a new trial therefore is refused by the trial court, and no appeal based upon such action of the court shall be sustained nor reversal had unless, from consideration of the whole proceedings, the reviewing court finds that a failure of justice resulted.

(E) Bill of particulars. When the defendant makes a written request within twenty-one days after arraignment but not later than seven days before trial, or upon court order, the prosecuting attorney shall furnish the defendant with a bill of particulars setting up specifically the nature of the offense charge and of the conduct of the defendant alleged to constitute the offense. A bill of particulars may be amended at any time subject to such conditions as justice requires.

History: Amended, eff 7-1-93; 7-1-00.

Rule 12. Pleadings and Motions Before Trial: Defenses and Objections

(A) Pleadings and motions. Pleadings in criminal proceedings shall be the complaint, and the indictment or information, and the pleas of not guilty, not guilty by reason of insanity, guilty, and no contest. All other pleas, demurrers, and motions to quash, are abolished. Defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(B) Filing with the court defined. The filing of documents with the court, as required by these rules, shall be made by filing them with the clerk of court, except that the judge may permit the documents to be filed with the judge, in which event the judge shall note the filing date on the documents and transmit them to the clerk. A court may provide, by local rules adopted pursuant to the Rules of Superintendence, for the filing of documents by electronic means. If the court adopts such local rules, they shall include all of the following:

(1) the complaint, if permitted by local rules to be filed electronically, shall comply with Crim. R. 3.

(2) any signature on electronically transmitted documents shall be considered that of the attorney or party it purports to be for all purposes. If it is established that the documents were transmitted without authority, the court shall order the filing stricken.

(3) a provision shall specify the days and hours during which electronically transmitted documents will be received by the court, and a provision shall specify when documents received electronically will be considered to have been filed.

(4) any document filed electronically that requires a filing fee may be rejected by the clerk of court unless the filer has complied with the mechanism established by the court for the payment of filing fees.

(C) Pretrial motions. Prior to trial, any party may raise by motion any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue. The following must be raised before trial:

(1) Defenses and objections based on defects in the institution of the prosecution;

(2) Defenses and objections based on defects in the indictment, information, or complaint (other than failure to show jurisdiction in the court or to charge an offense, which objections shall be noticed by the court at any time during the pendency of the proceeding);

(3) Motions to suppress evidence, including but not limited to statements and identification testimony, on the ground that it was illegally obtained. Such motions shall be filed in the trial court only.

(4) Requests for discovery under Crim. R. 16;

(5) Requests for severance of charges or defendants under Crim. R. 14.

(D) Motion date. All pretrial motions except as provided in Crim. R. 7(E) and 16(F) shall be made within thirty-five days after arraignment or seven days before trial, whichever is earlier. The court in the interest of justice may extend the time for making pretrial motions.

(E) Notice by the prosecuting attorney of the intention to use evidence.

(1) At the discretion of the prosecuting attorney. At the arraignment or as soon thereafter as is practicable, the prosecuting attorney may give notice to the defendant of the prosecuting attorney's intention to use specified evidence at trial, in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under division (C)(3) of this rule.

(2) At the request of the defendant. At the arraignment or as soon thereafter as is practicable, the defendant, in order to raise objections prior to trial under division (C)(3) of this rule, may request notice of the prosecuting attorney's intention to use evidence in chief at trial, which evidence the defendant is entitled to discover under Crim. R. 16.

(F) Ruling on motion. The court may adjudicate a motion based upon briefs, affidavits, the proffer of testimony and exhibits, a hearing, or other appropriate means.

A motion made pursuant to divisions (C)(1) to (C)(5) of this rule shall be determined before trial. Any other motion made pursuant to division (C) of this rule shall be determined before trial whenever possible. Where the court defers ruling on any motion made by the prosecuting attorney before trial and

makes a ruling adverse to the prosecuting attorney after the commencement of trial, and the ruling is appealed pursuant to law with the certification required by division (K) of this rule, the court shall stay the proceedings without discharging the jury or dismissing the charges.

Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

(G) Return of tangible evidence. Where a motion to suppress tangible evidence is granted, the court upon request of the defendant shall order the property returned to the defendant if the defendant is entitled to possession of the property. The order shall be stayed pending appeal by the state pursuant to division (K) of this rule.

(H) Effect of failure to raise defenses or objections. Failure by the defendant to raise defenses or objections or to make requests that must be made prior to trial, at the time set by the court pursuant to division (D) of this rule, or prior to any extension of time made by the court, shall constitute waiver of the defenses or objections, but the court for good cause shown may grant relief from the waiver.

(I) Effect of plea of no contest. The plea of no contest does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion, including a pretrial motion to suppress evidence.

(J) Effect of determination. If the court grants a motion to dismiss based on a defect in the institution of the prosecution or in the indictment, information, or complaint, it may also order that the defendant be held in custody or that the defendant's bail be continued for a specified time not exceeding fourteen days, pending the filing of a new indictment, information, or complaint. Nothing in this rule shall affect any statute relating to periods of limitations. Nothing in this rule shall affect the state's right to appeal an adverse ruling on a motion under divisions (C)(1) or (2) of this rule, when the motion raises issues that were formerly raised pursuant to a motion to quash, a plea in abatement, a demurrer, or a motion in arrest of judgment.

(K) Appeal by state. When the state takes an appeal as provided by law from an order suppressing or excluding evidence, the prosecuting attorney shall certify that both of the following apply:

(1) the appeal is not taken for the purpose of delay;

(2) the ruling on the motion or motions has rendered the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed. The appeal from an order suppressing or excluding evidence shall not be allowed unless the notice of appeal and the certification by the prosecuting attorney are filed with the clerk of the trial court within seven days after the date of the entry of the judgment or order granting the motion. Any appeal taken under this rule shall be prosecuted diligently.

If the defendant previously has not been released, the defendant shall, except in capital cases, be released from custody on his or her own recognizance pending appeal when the prosecuting attorney files the notice of appeal and certification.

This appeal shall take precedence over all other appeals.

If an appeal pursuant to this division results in an affirmance of the trial court, the state shall be barred from prosecuting the defendant for the same offense or offenses except upon a showing of newly discovered evidence that the state could not, with reasonable diligence, have discovered before filing of the notice of appeal.

History: Amended, eff 7-1-75; 7-1-80; 7-1-95; 7-1-98; 7-1-01.

Rule 52. Harmless Error and Plain Error

(A) Harmless error. Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

(B) Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.